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Inherent Judicial Power: Flexibility Congress Did Not Write into the Federal Rules of Evidence

Michael M. Martin*

Not all the separation of powers issues raised in the early 1970's centered on the extraordinary assertions of executive powers by the Nixon White House. Even as the Watergate drama was being played out, relations between Congress and the federal courts reached a less publicized turning point. In March 1973 Congress reversed over thirty-five years of deference to the courts in procedural rulemaking and

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postponed the effective date of evidence rules that had been prescribed by
the Supreme Court.\(^3\) Two years later the Federal Rules of Evi-
dence, resembling in basic form but differing in significant details from
the rules prescribed by the Court, were approved by Congress and en-
acted into law.\(^4\) The separation of powers implications of this first
foray by Congress into comprehensive prescription of adjective law is
the subject of this Article.

An important characteristic of both the Supreme Court and the
statutory versions of the Federal Rules of Evidence is the flexibility
allowed the trial court in admitting and excluding evidence and in
otherwise conducting the trial. That the Federal Rules are not an ex-
haustive codification is one source of this flexibility. For example, the
rules contain no provisions dealing with impeachment by bias, interest,
or mental incapacity; with competency of infants; with impeachment
on collateral matters; or with the judge's power to comment on the evi-
dence.\(^5\) Thus, there are significant areas in which evidence rules will
continue to be made through the common-law process of case-by-case
adjudication.\(^6\) Flexibility is also provided by explicit grants of discre-
tion to trial courts in applying the Federal Rules. The most important
provision of this nature is rule 403, which authorizes exclusion of rele-
vant evidence if its probative value is substantially outweighed by its
potential for unfair prejudice, confusion, or undue delay. Equally im-
portant in the conception of the Federal Rules, if perhaps less likely to
have much practical effect,\(^7\) is the discretion given the court, under the

1159 (1976)) (text of proposed amendments in H.R. Doc. No. 464, at 1-6 (1976), effective date of
rules were entered on November 20 and December 18, 1972, and the rules were transmitted to
the Court were published at 56 F.R.D. 183 (1973) [hereinafter cited as Proposed Fed. R. Evid.].
1, 1975).
5. The Supreme Court prescribed a rule dealing with summing up and comment by the
judge, Proposed Fed. R. Evid., supra note 3, rule 105, but it was deleted by the House Judiciary
CONG. & AD. NEWS 7073, 7078-79 [hereinafter cited as HOUSE REPORT].
6. Rule 501 explicitly provides for continuation of common-law processes in developing
privilege rules:
Except as otherwise required by the Constitution of the United States or provided by Act
of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority,
the privilege of a witness, person, government, State, or political subdivision thereof
shall be governed by the principles of the common law as they may be interpreted by the
courts of the United States in the light of reason and experience.
FED. R. EVID. 501 (emphasis added).
"catch-all" hearsay exceptions, to admit hearsay not coming within the listed exceptions if it has equivalent circumstantial guarantees of trustworthiness. In addition, flexibility in application of the Federal Rules arises from the traditional power of courts to interpret and construe legislation. The court must decide, for example, whether the "customer book" in a heroin distribution operation is a business record; whether a statement by a suspended employee is an admission by the employer; and whether the circumstances clearly corroborate the trustworthiness of an exculpatory declaration against interest.

In spite of the substantial flexibility retained in the structure of the Federal Rules, it is clear that the purpose of many of the changes made by Congress was to require the exclusion of evidence that would have been admissible under the rules prescribed by the Supreme Court. Particularly with respect to hearsay, congressional modifications explicitly limited admissibility. For example, memoranda of recorded recollection were made admissible only if "made or adopted by the witness"; the Court's version would not have excluded accurate memoranda even if made by someone else and not adopted by the witness. Likewise, rule 803(8)(B) was amended to exclude reports of matters observed by law enforcement personnel in criminal cases. Even the flexibility
given by the "catch-all" exceptions was limited by the congressional changes. First, a trial court is now required to determine that the evidence offered under the exception is more probative than any other reasonably procurable evidence. Second, the proponent must give notice before trial of particulars of the statement and his intention to offer it. Finally, it seems implicit that Congress, in deleting various hearsay exceptions from the Court's version, determined that the deleted classes of statements did not have "equivalent circumstantial guarantees of trustworthiness." Thus, declarations against social interest or statements of recent perception would apparently not come within the "catch-all" exceptions.

This Article focuses on the question whether, or to what extent, a federal court is bound by the explicit and implicit restrictions placed by Congress on a court's power to admit evidence. This is a question that did not arise prior to adoption of the Federal Rules of Evidence because previous prospective rulemaking in the procedural area was in truth a judicial exercise. Although Congress had an implicit veto power over rules of procedure prescribed by the Supreme Court, it never exercised that power. Thus, a lower court's decision to disregard a rule of procedure raised, as a practical matter, only problems of the relations between superior and inferior courts. On the other hand, disregard of, or substitution for, a Federal Rule of Evidence involves


14. The requirements of rules 803(24) and 804(b)(5) that "(A) the statement is offered as evidence of a material fact" and "(C) the general purpose of these rules and the interests of justice will best be served by admission of the statement into evidence" really only restate the requirements of rules 401, 402, and 102. See 4 J. WEINSTEIN & M. BERGER, EVIDENCE 803-242 to -243 (1975).


16. Cf. In re IBM Peripheral EDP Devices Antitrust Litigation, 444 F. Supp. 110, 113 (N.D. Cal. 1978) ("[I]t is unlikely that Congress meant this exception [rule 804(b)(5)] to be used to circumvent its own restriction of another exception [former testimony admissible only against the part relative in which it was given or their successors in interest].") But see 4 J. WEINSTEIN & M. BERGER, supra note 14, at 804-65, 804-111. Hearsay exceptions for declarations against social interest and statements of recent perception were included in Proposed Fed. R. Evid., supra note 3, rules 804(b)(4) and 804(b)(2). Both provisions were subsequently deleted by the House Judiciary Committee. See HOUSE REPORT, supra note 5, at 6, 16, reprinted in [1974] U.S. CODE CONG. & AD. NEWS at 7079-80, 7089.

17. Rule 403 gives a court authority to exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403. Because of the broad discretion given the courts by this rule, it will be difficult to construe a decision to exclude evidence as defiance of a congressional mandate to admit it. See also note 74 infra & accompanying text.

18. See note 2 supra.
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relations between coordinate branches of government. The question did not arise before comprehensive procedural rulemaking started in the 1930's because the earlier evidence statutes were generally remedial measures, adopted in a day when courts were more wed to strict stare decisis even in procedural matters. In that context the courts were willing to defer to the legislature in making reforms that they did not consider appropriate subjects for judicial action. Now, however, the courts do not take such a limited view of their own competence. Furthermore, in adopting evidence rules the legislature has generally been more "conservative," the courts adopted the "reform" positions.

I. Evidence in the Federal Courts Before the Federal Rules

The Federal Rules of Evidence are the first comprehensive set of rules governing admissibility of evidence and the conduct of trials at the federal level. Prior to adoption of the Federal Rules the federal courts applied evidence rules from three major sources: common law, statutes, and court rules. An overwhelming portion of the rules now included in the Federal Rules had their origin as common-law principles and were never codified. The remaining rules, which had been announced prospectively by the legislature as statutes and by the courts as court rules, generally had one of two purposes: the regulation (and usually "reform") of a rather narrow problem area or the incorporation of a general body of evidence rules by reference.

Most evidence rules in the Anglo-American legal system have developed as a product of case-by-case adjudication. Major doctrines, such as relevancy, the hearsay rule and most of its exceptions, judicial notice, authentication and the "best evidence" rule, and rules governing opinions and expert witnesses, had their genesis and most of their elaboration in judicial decisions. Thus, at the time of the Amer-

22. See, e.g., notes 12-13 supra & accompanying text. Whether either position can be characterized as one of "reform" is convincingly questioned in 21 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5006, especially at 97, 108 (1977).
23. See generally 21 C. WRIGHT & K. GRAHAM, supra note 22, §§ 5001-04 for a comprehensive discussion of this subject.
24. See G. NOKES, AN INTRODUCTION TO EVIDENCE 27 (4th ed. 1967); J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE 2-4 (1898).
ican Revolution there were very few English statutes dealing with what would now be termed evidence, and most of those were either declarative of judge-made law or intended to deal with problems going beyond the conduct of trials. The legislature did not significantly enter the field of comprehensive evidence rulemaking in England until 1854, when the Common Law Procedure Act of that year included provisions governing competency, impeachment, and proof of writings. In the United States, statutory regulation of evidence was sporadic even during the growth of legislative procedural rulemaking, which began in the mid-nineteenth century.

