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Evidence Myopia: The Failure to See the Federal Rules of Evidence as a Codification of the Common Law

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EVIDENCE MYOPIA: THE FAILURE TO SEE THE FEDERAL RULES OF EVIDENCE AS A CODIFICATION OF THE COMMON LAW

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INTRODUCTION

We interpret the legislatively enacted Federal Rules of Evidence as we would any statute.[1]

We live in an "age of statutes."[2] Consequently, when a court encounters a body of rules resulting from a process that concluded with legislation, the court may find it hard to resist the conclusion that the rules are subject to the principles used to interpret statutes. The Supreme Court of the United States is no exception. Describing the Federal Rules of Evidence ("Federal Rules" or "Rules") as a "legislative enactment,"[3] the United States Supreme Court has stated that a court should use "traditional tools of statutory construction" in interpreting the Federal Rules.[4] With minor variation, the same analysis appears in virtually every case rendered by the Supreme Court interpreting the Federal Rules of Evidence.[5] Although the Supreme Court

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1. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 587 (1993) (emphasis added).

2. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1 (1982).

3. Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 163 (1988).

4. *Id.* (quoting INS v. Cardoza-Fonseca, 480 U.S. 421, 446 (1987)).

5. *See, e.g.*, United States v. Mezzanatto, 513 U.S. 196, 209 (1995) (disagreeing with the argument that with Rule 410 "Congress intended to prevent criminal defendants from offering to waive the plea-statement Rules during plea negotiation"); Tome v. United States, 513 U.S. 150, 160 (1995) (noting that the Advisory Committee draft was "'particularly relevant in determining the meaning of the document Congress enacted'" (quoting *Beech Aircraft*, 488 U.S. at 165-66 n.9)); Williamson v. United States, 512 U.S. 594, 600 (1994) (concluding that the ambiguous language of Rule 804(b)(3) did not mean that Congress endorsed a view "so inconsistent with the Rule's underlying theory"); *Daubert*, 509 U.S. at 587 ("We interpret the . . . Federal Rules of Evidence as we would any statute."); United States v. Salerno, 505 U.S. 317, 322 (1992) (relying on the plain meaning of "testimony" to conclude that Rule 804(b)(1) "applies only to sworn statements"); United States v. Zolin, 491 U.S. 554, 566 (1989) (relying on the "plain language" of Rule 104(a) to reject an "inconsistent" interpretation); Green v. Bock Laundry Mach. Co., 490 U.S. 504, 508 (1989) ("Our task in deciding this case . . . is . . . to identify the rule that Congress fashioned . . . ."); Huddleston v. United States, 485 U.S. 681, 688 (1988) ("Congress was not nearly so concerned with the potential prejudicial effect of Rule 404(b) . . . ."); Bourjaily v. United States, 483 U.S. 171, 178 (1987) (concluding that under Rule 104 "Congress has decided that courts may consider hearsay in making these factual determinations"); Tanner v. United States, 483 U.S. 107, 125 (1987) ("[T]he legislative history demonstrates with uncommon clarity that Congress specifically understood, considered, and rejected a version of Rule 606(b) . . . ."); United States v. Abel, 469 U.S. 45, 49 (1984) (noting that although the Court promulgates the Feder-

has not metaphorically joined the terms "tool" and "construction" in every pertinent case, it has been consistent in treating the text of the Rules as the text of a statute.[6] As a result, the Supreme Court has interpreted the Federal Rules of Evidence with principles drawn from the extensive and elusive body of law applicable to statutory construction. Despite the Court's consistency in commencing with the premise that the Federal Rules of Evidence are a statute, evidence scholars have noted a remarkable inconsistency in the way in which the Court actually interprets the Federal Rules of Evidence.[7] Indeed, the Supreme Court

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al Rules of Evidence, "we are in truth merely a conduit"); United States v. Gillock, 445 U.S. 360, 367 (1980) ("The language and legislative history of Rule 501 give no aid to Gillock.").

6. *See Mezzanatto*, 513 U.S. at 201 ("[A]bsent some affirmative indication of Congress' intent to preclude waiver, we have presumed that statutory provisions are subject to waiver by voluntary agreement of the parties."); *Salerno*, 505 U.S. at 322 ("To respect [Congress's] determination, we must enforce the words that it enacted"); *Green*, 490 U.S. at 524 ("A general statutory rule usually does not govern unless there is no more specific rule. Rule 403, the more general provision, thus comes into play only if Rule 609, though specific regarding criminal defendants, does not pertain to civil witnesses." (citation omitted)).

7. *See* Edward R. Becker & Aviva Orenstein, *The Federal Rules of Evidence After Sixteen Years—The Effect of "Plain Meaning" Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 60 GEO. WASH. L. REV. 857, 864-66 (1992) (concluding that although the Supreme Court has used a plain meaning interpretation, it is not the sole method of interpretation); Edward J. Imwinkelried, *Moving Beyond "Top Down" Grand Theories of Statutory Construction: A "Bottom Up" Interpretive Approach to the Federal Rules of Evidence*, 75 OR. L. REV. 389, 395-96 (1996) (criticizing the Court's apparent shift from textualism in recent cases); Randolph N. Jonakait, *Text, Texts, or Ad Hoc Determinations: Interpretation of the Federal Rules of Evidence*, 71 IND. L.J. 551, 552 (1996) (concluding that although the Court claims to be using the plain meaning standard, it actually uses other methods of interpreting the Federal Rules of Evidence); Eileen A. Scallen, *Classical Rhetoric, Practical Reasoning, and the Law of Evidence*, 44 AM. U. L. REV. 1717, 1759 (1995) [hereinafter Scallen, *Classical Rhetoric*] ("The Court consistently has held that only a 'plain meaning,' textualist approach to interpretation is appropriate for evidentiary rules."); Eileen A. Scallen, *Interpreting the Federal Rules of Evidence: The Use and Abuse of the Advisory Committee Notes*, 28 LOY. L.A. L. REV. 1283, 1291-93 (1995) [hereinafter Scallen, *Use and Abuse*] (advocating the increased use of the Advisory Committee Notes in the interpretation of the Federal Rules of Evidence); Andrew E. Taslitz, Daubert's *Guide to the Federal Rules of Evidence: A Not-So-Plain-Meaning Jurisprudence*, 32 HARV. J. ON LEGIS. 3, 7 (1995) [hereinafter Taslitz, Daubert's *Guide*] ("[T]he Court has not engaged in the kind of pure plain-meaning approach that recent scholarship has suggested."); Andrew E. Taslitz, *Interpretive Method and the Federal Rules of Evidence: A Call for a Politically Realistic Hermeneutics*, 32 HARV. J. ON LEGIS. 329, 399 (1995) [hereinafter

has failed to advance a manageable set of guiding interpretational principles for the Federal Rules of Evidence despite numerous efforts at construction.[8] The Court's difficulty in articulating a coherent hermeneutic for construing the Federal Rules of Evidence may be traceable to the inherent incompatibility of the text of the Rules and customary principles of statutory construction.[9]

When the United States Supreme Court claims that the Federal Rules of Evidence must be interpreted by use of the "traditional tools of statutory construction," its statement is likely to be treated as inviolable.[10] Taking the Supreme Court's "tool" metaphor seriously has led many evidence scholars to the ineluctable next step of sorting through and selecting which "tools" of statutory construction should apply.[11] This exercise inevitably results in an examination of the various schools of thought regarding the construction of statutes, extracting the most attractive or pertinent features from those schools, and then forging a unique theory for interpreting the Federal Rules of Evidence.

Taslitz, *Politically Realistic Hermeneutics*] (concluding that the Court is now using a "politically realistic hermeneutic" approach to the interpretation of the Federal Rules of Evidence).

8. *See* Becker & Orenstein, *supra* note 7, at 863 ("*Bourjaily* presents a serious problem in the interpretation of the Rules of Evidence and demonstrates the potential mischief that can result from a rigid plain meaning analysis of the Rules."); Jonakait, *supra* note 7, at 552 ("Whatever the cause the Supreme Court's decisions interpreting the Federal Rules of Evidence certainly have not been satisfying.").

9. *See infra* text accompanying notes 25-34. Of course, the Supreme Court's lack of consistency also may be traceable in part to the fact that law surrounding the interpretation of statutes is a moving target at best. *See, e.g.*, Imwinkelried, *supra* note 7, at 396-407 (discussing various methods of statutory interpretation).

10. *See, e.g.*, Imwinkelried, *supra* note 7, at 393; Scallen, *Classical Rhetoric*, *supra* note 7, at 1718-20; Eileen A. Scallen & Andrew E. Taslitz, *Reading the Federal Rules of Evidence Realistically: A Response to Professor Imwinkelried*, 75 OR. L. REV. 429, 429-30 (1996); Taslitz, *Politically Realistic Hermeneutics*, *supra* note 7, at 355.

11. *See* Imwinkelried, *supra* note 7, at 412-27 (arguing that political and linguistic considerations require giving significant relative weight to the text of the Rules); Scallen, *Classical Rhetoric*, *supra* note 7, at 1741-59 (evaluating the intentionalism, purposivism, textualism, and practical reasoning models of statutory construction); Scallen & Taslitz, *supra* note 10, at 435-42 (defending practical reasoning and politically realistic hermeneutics); Taslitz, *Politically Realistic Hermeneutics*, *supra* note 7, at 353-401 (criticizing the plain meaning model of statutory construction and advocating the adoption of politically realistic hermeneutics).

Participants in the recent scholarly debate concerning the interpretation of the Federal Rules of Evidence are evidence professors who appear to have an irresistible compulsion to revisit the issue.[12] Although several scholars have published more than one article on the subject, the most recent and most orchestrated synthesis of earlier scholarship on the interpretation of the Federal Rules is the product of Professors Imwinkelried, Scallen, and Taslitz, each of whom is a major participant in the debate focusing on the proper interpretational approach to construing the Rules.[13] In what might be described as a debate struggling to find a conflict, Professors Imwinkelried, Scallen, and Taslitz have each advocated an interpretive scheme that draws upon established theories for construing statutes. In his latest contribution to the debate, Professor Imwinkelried summarily cites five schools of thought that he derived from literature applicable to statutory construction: plain meaning, legal process, textualism, practical reasoning, and politically realistic hermeneutics.[14] Sifting through common ground and seeking to find harmony with Professors Scallen and Taslitz, Professor Imwinkelried has endeavored to embrace certain aspects of the practical reasoning model endorsed by Professor Scallen as well as certain elements of the politically-realistic hermeneutics model supported by Professor Taslitz.[15] Professor Imwinkelried

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12. *See supra* note 7.

13. *See* Imwinkelried, *supra* note 7, at 412-27 (suggesting a "bottom up" approach); Scallen, *Classical Rhetoric*, supra note 7, at 1747-59 (advocating practical reasoning); Scallen & Taslitz, *supra* note 10, at 435-42 (advocating practical reasoning and politically realistic hermeneutics); Taslitz, *Politically Realistic Hermeneutics*, *supra* note 7, at 353-54, 377-401 (arguing for politically realistic hermeneutics).

14. *See* Imwinkelried, *supra* note 7, at 396-407.

15. *See id.* at 410-12, 421-23. Like Professors Scallen and Taslitz, Professor Imwinkelried concludes that no one interpretive approach should govern all statutes. *See id.* at 410-12. Thus, similar to the arguments advanced by Professors Scallen and Taslitz, Professor Imwinkelried argues that the Court should devise an interpretive approach specifically tailored to the statutory scheme of the Federal Rules of Evidence. *See id.* Moreover, Professor Imwinkelried agrees with Professor Scallen's view that evidence decisions be made quickly at trial and that, consequently, courts should attach great relative weight to the text of the Rules. *See id.* at 421. In addition, in an approach similar to the interpretive model advanced by Professor Taslitz, Professor Imwinkelried treats the issue of interpretation from the perspective of hermeneutics. *See id.* Professor Imwinkelried also concurs with Professor Taslitz's notion

nevertheless ultimately concludes that "Professors Scallen and Taslitz undervalue the importance of the text of the Federal Rules."[16] In response, Professors Scallen and Taslitz express "frustration" with Professor Imwinkelried's position and argue that his conclusion that the text of the Federal Rules of Evidence deserves primary importance simply begs the question.[17] Their inquiry, rather, is to find guidance in principles pertaining to statutory construction when the text fails to supply an answer.[18]

Distilled to its essence, this recent exchange on the interpretation of the Federal Rules of Evidence among Professors Scallen, Taslitz, and Imwinkelried appears to focus on the appropriate balance between text and extrinsic sources in interpreting a particular statute.[19] Although interesting, this debate, like most

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that "[m]eaning emerges from an interplay between the writer's text and the reader." *Id.* As a result, Professor Imwinkelried agrees that the choice of interpretive community is one of the keys to determining the meaning of the Federal Rules of Evidence. *See id.* at 421-23.

16. *Id.* at 426.

17. *See* Scallen & Taslitz, *supra* note 10, at 442.

18. *See id.* at 441-42.

19. Unlike Professors Scallen and Taslitz, Professor Imwinkelried argues that the text of the Rules is entitled to far more relative weight than extrinsic materials. *See* Imwinkelried, *supra* note 7, at 412. Examining the nature of the Rules, he concludes:

> Text deserves little relative weight when it is clear that the drafter chose the language hurriedly, but here the statutory writers took almost two years to carefully select the language. Likewise, text warrants less weight when the reader is unlikely to read the text and rely on its language. However, here the intended readers, trial judges and attorneys, are attentive to text; in the heat of battle at trial, they rely on text—and little or nothing else. Similarly, text can justifiably be depreciated when the statute writers' linguistic conventions differ from those of the readers, or the writers target multiple groups of readers with varying conventions. However, as *Tome* illustrates, in construing the Federal Rules of Evidence, the courts should typically assume that Congress contemplates the use of the legal community's conventions.

Id. at 426. Contrary to Professor Imwinkelried's position, Professors Scallen and Taslitz argue that the Rules should be interpreted in light of all sources of meaning:

> While careful consideration of rules passed by Congress suggests that the text deserves the greatest relative weight when it is clear, where there is any ambiguity, other indicators of intent, such as legislative history, must be examined precisely to show appropriate deference to legislative authority; even in the "clear" cases, it is important to examine all sources to

other treatments of the subject, faces a fate of unsatisfactory conclusions from the start because it proceeds from the wrong-minded premise that the Federal Rules of Evidence are a statute.[20] Professors Imwinkelried, Taslitz, and Scallen each unquestioningly embrace the premise established for them by the Supreme Court, and each is led into a maze of literature on the interpretation of statutes.[21]

Admittedly, one must disavow hierarchical thinking and challenge pronouncements by the United States Supreme Court in order to approach the subject of the interpretation of the Federal Rules of Evidence from a more defensible intellectual point of departure. As this Article seeks to demonstrate, however, some iconoclasm may well foster a better way of thinking about a body of evidence rules. Ultimately, the purpose of this Article is to challenge the Rules-as-statute premise on historical and policy bases, and then to redirect the discussion in a more constructive fashion. In challenging the Rules-as-statute premise, this Article first examines the consequences of treating the Federal Rules of Evidence as a statute, canvassing the existing scholarly debate on the issue. It then turns to the historical and analytical reasons for concluding that the Federal Rules of Evidence possess a unique identity that is distinct from that of a typical

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ensure that "plain" meaning does not contravene legislative will, a deferential approach expressly endorsed by the Supreme Court.

Scallen & Taslitz, *supra* note 10, at 440 (citing Green v. Bock Laundry Mach. Co., 490 U.S. 504, 509-11 (1989)).

20. *See* Leslie A. Lunney, *Protecting Juries From Themselves: Restricting the Admission of Expert Testimony in Toxic Tort Cases*, 48 SMU L. REV. 103, 115-18 (1994) (providing another example of an argument based on the premise that the Federal Rules of Evidence are a statute).

