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The Supreme Court of North Carolina's Rulemaking Authority and the Struggle for Power: State v. Tutt

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The Supreme Court of North Carolina's Rulemaking Authority and the Struggle for Power: *State v. Tutt*

Imagine that you are a state supreme court justice in your second elected term. In addition to the expected stresses of following the law and making sure justice is served while dealing with the political ramifications of your decisions, a primary source of your anxiety is the court's lack of funding.[1] You worry the court will have to reduce the number of clerks or cut the support staff. This scenario is undoubtedly a reality for many state judges. Each year, caseloads and technological demands increase, and the difficulty of meeting state citizens' needs within these constraints also continues to grow.[2] To compound these problems, judges must deal with challenges to the efficiency of their courtrooms as lawmakers attempt to encroach on the judiciary's ability to make court rules by enacting changes to state evidentiary codes that directly contradict rules of court procedure.[3] Such legislative action strips judges of the power to control their courts' "essential functions," which makes efficient judicial administration increasingly difficult when coupled with dwindling funds and towering caseloads.[4]

The court's ability to determine which issues to consider on appeal is an important part of streamlining the decision making process. Prior to a 2004 amendment by the North Carolina General Assembly, courts had interpreted rule 103(a) of the North Carolina Rules of Evidence to mean that a party must make an objection to the admission of evidence at trial in order to preserve the issue of admissibility of the evidence for appeal.[5] In contrast, the 2004

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1. *See, e.g.*, I. Beverly Lake, Jr., Chief Justice, Supreme Court of N.C., State of the Judiciary Speech (Mar. 30, 2001), http://www.nccbi.org/Legislative_Bulletin/LB-03-30-01lakespeech.htm (last visited Aug. 25, 2006) [hereinafter Speech by Chief Justice Lake] (discussing the consequences of inadequate funding on the North Carolina court system).

2. *See id.*

3. *See, e.g.*, State v. Tutt, 171 N.C. App. 518, 521, 615 S.E.2d 688, 690 (2005) (stating that "Rule 103(a)(2) of the North Carolina Rules of Evidence is in direct conflict with Rule 10(b)(1) of the Rules of Appellate Procedure as interpreted by our case law on point").

4. James R. Wolf, *Inherent Rulemaking Authority of an Independent Judiciary*, 56 U. MIAMI L. REV. 507, 509 (2002).

5. *See* State v. Short, 322 N.C. 783, 790, 370 S.E.2d 351, 355 (1988) ("Under . . . Rule 103(a)(1) an assignment of error ordinarily will not be considered on appellate review unless the error has been brought to the attention of the trial court by appropriate and timely objection."); Forsyth County Hosp. Auth., Inc. v. Sales, 82 N.C. App. 265, 269, 346

amendment to rule 103(a) provided that a party need not object to the admission of evidence in order to preserve the issue for appeal.[6]

The North Carolina Court of Appeals' decision in *State v. Tutt*[7] held that the general assembly's amendment to rule 103(a) encroached upon the supreme court's constitutional authority to promulgate rules of practice and procedure because it directly conflicted with North Carolina Rule of Appellate Procedure 10(b)(1).[8] The amendment to rule 103(a) provided: "Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal."[9]

S.E.2d 212, 215 (1989) (interpreting rule 103(a) to mean that "error may not be predicated upon the admission of evidence unless a timely objection or motion to strike appears of record").

6. The pertinent text of the amended rule reads:

> (a) Effect of Erroneous Ruling.—Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> (1) Objection.—In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record. No particular form is required in order to preserve the right to assert the alleged error upon appeal if the motion or objection clearly presented the alleged error to the trial court;
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> (2) Offer of Proof.—In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked. Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

N.C. GEN. STAT. § 8C-1, Rule 103(a) (2005).

7. 171 N.C. App. 518, 615 S.E.2d 688 (2005).

8. *Id.* at 519, 615 S.E.2d at 689. The text of rule 10(b)(1) reads:

> (b) Preserving questions for appellate review.
>
> (1) General. In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion. Any such question which was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action, may be made the basis of an assignment of error in the record on appeal.

N.C. R. APP. P. 10(b)(1).

9. *See* Act Conforming Rule 103 of the North Carolina Rules of Evidence to the Corresponding Federal Rule, ch. 101, § 1, 2003 N.C. Sess. Laws 127 (codified at N.C. GEN. STAT. § 8C-1, Rule 103(a) (2005)).

The amendment thus allows parties to preserve an issue of admissibility of evidence for appeal, even if they fail to make an objection to the evidence in the trial court.

