ZARELLA, J., with whom SULLIVAN, J., joins, concurring. I concur in the result that the majority reaches in part I of its opinion that the defendant is entitled to a new trial on the charge of kidnapping in the first degree on the basis of an improper jury instruction. See *State* v. *Sanseverino*, 287 Conn. 608, 649–50, 949 A.2d 1156 (2008) (*Zarella*, *J.*, dissenting). I also agree with the majority's conclusions in part II with respect to this court's authority to change or modify the law of evidence and the admissibility of uncharged misconduct evidence in sexual assault cases. I write separately for two reasons.

First, I maintain my position that the direction that this court has taken recently with respect to our law of kidnapping is not supported by the clear statutory language defining that crime and other restraint-based offenses. See *State* v. *Salamon*, 287 Conn. 509, 576, 949 A.2d 1092 (2008) (*Zarella*, *J.*, concurring in part and dissenting in part). Therefore, I would remand the case for a new trial so that the jury may be instructed properly on the crime of kidnapping in accordance with the conclusions articulated in my concurring and dissenting opinion in *Salamon*. I remain optimistic that the legislature will take action to resolve the numerous questions created by this court's recent kidnapping jurisprudence.

Second, with respect to the analysis in part II of the majority opinion, which resolves the question that we certified as to whether this court or any court has authority to change or modify a rule of evidence in the Connecticut Code of Evidence (code), I see no reason to interpret the language of the code to resolve this particular issue. Rather, I conclude that the authority of this court to review evidentiary rulings by the Superior Court existed at common law and was incorporated into the 1818 constitution. Furthermore, I suggest that the majority's resolution of this question places too much emphasis on determining the intent of the Superior Court judges, thereby indicating that possession of such an intent could be dispositive of our inquiry. This emphasis, coupled with the majority's repeated reference to this court's "inherent" and "constitutional" authority, creates unnecessary ambiguity as to the actual scope of the Superior Court's authority over the law of evidence.

The majority devotes significant attention to determining whether the language expressing the purpose of the code is clear and unambiguous and to the question of "whether the judges of the Superior Court *intended* to abrogate the authority of the appellate courts to develop and change the law of evidence via case-by-case common-law adjudication . . . ." (Emphasis added.) After recounting the history of the adop-

tion of the code and its purpose, the majority observes that that "history does not support the conclusion . . . that the code was intended to divest *this court* of its inherent authority to change and develop the law of evidence through case-by-case common-law adjudication." (Emphasis in original.) I suggest that this analysis unnecessarily clouds a simple fact. Regardless of the intent of the Superior Court judges, I conclude, like Justice Palmer, that the judges of the Superior Court do not possess authority under our constitution to divest this court of its inherent authority to change and develop the law of evidence. See p. 485 of Justice Palmer's concurring opinion ("the ultimate authority to determine the law of evidence has resided in this court since its inception, and no persuasive reason has been proffered to support the contention that the judges of the Superior Court have the power to assert that authority for themselves").

It is unnecessary for me to repeat the historical underpinnings of my conclusion because they are well documented in the majority opinion. The majority accurately observes that, "[u]nder the common law of this state prior to 1818, as under the common law of England, the ultimate authority over the rules and standards governing the admissibility of evidence rested with the highest court of the state." After accurately noting that "this court had final and binding authority over the law of evidence prior to 1818, and [noting that this] common-law authority of the Supreme Court and the Superior Court was codified in article fifth, § 1, of the constitution of 1818," the majority stops short of concluding that the judges of the Superior Court have no authority under our constitution to alter this relationship. Rather, the majority simply asserts that it "question[s] whether the judges of the Superior Court have the constitutional authority to adopt a code of evidence that is inconsistent with the legal principles promulgated by this court, or to divest this court of its power to develop and change the law of evidence via case-by-case adjudication." I am puzzled by the majority's failure to declare that the lack of constitutional authority is clear. On the one hand, the majority expresses its opinion that the Superior Court's authority is questionable but, on the other hand, asserts that, "under article fifth, § 1, of the state constitution, it is the province of this court, *rather than the Superior Court*, ultimately to determine what the correct view of the law is." (Emphasis added.) Footnote 27 of the majority opinion. Such vacillation, in my opinion, creates unnecessary confusion as to the division of authority within the judicial branch under the state constitution.