21. *See, e.g.*, Imwinkelried, *supra* note 7, at 392, 407-09; Scallen & Taslitz, *supra* note 10, at 438 n.51; Taslitz, *Politically Realistic Hermeneutics*, *supra* note 7, at 384 n.273. The maze of literature to which these authors turn includes such works as: HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1111-380 (William N. Eskridge, Jr. & Philip N. Frickey eds., 1994); Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59 (1988); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990); and Richard A. Posner, *Legislation and Its Interpretation: A Primer*, 68 NEB. L. REV. 431 (1989).

statute. This Article then focuses on the developmental history of the Federal Rules of Evidence and examines this creation of the Rules as a process of codifying the common law. The remainder of the Article seeks to illuminate the hermeneutical consequences of treating the Federal Rules of Evidence as a codification of the common law.

I. ARE THE FEDERAL RULES OF EVIDENCE A STATUTE? FRAMING THE DEBATE

The issue of whether the Federal Rules of Evidence are a typical statute to be construed with the "traditional tools of statutory construction" is not new to this author.[22] Admittedly, some may have difficulty embracing my earlier challenges to the notion that the Federal Rules of Evidence should be construed with principles applicable to statutory interpretation because of one indisputable historical fact: The Federal Rules of Evidence were brought into existence through a process that concluded with legislation.[23] Consequently, in an age of statutes, one may find it somewhat counterintuitive to conclude that principles of statutory interpretation should not apply to the Federal Rules of Evidence.[24]

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22. *See* Glen Weissenberger, *Are the Federal Rules of Evidence a Statute?*, 55 OHIO ST. L.J. 393 (1994) [hereinafter Weissenberger, *Are the Rules a Statute?*]; Glen Weissenberger, *The Supreme Court and the Interpretation of the Federal Rules of Evidence*, 53 OHIO ST. L.J. 1307 (1992) [hereinafter Weissenberger, *Interpretation of the Rules*].

23. The House of Representatives held hearings on the Rules on January 30, 1974 and passed its version of H.R. 5463 on February 6, 1974. *See* 120 CONG. REC. 2366-94 (1974). After hearings on November 21, 1974, the Senate passed an amended version of H.R. 5463 on November 22, 1974. *See* 120 CONG. REC. 37084-85 (1974). A Conference Committee produced the final version of H.R. 5463, and both Houses agreed to it on December 16-18, 1974. *See* 120 CONG. REC. 40069-70 (1974); 120 CONG. REC. 40890-97 (1974). Finally, the President signed the Rules on January 3, 1975. *See* Gerald R. Ford, Statement on Signing a Bill Establishing Rules of Evidence in Federal Court Proceedings, 1 PUB. PAPERS 6, 6 (Jan. 3, 1975). For further discussion on the enactment of the Rules, see Weissenberger, *Interpretation of the Rules*, *supra* note 22, at 1319-24.

24. *See* Edward J. Imwinkelried, *A Brief Defense of the Supreme Court's Approach to the Interpretation of the Federal Rules of Evidence*, 27 IND. L. REV. 267, 267 (1993) ("[S]tatutes have now become the dominant source of American law. This trend is certainly evident in the field of evidence law." (footnote omitted)); Scallen,

In earlier work on this subject, I advanced several arguments that sought to demonstrate that the Federal Rules of Evidence should not be subject to the principles of statutory construction.[25] For the sake of completeness, I will restate briefly those arguments here. First, the Federal Rules of Evidence were developed by a multi-branch process in which the dominant participant was the judicial branch.[26] Congress's role in regard to most of the Rules was primarily to review and ratify the product of a coordinate branch of government.[27] Consequently, under a separation of powers theory, the principle of legislative supremacy does not comport with the unique process that produced the Federal Rules of Evidence.[28] This argument is supported by the recognition that statutes typically involve broader subjects than the Federal Rules of Evidence and have audiences beyond judges and lawyers.[29] Moreover, statutes typically originate in Congress[30] and are not designed by a distinct coordinate branch of government to operate internally within that distinct branch.[31]

Classical Rhetoric, *supra* note 7, at 1741 ("The rules of evidence are indeed statutes . . . ."); Taslitz, Daubert's *Guide*, *supra* note 7, at 31-32 ("[T]he Rules are a statute of a special kind . . . .").

25. *See* Weissenberger, *Are the Rules a Statute?*, *supra* note 22, at 397-400, 402; Weissenberger, *Interpretation of the Rules*, *supra* note 22, at 1307-11, 1319-38.

26. *See* Weissenberger, *Interpretation of the Rules*, *supra* note 22, at 1319-21.

27. *See id.* at 1323.

28. *See id.* at 1323-24; *cf.* Karen Nelson Moore, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039, 1093 (1993) ("Congress has explicitly delegated to the Court rulemaking power, and it is not inconsistent to imply the Court has greater power to interpret Rules than it does to interpret statutes.").

29. On the other hand, generally only lawyers and judges read the Federal Rules of Evidence. *See* Edward W. Cleary, *Preliminary Notes on Reading the Rule of Evidence*, 57 NEB. L. REV. 908, 910 (1978); Imwinkelried, *supra* note 7, at 423; Taslitz, *Politically Realistic Hermeneutics*, *supra* note 7, at 364.

30. *See, e.g.*, WILLIAM P. STATSKY, LEGISLATIVE ANALYSIS: HOW TO USE STATUTES AND REGULATIONS 1 (1975) ("The legislature is a branch of government which has primary responsibility for creating or enacting laws."); Arthur M. Weisburd, *The Executive Branch and International Law*, 41 VAND. L. REV. 1205, 1253 (1988) ("Statutes may and usually do originate in the Congress . . . .").

31. *See, e.g.*, 1 NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 1.06 (5th ed. 1994) ("The legislative function involves the creation of 'general rules' which usually affect the entire population or a 'general class' of the population . . . ."); WILLIAM P. STATSKY, LEGISLATIVE ANALYSIS AND DRAFTING 7-8 (2d ed. 1984) ("Most enacted law is written to solve broad problems in society, e.g., pollution control, revenue collection, traffic congestion, crime detection."); Moore, *supra* note 28, at 1093 ("The

In addition, the nature of Congress's participation in the adoption of the Federal Rules of Evidence belies the notion that coherent conceptions of legislative intent stand behind the text of the Rules. Congress's role in the rulemaking process differs substantially from its traditional role in enacting statutes and, consequently, the passive enactment of Rules drafted largely by the judicial branch does not comport with any realistic conception of a legislature's typical function in creating statutes.[32] In the context of the Federal Rules of Civil Procedure, this reality has long been recognized. In a dissenting opinion joined by Justices Douglas, Black, and Murphy, Justice Frankfurter made the following, essentially indisputable, observation about the Federal Rules of Civil Procedure:

> Plainly the Rules are not acts of Congress and can not be treated as such. Having due regard to the mechanics of legislation and the practical conditions surrounding the business of Congress when the Rules were submitted, to draw any inference of tacit approval from non-action by Congress is to appeal to unreality.[33]

On a substantive level, this multi-faceted argument suggests that the principle of separation of powers, which supports judicial deference to the legislative branch, is misplaced in the context of the Federal Rules of Evidence. Consequently, the typical techniques used to interpret statutes, many of which are derived from judicial deference to legislative supremacy, do not logically apply to the Rules.[34]

A second argument challenging the Rules-as-statute premise focuses on the unique attributes of federal courts.[35] Federal

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judiciary plays no role in statutory promulgation . . . . Although the Court's actual role in the rulemaking process is relatively minimal, nonetheless the Court must at least approve the proposed Rules before they are transmitted to Congress.").

32. *See supra* text accompanying notes 27-28.

33. Sibbach v. Wilson & Co., 312 U.S. 1, 18 (1941) (Frankfurter, J., dissenting) (interpreting Federal Rule of Civil Procedure 35).

34. *See* Weissenberger, *Interpretation of the Rules*, *supra* note 22, at 1323; *cf.* Moore, *supra* note 28, at 1040 (advocating a more activist role for the Court in the interpretation of the Federal Rules of Civil Procedure than is taken in the interpretation of statutes).

35. *See* Weissenberger, *Interpretation of the Rules*, *supra* note 22, at 1332-38.

courts have certain inherent powers that were not and could not have been legislatively eliminated by virtue of the adoption of the Federal Rules of Evidence.[36] Inherent powers give courts substantial latitude in their actions under the Rules,[37] a latitude typically not enjoyed by entities subject to the mandates of statutes.[38] Consequently, if the adoption of the Federal Rules of Evidence were intended to alter radically the authority of federal courts, one would expect to see this change made very express in the text of the Rules.[39] In one of the few recent Supreme Court decisions on the subject of inherent judicial powers, the Supreme Court held that the adoption of the Federal Rules of Civil Procedure did not displace the inherent powers of the judiciary.[40] This authority minimally suggests that inherent judicial powers are

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36. *See id.*

37. *See id.* at 1333-34; *see also, e.g.*, Chambers v. NASCO, Inc., 501 U.S. 32, 46 (1991) (noting that the inherent power of a court can be invoked even if procedural rules and statutes sanction the same conduct); Roadway Express, Inc. v. Piper, 447 U.S. 752, 765 (1980) (concluding that Federal Rule of Civil Procedure 41(b) does not limit a court's power to dismiss for failure to prosecute); Link v. Wabash R.R., 370 U.S. 626, 630 (1962) (ruling that Federal Rule of Civil Procedure 41(b) does not abrogate the power of the courts); Primus Automotive Fin. Servs., Inc. v. Batarse, 115 F.3d 644, 648 (9th Cir. 1997) (concluding that sanctionable conduct fell outside the scope of Federal Rule of Civil Procedure 11 and 28 U.S.C. § 1927, but within the court's inherent powers); Glatter v. Mroz, 65 F.3d 1567, 1575 (11th Cir. 1995) (noting that a rule "promulgated by Congress does not displace a court's inherent power to impose sanctions for a parties' [sic] bad faith conduct"); Philippines v. Westinghouse Elec. Corp., 43 F.3d 65, 74-75 (3d Cir. 1994) (concluding that courts do not need to exhaust all other sanctioning mechanisms before resorting to their inherent powers).

38. *See, e.g.*, Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 107 (1984) (finding that a Pennsylvania statute concerning the institutionalization of the retarded did not give petitioners any discretion to disregard their duties); Mackey v. Montrym, 443 U.S. 1, 5 (1979) (reading the Massachusetts Implied Consent Law to leave a police officer no discretion once a breath-analysis test had been refused); Adams v. Nagle, 303 U.S. 532, 542 (1938) (stating that when a statute vests no discretion in an executive officer, a court must compel him to act or to refrain from acting in accordance with the statute if he disregards the statutory mandate); *see also* Don LeDuc, *Michigan Administrative Law: Abridged Edition—A Michigan Administrative Law Primer*, 12 T.M. COOLEY L. REV. 21, 27 (1995) ("Agencies have no inherent power and must obtain power from the legislature through statutes . . . .").

39. *See* Weissenberger, *Interpretation of the Rules*, *supra* note 22, at 1333.

40. *See Chambers*, 501 U.S. at 50 (affirming the use of inherent powers to impose sanctions not otherwise stipulated in Federal Rule of Civil Procedure 11 or in 28 U.S.C. § 1927). For further discussion regarding *Chambers*, see Weissenberger, *Interpretation of the Rules*, *supra* note 22, at 1333-34.

incompatible with the proposition that the Federal Rules of Evidence embody statutory mandates of the variety more typically found in legislation governing society in general.[41] Admittedly, the full extent of indefeasible inherent judicial powers has not been defined clearly.[42] It nevertheless is clear that whatever power Congress might have to enact legislation that affects the internal operation of federal courts,[43] Congress's rulemaking authority would at some point collide with inherent judicial prerogatives were Congress to encroach upon the judiciary's fundamental Article III powers.[44] Although not deductively conclusive, this argument strongly suggests that any radical alteration of the judiciary's range of choices in applying evidentiary doctrines was extremely unlikely.

Finally, Federal Rule of Evidence 102 serves as the basis for a third analytic argument supporting the conclusion that the Rules should not be construed as a typical statute.[45] Rule 102 is

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41. *See* Weissenberger, *Interpretation of the Rules*, *supra* note 22, at 1336-38.

42. *See, e.g.*, Young v. United States *ex rel.* Vuitton et Fils, S.A., 481 U.S. 787, 819-20 (1987) (Scalia, J., concurring in the judgment) (stating that inherent powers are only those "necessary to permit the courts to function"); Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980) ("The inherent powers of federal courts are those which 'are necessary to the exercise of all others.'" (quoting United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812))); United States v. Rojas, 53 F.3d 1212, 1214 (11th Cir. 1995) ("[T]he exact scope of this 'inherent judicial power' is uncertain."); *In re* Stone, 986 F.2d 898, 902 (5th Cir. 1993) ("[Inherent] powers are those deemed necessary to protect the efficient and orderly administration of justice and those necessary to command respect for the court's orders, judgments, procedures, and authority."); Eash v. Riggins Trucking Inc., 757 F.2d 557, 561 (3d Cir. 1985) ("[T]he notion of inherent power has been described as nebulous, and its bounds as 'shadowy.'" (footnote omitted)).

43. *See* Weissenberger, *Interpretation of the Rules*, *supra* note 22, at 1320-21 (discussing congressional modification of specific Federal Rules).

44. *See, e.g.*, New York v. United States, 505 U.S. 144, 182 (1992) ("The Constitution's division of power among the three branches is violated where one branch invades the territory of another . . . ."); Michaelson v. United States, *ex rel.* Chicago, St. Paul, Minneapolis & Omaha Ry. Co., 266 U.S. 42, 64 (1924) (affirming that the Constitution vests courts with powers unalterable by legislation); *Stone*, 986 F.2d at 901 (explaining that any legislation purporting to interfere with the court's inherent powers under Article III would be an unconstitutional violation of the doctrine of separation of powers); Martin-Trigona v. Lavien, 737 F.2d 1254, 1261 (2d Cir. 1984) (stating that courts have a constitutional obligation to protect themselves from legislation that "impairs their ability to carry out Article III functions").

45. *See* Weissenberger, *Are the Rules a Statute?*, *supra* note 22, at 397-98, 402.

a simple, if not eloquent, rule that addresses the issue of the construction of the Federal Rules of Evidence. Amazingly, this rule has been overlooked, if not purposefully ignored, by those who advocate the use of principles applicable to statutory interpretation in construing the Federal Rules of Evidence.[46] The importance of Rule 102 in the interpretation of the Rules is central because it supplies the interpretive directive by which all other Rules are to be construed. Rule 102 provides:

> These Rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.[47]

As I have stated previously regarding this rule:

> Rather than containing any message whatsoever about applying such statutory interpretation doctrines as "legislative intent" and the preemption of the common law, Rule 102 articulates values which have historically been recognized as guiding and inspiring the application of evidentiary rules. Most important, Rule 102 does not say: "hold fast, remain static, and do not expand upon the text of the rules." Rather, it could not be clearer in its language in contemplating "the growth and development of the law of evidence" in the construction of the Rules. . . . I cannot escape an interpretation of the phrase "growth and development of the law of evidence" as one which authorizes the development of novel evidentiary doctrines. Growth cannot be achieved but through these evidentiary principles, preserved in case law precedent.[48]

The convergence of the three preceding arguments strongly suggests that the characterization of the Federal Rules of Evidence

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46. *See* Mark D. Rosen, *What Has Happened to the Common Law?—Recent American Codifications, and Their Impact on Judicial Practice and the Law's Subsequent Development*, 1994 WIS. L. REV. 1119, 1195 (noting that Professor Imwinkelried's article, *supra* note 24, "makes no reference at all to Rule 102"); *supra* note 7.

47. FED. R. EVID. 102.

48. Weissenberger, *Are the Rules a Statute?*, *supra* note 22, at 398 (footnotes omitted).

as a typical statute is not supported by the nature of federal courts or the text of the Rules.