In *Tutt*, the defendant failed to object at trial to the admission of photographic lineup evidence but argued on appeal that the trial court erred in denying his motion to suppress that evidence.[10] The court of appeals held that a pretrial motion to suppress was a type of motion in limine.[11] The court then reasoned that because "[the North Carolina] Supreme Court has consistently held that '[a] motion in limine is insufficient to preserve for appeal the question of the admissibility of evidence' " if the defendant does not object to that evidence at trial, the motion to suppress could not be considered on appeal.[12] The court further held that the amendment to rule 103(a) directly conflicted with the rules of appellate procedure,[13] and the supreme court, not the general assembly, has the " 'exclusive authority to make rules of procedure and practice for the Appellate Division' " under the North Carolina Constitution.[14] The court struck down the amendment as an unconstitutional exercise of state legislative power due to its direct conflict with a rule of procedure enacted by the supreme court in the course of its constitutionally delegated powers.[15]

The amendment to rule 103(a) was not a radical evidentiary change; the general assembly specifically stated that it intended to align the North Carolina Rules of Evidence with the Federal Rules of Evidence.[16] The evidence issue in *Tutt* is essentially a red herring. The larger, more compelling issue in the case is the power struggle between the general assembly and the judiciary. *Tutt* raises interesting and controversial questions about which branch of state

10. *Tutt*, 171 N.C. App. at 519–20, 615 S.E.2d at 690.

11. *Id.*

12. *Id.* (quoting State v. Hayes, 350 N.C. 79, 80, 511 S.E.2d 302, 303 (1999) (per curiam) (citations omitted)).

13. *Id.* at 521, 615 S.E.2d at 690–91.

14. *Id.* at 521, 615 S.E.2d at 691 (citing N.C. CONST. art. IV, § 13(2)).

15. *Id.* at 519, 615 S.E.2d at 689. In contrast, the dissent in *Tutt* clearly supported deference to the general assembly, arguing that rule 103(a)(2) is a rule of evidence and not a rule of procedure, and such action was thus outside the realm of the supreme court's rulemaking authority. *Id.* at 527, 615 S.E.2d at 694 (Tyson, J., dissenting). The dissent further argued that the Federal Rules of Evidence should serve as a model for the North Carolina Rules of Evidence, and because the amendment was in line with the federal rules, it should stand. *Id.* at 530–31, 615 S.E.2d at 696–97 (Tyson, J., dissenting).

16. *See* Act Conforming Rule 103 of the North Carolina Rules of Evidence to the Corresponding Federal Rule, ch. 101, § 1, 2003 N.C. Sess. Laws 127 (codified at N.C. GEN. STAT. § 8C-1, Rule 103(a) (2005)).

government should be able to draft court rules and how those rules affect the judiciary.

This Recent Development explores the problem of state legislatures infringing on judicial rulemaking authority. Specifically, it discusses the origins of judicial rulemaking authority, the rationales for courts having the power to create their own rules, and the difficulty of determining whether rules are evidentiary or procedural in nature. It also analyzes the main argument the dissent puts forth in *Tutt* and determines that the rule at issue in *Tutt* is more a rule of practice and procedure than a rule of evidence. This Recent Development concludes that the majority opinion was correct in holding that the North Carolina General Assembly cannot impinge on the Supreme Court of North Carolina's authority to make rules of appellate procedure for the state courts. Finally, it argues that the Supreme Court of North Carolina must endorse and reinforce the position of the majority in *Tutt*, make a strong ruling to prevent an erosion of its authority, and preserve the separation of powers between the judiciary and the general assembly.

The issue of whether court rules should be made by lawmakers or courts is a source of conflict in many states.[17] Commentators offer

17. *See* Kala Rogers Holt, *The Balance of Power:* Weidrick v. Arnold *and the Conflict over Legislative and Judicial Rulemaking Authority in Arkansas*, 46 ARK. L. REV. 627, 642–48 (1993) (providing an overview of the power struggles over court rulemaking authority in Texas, Connecticut, Mississippi, and Florida, and suggesting that Arkansas consider amending the state constitution to help solve similar problems); Robert G. Lawson, *Modifying the Kentucky Rules of Evidence—A Separation of Powers Issue*, 88 KY. L.J. 525, 540–41 (2000) (describing the struggle faced by the federal courts and stating that "[d]ebate has been raging for nearly a century over whether court rules should be made by courts or legislatures, without a clear-cut resolution"). For cases dealing with this controversy, see Weidrick v. Arnold, 835 S.W.2d 843, 845–46 (Ark. 1992) (holding that the Arkansas Rules of Civil Procedure superseded a law with which they conflicted); State v. Clemente, 353 A.2d 723, 728–30 (Conn. 1974) (holding that the judiciary has exclusive rulemaking power on which the state legislature cannot intrude); Bluesten v. Fla. Real Estate Comm'n, 125 So. 2d 567, 568 (Fla. 1960) (holding that the Florida Supreme Court has exclusive power to make rules of practice and procedure for the state courts); R.A. Ponte Architects, Ltd. v. Investors' Alert, Inc., 857 A.2d 1, 15 (Md. 2004) (holding that the Maryland Supreme Court has broad constitutional power to adopt rules of practice and procedure, but the Maryland General Assembly has concurrent jurisdiction over matters of procedure); McDougall v. Schanz, 597 N.W.2d 148, 153–55 (Mich. 1999) (holding that a law enacted by the state legislature dealing with evidence in medical malpractice cases was not an infringement on the court's constitutional power to make rules of procedure); Newell v. State, 308 So. 2d 71, 76–78 (Miss. 1975) (holding that procedural rules are to be left to the judiciary because it is more well-versed in the law than the state legislature); Stokes v. Denmark Emergency Med. Servs., 433 S.E.2d 850, 851–53 (S.C. 1993) (holding that the South Carolina Supreme Court's rulemaking authority is subordinate to any laws passed by the general assembly); White v. Berryman, 418 S.E.2d 917, 923–24 (W. Va.