The federal evidence statutes existing prior to adoption of the Federal Rules can be classified into five major categories. First, Congress had enacted legislation that restated or implemented constitutional principles. In this category were laws granting a privilege against self-incrimination in statements made before Congress and providing for authentication of public acts and records pursuant to the full faith and credit clause. A second category can best be described as including rules that regulated relations between the government and its citizens. For example, the Jencks Statute, by regulating disclosure of state-

25. See, e.g., Shop-books Evidence Act, 7 Jac. 1, c. 12 (1609); Statute of Frauds, 29 Car. 2, c. 3 (1677). Both statutes are discussed in 6 W. Holdsworth, A HISTORY OF ENGLISH LAW 387-90 (1926) and I W. Tind, PRACTICE OF THE COURTS OF KING'S BENCH at lxiv (4th Am. ed. 1856). See generally 9 W. Holdsworth, supra, at 127-222. See also G. Nokes, supra note 24, at 28; 21 C. Wright & K. Graham, supra note 22, at 61; Tyler, The Origin of the Rule-Making Power and Its Exercise by Legislatures, 22 A.B.A.J. 772, 773-74 (1936). One commentator notes that “the English law of evidence may be described as modern; for many of its rules are not more than 300 years old.” G. Nokes, supra note 24, at 18. Another includes the observation that “the subject of evidence was not ‘invented’ until the 19th century.” F. James & G. Hazard, Civil Procedure at xxi (2d ed. 1977).


27. See 21 C. Wright & K. Graham, supra note 22, at 68-75. The Field Code of 1848, which served as the prototype for procedural reform, contained no provisions regulating the admissibility of evidence. See Act of April 12, 1848, ch. 379, 1848 N.Y. Laws 497. However, Field had prepared evidence provisions that were subsequently adopted in Oregon and California. See 21 C. Wright & K. Graham, supra note 22, at 68-69, 71-72.


31. 18 U.S.C. § 3500 (1976). See also 18 U.S.C. § 3501(c) (1976) (admissibility of confessions). Both of the cited statutes were enacted in response to Supreme Court decisions: the former
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ments by government witnesses, balances national security interests and the accused's interest in a "fair" trial.

Another category of evidence statutes includes those concerned essentially with public policies extrinsic to the litigation process. Illustrations include laws making reports to government agencies inadmissible in order to encourage accurate and complete reporting and laws making copies of official records admissible in order to keep originals available for the conduct of public business. A fourth category, probably encompassing most evidence statutes enacted before the Federal Rules, consists of those adopted to relax the common-law rules of authentication, best evidence, and hearsay, all of which restricted the admissibility of business and public records. This category includes the Federal Business Records Act and numerous laws making government records bearing specified signatures prima facie admissible as proof of their contents.

Finally, a number of statutes conformed the evidence rules in federal courts to the practice followed in the state in which a court sat. The Rules of Decision Act, originally set forth in the Judiciary Act of 1789, provided that "the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." The Conformity Act of 1872 explicitly required the federal courts to use state rules of practice and procedure. Despite these acts, however, to codify, but also to limit, Jencks v. United States, 353 U.S. 657 (1957); the latter to modify Mallory v. United States, 354 U.S. 449 (1957).

37. The Act was held applicable to evidence rules in McNeil v. Holbrook, 37 U.S. (12 Pet.) 84, 89-90 (1838). See generally 21 C. WRIGHT & K. GRAHAM, supra note 22, at 32-35. See also Mode of Proof Act, ch. 20, § 30, 1 Stat. 90 (1789) (as amended, codified in FED. R. CIV. P. 43(a)) ("[T]he mode of proof of oral testimony and examination of witnesses in open court shall be the same in all courts of the United States, as well as in the trial of causes in equity and of admiralty and maritime jurisdiction, as of actions at common law."); 21 C. WRIGHT & K. GRAHAM, supra note 22, at 15-16.
38. [T]he practice, pleadings, and forms and modes of proceeding in other than equity and admiralty causes in the circuit and district courts of the United States shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding: Provided, however, That nothing herein contained shall alter the rules of evidence under the laws of the United States, and as practiced in the courts thereof.
Act of June 1, 1872, ch. 255, § 5, 17 Stat. 197 (repealed 1948) (emphasis in original). The proviso was deleted in the 1875 codification. See Rev. Stat. § 914 (1875). See generally notes 139-55 infra
there were many areas in which the federal courts followed their own practice regarding admissibility of evidence and the conduct of trials. In the first place, the references to "trials at common law" meant the statutes did not apply to equity or admiralty proceedings. Furthermore, an early Supreme Court decision held that criminal prosecutions were also not "trials at common law," so the conformity statutes did not apply to criminal cases either. Finally, judges were reluctant either to adopt idiosyncratic state rules or to give up firmly held traditions in federal practice, such as judicial comment on the evidence. In the areas for which there was no requirement of conformity, as well as those in which the federal courts declined to follow state judge-made evidence rules, the federal courts continued the historic pattern of case-by-case evidence law development.

The first time the Supreme Court exercised its power to make procedural rules for the lower courts was in the Equity Rules of 1822, although Congress had recognized that power in statutes since 1792. The Court revised those rules on several occasions, and prescribed and revised rules of admiralty and bankruptcy, but prescribed no rules dealing with evidence in common-law cases until the adoption of

& accompanying text. See also Competency of Witnesses Act, ch. 189, § 1, 12 Stat. 588 (1862) (repealed 1948) ("That the laws of the State in which the court shall be held shall be the rules of decision as to the competency of witnesses in the courts of the United States, in trials at common law, in equity, and admiralty.").


40. United States v. Reid, 53 U.S. (12 How) 361, 363 (1851). The Reid decision imposed "static conformity" on evidence law in the federal court: "[T]he rules of evidence in criminal cases, are the rules which were in force in the respective states when the Judiciary Act of 1789 was passed." Id. at 366. The principle of Reid was disapproved, and common-law development "in the light of general authority and sound reason" was restored, in Rosen v. United States, 245 U.S. 467, 470-71 (1918). See 1 J. Wigmore, supra note 28, at 194-95.


42. Rules of Practice for the Courts of the Equity of the United States, 20 U.S. (7 Wheat.) at v (1822). In its first term the Court prescribed "the Practice of the courts of King's Bench and Chancery in England, as affording outlines for the practice of this court; and that they will, from time to time, make alterations therein, as circumstances may render necessary." Sup. Ct. R., 2 U.S. (2 Dall.) 413-14 (1927). See also Judiciary Act of Sept. 24, 1789, ch. 20, § 17, 1 Stat. 83.

43. See Process Act of May 8, 1792, ch. 36, § 2, 1 Stat. 276 (repealed 1948).

44. The principal revisions were the Equity Rules of 1842, 42 U.S. (1 How.) at xli (1842), and the Equity Rules of 1912, 226 U.S. 627 (1912).


46. E.g., General Orders and Forms in Bankruptcy, 172 U.S. 653 (1898); General Orders and Forms in Bankruptcy, 305 U.S. 677 (1939).
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the Federal Rules of Civil Procedure in 1938. The civil procedure rules specifically treated only a few questions about admissibility and conduct of the trial: depositions and requests for admissions, objections and harmless error, effect of a refused offer of judgment, proof by stenographic transcripts, and authentication of official records. Similar provisions regulating evidence were included in the Federal Rules of Criminal Procedure beginning in 1946. In addition, both the civil and criminal rules included provisions generally prescribing the sources for evidence law to be applied. Civil rule 43(a) required application of the relevant rule favoring admissibility, while criminal rule 26 called for application of rules developed through common-law processes. Both rules were adopted largely as stop-gap measures and left development of federal evidence law to common-law processes until a comprehensive code could be fashioned. By 1975 the Federal Rules of Evidence were prepared under the aegis of the Supreme Court and revised and adopted by Congress. The Federal Rules are largely a restatement or revision of common law. The act adopting them re-

47. The Court's order adopting the rules was entered on December 20, 1937, and the rules were submitted to Congress by the Attorney General in January 1938. Orders re Rules of Procedure, 302 U.S. 783 (1938).
48. See FED. R. CIV. P. 32, 36(b); cf. FED. R. CIV. P. 33(b) (admissibility of answers to interrogatories), 35(b)(2) (waiver of physician-patient privilege by requesting and receiving report of physical or mental examination), 37(b)(2)(B) (inadmissibility of evidence as sanction for failure to comply with discovery order).
49. FED. R. CIV. P. 46, 61.
50. See FED. R. CIV. P. 68.
51. FED. R. CIV. P. 80(c).
52. FED. R. CIV. P. 44(a). See also FED. R. EVID. 902(1)-(5).
53. See, e.g., FED. R. CRIM. P. 15(e) (use of depositions), 26 (taking of testimony), 26.1 (determination of foreign law), 27 (proof of official record), 51 (exceptions unnecessary).
54. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner.
55. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.
pealed only one statute,\textsuperscript{57} and only six provisions of the Rules of Civil and Criminal Procedure were effectively superseded.\textsuperscript{58}

II. Sources of Authority to Prescribe Evidence Rules

The historic existence of three sources of evidence law supports the view that both Congress and the courts have authority to prescribe rules of evidence. Arguments made half a century ago that procedural rulemaking was, on the one hand, a nondelegable legislative function,\textsuperscript{59} or, on the other hand, an inherently and exclusively judicial function,\textsuperscript{60} are no longer credible. Rather, judicial interpretation and application of the Constitution has confirmed that the power to govern the admissi-


\textsuperscript{59} E.g., Walsh, Rule-Making Power on the Law Side of Federal Practice, 6 Ore. L. Rev. 1 (1926), reprinted in 13 A.B.A.J. 87 (1927). In recent years the nondelegability argument has been limited to substantive rules. For example, Mr. Justice Black stated his opposition to the Court's promulgation of amendments to the Federal Rules of Civil Procedure as follows: We believe that while some of the Rules of Civil Procedure are simply housekeeping details, many determine matters so substantially affecting the rights of litigants in lawsuits that in practical effect they are the equivalent of new legislation which, in our judgment, the Constitution requires to be initiated in and enacted by the Congress and approved by the President.