Where my earlier articles have sought to explicate analytic and policy reasons to support the thesis that the Federal Rules of Evidence should not be interpreted with principles attendant to statutory interpretation, this Article seeks to substantiate one additional proposition supported by historical facts: The Federal Rules of Evidence represent a codification of preexisting common law and, as such, the Federal Rules have a unique identity that should inform their interpretation. Moreover, because of the distinct ethos of the Federal Rules, Rule 102 occupies a special status in the constellation of evidentiary rules.[49] Rule 102, the only rule in the Federal Rules of Evidence in which "intent" or "purpose" matters, essentially commands that the text of the Federal Rules of Evidence not be treated as the text of a statute.[50] Consequently, the Rules should not be approached with the design of discerning intent or meaning from the text, from extrinsic sources, or from both.[51] As a codification of the common law, the text of the Federal Rules of Evidence serves a distinct nonstatutory purpose in articulating an index of the development of the law of evidence, which facilitates the continued growth of evidence law commanded by Rule 102. Although this approach to interpreting the Federal Rules of Evidence may seem radical in the age of statutes, it gains compelling support from this country's history of the codification of common law.[52]

Before turning to this historical analysis, it is appropriate to ask: What is at stake in this debate? Does it really matter whether the Federal Rules of Evidence are construed as a statute? Will embracing the premise that the Federal Rules of Evi-

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49. *See infra* text accompanying notes 111-19.

50. *See infra* text accompanying notes 155-61.

51. *But see* Imwinkelried, *supra* note 7, at 418-19 (arguing that the legislative history and historical context of the Rules weighs strongly in favor of attaching great relative weight to the text of the Rules); Scallen, *Classical Rhetoric*, *supra* note 7, at 1748 (advocating examination of all relevant sources, including the text of the Rules, the intent of the drafters, and the historical context of the Rules); Taslitz, *Politically Realistic Hermeneutics*, *supra* note 7, at 389, 394 (maintaining that the "intent" or "purpose" of the Rules is often ascertainable from legislative history, the Advisory Committee Notes, and chamber committee reports).

52. *See infra* text accompanying notes 120-99.

dence are a typical statute result in no adverse consequences? In attempting to answer these questions, commentators have identified systemic problems in interpreting the Federal Rules of Evidence as a typical statute.[53] For example, one commentator argues that construing the Federal Rules of Evidence as a typical statute will inhibit the growth of evidence law.[54] More specifically, a statutory approach to the Federal Rules of Evidence will necessarily mean that their interpretation will be inescapably text-bound.[55] On one level, a text-bound approach deprives the Rules of flexibility and adaptability.[56] On a more significant level, however, a text-bound approach may result in the wholesale elimination of a multitude of important pre-Rules common-law doctrines that are not expressly preserved on the face of the text of the Rules.[57] In regard to this latter point, Professor Imwinkelried has argued, commencing with the Rules-as-statute premise, that federal courts of appeals have no authority to engraft principles of exclusion on the express text of the Rules.[58] According to Professor Imwinkelried, the preexisting common law has been legislated away, and the express text precludes the creation of new doctrines that would further delimit admissibility

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53. *See* Becker & Orenstein, *supra* note 7, at 867-68; Jonakait, *supra* note 7, at 551-53; Rosen, *supra* note 46, at 1194-96.

54. *See* Rosen, *supra* note 46, at 1196.

55. *See* Imwinkelried, *supra* note 7, at 412 ("[I]n a relative sense, the text is entitled to far more weight [than extrinsic materials]."); Scallen, *Classical Rhetoric*, *supra* note 7, at 1751 ("[L]ooking to the text first provides some degree of continuity and stability."); Scallen & Taslitz, *supra* note 10, at 429 (concluding that they and Professor Imwinkelried "all agree that the text of a rule deserves the most weight"); Taslitz, *Politically Realistic Hermeneutics*, *supra* note 7, at 394 ("[S]tatutory text deserves special weight.").

56. *See* Randolph N. Jonakait, *The Supreme Court, Plain Meaning, and the Changed Rules of Evidence*, 68 TEX. L. REV. 745, 784-86 (1990).

57. *See* Imwinkelried, *supra* note 24, at 271 ("[I]f a common-law exclusionary rule has not been codified in the text of the Federal Rules of Evidence, the Court has uniformly held that the rule is no longer good law.").

58. *See id.* at 273-75, 279-81, 289-92. Ultimately, Professor Imwinkelried believes that empowering appellate courts to formulate general exclusionary evidentiary Rules would threaten trial court discretion. *See id.* at 290. Consequently, he sees the limitation on engrafting inadmissibility doctrines on the Rules as desirable. *See id.* at 294. Preserving trial court discretion is indeed a laudable goal; however, there are numerous ways of accomplishing that end without depriving the Rules of Evidence of a flexible and expansive application. For further examination of this specific problem, see *infra* notes 183-99 and accompanying text.

beyond the express language of the Rules themselves.[59] Ultimately, however, treating the Federal Rules of Evidence as a statute will result in courts abdicating their time-honored role in crafting the law of evidence. If courts treat the Federal Rules of Evidence as a statute, they will defer to the legislative branch as the arbiter of evidentiary policy when confronted with the inevitable indeterminacy of the text of the Rules.[60] This reversal of traditional roles flies in the face of historical wisdom, and it is incongruous with the design of the Federal Rules of Evidence.[61] Consequently, the debate among Professor Imwinkelried, myself, and several other commentators is not merely academic. It ultimately sheds light on the ability of courts to promote the growth and development of the Federal Rules of Evidence, as contemplated by the express mandate of Rule 102.

This debate also will influence the way in which the positive aspects of statutes affect the landscape of evidence law, and it

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59. *See* Imwinkelreid, *supra* note 24, at 273-75. Courts in California have been reluctant to exercise powers, even inherent powers, when the California legislature has spoken on the same matter. *See* People v. Municipal Court, 574 P.2d 425, 427 (Cal. 1978) ("The exercise of a judicial power . . . which inheres in courts when the Legislature is silent must be tempered and restrained when the Legislature has spoken. . . . '[I]nherent powers should never be exercised in such a manner to nullify existing legislation or frustrate legitimate legislative policy.'" (quoting Ferguson v. Keays, 484 P.2d 70, 73 (Cal. 1971)) (emphasis omitted)). Thus, upon the creation of the California Evidence Code, California courts referred to the Code as the "sole and authoritative arbiter of all matters which come within its purview." Pitchess v. Superior Court, 522 P.2d 305, 311 (Cal. 1974). The legislature's resolution of competing interests, as contained in the Code, is understood as binding on California courts because the legislature undertook the role of drafting the Evidence Code. *See* Lemelle v. Superior Court, 143 Cal. Rptr. 450, 457 (Ct. App. 1978). In this regard, Professor Imwinkelried has correctly pointed out that California's uncodified exclusionary rules of evidence were abolished upon the enactment of the California Evidence Code, a code that bears little resemblance to the Federal Rules of Evidence, both in its adoption and application. *See* Imwinkelried, *supra* note 24, at 277. By attempting to engraft the experience of California upon the interpretation of the Federal Rules of Evidence with regard to the rulemaking authority of federal courts, Professor Imwinkelried fails to appreciate the differences between the California Evidence Code and the Federal Rules of Evidence. The fact that California is Professor Imwinkelried's home may help explain his perception of the Federal Rules of Evidence.

60. *See* HART & SACKS, *supra* note 21, at 413-14; Eskridge & Frickey, *supra* note 21, at 332; Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 426-28 (1989).

61. *See infra* notes 120-65 and accompanying text.

will sharpen the analysis of statutes that affect evidentiary issues. Statutes can secure several benefits that are unique to their identity and origin. They can, for example, clear away preexisting law and provide future predictability.[62] In addition, statutes can promote evenhanded justice in every context and forum in which they are applied.[63] Convincing historical evidence, however, indicates that the judicial and legislative branches did not collaborate in the promulgation of a statute in creating the Federal Rules of Evidence.[64] Rather, these branches joined to create a codification of the preexisting common law, which occupies an extraordinary position in the law.[65] As the following sections of this Article address, such codes have unique attributes that distinguish them from statutes, both in design and in operation.

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62. *See, e.g.*, Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 621 (1978) ("[The Death on the High Seas Act] brought a measure of uniformity and predictability to the law . . . ."); United States v. Marion, 404 U.S. 307, 322 (1971) ("[S]tatutes [of limitation] provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced."); Gable v. Sweetheart Cup Co., 35 F.3d 851, 857 (4th Cir. 1994) ("Congress expressed [an] 'emphatic preference for written agreements' in ERISA in order to establish predictability as to an employer's future obligations." (quoting Coleman v. Nationwide Life Ins. Co., 969 F.2d 54, 58 (4th Cir. 1992))); American Tel. and Tel. Co. v. FCC, 836 F.2d 1386, 1394 (D.C. Cir. 1988) (Starr, J., concurring) ("An examination of the [Communications Act] as a whole makes crystal clear that the schedule filed by a carrier serves as the foundation by which Congress' regulatory scheme achieves stability, predictability, and protection of the public interest."); *see also* John Fellas, *Reconstructing Law's Empire*, 73 B.U. L. REV. 715, 763 (1993) ("[C]lear statutes and precedents secure predictability . . . ."); Teresa Moran Schwartz, *The Role of Federal Safety Regulations in Products Liability Actions*, 41 VAND. L. REV. 1121, 1137 n.61 (1988) ("Courts and scholars also recognize that the use of statutory and regulatory standards to define common-law liability can add clarity and predictability to the tort system.").

63. *See, e.g.*, Community for Creative Non-Violence v. Reid, 490 U.S. 730, 740 (1989) ("'[F]ederal statutes are generally intended to have uniform nationwide application.'" (quoting Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 43 (1989))); North Carolina Dep't of Transp. v. Crest St. Community Council, Inc., 479 U.S. 6, 18 (1986) (Brennan, J., dissenting) ("Section 1988 is designed to 'achieve uniformity in those statutes and justice for all citizens.'" (quoting H.R. REP. NO. 94-1558, at 9 (1976))); Grubbs v. General Elec. Credit Corp., 405 U.S. 699, 705 (1972) ("[T]he removal statutes and decisions of this Court are intended to have uniform nationwide application.").

64. *See infra* text accompanying notes 120-29.

65. *See infra* text accompanying notes 89-119.

II. EVIDENCE MYOPIA: THE FAILURE TO RECOGNIZE THAT THE FEDERAL RULES OF EVIDENCE ARE A PERPETUAL INDEX CODE

A. The Lesson from History: The Federal Rules of Evidence Are a Perpetual Index Code

The title of this Article was inspired by an article written by my colleague, Professor Paul Caron of the University of Cincinnati College of Law. In *Tax Myopia, or Mamas Don't Let Your Babies Grow Up to be Tax Lawyers*, Professor Caron states: "Until we start opening up the tax law to the light of nontax insights, we cannot expect the public to treat us like our nontax counterparts."[66] Professor Caron convincingly argues that the resolution of significant issues in the law of taxation would be better served if the tax law community were informed by scholarship not directed exclusively to the audience of tax lawyers and tax scholars.[67] The message for tax scholars also should resonate with evidence scholars.[68]

Evidence myopia in the interpretation of the Federal Rules of Evidence springs from identifiable sources: Contemporary evidence scholars appear to be overly influenced by the literature on the interpretation of legislative enactments that surrounds them in an age of statutes; simultaneously, they have lost sight of the literature that informed the culture and climate at the time of the true origins of the Federal Rules of Evidence. Impressive scholarship provides illumination from an historical perspective that the Federal Rules of Evidence are the result of a process that was designed to build upon the extant common law.[69] This codification of the common law has been aptly de-

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66. Paul L. Caron, *Tax Myopia, or Mamas Don't Let Your Babies Grow Up to Be Tax Lawyers*, 13 VA. TAX REV. 517, 589 (1994).

67. *See id.*

68. Professor Caron's plea for eclecticism is echoed in Rosen, *supra* note 46, at 1247-48. Rosen predicts: "As law students' and practitioners' knowledge of evidence law becomes increasingly identified with mastery of the Federal Rules of Evidence, it becomes dangerously likely that evidentiary myopia will only advance." *Id.* at 1248.

69. *See id.* at 1137-60. A code may operate as the "culmination of the pre-code materials," as seen in the Federal Rules of Evidence. *Id.* at 1176-77. Development of this code "takes place in the hybrid soil of the Code and the pre-Code legal materials." *Id.* at 1177. A code may comport to "break[] from pre-code archaic law" as in the case of the Uniform Commercial Code. *Id.* at 1178. Under this form of code, the

scribed by one commentator, Mark Rosen, as "the legislative pronouncement of previously fluid judge-made law in an organized and authoritative form."[70]

Before examining the unique process surrounding the actual development of the Federal Rules of Evidence, it may be helpful to review briefly the distinctive characteristics of codes. Codification is an ancient phenomenon that lacked a universal definition and format until the Napoleonic French Code in the beginning of the nineteenth century.[71] The French Civil Code was the first example of modern "true codification," a comprehensive and exclusive set of rules governing one or several areas of the law.[72] Although this method of codification became prevalent in European civil-law nations,[73] it was not widely accepted in common-law countries.[74] Several leading proponents of codification in the

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antecedent common law is not codified away, but retains a "not insubstantial legal continuity" with the Code. *Id.*

70. *Id.* at 1127; *see also* Bruce Donald, *Codification in Common Law Systems*, 47 AUSTL. L.J. 160, 161 (1973) (describing codification in its most general sense as a "systematic collection or formulation of law, reducing it from a disparate mass into an accessible statement which is given legislative rather than mere judicial or academic authority").

71. *See* Jean Louis Bergel, *Principal Features and Methods of Codification*, 48 LA. L. REV. 1073, 1074 (1988). Hammurabi's Code in Babylon and both the Sumerian and Accadian Codes were compilations meant to supplement custom, not supersede preexisting law. *See id.* at 1073. Roman law codes, such as the Gregorian Code, Theodosian Code, and Justinian Code were composed of texts and doctrinal writings. *See id.* Additionally, Russia and some Nordic countries had ancient codes. *See id.*

72. *See id.* at 1074; Donald, *supra* note 70, at 165; Wienczyslaw J. Wagner, *Codification of Law in Europe and the Codification Movement in the Middle of the Nineteenth Century in the United States*, 2 ST. LOUIS U. L.J. 335, 340-41 (1953).

73. *See* Bergel, *supra* note 71, at 1075. Among the countries adopting the French Civil Code's method of codification are Belgium, Luxemburg, Holland, Italy, Portugal, Spain, Brazil, Argentina, Lebanon, and Germany. *See id.*

74. *See id.* at 1076. Jeremy Bentham was the primary proponent of codification in the early nineteenth century. *See* Donald, *supra* note 70, at 164. In 1811, he even went so far as to draft a comprehensive code for the United States in a letter to President James Madison. *See* Jeremy Bentham, *An Offer to Codify the Law of the United States, reprinted in* PAPERS RELATIVE TO CODIFICATION AND PUBLIC INSTRUCTION 1 (London, J. McCreery 1817). Although Bentham's efforts ultimately were rejected, later codification efforts by David Dudley Field did result in the adoption of civil codes in California, North Dakota, South Dakota, Georgia, and Montana. *See* Bergel, *supra* note 71, at 1076; Wagner, *supra* note 72, at 353-54. The eventual failure of many of these Field Codes

United States developed a species of code that was distinct from codes advocated by their continental European counterparts.[75] This historical development of the codes in the United States has been described by one scholar in these words:

> From the period following the Civil War and well into this century the codification movement resulted mainly in the enactment of statutes which were intended simply to compile the common law. The codification process was understood as a means of providing access to the prevailing wisdom, and purging the common law of "impurities."[76]

Consequently, in the United States, codes assumed an identity that was distinguishable from continental models and that was derived uniquely from this country's common law heritage.

Codification has historically fallen into certain identifiable patterns,[77] each of which has an identity and function quite dif-

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> highlights the immense difficulty of adopting this methodology in an already active common law system. A basic problem with the Field Civil Code . . . was that it restated many existing principles in completely new terminology which was extremely confusing, especially in light of the idea that pre-existing law, where untouched, would continue to govern.

Donald, *supra* note 70, at 167-68.

