PALMER, J., concurring. I agree with, and join, part I of the majority opinion concerning the application of the principles articulated in *State* v. *Salamon*, 287 Conn. 509, 942 A.2d 1092 (2008), to the present case. I also agree with that portion of part II of the majority opinion dealing with the standard of admissibility of uncharged sexual misconduct evidence in sexual assault cases. Although I agree with the threshold determination of the majority in part II of its opinion that this court retains the authority to change or modify the law of evidence as embodied in the Connecticut Code of Evidence (code), I reach that result by a somewhat different route than the majority. I write separately primarily for that reason.

I

Before addressing part II of the majority opinion, however, I note briefly that, although I join the majority in concluding that the defendant in *State* v. *Sanseverino*, 287 Conn. 608, 949 A.2d 1156 (2008), is not entitled to a judgment of acquittal, I also believe it is extremely unlikely that, because of the factual scenario presented by that case, the state will be able to adduce evidence sufficient to support a conviction of kidnapping in light of the factors that this court recently announced in *State* v. *Salamon*, supra, 287 Conn. 548. Nevertheless, as the majority has explained, the defendant in *Sanseverino* was entitled to a reversal of his conviction not because of evidentiary insufficiency but, rather, because he did not receive an instruction of the kind mandated by *Salamon*.[1] Consequently, contrary to this court's determination in *Sanseverino* barring the state from seeking to retry the defendant in that case for the offense of kidnapping, the state has the right to decide whether to attempt to seek a conviction for that offense. As I have indicated, unless there is evidence, not adduced at the first trial, that would support a finding of kidnapping, as that offense has been construed in *Salamon*, the state will be unable to obtain a kidnapping conviction. Indeed, it must be presumed that, if the state lacks such evidence, it will not seek to retry the defendant for kidnapping. That decision, however, rests with the state, subject to appropriate oversight by the trial court. Consequently, no matter how apparent it may seem, on the basis of the record of the first trial, that the state cannot establish the crime of kidnapping, the appropriate order in *Sanseverino* is a reversal of the defendant's conviction and a remand for a new trial, rather than a judgment of acquittal.[2]

II

In concluding that this court continues to have the ultimate responsibility for determining the law of evi-

dence through common-law adjudication, despite the promulgation of the code by the judges of the Superior Court, the majority concludes that the language of the code is ambiguous with respect to whether the judges of the Superior Court intended to oust this court from its historical role with respect to the law of evidence. In essence, the majority reviews one of the stated purposes of the code, namely, "to promote the growth and development of the law of evidence through interpretation of the [c]ode and through judicial rule making to the end that the truth may be ascertained and proceedings justly determined"; Conn. Code Evid. § 1-2 (a); and concludes that the terms "interpretation" and "judicial rule making" are ambiguous.[3] The majority then turns to extratextual considerations, including the history and purpose of the code, and concludes that the code "was not intended to displace, supplant or supersede common-law evidentiary rules or their development via common-law adjudication, but, rather, simply was intended to function as a comprehensive and authoritative restatement of evidentiary law for the ease and convenience of the legal community." The majority also recognizes that, under the code, the judges of the Superior Court, upon recommendation of the evidence code oversight committee, are authorized to adopt revisions to the code "reflecting common-law developments in evidentiary law, clarifications [to] the code to resolve ambiguities and additions to the code in the absence of governing common-law rules."

Although I agree with the majority's conclusion regarding the overall scope of the code, I am not persuaded that the terms "interpretation" and "judicial rule making," as used in § 1-2 (a) of the code, are "ambiguous" in any meaningful sense of that term. As I see it, the code identifies two ways in which it is to be modified: through the construction of the terms of the code, and through the rule-making authority of the judges of the Superior Court, acting as a body. For the reasons that follow, however, I also conclude that the judges of the Superior Court, in promulgating the code, were not attempting to strip the Supreme Court of its traditional common-law role regarding the growth and development of the law of evidence.[4] In other words, although the code prescribes the manner in which it may be modified *by the judges of the Superior Court*, it does not purport to occupy the field by displacing the *Supreme Court* as the ultimate authority with respect to the law of evidence. Read in this light, the purpose of the code, as set forth in § 1-2 (a), is plain and perfectly reasonable: the judges of the Superior Court shall interpret the code, and may modify the code via the exercise of their rule-making function, to clarify its terms or to fill in gaps that may exist in the code. Nothing in the code, however, purports to limit the traditional power of the Supreme Court concerning this state's evidentiary law.

