The Supreme Court and the Interpretation of the Federal Rules of Evidence

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I. INTRODUCTION

In *Beech Aircraft Corp. v. Rainey*,[1] the Supreme Court of the United States stated that the Federal Rules of Evidence are a "legislative enactment" to be construed by the "traditional tools of statutory construction."[2] While this pronouncement is consistent with that made in numerous cases in which the Court has employed "legislative intent" as a guiding principle in construing the Federal Rules of Evidence,[3] the Court has never fully explicated the underlying basis for its treatment of the Federal Rules of Evidence as a statute. In actuality, the Federal Rules of Evidence have very little in common with a typical statute. Most fundamentally, the Federal Rules of Evidence originated in, and were designed by, the judicial branch and not the legislative branch.[4] In addition, the role of Congress in the process that generated the Federal Rules of Evidence was largely passive. Congress' primary function was to enact into law the will and intent of the Supreme Court and its Advisory Committee.[5] Moreover, the judicial branch designed the Federal Rules of Evidence to operate as guidance for the exercise of discretion within the federal judiciary, and consequently, the Rules' intended function is very much unlike that of most statutes.[6] Based on all of these considerations, the primary thesis of this Article is that application of the doctrine of "legislative intent" is functionally and substantively misplaced in the interpretation of the Federal Rules of Evidence.

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[1] 488 U.S. 153 (1988).

[2] *Id.* at 163 (quoting INS v. Cardoza-Forseca, 480 U.S. 421, 446 (1987)).

[3] *See, e.g.*, United States v. Salerno, 112 S. Ct. 2503 (1992); United States v. Zolin, 491 U.S. 554 (1989); Green v. Bock Laundry Mach. Co., 490 U.S. 504 (1989); Huddleston v. United States, 485 U.S. 681 (1988); United States v. Owens, 484 U.S. 554 (1988); Bourjaily v. United States, 483 U.S. 171 (1987).

[4] *See infra* notes 62–69 and accompanying text.

[5] *See infra* note 66 and accompanying text.

[6] *See infra* notes 118–23, 150–56 and accompanying text.

In interpreting a typical statute, the doctrine of legislative intent enjoys virtually unanimous acceptance as the central guiding principle.[7] While there may be diverse views as to the method by which legislative intent in a particular instance is to be determined,[8] there appears to be virtually universal

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[7] *See* REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 67–86 (1975); HENRY M. HART & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1412 (tent. ed. 1958); 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 45.05 (5th ed. 1992); Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 453–61 (1988); Earl M. Maltz, *Statutory Interpretation and Legislative Power: The Case for a Modified Intentionalist Approach*, 63 TUL. L. REV. 1, 6–13 (1988); Laurence C. Marshall, *"Let Congress Do It": The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177, 201 (1989); Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 78–79 (1984).

[8] *See* Farber & Frickey, *supra* note 7 (summarizing debate on the significance of legislative intent). *But see* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982) (proposing that courts should freely review and revise statutes as legal environment changes); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930) (arguing that intent of legislature is undiscoverable). The various principles, canons, and doctrines of statutory construction are diverse. *See generally* DICKERSON, *supra* note 7; SINGER, *supra* note 7. The determination and use of legislative intent are currently the subjects of substantial scholarship and debate. *See, e.g.*, Conference, *The Role of Legislative History in Judicial Interpretation*, 1987 DUKE L.J. 361; Symposia, *Statutory and Constitutional Interpretation*, 48 U. PITT. L. REV. 619, 663 (1987). Many scholars have argued for various means of determining legislative intent by analyzing a statute's legislative history. James M. Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886, 888–90 (1930) (arguing that legislative records provide accurate and compelling guides to interpretation); Maltz, *supra* note 7 (arguing that, absent absolutely clear contrary legislative history, plain meaning should be enforced); Marshall, *supra* note 7, at 177, 201 (stating that courts should implement value choices of legislature); Arthur W. Murphy, *Old Maxims Never Die: The "Plain Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299 (1975) (arguing that courts should abandon plain meaning rule); Redish, *supra* note 7, at 78–79 (stating that constitutional democracy requires courts to enforce language and intent of statute). Others advocate a stricter reliance on the statute's text. *See* Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59 (1988) (arguing that use of original intent of legislature increases judicial discretion); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990) (favoring text-based interpretations); Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 279, 338–58 (1985) (arguing that words alone should be used and "legislative intent" has no role). Judge Richard A. Posner has argued that a judge must adhere to the intent of the enacting legislature and "imagine as best he can how the legislators who enacted the statute would have wanted it applied to situations that they did not foresee." Richard A. Posner, *Statutory Interpretation—in the Classroom and*

recognition that the obligation of the courts to follow the intent of the legislature is derived from principles that seek to preserve the separation of powers between the branches of government.[9] Contrary to the typical statutory enactment, however, the Federal Rules of Evidence were developed by a multibranch process in which the subjective intent of the drafters is predominantly traceable to the judicial branch. In the case of most of the Federal Rules of Evidence, Congress' role was primarily to review and ratify the intent of a coordinate branch of government in its design of rules intended to operate internally within that branch.[10] Only in isolated instances did Congress actually modify the version of the Rules submitted to it by the Supreme Court.[11] Consequently, this Article seeks to show that under a theory of separation of powers, the principle of legislative supremacy does not comport with the unique and extraordinary process which produced the Federal Rules of Evidence.

A second thesis of this Article is that the Supreme Court and its Advisory Committee, as the primary architects of the Rules, never intended that the Rules should be subject to principles of statutory construction. Specifically, this Article will seek to demonstrate that the so-called "plain meaning" doctrine, predominantly employed as a means of determining legislative intent, is inconsistent with the Supreme Court's design of the Federal Rules of

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the Courtroom, 50 U. CHI. L. REV. 800, 818 (1983); *see also* Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263 (1982) (discussing the role of courts in an economic theory of legislative interpretation).

[9] As the Supreme Court has stated, "[The courts'] commitment to the separation of powers is too fundamental for us to pre-empt congressional action . . . ." Tennessee Valley Auth. v. Hill, 437 U.S. 153, 195 (1978); *see also* sources cited *infra* notes 74–76.

[10] *See infra* notes 69–71 and accompanying text.

[11] *See infra* note 70. Congress has also amended the Rules in certain instances subsequent to their original adoption: Rule 410, Inadmissibility of Pleas, Plea Discussions, and Related Statements, Act of Dec. 12, 1975, Pub. L. No. 94-149, § 1(9), 89 Stat. 805, 805; Rule 412, Sex Offense Cases; Relevance of Victim's Past Behavior, Privacy Protection for Rape Victims Act of 1978, Pub. L. No. 95-540, § 2(a), 92 Stat. 2046, 2046–47; Rule 704(b), Opinion on Ultimate Issue, Act of Oct. 12, 1984, Pub. L. No. 98-473, § 406, 98 Stat. 1837, 2067–68. *See* Edward R. Becker and 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, 859 n.4 (1992); *see also* STEPHEN A. SALZBURG & MICHAEL M. MARTIN, FEDERAL RULES OF EVIDENCE MANUAL 12 (5th ed. 1990) (arguing that Congressional enactment of the Rules hinders the amendment process and, consequently, the growth and development of evidence law); Margaret A. Berger, *The Federal Rules of Evidence: Defining and Refining the Goals of Codification*, 12 HOFSTRA L. REV. 255, 277 (1984) (advocating the need for an Advisory Committee to quicken the pace of reform).

Evidence.[12] While this Article will not enter the fray of argumentation addressing the precise role of "plain meaning," it will seek to show that the Federal Rules of Evidence were never intended to operate as a statute which would have plain meaning. Rather than being designed as specific mandates, the Federal Rules of Evidence were consciously drawn with a recognition that the federal trial judiciary possess substantial inherent discretion in interpreting, expanding upon, and applying the Rules.[13] This discretion was designed to be utilized pervasively in the functional application of all the Federal Rules of Evidence, and by its nature, it is inconsistent with interpreting the Federal Rules of Evidence under such statutory construction canons as plain meaning.

