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Whether the Federal Rules of Evidence Should be Conceived as a Perpetual Index Code: Blindness Is Worse Than Myopia

Edward J. Imwinkelried

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RESPONSE

WHETHER THE FEDERAL RULES OF EVIDENCE SHOULD BE CONCEIVED AS A PERPETUAL INDEX CODE: BLINDNESS IS WORSE THAN MYOPIA

EDWARD J. IMWINKELRIED*

At the outset, I want to make clear that I have enormous respect for Professor Weissenberger. We are not only colleagues; we are also coauthors.¹ We agree on many, if not most, evidentiary issues.² Even coauthors, however, sometimes disagree. Professor Weissenberger's article refers to Professor Summers,³ the coauthor of the leading text on the Uniform Commercial Code.⁴ As a professor of Contracts, I frequently consult that text. One of the most noteworthy features of the text is that the authors openly express their disagreements in black and white.⁵ Following the example of those distinguished authors, Professor Weissenberger and I are openly expressing our disagreement

* Professor of Law, University of California, Davis; B.A., 1967, J.D., 1969, University of San Francisco.

1. See EDWARD J. IMWINKELRIED & GLEN WEISSENBERGER, *AN EVIDENCE ANTHOLOGY* (1996).

2. Professor Weissenberger and I concur in the observation that, in the future, the U.S. Supreme Court should rest opinions regarding evidentiary privileges on the concept of personal autonomy rather than the instrumental rationale that it has used in the past. Compare Glen Weissenberger, *The Psychotherapist Privilege and the Supreme Court's Misplaced Reliance on State Legislatures*, 49 HASTINGS L.J. 999 (1998), with Edward J. Imwinkelried, *The Rivalry Between Truth and Privilege: The Weakness of the Supreme Court's Instrumental Reasoning in Jaffee v. Redmond*, 518 U.S. 1 (1996), 49 HASTINGS L.J. 969 (1999).

3. See Glen Weissenberger, *Evidence Myopia: The Failure to See the Federal Rules of Evidence as a Codification of the Common Law*, 40 WM. & MARY L. REV. 1539, 1582 (1999).

4. JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* (4th ed. 1995).

5. See *id.* § 1-3, at 10-12.

over the question of the basic conception of the Federal Rules of Evidence ("Federal Rules" or "Rules") as a statute.

Professor Weissenberger accurately restates my general position.⁶ In most of the cases construing the Federal Rules of Evidence, a majority of the justices have adopted a moderate textualist approach. On the one hand, the justices have rejected a strict textualist approach that would allow a judge to consider extrinsic legislative history material only if the judge cannot discern a "plain meaning" on the face of the statute.⁷ Instead, the justices routinely consider extrinsic material such as the Advisory Committee Notes and relevant congressional committee reports.⁸ On the other hand, a majority of the justices also have abandoned the traditional "legal process" approach to statutory construction. Under that approach, a judge should not only consider the extrinsic material; more importantly, he or she should attach great weight to the material. The legal process approach often yields the conclusion that an intent expressed only in the extrinsic material trumps any apparent plain meaning of the statutory text.⁹ In contrast, textualists assign great primacy to the specific language of the statute. They argue that the text is "all that Congress enacts into 'law'"¹⁰ and that the extrinsic material is subject to manipulation by special interest groups.¹¹ Moderate textualists thus recognize a strong, albeit rebuttable, presumption that the text prevails over any contrary meaning suggested by the extrinsic material.¹² I have written in defense of this brand of moderate textualism.¹³

Even more to the point, Professor Weissenberger also correctly states my view on the pivotal question of whether the federal

6. See Weissenberger, *supra* note 3, at 1543.

7. 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, 269-70 (1993).

8. See *Lever Bros. v. United States*, 981 F.2d 1330, 1332-36 (D.C. Cir. 1993); Imwinkelried, *supra* note 7, at 270.

9. See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 628 (1990).

10. *Id.* at 648.