Additionally, I depart from the views of Justices Katz and Palmer that the code properly can be analogized to our rules of practice. Justice Palmer, in his concurring opinion, suggests that he would conclude that this court has ultimate authority over the rules of practice as well

as evidence law by virtue of its inherent supervisory powers. See p. 487 of Justice Palmer's concurring opinion (likening code of evidence to rules of practice and asserting that this court is final arbiter of disputes over provisions in code and rules of practice). Likewise, Justice Katz, in her dissenting opinion, states that there is "no principled rationale" for treating the rules of practice and the code of evidence differently. Furthermore, Justice Katz insists that "[t]he judges of the Superior Court . . . adopted the code in the exercise of their heretofore unquestioned rule-making authority in matters of procedure." These positions are clearly in conflict with one another, however, as both are premised on a failure to recognize the different evolution of the rules of practice and evidentiary law.

My research, as well as that conducted by the majority, reveals that the genesis of the rules of practice differs from the development of our evidentiary law over time and that the authority of the Superior Court with respect to each is separate and distinct. The majority correctly observes that, "[u]nlike evidentiary law, over which this court has exercised final and binding adjudicative authority *since its inception* more than 200 years ago . . . prior to 1818, the judges of the Superior Court had the authority to adopt rules governing pleading, practice and procedure . . . ."

Significantly, in 1807, the General Assembly passed a law that was codified in 1808 and that provided: "And be it further enacted, That the judges of the superior court, *when constituting a supreme court of errors*, *or met for any purpose*, be, and they hereby are empowered, to institute such rules of practice for the regulation of the said court of errors, and of the superior court in the respective circuits, as shall be deemed most conducive to the administration of justice." (Emphasis added.) General Statutes (1808 Rev.) tit. 42, c. 15, § 2 (1808 statute). The 1808 statute remained in effect through 1818, and the adoption of our state constitution. In contrast to this delegation of rule-making authority by the General Assembly in 1807, no similar statutory history exists regarding evidentiary law. Rather, from the time of the Connecticut colony's adoption of the common law of England until 2000, when the code first was adopted, our evidence law was consistently a product of common-law adjudication subject to the appellate authority initially of the General Assembly and, since 1784, of the Supreme Court of Errors and the Supreme Court. By treating our laws of evidence as akin to rules of practice, my colleagues fail to credit these historically significant differences in the origins of each body of rules, as well as the importance of these differences in determining the judicial body with ultimate authority.

A side effect of this appears to be Justice Palmer's conclusion that this court has authority to change, modify or enact a rule of practice, a conclusion that I suggest

is premature in light of the language of the 1808 statute and the fact that the present case does not present a challenge to this court's authority over the rules of practice. Unlike the clear constitutional authority of this court to be the final and binding arbiter over evidence law, the 1808 statute presents an ambiguity as to what court possesses the final authority over the rules of practice. At a minimum, the 1808 statute makes it clear that the authority to enact rules of practice was vested in the judges of the Superior Court serving in some capacity, and, ultimately, this authority was incorporated into the state constitution in 1818.

I suggest, however, that the 1808 statute does not unambiguously resolve a dispute that could arise with respect to whether the judges of the Superior Court or the Supreme Court have final authority over the rules of practice applicable to trial courts. At the time that the 1808 statute was passed, and after the constitution was adopted in 1818, the judges of the Superior Court sat not only as trial judges but also as the judges of the Supreme Court of Errors. Therefore, the rules promulgated by the Superior Court pursuant to the 1808 statute could have been promulgated in their capacity as trial judges or in their capacity as appellate judges. See *Kinsella* v. *Jaekle*, 192 Conn. 704, 716, 475 A.2d 243 (1984) (1806 act "mandated that only judges of the Superior Court would . . . serve on the Supreme Court of Errors"). Also, the reference in the 1808 statute to "or met for any purpose" could be construed broadly to encompass the authority of the Superior Court judges to promulgate rules of practice generally, regardless of whether they were sitting as judges of the Supreme Court of Errors. Although I admit these questions as to our history are fascinating, I reiterate that resolution of the ambiguities they present is for another day.