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[12] The plain meaning doctrine has been expressed in various ways. Essentially, the doctrine is as follows: "If the words are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning." Caminetti v. United States, 242 U.S. 470, 490 (1917). Commentators have noted that the plain meaning doctrine has not precluded courts from performing detailed analysis of legislative history. *See* SINGER, *supra* note 7, § 46.01 (discussing plain meaning as a primary but not exclusive rationale in courts' reasoning); Douglas E. Abrams, *The Place of Procedural Control in Determining Who May Sue or Be Sued: Lessons in Statutory Interpretation from Civil RICO and Sedima*, 38 VAND. L. REV. 1477, 1492 n.67 (1985); Becker and Orenstein, *supra* note 11, at 864 n.22; Randolph N. Jonakait, *The Supreme Court, Plain Meaning, and the Changed Rules of Evidence*, 68 TEX. L. REV. 745, 746 (1990); Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 195 (1983). However, some recent Supreme Court opinions have exhibited a rigid application of the plain meaning doctrine to the exclusion of other interpretational sources and devices. *See, e.g.*, United States v. Salerno, 112 S. Ct. 2503 (1992) ("To respect [Congress'] determination, we must enforce the words that it enacted."); Freytag v. Commissioner of Internal Revenue, 111 S. Ct. 2631, 2636 (1991) ("When we find the terms of a statute unambiguous, judicial inquiry should be complete except in rare and exceptional circumstances."); Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 473 (1989) (Kennedy, J., concurring) ("[I]t does not foster a democratic exegesis for this Court to rummage through unauthoritative materials to consult the spirit of the legislation . . . ."); Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1989) (Scalia, J., concurring) ("I would not permit any of the historical and legislative material . . . to lead me to a result different from the one that [the plain, ordinary meaning suggests]."); United States v. Ron Pair Enters., 489 U.S. 235, 241 (1989) (stating that statutory language expresses Congressional intent); Thompson v. Thompson, 484 U.S. 174, 191–92 (1988) (Scalia, J., concurring) ("Committee reports, floor speeches, and even colloquies between Congressmen . . . are frail substitutes for bicameral vote upon the text of a law and its presentment to the President."). *See also* Eskridge, *supra* note 8, at 656–66 (summarizing 1987–89 United States Supreme Court terms and positions of various justices).

[13] *See infra* notes 118–24, 151–57 and accompanying text.

The Supreme Court's treatment of the Federal Rules of Evidence as a statute undoubtedly has and will result in several unintended and untoward ramifications, two of which will be themes of this discussion. First, if it is assumed that the Federal Rules of Evidence are a statute, then any pre-existing evidentiary doctrine not preserved in the express, "plain language" of the Rules will be deemed superseded and discarded by the adoption of the Rules. Likewise, courts will be constrained from creating evidentiary doctrines not derived from the express, "plain language" of the Rules. Second, if treated as a statute, the Federal Rules of Evidence will distort the complex and richly textured nature of judicial discretion which historically has been central to the operation of all evidentiary rules. Because this discretion has not been expressly codified, and probably cannot be codified in the Rules, its continued viability is jeopardized by the application of statutory construction canons to the Federal Rules of Evidence.[14]

II. THE SUPREME COURT AND THE STATUTORY IDENTITY OF THE FEDERAL RULES OF EVIDENCE

In virtually every case in which the Court has elected to interpret the textual language of the Federal Rules of Evidence, it has commenced its analysis with the articulated premise that the Federal Rules of Evidence represent a piece of legislation to the interpreted in accordance with traditional

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[14] *See infra* notes 127–32; *see also* Edward J. Imwinkelried, *Federal Rule of Evidence 402: The Second Revolution*, 6 REV. LITIG. 129 (1987); 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 (1988); Edward J. Imwinkelried, *The Need to Amend Federal Rule of Evidence 404(b): The Threat to the Future of the Federal Rules of Evidence*, 30 VILL. L. REV. 1465 (1985). Professor Imwinkelried argues that the Rules have superseded the common law of evidence and that judges have consequently lost much of their power to fashion exclusionary rules of evidence based on reliability or public policy. *See* Becker & Orenstein, *supra* note 11, at 864 n.23.

Professor Jonakait has espoused a position similar to that of this Article. Jonakait, *supra* note 12, at 745–49. He has argued that the Supreme Court's application of the plain meaning doctrine to the Federal Rules of Evidence "will take away much of evidence law's dynamic quality, forcing courts to decide cases without considering evidentiary policy." *Id.* at 749. He concluded that this interpretational method will lead to results unforeseen and unintended by the Rules' drafters. *Id.* Jonakait explored only the effects of statutory construction canons on the Federal Rules of Evidence. *Id.* at 782 n.152. This Article, however, primarily seeks to demonstrate that the Court's premise, that the Federal Rules of Evidence are a statute, is unfounded.

principles of statutory construction.[15] The premise itself, however, has not been the subject of analysis by the Court, but rather, it has been simply an operative assumption in the Court's analysis.[16] Three cases are illustrative.

In *Green v. Bock Laundry Machine Co.*,[17] the plaintiff sued a manufacturer of laundry equipment after he was injured while operating one of defendant's machines.[18] During the trial, the defendant attacked the plaintiff's credibility by eliciting admissions that the plaintiff had a criminal record involving convictions for burglary and related crimes.[19] Although the plaintiff objected to the use of this evidence, the district court allowed the impeachment on the basis of Federal Evidence Rule 609(a), and the court of appeals affirmed.[20] The United States Supreme Court granted certiorari to resolve a conflict among the circuits as to whether the special balancing test in Rule 609(a)(1) applied to a witness other than a criminal defendant.[21] Additionally, the Court addressed whether Rule 609 might be superseded by Rule 403 which balances the probative value of relevant evidence against the dangers of unfair prejudice, confusion of the issues, misleading the jury, undue delay, and needless repetition.[22]

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[15] *See* cases cited *supra* notes 1–3.

[16] *See* United States Supreme Court cases cited *supra* notes 1–3. Likewise, several United States Courts of Appeals opinions reflect the premise that the Federal Rules of Evidence are subject to traditional canons of statutory interpretation. *See, e.g.*, Christophersen v. Allied-Signal Corp., 939 F.2d 1106, 1116–17 (5th Cir. 1991) (Clark, J., concurring); United States v. Rogers, 918 F.2d 207, 209 (D.C. Cir. 1990); Donald v. Wilson, 847 F.2d 1191, 1199 (6th Cir. 1988) (Martin, J., concurring); Campbell v. Greer, 831 F.2d 700, 703 (7th Cir. 1987); McQueeney v. Wilmington Trust Co., 779 F.2d 916, 922 (3d Cir. 1985); Lataille v. Ponte, 754 F.2d 33, 35 (1st Cir. 1985); United States v. Petersen, 611 F.2d 1313, 1334 (10th Cir. 1979) (McKay, J., dissenting); United States v. Oates, 560 F.2d 45, 68 (2d Cir. 1976).

[17] 490 U.S. 504 (1989).

[18] *Id.* at 506.

[19] *Id.*

[20] *Id.*

[21] *Id.* at 505.

[22] *Id.*; FED. R. EVID. 403. The version of Rule 609(a)(1) then in effect read:

> For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during cross examination but only if the crime: (1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect *to the defendant*, or (2) involved dishonesty or false statement, regardless of the punishment.