different rationales in support of state supreme courts having authority over court rules instead of the legislatures. In articulating these different rationales, commentators have noted that: (1) the courts have familiarity and experience with court procedure and can thus make better rules;[18] (2) the judiciary will be directly accountable for the effects of its own methods of administration of justice;[19] (3) judges tend to be more willing to modify and revise rules of procedure as needed;[20] and (4) judges have the ability to make the rules clearer and more specific due to their experience with courtroom procedure, thereby reducing litigation over the interpretation of legislative language.[21] Some reasons given for allowing state legislatures to control court rulemaking include the following: judges could be out of touch with the needs of citizens and attorneys;[22] judges could be biased and favor rules that meet only their own needs;[23] the state legislature better represents the public's view of how courts should operate;[24] and courts will infringe upon or create substantive rights if allowed exclusive rulemaking authority.[25]

The fact that judges deal with rules of court procedure daily and have a wealth of experience with the effectiveness of such rules is a convincing argument in favor of judicial rulemaking power. Judges are certainly not out of touch with what makes their courts function most efficiently, and since judges in North Carolina are elected, they

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1992) (holding that the state constitution recognizes the inherent power of the West Virginia Supreme Court to make rules of court procedure).

18. Wolf, *supra* note 4, at 514 (stating that the strongest argument for judges having control over rules of procedure is that they work with those rules every day and, thus, are more knowledgeable about them); *see also* Bruce L. Dean, *Rule-Making in Texas: Clarifying the Judiciary's Power to Promulgate Rules of Civil Procedure*, 20 ST. MARY'S L.J. 139, 149–50 (1988).

19. Dean, *supra* note 18, at 149–50. This is especially true in states like North Carolina where judges are elected by the citizenry. N.C. CONST. art. IV, § 16. It does seem doubtful, though, that average citizens would be aware of court rules and would base their vote on them.

20. Dean, *supra* note 18, at 149–50. This approach would ensure flexibility, but it could also lead to the rules remaining in a state of flux, putting an extra burden on lawyers to constantly make sure they are in compliance with the newest changes.

21. *Id.* The experience level of judges could allow them to create clearer rules than members of state legislatures. However, judicial opinions are not always easy to interpret or apply in practice, and such issues continually contribute to litigation.

22. *Id.*

23. *Id.* One could see how this might be true in cases like *Tutt* where the court-approved rules reduce the number of appeals but might deprive citizens of justice because their lawyers did not object to the admission of evidence at trial.

24. *Id.* This is not a persuasive argument in a state like North Carolina where judges are democratically elected. N.C. CONST. art. IV, § 16.

25. Dean, *supra* note 18, at 149–50. This could be true in the case of a rule that makes the appeals process more difficult, as manifested in *Tutt*.

would have to tailor such rules to best serve the needs of citizens and attorneys or risk not getting reelected. Even though the average citizen has probably never seen the rules of appellate procedure, it is doubtful that the Supreme Court of North Carolina will enact rules that will infringe upon the rights or opportunities of the citizenry due to the looming reality of reelection. If judges do overstep boundaries by enacting a rule that imposes a burden upon the citizenry or exists mostly to serve the court's own biases, the public can vote the judge out when his or her term ends.

Many state constitutions give the state's highest court the power to make rules of procedure for appellate courts,[26] but many also specify that these rules must not conflict with any state legislative provision.[27] The degree of judicial power granted by state constitutions in the Fourth Circuit varies. For example, the Virginia Constitution states:

> The Supreme Court shall have the authority to make rules governing the course of appeals and the practice and procedures to be used in the courts of the Commonwealth, but such rules shall not be in conflict with the general law as the same shall, from time to time, be established by the General Assembly.[28]

Similarly, the South Carolina Constitution states that "[t]he Supreme Court shall make rules governing the administration of all the courts of the State. Subject to the statutory law, the Supreme Court shall make rules governing the practice and procedure in all such courts."[29] The Maryland Constitution gives the court of appeals, the state's highest court, the power to adopt rules and regulations for all the state courts, but the rules "shall be subject to the rules and regulations adopted . . . otherwise by law," indicating that the court's rulemaking authority is subordinate to laws enacted by the state legislature.[30]

In contrast, the West Virginia Constitution gives the state supreme court "power to promulgate rules for all cases and proceedings, civil and criminal, for all of the courts of the State relating to writs, warrants, process, practice and procedure, which shall have the force and effect of law," with no mention of