11. See Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 HARV. L. REV. 1005, 1015-17 (1992).

12. See *Gang v. United States*, 783 F. Supp. 376, 380 (N.D. Ill. 1992).

13. See, e.g., Imwinkelried, *supra* note 7.

courts are free to expand upon the text of the Federal Rules by enforcing exclusionary rules that are not codified in the statutory text.¹⁴ As he notes, I have argued that the enactment of the Federal Rules deprived the federal appellate courts of the power to enforce categorical exclusionary rules when the text of the Rules does not include any language that reasonably could bear that interpretation.¹⁵ In my view, the text of the Federal Rules is especially pertinent to this question—in particular, the text of Rule 402. The defining characteristic of an exclusionary rule of evidence is that it can operate to bar the admission of logically relevant evidence. Rule 402 purports to list the sources of law upon which a federal court can draw to justify the exclusion of logically relevant evidence. In pertinent part, Rule 402 reads: “All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority.”¹⁶ Although the exceptive clause in Rule 402 lists four different types of law upon which an appellate court may draw to rationalize the exclusion of relevant evidence, case or decisional law is conspicuously absent from the list. The wording of Rule 402 and my reading of the history of the Federal Rules lead me to conclude that federal appellate courts no longer possess the common-law power to prescribe exclusionary rules in addition to those enunciated in the text of the Federal Rules.

In contrast, Professor Weissenberger believes that the federal appellate courts retain the common-law power to apply exclusionary rules that have not been reduced to statutory text.¹⁷ He characterizes the Federal Rules as a “perpetual index code”¹⁸ that compiles the common-law exclusionary rules¹⁹ but allows

14. See Weissenberger, *supra* note 3, at 1553-54, 1572.

15. Even Justice Roger Traynor believed that the process of interpretation had to be limited to meanings “to which the language of the instrument is reasonably susceptible.” *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 442 P.2d 641, 644 (Cal. 1968).

16. FED. R. EVID. 402.

17. See Weissenberger, *supra* note 3, at 1550-51, 1563, 1566.

18. See *id.* at 1559-62.

19. See *id.* at 1561.

the federal appellate courts to go beyond the compilation and expand the list of exclusionary rules.²⁰ Professor Weissenberger advances an historical as well as a textual argument to support this characterization. At several points, he asserts that as a matter of historical fact, the judiciary "dominated" the process of promulgating the Federal Rules.²¹ He concludes, therefore, that in interpreting the Rules, courts should not be unduly influenced by separation of powers concerns²² or unnecessarily defer to legislative supremacy.²³ Further, he contends that the text of Rule 102 "commands" that the Federal Rules be treated as a perpetual index code.²⁴

Professor Weissenberger's discussion of the various types of codes—fully comprehensive, field comprehensive, meta-scheme, and perpetual index²⁵—is illuminating. To restate my position in Professor Weissenberger's terminology, it would be fair to say that I have argued that, with the exception of certain windows to the common law found within Rules 301²⁶ and 501,²⁷ the Federal Rules constitute a field comprehensive code, regulating a particular body of doctrine—evidence law. Further, he is probably correct in identifying the consequences that would flow if the Federal Rules were classified as a perpetual index code. The critical question, however, is *whether* the history or the text of the Federal Rules justifies classifying the Rules in that fashion. The rub for Professor Weissenberger is that on close scrutiny, neither the history nor the text supports that classification.

20. *See id.* at 1551, 1563, 1566.

21. *See id.* at 1547, 1574.

22. *See id.* at 1547-48.

23. *See id.* at 1547-48, 1590.

24. *See id.* at 1552, 1566.

25. *See id.* at 1559-60.

26. *See* FED. R. EVID. 301 (prescribing certain limitations on the presumption and inference doctrine but, by default, allowing the courts to employ common-law methodology to fill the gaps in that body of doctrine).

27. FED. R. EVID. 501 (empowering the courts to continue to use common-law methodology to evolve privilege doctrine). *But see* 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE* §§ 5422, 5425 (1980) (pointing out that although the statute refers to the common law, the courts' common-law power is no longer intact, because the courts are now exercising a delegated legislative power).

THE HISTORY OF THE PROMULGATION OF THE FEDERAL RULES

As Professor Weissenberger chronicles the promulgation of the Federal Rules, the process was largely a judicial one in which Congress played only a minor role. There is certainly a temporal element of truth in that characterization: the Judicial Conference invested well over a decade studying the question of a uniform set of evidentiary rules for federal courts while Congress spent only two years considering the draft rules. Professor Weissenberger, however, goes farther and twice asserts that the judiciary "dominated" the process.²⁸ Congress's role was essentially "passive,"²⁹ "primarily" limited to "ratify[ing]" the evidentiary rules devised by the judiciary.³⁰ Analogizing to the Federal Rules of Civil Procedure, Professor Weissenberger writes that although in a technical sense the process formally concluded with congressional action, the "[r]eality" is "non-action by Congress" constituting "tacit approval."³¹ Given these assumptions about the respective roles of Congress and the judiciary, Professor Weissenberger believes there is no need for the courts to "defer[] to legislative supremacy" in interpreting the Federal Rules.³² Professor Weissenberger expressly states 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."³³ This version of the historical process is both oversimplified and inaccurate.