In analyzing the first issue, the Supreme Court examined the language of Rule 609 and found that a literal reading of the plain language would compel "an odd result in a case like this."[23] Literally applying the plain language of the Rule would compel an interpretation that would deny a civil plaintiff the same right to the Rule 609(a) balancing test as that granted to a civil defendant.[24] Such a result, the Court reasoned, could not rationally have been intended. Following statutory construction principles, the Court was compelled to go beyond the literal text of the Rule and examine the underlying developmental history of the Rule itself.[25] From this analysis, the Court concluded that Rule 609(a)(1) was intended to apply only to criminal cases and that the term "defendant" in the rule applied only to a criminal defendant (*i.e.*, the accused in a criminal case).[26]

The second interpretation issue in the *Green* case was also predicated on the premise that the Federal Rules of Evidence are a statute. The specific issue presented was whether Rule 609(a)(1) governed all prior felony conviction impeachment, such that no discretion may be exercised to benefit any witness other than the criminally accused, or in the alternative, whether Rule 609's specific reference to the criminal defendant left Rule 403 balancing available in the context of other witnesses.[27] The Court stated: "Prodigious scholarship highlighting the irrationality and unfairness of impeaching credibility with evidence of felonies unrelated to veracity indicates that judicial exercise of discretion is in order. If Congress intended otherwise, however, judges must adhere to its decision."[28] In resolving the issue of the interaction of Rule 403 and Rule 609, the Court did not find any definitive authority within the legislative history pertinent to the applicability of Rule 403 to Rule 609. In fact, the Court stated that the "legislative history evince[d] some confusion."[29] To

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FED. R. EVID. 609(a)(1) (emphasis added).

[23] *Green*, 490 U.S. at 509.

[24] *Id.* Considering that in civil cases the roles of plaintiff and defendant are often assumed without reflecting on such evidentiary consequences and that those roles could often be reversed, the grant of a right to one and denial of that same right to the other is clearly improper.

[25] *Id.* at 510–24. The court looked at the entire legislative history, including communications between the Judicial Advisory Committee and Congress as to Rule 609. *Id.* Because Rule 609 was changed by Congress from the form submitted by the U.S. Supreme Court, its developmental history includes the actions and discussions of both the judiciary and legislative branches.

[26] *Id.* at 523–24.

[27] *Id.* at 524.

[28] *Id.*

[29] *Id.* at 524–25.

effectuate the "intent" of Congress, the Court instead looked to a canon of statutory construction and examined the role of the textual language of a statute. The Court stated:

> A general statutory rule usually does not govern unless there is no more specific rule. *See D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932). 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.[30]

Based on this principle, which examines the facial qualities of the language of a statute, the Court concluded that Rule 403 could not operate in conjunction with Rule 609 to exclude otherwise authorized convictions.

The Court's analysis in *Green* contains several noteworthy features. First, the Court's treatment of the text of Rule 609(a) as statutory language was not extraordinary[31] because the version of Rule 609(a) considered in *Green* was one of the provisions of the Federal Rules of Evidence that Congress modified during the rule-making process.[32] Consequently, in applying statutory construction principles, the Court first encountered language which, if applied according to its plain meaning, would compel "an odd result."[33] More importantly, the Court was able to uncover authentic legislative history, specific to the Rule in question, that originated in Congress.[34] In most instances, however, the Federal Rules of Evidence will not be accompanied by such a record of legislative deliberation because the subjective intent regarding the vast majority of provisions of the Federal Rules of Evidence originated in the judicial branch.

The second noteworthy feature of the Court's decision in *Green* was the use of a principle of statutory construction to determine the respective roles of two distinct Federal Rules of Evidence. The Court found no express discussion in the history of the Rules that would determine the relative roles of Rule 403

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[30] *Id.* at 524.

[31] The Court began its analysis by considering the text of the Rule to see if the plain language answered the question before it. Finding the text ambiguous, the Court then turned to a detailed review of the Rule's legislative history to determine its correct interpretation. *Id.* at 508–23.

[32] *See id.* at 517–20; *see also Proposed Rule of Evidence Rule 609 Impeachment by Evidence of Conviction of Crime*, 51 F.R.D. 391 (1971); H.R. Rep. No. 650, 93d Cong., 1st Sess. 11 (1973); 120 Cong. Rec. 40,894 (1974); 120 Cong. Rec. 2374 (1974).

[33] *Green*, 490 U.S. at 509.

[34] *See* sources cited *supra* notes 22–25 and accompanying text.

and Rule 609,[35] and the resolution of the issue was essentially achieved by resort to a canon of statutory construction which provides that a general statutory provision will not govern where a more specific rule addresses the subject.[36] While the Court cited other arguments that reinforced the result indicated by this principle of statutory construction, no definitive history compelled the result.[37] The significance of the Court's analysis lies in its treatment of the entire body of the Federal Rules of Evidence as an integrated statute, thereby warranting the use of principles of statutory construction to determine the interplay among the various provisions of the Federal Rules of Evidence.[38] Consequently, the Court not only uses statutory construction principles for interpreting specific language of the text of the Rules, but it is also prepared to use such principles to discern the internal structure of the Federal Rules of Evidence.[39] In essence, the Court assumed that the Federal Rules of Evidence were designed in accordance with, and in contemplation of, devices normally attending the structure of a statute.

Another illustration of the Court's treatment of the Federal Rules of Evidence as a statutory enactment is found in *Huddleston v. United States*.[40] In *Huddleston*, the accused was charged with possessing five hundred stolen videotapes. A key element of the charged offense was subjective knowledge that the tapes were stolen.[41] At trial, the prosecution presented evidence concerning the defendant's involvement in other acts involving stolen merchandise from the same supplier.[42] The district court allowed this evidence under the second sentence of Rule 404(b) which permits evidence of extrinsic acts when offered to show a consequential fact other than the actor's characterological propensity or inclination to behave in a certain manner.[43] The defendant was convicted, and the court of appeals first reversed the conviction, but upon re-hearing, affirmed.[44] The United States Supreme Court affirmed the conviction after deciding that the district court was not required to hold a preliminary hearing to determine whether the government had proven the "similar act" or "extrinsic act" by a preponderance of the evidence before

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[35] *Green*, 490 U.S. at 524–25.
[36] *Id.*
[37] *Id.* at 525–27.
[38] *Id.* at 508–09.
[39] *Id.*
[40] 485 U.S. 681 (1988).
[41] *Id.* at 682.
[42] *Id.* at 683.
[43] *Id.*
[44] *Id.* at 683–84.

submitting that evidence to the jury.[45] In reaching its determination, the Court concluded that requiring a preliminary hearing, as well as conditioning admissibility on proof of the accused's commission of the act by a preponderance of the evidence, would be inconsistent with the plain language of Rule 404(b) and the structure of the Federal Rules of Evidence.[46] The Court stated:

> Petitioner's reading of Rule 404(b) as mandating a preliminary finding by the trial court that the act in question occurred not only superimposes a level of judicial oversight that is nowhere apparent from the language of that provision, but it is simply inconsistent with the legislative history behind Rule 404(b).[47]

The *Huddleston* Court concluded that questions of admissibility concerning the extrinsic act were governed by Rule 104(b), which provides: "When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition."[48] The significance of this conclusion, as well as the analysis which led to it, lies in its rejection of virtually any evidentiary doctrine that is not found on the face of the literal text, the "plain language," of the Federal Rules of Evidence. If the plain language of the Rules does not provide for a doctrine of admissibility or inadmissibility, the doctrine is ostensibly rejected under the Court's interpretation of the Rules of Evidence. Consequently, the *Huddleston* decision demonstrates that the Supreme Court views the Federal Rules of Evidence as a definitive, inclusive statute which is designed to address and resolve every evidentiary issue. As will be discussed later in this Article, such a position is inconsistent with the design of the Rules which was intended to create guidance rather than definitive resolution of evidentiary issues.[49]

Finally, the Supreme Court's decision in *Bourjaily v. United States*,[50] represents an even more vivid illustration of the Supreme Court's perception of

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[45] *Id.* at 689.

[46] *Id.* at 687.

[47] *Id.* at 688.

[48] FED. R. EVID. 104(b).

[49] *See infra* notes 111–32 and accompanying text.