The process [for amending the Federal Rules] is, I submit, unconstitutional as well. The Supreme Court is not given the power under Article III of the Constitution to legislate rules on substantive matters. It can pass such judgments only in the context of a particular case or controversy. Yet, H.R. 5453 [sic] allows the Court to promulgate a rule in a substantive policy area without the benefit of an adversary proceeding. We cannot (and should not) delegate such rule-making power to the Supreme Court.


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bility of evidence and the conduct of trials is shared between the legislative and judicial branches.

The constitutional source of Congress' power to regulate evidence includes the grant of authority to enact legislation "necessary and proper" to implement the powers granted the federal government.61 Under any reasonable definition of "judicial power," rules of evidence appear necessary and proper to the exercise of that power. In addition, authority for statutory evidence rules might inhere in the power to establish inferior federal courts.62 The rules justified under this head, however, usually go beyond matters of probative value and, instead, constitute legislative judgments about subject matter jurisdiction or legally-cognizable claims.63

The congressional power to make adjective law rules can be delegated to the courts.64 Delegations of rulemaking power have been included in federal statutes beginning with the Judiciary Act of 178965 and have been exercised since the Equity Rules of 1822.66 In 1938 the Court prescribed comprehensive rules of civil procedure, including some evidence rules, pursuant to the Rules Enabling Act adopted in 1934.67 That delegation and its exercise were upheld by the Court in Sibbach v. Wilson & Co.:68 "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

68. 312 U.S. 1 (1941).
States . . . ”69 Congress passed an enabling act for comprehensive criminal rules in 1940,70 and the Court prescribed the Federal Rules of Criminal Procedure, which also included some evidence rules, in 1945.71

In addition to statutory delegation, the constitutional grant of the judicial power to the federal courts arguably authorizes court-prescribed evidence rules.72 Anglo-American evidence law has historically been a product of case-by-case adjudication. Moreover, as courts decide cases they inevitably create evidence law through the process of interpreting statutes and fitting them to the specific facts of each case.

The question implicitly posed by congressional adoption of the Federal Rules of Evidence is thus not whether Congress exceeded its authority in adopting them, but whether the Federal Rules as adopted preempt contrary rules that a federal court might adopt or apply. In most cases, there will be no preemption problem because of the flexibility of the Federal Rules: most situations in which a court might wish to exclude evidence generally deemed admissible by Congress in the Federal Rules would be subject to the court’s power under rule 403 to exclude unduly prejudicial, confusing, or time-wasting evidence.73 In addition, Congress has specifically given the court discretion in several other rules to exclude untrustworthy evidence.74 Inter-branch conflicts are more likely to arise when the Federal Rules exclude otherwise-relevant evidence, or condition its admissibility on compliance with procedural or other requirements. For example, because rule 803(8)(B) prohibits the use of police officers’ reports as substantive evidence in criminal prosecutions, a judge admitting such a report on the ground that it is as reliable as other business and official records would be acting contrary to the express direction of Congress. Similarly, a judge who admits hearsay under one of the catch-all exceptions if no notice had been given before trial violates the requirements of the Federal Rules. Some such difficulties can be resolved through the process of

69. Id. at 9-10 (footnote omitted).
72. See U.S. Const. art. III, § 1.
74. See, e.g., Fed. R. Evid. 803(6), 803(8), 804(b)(3); cf. Fed. R. Evid. 609(a)(1), 609(b) (court must determine whether probative value of conviction offered to impeach outweighs prejudicial effect).
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interpretation. For example, the court may determine that the excluding rule was not intended to apply to the given situation. Other apparent conflicts can sometimes be resolved by reference to constitutional limitations. For example, an excluding rule may be inapplicable under the doctrine of Chambers v. Mississippi because it would keep out reliable evidence helpful to an accused. Nevertheless, there are situations in which the applicability of the rule is clear, the congressional intent is unambiguous, and no constitutional rights are involved. It is in these situations that the question arises whether, or to what extent, the federal courts can substitute their judgment for that expressed by Congress in the Federal Rules of Evidence.

III. The Supremacy of Judicial Evidence Rules Indispensable to the Exercise of the Judicial Power

The thesis of this Article is that the federal courts are supreme over Congress regarding at least some rules of evidence, so that a court may on some occasions disregard explicit directives in the Federal Rules of Evidence. This argument is grounded on the constitutional grant of the judicial power to the courts and a determination that some evidence rules are "inherent" in that power.

A. Evidence Rules Within the Judicial Power

The Constitution does not define the nature and extent of the judicial power vested in the courts by article III. The relevant language of that article and elsewhere in the Constitution relates almost entirely to subject matter jurisdiction and provides no assistance for inferring the content of the power conferred. Knowing that the judicial power extends to specified "cases" and "controversies," that Congress may es-

77. The questions thus posed are different from those usually considered heretofore: (1) "whether the court may act at all" to pronulgate procedural rules, and (2) "whether the legislature has competence to review and rescind a pronounced rule." Levin & Amsterdam, Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision, 107 U. Pa. L. Rev. 1, 23 (1958).
78. In using the term "inherent" in this section, I have tried to resist the "constant invitation to think words instead of things" by applying the tests of "analysis [i.e., whether "to deny these powers and yet to conceive of courts is a self-contradiction"], history, and social utility." See Frankfurter & Landis, supra note 28, at 1023.
79. U.S. Const. art. III, § 2. Representative Holtzman inferred from the "case or controversy" requirement a prohibition on the Court making rules on substantive matters. See House
tablish inferior courts, and that Congress may regulate the appellate jurisdiction of the Supreme Court tells us little about the power those courts possess.

Records of the Constitutional Convention and discussions at the time of ratification do not help define the judicial power of the federal courts. The Framers were principally concerned with the allocation of jurisdiction between the state and federal judicial systems, the method of appointing judges, and whether judges should have the veto in the law-making process. Even when Edmund Randolph observed "the difficulty in establishing the powers of the judiciary," he was referring to the courts' jurisdiction, not to their proper functions.

In all probability the judicial power was not defined because a consensus existed concerning not only its general outlines but also its specific content. Montesquieu, whose views on the separation of governmental powers strongly influenced the Framers, described the judicial function as the means by which government "punishes criminals, or determines disputes that arise between individuals." The English and colonial courts with which the Framers were familiar performed this function. Since the Framers had a firmly established court system in mind over which no significant controversies about its method of operation had arisen, perhaps they perceived no need to specify the elements of the new government's judicial power.

In performing their essential function of deciding controversies,
both the English and the colonial courts applied "the law" as declared by the legislature or discovered by the court. In addition, the courts applied a body of principles developed largely on their own to govern the process by which controversies were decided and relief given. The rules of evidence were included within this latter body of principles applied by the English and colonial courts. These rules regulated the presentation of proof to the tribunal, the probative value given to that proof, and the conduct of the trial. Thus, in giving the judicial power to the courts, the Framers in all likelihood intended to include the power to develop, as the English courts had developed, what we would call rules of evidence.

B. Evidence Rules as an "Inherent" Judicial Power

Simply demonstrating that English courts developed rules of evidence is insufficient to establish the thesis that some court-made evidence rules preempt the Federal Rules of Evidence. Since the Constitution was intended to create a government structured differently from England's, governmental functions were not necessarily to be distributed in the same way. England's government was unitary, with sovereignty in the King. After the Glorious Revolution of 1688, that sovereignty was exercised by Parliament, but the allocation of functions among the branches of government continued to be for the convenience of the "sovereign," and all organs of government remained subject to the supremacy of Parliament, the King's successor as sovereign. In the United States, on the other hand, powers were distributed among branches of the government that were equal among themselves and subject only to the sovereignty of "the people," who had delegated their powers through the Constitution. Given this difference in principles of government organization, the historical exercise of a power by an English governmental organ (for example, the House of Lords acting as a court of appeal) does not necessarily indicate devolution of that function on the American counterpart.

Nevertheless, reason suggests that developing and applying princi-

88. See also H. Hart & H. Wechsler, supra note 41, at 66:
Would it be sound to conclude that the judicial function is essentially the function (in such cases as may be presented for decision) of authoritative application to particular situations of general propositions drawn from preexisting sources—including as a necessary incident the function of determining the facts of the particular situation and of resolving uncertainties about the content of the applicable general propositions? Would it be sound to conclude, in addition, that this function is an inescapable one in any regime of law?