To begin with, the analogy to the experience with the Federal Rules of Civil Procedure is inapt in the extreme. In 1934, Congress approved the Rules Enabling Act authorizing the federal judiciary to promulgate rules of court.³⁴ When the Supreme

28. See Weissenberger, *supra* note 3, at 1547.

29. See *id.* at 1548; see also *id.* at 1575-76 (describing the "wholly passive" role of some state legislatures in the process of promulgating their jurisdictions' codes patterned after the Federal Rules).

30. *Id.* at 1547.

31. *Id.* at 1548 (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 18 (1941) (Frankfurter, J., dissenting)).

32. *Id.*; see *id.* at 1547, 1590.

33. *Id.* at 1548.

34. See 28 U.S.C. § 2072 (1994); Jack H. Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673, 673 (1975).

Court promulgated the Rules of Civil Procedure, the process proceeded uneventfully; Congress neither intervened to modify any of the proposed rules nor even threatened to do so.³⁵ For that matter, between 1934 and the time of the Court's submission of the Federal Rules of Evidence, "Congress had never challenged any rule approved by the Court."³⁶ As a practical matter, the Court enjoyed an autonomous role in prescribing rules for federal judicial practice for forty years.³⁷ "This situation changed dramatically," however, when the Court transmitted the proposed Federal Rules of Evidence to Congress.³⁸ Congress intervened for the first time, precipitating a "crisis" in the relationship between Congress and the Court in promulgating standards for the federal courts.³⁹ The congressional response to the earlier draft civil court rules can be described accurately as "non-action" conferring "tacit approval" on the Court's draft,⁴⁰ but that description is woefully inadequate to capture the intensity of the negative congressional response to the draft Federal Rules of Evidence.

The stated reasons for the congressional intervention are even more significant than the fact of the intervention:

Even before the draft rules reached Congress, Justice Douglas placed separation of powers in issue. He dissented from the Court's order transmitting the draft rules to Congress. He did so on the ground that the promulgation of the rules exceeded the Court's authority. When the rules reached Congress, several members voiced their agreement with Justice Douglas and opined that promulgation of the rules was properly a legislative function. House Judiciary Committee Report No. 93-52 accompanied that chamber's bill blocking the implementation of the Federal Rules of Evidence by the Court. The report specifically mentioned Justice Douglas's dissent. More to the point, the report expressly cited "the constitutional separation of powers" doctrine as a reason for prevent-

35. See Friedenthal, *supra* note 34, at 674-75.

36. *Id.* at 675 n.18.

37. See *id.* at 675.

38. *Id.*

39. See *id.* at 673, 675.

40. See Weissenberger, *supra* note 3, at 1548 (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 18 (1941) (Frankfurter, J., dissenting)).

ing "the promulgation of Rules of Evidence by the Supreme Court." A similar bill was introduced in the Senate. The Senate legislation was entitled "[a] bill to promote the separation of constitutional powers." Then Senator . . . Samuel Ervin introduced the bill. The very first sentence of his remarks referenced the separation of powers doctrine.⁴¹

Again, Professor Weissenberger flatly asserts that "the principle of separation of powers . . . is misplaced in the context of the Federal Rules of Evidence."⁴² Congress obviously disagreed. That principle was a paramount concern when Congress decided to take the unprecedented step of blocking the Court's draft and insisting that the Rules take effect, if at all, as statutes rather than rules promulgated under the Court's authority.

Professor Weissenberger is surely correct in stating that to appreciate the Federal Rules, we must understand "the . . . climate at the time of the . . . origins of the Federal Rules of Evidence."⁴³ Professor Weissenberger, however, overlooks the historical development that poisoned Congress's attitude toward the draft Federal Rules, especially its proposal for a broad privilege for government information:

[C]onsider *when* Congress intervened. Congress considered the draft rules against the backdrop of the Watergate controversy. That controversy made Congress acutely "jealous of its prerogatives vis-à-vis both the Executive and the Judiciary." [The same] Congress [that blocked the promulgation of the Federal Rules] was battling in federal court over evidentiary doctrines, namely, President Nixon's privilege claims. The [Supreme] Court handed down its privilege decision, *United States v. Nixon*, in 1974 while the rules were still pending before Congress. The congressional proceedings on the Federal Rules contain numerous references to the Watergate controversy and the related evidentiary privilege issues.⁴⁴

41. 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, 414 (1996) (footnotes omitted).