[50] 483 U.S. 171 (1987). The defendant was charged with conspiring to distribute cocaine and possession with intent to distribute. *Id.* at 174. Another individual, Lonardo, and an undercover FBI agent had arranged the sale by telephone, with Lonardo stating that a "friend" would distribute the cocaine. *Id.* at 173–74. The recorded conversation of Lonardo with the informant, referring to the friend's participation, was admitted against the defendant under Rule 801(d)(2)(E). *Id.* at 174.

the Federal Rules of Evidence as a definitive statutory enactment which allows for no superimposition of additional evidentiary doctrines. In *Bourjaily*, the Supreme Court interpreted the federal co-conspirator hearsay exception contained in Rule 801(d)(2)(E) and held that a trial court may consider the offered hearsay itself in making the preliminary factual determination of whether a conspiracy existed and whether the statement was made in the furtherance of the conspiracy.[51] The Court also determined that the offering party must establish foundational facts pertinent to applying the exception by sufficient evidence to support a finding of conspiracy by a preponderance of the evidence.[52] While there appears to be some question as to the precise interpretation of pre-Rule law regarding the requirement of independent proof for the establishment of a conspiracy, the Court ultimately resolved this issue by pointing out that precedent for the independent proof requirement was decided prior to Congress' enactment of the Federal Rules of Evidence.[53] Called the "bootstrapping rule" in *Glasser v. United States*,[54] the independent proof requirement was not expressly preserved on the face of the Rules. The *Bourjaily* Court framed the issue as one of "whether any aspect of *Glasser*'s bootstrapping rule remains viable after the enactment of the Federal Rules of Evidence."[55] The Court's resolution of the issue again demonstrated its treatment of the Federal Rules of Evidence as a definitive, inclusive statute. Finding that Rule 104 allows the trial court to make the preliminary factual determinations pertinent to Rule 801(d)(2)(E) by considering any appropriate evidence, the Court decided that the adoption of the Federal Rules eliminated

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[51] *Id.* at 178–79. Rule 801(d)(2) provides that a statement is not hearsay if the statement:

> is offered against a party and is (A) his own statement, in either his individual or a representative capacity or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

FED. R. EVID. 801(d)(2).

[52] *Bourjaily*, 483 U.S. at 178–79.

[53] *Id.* at 177 (citing United States v. Nixon, 418 U.S. 683 (1974); Glasser v. United States, 315 U.S. 60 (1942)).

[54] *Glasser*, 315 U.S. at 74–75.

[55] *Bourjaily*, 483 U.S. at 178.

any of the safeguards once imposed by *Glasser*.[56] Because the plain language of the Rules did not expressly preserve the so-called "bootstrapping doctrine," the Court found the doctrine to be superseded by the adoption of the Federal Rules of Evidence.[57] Consequently, the Court summarily dismissed any argument that the bootstrapping rule represented sound policy which might be reaffirmed subsequent to the adoption of the Federal Rules of Evidence. In essence, any policy considerations were eclipsed by the entertainment of a fiction that Congress consciously intended to overrule *Glasser* by adopting Rule 104. As the petitioner pointed out in *Bourjaily*, the legislative history was silent as to whether Congress or the Advisory Committee actually ever considered the application of Rule 104 to the foundational requirements of the co-conspirator hearsay exception.[58] Nevertheless, by treating the Federal Rules of Evidence as a statute, the Court not only eliminated the possible superimposition of additional safeguards to the admissibility of evidence, it simultaneously eliminated any pre-existing common-law evidentiary safeguard which would create a higher threshold to the admission of evidence.[59]

While the Supreme Court has used statutory construction principles in interpreting the Federal Rules of Evidence in several other cases,[60] *Green*, *Huddleston*, and *Bourjaily* are representative illustrations of analyses that result from an initial premise that the Federal Rules of Evidence are a legislative enactment. Fundamentally, the analysis always appears to employ the fiction that Congress possessed a conscious intent regarding the import of the text of specific Rules, as well as the functional interplay of the various provisions of the Federal Rules of Evidence. This fiction appears to be anchored to the fact that congressional legislation was the final step in the process that engendered the Federal Rules of Evidence.

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[56] *See id.* at 186-202 (Blackmun, J., dissenting).

[57] *Id.* at 178.

[58] *Id.* at 178-79. Congress took no action to revise Rule 801(d)(2)(E).

[59] For an extensive analysis of *Bourjaily*, see Becker and Orenstein, *supra* note 11, at 869-76. The authors believe that the result was fundamentally incorrect. They argue that the abandonment of the independent proof requirement violates the agency justification for admitting co-conspirator statements, fails to address the history and development of this hearsay exception, and also strengthens the hand of the prosecutor in establishing a conspiracy. *Id.* at 873-74.

[60] *See* cases cited *supra* notes 1-3.

III. THE DOCTRINE OF LEGISLATIVE INTENT AND THE RULE-MAKING PROCESS

The Federal Rules of Evidence became law as a result of a process that concluded with legislation,[61] and perhaps not surprisingly, the Supreme Court has treated the Rules as a statute subject to an analysis which commences with the stated objective of discerning legislative intent. Nevertheless, treating the Federal Rules of Evidence as a statute for the purpose of interpretation places undue emphasis on the terminal point of a process in which the judiciary was the predominant participant.

The Federal Rules of Evidence were conceived in the judicial branch in 1961 when Chief Justice Warren appointed a Special Committee on Evidence to study the desirability and feasibility of a uniform code of evidence for federal courts. 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.[62] Three drafts of the Rules were published and circulated for comment before submission to Congress.[63] Unlike prior procedural Rules, however, when the Supreme Court promulgated the Federal Rules of Evidence on November 20, 1972,[64]

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61 *See infra* note 69.

62 The Judicial Conference created a Committee on Rules of Practice and Procedure. JUDICIAL CONFERENCE OF THE UNITED STATES REPORT 1958, 15 (U.S. Government Printing Office 1958). The subject of evidence rules was referred to this committee and it 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. After the Committee's affirmative recommendation, in its 1963 Final Report, Warren appointed an Advisory Committee to draft the Federal Rules of Evidence. *Preliminary Draft of Proposed Rules of Evidence for the U.S. District Courts and Magistrates*, 46 F.R.D. 161, 175–79 (1969) [hereinafter *Preliminary Draft].*

63 The proposed Rules drafted by the Advisory Committee were approved by the Standing Committee on Rules of Practice and Procedure and then by the Judicial Conference as a whole. *Preliminary Draft, supra* note 62, at 173. Copies of the Rules and accompanying notes were circulated among bench and bar for comments. *Revised Draft of Proposed Rules of Evidence for the U.S. Courts and Magistrates*, 51 F.R.D. 315, 316 (1971) [hereinafter *Revised Draft*]. The Rules were then submitted to the U.S. Supreme Court but sent back to the Committee for further consideration. With more comments, the Committee made some changes and sent the revised Rules back to the U.S. Supreme Court. The Court then transmitted the Rules to Congress. *Rules of Evidence for United States Courts and Magistrates*, 56 F.R.D. 183, 184 (1973) [hereinafter *Rules*].

64 *Rules, supra* note 63, at 184–85.

questions were raised concerning the Court's authority to prescribe certain Rules.[65] The Rules were promulgated pursuant to congressional enabling authority granting 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."[66] Critics closely scrutinized several of the Rules promulgated by the Supreme Court in an effort to determine whether the Court had exceeded its authority under the Enabling Act by prescribing rules that were outside the scope of "practice and procedure."[67] The debate over whether the Supreme Court had exceeded its power became moot, however, when Congress intervened in the process with legislation stipulating that the Federal Rules of Evidence would not take effect until they were expressly approved by Congress.[68] While Congress thereafter revised the Supreme Court's version of the Rules in specific, isolated provisions, it did not reconstruct the design of the Rules. Its 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.[69]

An important digression must be made at this juncture of the analysis. In certain isolated instances a Rule is authentically statutory in nature because the text was revised by Congress.[70] Where Congress chose to alter the Supreme

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[65] *Id.* at 185 (Douglas, J. dissenting); *see also Proposed Rules of Evidence: Hearings Before the Special Subcommittee on Reform of Federal Criminal Laws of the Committee on the Judiciary*, 93d Cong., 1st Sess. (1973).