I read the code in this manner because I do not believe

that the judges of the Superior Court have the power to supplant the Supreme Court as the judicial body ultimately responsible for determining the law of evidence. The Supreme Court has exercised its common-law authority in this realm since the court was created centuries ago, prior to the adoption of the constitution of 1818. Because the Supreme Court is a constitutional court, there can be no doubt that its common-law authority, including its common-law authority over the law of evidence, is constitutionally rooted. In light of that fact, I cannot see how the judges of the Superior Court possess the power to divest this state's highest court of a significant measure of that authority.

Such a conclusion also would be inconsistent with this court's inherent supervisory authority over the administration of justice.[5] Of course, this authority encompasses the power to exercise supervision and control of proceedings on appeal. See, e.g., Practice Book § 60-2 ("[t]he supervision and control of the proceedings on appeal shall be in the court having appellate jurisdiction from the time the appeal is filed, or earlier, if appropriate"); Practice Book § 60-3 (authorizing court to "suspend the requirements or provisions of any of these rules [of practice] in a particular case on motion of a party or on its own motion"). This court's inherent supervisory authority, however, clearly transcends the authority to manage cases on appeal. It extends to the supervision of the manner in which proceedings are conducted in our trial courts. Thus, although this court exercises its supervisory authority sparingly; e.g., *State* v. *Smith*, 275 Conn. 205, 241, 881 A.2d 160 (2005); it nevertheless has "adopted rules intended to guide lower courts in the administration of justice in all aspects of the criminal process"; (internal quotation marks omitted) *State* v. *Valedon*, 261 Conn. 381, 386, 802 A.2d 836 (2002); and in the civil arena, as well. See, e.g., *Roth* v. *Weston*, 259 Conn. 202, 231–32, 789 A.2d 431 (2002) (exercising supervisory authority to establish burden of proof in nonparent visitation cases); *Ireland* v. *Ireland*, 246 Conn. 413, 429, 432–33, 717 A.2d 676 (1998) (exercising supervisory authority to adopt factors to be considered in determining best interests of child in cases involving parental relocation); *Bennett* v. *Automobile Ins. Co. of Hartford*, 230 Conn. 795, 806, 646 A.2d 806 (1994) (exercising supervisory authority to direct that, in cases involving insurance disputes, insurers raise certain issues of policy limitation by way of special defense). Moreover, the importance with which this court views its supervisory authority is reflected in the fact that, on at least one occasion, the court has prohibited the parties' waiver of the procedure imposed under that authority; see *State* v. *Patterson*, 230 Conn. 385, 400, 645 A.2d 535 (1994) ("[W]e now decide under our supervisory power that henceforth the trial judge must continuously be present to oversee voir dire in a criminal case. Because this requirement is imposed by

this court pursuant to its supervisory powers, the requirement cannot be waived by either party in future criminal cases."); even though constitutional rights may be waived.

I do not believe that the judges of the Superior Court have the power to trump this court's inherent supervisory authority over the administration of justice in the trial courts, the exercise of which generally is reserved for matters of the greatest seriousness that implicate the fairness and integrity of the judicial system as a whole. See footnote 5 of this opinion. Indeed, if the judges of the Superior Court have that power, then this court does not truly possess supervisory authority over the trial courts at all, because those courts would be free to override this court's assertion of its authority. I therefore am unwilling to conclude that this court possesses supervisory power over our trial courts only to the extent that those courts acquiesce in our exercise of that power—a result that would so limit the authority of this court over the administration of justice in the trial courts as to render that role advisory rather than supervisory.[6]

Supervisory authority over the administration of justice is inherent in appellate courts generally, including, of course, the United States Supreme Court. Thus, as that court stated in *McNabb* v. *United States*, 318 U.S. 332, 63 S. Ct. 608, 87 L. Ed. 819 (1943), "[t]he principles governing the admissibility of evidence in federal criminal trials have not been restricted . . . to those derived solely from the [United States] [c]onstitution. In the exercise of its supervisory authority over the administration of criminal justice in the federal courts . . . th[e] [United States Supreme] Court has, from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions. . . . And in formulating such rules of evidence for federal criminal trials the [c]ourt has been guided by considerations of justice not limited to the strict canons of evidentiary relevance." (Citations omitted.) Id., 341. The United States Supreme Court recently reiterated this principle, stating: "The law . . . is clear. Th[e] [United States Supreme] Court has supervisory authority over the federal courts, and [it] may use that authority to prescribe rules of evidence and procedure that are binding in those tribunals."[7] *Dickerson* v. *United States*, 530 U.S. 428, 437, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000). In this state, as well, 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.[8] Consequently, it cannot be presumed that the judges of the Superior Court purported to do so when they adopted the code in 2000. Indeed, I agree with the majority that, if the judges of the Superior Court had purported to accomplish such a radical—and constitu-