75. The Story Commission submitted a report to the Governor of Massachusetts in 1837 in which it recommended that the law of evidence, along with other areas of the law, be codified. *See* JOSEPH STORY ET AL., CODIFICATION OF THE COMMON LAW 25, 44 (New York, John Polhemus 1882). The Story Commission's approach to codification was radically different from that advanced by Bentham. Under Story's approach, codification was simply a means of dealing with the growing common law. *See* GRANT GILMORE, THE AGES OF AMERICAN LAW, 26-27 (1977). The Commission stated that the code was to be "interpreted and applied to future cases, as a Code of the common law of Massachusetts. . . . It is to be deemed an affirmance of what the common law now is . . . ." STORY ET AL., *supra*, at 44. The Commission's Report also noted that the common law was to govern in situations not provided for by the code. *See id.*

76. Ronald J. Allen, *The Explanatory Value of Analyzing Codifications by Reference to Organizing Principles Other Than Those Employed in the Codification*, 79 NW. U. L. REV. 1080, 1080 n.1 (citing GILMORE, *supra* note 75, at 69-73).

77. *See* Rosen, *supra* note 46, at 1200. Development of a codified area of law is manifest in three code characteristics: the unique scope of each code, the arrangement of each code's materials in accordance with a particular organizing scheme, and the philosophical approach to the doctrinal field. *See id.* at 1200-01. According to Rosen, the failure of scholars to recognize these characteristics of the codified law has hindered the development of the Federal Rules of Evidence. *See id.* at 1213-16, 1241. First, the approach of evidence scholars in taking as a given the law that is

ferent from that of a typical statute.[78] Although there is no universal agreement on the nomenclature for the different types of codes,[79] scholars generally agree on the characteristics of the different types of codes.[80] For the sake of convenience, this Article adopts the nomenclature system refined by Rosen, which identifies four types of codes: the fully comprehensive code;[81] the field comprehensive code;[82] the meta-scheme model;[83] and the perpetual index model.[84] Historical evidence substantiates that nearly all modern codifications in the United States belong to the perpetual index model.[85] Joseph Story described this model as a "*perpetual index* to the known law, gradually refining, enlarging and qualifying its doctrines, and, at the same time bringing them together in a concise and positive form for public use."[86] Under the perpetual index paradigm, a "code is a clari-

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most determinative of their field of expertise has limited both the creativity and scope of evidentiary principles. *See id.* at 1213. Second, the failure of scholars to recognize admissibility as the organizing principle of the Federal Rules of Evidence has created confusion in properly interpreting the Rules. *See id.* at 1214-15. Finally, the development of the Federal Rules of Evidence has been hindered by inattention to adversarialism, the spirit of the Rules. *See id.* at 1241-44.

78. *See id.* at 1127 n.13.

79. *See* Bergel, *supra* note 71, at 1076-77 (identifying two types of codification—substantive codification and formal codification); Donald, *supra* note 70, at 164 (identifying three forms of codes: the complete comprehensive code, the institutional comprehensive code, and the partial comprehensive code); Rosen, *supra* note 46, at 1127 (identifying four forms of codes: the fully comprehensive code, the field comprehensive code, the meta-scheme model, and the perpetual index model).

80. Varieties of codes range from those that supersede all areas of preexisting law to those that serve as an organizing tool for the preexisting law in a particular area. *See* Bergel, *supra* note 71, at 1077, 1092; Donald, *supra* note 70, at 164-69; Rosen, *supra* note 46, at 1127-37.

81. *See* Rosen, *supra* note 46, at 1127. The fully comprehensive code presupposes that the whole body of private law is contained within the code, and its interpretive focus is on the text of the code. *See id.* at 1127, 1129.

82. *See id.* at 1129. The field comprehensive code views itself as comprehensive within its doctrinal field such that it is the exclusive source of law; however, it does not purport to digest all of the private law. *See id.*

83. *See id.* at 1135. The meta-scheme model "asserts that the primary significance of a code is that it organizes the legal materials, making 'a philosophically arranged *corpus juris* possible.'" *See id.* (quoting Oliver Wendell Holmes, *Codes, and the Arrangement of the Law*, 5 AM. L. REV. 1, 2 (1870-71), *reprinted in* 44 HARV. L. REV. 725, 726 (1931)).

84. *See id.* at 1135, 1195-96.

85. *See id.*

86. STORY ET AL., *supra* note 75, at 46 (emphasis added).

fying aid rather than a final statement"; it serves as "a vehicle for facilitating the law's continued growth."[87] Historically, this type of codification was considered useful because it "facilitate[d] access to the law without stifling the law's development."[88]

The dynamics of the unique process of common law codification in the United States have eluded contemporary evidence scholars,[89] as well as the United States Supreme Court.[90] This loss of perspective is somewhat surprising because impressive historical evidence substantiates the conclusion that there are only two federal codes: the Federal Rules of Evidence and the Federal Rules of Civil Procedure.[91] At some point in time between the development of the predecessors of the Federal Rules of Evidence—i.e., the Model Code and the Uniform Rules of Evidence—and the proliferation of scholarship and judicial decisions concerning the interpretation of the Federal Rules of Evidence, evidence scholars and the Supreme Court appear to have lost

87. Rosen, *supra* note 46, at 1132; *see* SIR CARLETON KEMP ALLEN, LAW IN THE MAKING 476 (7th ed. 1964) (defining a code as a restatement of the law that has the authority of a statute); Bergel, *supra* note 71, at 1076 (arguing that codes in common law systems "have as their main objective the identification and classification of pre-existing rules").

88. Rosen, *supra* note 46, at 1132.

89. *See supra* notes 12-21 and accompanying text. At least one evidence scholar mistakenly has described the Federal Rules as a self-contained civil law code. *See* Edward J. Imwinkelried, *The Meaning of Probative Value and Prejudice in Federal Rule of Evidence 403: Can Rule 403 Be Used to Resurrect the Common Law of Evidence?*, 41 VAND. L. REV. 879, 883 (1988). There is little question that a codification of law can assume this form. *See, e.g.*, FRANZ WIEACKER, A HISTORY OF PRIVATE LAW IN EUROPE 371 (Tony Weir trans., 1995) (illustrating the German civil law code); Bergel, *supra* note 71, at 1074 (noting a self-contained civil law code in the Napoleonic Code); Donald, *supra* note 70, at 164 (discussing complete comprehensive codes); Rosen, *supra* note 46, at 1176 (arguing that political factors gave rise to a civil law code that governed to the exclusion of pre-Code law in France and Germany); Wagner, *supra* note 72, at 342 (examining the historical background of the French Civil Code). The historical evidence pertinent to the conception and adoption of the Federal Rules, however, is overwhelmingly to the contrary. *See* David J. Langum, *Uncodified Federal Evidence Rules Applicable to Civil Trials*, 19 WILLIAMETTE L. REV. 513, 531 (1983) ("Historically, almost the entire law in this field was judicially created."); Rosen, *supra* note 46, at 1176-77; *infra* notes 120-65 and accompanying text. Continental self-contained codes are in fact nonexistent at the federal level in this country. *See* Rosen, *supra* note 46, at 1195-96.

90. *See supra* text accompanying notes 2-9.

91. *See* Rosen, *supra* note 46, at 1196 n.296.

sight of the underpinnings of the codification movement in the United States.[92] This myopia is particularly remarkable because the literature concerning codification is not obscure. The writing of influential scholars such as Story, Pomeroy, and Llewellyn during the latter half of the nineteenth century and the first half of the twentieth century frequently addressed the universally understood principle that a code is subject to unique hermeneutics because of its integral connection to, and derivation from, the antecedent common law.[93]

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92. *See supra* note 89.

93. *See* STORY ET AL., *supra* note 75, at 44. Other scholars of great magnitude shared Story's understanding of a perpetual index code. *See* KARL LLEWELLYN, THE CASE LAW SYSTEM IN AMERICA § 47, at 67 (Paul Gewirtz ed. & Michael Ansaldi trans., University of Chicago Press 1989) (1933); JOHN NORTON POMEROY, THE "CIVIL CODE" IN CALIFORNIA (1885), *microformed on* 19th Century Legal Treatises, No. 788 (Research Publications); *cf.* GILMORE, *supra* note 75, at 108-09 (noting the difficulties of a formalistic approach to law in which judges are precluded from going beyond the statute). John Norton Pomeroy, in a series of articles on the interpretation of the California Civil Code, addressed the judiciary's role in the proper interpretation of the Code. The courts were left the task of delineating the boundaries and defining the meaning of the Code because the Code was not comprehensive. *See* POMEROY, *supra*, at 45. A proper interpretation would construe the Code in a manner that would retain the "distinguishing element of the common law, and one of its highest excellencies . . . its elasticity." *Id.* at 52. The Code, according to Pomeroy, should be construed as a "mere statement of the common law doctrines unchanged, with all its consequences, unless from the unequivocal language of the provision a clear and certain intent appeared to alter the common law rule." *Id.* at 50. Rather than merely stating the common law, though, Pomeroy argued that a code should contain a provision for adjustment so that an unjust or inequitable decision would not result from blind adherence to the language of the code. *See id.* at 53. The codified common law, then, was not static, but should possess "the inherent power of adaptation." *Id.* Karl Llewellyn shared this prospective view of codification. According to Llewellyn, the development of case law inevitably called for a statute, yet the statute was not an end unto itself, but served as the starting point for future development. *See* LLEWELLYN, *supra*, § 47, at 67 ("Optimally, a statute will create a new goal and a new means to achieve it, but never the ultimate particularized solution which is finally achieved—knowingly or unknowingly, admitted or kept under wraps—only through judicial decision."). Grant Gilmore discarded a formalistic approach to legal interpretation, asserting that such an approach promotes the idea that courts, without legislative approval, are constrained from judicial innovation. *See* GILMORE, *supra* note 75, at 109. Gilmore asserted:

> The function of law . . . is to provide a mechanism for the settlement of disputes in the light of broadly conceived principles on whose soundness, it must be assumed, there is a general consensus . . . [S]o long as the consensus exists, the mechanism which the law provides is designed to insure that our institutions adjust to change, which is inevitable, in a

After overcoming myopia by drawing upon the work of scholars who have carefully analyzed the various types of codes, it is apparent that the Federal Rules of Evidence fit squarely in the perpetual index category.[94] Under this perpetual index model, the code is not "construed . . . in derogation of the common law," but is "expanded in conscious reference to the antecedent common law."[95] The very same techniques used to expand the common law apply to the forward application of the code, unless the code explicitly indicates that it is modifying specific provisions of the extant common law.[96]

Consequently, the code is construed and expanded in a manner quite different from that applicable to statutes. The facial qualities of the Federal Rules of Evidence convincingly demonstrate that the Rules fit within the perpetual index model. Any hermeneutical approach that would view the Rules as a wholesale displacement of the common law is manifestly inconsistent with the structure of the Federal Rules of Evidence. In contrast to the vast body of evidence law, the Federal Rules of Evidence are, at best, skeletal.[97] As pointed out by Professor Jon R. Waltz,

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> continuing process which will be orderly, gradual, and, to the extent that such a thing is possible in human affairs, rational.

See id. at 109-10.

94. *See* Rosen, *supra* note 46, at 1195-96.

95. *Id.* at 1134; *see also* POMEROY, *supra* note 93, at 50 (offering a general principle of interpretation that the common law should remain unchanged unless there was a "clear and certain intent" to alter it); Bergel, *supra* note 71, at 1076 (noting that in common law systems, interpretation of codes is "based on the pre-existing law rather than on the proper legislative purpose that they express or the policy that they reflect"); Wagner, *supra* note 72, at 358 (stating that although European codes were not examined "in the light of the preexisting law . . . the contrary happened" in the United States).

96. *See* Rosen, *supra* note 46, at 1135. Alternative hermeneutical approaches for interpreting perpetual index codes include the view that the code displaces pre-code common law. *See id.* Under this model, the code provides the platform on which future growth is built. *See id.* Another variation is that the code, by virtue of its own internal language, displaces the common law in regard to all matters that it expressly addresses. *See id.* Under this hermeneutical approach, the rule of decision is furnished by the common law with respect to matters not expressly covered by the code. *See id.*

97. *See* Margaret A. Berger, *The Federal Rules of Evidence: Defining and Refining the Goals of Codification*, 12 HOFSTRA L. REV. 255, 255 (1984) (noting that the Federal Rules of Evidence are not comprehensive, but rather set forth general principles or standards); Thomas M. Mengler, *The Theory of Discretion in the Federal Rules of*

Dean Wigmore's classic treatise on evidence included several volumes; in comparison, the text of the Federal Rules of Evidence can be printed on a handful of pages.[98] The Federal Rules of Evidence simply cannot be understood without the benefit of antecedent common law. One of the most indispensable roles of the preexisting common law is to supply meaning to numerous terms of art used throughout the Rules, and the Federal Rules of Evidence would be dysfunctional in the absence of these definitions.[99] For example, the entire hearsay system of Article VIII would be incomprehensible were it not for the common law definitions of numerous terms, such as "truth," "statement," "utterance," "intend," and "verbal."[100]

Beyond the structure of the text of the Rules, the Advisory Committee Notes demonstrate that the Rules are the culmination and index of antecedent common law. Whatever may be the appropriate role of the Advisory Committee Notes in interpreting the Federal Rules of Evidence,[101] a reading of the Notes reveals that they rely heavily upon antecedent common law.[102] In

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Evidence, 74 IOWA L. REV. 413, 427 (1989) (referring to the Rules as a "handy pamphlet").

98. *See* Jon R. Waltz, *Judicial Discretion in the Admission of Evidence Under the Federal Rules of Evidence*, 79 NW. U. L. REV. 1097, 1097-98 (1984).

99. *See* Weissenberger, *Are the Rules a Statute?*, *supra* note 22, at 399. As I previously have written:

> The day the Federal Rules of Evidence went into effect, the language of the Rules was not lifeless, and courts were not befuddled by their application. Indeed every trial judge had a sense of how to apply such undefined words as "plain error" in Rule 103(d), "condition of fact" in Rule 104(b), "adjudicative facts" in Rule 201(a), "probative value" in Rule 403, "character" in Rule 404, "habit" in Rule 406, "competent" in Rule 601, "assist" in Rule 702, "excitement" in Rule 803(2), and "impending" in Rule 804(b)(2).

Id.

100. *See* Glen Weissenberger, *Reconstructing the Definition of Hearsay*, 57 OHIO ST. L.J. 1525, 1541 (1996) ("[Rule 801] likewise relies upon the context of a long history of common law development, without which the rule would be indecipherable.").

101. *See* Scallen, *Use and Abuse*, *supra* note 7, at 1296 ("Justice Kennedy [in *Tome v. United States*, 513 U.S. 150 (1995)] pointed out that the Advisory Committee drew heavily upon the common law as portrayed in the work of Wigmore and McCormick . . . .").

102. *See, e.g.*, FED. R. EVID. 403 advisory committee's note ("[Rule 403] does not enumerate surprise as a ground for exclusion . . . following Wigmore's view of the common law."); FED. R. EVID. 602 advisory committee's note ("'[T]he rule requiring

an effort to define the scope and meaning of the Rules, the Advisory Committee Notes repeatedly refer to preexisting evidence literature and preexisting case law.[103] In this context, the late Professor Edward Cleary wrote a well-known article that addressed the interpretation of the Federal Rules of Evidence.[104] Discreet passages of Cleary's article are cited frequently by evidence scholars as well as by courts in an effort to substantiate the appropriate role of preexisting common law in the interpretation of the Federal Rules of Evidence.[105] Although different scholars have found different messages in Professor Cleary's language,[106] his article suggests an integral and indispensable role

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that a witness who testifies to a fact which can be perceived by the senses must have had an opportunity to observe, and must have actually observed the fact' is a 'most pervasive manifestation' of the common law . . . .") (quoting CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 19 (1954)); FED. R. EVID. 901(b) advisory committee's note ("The treatment of authentication and identification draws largely upon the experience embodied in the common law . . . .").