[66] 18 U.S.C. §§ 3402, 3771-72 (1988); 28 U.S.C. §§ 2072, 2075 (1988).

[67] The Supreme Court has the authority to prescribe "Rules of . . . practice and procedure . . . ." 18 U.S.C. §§ 3402, 3771-72 (1988).

[68] S. Res. 583, 93d Cong., 1st Sess. (1973) (enacted).

[69] The House held hearings on the Rules on January 30, 1974 and passed its version on February 6, 1974. H.R. 650, 93d Cong., 1st Sess. (1974). The Senate, after hearings on November 21, 1974, passed a different version on November 22, 1974. S.R. 1277, 93d Cong., 1st Sess. (1974). A Conference Committee produced the final version and both Houses agreed to it on December 16-18, 1974. H.R. 1597, 93d Cong., 1st Sess. (1974) (enacted). Finally, the President signed the Rules on January 3, 1975. *Statement on Signing a Bill Establishing Rules of Evidence in Federal Court Proceedings*, Public Papers of the Presidents, Gerald R. Ford.

[70] *See, e.g.*, FED. R. EVID. 609(a); FED. R. EVID. 804(b)(1). For a discussion of Rule 609, see *supra* notes 22-25 and accompanying text. For a discussion of Rule 804(b)(1), see United States v. Salerno, 112 S. Ct. 2503 (1992) (interpreting the language of Rule 804(b)(1)); Glen Weissenberger, *The Former Testimony Hearsay Exception: A Study in*

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. In fact, the version of Rule 609(a) at issue in *Green v. Bock Laundry*, discussed earlier in this Article, is such a provision.[71] 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.

Another important digression pertains to the authority of Congress in the rule-making process. From the perspective of constitutional and statutory powers, little doubt exists that Congress possesses the ultimate authority in the rule-making process.[72] In examining the authority to create the Federal Rules of Evidence and in reviewing the rule-making process as it actually evolved, the Federal Rules of Evidence inescapably appear to the product of a process that appropriately concluded with congressional legislation. Even so, recognizing Congress' ultimate constitutional and statutory authority in the rule-making process is not tantamount to resolving issues of statutory interpretation. While the Federal Rules of Evidence may be the result of a process which concluded with legislation, the process that brought about the legislation is not typical of that preceding other legislative enactments. Consequently, the authority to create the Federal Rules of Evidence should not operate to resolve the question of the manner in which the Federal Rules of Evidence are to be interpreted.

Turning to the import of the legislative intent doctrine,[73] its incongruity with the Federal Rules should become apparent after a brief explication of the doctrine. Said to be the touchstone of statutory interpretation,[74] underpinnings

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Rulemaking, Judicial Revisionism, and the Separation of Powers, 67 N.C. L. REV. 295, 312-36 (1989) (discussing Rule 804(b)(1) and the ramifications of congressional amendment).

[71] *See* discussion of *Green v. Bock Laundry*, *supra* notes 17-39 and accompanying text.

[72] *See supra* notes 65-68.

[73] EARL T. CRAWFORD, THE CONSTRUCTION OF STATUTES § 158 (1940); SINGER, *supra* note 7, § 45.05; *accord* DICKERSON, *supra* note 7, at 67; PLATT POTTER, DWARRIS ON STATUTES 61 (Albany, William Gould & Son 1875).

[74] Maltz, *supra* note 7, at 3 (citing Philbrook v. Glodget, 421 U.S. 707, 713 (1975); National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974); Flora v. United States, 357 U.S. 63, 65 (1958)). Commentators have described the legislative intent doctrine in terms of agency and principal. *See, e.g.*, Frank H.

of the legislative intent doctrine are constitutionally based on the assumption that courts have an obligation to construe statutes so that they carry out the will, real or attributed, of the lawmaking branch of the government.[75] Accordingly, the doctrine of legislative intent is mandated by the principles of separation of powers,[76] and the implementation of the legislature's intent has been described as a constitutionally compelled judicial duty to follow the will of the legislative branch,[77] which prohibits courts from either expanding[78] or narrowing[79] statutes passed by Congress. To do otherwise would result in an "unhealthy process of amending the statute by judicial interpretation."[80]

Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 60 (1984) ("Judges must be honest agents of the political branches."); Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 284 (1989); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 415–41 (1989). Judges are viewed as agents or servants who follow the command of the legislature which is the principal. *Id.* at 415. Professor Sunstein explained that the agency approach appears in the various competing forms of statutory interpretation such as textual and contextual approaches. *Id.* Under this theory it is "impermissible for [courts] to invoke considerations that cannot be traced to an authoritative text." *Id.*

The doctrine of legislative intent is thought functionally to allocate the law-making powers and diminish the chance of inappropriate judicial lawmaking. Eskridge, *supra* note 8, at 654; *accord* T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 22–23 (1988); Marshall, *supra* note 7, at 201; Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 19 (1985). Ultimately predicated on a policy of legislative supremacy, the doctrine reflects the Supreme Court's frequently articulated position that "the federal lawmaking power is vested in the legislative, not the judicial branch of government." *Id.* at 19 (quoting Northwest Airlines v. Transport Workers Union, 451 U.S. 77, 95 (1981)). Apart from constitutional issues, judges are subordinate to legislatures in the making of public policy. Tennessee Valley Auth. v. Hill, 437 U.S. 153, 194 (1978); Farber, *supra*, at 292.

[75] *See* Osborn v. United States, 22 U.S. (9 Wheat) 738, 866 (1824); Priestman v. United States, 4 U.S. (4 Dall.) 28, 30 n.1 (1800); Marshall, *supra* note 7, at 201.

[76] SINGER, *supra* note 7, § 45.05.

[77] William S. Blatt, *The History of Statutory Interpretation: A Study in Form and Substance*, 6 CARDOZO L. REV. 799, 808 (1985).

[78] United States v. Anderson, 626 F.2d 1358, 1365-66 n.11 (8th Cir. 1980) ("[E]xpanding the scope of RICO beyond congressional intent is judicial legislation violative of the separation of powers doctrine established in the United States Constitution."), *cert. denied*, 450 U.S. 912 (1981).

[79] Stretton v. Disciplinary Bd., 763 F. Supp. 128, 138 (E.D. Pa. 1991) ("To narrow the scope of a statute in contravention to the expressed intent of the framers would usurp the role of the legislature and encroach on the constitutional separation of powers."), *reh'g denied*, 944 F.2d 137 (3d Cir. 1991).

[80] Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring).

Ultimately, the separation-of-powers underpinning of the legislative intent doctrine is the product of democratic theory,[81] and a common argument for judicial deference to the legislature is frequently cast in terms of the merits of a political system committed to majority rule.[82] Under this argument, enactment of a statute reflects the will of the majority which should control the non-majoritarian judiciary,[83] and the judicial branch is deferential to the legislative branch because the latter is controllable by the electorate.[84] In this context, Professor Redish has argued that "[t]he essential element of any democratic society is at least some level of majoritarian self-determination.[85] While our constitutional democracy does allow the judiciary to invalidate legislation on the basis of unconstitutionality, the courts' role is otherwise to implement the intent of the legislative branch.[86]

While the foregoing description of the underlying purpose of the legislative intent doctrine runs the risk of extreme over-simplification, it serves to illuminate the fundamental reason the doctrine has but a limited role to play in the interpretation of the Federal Rules of Evidence. In contrast to Congress' typical function in creating legislation, Congress' role in enacting the Federal Rules of Evidence was to approve the internal rules of a coordinate branch of government where such rules originated within that coordinate branch. The policies of the separation of powers supporting the doctrine of legislative intent in this context are misplaced because of the respective roles of the Supreme Court and Congress in the rule-making process. In this regard, a functional examination is instructive in identifying the precise nature of Congress' actual intent in the rule-making process which produced the Federal Rules of Evidence. First, Congress granted the Supreme Court the authority to design

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[81] *See* Maltz, *supra* note 7, at 9; Marshall, *supra* note 7, at 201.