89. See generally Kaplan, The Validity of Legislative Regulation of Procedure, 16 Temp. L.Q. 51, 51-52 (1941); Shanfeld, supra note 62, at 164-65; Tyler, supra note 25, at 772-74.
ceries of evidence is, analytically, part of the judicial power. In the Anglo-American tradition, deciding cases involves applying not only rules governing the merits of the controversies, but also a second body of rules designed to apply the first set of rules to the merits of the particular controversy before the court. Among these rules of proceeding are rules about the proof that may be presented and about the conduct of the trial, i.e., rules of evidence.

The power to apply rules of evidence is more than just an attribute of the judicial power; it is indispensable to the exercise of the power. A court admitting or excluding evidence on the judge's whim alone cannot be said to be deciding cases according to law, as is its responsibility, regardless of how faithful it is to the principles governing the merits. If consistent "lawful" results are to be obtained, there must be consistency in the process by which facts are judicially determined. This is not to say that the rules of evidence need be complex, only that they must establish a principled basis for the presentation of proof and the conduct of trials.

The indispensability of rules of evidence to the exercise of the judicial power, however, does not necessarily prove that the authority to develop such rules is also indispensable. For example, a central principle of the separation of powers is a division between the development of and the application of the principles governing the merits of a controversy. Nonetheless, it seems clear that the judicial power referred to in the Constitution includes as an indispensable element the power to make some kinds of evidence rules. As an historical matter, the Framers knew a system in which the courts made the rules of evidence. Although the law applicable to the merits might have its source outside the courts, the principles governing admissibility of evidence were largely judicial creations. Placing all authority to make evidence rules outside the courts would have been foreign to the judicial power known to the Framers. This historical view is corroborated by the length of time that passed before the legislatures finally reformed some of the more egregious common-law evidence rules. They expected the courts to do the job and stepped in only when judicial conservatism allowed abuses to continue. Implicitly, the notion up until the middle

90. See text accompanying notes 24-25 supra.
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of the nineteenth century was that such matters inhered in the judicial power given the courts.

Analytically, the same conclusion follows. The power to make rules of evidence is an indispensable component of the judicial power, for if all evidence law were made outside the courts, evidence rules could be fashioned that would prevent courts from fulfilling their constitutional function of deciding controversies. That function is performed by determining the "facts" involved in the controversies and applying the "law" (from whatever source) to the facts so determined.92 If evidence rules are framed so that the facts that courts are allowed to determine are not relevant to the resolution of the issues raised by the substantive rules governing controversies between parties, then courts cannot decide those controversies as they are required to do. To take an extreme example, the application of a law declaring testimony by males incompetent would significantly impair performance of the courts' constitutional duty to decide controversies because the courts would be foreclosed from discovering the true nature of those controversies (assuming that men as a class are not unreliable witnesses). Although some controversies, such as those involving only documentary evidence or female witnesses, could be decided, the rule about male witnesses would constitute a major obstacle to performance of the courts' duty. Similarly, the authority to outlaw and punish contempts has been held an indispensable part of the judicial power.93 If courts could not punish contempts, their power to decide cases would not be totally frustrated; however, it would be impaired if persons obstructing the court could disobey judicial orders with impunity,94 and the independence of the judicial branch would be compromised if it had to depend on another branch to remove obstructions to its proceedings.95 Its independence is similarly impaired if it must depend on, or is limited by, another branch in determining and evaluating the facts of the controversies it must adjudicate.96

92. Implicit in the transformation of the original conflict between the parties into a "persuasive conflict" in court, see Golding, Preliminaries to the Study of Procedural Justice, in LAW, REASON, AND JUSTICE 85-86 (G. Hughes ed. 1969), is the need to relate the two "conflicts" through presentation of evidence.
95. See Frankfurter & Landis, supra note 28, at 1020-22.

In the case before us . . . the court is forbidden to give the effect to evidence which, in its
C. Supremacy of "Inherent" Powers

Because the authority to make and apply evidence rules is indispensable to the exercise of the judicial power granted the courts by the Constitution, it cannot be among the powers that the legislature has a residual power to allocate among the three principal branches. Superficial notions of the separation of powers doctrine often fail to take into account that there are many governmental powers that can be allocated to any of the branches without violating the essential premises of the doctrine. For example, the powers to regulate prices in commerce, to set tariff rates, and to prescribe appropriate remedies in civil actions are rationally classifiable within the functions delegated to two branches.

When Congress acts pursuant to its authority to make laws necessary and proper for execution of those powers, it decides which branch shall exercise the power. Powers explicitly granted in the Constitution, or indispensable to the exercise of such powers (sometimes called "inherent" powers) are not, however, subject to this congressional apportionment.

On the other hand, a power explicitly delegated to one depart-

own judgment, such evidence should have, and is directed to give it an effect precisely contrary.

We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power.


98. See, e.g., FPC v. Natural Gas Pipeline Co., 315 U.S. 575 (1942); Intermountain Rate Cases, 234 U.S. 476 (1914).


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ment, or indispensable to one so delegated, may be exercised concurrently by two or all three departments. 105 For example, law is made by both the legislative and judicial branches: in the former by adoption of statutes and in the latter by the common-law process of judicial decisions. Similarly, controversies are adjudicated by the quasi-judicial administrative agencies within the executive branch. 106 It is therefore clear that the separation of powers doctrine cannot be taken so literally that it precludes concurrent exercise of delegated or implied powers. 107

Although there can be concurrent exercise of explicitly delegated or inherent powers, the branch to which the power has been delegated or is inherent prevails in cases of conflict. In Myers v. United States 108 the Supreme Court decided that the power to remove executive officers was indispensable to the exercise of the executive power vested in the President. Therefore, a statute requiring Senate approval before a postmaster could be dismissed was held ineffective when the President dismissed a postmaster without seeking Senate agreement. As Chief Justice Taft said, "Made responsible under the Constitution for the effective enforcement of the law, the President needs as an indispensable aid to meet it the disciplinary influence upon those who act under him of a reserve power of removal." 109 On the other hand, the President could have acquiesced in the statutory arrangement by conditioning dismissal on Senate approval without violating the separation of powers doctrine because powers vested in one branch can be delegated to another. 110

Although the branch to which the power is indispensable has supremacy regarding the manner and occasion of its exercise, the Court has construed the scope of such "inherent" powers very narrowly. The standard usually applied to determine the reach of inherent powers is derived from Anderson v. Dunn, 111 an 1821 case establishing the inherent power of Congress to try and to punish contempts against it. The Court held that this power, which would ordinarily be considered judicial, was necessary if the legislative branch were to protect itself against

107. See, e.g., Weinstein, supra note 20, at 915-16 (1976).
108. 272 U.S. 52 (1926).
109. Id. at 170-73. As Professor Van Alstyne has noted, the weakness of the Myers decision lies not in its enunciation of this principle, but in application of the principle to a subordinate officer about whom the "reserve power of removal" could not reasonably be said to be an "indispensable aid." Van Alstyne, supra note 101, at 802-04.
110. See 272 U.S. at 170-73.
111. 19 U.S. (6 Wheat.) 204 (1821).
interference with its constitutional duties. The Court noted, however, that only the "least possible power adequate to the end proposed" was inherent. A power that is not indispensable to exercise of an explicit power, but is only appropriate or helpful to its exercise, is controlled by the branch to which powers of that type are allocated or, if reasonably classifiable in more than one category, is under the aegis of the legislature, which is given the power to make laws "necessary and proper" to the exercise of all powers granted by the Constitution.

D. Judicial Supremacy Over Evidence Rules: Review of Authorities

Arguments that Congress has preemptive responsibility for formulating evidence rules usually rely on statements in Wayman v. Southard and Sibbach v. Wilson & Co. directed at procedural rules in the federal courts. Neither case, however, is persuasive when the issue involves evidence rules.

Wayman v. Southard involved a conflict between state rules governing the manner by which execution would be levied and the federal rules on the same subject. The latter had been adopted under the Process Acts, which provided that process was to be governed by the common law, statutes, or rules of court. In holding that the federal government could regulate the conduct of its officers in executing federal court judgments, Chief Justice Marshall relied on Congress' power under the necessary and proper clause, not the courts' power under article III:

The constitution concludes its enumeration of granted powers,

112. Id. at 227-29. The contempt power exercisable by Congress without judicial proceedings was limited in Kilbourn v. Thompson, 103 U.S. 168, 189-90 (1890), to that necessary in pursuance of the delegated powers to discipline its members for disorderly conduct, compel their attendance, judge their qualifications, and conduct impeachments.


114. Van Alstyne, supra note 101, at 794.


116. 312 U.S. 1 (1941).

117. Dean Clark and Professor Moore suggest congressional supremacy without referring to any case authority, pointing only to the statutory prescription of evidence rules and delegation of rulemaking authority that has continued since the first Judiciary Act of Sept. 24, 1789, ch. 20, 1 Stat. 73. See C. Clark, supra note 19, at 44-45 n.129, 61-62 & n.166; 10 J. Moore, Federal Practice § 57 (2d ed. 1976); Clark, Power of the Supreme Court to Make Rules of Appellate Procedure, 49 Harv. L. Rev. 1303, 1309 n.17 (1936); Clark, The Proper Function of the Supreme Court's Federal Rules Committee, 28 A.B.A.J. 521, 523 n.11 (1942).