42. Weissenberger, *supra* note 3, at 1548.

43. *Id.* at 1556.

44. Imwinkelried, *supra* note 41, at 414-15 (footnotes omitted).

Senator Ervin chaired the Senate hearings reviewing the draft Federal Rules of Evidence as well as those investigating President Nixon.⁴⁵ In this political climate, it is understandable that Congress would be acutely conscious of asserting its area of hegemony.

When it intervened, Congress not only rewrote many provisions of the draft Federal Rules of Evidence; more fundamentally, it also revised the basic legislation authorizing the Court to promulgate rules by tightening congressional control over the process. To begin with, Congress amended the Rules Enabling Act to ensure that it had ample time to review a draft evidence rule before the rule took effect.⁴⁶ Revisiting the issue in 1988, Congress amended the statute again to give it even more time to scrutinize a draft evidence rule proposed by the Court.⁴⁷

Congress went even farther in restricting the judiciary's power to adopt court rules relating to evidentiary privileges. With respect to other evidentiary doctrines, Congress was content to guarantee itself a substantial period of time in which to veto a proposal submitted by the Court. When it came to privileges, however, Congress decided to deprive the Court of any independent power to promulgate a court rule; Congress decreed that "[a]ny . . . rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress."⁴⁸ In short, Congress not only changed specific provisions of the draft Federal Rules; Congress went to the length of revamping the very procedure for promulgating future court rules to enhance its role and diminish that of the judiciary.

Professor Weissenberger repeatedly insists that considerations of legislative supremacy are largely irrelevant to the interpretation of the Federal Rules.⁴⁹ The detailed historical record, however, bears out the contrary position taken by the late Professor Cleary, the Reporter for the Advisory Committee that drafted the Rules for the Judicial Conference. As Reporter, Professor

45. *See id.* at 415 n.271.

46. *See id.* at 416.

47. *See id.*

48. 28 U.S.C. § 2074(b) (1994).

49. *See Weissenberger, supra* note 3, at 1547-48, 1590.

Cleary was intimately familiar with the process of developing the Rules; he was a key participant and helped shape the process. Looking back at the process in retrospect in 1978, Professor Cleary observed that "[t]he most basic and fundamental assumption underlying the Rules is that of congressional supremacy."⁵⁰

Like the history of the general process of promulgating the Federal Rules, the history of individual rules lends support to Professor Cleary's observation. At one point, Professor Weissenberger approvingly cites Dean Mengler's analysis of habit evidence under Rule 406.⁵¹ Professor Weissenberger notes that Dean Mengler crafts a persuasive argument that Rule 406 gives "courts" discretion to evolve a definition of habit. In the course of restating Dean Mengler's analysis, Professor Weissenberger sometimes refers generally to "courts"⁵² and on other occasions to "trial courts."⁵³ The distinction between trial and appellate courts is critical to understanding Dean Mengler's position. The thrust of Dean Mengler's position is that Rule 406 illustrates a legislative judgment that power should be shifted from appellate courts to trial judges.⁵⁴ Based on his reading of the history of the Federal Rules, Dean Mengler concludes that "appellate rulemaking is entirely inconsistent with the" basic design of the Rules.⁵⁵ In Dean Mengler's words, Congress left "play in the joints" of many Rules provisions to enable the trial judge to situationally adapt the statutory mandate.⁵⁶ However, he expressly rejects Professor Weissenberger's conclusion that the drafters "left the task of" defining habit "to the [appellate] courts."⁵⁷ Quite to the contrary, Dean Mengler uses the history of Rule 406 to support his conclusion that the members of the Advisory Committee were "skeptical" about appellate [eviden-

50. Edward W. Cleary, *Preliminary Notes on Reading the Rules of Evidence*, 57 NEB. L. REV. 908, 910 (1978).

51. See Weissenberger, *supra* note 3, at 1584-86 (citing Thomas M. Mengler, *The Theory of Discretion in the Federal Rules of Evidence*, 74 IOWA L. REV. 413 (1989)).