26. *Id.*
27. MD. CONST. art. IV, § 9; S.C. CONST. art. V, § 4; VA. CONST. art. VI, § 5.
28. VA. CONST. art. VI, § 5.
29. S.C. CONST. art. V, § 4.
30. *See* MD. CONST. art. IV, § 9.

subordination to state statute.[31] Similarly, the North Carolina Constitution does not contain a clause that the judiciary's rulemaking authority must show deference to the legislature; in fact, it specifically declares the supreme court's rulemaking authority to be "exclusive."[32] The North Carolina Court of Appeals has emphasized that this constitutionally granted authority may not be encroached upon by the legislature, even when the rules in question are rules of evidence and not rules of practice and procedure, holding that "[t]he Legislature has virtually untrammeled authority to codify and change the rules of evidence so long as due process is accorded and *no other constitutional provisions are infringed.*"[33]

Based on the explicit constitutional grant of power and its reaffirmation by the court of appeals, it seems that there is little doubt that the Supreme Court of North Carolina has authority over rules of court practice and procedure. However, the judiciary appears to have little to no influence over the rules of evidence, where rule 103 lies.[34] The court of appeals has stated that "[i]t is well settled in this State that it is within the power of the General Assembly to change the rules of evidence,"[35] and the rulings of the Supreme Court of North Carolina support this point.[36] Unlike the procedure for modification of the Federal Rules of Evidence,[37] North Carolina does not provide for an advisory panel that counsels the general assembly on modifications to the rules of evidence.[38] However, the North Carolina General Statutes Commission, a twelve-member panel comprised of attorneys, professors from state law schools, and representatives from the North Carolina Senate and House of Representatives,[39] does have some influence on the general

31. *See* W. VA. CONST. art. VIII, § 3.

32. *See* N.C. CONST. art. IV, § 13(2) (stating that "[t]he Supreme Court shall have exclusive authority to make rules of procedure and practice for the Appellate Division").

33. State v. Taylor, 63 N.C. App. 364, 366, 304 S.E.2d 767, 769 (1983) (emphasis added) (citing 1 BRANDIS ON NORTH CAROLINA EVIDENCE § 6 (2d rev. ed. 1982)).

34. N.C. GEN. STAT. § 8C-1, Rule 103(a)(2) (2005).

35. State v. Lassiter, 13 N.C. App. 292, 297, 185 S.E.2d 478, 482 (1971).

36. Bockweg v. Anderson, 328 N.C. 436, 452, 402 S.E.2d 627, 637 (1991) (stating that "the General Assembly is the sole source of the North Carolina Rules of Civil Procedure, unless this authority is expressly delegated to the Supreme Court").

37. The Federal Rules of Evidence are amended through the following process: (1) the Supreme Court formulates amendments; (2) Congress reviews these amendments; and (3) Congress can reject or alter the proposed amendments, or it can set a fixed date for when they become effective. *See* Lawson, *supra* note 17, at 529 (citing 28 U.S.C. § 2072 (1990); 28 U.S.C. § 2074 (1988)).

38. Telephone Interview with Matt Osborne, Assistant Legal Counsel, N.C. Admin. Office of the Courts, in Raleigh, N.C. (Oct. 7, 2005).

39. N.C. GEN. STAT. § 164-14 (2005). Members are appointed as follows:

assembly.[40] The commission prepares and recommends statutory changes to the general assembly and advises the Department of Justice's Division of Legislative Drafting and Codification in statutory research and correction.[41] Currently, no judges serve on the commission,[42] although nothing bars judges or former judges from serving if they are appointed according to the statutory requirements.[43] Thus, it seems that even though the North Carolina

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1) One member, by the president of the North Carolina State Bar;
2) One member, by the General Statutes Commission;
3) One member, by the dean of the school of law of the University of North Carolina;
4) One member, by the dean of the school of law of Duke University;
5) One member, by the dean of the school of law of Wake Forest University;
6) One member, by the Speaker of the House of Representatives of each General Assembly from the membership of the House;
7) One member, by the President Pro Tempore of the Senate of each General Assembly from the membership of the Senate;
8) Two members, by the Governor;
9) One member, by the dean of the school of law of North Carolina Central University;
10) One member, by the president of the North Carolina Bar Association;
11) One member, by the dean of the school of law of Campbell University.

Id.

40. § 164-13. The commission's duties are:

(1) To advise and cooperate with the Division of Legislative Drafting and Codification of Statutes of the Department of Justice in the work of continuous statute research and correction for which the Division is made responsible by G.S. 114-9(3).
(2) To advise and cooperate with the Division of Legislative Drafting and Codification of Statutes in the preparation and issuance by the Division of supplements to the General Statutes pursuant to G.S. 114-9(2).
(3) To make a continuing study of all matters involved in the preparation and publication of modern codes of law.
(4) To recommend to the General Assembly the enactment of such substantive changes in the law as the Commission may deem advisable.
(5) To receive and consider proposed changes in the law recommended by the American Law Institute, by the National Conference of Commissioners on Uniform State Laws or by other learned bodies.