103. *See, e.g.*, FED. R. EVID. 201 advisory committee's note (noting that the advisory committee's discussion of adjudicative and legislative facts "draws extensively upon [the] writings" of Professor Kenneth Davis); FED. R. EVID. 402 advisory committee's note (quoting JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 264 (1898)); FED. R. EVID. 703 advisory committee's note (citing Paul D. Rheingold, *The Basis of Medical Testimony*, 15 VAND. L. REV. 473, 489 (1962)); FED. R. EVID. 706 advisory committee's note (citing Elwood S. Levy, *Impartial Medical Testimony—Revisited*, 34 TEMP. L.Q. 416 (1961)); FED. R. EVID. 1008 advisory committee's note (citing A. Leo Levin, *Authentication and Content of Writings*, 10 RUTGERS L. REV. 632, 644 (1956)).

104. *See generally* Cleary, *supra* note 29 (arguing that the Federal Rules of Evidence are applied by means of judicial interpretation).

105. *See, e.g.*, Tome v. United States, 513 U.S. 150, 168 (1995) (Scalia, J., concurring) (reiterating *Daubert*'s reliance on Cleary's position); Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 587-88 (1993) (recognizing previous references by the Court to Cleary's article); Bourjaily v. United States, 483 U.S. 171, 187 (1987) (Blackmun, J., dissenting) (noting Cleary's article to reject the majority's reliance on the "plain meaning" of the rule); United States v. Abel, 469 U.S. 45, 51-52 (1984) (citing Cleary's article to support the notion that one could impeach a witness on the basis of bias because such impeachment is consistent with common law principles); Imwinkelried, *supra* note 7, at 394 (quoting Cleary in support of the strength of the Advisory Committee Notes).

106. *Compare* Weissenberger, *Interpretation of the Rules*, *supra* note 22, at 1330-31 ("[T]he preservation or engraftment of additional evidentiary doctrines and principles was . . . specifically contemplated as integral to the structural scheme of the Rules . . . Professor Cleary . . . stated: '[i]n reality . . . the body of common law knowledge [of evidence] continues to exist, though in the somewhat altered form of a source of guidance . . . .'" (quoting Cleary, *supra* note 29, at 915)), *with*

for the preexisting common law: "In principle, under the Federal Rules no common law of evidence remains. . . . In reality, of course, the body of common law knowledge continues to exist, though in the somewhat altered form of a source of guidance in the exercise of delegated powers."[107] The simple fact is that the Federal Rules of Evidence would be incomprehensible to anyone who did not understand the broad common-law landscape of evidence law that preceded the adoption of the Federal Rules of Evidence. Many, if not most, Rules only make sense if they are construed in the context of the common law they codify,[108] and the Advisory Committee Notes document this proposition by demonstrating a conscious awareness of the indispensable role of the preexisting common law.[109] The compression of evidence law into a brief code would not have been possible without the vitality of the underlying and preexisting common law that continues to animate the Rules in their application.[110]

Although historical evidence concerning the codification movement in the United States provides the greatest insight into the identity of the Federal Rules of Evidence as a perpetual index code, Rule 102, "Purpose and Construction,"[111] further reinforces this conclusion. Provisions like Rule 102 are not only a common denominator of virtually all perpetual index codes;[112] they also are critical to understanding the function and interpretation of

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Imwinkelried, *supra* note 24, at 287-88 ("Professor Cleary . . . noted an early post-Rules case applying the clear and convincing evidence standard under Rule 404(b) . . . [and] condemned the case as unjustifiably 'engrafting a further requirement' onto the text of the statute." (quoting Cleary, *supra* note 29, at 917)).

107. Cleary, *supra* note 29, at 915.

108. For example, Rule 613 is only comprehensible as changing the common law if the preexisting common law is understood. *See* GLEN WEISSENBERGER, FEDERAL RULES OF EVIDENCE 321 (1996-97 ed.) ("The prior practice in some Federal Courts was to follow the rule established in *Queen Caroline's* case. . . . Rule 613, however, dispenses with the *Queen's* Rule in favor of a procedure which is designed to enhance the effective use of cross-examination.").

109. *See* Rosen, *supra* note 46, at 1131-35, 1161, 1187-96.

110. *See id.* at 1171-72.

111. FED. R. EVID. 102.

112. *See* Rosen, *supra* note 46, at 1179-86; *see also* FED. R. CIV. P. 1 (providing the scope and purpose of the rules); FED. R. EVID. 102 (noting the purpose and construction of the rules); UNIF. PROBATE CODE § 1-102 (illustrating the rules of construction).

the code.[113] Typically, if a code is intended to allow judicially-led expansion and development of codified law, a "purpose" provision will stipulate that intention.[114] Accordingly, Rule 102 expressly invites, if not commands, such judicial activism.[115] In this context, the express and literal language of Rule 102 is direct and clear: "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that truth may be ascertained and proceedings justly determined."[116] Understanding the literal import of Rule 102 must be extremely elusive, because evidence scholars who have studied the Federal Rules of Evidence have manifested a chronic proclivity to avoid this Rule.[117] When considered with the benefit of an historical perspective that appreciates the process of the codification of the common law in the United States, however, Rule 102 is clearly unique among all of the Federal Rules of Evidence. As is typically the case in codes, the "Purpose and Construction" rule, Rule 102, is the only rule in the Federal Rules of Evidence that contains an express mandate.[118] This mandate of Rule 102 must be applied literally, and if it is, the remainder of the Rules will not be interpreted as typical statutes. Interestingly, logical and deductive reasoning commands this result. Either Rule 102 is to be taken literally in such a way that the express text of the various Rules does not operate as an impasse to the mandated growth and development of evidence

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113. *See* Rosen, *supra* note 46, at 1179-86 (discussing code provisions permitting equitable adjustments to vary the code's strict rules).

114. *See id.* at 1253; *see also* Bruce W. Frier, *Interpreting Codes*, 89 MICH. L. REV. 2201, 2202 (1991) (describing "general clauses" as vague provisions that allow for judicial discretion and appear in all European civil codes).

115. *See* Rosen, *supra* note 46, at 1189; *cf.* Moore, *supra* note 28, at 1095 (determining that in the context of the Federal Rules of Civil Procedure, "[r]equiring the Court to apply a Rule rigidly without permitting the Court to consider the policies behind the Rule would deprive the litigants of a fair and just result in their case, thereby violating the central goal of the Rules expressed in Rule 1.").

116. FED R. EVID. 102.

117. *See supra* note 7 and accompanying text.

118. *See* Rosen, *supra* note 46, at 1195 ("The Federal Rules of Evidence must be seen for what they are—a codification of the common law. Rule 102 is that Code's mechanism . . . for avoiding the dangers of ossification and ensuring that evidence law can continue to evolve.").

law, or the remaining Rules of Evidence must be perceived as literal, statutory mandates and Rule 102 is meaningless. Clearly, Rule 102, as fundamental as it is, cannot be treated as frivolous.[119]

Consequently, the structure of the Federal Rules of Evidence, the Advisory Committee Notes, and Rule 102 each reinforce the conclusion that the Rules are a perpetual index code. As further confirmation of this conclusion, this Article next examines the events surrounding the conception and adoption of the Federal Rules of Evidence.

B. Codification and the Developmental History of the Federal Rules of Evidence

With the benefit of historical perspective, the Federal Rules of Evidence readily can be seen as the product of the continuing codification movement in the United States. The Federal Rules of Evidence were conceived in the judicial branch in 1961 when Chief Justice Earl Warren appointed a Special Committee on Evidence to study the desirability and feasibility of a uniform code of evidence for federal courts that would unify existing evidence doctrines.[120] It is noteworthy that the original task was identified as one that would unify, but not recast, evidentiary doctrine.[121] In response to the affirmative recommendation of the Special Committee's 1963 Final Report, Chief Justice Warren appointed an Advisory Committee in 1965 to draft the Federal Rules of Evidence.[122] Three drafts of the Rules were published and circulated for comment before they were submitted to Congress.[123]

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119. *See supra* text accompanying notes 49-51.

120. The Judicial Conference created a Committee on Rules of Practice and Procedure. *See* 1958 JUD. CONF. OF THE U.S. ANN. REP. 15. After the subject of evidence rules was referred to this committee, the committee decided a special group should be convened to address the question. In 1961, the Judicial Conference approved a study to determine the advisability and feasibility of uniform rules for federal courts. Chief Justice Warren then appointed a special committee on evidence. *See Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates*, 46 F.R.D. 161, 175-77 (1969) [hereinafter *Preliminary Draft*].

121. *See Preliminary Draft*, *supra* note 120, at 177-78.

122. *See id.* at 177-79.

123. The proposed Rules drafted by the Advisory Committee were approved by the

Unlike prior procedural rules, however, when the Supreme Court promulgated the Federal Rules of Evidence on November 20, 1972, questions were raised concerning the Court's authority to prescribe certain specific rules.[124] The Rules were promulgated pursuant to congressional enabling authority that granted the Supreme Court the power to prescribe Rules governing the practice and procedure of the federal courts, provided that such Rules did not "abridge, enlarge or modify any substantive right."[125] Critics closely scrutinized several of the rules promulgated by the Supreme Court in an effort to determine whether the Supreme Court had exceeded its authority under the Enabling Act by prescribing certain rules that might be outside the scope of "practice and procedure."[126] The debate over whether the Supreme Court had exceeded its power became moot, however, when Congress intervened with legislation stipulating that the Federal Rules of Evidence would not take effect until they were approved expressly by Congress.[127] Consequently, Congress intervened in the process to facilitate the adoption of the Rules by eliminating an issue that might have served as an obstacle to the realization of the Rules. Although Congress did revise the

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standing Committee on Rules of Practice and Procedure and then by the Judicial Conference as a whole. *See id.* at 173. Copies of the Rules and accompanying Advisory Committee Notes were circulated among the bench and bar for comments. *See Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates*, 51 F.R.D. 315, 316 (1971). After the Rules were submitted to the United States Supreme Court, they were sent back to the Committee for further consideration. With more comments, the Committee made some changes and then sent the revised Rules back to the Supreme Court. The Court then transmitted the Rules to Congress. *See Rules of Evidence for United States Courts and Magistrates*, 56 F.R.D. 183, 184 (1973) [hereinafter *Rules*].

124. *See Rules*, *supra* note 123, at 185 (Douglas, J., dissenting); *see also* S. REP. NO. 93-1277, at 6 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7053 (noting criticisms of the promulgation process); H.R. REP. NO. 93-650, at 3-4 (1973), *reprinted in* 1974 U.S.C.C.A.N. 7075, 7077 (noting Justice Douglas's dissent).

125. 28 U.S.C. § 2072 (1994).

126. *See Rules of Evidence: Hearings Before the Special Subcomm. on Reform of Fed. Crim. Laws of the House Comm. on the Judiciary*, 93d Cong. 142-58 (1973) (testimony and statement of Hon. Arthur J. Goldberg, retired Associate Justice of the Supreme Court of the United States) (testifying that the proposed Federal Rules of Evidence affected substantive rights and, therefore, surpassed the scope of the Rules Enabling Act).

127. *See* Act of Mar. 30, 1973, Pub. L. No. 93-12, 87 Stat. 9.

Supreme Court's version of the Rules in specific isolated provisions,[128] it did not reconstruct the design of the Rules, nor did it change the character of the Rules as a unification of preexisting evidence law. Rather, Congress's modifications were limited to the revision of the text of certain discrete provisions of the Rules, and the vast majority of the Supreme Court's version of the Federal Rules of Evidence, as well as the integrity of the structure and identity of the Rules as a code, were left intact by Congress when the Rules became effective on January 3, 1975.[129]

Although Congress played an indispensable role in the process that led to the enactment of the Federal Rules, the structural design and textual balance of the Rules originated in the judicial branch.[130] Consequently, it is important to examine the crafting of the Rules within the judicial branch to appreciate their identity as a unifying codification of preexisting law. At the judicial conference, Chief Justice Warren charged the Special Committee on Evidence—with the approval of the judicial conference—with considering the advisability and feasibility of rules to govern evidence uniformly in all federal courts.[131] Upon an affirmative response to the report of the Special Committee, Chief Justice Warren appointed the Advisory Committee on Federal Rules of Evidence to draft the actual text of the Rules.[132] The Advisory Committee commenced its task not by rethinking and revolutionizing the law of evidence, but by drawing upon the framework of the Model Code of Evidence and the Uniform Rules of Evidence.[133] In fact, when the Advisory Committee transmitted its first draft to the Supreme Court, the Committee specifically acknowledged "its indebtedness to its predecessors [the Model Code and the Uniform Rules] in the field of drafting Rules of evidence."[134]

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128. *See* H.R. CONF. REP. NO. 93-1597, at 1-8 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7098, 7099-7106.

129. *See supra* text accompanying note 26.

130. *See supra* text accompanying note 120.

131. *See A Preliminary Report on the Advisability and Feasibility of Developing Uniform Rules of Evidence for the United States District Courts*, 30 F.R.D. 73, 75 (1962).

132. *See id.* at 113; *Preliminary Draft*, *supra* note 120, at 173.

133. *See* Michael S. Ariens, *The Law of Evidence and the Idea of Progress*, 25 LOY. L.A. L. REV. 853, 863 (1992).

134. *Preliminary Draft*, *supra* note 120, at 180.

By modeling the text of the Federal Rules after the Model Code and the Uniform Rules, the Advisory Committee embraced what can be placed in historical context as a codification of existing principles and not a statutory displacement of preexisting evidentiary doctrines. In fact, Professor Edmund Morgan, who had written the preface to the Model Code in 1956, advocated a generalized approach to codification that would allow for judicial discretion in the application of the Rules.[135] Opposing this approach, Dean Wigmore advocated a particularized statute that detailed the specific application of each of the rules.[136] After an extensive debate concerning the underlying philosophies of textual design, the framers of the Model Code conclusively rejected Wigmore's approach.[137] In the foreword to the Model Code, Professor Morgan indicated that the framers specifically chose to create a "Code."[138] Explaining the framers' resolution, Professor Morgan pointed out that the framers could have followed three distinct courses in drafting the Model Code:

> Anyone attempting to frame the necessary provisions to these ends has several courses open. The first is to canvass all the situations in which pertinent questions have been answered by the courts and to devise a mandate to the trial judge for each such case. . . . Another course is to frame a very few, very broad general principles, and direct the trial judge to apply them. . . . The third method is to draw a series of rules in general terms covering the larger divisions and subdivisions of the subject without attempting to frame rules of thumb for specific situations and to make the trial judge's rulings reviewable for abuse of discretion. . . . In short, . . . the choice is between a catalogue, a creed, and a Code. The Institute decided in favor of a Code.[139]

Clearly, Professor Morgan believed that the audience of his remarks would attach a common understanding, undoubtedly de-

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135. *See* Edmund M. Morgan, *Foreword* to MODEL CODE OF EVIDENCE 1, 13-15 (1942); Ariens, *supra* note 133, at 859.

136. *See* Ariens, *supra* note 133, at 860.

137. *See* Morgan, *supra* note 135, at 12-13.

138. *See id.* at 13.

139. *Id.* at 12-13.

rived from history, to the use of the term "Code." The term appears to be carefully chosen for its intended connotation. In fact, Professor Morgan capitalized the word "Code" in an apparent effort to emphasize its use in a specially meaningful way.[140] Although there is no indication that a similar debate occurred in the context of the Federal Rules of Evidence, the drafters of the Federal Rules of Evidence were well aware of Professor Morgan's comments when they chose to model the Rules directly after its predecessor codes.[141] The lack of such a debate suggests that the drafters of the Federal Rules of Evidence acquiesced to the identity of the Rules as a codification of law and not a detailed displacement.