52. Weissenberger, *supra* note 3, at 1585-86.

53. See *id.* at 1585.

54. See Mengler, *supra* note 51, at 415.

55. *Id.*

56. *Id.* at 414.

57. *Id.* at 423.

tiary] decisionmaking."⁵⁸ The 1961 Judicial Conference study, which Professor Weissenberger mentions,⁵⁹ bears out Dean Mengler's conclusion. That study recommended a uniform set of court rules for federal evidence practice in part because the appellate courts had failed to produce a clear, coherent body of evidence law.⁶⁰ The study found that despite decades of effort by the federal appellate courts, on many vital issues the common law of evidence was a "grotesque structure"⁶¹ troubled by "conflicting precedents."⁶²

As Professor Weissenberger explains, if the Federal Rules were intended to function as a perpetual index code, the appellate courts would enjoy roughly the same decisionmaking authority on evidentiary matters that they possessed at common law. In light of the history of the Federal Rules, it is a grave mistake to attribute that intent to either the Advisory Committee or Congress. As Dean Mengler demonstrates, the proceedings of the Advisory Committee indicate that the committee members had reached the conclusion that, in many respects, appellate court development of evidence doctrine had failed. It is certainly dubious to ascribe that intent to the Congress that enacted the Federal Rules; that body was the Watergate Congress that was predictably concerned with preserving its sphere of legislative supremacy in the separation of powers scheme. In the legislation blocking the Supreme Court's draft of the Federal Rules, the pertinent committee reports, and individual statements of legislators, Congress repeatedly asserted that one of its motivations for intervening was to safeguard that sphere. Professor Weissenberger believes that "the principle of separation of powers . . . is misplaced in the context of the Federal Rules of Evidence,"⁶³ but Congress obviously viewed the Court's proposal in the context of that very principle.

58. *Id.* at 424.

59. See Weissenberger, *supra* note 3, at 1567.

60. See COMMITTEE ON RULES OF PRACTICE & PROCEDURE, U.S. JUDICIAL CONFERENCE, A PRELIMINARY REPORT ON THE ADVISABILITY AND FEASIBILITY OF DEVELOPING UNIFORM RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS 25-26, 28, 51 (1962).

61. *Id.* at 27 (citing *Michelson v. United States*, 335 U.S. 469, 486 (1948)).

62. *Id.* at 42.

63. Weissenberger, *supra* note 3, at 1548.

THE TEXT OF THE FEDERAL RULES OF EVIDENCE

Professor Weissenberger does not rely exclusively on an historical argument; he also advances an alternative, textual argument for his position. Rule 102 provides the linchpin of this textual argument. That rule reads: "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."⁶⁴ Professor Weissenberger looks to Rule 102 as the basis of his contention that the appellate courts still possess common-law authority to expand on the list of exclusionary rules set out in the text of the Federal Rules.⁶⁵ He forcefully declares that Rule 102 "commands" that the Federal Rules be treated as a perpetual index code.⁶⁶ To his mind, the language of Rule 102 is so crystal clear that "by its very nature," Rule 102 "trumps all other Rules"⁶⁷ and empowers the appellate courts to "disregard" the express language of the other Rules.⁶⁸ His extended textual argument includes mention of Uniform Commercial Code section 1-103,⁶⁹ the Model Code of Evidence,⁷⁰ the original version of the Uniform Rules of Evidence,⁷¹ and the California Evidence Code.⁷² I submit that Professor Weissenberger has read too much into Rule 102 and that the other codes to which he alludes undermine his position.

To begin with, every word of the text of Rule 102 can be given effect without accepting the assumption of the continued authority of the appellate courts to expand upon the list of codified exclusionary rules. In two passages, Professor Weissenberger correctly remarks that Rule 102 identifies "values" or policies

64. FED. R. EVID. 102.

65. See Weissenberger, *supra* note 3, at 1552, 1565-67.

66. See *id.* at 1566.

67. *Id.* at 1581.