Id.

41. *Id.*

42. Telephone Interview with Matt Osborne, *supra* note 38; E-mail from Kenneth S. Broun, Henry Brandis Professor of Law, University of North Carolina School of Law, to author (Oct. 7, 2005, 09:02:41 EST) (stating that North Carolina has no committee of judges charged with reviewing evidence rules) (on file with the North Carolina Law Review).

43. *See* § 164-14.

judiciary has sole authority over rules of practice and procedure, it has virtually no influence over the rules of evidence.

Even though the general assembly has the power to modify the rules of evidence without input from the supreme court, it cannot encroach on the constitutionally granted rulemaking power of the court. The general assembly also lacks the authority to amend the rules of evidence if a change conflicts with a rule of practice or procedure that the supreme court has made under its constitutionally granted authority.[44] However, determining whether a rule is one of evidence or one of practice and procedure, and thus deciding which branch has authority over which rules, is not always easy.[45]

The main point of disagreement between the majority and the dissent in *Tutt* was whether rule 103 is a rule of evidence or one of procedure. The dissent in *Tutt* claimed that rule 103 is a rule of evidence because it mirrors the Federal Rules of Evidence; therefore, the general assembly has the power to enact it.[46] As of 2002, thirty-nine states had adopted evidence rules based on the Federal Rules of Evidence.[47] The federal rules can be a model for state evidence codes, but there are important differences between the state scheme and the federal scheme. The North Carolina Rules of Evidence are "inspired by and largely modeled after (but not identical to) the Federal Rules of Evidence."[48] In general, the North Carolina Rules of Evidence and the federal rules closely parallel each other. However, the federal model of separation of rulemaking powers is quite different from most state schemes.[49] State constitutions differ greatly from the United States Constitution in the powers they confer on the legislature and the courts.[50] The United States Constitution, unlike the North Carolina Constitution, expressly gives Congress the

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44. N.C. CONST. art. IV, § 13(2).

45. The process of making this distinction could perhaps be facilitated by the appointment of state judges or former judges to the North Carolina General Statutes Commission, who could give valuable insight into the rules of appellate procedure and help prevent conflicts like the one in *Tutt*.

46. State v. Tutt, 171 N.C. App. 518, 530–31, 615 S.E.2d 688, 696 (2005) (Tyson, J., dissenting).

47. Kenneth S. Broun, *Giving Codification a Second Chance—Testimonial Privileges and the Federal Rules of Evidence*, 53 HASTINGS L.J. 769, 789–90 (2002).

48. 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 2 (6th ed. 2004).

49. *See supra* notes 37–43 and accompanying text.

50. Michael P. Dickey, *The Florida Evidence Code and the Separation of Powers Doctrine: How to Distinguish Substance and Procedure Now That It Matters*, 34 STETSON L. REV. 109, 131 (2004). This difference is often said to occur because of the principles of federalism. *Id.*

"authority to regulate practice and procedure in federal courts."[51] Congress gave the United States Supreme Court the power "to make rules of procedure and of evidence" when it passed the Rules Enabling Act.[52] Rules of procedure and rules of evidence are created by advisory committees to the Supreme Court and can be modified by Congress.[53]

Another difference between the federal model and some state models, as the majority in *Tutt* pointed out, is that "the United States Constitution has no provision similar to that of section thirteen of the North Carolina Constitution," which grants exclusive rulemaking authority to the supreme court.[54] The majority thus concluded that rule 103 was one of appellate procedure because: "(1) the North Carolina Constitution vests with our Supreme Court the authority to make appellate rules of practice and procedure and (2) under N.C. R. App. P. 10(b)(1), our Supreme Court has long held that this rule is one of practice and procedure."[55] The distinct differences between the federal and state models, coupled with the long history of case law relying on rule 10(b)(1) as a rule of court procedure,[56] render unpersuasive the dissent's assertion that the rule is one of evidence because it is based on the federal rules.

Other courts have distinguished rules of evidence from rules of procedure in different ways. Some courts have decided that "a rule of evidence is procedural only to the extent it affects matters of court administration," while others "treat a rule of evidence as substantive only if it affects the outcome of the litigation in the eyes of the reviewing court."[57] The debate over what makes something a rule of evidence or a rule of practice and procedure is a longstanding one with no resolution.[58] However, the consensus among those who have

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51. *Id.*

52. *Id.* (citing 28 U.S.C. § 2072 (2000)).

53. *Id.* (citing Dickerson v. United States, 530 U.S. 428, 437 (2000)).

54. State v. Tutt, 171 N.C. App. 518, 524, 615 S.E.2d 688, 692 (2005). Section thirteen of the North Carolina Constitution states that "[t]he Supreme Court shall have exclusive authority to make rules of procedure and practice for the Appellate Division." N.C. CONST. art. IV, § 13(2).