[82] *See* Maltz, *supra* note 7, at 7.

[83] *Id.* at 7-8.

[84] STEVEN J. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 41 (1985).

[85] Redish, *supra* note 7, at 76.

[86] *Id.* Redish stated that the Court must assume that the legislature intended the courts "to perform neither more nor less than their traditional function in a constitutional democracy—to interpret the language and intent of the statute, to enforce it as so construed, and to invalidate or ignore it only when they find that the law is unconstitutional." *Id.* at 78-79; *see also* United States v. Cheiman, 578 F.2d 160, 164 (6th Cir. 1978) ("Congress has expressed its purpose in a clear statute, the constitutionality of which is no longer in question, and the principle of legislative supremacy requires us to enforce the statutory language."); Farber, *supra* note 74, at 293 n.57 (stating that Article VI, Section 2 of the Constitution assumes a court may not disregard federal statutes on non-constitutional grounds).

and promulgate the Rules.[87] Second, it received the Rules from the Supreme Court for review.[88] Third, to obviate questions of the Rules' constitutional and statutory legitimacy, Congress extended the effective date of the Rules and conditioned their enactment upon its express approval.[89] Fourth, Congress, through its various committees, sought to discern the import of the Rules as received from the Supreme Court and its Advisory Committee.[90] Fifth, Congress modified certain discreet provisions of the Rules where it sought to have its actual intent supersede that of the Supreme Court and its Advisory Committee.[91] Sixth, Congress ensured the validity of the entire process by affirmatively enacting the Federal Rules of Evidence.[92] In thus reviewing the functional operation of the rule-making process, the distinct nature of Congress' actual intent becomes apparent. Except in instances in which it modified the text of certain Rules, Congress' intent was to ratify and enact the intent of the Supreme Court and its Advisory Committee. Consequently, it is critical to focus upon whether the Supreme Court and its Advisory Committee intended the application of statutory construction principles to the interpretation of the language of the Federal Rules of Evidence. The following analysis addresses this issue.

IV. APPLYING TRADITIONAL TOOLS OF STATUTORY CONSTRUCTION TO THE FEDERAL RULES OF EVIDENCE IS INCONSISTENT WITH THE ORIGIN AND DESIGN OF THE FEDERAL RULES OF EVIDENCE AND THE ROLE OF THE FEDERAL JUDICIARY

A. *The Federal Rules of Evidence Were Not Designed to Have "Plain Meaning"*

It is the thesis of this Article that not only is legislative intent an inappropriate guiding doctrine for interpreting the Federal Rules of Evidence, but that the Rules were never intended by its architects, the Supreme Court and

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87 18 U.S.C. §§ 3402, 3771–72 (1988).

88 *See* discussion of proposed Rules, *supra* note 63, at 184; *see also* sources cited *supra* note 69.

89 S. Res. 583, 93d Cong., 1st Sess. (1973) (enacted).

90 *See* H.R. 650, 93d Cong., 2nd Sess. (1974) (enacted); S.R. 1277, 93d Cong., 2nd Sess. (1974) (enacted).

91 *See* H.R. 650, 93rd Cong., 2nd Sess. (1974) (enacted); S.R. 1277, 93d Cong., 2nd Sess. (1974) (enacted).

92 H.R. 5463, 93d Cong., 2nd Sess. (1974) (enacted); S.R. 1277, 93d Cong., 2nd Sess. (1974) (enacted).

its Advisory Committee, to be interpreted as a statute. Rather, the federal judiciary designed the Rules to be a source of guidance for the exercise of powers inherently reposed in federal trial judges, and statutory construction canons are incompatible with this design.

Of the several canons of statutory construction designed to determine legislative intent, the most fundamental is the "plain meaning" doctrine.[93] In determining legislative intent, the United States Supreme Court has looked primordially at the plain language used,[94] and thereafter, the design of the whole statute,[95] the statute's object and policy,[96] and the act's history.[97] While there is substantial debate as to the exact use of the express text of a particular statute being interpreted,[98] there appears to be near universal agreement that the starting point in analyzing legislative intent is the plain meaning or ordinary meaning of the statutory language.[99] *Caminetti v. United States*[100] provides a common framing of the principle: "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms."[101]

While several aspects of the "plain meaning" doctrine are significant to the instant discussion, foremost of these is simply the recognition that "plain

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[93] *See generally* DICKERSON, *supra* note 7; SINGER, *supra* note 7.

[94] *See* SINGER, *supra* note 7, § 46.01.

[95] Crandon v. United States, 494 U.S. 152, 158 (1990); K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988); SINGER, *supra* note 7, § 46.01.

[96] *See, e.g.*, *Crandon*, 494 U.S. at 158-60 (relying on design, object, and policy of several similar statutes); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 51-57 (1987) (interpreting ERISA in light of its policies and purposes); Watt v. Western Nuclear, Inc., 462 U.S. 36, 56 (1983) (stating that court should not interpret statute to produce result at odds with purposes underlying statute); Ozawa v. United States, 260 U.S. 178, 194 (1922) (If plain meaning leads to an unreasonable result, the Court will "look to the reason of the enactment and inquire into its antecedent history and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning . . . .").

[97] *See e.g.*, Toibb v. Radloff, 111 S. Ct. 2197, 2200 (1991) (stating that courts may rely on legislative history to resolve statutory ambiguity); Blum v. Stenson, 465 U.S. 886, 896-97 (1984) (relying on Senate reports and past judicial interpretations in calculating "reasonable" attorney fees in civil rights case).

[98] *See* sources cited *supra* note 8.

[99] *See, e.g.*, Bread Political Action Comm. v. FEC, 455 U.S. 577, 580 (1982) ("[s]tatutory construction must begin with the language of the statute itself"); *see also* sources cited *supra* note 12.

[100] 242 U.S. 470 (1917).

[101] *Id.* at 485.

meaning" is a derivative doctrine of legislative intent and not a doctrine of independent application.[102] It is not an end, but a means to determining the intent of the legislature. Consequently, to the extent it represents a doctrine of constitutional dimension, its constitutional underpinning is derived from legislative supremacy rather than any inherent constitutional sanctity of statutory language.[103] As a result, myriad situations exist in which courts may appropriately discount, ignore or attribute a unique meaning to the plain language of a statute without threatening the values supporting the separation of powers.[104] In *Church of the Holy Trinity v. United States*,[105] for example, the Court stated that "a consideration of the whole legislation, or of the circumstances surrounding its enactment, . . . [may make] it unreasonable to believe that the legislator intended" a literal interpretation.[106] Consequently, even though the Rules were ultimately enacted into law through legislation, the plain meaning doctrine does not operate as a constitutional or analytical obstruction to implementing the intent of the Supreme Court in the interpretation of the Federal Rules of Evidence.[107] Given the unique circumstances surrounding the multi-branch rule-making process, the Rules may be interpreted in a manner consistent with the Supreme Court's intent surrounding the use of language in the text of the Rules. Building on this premise, the following discussion will seek to demonstrate that the Supreme Court and its Advisory Committee selected a textual balance in the Rules which integrally incorporates a level of judicial flexibility that is antithetical to statutory construction principles.[108] It is important to bear in mind throughout this discussion that Congress did not disturb this textual balance in its

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[102] *See, e.g.*, United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989); Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842–43 (1984); American Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982); Richards v. United States, 369 U.S. 1, 9 (1962).

[103] Farber, *supra* note 74, at 288–90; Maltz, *supra* note 7, at 22; *accord* Merrill, *supra* note 74, at 23. *But see* Aleinikoff, *supra* note 74, at 32 (arguing plain meaning doctrine is political strategy for disciplining judges and legislators).

[104] *See, e.g.*, Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90, 98 (1974); Swift & Co. v. Wickham, 382 U.S. 111, 127 (1965).

[105] 143 U.S. 457 (1892).

[106] *Id.* at 459.