68. See *id.*

69. See *id.* at 1581-82.

70. See *id.* at 1569-71.

71. See *id.*

72. See *id.* at 1554 n.59.

that should inform the construction of the Federal Rules.⁷³ The first is "secur[ing] fairness in administration."⁷⁴ Judges certainly should consider that policy in exercising their discretionary control over the mode and order of examining witnesses under Rule 611(a).⁷⁵ The second value is the "elimination of unjustifiable expense and delay."⁷⁶ Judges ought to factor this policy into their limited power to exclude evidence under Rule 403.⁷⁷ The final value enumerated in Rule 102 is the "promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."⁷⁸ This value also can be implemented without assuming that the appellate courts have independent authority to prescribe new exclusionary rules. For example, the courts can accept new theories of noncharacter logical relevance for an accused's uncharged misconduct under Rule 404(b).⁷⁹ Similarly, a court effectuates this Rule 102 value under Rule 901(a), concerning authentication, by fashioning novel foundations for evidence generated by recent technological breakthroughs such as facsimile,⁸⁰ e-mail,⁸¹ and caller identification.⁸² The recognition of these new theories and foundations represents "growth and development" in evidence law, and these theories certainly promote "the end that the truth may be ascertained and proceedings justly determined."⁸³ In Professor Cleary's words, the courts can weigh these values "in the exercise of [their] delegated powers" under the express terms of the individual rules.⁸⁴ Thus, there is a plausible reading of Rule 102 that gives effect to every word in the rule

73. *See id.* at 1590-91.

74. FED. R. EVID. 102.

75. *See* FED. R. EVID. 611(a).

76. FED. R. EVID. 102.

77. *See* FED. R. EVID. 403.

78. FED. R. EVID. 102.

79. Rule 404(b) commits the federal courts to the inclusionary conception of the uncharged misconduct doctrine. EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 2:31 (rev. ed. 1998).

80. *See* EDWARD J. IMWINKELRIED, EVIDENTIARY FOUNDATIONS 54-59 (4th ed. 1998).

81. *See id.* at 59-69.

82. *See id.* at 79-84.

83. FED. R. EVID. 102.

84. Cleary, *supra* note 50, at 915.

without positing the continued existence of the common-law power to engraft uncodified exclusionary rules.

The case for Professor Weissenberger's reading of Rule 102 becomes even weaker when one turns to the other codes to which he alludes in the course of his argument. Consider, for example, his analogy to UCC section 1-103. That statute reads:

Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.⁸⁵

The Official Comment states that the section is intended to "indicate[] the continued applicability . . . of all supplemental bodies of law except insofar as they are explicitly displaced by this Act."⁸⁶ There is a vast difference between the wording of Rule 102 and UCC section 1-103. Section 1-103 specifically announces that other "principles of [common] law and equity" remain good law, and the Official Comment confirms the plain meaning of the text of section 1-103. In stark contrast, the text of Rule 102 is devoid of any mention of the common law. Similarly, the Advisory Committee Note to Rule 102 contains no language comparable to the quoted passage in the Official Comment to UCC section 1-103.

Professor Weissenberger's reliance on Rule 102 is fundamentally flawed because it does not speak to the critical question. Suppose that the question is whether a court may rely on the common-law economic duress doctrine⁸⁷ to invalidate a contract that otherwise complies with the UCC. The court would turn to UCC section 1-103 because the text of the statute expressly states that the court may consider "principles of [common] law" that "invalidat[e]" contracts.⁸⁸ Here, the corresponding issue is whether an appellate court may draw on the common law to

85. U.C.C. § 1-103 (1995).

86. *Id.* § 1-103 cmt. 1.

87. See E. ALLAN FARNSWORTH, *CONTRACTS* §§ 4.16-19 (1990 & Supp. 1998).

88. U.C.C. § 1-103.

enforce an uncodified exclusionary rule. By definition, exclusionary rules are evidentiary doctrines that have the operative effect of barring the introduction of logically relevant evidence. The question becomes which sources of law may an appellate court rely upon as authority for excluding such evidence? On its face, Rule 402—not Rule 102—directly addresses that question. Rule 402 provides: “All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority.”⁸⁹

As Professor Weissenberger acknowledges,⁹⁰ Professor Cleary asserts that “[i]n principle, under the Federal Rules no common law of evidence remains.”⁹¹ As authority for that proposition, Professor Cleary cites Rule 402⁹² because he understands that Rule 402 is apposite when the question presented is whether appellate courts retain the power to enforce case or decisional exclusionary rules to block the admission of relevant evidence. Professor Cleary is not alone in that understanding. The drafters of the Vermont code acknowledged that understanding of the impact of Rule 402 in their Note. That Note specifically states that Rule 402 has the effect of eliminating prior decisional law.⁹³ In several other jurisdictions, including Oregon and West Virginia, the drafters decided as a matter of policy that their appellate courts should retain their common-law authority; in order to preserve that authority, the drafters amended the wording of Rule 402.⁹⁴ Both the Reporter and all these drafting committees therefore worked on the assumption that Rule 402 controlled.