55. *Tutt*, 171 N.C. App. at 523, 615 S.E.2d at 692. The Supreme Court of North Carolina recently affirmed rule 10 of the North Carolina Rules of Appellate Procedure, holding that because a defendant did not raise objections to certain evidentiary statements at trial, those statements would not be considered on appeal. *See* State v. Barden, 356 N.C. 316, 346, 572 S.E.2d 108, 128 (2002).

56. *See Tutt*, 171 N.C. App. at 523, 615 S.E.2d at 692 (listing cases where rule 10(b)(1) was followed by the appellate courts in North Carolina).

57. Dickey, *supra* note 50, at 122–23.

58. Lawson, *supra* note 17, at 541.

studied the issue is that the large majority of evidence law is procedural.[59] Professor Earl C. Dudley describes rules of evidence as rules " 'designed to affect conduct outside the courtroom' " and rules of procedure as rules enacted " 'to enhance the accuracy of the fact finding process.' "[60] Certainly some rules can serve both purposes, and in that situation, Professor Dudley suggests that a dominant purpose be identified.[61] In the case of a conflict between rule 103 and rule 10(b)(1), objecting to a pretrial motion in order to preserve that issue for appeal speaks directly to the appeals process and deals with a matter of court administration as well as behavior inside the courtroom. Rule 10(b)(1) and the unamended version of rule 103 enhance the administration of justice by eliminating issues that the supreme court designated as not properly preserved for appeal, thus allowing the court to perform its job more efficiently.[62] Despite the amended rule 103's similarity to the Federal Rules of Evidence, the dominant purpose of rule 103 seems to be procedural and not evidentiary in nature.

The Supreme Court of North Carolina has demonstrated that it views the underlying issue in rule 103 to be procedural in nature, as it has shown a willingness to strike down statutes that impinge on that rule as unconstitutional. In *State v. Bennett*,[63] the court held section 15A-1446(d)(13) and part of section 15A-1231(d) of the North Carolina General Statutes unconstitutional to the extent that they conflicted with North Carolina Rule of Appellate Procedure 10(b)(2).[64] The court stated, "Rule 10(b)(2) is a rule of appellate practice and procedure, promulgated by the Supreme Court pursuant to its exclusive authority under the Constitution of North Carolina, Article IV, Section 13(2). To the extent that G.S. 15A-1446(d)(13) is inconsistent with Rule 10(b)(2), the statute must fail."[65]

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59. *Id.* at 569.

60. *Id.* at 570–71 (quoting Earl C. Dudley, Jr., *Federalism and Federal Rule of Evidence 501: Privilege and Vertical Choice of Law*, 82 GEO. L.J. 1781, 1797 (1994)).

61. *Id.* at 571.

62. The court can still consider certain issues on appeal even if rule 10(b)(1) is violated because rule 2 of the North Carolina Rules of Appellate Procedure states that "[t]o prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules . . . ." N.C. R. APP. P. 2.

63. 308 N.C. 530, 302 S.E.2d 786 (1983).

64. *Id.* at 535, 302 S.E.2d at 790.

65. *Id.* (citations omitted).

In *State v. Stocks*,[66] the supreme court again held a statute unconstitutional because it conflicted with North Carolina Rule of Appellate Procedure 10(b)(3).[67] The court stated:

> N.C.G.S. 15A-1446(d)(5) provides that errors based upon insufficiency of the evidence may be the subject of appellate review even though no objection, exception or motion has been made in the trial division. N.C.R. App. P. 10(b)(3), however, provides that a defendant "may not assign as error the insufficiency of the evidence to prove the crime charged unless he moves to dismiss the action, or for judgment as in case of nonsuit, at trial." To the extent that N.C.G.S. 15A-1446(d)(5) is inconsistent with N.C.R. App. P. 10(b)(3), the statute must fail.[68]

The majority in *Tutt* noted that these cases involved situations where the general assembly attempted to "make a rule of practice or procedure for the Appellate Division."[69] Based on *Bennett* and *Stocks*, the supreme court's interpretation of what constitutes a rule of procedure seems simple: if a rule directly conflicts with one of the court's rules of procedure, it is itself equivalent to a rule of procedure and impinges on the court's authority. The majority in *Tutt* analyzed the amendment to rule 103 under this philosophy, stating that the amendment "would allow appellate review of an evidentiary ruling even though the party failed to follow the Supreme Court's procedural requirements under N.C. R. App. P. 10(b)(1) mandating that the party further object at trial."[70]

In addition to the distinction between rules of evidence and procedure, courts can look to their "essential functions" as a basis for asserting their rulemaking authority.[71] Judge James R. Wolf, of the Florida First District Court of Appeals, described the judiciary's rulemaking authority as a way for it to ensure that it can perform its essential functions:

> The emphasis on the court's ability to function . . . is an apparent recognition of an independent source of powers for the court's rulemaking authority. This independent source of authority may arise from the concept of separation of powers or

66. 319 N.C. 437, 355 S.E.2d 492 (1987).
67. *Id.* at 439, 355 S.E.2d at 493.
68. *Id.* (citing *Bennett*, 308 N.C. at 535, 302 S.E.2d at 790; State v. Elam, 302 N.C. 157, 160–61, 273 S.E.2d 661, 664 (1981)).
69. State v. Tutt, 171 N.C. App. 518, 523, 615 S.E.2d 688, 692 (2005).
70. *Id.*
71. Wolf, *supra* note 4, at 509.