tionally suspect—change, it is extremely unlikely that they would have done so without any public discussion of it in advance of the adoption of the code. Moreover, the fact that the code was presented to the judges of the Superior Court for their approval on the basis that it was merely a compilation of the existing common law of evidence strongly supports the conclusion that the Superior Court judges treated the code as representing the status quo, and not as creating a dramatically new and different set of procedures for determining the law of evidence in this state.

It may be argued that the judges of the Superior Court have asserted a similar authority by virtue of their promulgation of the rules of procedure contained in the Practice Book (rules of practice). It is not apparent to me, however, that those rules are binding on this court *as a matter of law*.[9] Although, for prudential reasons, it is very unlikely that this court would see fit to alter a rule of practice in the exercise of its supervisory authority, I do not believe that this court lacks the power to do so. Indeed, once again, this is the position that the United States Supreme Court has taken concerning the relative authority of that court and the lower federal courts with respect to the promulgation of rules of procedure. Although "a district court has discretion to adopt local rules that are necessary to carry out the conduct of its business . . . [the United States Supreme Court] may exercise its inherent supervisory power to ensure that these local rules are consistent with the principles of right and justice." (Citations omitted; internal quotation marks omitted.) *Frazier* v. *Heebe*, 482 U.S. 641, 645, 107 S. Ct. 2607, 96 L. Ed. 2d 557 (1987) (invoking supervisory authority to invalidate certain residency requirements contained in local rules of United States District Court for Eastern District of Louisiana).[10] I therefore view the rules of practice in the same way that I view the code, namely, as a set of rules adopted by the judges of the Superior Court that govern the manner in which cases are to proceed in our trial courts. Under its common-law adjudicative authority, however, this court is the final arbiter of any dispute between the parties regarding the interpretation of those rules. Similarly, this court, by virtue of its inherent authority as the state's highest court, ultimately retains the power—however infrequently it may choose to invoke it—to establish the rules that govern the administration of justice in the courts of this state.[11]

For the foregoing reasons, I conclude that the judges of the Superior Court did not undertake to adopt an evidence code that purported to usurp this court's historical and constitutionally based authority over the law of evidence. I therefore agree with the majority's determination in part II of this opinion that this court retains such authority following the adoption of the code.[12] Accordingly, I concur in the result that the majority reaches in part II of its opinion.

[1] It bears emphasis that the jury instruction on kidnapping that the trial court gave in *Sanseverino* was perfectly correct under then binding precedent of this court. We concluded that the defendant in *Sanseverino* was entitled to a reversal of his kidnapping conviction only because of this court's interpretation of the kidnapping statute in *Salamon*, which this court decided on the same day that it decided *Sanseverino*.

[2] The dissenting justice asserts that it is unfair to the defendant in *Sanseverino* and the defendant in the present case to allow the state the *opportunity* to retry them. I do not share the dissenting justice's view. First, the defendant in *Sanseverino* and the defendant in the present case received the benefit of our holding in *Salamon* even though neither defendant raised the claim concerning the kidnapping statute that we addressed in *Salamon*. They benefit from our holding in *Salamon* only because their appeals happened to be pending when this court decided *Salamon*. Second, and more importantly, by permitting the state to determine whether to seek a retrial in *Sanseverino* and in the present case, we do not place the defendants in those cases in unwarranted jeopardy. Rather, as I have indicated, we must presume that if, in light of our decision in *Salamon*, the state does not believe that it has sufficient evidence to retry one or both of those defendants for kidnapping, then the state will not do so. Under the circumstances, however, it simply is not our responsibility to make that decision for the state.