The case for this interpretation of Rule 402 becomes even stronger when one turns to the other evidentiary codes that Professor Weissenberger mentions. Two such codes are the Model Code of Evidence and the original version of the Uniform Rules of Evidence. In the same sentence, Professor Weissenberger

89. FED. R. EVID. 402.

90. Weissenberger, *supra* note 3, at 1565.

91. Cleary, *supra* note 50, at 915.

92. *See id.* at 915 n.27.

93. *See* VT. R. EVID. 402 reporter's note.

94. *See* Edward J. Imwinkelried, *Federal Rule of Evidence 402: The Second Revolution*, 6 REV. LITIG. 129, 136 (1987).

states both that the Advisory Committee "model[ed] the text of the Federal Rules after the Model Code and the Uniform Rules" and that the Rules were "not" intended as "a statutory displacement of preexisting evidentiary doctrines."⁹⁵ Professor Weissenberger is correct in asserting that the Advisory Committee opted to follow the model of the Uniform Rules. For example, the committee expressly cited Uniform Rule 7(f), but did so in its Note to Rule 402, not Rule 102.⁹⁶ The location of the citation there is appropriate. Uniform Rule of Evidence 7 announced that "[e]xcept as otherwise provided in these Rules . . . all relevant evidence is admissible."⁹⁷ Kansas adopted the Uniform Rules and, in commenting on Rule 7, the Kansas drafting committee explained that "[t]his rule wipes out all existing restrictions . . . on the admissibility of relevant evidence."⁹⁸ Model Code Rule 9 also provided that "[e]xcept as otherwise provided in the Rules, . . . all relevant evidence is admissible."⁹⁹ The official comment to Rule 9 reads: "These Rules . . . abrogate the effect of any prior judicial decision contrary to any part of any of the Rules"¹⁰⁰ Admittedly, these codes provisions do not use Professor Weissenberger's preferred term, "displace" the common law, but short of using that word, it is hard to imagine how the drafters could have made their intent any more explicit. The phrasing of these provisions is strikingly similar to that of Rule 402. The only distinction is linguistic; in the Model Code and Uniform Rule, the exceptive language precedes the statutory mandate that "all relevant evidence is admissible," while in Federal Rule 402 the exceptive language follows an identically worded statutory mandate.

Finally, consider Professor Weissenberger's footnote discussion of the California Evidence Code.¹⁰¹ In this footnote, he concedes

95. Weissenberger, *supra* note 3, at 1570.

96. See FED. R. EVID. 402 advisory committee's note.

97. 22 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE: EVIDENCE* § 5191, at 175 n.14 (1980).

98. *Id.* § 5192, at 178 n.9.

99. *Id.* § 5191, at 174-75 n.13.

100. MODEL CODE OF EVID. Rule 2 cmt., *quoted in* 22 WRIGHT & GRAHAM, *supra* note 96, § 5199, at 219 n.1.

101. See Weissenberger, *supra* note 3, at 1554 n.59.

that that Code was intended to function as the "sole and authoritative" source of exclusionary rules of evidence.¹⁰² However, he quickly adds that that "code . . . bears little resemblance to the Federal Rules of Evidence."¹⁰³ The Advisory Committee thought otherwise. California Evidence Code section 351 is the counterpart to Uniform Rule 7 and Model Code Rule 9. Section 351 states that "[e]xcept as otherwise provided by statute, all relevant evidence is admissible."¹⁰⁴ As previously stated, the Advisory Committee Note to Rule 402 cites Uniform Rule 7 as one of its models.¹⁰⁵ In the same vein, the Note cites California Evidence Code section 351.