[107] In the context of the Federal Rules of Evidence, the Court has rejected the plain meaning of a provision when the purpose and history of the specific Rule in question indicated a result different than that compelled by the ordinary meaning of the text. For a discussion of this proposition see *supra* notes 23–26 and accompanying text.

[108] *Compare, e.g.*, Beech Aircraft Corp. v. Rainey, 488 U.S. 153 (1988) *and* cases cited *supra* note 3.

ratification of the Rules. Emphasizing a point made previously in this Article, Congress' role was to ensure the statutory and constitutional legitimacy of the Rules and to review the Supreme Court's promulgated Rules.[109] Its role was either to ratify or alter the Supreme Court's version of the Rules, and in this role it substituted its intent only in discreet, textual provisions of the Rules.[110] Most important, however, Congress did not recast the Supreme Court's overall structural design of the use of textual balance in the language of the Federal Rules of Evidence.

To understand the Supreme Court's use of language in the text of the Federal Rules of Evidence, the starting place is the process which created the textual design of the Rules. The Special Committee on Evidence established by Chief Justice Warren with the approval of the Judicial Conference was charged to consider the advisability and feasibility of Rules to govern evidence uniformly in all federal courts.[111] Upon an affirmative response in the report of the Special Committee, Chief Justice Warren appointed the Advisory Committee on the Federal Rules of Evidence to draft the actual text of the Rules.[112] The Advisory Committee commenced its task by drawing upon the previous experience reflected in the Model Code and Uniform Rules of Evidence. Professor E. M. Morgan, who had previously written the preface to the Model Code in 1956,[113] suggested that the proposed Federal Rules of Evidence be drafted taking the best features of the previous two attempts, the Uniform Rules and Model Code.[114] When the Advisory Committee on the Federal Rules of Evidence 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

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[109] *See supra* note 69–71; *see also* 18 U.S.C. §§ 3402, 3771, 3772; 28 U.S.C. §§ 2072, 2075.

[110] *See supra* notes 69–71 and accompanying text.

[111] *Introduction to Preliminary Study of the Advisability and Feasibility of Developing Uniform Rules of Evidence for the Federal Courts*, 30 F.R.D. 73, 75 (1961).

[112] *Id.* at 113; *Preliminary Draft*, *supra* note 62, at 173.

[113] Professor Morgan had advocated a generalized approach to codification which would allow for judicial discretion. Opposing this approach, Dean Wigmore desired less discretion and a particularized code of evidence. For a further discussion of their debate, see Michael S. Ariens, *The Law of Evidence and the Idea of Progress*, 25 LOY. L.A. L. REV. 853, 859-60 (1992).

[114] Edmund M. Morgan, *The Uniform Rules and the Model Code*, 31 TUL. L. REV. 145, 151–52 (1956).

evidence."[115] It cited not only the actual predecessor codes, but the supporting studies and commentaries as invaluable for suggesting general approaches.[116]

Tracing the text of the Federal Rules to the Model Code and the Uniform Rules, one can clearly see that the Committee developed a draft which, like these predecessor codes on which it was based, was never meant to be interpreted as a statute.[117] The framers of the Model Code and the Uniform Rules debated the underlying philosophies of textual design extensively, and the alternatives for the design of a body of evidence rules were finely focused for the Federal Rules Advisory Committee. In the forward to the Model Code, Morgan expressed the resolution of its framers as to the specificity of the Code.[118] He explained that there were three courses that could be followed:

> [T]o 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 . . .; to frame a very few, very broad general principles, and direct the trial judge to apply them . . .; [or] 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 . . . . [T]he choice is between a catalogue, a creed, and a Code. The Institute decided in favor of a Code.[119]

In his scholarly discussion of the Model Code, Professor Mason Ladd supported this interpretation of the underlying policy of the Code by stating, "requirements of ritualistic formalism are eliminated."[120] Finally, adopting the textual balance of the predecessor codes, the framers of the Federal Rules of Evidence added Rule 102, "Purpose and construction," where there was no similar Rule in any previous codification.[121] This Rule was added "to insure

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[115] *Preliminary Draft*, *supra* note 62, at 180.

[116] *Id.*

[117] For example, Edward W. Cleary, Reporter for the Advisory Committee on the Federal Rules of Evidence, reflected on the purpose of Rule 102 by stating, "It seems essential that the Rules contain at some point a provision allowing expansion by analogy to cover new or unanticipated situations . . . ." *Proposed Rules of Evidence: Hearings before the Subcomm. on Criminal Justice of the House Committee on the Judiciary*, 93d Cong., 1st Sess. Supp. 4 (1973).

[118] EDMUND M. MORGAN, *Forward* to MODEL CODE OF EVIDENCE 12–13 (1942).

[119] *Id.*

[120] Mason Ladd, *A Modern Code of Evidence*, 27 IOWA L. REV. 214, 240 (1942).

[121] Rule 102 reads: "These Rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and the promotion of growth

that the Rules are liberally, not strictly, construed."[122] Consequently, the intent of the designers of the Federal Rules of Evidence was to "draw a series of Rules in general terms . . . without attempting to frame rules of thumb for specific situations."[123] Moreover, by design, the latitude of the trial judge was integral in applying the language of the Rules. The Rules were to operate as broad guidance for the resolution of evidentiary issues leaving specific applications to the discretion of the trial judge.[124]

Given Congress' endorsement of the Advisory Committee's design of the Federal Rules of Evidence, how well does the primary "tool of statutory construction," the so-called "plain meaning" doctrine, serve the intended design? First, one must remember that it is a doctrine which is derived from legislative supremacy, a consideration previously discussed as having very questionable applicability to rules which were developed by a unique multi-branch process.[125] Second, the doctrine itself does not command rigid, unthinking implementation of the literal text of an enactment, particularly where the circumstances surrounding the enactment would indicate otherwise.[126] So softened, the doctrine might be applied in such a manner as to give the textual language passing reference on the way to examining extrinsic sources which would inform the interpretation process. But in reality, the plain meaning doctrine is an interpretational device that provides little utility in interpreting Rules that were never designed in the first instance to have plain meaning in the statutory sense. In contrast to typical legislation, the Federal Rules of Evidence were designed as general rules with intentional broad gaps.[127] By design, the gaps in the Federal Rules are their predominating

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and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." FED. R. EVID. 102.

[122] FED. R. EVID. 102 advisory committee's note.

[123] MORGAN, *supra* note 118, at 13.

[124] *Id.* at 13. The framers of the Federal Rules of Evidence followed the same form of the Rules and relied on the structural ideologies of the framers of the Model Code. *See supra* notes 114–17 and accompanying text.

[125] *See supra* notes 72–92 and accompanying text.

[126] *See* Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892).

[127] Thomas M. Mengler, *The Theory of Discretion in the Federal Rules of Evidence*, 74 IOWA L. REV. 413, 414 (1989); *accord* David P. Leonard, *Power and Responsibility in Evidence Law*, 63 S. CAL. L. REV. 937 (1990); David P. Leonard, *Appellate Review of Evidentiary Rulings*, 70 N.C. L. REV. 1155, 1159 (1992); Jon R. Waltz, *Judicial Discretion in the Admission of Evidence Under the Federal Rules of Evidence*, 79 NW. U. L. REV. 1097 (1985). *See generally* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 129 (1921); H.L.A. HART, THE CONCEPT OF LAW 124 (1961).

features,[128] and again by design, these gaps are to be addressed with discretion by the federal trial judge who historically has navigated such gaps with the guidance of the common-law principles of evidence.[129] Consequently, the intended design of the Rules, and the contemplated role of the federal trial judiciary, make the actual language of the Rules inherently something other than plain.[130] At minimum, the preservation or engraftment of additional

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[128] Even regarding enactments which are unarguably statutory, the literal text is subject to interstitial expansion by the judicial branch. *See* Farber, *supra* note 74, at 293 ("Although courts may not violate clearly enacted legislative intent, the supremacy principle does not prevent them from going beyond such intent in implementing statutory language when there are gaps in the legislative scheme.").