A distinctly instructive episode in the development of the Federal Rules of Evidence involves the congressional amendment of certain provisions of the Rules.[142] In regard to these isolated amendments, I have previously written:

> Where Congress chose to alter the Supreme Court's version of a particular rule, the modification inescapably represents substantial legislative intervention, such that the result is a provision of the Rules that can appropriately be treated in accordance with statutory construction principles. . . . Nevertheless, the recognition that certain isolated provisions of the Federal Rules of Evidence have a statutory identity highlights the necessity of a fine-tuned approach to interpreting the Federal Rules of Evidence, and Congress' specific alteration of certain Rules underscores the reality that the majority of the text of the Federal Rules of Evidence originated in the judicial branch of government.[143]

With the benefit of an historical perspective of the identity and nature of codes, Congress's amendments actually may be subject to two alternate, equally defensible analyses. On one hand, construing certain portions of the Rules that were amended by Congress as a statute is defensible because Congress sought to exer-

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140. *See id.*

141. *See supra* notes 133-34 and accompanying text.

142. *See* H.R. CONF. REP. NO. 93-1597, at 1-8 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7098, 7099-7106.

143. Weissenberger, *Interpretation of the Rules*, *supra* note 22, at 1320-21.

cise its legislative prerogative in these extremely limited instances.[144] On the other hand, with the benefit of historical insight, it is equally, if not more, defensible to argue that Congress was merely fine-tuning a code that was delivered to it by the judicial branch. Under this analysis, the congressional amendments are no more statutory than the rules that Congress left intact. Regardless of which analysis one embraces, it is most important to appreciate that Congress did not reformulate the entire structure of the code, nor did it in any way revise Rule 102—the Rule that defines the ethos of the code.[145]

Recognizing Congress's actions as amendments to a codification of preexisting law places in proper perspective the few provisions of the Rules that appear incongruous with the identity of the Federal Rules of Evidence as such a code. For example, Professor Imwinkelried has criticized my position that federal courts continue to possess the power to create uncodified evidence doctrines by superimposing or engrafting such doctrines onto the language of the Federal Rules of Evidence.[146] In doing so, Professor Imwinkelried has focused on the presence of Rule 501, which "specifically authorizes the courts to continue to evolve privilege doctrine by 'common law' process."[147] Professor Imwinkelried has stated: "Professor Weissenberger's position

144. *See, e.g.*, FED. R. EVID. 609(a); FED. R. EVID. 804(b)(1). For a discussion of Rule 609, see Weissenberger, *Interpretation of the Rules*, *supra* note 22, at 1312-13. For a discussion of Rule 804(b)(1), see *United States v. Salerno*, 505 U.S. 317 (1992); Glen Weissenberger, *The Former Testimony Hearsay Exception: A Study in Rulemaking, Judicial Revisionism, and the Separation of Powers*, 67 N.C. L. REV. 295, 312-36 (1989).

145. *See* Weissenberger, *Interpretation of the Rules*, *supra* note 22, at 1320-21. As I explained in that article,

> [Congress's] modifications were limited to the revision of the specific text of discreet provisions of the Federal Rules of Evidence, and the vast majority of the Supreme Court's version of the Federal Rules of Evidence, as well as the integrity of the structure of the Rules, were left intact by Congress when the Rules became effective on January 2, 1975.

Id. at 1320; *see also* Moore, *supra* note 28, at 1060 ("It should also be noted that the recent actions of Congress interjecting itself in the rulemaking process have primarily involved discrete procedural issues rather than issues that have a significant substantive effect.").

146. *See* Imwinkelried, *supra* note 24, at 272.

147. *Id.* at 277 (quoting FED. R. EVID. 501).

would reduce Rule 501 to a meaningless nullity. Rule 501 would be unnecessary if, as Professor Weissenberger asserts, the courts retain a general common law power to create 'evidentiary doctrines'; the provision purports to confer on them a power he asserts they already have."[148] Rule 501, which preserves the common law powers of federal courts in regard to the law of privileges, originated in Congress to replace an extensive constellation of rules promulgated by the Advisory Committee.[149] Congress substituted Rule 501 for the Advisory Committee's rules to preserve the status quo, rather than to modify the law of privileges.[150] Rule 501 therefore was not a product of the original design of the Rules. Rather, it was added as the result of a politically driven process in which Congress sought to make the Rules more palatable in order to attain their ultimate adoption.[151] This accident of political compromise should not be seen, as Professor Imwinkelried suggests, as a demonstration that rules outside of Article V preclude the continued growth and expansion of evidentiary law.[152] Viewed with an historical perspective, Rule 501 is an anomalous product of political necessity and not the product of the overall design.

When examined in historical context, the development of the Federal Rules of Evidence emerges as a part of the codification movement in the United States that sought to make the increas-

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148. *Id.* (footnotes omitted).

149. *See* H.R. REP. NO. 93-650, at 8 (1973), *reprinted in* 1974 U.S.C.C.A.N. 7075, 7082 ("Article V as submitted to Congress contained thirteen Rules. . . . The Committee amended Article V to eliminate all of the Court's specific Rules on privileges."). *See generally* Glen Weissenberger, *The Psychotherapist Privilege and the Supreme Court's Misplaced Reliance on State Legislatures*, 49 HASTINGS L.J. 999 (1999).

150. *See* H.R. REP. NO. 93-650, at 8 ("[T]he Committee, through a single Rule, 501, left the law of privileges in its present state . . . .").

151. *See* S. REP. NO. 93-1277, at 6 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7053. The report states:

> Since it was clear that no agreement was likely to be possible as to the content of specific privilege rules, and since the inability to agree threatened to forestall or prevent passage of an entire rules package, the determination was made that the specific privilege rules proposed by the Court should be eliminated and a single rule ([R]ule 501) substituted . . . .

Id.

152. *See* Imwinkelried, *supra* note 24, at 276-79.

ing complexity of the common law more accessible.[153] Dominated by the judiciary, it was a process designed to unify, not to displace, the preexisting law of evidence.[154] How can so many scholars and the Supreme Court fail to recognize that the Federal Rules possess a unique identity as the codification and continuation of the common law? Beyond a simple myopic disregard of history, there may be some other explanatory theories that underlie this phenomenon:

1. Admittedly, the idea that only one rule (i.e., Rule 102) in a constellation of rules is to be taken mandatorily and literally is somewhat elusive. An awareness of the historical context of the codification of American law, however, yields a proper understanding of the unique role of Rule 102 and what it expressly commands. The mental gyrations involved in taking literal commands from one rule but not others is best understood with the benefit of this historical perspective.[155]
2. Ultimately, Congress has the dominant authority in the rulemaking process,[156] and some scholarship appears to be distracted by this basic principle.[157] This authority, however, should not be confused with actual historical occurrence. Congress in fact collaborated with the Supreme Court in the creation of a codification of the preexisting common law.
3. The rulemaking process that produced the Federal Rules of Evidence concluded with a legislative act.[158] Consequently, scholars and courts leap carelessly to the conclusion that the Federal Rules of Evidence are a typical statute. Not all legislation, however, results in statutes.[159] As history illuminates, some legisla-

153. *See supra* notes 69-96 and accompanying text.
154. *See id.*; *supra* notes 120-21 and accompanying text.
155. *See supra* text accompanying notes 111-19.
156. *See* Moore, *supra* note 28, at 1041-53.
157. *See supra* note 11 and accompanying text.
158. *See* President Gerald R. Ford, Statement on Signing a Bill Establishing Rules of Evidence in Federal Court Proceedings, 1 PUB. PAPERS 6 (Jan. 3, 1975) (signing bill into law).
159. *See* Rosen, *supra* note 46, at 1138-40 (explaining the types and interpretations of authoritative legal texts including statutes, constitutions, and codes); Wagner, *supra* note 72, at 342 (illustrating that the French Civil Code was the product of legislation).

tion results in codes that have unique identities.[160] With the benefit of a historical perspective and a proper appreciation of the express language of Rule 102, it becomes much easier to understand that Congress, in promulgating the Federal Rules of Evidence, participated in the creation of a perpetual index code. This affirmation requires a bit of mental gymnastics because, in effect, Congress was saying that it "intended" a code, and yet no legislative intent lies behind the individual rules, except for Rule 102.[161]

4. A final reason why the appropriate ethos of the Federal Rules of Evidence has eluded many scholars, as well as the Supreme Court, is that codes are encountered infrequently in federal law. In this respect, Rosen's insight is particularly perceptive: "It is not surprising that the Supreme Court has not been sensitive to the code-quality of the Federal Rules of Evidence. The Court has only limited occasion to deal with codes, for most codes are codifications of *state* law."[162] In fact, some state evidence codes have been adopted through a process that does not involve the participation of the legislature.[163] Frequently, when state legislatures are involved in the adoption process, their role is wholly passive.[164]

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160. *See supra* text accompanying notes 77-84.

161. *See supra* text accompanying notes 45-51.

162. Rosen, *supra* note 46, at 1196 n.296.

163. The two most recent states to adopt the Federal Rules of Evidence, Pennsylvania and Alabama, have done so without any legislative involvement whatsoever. *See* Pa. R. Evid. § 101(b) Pennsylvania, PA Order 98-16 (1998); Charles W. Gamble, *Drafting, Adopting and Interpreting the New Alabama Rules of Evidence: A Reporter's Perspective*, 47 ALA. L. REV. 1, 1-5 (1995). Prior to the codification of their law of evidence, both Pennsylvania and Alabama followed common law evidentiary rules that served as the guiding principle in the adoption of the Rules of Evidence. *See* Pa. R. Evid., preface (West 1998); Charles W. Gamble & Frank S. James III, *Perspectives on the Evidence Law of Alabama: A Decade of Evolution, 1977-1987*, 40 ALA. L. REV. 95, 112-13 (1988). The Alabama Rules were even revised to reflect more explicitly preexisting Alabama common law. *See* Gamble, *supra*, at 3, app. at 27-71 (detailing objections to proposed rules and the Advisory Committee's response, and indicating that rules were changed in response to objections).

164. *See* Walker J. Blakey, *A Short Introduction to the Ohio Rules of Evidence*, 10 CAP. U. L. REV. 237, 242 (1980). Subsequent amendments to the Ohio Rules of Evidence also have been enacted through the passive inaction of the Ohio legislature, allowing the evolution of the common law of evidence to be reflected in the Ohio Rules of Evidence. For example, the Ohio Supreme Court Advisory Committee drafted

Whatever the reasons behind this evidence myopia, the consequences are disturbing and damaging. The United States Supreme Court's impairment of vision is particularly unfortunate, because it ultimately could mean a stagnation in the growth of evidence law and an abdication in deference to an intent that does not exist either metaphorically or in reality.[165]

Up to this point, this Article has endeavored to convince the reader that statutory interpretation principles are ill-suited for interpreting the Federal Rules of Evidence because of the unique identity of the Rules as a perpetual index code. If at all impressed with these arguments, the reader may well ask: What then is the function of the text of the Federal Rules of Evidence? The remainder of the Article addresses this issue.

III. INTERPRETATIONAL LESSONS TO BE DERIVED FROM THE CONCLUSION THAT THE FEDERAL RULES OF EVIDENCE ARE A PERPETUAL INDEX CODE

A. Examination of Professors Scallen and Taslitz's Approach to Interpreting the Federal Rules of Evidence

In their discussion of the Supreme Court's interpretation of the Federal Rules of Evidence, Professors Scallen and Taslitz point out that critics of the Supreme Court's predominately textualist approach have failed to offer an alternative approach to interpreting the Rules.[166] In this respect, Professors Scallen and Taslitz are correct. Most critics of the Supreme Court's approach to interpreting the Federal Rules of Evidence have ar-

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an expanded version of the text of Rule 702 to reflect a series of decisions of the Ohio Supreme Court, and the passive inaction of the Ohio General Assembly led to that version's adoption. *See* OHIO R. EVID. 702 staff note (1994).

165. *See* Rosen, *supra* note 46, at 1196. As Rosen notes:

> And to the extent the Supreme Court's interpretive dictum . . . could mean that the Federal Rules of Evidence should be construed as an ordinary statute with respect to growth of the law, such an approach to the Federal Rules of Evidence evinces a misunderstanding that threatens to undermine the very code protection sculpted to allow continued legal growth.

Id.

166. *See* Scallen, *Classical Rhetoric*, *supra* note 7, at 1719; Taslitz, *Politically Realistic Hermeneutics*, *supra* note 7, at 354, 355-56 & n.112.

gued that the approach is wrong-minded but have failed to present an alternative approach.[167] In fact, a comprehensive approach to interpreting the Federal Rules of Evidence was not advanced until the contributions of Professors Scallen and Taslitz.[168] Unfortunately, both Professor Scallen and Professor Taslitz start from the wrong place. In developing interpretation schemes that purportedly are more desirable and more coherent than the Supreme Court's prevailing texualist approach, Professors Scallen and Taslitz assume that the Federal Rules of Evidence are a statute.[169] As previously illustrated, and as will be the subject of further elaboration, this premise is an unfounded and ill-suited point of departure for developing a system for construing the Federal Rules of Evidence. Consequently, regardless of how carefully Professor Scallen and Taslitz construct their interpretive schemes, they are congenitally flawed.

On a side note, although the largely overlapping interpretive approaches of Professors Scallen and Taslitz might be intellectually defensible if the Federal Rules of Evidence were indeed a statute, both approaches suffer from an inescapable density that precludes their effective application at the spark point of litigation in the trial courtroom.[170] The experience of most trial law-

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167. *See, e.g.*, Jonakait, *supra* note 56, 782-86.

168. Professor Taslitz's hermeneutic approach focuses on the interaction between the author of a rule and its reader, whereas Professor Scallen's practical reasoning approach emphasizes the process through which a reader of a rule argues for a specific interpretation to his or her audience. *See* Scallen & Taslitz, *supra* note 10, at 435. Both approaches, however, require the reader to resort to extrinsic sources in order to interpret the purpose of a rule properly. *See id.* at 435-36.

169. *See supra* text accompanying notes 13-14.

170. *See* Scallen, *Classical Rhetoric*, *supra* note 7, at 1750. Scallen notes that in a difficult case

> the judge's rationale will become "part of a dialogue or conversation among the individuals participating in a practical endeavor. For some period of time, the techniques of practical reason will lead different participants to incompatible conclusions. As to issues of this sort, practical reason will not yield a definitive answer because there is a lack of consensus. If the issue is particularly intractable, consensus might take years or even generations to develop. In the meantime, since action cannot be suspended, participants in the dialogue will act upon their individual practical judgments."

Id. (quoting Michael L. Seigel, *A Pragmatic Critique of Modern Evidence Scholarship*, 88 NW. U. L. REV. 995, 1029 (1994)); *see also* Taslitz, *Politically Realistic Hermeneu-*

yers will support the conclusion that the courtroom is no place for Taslitzian hermeneutics or Scallenian practical reasoning.[171] Even when applied at the appellate level, the interpretational schemes of Professors Scallen and Taslitz inevitably involve a complex calculus of weighing extrinsic and textual sources that appears to be so indeterminate that there really is no system at all.[172] Still, the most fatal defect of the analyses of Professors

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tics, *supra* note 7, at 394-95. Taslitz states:

> [H]ermeneutics teaches us that text cannot be given meaning until it is interpreted, for the interpreter must often choose among competing meanings and inevitably draws on his own experience. The choices of the interpreter, the judge, will be controlled by no single value. . . . [It then] becomes appropriate to inquire into the historical setting, particularly the legislative history. Where that is inadequate, one should try imaginative reconstruction, and where that fails, purpose is the next best guide. Purpose itself is flexible, however, since it can be described at varying levels of generality, purposes may conflict, and new problems may arise that the Congress did not anticipate. This, in turn, requires consideration of evolutive concerns . . . . This reliance on multiple sources of evidence reflects the pragmatic view that decision-making is best and most convincing when we examine the consistency of the evidence for each value of importance to us before reaching a decision.

Id. (footnotes omitted).

171. The time to argue an objection is simply not sufficient, as the vast degree of study necessary to present comprehensive arguments on the basis of extrinsic materials would thwart the timely resolution of legal claims.

172. The hermeneutic approach, as explained by Professor Taslitz, denies a single, objectively valid interpretation of a body of text, thereby allowing the reader to choose among competing interpretations. *See* Taslitz, *Politically Realistic Hermeneutics*, *supra* note 7, at 353-54. The choice among competing interpretations is "politically realistic" in that recognizing particular statutory interpretations reflects political values, thus requiring a theory of politics concerning "how the legislature works, whether it works well, and what is and should be its relationship to the courts." *Id.* at 354. A hierarchy of sources determines the correct approach to statutory interpretation. *See id.* at 394-95. The text of the statute is the most important source because it represents a formal enactment of law. *See id.* at 394. In descending order of importance, the remaining sources of utilization in statutory interpretation are historical considerations, imaginative reconstruction, and purpose. *See id.* at 394-95.