I also strongly disagree with the dissenting justice's criticism of our decision on stare decisis grounds. *Sanseverino* was decided less than two months ago, and, consequently, there cannot have been any material reliance on it. Cf., e.g., *Conway* v. *Wilton*, 238 Conn. 653, 658, 680 A.2d 242 (1996) (explaining that doctrine of stare decisis is justified because, inter alia, it "allows for predictability in the ordering of conduct" by "giv[ing] stability and continuity to our case law"). Indeed, the dissenting justice acknowledges, as she must, that stare decisis is hardly applicable when, as in *Sanseverino*, a motion for reconsideration of our decision in that case is pending. Moreover, it is far better for this court to acknowledge and to correct an error promptly than to refuse to do so based on rigid adherence to flawed precedent. See id., 659. Thus, to the extent that this court's decision in the present case serves to clarify that our decision in *Salamon* rejecting the defendant's claim of entitlement to a judgment of acquittal ultimately was not fact bound, despite certain language in *Salamon* that might suggest a contrary conclusion; see *State* v. *Salamon*, supra, 287 Conn. 548–50; that clarification is entirely appropriate.

[3] In the majority's view, the word "interpretation," as used in § 1-2 (a) of the code, is ambiguous because the judges of the Superior Court reasonably may have intended it "to be construed broadly as descriptive of the common-law adjudicative function pursuant to which evidentiary law historically has grown and developed" and not merely limited to the construction or explanation of the code. The majority also concludes that the term "judicial rule making" is ambiguous because such rule making reasonably may be construed to mean case-by-case, common-law adjudication rather than the promulgation of court rules by the judges of the Superior Court acting as a group.

[4] I likewise do not believe that the judges of the Superior Court intended to limit the authority of the Appellate Court in regard to that court's common-law adjudicative function vis-á-vis the law of evidence. I refer only to the Supreme Court, however, for ease of reference, and because the common-law role of the Supreme Court with respect to the rules of evidence dates back more than 200 years; by contrast, the similar role of the Appellate Court dates back only to its creation in 1983.

[5] As this court repeatedly has stated, both the Supreme Court and the Appellate Court "possess an inherent supervisory authority over the administration of justice. . . . Supervisory powers are exercised to direct trial courts to adopt judicial procedures that will address matters that are of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole. . . . [The Supreme Court] ordinarily invoke[s] [its] supervisory powers to enunciate a rule that is not constitutionally required but that [it believes] is preferable as a matter of policy." (Citation omitted; internal quotation marks omitted.) *State* v. *Ledbetter*, 275 Conn. 534, 577–78, 881 A.2d 290 (2005).

[6] Indeed, I have found no federal or sister state precedent that supports such a division of authority as between a high court and a subordinate court.

[7] Although the authority of the United States Supreme Court in this regard is superior to that of the lower federal courts, "Congress retains the ultimate authority to modify or set aside any judicially created rules of evidence

and procedure that are not required by the [United States] [c]onstitution." *Dickerson* v. *United States*, 530 U.S. 428, 437, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000). This court has observed that, in this state, "the rules of evidence . . . have never . . . been regarded as exclusively within the judicial domain. Over a period of years, the legislature has enacted various statutes modifying the rules of evidence prevailing at common law . . . . These changes have been accepted by our courts and have never been challenged as violating the principle of separation of powers." *State* v. *James*, 211 Conn. 555, 560, 560 A.2d 426 (1989).

[8] General Statutes § 51-14 (a), which provides in relevant part that the judges of the Supreme Court, the Appellate Court and the Superior Court "shall adopt and promulgate and may from time to time modify or repeal rules and forms regulating pleading, practice and procedure in judicial proceedings in courts in which they have the constitutional authority to make rules," is not to the contrary. Section 51-14 (a) codifies the inherent authority of the various courts; see, e.g., *In re Dattilo*, 136 Conn. 488, 493, 72 A.2d 50 (1950) ("[e]ven lacking statutory authority, it would be well within the inherent power of the judges of the Superior Court to make rules which would bring about an orderly, expeditious and just determination of the issues"); and says nothing about the relative authority of one such court vis-á-vis another.