> from the necessity of a court having those powers to enable it to perform essential functions. If so, it is a vital recognition that an independent court system has inherent powers within the area of rulemaking which cannot be usurped.[72]

Courts have also considered whether the statute affects the judiciary's efficiency and effectiveness when deciding whether a statute should be invalidated as an infringement on court rulemaking authority.[73] Other courts have relied on the "judiciary's inherent authority to promulgate rules of practice, procedure, and evidence" in its own courtrooms.[74] This theory suggests that all courts have an authority " 'beyond legislative power' " that stems " 'from the very fact that it is a court' " to control rules that are " 'essential to the existence, dignity and functions of the court.' "[75] The North Carolina General Assembly's own words support this theory. The North Carolina General Statutes state that "[t]he Supreme Court shall prescribe rules of practice and procedure designed to procure the expeditious and inexpensive disposition of all litigation in the appellate division."[76]

The efficiency-effectiveness analysis is particularly applicable to the potential repercussions of the amendment to rule 103. The amendment would allow defendants to preserve issues for appeal without objecting at trial, exerting a detrimental impact on a court's ability to perform its essential functions. The holding of *Tutt* rectifies this and allows the courts to control which issues they examine on appeal.

Based on this analysis, the amendment could be viewed cynically as a power grab by the general assembly that will increase the courts' caseload and thus impair their ability to perform their essential functions, while providing no corresponding increases in the judiciary's budget. In the Administrative Office of the Courts Fiscal Year 2001–02 Annual Report, Chief Justice I. Beverly Lake, Jr., discussed the state courts' struggle to function after severe budget cuts and stated that "the continual lack of necessary resources and funding could eventually have serious effects on the quality of justice

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72. *Id.* at 509 (emphasis added).

73. Justin L. Matheny, Comment, *Inherent Judicial Rule Making Authority and the Right to Appeal: Time for Clarification*, 22 MISS. C. L. REV. 57, 60 (2002).

74. *Id.* at 57.

75. Wolf, *supra* note 4, at 514 (quoting Leo Levin & Anthony G. Amsterdam, *Legislative Control over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 31–32 (1958)).

76. N.C. GEN. STAT. § 7A-33 (2005).

that our court system can provide for North Carolinians."[77] The 2002–03 annual report noted that the 2002–03 fiscal year was a period of "severe budget cuts" and that the caseload of the court system "ha[d] increased in both quantity and complexity."[78] Chief Justice Lake also commented on the state of judiciary funding in his 2001 "State of the Judiciary Speech" delivered to the North Carolina General Assembly:

> For many years now, our entire third branch of government . . . has been required to operate with less than 3 percent of all funds available to the State of North Carolina. With that level of funding, we have not been able to meet adequately our constitutional responsibilities and expand our services as demanded by our growing population.[79]

The 2003–04 Judicial Report listed funding as one of the judiciary's "challenges for the future," noting that "[t]he Judicial Branch received only 2.6% of the entire state budget in Fiscal Year 2003–04."[80] The general assembly must have enacted the amendment to rule 103 with the knowledge that not requiring an objection to preserve an issue for appeal could put further strain on the already overburdened court system. Recently, the supreme court again expressed its desire to operate with streamlined efficiency by holding that appeals not following the prescribed rules should be dismissed.[81] The amendment to rule 103 works against this spirit of streamlined efficiency, as well as against the court's efforts to make the best use of limited funding.

Judge Wynn, writing for the majority in *Tutt*, asked the Supreme Court of North Carolina to grant discretionary review to the case "because of the importance of deciding the Rule 103 issue."[82] If the Supreme Court of North Carolina does not take up the separation of

77. OFFICE OF RESEARCH & PLANNING, N.C. ADMIN. OFFICE OF THE COURTS, FISCAL YEAR 2001–02 ANNUAL REPORT: THE NORTH CAROLINA JUDICIAL BRANCH (2002), http://www.nccourts.org/Citizens/Publications/Documents/annrep02.pdf.

78. OFFICE OF RESEARCH & PLANNING, N.C. ADMIN. OFFICE OF THE COURTS, FISCAL YEAR 2002–03 ANNUAL REPORT: THE NORTH CAROLINA JUDICIAL BRANCH (2003), http://www.nccourts.org/Citizens/Publications/Documents/annrep03.pdf.

79. Speech by Chief Justice Lake, *supra* note 1.

80. OFFICE OF RESEARCH & PLANNING, N.C. ADMIN. OFFICE OF THE COURTS, FISCAL YEAR 2003–04 ANNUAL REPORT: THE NORTH CAROLINA JUDICIAL BRANCH (2004), http://www.nccourts.org/Citizens/Publications/Documents/annrep04.pdf.