Like politically realistic hermeneutics, Professor Scallen's practical reasoning approach also eschews the application of a single method of interpretation in all circumstances. *See* Scallen, *Classical Rhetoric*, *supra* note 7, at 1748. At the trial court level, a court using practical reasoning usually will be limited to the text or legislative history in interpreting a rule, as discussion beyond these sources would affect a trial's timely resolution adversely. *See id.* at 1753. An appellate court applying practical reasoning, however, will have a greater obligation to look beyond the text of the rule, thereby allowing for the most thorough and persuasive interpretation. *See*

Scallen and Taslitz is that they both perceive the Rules as containing language that stands for underlying meaning,[173] when in reality the language of the Rules serves an entirely different purpose.[174] Consequently, Professors Scallen and Taslitz's well-meaning but wrong-minded quest to reach a "justifiable construction of the rule"[175] by weighing all sources of interpretation is destined to fail from the very start. To see a rule as the result of a process that works its way to some underlying meaning is to misperceive the function of a rule in a perpetual index code. The discussion below demonstrates the proper approach to the interpretation of the Federal Rules of Evidence as an index to the preexisting common law.

B. Interpreting the Federal Rules of Evidence as a Perpetual Index Code

Rules in a perpetual index code, such as the Federal Rules of Evidence, are best understood as markers, or indices, of progress. As noted above, these rules constitute "a perpetual index to the known law, gradually refining, enlarging and qualifying its doctrines, and, at the same time, bringing them together in a concise and positive form for public use."[176] No "intent" lies behind a rule in such a code.[177] The language in an evidence code

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id. at 1754. In choosing among different interpretations of a rule, a court applying practical reasoning will look to extrinsic sources to aid its determination. *See* Scallen, *Use and Abuse*, *supra* note 7, at 1301. These sources include the language of the rule, language of related texts, intentions of the drafters, historical context of the rule, past textual interpretations, instrumental aspects of potential interpretations, and the evolution of the text over time. *See id.*

173. *See, e.g.*, Scallen, *Classical Rhetoric*, *supra* note 7, at 1751-52 (describing the different types of sources necessary to determine properly the meaning behind the text of a rule); Scallen & Taslitz, *supra* note 10, at 441 (explaining the proper approach to determine the meaning behind the text of the Rules); Taslitz, *Politically Realistic Hermeneutics*, *supra* note 7, at 394 (arguing that hermeneutics teaches us that text cannot be given meaning until it is interpreted).

174. *See supra* text accompanying notes 48-50.

175. Scallen & Taslitz, *supra* note 10, at 430.

176. STORY ET AL., *supra* note 75, at 46.

177. *See* Rosen, *supra* note 46, at 1177; *supra* text accompanying notes 50-51; *see also* Bergel, *supra* note 71, at 1076 (stating that in common law countries "[t]he assumption is that the legislator simply meant to reformulate rules drawn from the jurisprudence"); Donald, *supra* note 70, at 169 ("The methodology of partial codification

may be seen metaphorically as the common vocabulary spoken by lawyers and judges in trial and appellate courtrooms and in their attendant memoranda and briefs. Accordingly, the rules in the Federal Rules of Evidence should not be construed by attempting to discern their intended underlying meaning. Rather, they must be interpreted in the context of the fluid common-law doctrines that the Rules represent.[178] Furthermore, if the mandate of Rule 102 is to be taken seriously, one must accept the notion that the text of the Rules represents one point in the continuum of the development of evidence law.[179] This continuum reflects the substantial development of the common law prior to the adoption of the Federal Rules of Evidence and subsequent to which the same repertoire of techniques employed to foster the enlightened growth and development of evidence law must be used.

Nothing in the foregoing should be construed to suggest that the adoption of the Federal Rules of Evidence left the common law totally unchanged. Unquestionably, one of the benefits of codification is the opportunity to alter common-law doctrines that have proven to be unworkable or unfair.[180] In the same way that a court may change judicial precedent, a perpetual index code can alter the common law.[181] A perpetual index code is, nevertheless, but a marker of that change. Most importantly, consistent with the mandate of Rule 102, the position of the law at the time of the adoption of the Federal Rules of Evidence is not paralyzed.

To a generation of statutory thinkers, the above analysis may seem preposterously unworkable.[182] After all, one may easily

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is basically to restate, in a detailed form, the pre-existing law in particular areas.").

178. *See supra* text accompanying notes 89-96, 103-10.

179. *See* Rosen, *supra* note 46, at 1189.

180. *See id.* at 1177 ("Sometimes, it is true, [codification] requires alteration of a 'bad' common law rule.").

181. *See id.* at 1137 & nn.56-58. In fact, the Federal Rules of Evidence were developed in the hope of "unifying" the law of evidence in federal courts. *See supra* text accompanying notes 120-21. This unifying process inevitably created changes.

182. *See, e.g.*, GILMORE, *supra* note 75, at 97 ("[In] cases in which even the most disingenuous construction will not save the day . . . it has always been assumed . . . a court must bow to the legislative command, however absurd, however unjust, however wicked.").

hypothesize severe adverse consequences when the law of evidence is allowed to grow judicially beyond the point of the marker or index captured by the language of the Federal Rules of Evidence. Although this may be a problem for those who think in statutory terms, the problem is hardly novel from an historical perspective. In fact, one of the earliest arguments against codifying the common law was that codification would deprive judges of the necessary discretion to do justice in particular cases.[183] However, "[t]he hollowness of this argument is patent: there is no reason why codes could not incorporate provisions granting judges the discretion to make equitable adjustments where necessary."[184] Rule 102, which by its very nature trumps all other Rules, specifically grants this discretion by declaring that the Federal Rules of Evidence must be construed "to secure fairness in administration."[185] Accordingly, the express text of a rule can be disregarded in a particular case, i.e., "in administration," when fairness will be "secured."[186] In fact, Professor Robert

183. *See* F.H. Lawson, *A Common Law Lawyer Looks at Codification*, 2 INTER-AM. L. REV. 1, 4 (1960); Carl McFarland, *Administrative Law and Codification of Statutes*, *in* DAVID DUDLEY FIELD: CENTENARY ESSAYS 204, 206 (Alison Reppy ed., 1949); Rosen, *supra* note 46, at 1123 & n.4; Wagner, *supra* note 72, at 348.

184. Rosen, supra note 46, at 1179; *see also* WIEACKER, *supra* note 89, at 377 (defining general clauses in the German Code as "guidelines in the form of maxims addressed to the judge, designed both to control and to liberate him"); Frier, *supra* note 114, at 2202-05 (examining French and German "general clauses" that allow for judicial discretion in the application of laws); Wagner, *supra* note 72, at 350-51 (discussing judicial discretion in the context of complex civil codes).

185. FED. R. EVID. 102.

186. Although the Supreme Court has never placed its imprimatur on this approach, other courts have cited Rule 102 as the basis for disregarding the express text of an evidence rule in particular cases. *See* United States v. Panzardi-Lespier, 918 F.2d 313, 317-18 (1st Cir. 1990) (noting that although the government failed to comply with the formal notice requirement of Rule 804(b)(5), "allowing the jury to hear the dead informant's testimony before the grand jury is in harmony with both the interest of justice and the general purposes of the Rules of Evidence"); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 723 F.2d 238, 288 (3d Cir. 1983) (affirming the trial court's decision to admit records despite the absence of supporting testimony by a qualified witness or custodian as required by Rule 803(6) on the basis that the trial court's ruling was "consistent with the spirit of the Rules"), *rev'd*, 475 U.S. 574 (1986); United States v. Batts, 558 F.2d 513, 517 (9th Cir. 1977) (concluding that the trial court's deviation from the requirements of Rule 608(b) was proper in that "the rules of evidence should not be lost by a rigid, blind application of a single rule of evidence"), *withdrawn and aff'd on other grounds*, 573 F.2d 599 (9th

Summers has argued that section 1-103 of the Uniform Commercial Code should be interpreted in a similar manner.[187] Under his approach, the common law equitable principles embodied in section 1-103 would be available not only to fill in gaps created by code silence, but also to create exceptions to code provisions.[188] Accordingly, in the evolution of a code over time, when a number of cases reflect a collective disregard for a particular rule, that rule becomes ripe for amendment.[189] In this circumstance, a new marker or index may be necessary to preserve the progress and growth of evidence law, and the rulemaking process should be triggered to initiate the creation of an amendment. To statutory thinkers, this approach undoubtedly appears radical. If Rule 102 is to be taken seriously, however, the law must be permitted to grow, and this growth inevitably occurs within the judicial branch on a case-by-case basis.[190]

The foregoing analysis should not be construed as an argument that federal courts have unbridled discretion to disregard the text of the Federal Rules of Evidence. Courts did not have limitless discretion to disregard the federal common law of evidence prior to the adoption of the Rules.[191] On a case-specific basis, however, a court is justified in departing from the literal text of a rule of evidence when fairness, growth, and justifiable efficiency require it.[192] Moreover, a court of appeals should af-

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Cir. 1978); *see also* Rosen, *supra* note 46, at 1185-86 (discussing situations in which equitable adjustments are permissible to vary the code's strict rules).

187. *See* Robert S. Summers, *General Equitable Principles Under Section 1-103 of the Uniform Commercial Code*, 72 NW. U. L. REV. 906, 908-10 (1978).

188. *See id.*

189. *See* Rosen, *supra* note 46, at 1196.

190. *See supra* text accompanying notes 112-16.

191. *See* Funk v. United States, 290 U.S. 371, 381-83 (1933). In *Funk*, the Court deviated from the common-law rule that a wife was not competent to testify as a witness on behalf of her husband. *See id.* at 381-82. The common law, according to the Court, "is not immutable but flexible, and by its own principles adapts itself to varying conditions." *Id.* at 383. The Court concluded that it, and other federal courts, "by right of their own powers, may decline to enforce the ancient rule of the common law." *Id.* at 382.

192. *See, e.g.*, FED. R. EVID. 102; United States v. Panzardi-Lespier, 918 F.2d 313, 317-18 (1st Cir. 1990); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 723 F.2d 238, 288 (3d Cir. 1983), *rev'd*, 475 U.S. 574 (1986); United States v. Batts, 558 F.2d 513, 517 (9th Cir. 1977), *withdrawn and aff'd on other grounds*, 573 F.2d 599 (9th

firm a trial court decision disregarding a particular rule when the mandate of Rule 102 warrants such a result.[193] Courts only effectively change the law on a case-by-case, fact-specific basis. Consequently, only when several cases have justifiably disregarded the text of a particular rule of evidence does a signal for possible reevaluation and amendment of the rule emerge. In fact, specific Federal Rules of Evidence that have undergone amendment have reflected a process not unlike the one described here.[194]

Accordingly, the appropriate hermeneutical approach for interpreting the Federal Rules of Evidence becomes better focused when one understands the dynamism of the growth of the common law. Fundamentally, as a perpetual index code, the Federal Rules of Evidence bring together and make useful the body of law that preceded their adoption.[195] Likewise, the Federal Rules of Evidence represent an index of the best thinking that could be brought to bear on the issues of evidence law at the time of the Rules' adoption.[196] To use the common-law paradigm, the Federal Rules of Evidence are the strongest precedent for the issues they address. Still, the Federal Rules of Evidence, other than Rule 102, do not reflect the intent of any entity, legislative or judicial. Thinking about the Federal Rules of Evidence in terms of intent introduces an analysis that anthropomorphizes the Rules beyond their appropriate function. In this context, the Advisory Committee Notes are extremely useful in understand-

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Cir. 1978).

193. *See* Rosen, *supra* note 46, at 1185 (discussing the use of Rule 102 as a source for "equitable deviation"). For examples of courts disregarding the express text of a Federal Rule of Evidence to achieve equitable results, see *Panzardi-Lespier*, 918 F.2d at 317-18; *Zenith Radio Corp.*, 723 F.2d at 288; *Batts*, 558 F.2d at 517.

194. *See* Becker & Orenstein, *supra* note 7, at 866-67. According to Becker and Orenstein, the amendment of Rule 609 resulted "in part from the [Supreme] Court's criticism [in *Green v. Bock Laundry Mach., Inc.*, 490 U.S. 504 (1989)] of the irrationality of the old version." *Id.* at 867 n.46. Becker and Orenstein discuss the split among the circuits over whether Rule 407 applies in products liability actions. *See id.* at 893-94. A recent amendment to Rule 407 reflects the position of the majority of circuit courts, and provides that evidence of subsequent measures "is not admissible to prove . . . a defect in a product, a defect in a product's design, or a need for a warning or instruction." FED. R. EVID. 407.

195. *See supra* text accompanying notes 85-88.

196. *See supra* text accompanying notes 101-10.

ing the thinking, but not the intent, that operated in the selection of the specific language used in a rule.[197] Accordingly, the text of a rule of evidence can only be understood, and then applied, with the aid of context derived from the preexisting common law, regardless of whether the rule restated or altered the common law.[198] Most significantly, the dynamic process of the growth of the common law informs the process for interpreting the Federal Rules of Evidence, whereas principles borrowed from interpreting statutes do not.[199]

C. Illustrations of the Application of the Perpetual Index Code Model

This Article does not seek to explain the essence of the dynamism of the common law. Perhaps, under a Llewellian analysis, understanding that dynamism is an endless process.[200] The following, however, are some brief analyses, drawn from cases and other scholarly commentary, that illustrate the way in which the Federal Rules of Evidence, as a perpetual index code, appropriately should operate.

In a frequently cited article, Professor Thomas Mengler observes that the Federal Rules of Evidence incorporate discretion by virtue of certain ambiguities contained within the Rules.[201] According to Mengler, flexibility was built into the Federal Rules in diverse ways.[202] Among other devices, the text of some of the Rules incorporated a certain degree of vagueness.[203] Rule 406, for example, provides for the admissibility of habit evidence, but nowhere in the Rule is the term "habit" defined.[204] Moreover, as Professor Mengler points out, not only does the Advisory Committee Note fail to resolve the issue, it actually compounds the

197. *See supra* text accompanying notes 101-03.
198. *See id.*
199. *See* Rosen, *supra* note 46, at 1134 ("[The Code] is to be understood and expanded in conscious reference to the antecedent common law and by means of the repertoire of common law interpretive techniques . . . ."); *supra* note 93.
200. *See generally* KARL N. LLEWELLYN, BRAMBLE BUSH (1991).
201. *See* Mengler, *supra* note 97, at 426.
202. *See id.* at 426-27, 438.
203. *See id.* at 440.
204. *See* FED. R. EVID. 406; Mengler, *supra* note 97, at 416.

ambiguity by rendering two different theories concerning the nature of conduct that constitutes a "habit," one that is narrow and one that is broad.[205] According to Mengler, this ambiguity grants trial courts significant leeway in deciding whether to admit evidence under Rule 406.[206] By deciding whether to apply a limited or comprehensive definition of the term "habit," trial courts ultimately may determine the admissibility of evidence in a specific case.[207] Professor Mengler's analysis of Rule 406 provides the basis for an illustration as to the proper function of an evidence code, with his identification of the vagueness in Rule 406 as a point of departure.[208]

Although one may lapse easily into the inflexible vocabulary used by statutory thinkers concerning the "design" or "intent" of the rule, a better understanding of the proper hermeneutics for interpreting Rule 406 results from simply recognizing the absence of a definition within the rule itself. Without a clear definition in the rule, any court applying Rule 406 would recognize immediately that it must make a choice as to a definition.[209] Several courts making these choices over time create a body of precedent. Ultimately, in the same manner as the common law develops, a particular understanding of the term "habit" may emerge as the prevailing definition. Thus, at some point in time, Rule 406 may be ripe for amendment to reflect the prevailing view, or it may be amended to reset the course by rejecting the prevailing position and embracing an alternate definition.[210] If the amendment process were activated and an amendment actually adopted, courts thereafter still would have a choice, but the choice would be different. A court would have the option to follow the strong precedent presented by the definition expressly contained in Rule 406 or, if that definition would produce an unfair, unjust, or inefficient result in a particular case, the court would have the option to use its discretion to disregard the text

205. *See* Mengler, *supra* note 97, at 417-18.
206. *See id.* at 424.
207. *See id.*
208. *See id.* at 416-25.
209. *See id.* at 424.
210. *See supra* note 189 and accompanying text.

of the Rule in accordance with the express mandate of Rule 102.[211] Before long, the process would begin anew. Courts would sort through fact-specific cases and develop the law of habit evidence on a case-by-case basis. Periodically, the marker or index might change, but the process would remain the same.