[9] The dissenting justice cites to several cases in which this court has indicated that it lacks authority to change or modify rules of practice adopted by the judges of the Superior Court. See *Oakley* v. *Commission on Human Rights & Opportunities*, 237 Conn. 28, 30, 675 A.2d 851 (1996) ("[d]espite [the] legitimacy [of the concern raised by the certified question], the concern is one that cannot be addressed through the process of appellate review but requires a change in the appropriate provisions either of the General Statutes or of the Practice Book"); *State* v. *Johnson*, 228 Conn. 59, 61, 634 A.2d 293 (1993) ("[a]lthough a clarifying amendment [to] the rules of practice to address the problem illuminated . . . might well be desirable, this court does not sit as the [r]ules [c]ommittee of the Superior Court"); *State* v. *Jennings*, 216 Conn. 647, 665 n.11, 583 A.2d 915 (1990) ("We do not sit to decide the utility or need for written instructions in the Connecticut courts. To the extent that the defendant seeks such a decision, his request is more properly directed to the [r]ules [c]ommittee of the Superior Court."); *Kupstis* v. *Michaud*, 215 Conn. 435, 437, 576 A.2d 152 (1990) ("[t]he problem illuminated by this litigation calls for a change in the rules of practice that this court cannot enact"). I acknowledge that language in these cases would appear to support the contention that this court lacks the ultimate authority to modify a rule of practice adopted by the judges of the Superior Court. Upon closer analysis, however, these cases are not persuasive authority for that proposition. Three of the four decisions, *Oakley*, *Johnson* and *Kupstis*, were summary, per curiam opinions consisting of one to two pages each, and none contains any analysis of the relative authority of this court and the Superior Court concerning the adoption of the rules of practice. At most, these decisions reflect the court's understandable reluctance to override rules of practice adopted by the judges of the Superior Court. In *Jennings*, the fourth case, this court rejected the claim of the defendant, Gerald Jennings, that the trial court had violated his constitutional rights in declining to provide the jury with a written copy of the court's jury instructions. See *State* v. *Jennings*, supra, 664–65. In response to Jennings' assertion that other state and federal courts had utilized written jury instructions and that the practice had received favorable review and comment, we observed that his policy argument was "more properly directed" to the rules committee of the Superior Court. Id., 665 n.11. Significantly, Jennings did not request that this court invoke its supervisory authority. Although I express no view on the merits of written jury instructions, I have no doubt that this court has the authority, under its supervisory power, to require that written instructions be provided to the jury. *Jennings*, therefore, is inapposite.

[10] Thus, contrary to the assertion of the dissenting justice, the United States Supreme Court expressly has held that it possesses inherent power to invalidate an otherwise lawful rule of procedure adopted by the judges of the United States District Court under their inherent rule-making authority. See *Frazier* v. *Heebe*, supra, 482 U.S. 645.

[11] As Justice Zarella underscores in his concurrence, the history of our rules of practice and the history of our law of evidence are not identical. I do not view the former, however, including the 1807 legislative delegation of rule-making authority to our courts as they were constituted prior to 1818; see General Statutes (1808 Rev.) tit. 42, c. 15, § 2 (1808 statute); as

demonstrating that the Supreme Court is subordinate to the Superior Court with respect to that authority. First, from the late eighteenth century until 1818, the judges of the Supreme Court of Errors and the judges of the Superior Court were one and the same, and, therefore, distinctions between them regarding their relative authority over the administration of justice were of little practical significance. More importantly, however, as Justice Zarella also notes, the 1808 statute is ambiguous with respect to the division of authority, if any, between the judges of the Supreme Court of Errors and the judges of the Superior Court. In the absence of a reasonably clear historical record limiting the inherent power that this court possesses as the state's highest court, I see no persuasive reason for concluding that that authority is subordinate to the authority of the judges of the Superior Court. Although the present case does not necessarily require this court to decide whether the Supreme Court or the Superior Court possesses ultimate authority over the rules of practice, I address the issue because it is so closely related to the issue of whether the Supreme Court or the Superior Court ultimately is responsible for determining the law of evidence in this state.

[12] The dissenting justice states that, "[s]adly, the result in this case may motivate the legislature to follow through on previously contemplated action to bring the rules of evidence under the supervision of that body . . . ." The dissenting justice provides no explanation for this concern, and I know of none. In accordance with the preference of the legislature, the judicial branch itself has promulgated an evidence code that is subject to regular review and revision. See Foreword to Connecticut Code of Evidence (2000) p. iii. The legislature having deferred to the judicial branch with respect to this endeavor, I cannot imagine why the legislature now would see fit to reverse course. In any event, the decision of this court in the present case cannot rest on the unsubstantiated concern that the legislature nevertheless may elect to do so.