118. 23 U.S. (10 Wheat.) at 2. See Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93; Act of May 8, 1792, ch. 36, § 2, 1 Stat. 276. The case arose because the marshal had followed Kentucky procedures. 23 U.S. (10 Wheat.) at 2. There is no indication in the report whether procedures other than those used at common law had been prescribed either by the circuit court or the Supreme Court.
with a clause authorizing Congress to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof. The judicial department is invested with jurisdiction in certain specified cases, in all which it has power to render judgment.

That a power to make laws for carrying into execution all the judgments which the judicial department has power to pronounce, is expressly conferred by this clause, seems to be one of those plain propositions which reasoning cannot render plainer. The terms of the clause neither require nor admit of elucidation. The Court, therefore, will only say, that no doubt whatever is entertained on the power of Congress over the subject.\textsuperscript{119}

Similarly, in responding to the argument that making rules governing execution on judgments was a legislative function, which could not be delegated,\textsuperscript{120} Marshall clearly assumed that the power to make such rules, which clearly pertained to the judicial business,\textsuperscript{121} was a legislative one.\textsuperscript{122} The Court nevertheless held that the delegation was authorized by the necessary and proper clause, and did not rely on the judicial article, which would have been appropriate if the Court had viewed the statute as merely confirming a rulemaking power already possessed by the courts.\textsuperscript{123} Thus, \textit{Wayman} is said to stand for the proposition that the courts' power to "establish all necessary rules for the orderly conducting [of] business in the said courts"\textsuperscript{124} has its source in a statutory delegation made pursuant to Congress' necessary and proper power—rather than inhering in the judicial power vested in the courts.

\textsuperscript{119} 23 U.S. (10 Wheat.) at 22.
\textsuperscript{120}  Id. at 42.
\textsuperscript{121} Van Alstyne, \textit{supra} note 101, at 814.
\textsuperscript{122} See 23 U.S. (10 Wheat.) at 42-43. Professor Van Alstyne says: "What is interesting about Marshall's response is its explicit assumption that indeed the power being exercised [to provide rules specifying the manner in which federal court judgments were to be executed] is \textit{exclusively a legislative one, i.e., a power solely to be exercised by Congress.}" Van Alstyne, \textit{supra} note 101, at 814 (emphasis in original). That observation seems inconsistent with Marshall's statement:

\begin{quote}
It will not be contended, that congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative. But congress may certainly delegate to others, powers which the legislature may rightfully exercise itself. Without going further for examples, we will take that, the legality of which the counsel for the defendants admit. The 17th section of the judiciary act, and the 7th section of the additional act, empower the courts respectively to regulate their practice. It certainly will not be contended, that this might not be done by congress. The courts, for example, may make rules, directing the returning of writs and processes, the filing of declarations and other pleadings, and other things of the same description. It will not be contended, that these things might not be done by the legislature, without the intervention of the courts; yet it is not alleged, that the power may not be conferred on the judicial department.
\end{quote}

\textsuperscript{123} See Van Alstyne, \textit{supra} note 101, at 813-14.
\textsuperscript{124} Judiciary Act of Sept. 24, 1789, ch. 20, § 17, 1 Stat. 83.
by the Constitution— and that therefore Congress is supreme in regulating proceedings in the federal courts.

Nevertheless, there are several reasons for not reading the language in Wayman so broadly as to encompass evidence rules. First, the case did not involve a matter that is indispensable to exercise of the judicial power. Although rules governing executions are significant in determining the practical effect that will be given federal court judgments, the essential judicial function of determining the facts of controversies and deciding how the law applies to those facts is not impaired by external regulation of the manner by which those decisions are effectuated. Put another way, execution of judgments is one of those matters that could reasonably be regulated by either the judiciary or the legislature without significantly impairing the independence of either branch, which the constitutional separation of powers is intended to protect. As such, the matter is one falling within Congress' residual power to allocate. Thus, Marshall's reliance on the necessary and proper clause rather than article III indicates only that rules regulating the manner of execution are subject to congressional supremacy, not that all procedural rulemaking is.

A second reason for not reading too much into Wayman is that the case did not raise a separation of powers problem at all, but only a question of federalism. The precise issue with which the Court was concerned was whether state or federal law was to apply; there was no suggestion that the federal court was about to apply its own rule in disregard of any explicit or implicit directive of Congress. The Court explicitly avoided the question of the "right of the Courts to alter the modes of proceeding in suits at common law."  

Finally, Wayman should be read with caution because of the context in which it was decided. Up through the Civil War, thinking about the separation of powers doctrine was accompanied by a notion of leg-

125. Van Alstyne, supra note 101, at 813-14; Weinstein, supra note 20, at 927.
126. The court has performed its essential function of decision-making when it announces its judgment. The traditionally accepted dependence on other agencies to execute that judgment is implicit in the remark attributed to Andrew Jackson: "John Marshall has made his decision now let him enforce it." M. McNamara, 2,000 Famous Legal Quotations 149 (1967), citing Sumner, Andrew Jackson 182 (1882). Or, as stated by Hamilton in The Federalist: "It is evident that there is no process of a court by which the observance of the laws can, in the last resort, be enforced. Sentences may be denounced against them for violations of their duty; but these sentences can only be carried into execution by the sword." The Federalist No. 15 (A. Hamilton), at 77 (rev. ed. G. Smith 1901). By contrast, there can be no legal decision apart from a finding of fact. See H. Hart & H. Wechsler, supra note 41, at 66.
128. Id. at 48.
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Legislative omnicompetence. As a general proposition, this notion was founded on a perception of the legislature as directly representing the will of "the people." Therefore, all the powers of the people devolved upon the legislature. The training of lawyers tended at that time to reinforce this perception. Apprentice training of lawyers emphasized the procedural aspects of enforcing substantive rights. Defining rights in terms of procedure and remedies suggested that the legislature could not give up its power to regulate procedure without forfeiting its control over substance. Since the power to make any rules governing the conduct of individuals, as well as the power to protect individuals against arbitrary government, was vested in the legislature, it followed that the legislature also controlled procedure. Given these assumptions about the integral relation between what would now be called substance and procedure, it is not surprising that judges deferred to "the people's representative" even on questions regarding the conduct of proceedings in the courts.

Sibbach v. Wilson & Co. was decided long after such notions of legislative omnicompetence had faded. Yet its language that "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" has been used to infer congressional supremacy over procedural rules. Sibbach, too, does not establish the point as a matter of constitutional law. The problem before the Court was the enforceability of Federal Rule of Civil Proce-

129. See Kaplan, supra note 89, at 56; Pound, supra note 97, at 34-35, 43.
130. See Pound, supra note 97, at 35. Examples of this supremacy included the calling of judges before the legislature to justify their decisions and the adoption of statutes to reverse judgments in particular cases. Id.
132. 312 U.S. 1 (1941).
133. Id. at 9-10 (emphasis added; footnotes omitted).
134. See C. CLARK, supra note 19, at 44-45 n.129; J. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES 90 (1977); Clinton, supra note 62, at 71, 72. Professor Clinton also quotes Mr. Justice Frankfurter in Palermo v. United States, 360 U.S. 343, 353 n.11 (1959): "The power of this Court to prescribe rules of procedure and evidence for the federal courts exists only in the absence of a relevant Act of Congress." Clinton, supra, at 72-73. As in Wayman and Sibbach, the issue before the Court in Palermo was whether Congress had the power to prescribe rules of procedure and not how to resolve a difference between statutory and court-made rules. See 360 U.S. at 353 n.11. Even if Palermo were read to involve a conflict between the rule of Jencks v. United States, 353 U.S. 657 (1957), and that of 18 U.S.C. § 3500 (1976), the matter involved (discovery of statements given to the prosecution) has consequences involving the government's ability to function that go far beyond the conduct of the particular litigation. See Palermo v. United States, 360 U.S. 343, 346, 350 (1959). Therefore, the matter is appropriately subject to congressional supremacy. See text accompanying notes 163-68 infra.
dure 35, which permitted orders compelling parties to submit to physical examinations. The statement quoted above reaffirmed Wayman’s point that Congress could regulate procedure and that delegation of that power to the courts was not a violation of the separation of powers doctrine. The issue the Sibbach Court decided was whether Rule 35 contravened the enabling legislation because it “abridge[d] . . . substantive rights”, since the Court concluded that it did not, there was no conflict between the congressional directive and the Court-made (and congressionally adopted) rule. Thus, the Court never decided whether the limitation on the Court’s power to make rules “not inconsistent with the statutes” was enforceable as a matter of constitutional law.

The argument that evidence rules are subject to judicial, not legislative, supremacy gains some support in decisions that construed the Conformity Act of 1872. The Act provided:

[T]he practice, pleadings, and forms and modes of proceeding in other than equity and admiralty causes in the circuit and district courts of the United States shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding: Provided, however, That nothing herein contained shall alter the rules of evidence under the laws of the United States, and as practiced in the courts thereof.