81. *See* Viar v. N.C. Dep't of Transp., 359 N.C. 400, 401, 610 S.E.2d 360, 360 (2005) (per curiam) (holding that "[t]he North Carolina Rules of Appellate Procedure are mandatory and 'failure to follow these rules will subject an appeal to dismissal' " (quoting Steingress v. Steingress, 350 N.C. 64, 65, 511 S.E.2d 298, 299 (1999))).

82. State v. Tutt, 171 N.C. App. 518, 523 n.2, 615 S.E.2d 688, 692 n.2 (2005).

powers problem from *Tutt*, it risks contributing to its burgeoning caseload by sanctioning the allowance of issues during the appeals process that were not preserved at the trial level. The broader, more important issue in *Tutt* that the court must address is its tolerance for infringements on its rulemaking authority through changes to the rules of evidence. Because there was a dissenting opinion, the parties in *Tutt* have an automatic right to appeal to the Supreme Court of North Carolina,[83] but no appeal was filed and the court did not grant discretionary review.[84] However, the supreme court must review the rulemaking issue raised in *Tutt*, perhaps by ruling on cases that follow the holding of *Tutt*, in order to solidify its authority and ensure its ability to function efficiently and effectively.

The supreme court asserted its authority to make rules of appellate procedure by overturning criminal statutes that conflict with its rules,[85] so it is almost certain that the court will continue to uphold its power. However, the supreme court has no precedent that specifically deals with how the courts should respond when the general assembly encroaches on its rulemaking authority by modifying the rules of evidence. Generally, North Carolina case law provides no protocol for lower courts to follow in situations where statutes infringe on court rules. Because of the complete absence of precedent in this area, the supreme court must not only uphold the court of appeals' finding that the amendment to rule 103 is unconstitutional, but also must define the nature of its rulemaking authority and set out a scheme for determining the scope of this authority. The supreme court should emphasize that it is necessary for a court to have the authority it needs to make rules that allow it to perform its essential functions,[86] and it should reiterate the general assembly's own words that "[t]he Supreme Court *shall* prescribe rules of practice and procedure *designed to procure the expeditious and inexpensive disposition of all litigation in the appellate division.*"[87]

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83. *See* N.C. R. APP. P. 14(b)(1).

84. Telephone Interview with Christie Cameron, Clerk of Court, Supreme Court of N.C., in Raleigh, N.C. (May 29, 2006).

85. *See, e.g.*, State v. Stocks, 319 N.C. 437, 439, 355 S.E.2d 492, 493 (1987) (holding that a state rule of appellate procedure regarding preservation of errors based upon the sufficiency of the evidence overruled an inconsistent state statute); State v. Bennett, 308 N.C. 530, 535, 302 S.E.2d 786, 790 (1983) (holding that a state rule of appellate procedure requiring a timely objection to jury charges overruled an inconsistent state statute); State v. Elam, 302 N.C. 157, 160, 273 S.E.2d 661, 664 (1981) (holding criminal statutes unconstitutional because they conflicted with the supreme court's authority to make rules of practice and procedure).

86. *See* Wolf, *supra* note 4, at 509.

87. N.C. GEN. STAT. § 7A-33 (2005) (emphasis added).

The court should also define its inherent rulemaking power, derived "from the very fact that it is a court,"[88] as the Arkansas Supreme Court has done.[89] The court is facing an unprecedented workload and increasing technological demands.[90] It is especially crucial in this era of stagnant court funding that the court refuse to tolerate statutory hindrances to its effectiveness and efficiency. Professor Erwin Chemerinsky has underscored the importance of rulings like *Tutt*:

> [T]he jurisprudence on separation of powers ... is scarce. There are scattered opinions, but little in the way of sustained development of analysis. There really needs to be, in [court] opinions ... development of the idea when legislative actions interfere with the essential functions of the courts .... The more [court] opinions can develop this ... the better the courts can be protected from the statutory threat.[91]

If the Supreme Court of North Carolina does not take up the issues implicated in *Tutt*, it risks relinquishing its constitutional authority to the general assembly while impairing the quality of services it provides to North Carolina citizens.

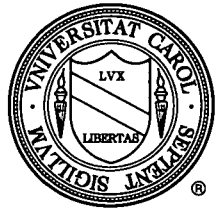
AMANDA G. RAY

88. Wolf, *supra* note 4, at 514.

89. *See* Angela Biggers, Case Note, *Special Proceedings in Arkansas after* Weiss v. Johnson, 52 ARK. L. REV. 233 (1999) (noting that the Arkansas Supreme Court has held that it has an inherent rulemaking authority not derived from the state legislature or the state constitution).

90. *See* OFFICE OF RESEARCH & PLANNING, *supra* note 77, at 20.

91. Wolf, *supra* note 4, at 507 (quoting Erwin Chemerinsky, *Closing Remarks at 1998 Forum for State Court Judges*, *in* ASSAULTS ON THE JUDICIARY: ATTACKING "THE GREAT BULWARK OF PUBLIC LIBERTY" 139 (Roscoe Pound Found. ed., 1999)).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