Although Rule 406 is hardly a lightning rod for evidentiary debate with attendant significant social implications, Professor Mengler, in his 1989 article, does foreshadow *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[212] a 1993 landmark case that unquestionably has had a meaningful impact on the role of litigation in society.[213] In his article, Professor Mengler describes the flexibility that is apparent in the text of Rule 702.[214] Simultaneously, Professor Mengler notes that the "general acceptance test" for scientific expert testimony under *Frye v. United States*[215] was the common law standard at the time the Federal Rules of Evidence were adopted.[216] Neither Rule 702 nor the Advisory Committee Note, however, mentions the *Frye* test.[217] Although statutory thinkers might seize upon this silence as a demonstration of the "intent" of the drafters to reject the *Frye* test, one hardly must think in terms of intent in order to recognize that Rule 702 permits a court to make a choice whether to apply the *Frye* general acceptance test or some other test.[218] The

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211. *See supra* text accompanying notes 111-19.

212. 509 U.S. 579 (1993).

213. *See, e.g.*, David L. Faigman, *Mapping the Labyrinth of Scientific Evidence*, 46 HASTINGS L.J. 555 (1995); David L. Faigman et al., *Check Your Crystal Ball at the Courthouse Door, Please: Exploring the Past, Understanding the Present, and Worrying About the Future of Scientific Evidence*, 15 CARDOZO L. REV. 1799 (1994); Edward J. Imwinkelried, *Evidence Law Visits Jurassic Park: The Far-Reaching Implication of the* Daubert *Court's Recognition of the Uncertainty of the Scientific Enterprise*, 81 IOWA L. REV. 55 (1995); Adina Schwartz, *A "Dogma of Empiricism" Revisited:* Daubert v. Merrell Dow Pharmaceuticals, Inc. *and the Need to Resurrect the Philosophical Insight of* Frye v. United States, 10 HARV. J.L. & TECH. 149 (1997); Laurens Walker & John Monahan, Daubert *and the Reference Manual: An Essay on the Future of Science in Law*, 82 VA. L. REV. 837 (1996).

214. *See* Mengler, *supra* note 97, at 447-49.

215. 293 F. 1013 (D.C. Cir. 1923).

216. *See* Mengler, *supra* note 97, at 448. Under *Frye*, an expert opinion based on scientific knowledge is admissible only when the technique is "generally accepted" in the relevant scientific community. *See Frye*, 293 F. at 1014.

217. *See* FED. R. EVID. 702; Mengler, *supra* note 97, at 448.

218. *See* Mengler, *supra* note 97, at 449. Mengler notes that Rule 702:

Rule, in providing this choice, must be viewed in the context of the prevailing *Frye* general acceptance test. The simple historical fact is that Rule 702 could have embraced the prevailing common-law rule, and it did not. Likewise, it could have rejected the prevailing common-law rule, and it did not. Given the dynamic process of common-law development, the message in Rule 702 at the time of the adoption of the Rules was that the law needed further evolution before the marker specifically should determine whether to embrace or reject the *Frye* test. As Professor Mengler quite correctly points out, the Rule gives courts the opportunity to make a choice based upon policy considerations.

Of course, in the well-known *Daubert* case, the United States Supreme Court, interpreting the Federal Rules of Evidence as a statutory enactment using a textualist approach, somewhat simplistically reasoned that because the *Frye* test was not expressly preserved in language on the face of Rule 702, there was an intent by somebody or some entity to reject the *Frye* test.[219] Given the Rules-as-statute premise of the Supreme Court, the Court employed logic derived from the law pertaining to statutory construction and concluded that if the *Frye* test were to be preserved, the plain language of the Rule would have referred expressly to that standard.[220] This approach inappropriately defers to legislative supremacy and abdicates the Court's responsibility to employ the values identified in Rule 102 in expanding the law of evidence. The appropriate hermeneutics in the *Daubert* case would have been to make a choice as a court would make such a

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> marks some clear parameters for trial courts: for expert testimony to be permitted, the expert must be able to inject some information into the trial proceeding that would be useful to untrained jurors. But Rule 702 also provides a trial court with the discretion to demand more of novel scientific evidence—that it meet *Frye*'s general acceptance test.

Id.

219. *See* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 588-89. In *Daubert*, the Court noted that "[n]othing in the text of [Rule 702] establishes 'general acceptance' as an absolute prerequisite to admissibility." *Id.* at 588. The Court found the assertion that the Rules assimilated the *Frye* standard "unconvincing" because Rule 702 did not specifically mention "general acceptance." *Id.* at 589. The Court thus concluded that the *Frye* standard, "absent from, and incompatible with, the Federal Rules of Evidence, should not be applied in federal trials." *Id.*

220. *See id.* at 588-89.

choice in the forward evolution of the common law. In other words, the Court should have selected the test based on the values articulated in Rule 102 rather than looking for some legislative command. None of this is to say that the Court should have adopted the *Frye* test. Perhaps the test should have been discarded based upon the wisdom derived from the evolution of the law on a fact-specific, case-by-case basis. It nevertheless would be a mistake to reason that the *Frye* standard was legislated away by virtue of the adoption of the Federal Rules of Evidence. Such reasoning plainly ignores the perpetual index quality of the Federal Rules of Evidence, in which the Rules operate as markers of the growth of the law rather than a displacement of the preexisting law.[221]

Beyond *Daubert*, the Supreme Court's hermeneutics in interpreting the Federal Rules of Evidence may be questioned seriously in virtually any of the cases in which it construed a rule of evidence as a statutory enactment.[222] One of the more interesting analyses appeared in *Tome v. United States*,[223] in which the Court construed Rule 801(d)(1)(B). This Rule provides that a prior statement of a witness is not hearsay if the out-of-court declarant testifies as a witness, is subject to cross-examination at the trial, and the statement is "consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive."[224] Defendant Tome stood trial on charges that he sexually abused his daughter.[225] In his defense, Tome argued that the child's mother concocted the allegations in an effort to obtain

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221. *See supra* text accompanying notes 168-84.

222. *See supra* note 5.

223. 513 U.S. 150 (1995).

224. FED. R. EVID. 801(d)(1)(B). For further discussion, see 2 MCCORMICK ON EVIDENCE § 251 (John William Strong ed., 4th ed. 1992); JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 801.12 (2d ed. 1998); WEISSENBERGER, *supra* note 108, at §§ 801.13, 801.15.

225. *See Tome*, 513 U.S. at 152-53. For in-depth treatment of prior statements, see, for example, Frank W. Bullock, Jr. & Steven Gardner, *Prior Consistent Statements and the Premotive Rule*, 24 FLA. ST. U. L. REV. 509 (1997); Scallen, *Classical Rhetoric*, *supra* note 7; Scallen, *Use and Abuse*, *supra* note 7; Taslitz, *Politically Realistic Hermeneutics*, *supra* note 7.

custody.[226] The issue the case ultimately presented to the Supreme Court was whether a declarant's prior consistent statements were subject to a "premotive requirement."[227] The premotive requirement was a part of the common law of evidence, and it provided that prior consistent statements used to bolster credibility and offered to rebut a charge of recent fabrication must have been made before the motive to fabricate arose.[228] In *Tome*, the trial court admitted the evidence, and the Tenth Circuit affirmed, noting that the text of the Rule did not mention the premotive requirement.[229] The Tenth Circuit announced a test in which a declarant's motive to lie, the circumstances under which the statement was made, and the declarant's tendency to lie are weighed against one another to determine whether the statement should be admissible.[230] The United States Supreme Court reversed, rejecting the balancing test of the Tenth Circuit.[231] Instead, the Court found that the Rule's language, in its limitations and similarities to the pre-Rule common law, suggested that Congress intended the Rule to codify and retain the premotive requirement of the antecedent common law.[232]

In some respects, the Court's analysis comes close to a hermeneutics that recognizes the Federal Rules of Evidence as a perpetual index code. The Court did examine and ascertain the antecedent common law.[233] Moreover, the Court closely examined the textual language of the Rule and compared it with the common law.[234] The Court also looked to the Advisory Committee Note for guidance as to whether the Rule is consistent or inconsistent with the prevailing common law at the time of the adop-

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226. *See Tome*, 513 U.S. at 153.
227. *See id.* at 152.
228. *See id.* at 156.
229. *See* United States v. Tome, 3 F.3d 342, 350 (10th Cir. 1993), *rev'd*, 513 U.S. 150 (1995) ("Although the text of the rule is silent on this point, some circuits require that the declarant's prior consistent statement precede the time that the alleged motive to lie arose.").
230. *See Tome*, 513 U.S. at 155.
231. *See id.* at 164-65.
232. *See id.* at 160.
233. *See id.* at 156.
234. *See id.* at 156-57, 159-60.

tion of the Federal Rules of Evidence.[235] Most interestingly, in addition to the meaning derived from the text of the Rule, the Supreme Court found support for rejecting the Tenth Circuit's balancing test in the fact that "the somewhat peculiar language of the Rule bears close similarity to the language used in many of the common-law cases that describe the premotive requirement."[236] The Court nevertheless failed to alloy these elements properly. By comparing the text of the Rule with the common law tradition, the Court found confirmation for its conclusion that the drafters *intended* the Rule to retain the premotive requirement.[237] The problem with the Court's analysis is that it anthropomorphizes the process behind the Rule by looking for intent, rather than perceiving the Rule as an index or a marker. In this context, the Court abdicated its role of deciding which of the potential interpretations of the Rule would best serve the adversary process and the values articulated in Rule 102. By construing the Rule as a statute, the Court deferred to legislative supremacy when such deference was misplaced.[238]

By way of comparative illustration, if the Supreme Court had recognized the Federal Rules of Evidence as a perpetual index code, the Court, behaving as it would under the common law tradition, would have examined which construction of the Rule best suited the articulated purposes of the evidentiary system. If, hypothetically, the Court had decided that the Tenth Circuit's balancing test was the best way to advance the purposes of the Federal Rules of Evidence, the Court then would have determined whether that approach could coexist with the express text of Rule 801(d)(1)(B).[239] If the Court had found compatibility between the balancing test and the text of the Rule, the test would

235. *See id.* at 160-63.

236. *Id.* at 159.

237. *See id.* at 159-60.

238. *See supra* text accompanying notes 25-34; *see also* Weissenberger, *Interpretation of the Rules*, *supra* note 22, at 1323-24 (discussing why the legislative intent doctrine has a limited role in the interpretation of the Federal Rules of Evidence).

239. After all, it is defensible to assume that the balancing test is compatible with the text because a panel of the Tenth Circuit had concluded that its balancing test was not palpably incompatible with the express language of the rule. *See* United States v. Tome, 3 F.3d 342, 350, *rev'd*, 514 U.S. 150 (1995).

have been engrafted on the Rule by common-law growth of the legal principles indexed by the Rule. If, however, the Court had decided that the Tenth Circuit's balancing test best advanced the purposes of the Rules, but could not reconcile such a test with the text of Rule 801(d)(1)(B), it nevertheless could have affirmed the Tenth Circuit based upon the language of Rule 102.[240] In essence, the Court would have concluded that, under the facts specifically presented by the *Tome* litigation, a balancing test was justified "to secure fairness in administration" under the values expressly articulated in Rule 102, i.e., efficiency, justice, and truth.[241] If the Court had decided the issue in this fashion, the decision would have become part of the landscape of the law of evidence, and it would have been factored into the decision at some point in time as to whether Rule 801(d)(1)(B) should be amended in order to better serve as a marker of evidence law.[242] Of course, if the United States Supreme Court had considered the Tenth Circuit's balancing test to be the most effective method of advancing the purposes of the Rules in the context of the specific facts of *Tome*, and it simultaneously had found that the balancing test was incompatible with the text of Rule 801(d)(1)(B), the Court simply could have employed one of the repertoire of techniques used to avoid a decision.[243]

Finally, one must remember that, given the rulemaking process of the Federal Rules of Evidence, the Supreme Court has the prerogative to initiate changes in the text of the Federal Rules of Evidence.[244] Accordingly, in the dynamic process of ad-

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240. *See supra* text accompanying notes 184-86.

241. FED. R. EVID. 102; *see supra* text accompanying notes 184-86.

242. *See supra* text accompanying note 162.

243. Although this Article tries to avoid myopia, it simultaneously recognizes the enormity of the issue of when it is appropriate for the highest court either to accept or decline to decide a particular issue. *See, e.g.*, Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603 (1992); Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153 (1987); Girardeau A. Spann, *Simple Justice*, 73 GEO. L.J. 1041 (1985).

244. *See* 28 U.S.C. §§ 2072-2074 (1994). The Rules Enabling Act authorizes the Supreme Court to propose changes in rules of practice and procedure, including the Federal Rules of Evidence. *See id.* § 2072. The Judicial Conference, which actually drafts and amends the Rules, consummates the proposed changes. *See id.* § 2073. To aid the performance of these responsibilities, the Judicial Conference is, in turn, divided into several standing committees, as well as various Advisory Committees. *See*

vancing the growth of the law, the Supreme Court not only has the opportunity to balance many values and considerations in decisions on a case-by-case basis; it also has the opportunity to initiate amendments in the code that reflect growth that emerges through the dynamics of the forward application of the common law process.

CONCLUSION

A number of commentators have pointed out that strict textualism in the interpretation and construction of the Federal Rules of Evidence inevitably will result in the ossification of the law of evidence, such that its vitality will be paralyzed.[245] Likewise, other evidence commentators have focused on Rule 102 as a rule that at least facially appears to be incompatible with a textualist approach to the Federal Rules of Evidence.[246] This Article has endeavored to make a unique contribution to the literature concerning the proper interpretation of the Federal Rules of Evidence by bringing historical illumination to the nature of the Rules as a perpetual index code. Simultaneously, this Article has sought to introduce a hermeneutics that reconciles the codification of the Federal Rules of Evidence with the mandate of Rule 102, a rule that commands that the Rules be construed to secure the promotion of growth and development of the law of evidence.

Without the benefit of an historical perspective as to the function of a perpetual index code, it is extremely difficult to understand the way to reconcile a static text and dynamism in the

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id. Upon completion of the final draft of the proposed changes in the Rules, the Judicial Conference transmits its recommendations to the United States Supreme Court. Upon an affirmative review of the changes, the Supreme Court, which possesses the ultimate responsibility for proposing and facilitating changes in the Federal Rules of Evidence, transmits the proposed changes to Congress for its approval. *See id.* §§ 2071-2074. For a comprehensive discussion concerning the process of effecting changes in the rules of practice and procedure, see *A Self-Study of Federal Judicial Rulemaking: A Report from the Subcommittee on Long Range Planning to the Committee on Rules of Practice, Procedure and Evidence of the Judicial Conference of the United States*, 168 F.R.D. 679 (1995).

245. *See supra* text accompanying notes 52-57.

246. *See* Mengler, *supra* note 97, at 438-39; Rosen, *supra* note 46, at 1189-93.

law. The problem is further exacerbated by the fact that we live in an age of statutes, and that, consequently, when we encounter a legislative enactment, it is difficult to resist viewing the enactment through a statutory lens. With the benefit of historical light, we can see more clearly that the Federal Rules of Evidence are a codification of, and a continuation of, the preexisting common law.