The proviso, which included the statute’s only reference to evidence

135. See 312 U.S. at 9-10 nn.6 & 7.
136. The Court noted:

The contention of the petitioner, in final analysis, is that Rules 35 and 37 are not within the mandate of Congress to this court. This is the limit of permissible debate, since argument touching the broader questions of Congressional power and of the obligation of Federal courts to apply the substantive law of a state is foreclosed.

137. Even a finding that the rule was “substantive” and therefore outside the ambit of the enabling act would not necessarily have settled the issue because “substantive” matters seem clearly within congressional supremacy; our concern is whether “procedural” matters are also.
138. Dealing specifically with that question, Dean (later Judge) Charles E. Clark expressed doubt that federal courts had inherent power to make procedural rules in conflict with statutes. C. CLARK, supra note 19, at 44-45 n.129; Clark, Power of the Supreme Court to Make Rules of Appellate Procedure, 49 HARV. L. REV. 1303, 1309 n.17 (1936); Clark, The Proper Function of the Supreme Court’s Federal Rules Committee, 28 A.B.A.J. 521, 523 n.11 (1942); accord, 10 J. MOORE, FEDERAL PRACTICE 87 (2d ed. 1976). His conclusion that the courts had acquiesced in legislative supremacy in the matter appears, however, to have been based on statements in cases like Wayman and Sibbach in which the issue was never squarely presented. Moreover, regardless of its analytical necessity, Clark may have believed that an argument of inherent judicial power by someone in his position as the principal draftsman of the Federal Rules of Civil Procedure would have imperiled their acceptance by Congress.
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rules, was deleted in the Revised Statutes recodification of 1875.\textsuperscript{140} Although the reference to the "rules of evidence . . . as practiced in the courts" appears to except state evidence rules from the conformity principle, the phrase was not relied upon for that purpose in the reported cases, nor was deletion of the proviso cited as requiring conformity to state evidence practice after 1875.\textsuperscript{141}

Under the Conformity Act, and continuing the practice developed long before the Act's adoption, the federal courts in most cases followed state statutes regulating admissibility of evidence.\textsuperscript{142} The conformity principle was not as consistently applied to state evidence rules that had been created by judicial decision. State opinions, even those construing state evidence statutes, were treated as persuasive, but not controlling, authority.\textsuperscript{143} Furthermore, some federal courts did not consider themselves bound by state practice when the rule would not be "convenient for the advancement of justice"\textsuperscript{144} or would "unwisely encumber the administration of the law."\textsuperscript{145} On that reasoning, one court held there was no error in admitting a tabulation without calling the clerks who made it, even though the common-law rule of the forum state required their testimony.\textsuperscript{146}

Although the question of the applicability of the Conformity Act to evidence rules was never squarely presented to it, the Supreme Court in several cases construed the Act narrowly when "the powers of the judge, as defined by the common law, were largely trenched upon."\textsuperscript{147} The Court held in \textit{Nudd v. Burrows} that judicial comment on the evidence was not included in the words "practice, pleadings, and forms and modes of proceeding" because it involved the "conduct and administration of the judge in the discharge of his separate functions."\textsuperscript{148}

The Court's restrictive view of the Act was followed in cases involving

\textsuperscript{141} See \textit{Ex parte Fisk}, 113 U.S. 713, 720 (1885).
\textsuperscript{145} Indianapolis & St. L.R.R. v. Horst, 93 U.S. 291, 301 (1876).
\textsuperscript{146} \textit{Massachusetts Bonding & Ins. Co. v. Norwich Pharmacal Co.}, 18 F.2d 934, 939 (2d Cir. 1927).
\textsuperscript{148} 91 U.S. 426, 442 (1875).
instructions to the jury, the exhibits to go into the jury room, the appropriateness of special verdicts, the scope of cross-examination, and the admissibility of character testimony. Although the Court in Nudd disclaimed any need to decide whether the legislative or the judicial branch would prevail in case of a conflict, it stated that there were "certain powers inherent in the judicial office." A year later the Court, referring to Nudd but again not specifically deciding the question, implied that there were constitutional limits on Congress' power to "fetter the judge in the personal discharge of his accustomed duties, or to trench upon the common-law powers with which in that respect he is clothed." Thus, although the courts purported to be construing the Conformity Act and deciding whether Congress intended it to apply to certain questions regarding the admissibility of evidence and the conduct of trials, the language used and the construction reached suggest that there was an area in which these courts did not consider themselves constrained to follow the congressional direction of conformity to state practice.

Dean Wigmore's assertion that "all legislative rules for judiciary procedure are void constitutionally," is no more persuasive than statements that the legislature is supreme regarding evidence rules. Assuming that his editorial note by that title was intended to be taken seriously, it overstates the case in two major respects. First, use of the word "void" implies that rules promulgated by the legislature have


154. 91 U.S. at 442, citing Houston v. Williams, 13 Cal. 24 (1859) (Field, J.).


156. Wigmore, supra note 60.

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no effect and should not be followed. Such a position applies the separation of powers doctrine with more strictness than the cases would support.\textsuperscript{158} That even Wigmore would not go so far is indicated by his concluding "proposition of law": "All rules of procedure declared by the legislature are void, and have only such effect as the comity of the judiciary may give by following them in the absence of any rule made by the judiciary."\textsuperscript{159}

Second, and more important, the reference to "all" procedural rules presupposes that authority to make rules regulating court procedure can be inferred only from the judicial power. The point is made explicitly: "All rules of procedure in courts, not expressly or impliedly prescribed by the constitution, fall under the judiciary power, for the purpose of making or changing them."\textsuperscript{160} "[A]ll judiciary power, except the definition of certain parts of jurisdiction and the place of criminal trials, is in the judiciary, not in the legislature."\textsuperscript{161} Wigmore's reasoning, however, is clearly inconsistent with the proposition—historically and analytically demonstrable—that the power to make adjective law is one shared between the judiciary and the legislature.\textsuperscript{162}

\textbf{E. Limits On Judicial Supremacy Over Rules Governing Court Proceedings}

Even if Wigmore's note is read as asserting only that the judiciary is supreme with respect to all rules governing court proceedings, he states the rule too broadly. As was discussed earlier, judicial supremacy extends only to rulemaking that is indispensable to the courts' functioning. Rules that are only incidental or helpful to the exercise of the judicial authority seem to be committed by the necessary and proper clause to legislative supremacy.\textsuperscript{163}

Furthermore, the judiciary must defer to the legislature in making rules that are rationally classifiable within the inherent powers of both branches. The legislature's function as "voice of the people" requires that its rules enunciating public policy take precedence over contrary rules adopted by the judiciary, even if the judicial rules are deemed indispensable to the process of deciding controversies.\textsuperscript{164} Certain evi-

\begin{itemize}
\item \textsuperscript{158} See, e.g., Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825).
\item \textsuperscript{159} Wigmore, supra note 60, at 279 (emphasis added; emphasis in original deleted).
\item \textsuperscript{160} Id. at 279 (emphasis in original).
\item \textsuperscript{161} Id. at 277 (emphasis added), referring to U.S. Const. art. I, §§ 1, 8, art. III, §§ 1-3.
\item \textsuperscript{162} See Note, supra note 59-72 supra.
\item \textsuperscript{163} See text accompanying notes 97-114 supra.
\item \textsuperscript{164} See Joiner & Miller, supra note 157, at 629-30; Reidl, supra note 103, at 604.
\end{itemize}

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Evidence rules may govern the probative effect to be given items of proof; but at the same time, they may also reflect public policy determinations, which are ultimately the responsibility of the legislature. It is not always easy to decide when evidence rules go beyond regulating probative value and orderly court proceedings into the realm of public policy, but the decision is crucial to the separation of powers issue.

The line between areas of judicial and legislative supremacy is sometimes described in terms of a distinction between "procedure" and "substance": matters of court "procedure" have traditionally been within the sphere of the judiciary, while matters of "substance" have been committed to the legislature. That distinction, however, is insufficiently precise for the present purpose since most evidence rules, regardless of their substantive effect, also regulate court procedure. The legislature's responsibility to announce public policy is, more precisely, a duty and power to define the rights and obligations of the governed among each other and in relation to the government. The area in which the legislature is supreme therefore includes not only the making of rules that give guidance about primary activity, such as what degree of care must be exercised in various circumstances, but also includes the making of rules that announce the consequences of breaches of the rules governing primary activity—in other words, the type and extent of remedy available if the rules' standards are not followed. Furthermore, rules affect conduct when they predictably affect the likelihood that a breach of the rules' standards will be translated into a judicial finding of that fact. Thus, people may conduct themselves differently, including insuring themselves differently, depending upon

166. See Degnan, The Feasibility of Rules of Evidence in Federal Courts, 24 F.R.D. 341, 345-47 (1960). The dangers of analyzing problems according to a substance-procedure dichotomy were well expressed by Mr. Justice Frankfurter:

Matters of "substance" and matters of "procedure" are much talked about in the books as though they defined a great divide cutting across the whole domain of law. But, of course, "substance" and "procedure" are the same keywords 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. . . . And the different problems are only distantly related at best, for the terms are in common use in connection with situations turning on such different considerations as those that are relevant to questions pertaining to ex post facto legislation, the impairment of the obligations of contract, the enforcement of federal rights in the State courts and the multitudinous phases of the conflict of laws.