The Advisory Committee's discussion of the California Evidence Code deals a further blow to Professor Weissenberger's position. He strenuously maintains that Rule 102 compels the conclusion that the Federal Rules should be treated as a perpetual index code rather than a field comprehensive code. As previously stated, he concedes in a footnote that the California Evidence Code was intended to operate as a field comprehensive code.¹⁰⁶ Interestingly enough, the Advisory Committee Note to Rule 102 indicates that the committee used a provision of the California Evidence Code—section 2¹⁰⁷—as a drafting model. The Note characterizes section 2 as a "similar provision[]." ¹⁰⁸ Obviously, even in Professor Weissenberger's mind, the inclusion of section 2 in the California Evidence Code did not convert that statutory scheme into a perpetual index code. If, as the Advisory Committee tells us, Rule 102 is a "similar provision," it appears fallacious to argue that standing alone, Rule 102 transforms the Federal Rules into a perpetual index code.

102. *Id.* (quoting *Pitchess v. Superior Court*, 522 P.2d 305, 311 (Cal. 1974)).

103. *Id.*

104. CAL. EVID. CODE ANN. § 351 (West 1995).

105. *See supra* note 95 and accompanying text.

106. *See supra* note 102 and accompanying text.

107. *See* CAL. EVID. CODE ANN. § 2 (stating that the "provisions" of the evidence code "are to be liberally construed with a view to effecting its objects and promoting justice").

108. FED. R. EVID. 102 advisory committee's note.

CONCLUSION

Early in his article, Professor Weissenberger suggests that the federal appellate courts have "inherent judicial powers"¹⁰⁹ to formulate their own evidentiary rules and that Congress's prescription of evidentiary rules may unconstitutionally "encroach upon the judiciary's fundamental Article III powers."¹¹⁰ Professor Weissenberger needs to elaborate this suggestion into a full-blown argument. That argument may have merit. On occasion, state courts have invoked the separation of powers doctrine to invalidate legislatively-prescribed evidentiary rules.¹¹¹ I am not a constitutional law scholar, and I would not presume to make any confident forecast of the prospect for that argument's success. Professor Weissenberger needs to amplify that constitutional argument, though, because his interpretive argument fails. His version of the "history" of the adoption of the Federal Rules of Evidence is both incomplete and inaccurate. Further, while reading too much into the text of Rule 102, he slights Rule 402 and ignores the instructive examples of Uniform Rule 7, Model Code Rule 9, and California Evidence Code section 351. Although he accuses other commentators of myopia, his argument suffers from a more serious malady—blindness to the details of the history and text of the Federal Rules of Evidence.

At one point Professor Weissenberger asks: "What is at stake in this debate?"¹¹² Simply stated, the stake is the future of evidence law. The United States still has "the most complex, restrictive set of evidentiary rules in the world."¹¹³ Our appellate courts have multiplied exclusionary rules to a greater extent than any other nation's judiciary, including the judicial systems in other countries that utilize lay jurors. The enactment of the Federal Rules of Evidence was a step in the right direction to-

109. Weissenberger, *supra* note 3, at 1549.

110. *Id.* at 1550.

111. *See, e.g.,* Day v. State, 643 N.E.2d 1, 3 (Ind. Ct. App. 1994) (holding that a partial statutory abolition of the character evidence prohibition was "a nullity since it conflicts with the common law rules of evidence").

112. Weissenberger, *supra* note 3, at 1552.

113. RONALD L. CARLSON ET AL., EVIDENCE IN THE NINETIES: CASES, MATERIALS, AND PROBLEMS FOR AN AGE OF SCIENCE AND STATUTES 3 (3d ed. 1991).

ward the rational simplification of American evidence law. Conceived as a field comprehensive code, the Federal Rules sweep away many uncodified limitations on the introduction of logically relevant evidence and disable the appellate courts from enforcing categorical exclusionary rules that cannot be grounded in the statutory text of the Rules. If the judiciary decides that we need to add a new categorical doctrine to the already long list of exclusionary rules enforceable in federal practice, the judiciary cannot implement that decision by a single appellate opinion; rather, the judiciary must proceed in a more deliberate fashion to promulgate a court rule embodying the new doctrine. As Rule 102 reflects, we should be concerned that "the law of evidence" be structured "to the end that the truth may be ascertained and proceedings justly determined."¹¹⁴ Given those end objectives, the "growth and development of the law of evidence"¹¹⁵ do not equate with the proliferation of exclusionary rules barring the admission of indisputably relevant evidence. Especially given the monumental effort expended in promulgating the Federal Rules, it would be a tragedy to take a step backward now. We may do precisely that, however, if we blind ourselves to the details of the history of the Federal Rules and their text, especially the language of Rule 402.

114. FED. R. EVID. 102.

115. *Id.*