167. "The essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of the society . . . ." The Federalist No. 74 (A. Hamilton), at 412-13 (rev. ed. G. Smith 1901).
whether their expected adversary must prove a breach of the legal standard by a preponderance of the evidence or beyond a reasonable doubt. In sum, the legislature announces public policy not only when it makes rules establishing standards of conduct, but also when it makes rules predictably affecting the application of those standards.\textsuperscript{168} Thus, the question whether court-made evidence rules come under legislative supremacy depends upon whether they only regulate the manner in which judicial decisions are made or go further and affect people's conduct outside the litigation context.

IV. Analyzing Specific Federal Rules

Congress intended some of its changes in the Federal Rules to affect only the conduct of the decision-making process at trial. Consequently, those rules may be disregarded by the federal courts on the basis of judicial supremacy. For example, Congress deleted a hearsay exception for statements so tending to make the declarant "an object of hatred, ridicule, or disgrace, that a reasonable man in his position would not have made the statement unless he believed it to be true."\textsuperscript{169} This "social interest" exception was deleted because it lacked "sufficient guarantees of reliability."\textsuperscript{170} Given that explicit determination, it might appear inappropriate for a court applying the Federal Rules to admit such statements under the "catch-all" exception, which requires "equivalent circumstantial guarantees of trustworthiness."\textsuperscript{171} Nevertheless, since the rule involves only the probative value of the evidence—the rule has no predictable out-of-court effect—the question whether to admit declarations against social interest seems to be one on which judicial, not legislative, judgments should prevail. As another example, Congress added a requirement to the Federal Rules that a party intending to offer hearsay evidence not specifically covered by the listed exceptions, but having equivalent circumstantial guarantees of trustworthiness, should "make known to the adverse party suffi-


\textsuperscript{169} Proposed Fed. R. Evid., supra note 3, rule 804(b)(4).


\textsuperscript{171} Fed. R. Evid. 803(24), 804(b)(5). Cf. In re IBM Peripheral EDP Devices Antitrust Litigation, 444 F. Supp. 110, 113 (N.D. Cal. 1978) ("[I]t is unlikely that Congress meant this exception [rule 804(b)(5)] to be used to circumvent its own restriction of another exception [former testimony admissible only against parties to action in which it was given or their successors in interest]"). But see 120 CONG. REC. 40892-93 (1974) (remarks of Rep. Holtzman); 4 J. WEINSTEIN & M. BERGER, supra note 14, at 804-111.
ciently in advance of the trial or hearing to provide the adverse party with a fair opportunity to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.” 172 This notice requirement is only a congressional statement of one expeditious and orderly procedure for the presentation of certain evidence. Yet, if it is applied literally the rule might exclude evidence that could be admissible if some other expeditious and orderly procedure were permitted. Since the rule has no object outside the litigation process, it is one appropriately subject to judicial supremacy. 173

Congress made some other changes based explicitly on its disagreement with the Advisory Committee’s evaluation of the probative value of the evidence. Nevertheless, these rules may be proper subjects of legislative supremacy because of the contexts in which they are usually applied. For example, the second sentence of rule 804(b)(3) was amended to exclude declarations against penal interest offered to exculpate the accused “unless corroborating circumstances clearly indicate the trustworthiness of the statement.” 174 The House Judiciary Committee decided that the Court’s simple corroboration requirement was insufficient to ensure the trustworthiness of exculpatory statements, which are more suspect than other declarations against penal interest. 175 The effect of the congressional change, however, was to shift the balance between the government and the accused to make conviction more likely in some cases. The change will never make conviction less likely because no corroboration requirement was imposed on the government. Thus, the rule may be said to have a “substantive” effect, which makes it a proper subject of legislative supremacy. A similar effect may also be discerned in changes in the rule governing prior

173. Several courts have dispensed with the pretrial notice requirement when other procedures, such as continuances, have accomplished the congressional purpose. See, e.g., United States v. Lyon, 567 F.2d 777, 784 (8th Cir. 1977), cert. denied, 435 U.S. 918 (1978) (defendant had statement before trial); United States v. Bailey, 439 F. Supp. 1303, 1306 (W.D. Pa. 1977) (3-day recess after statement offered). But see United States v. Oates, 560 F.2d 45, 73 n.30 (2d Cir. 1977) (“There is absolutely no doubt that Congress intended that the requirement of advance notice be rigidly enforced”).
174. The second sentence of the proposed rule provided: “A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborated.” Proposed Fed. R. Evid., supra note 3, rule 804(b)(4). To the extent that the final version imposes a strict corroboration requirement, it may run afoul of the teaching of Chambers v. Mississippi, 410 U.S. 284, 299-303 (1973), that hearsay rules precluding admission of reliable exculpatory evidence deny due process. See 4 J. Weinstein & M. Berger, supra note 14, at 804-91 to -93; id. at 111-13 (Supp. 1977).
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inconsistent statements of a witness.\textsuperscript{176} The Court's draft treated all such statements as nonhearsay; the final rule gave that treatment only to statements made under oath subject to the penalty of perjury. The announced purpose of the change was to increase the reliability of the statement in two distinct senses: ensuring that the statement was made, and increasing the dependability of its content.\textsuperscript{177} Particular concern was expressed that under the Court's draft a criminal defendant could be convicted solely on the basis of a prior inconsistent statement about which there might be a substantial question whether it was ever actually made.\textsuperscript{178} In light of that reasoning, Congress quite appropriately drew the balance between prosecutor and accused by drafting a rule with a predictable effect of making it more difficult for a conviction to result. However, to the extent that the rule also applies to civil cases (in which it has no predictable effects for any class of litigants), it is merely a congressional evaluation of probative value, a matter about which the courts should be supreme.

The Federal Rules of Evidence also include several provisions in which the changes made by Congress in the Supreme Court's version will, or are expected to, affect out-of-court conduct. Rules of privilege, for example, are justified by their tendency to promote socially desirable communications.\textsuperscript{179} A major factor in the congressional decision to revise the Federal Rules was the belief that the Court's privilege rules did not appropriately reflect the public policies involved in protecting (i.e., encouraging) communications between doctor and patient, husband and wife, and informant and government agency.\textsuperscript{180} Similarly, the change from having presumptions shift the burden of persuasion to their having only a "bursting bubble" effect\textsuperscript{181} affects the balance between the parties and, as a result, may alter the parties' out-of-court conduct. For example, if plaintiffs cannot shift the burden of proof on the issue of due care to the defendant by proving a statutory viola-

tion,\textsuperscript{182} then plaintiffs will lose more cases than if the burden of proof were shifted by the presumption. The congressional change in rule 301 was, therefore, an implicit assertion that the Court had misjudged the appropriate balance between the parties in many types of controversies.\textsuperscript{183}

In addition to changes made to implement public policies about out-of-court conduct, and those made to regulate the trial process or ensure the trustworthiness of evidence, there were changes for which the explicit justification was some notion of "fairness." Thus, the amendment to rule 803(8), which excluded records of matters observed by law enforcement personnel in criminal cases, followed a House debate in which "fair trial" was a major concern.\textsuperscript{184} Similarly, the former

\textsuperscript{182} \textit{See} \textsc{Cal. Evid. Code} § 669 (West Supp. 1978).

\textsuperscript{183} Two comments must be made about the illustrations used in text. First, saying that the privilege and presumption rules will have consequences beyond the litigation does not mean that they are thereby inappropriate subjects of court-made rules. Presumption rules, for example, can involve problems in deciding the controversy: the Senate and the conference committees rejected a House-passed version of rule 301 that would have treated presumptions as evidence because the House rule might confuse juries in performance of their duties. \textit{See Senate Report, supra} note 7, at 9, \textit{reprinted in} [1974] \textsc{U.S. Code Cong. & Ad. News} at 7056; \textit{Conference Report, supra} note 13, at 5-6, \textit{reprinted in} [1974] \textsc{U.S. Code Cong. & Ad. News} at 7099. As for the privilege rules, in rule 501 Congress ultimately delegated to the courts power to define privileges in deciding federal claims or defenses:

Except as otherwise required by the Constitution of the United States or provided by \textit{Act of Congress} or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

\textsc{Fed. R. Evid.} 501 (emphasis added). Thus, the out-of-court effects of these types of rules only establish legislative supremacy, not judicial incompetency. Second, as a practical matter, the congressional concern with these two areas and with the general rule on competency of witnesses, compare \textsc{Fed. R. Evid.} 601 with Proposed \textsc{Fed. R. Evid.}, \textit{supra} note 3, rule 601, was not so much the appropriate spheres of legislature and judiciary as it was the proper relations between the federal and state governments. \textit{See House Report, supra} note 5, at 9, \textit{reprinted in} [1974] \textsc{U.S. Code Cong. & Ad. News} at 7082-83; \textit{Senate Report, supra} note 7, at 6-7, 11-13, \textit{reprinted in} [1974] \textsc{U.S. Code Cong. & Ad. News} at 7052-54, 7058-59; \textit{Conference Report, supra} note 13, at 7-8, \textit{reprinted in} [1974] \textsc{U.S. Code Cong. & Ad. News} at 7100-02. As a result, state rules of presumptions, privileges, and competency were applied when state law supplied the rule of decision. \textit{See Fed. R. Evid.} 301, 501, 601. The concern for not invading the province of the states was, nevertheless, very similar to the present concern for not trenching on the legislature; ultimate authority over matters affecting the out-of-court conduct of citizens is divided by the Constitution between the federal legislature (which has explicit and inherent powers, as well as power to make legislation necessary and proper for exercise of other powers given the federal government), \textit{see U.S. Const. art.} 1, and the states (to which are reserved all other powers), \textit{see U.S. Const. amend. X.} Implicit, therefore, in the judgment that a proposed rule invaded the powers reserved to the states was the judgment that it was a matter over which Congress would otherwise be supreme.

\textsuperscript{184} \textit{See} 120 \textit{Cong. Rec.} 2387-88 (1974).
testimony exception\textsuperscript{185} was made applicable only if the party against whom the evidence was offered, or his predecessor in interest in a civil action, had been given an opportunity to develop the testimony, because the House Judiciary Committee believed that "it is generally unfair to impose upon the party against whom the hearsay evidence is being offered responsibility for the manner in which the witness was previously handled by another party."\textsuperscript{186} The conference committee also added requirements of advance notice of intent to offer a conviction over ten years old,\textsuperscript{187} or hearsay evidence under the catch-all exceptions,\textsuperscript{188} in order to give the opponent a "fair opportunity" to contest the use of the evidence.\textsuperscript{189} Although "fairness" would seem to be a matter that the legislature, as the people's representatives, would be particularly well qualified to determine, there is a good argument, at least in the latter of the above examples, that the area of judicial supremacy was invaded. Rules to provide a "fair opportunity" to meet evidence are rules for orderly procedures that are not intended to have a predictable effect on the decision on the merits other than to ensure the fullest possible presentation of relevant evidence. Seen in that light, the notice requirements of rules 609(b), 803(24), and 804(b)(5) should not be imposed rigidly, but should be applied or disregarded as the court believes will best assist the fact-finding process.

At the other extreme, the "fair trial" concern regarding the use of police reports\textsuperscript{190} may indicate congressional balancing of prosecution and defense interests in criminal cases. The Senate Judiciary Committee explained the change only in terms of the probative value of such reports: "[O]bservations by police officers at the scene of the crime or the apprehension of the defendant are not as reliable as observations by public officials in other cases because of the adversarial nature of the confrontation between the police and the defendant in criminal

\textsuperscript{185} \textit{Fed. R. Evid.} 804(b)(1).


\textsuperscript{187} \textit{Fed. R. Evid.} 609(b).

\textsuperscript{188} \textit{Fed. R. Evid.} 803(24), 804(b)(5).


\textsuperscript{190} \textit{See Fed. R. Evid.} 803(8)(B). In an attempt to avoid the strictures of rule 803(8), some reports by official agencies that had heretofore been accepted routinely (e.g., chemical analyses of seized substances, records of gun registrations) are now offered as business records under rule 803(6). However, the Second Circuit has read the legislative history of 803(8) as requiring, in a narcotics prosecution, exclusion of a report by a Customs Service chemist. \textit{See United States v. Oates}, 560 F.2d 45, 68-80 (2d Cir. 1977). \textit{But see United States v. Grady}, 544 F.2d 598, 604 (2d Cir. 1976) (police records of seized guns admissible). \textit{See generally J. WEINSTEIN & M. BERGER, supra note 14, at 67-69 (Supp. 1977).
cases." They introduced that explanation, however, with the word "ostensibly"; furthermore, the House debates included repeated assertions that it should not be possible "to convict people where the police officer's statement is not subject to cross-examination." Thus, it can be argued that Congress intended to impose a burden on a predictable class of litigants, i.e., prosecutors. That burden could affect out-of-court conduct because police might conduct more careful investigations if they know that in proving the case they cannot rely on reports not subject to cross-examination.

It is more difficult to determine the sense in which Congress applied the concept of fairness to the change limiting the admissibility of former testimony to that given when the present opponent or his predecessor in interest had an opportunity to examine the witness. The change in the rule has no predictable effect: sometimes it will work to the advantage of plaintiffs, sometimes for defendants. At the same time, there is no basis for saying that testimony previously offered against one with a similar motive to develop it is necessarily less reliable than if the present opponent had been a party when it was originally given. The change in the former testimony rule, therefore, seems to be neither a clear exercise of the legislature's powers over "substantive" matters nor a clear intrusion on the judicial power to determine the reliability of evidence to be used in the decision-making process. If an explanation must be chosen, however, it probably would be the latter: the legislature was probably more concerned that some litigants would be faced with former testimony that was not sufficiently developed, than that decisions on controversies in which such evidence had been received would tend in a predictable manner over the long run not to reflect the public policies established by the legislature. Thus, the legislative judgment made in amending rule 804(b)(1) seems to be one that a court could properly disregard in order to perform its constitutional function of fairly deciding controversies.

192. 120 Cong. Rec. 2388 (1974) (remarks of Rep. Johnson); see id. at 2387-88 (remarks of Reps. Holtzman & Briscoe). Representative Dennis, who proposed the amendment excluding police observations as official records, id. at 2387, explicitly denied that he was intending to impugn the trustworthiness of police officers. Id. at 2388.
V. Conclusion

The Federal Rules of Evidence provide a case study of how delicate the balance between the branches of government under the separation of powers principle can be.\(^{195}\) The traditionally, if imprecisely, stated balance, which left matters of "procedure" to the courts while the legislature had authority over regulation of "substance," was first upset when the rules promulgated by the Supreme Court included numerous provisions, especially those regarding privileges, that had significant public policy components.\(^{196}\)

The congressional response was not only to prescribe what it considered appropriate privilege rules, but also to review the entire evidence code and, as revised, to enact it into law. By providing that the statutory evidence rules, except those dealing with privileges, could be amended without legislative approval,\(^{197}\) Congress might be said to have reestablished the equilibrium between legislature and judiciary. There appears, however, to be a continuing threat to that balance.

Experience so far with the Federal Rules of Evidence indicates that some courts have quite liberally construed various rules. While the rules leave much to the courts' discretion, in a number of instances it appears that they have been applied without regard to, or even in defiance of, explicit congressional directives or intentions.\(^{198}\) In certain circumstances it is appropriate for a court to substitute its judgment for that of Congress in determining admissibility. While the courts have been given great latitude in excluding evidence, a judge may occasionally believe that the Federal Rules unnecessarily limit the reception of

\(^{195}\) See also Levin & Amsterdam, supra note 77, at 1-2.

\(^{196}\) Such a misjudgment of the political consequences, if not of the theoretical limits, of the judicial branch's competency suggests strongly the need for reform of the rulemaking process. Recent calls for reform are made in, e.g., J. Weinstein, supra note 134; Clinton, supra note 62; Friedenthal, supra note 2.


\(^{198}\) See, e.g., United States v. Schole, 553 F.2d 1109, 1123-25 (8th Cir.), cert. denied, 434 U.S. 940 (1977) (computer printout prepared by Drug Enforcement Administration admitted under rule 803(6) although arguably inadmissible under rule 803(8)(B)); United States v. Grady, 544 F.2d 598, 604 (2d Cir. 1976) (police records of weapons found in Northern Ireland admitted under rule 803(8)(B) although they were "facts observed by . . . law enforcement personnel"); United States v. Leslie, 542 F.2d 285, 289-91 (5th Cir. 1976) (prior inconsistent statements to FBI agents admitted under rule 803(24) although inadmissible under rule 801(d)(1)(A) because they were not made under oath subject to penalty of perjury); United States v. Iaconetti, 540 F.2d 574, 578 (2d Cir. 1976), cert. denied, 429 U.S. 1041 (1977) (statement admitted under rule 803(24) without notice given before trial); In re Master Key Antitrust Litigation, 72 F.R.D. 108, 109 (D. Conn.), aff'd without opinion, 551 F.2d 300 (2d Cir. 1976) (United States deemed "predecessor in interest" for purpose of admitting former testimony under rule 804(b)(1) against plaintiff in private antitrust action). I am not suggesting that in the above cases the courts' results were either unreasonable or impossible to justify, only that the results appear to be inconsistent with relatively specific statutory language.
probative evidence. So long as the applicable rule is founded only on considerations of the probative value of the evidence or orderly conduct of the trial, the court should be free to use its inherent power to substitute its judgment for that of Congress. When, however, the court is faced with a rule the application of which has a predictable effect on out-of-court conduct, it has a responsibility to comply with the congressional restrictions even if the result is to exclude evidence the court considers probative. Only if courts interpreting the Federal Rules of Evidence make an effort to analyze the particular rules in light of the criteria suggested here can the proper balance between the legislative and judicial branches be maintained.