[129] *See infra* notes 130 and 131.

[130] A significant feature of the plain meaning doctrine is that, despite the differing views concerning its operation, it never actually precludes examination of extrinsic aids to interpretation. Even the strongest advocates of the primacy of plain meaning demonstrate a willingness to consider other sources of insight into the intent of the legislature. *See* cases cited *supra* note 12. Accordingly, consistent with the plain meaning doctrine, courts routinely consider committee drafts and reports, legislators' statements at hearings and debates, testimony, and the motives of legislators. In considering sources extrinsic to the text of a statute, courts have also frequently relied on an act's antecedent common law as an aid to construction. *See,* e.g., Moskal v. United States, 498 U.S. 103 (1990) (applying common law of "falsely made" to criminal title washing statute); Norfolk Redevelopment and Housing Auth. v. Chesapeake & Potomac Tel. Co., 464 U.S. 30 (1983) (applying common law of eminent domain to statute granting relocation benefits); NLRB v. Amax Coal Co., 453 U.S. 322, 329 (1981) ("Where Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of the terms."); United States v. Spencer, 839 F.2d 1341, 1344 (9th Cir. 1988) (arguing that use of common law to interpret statutes does not usurp Congress' legislative prerogative); United States Dep't of Health and Human Servs. v. Smith, 807 F.2d 122 (8th Cir. 1986) (relying on common law to interpret "educational loan"); St. Paul Fire and Marine Ins. Co. v. Cox, 583 F. Supp. 1221, 1227 (N.D. Ala. 1984) ("The common law . . . furnishes one of the most reliable backgrounds upon which analysis of the objects and purposes of a statute can be determined."), *aff'd*, 752 F.2d 550 (11th Cir. 1985). Common law becomes an especially important factor when an enactment attempts to restate the common law. SINGER, *supra* note 7, § 50.02. The Court has found the common law to be so vital as to follow a presumption that any statute which purports to invade the common law will be read favoring the retention of long-established and familiar principles. Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952). Furthermore, the United States Supreme Court stated in 1875 that "[t]he language of the Constitution and of many acts of Congress could not be understood without reference to the common law." Moore v. United States, 91 U.S. 270, 274 (1875). Consequently, the Court often utilizes antecedent common law to construe specific terms of a statute, and the Court's general practice is to give common-law terms of

evidentiary doctrines and principles was not precluded, but rather, specifically contemplated as integral to the structural scheme of the Rules. A primary author of the Federal Rules of Evidence, 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 . . . ."[131] While some courts have not effectively harmonized such a statement with the plain meaning doctrine, they have explicitly or implicitly adopted Professor Cleary's insight.[132]

Significantly, the Supreme Court superimposed common-law evidence principles on the Federal Rules of Evidence in *United States v. Abel*[133] when it addressed the admissibility of testimony offered to impeach a witness by showing his or her bias.[134] Noting that the language of the Federal Rules of Evidence did not expressly address impeachment by bias, the Court indicated that it would give deference to Congress' review and debate of the Rules even though the Rules originated from within the judiciary.[135] Nevertheless, the unanimous Court then relied on several pre-Rules cases to support admission of testimony to show a witness's bias.[136] The Court concluded that because the common law of evidence allowed the showing of bias, the testimony was admissible.[137] Had the Court followed its usual line of reasoning, it would have eliminated impeachment by bias in the same way it discarded the bootstrapping safeguard of the pre-Rule co-conspirator exception in *United*

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established meaning their common-law meaning. *See* cases cited *supra*. Likewise, pre-enactment common law may be employed in interpreting imprecise terms and in discerning the purpose of a statute where the text is sought to be reconciled with that purpose. Norfolk Redevelopment and Housing Auth. v. Chesapeake & Potomac Tel. Co., 464 U.S. 30 (1983).

[131] Edward W. Cleary, *Preliminary Notes on Reading the Rules of Evidence*, 57 NEB. L. REV. 908, 915 (1978).

[132] *See, e.g.*, Werner v. UpJohn Co., 628 F.2d 848, 856 (4th Cir. 1980) ("Congress did not intend to wipe out the years of common law development in the field of evidence."), *cert. denied*, 449 U.S. 1080 (1981); United States v. Beechum, 555 F.2d 487, 508 (5th Cir. 1977) (stating that pre-Rules cases "fill in the gaps left by the Federal Rules").

[133] 469 U.S. 45 (1984).

[134] *Id.* at 49.

[135] *Id.*

[136] *Id.* at 50 (citing Davis v. Alaska, 415 U.S. 308 (1974); Palmer v. Hoffman, 318 U.S. 109 (1943); District of Columbia v. Clawans, 300 U.S. 617 (1937); Shepard v. United States, 290 U.S. 96 (1933); Funk v. United States, 290 U.S. 371 (1933); Alford v. United States, 282 U.S. 687 (1931)).

[137] *Id.* at 51–52.

States v. Bourjaily.[138] If it had employed the reasoning exemplified by that in *Bourjaily*, the Court would have concluded that a pre-Rule doctrine which was not expressly preserved in the plain language of text of the Rules was eliminated by the enactment of the Federal Rules of Evidence. As reasoned in *Bourjaily*, where Congress constructively knew of the pre-Rule doctrine, it must have intended, at least fictionally, its elimination where no express reservation of the doctrine textually appears in the plain language of the Rules.[139] The *Abel* case is intriguing in its avoidance of the Court's customary legislative intent and plain meaning approaches, and it represents the Court's implicit recognition that its more customary statutory construction analysis may not serve the purposes of the Federal Rules of Evidence.

B. *Inherent and Common-Law Judicial Powers Militate Against the Application of Statutory Construction Tools to the Federal Rules of Evidence*

As developed in the previous section of this Article, the Federal Rules of Evidence were intended to operate only as general rules for the resolution of evidentiary issues leaving specific applications to the wide discretion of the trial judge based upon experience in the common-law tradition.[140] Accordingly, the design of the Rules is dependent upon the broad range of inherent and common-law powers that historically have been attributed to federal trial judges.[141] These powers, which had been fully preserved in the design of the

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[138] 483 U.S. 171 (1987). For a discussion of *Bourjaily*, see *supra* notes 50–59 and accompanying text.

[139] 483 U.S. 171, 178 (1987).

[140] MORGAN, *supra* note 118, at 12–13.

[141] The principle of legislative supremacy does not prevent courts from filling gaps in a legislative scheme. Farber, *supra* note 74, at 293. No legislation can be expected to cover, in specific detail, every situation that might arise under it. Congress may not have addressed the specific facts before the court or may have failed to agree on an issue leaving it for the courts to resolve. *Id.* The Supreme Court has noted an "inevitable incompleteness presented by all legislation [which] means that interstitial federal lawmaking is a basic responsibility of the federal courts." United States v. Little Lake Misere Land Co., 412 U.S. 580, 593 (1973). The Court has concluded that the judicial branch may fill in these interstices to effectuate an overall statutory scheme or purpose. *Id.* (quoting Paul J. Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 800 (1957)). Furthermore, this process of gap-filling has been held to be a legitimate exercise of the courts' authority to interpret and construe statutes. Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240, 1245 (6th Cir. 1991). This authority to interpret statutes "lies at the very heart of judicial power." *Id.*

Rules, provide further support for the conclusion that the Federal Rules of Evidence were never conceived to operate as a statutory constraint on the function of the federal trial judiciary in the admission and rejection of evidence.

Had the Rules been designed to overhaul the role of trial judges and attenuate the broad spectrum of power invested in trial judges, the Rules would have engendered substantial discussion as to such a reformulation of the function of the judiciary. The absence of such debate strongly suggests that the Federal Rules of Evidence were never conceived to depart from established principles of courts' inherent powers. These powers cover an extremely broad spectrum of matters pertaining to the conduct of litigation, and they have been recognized since the earliest days of the federal judiciary.[142] As recently as 1991, the United States Supreme Court stated in *Chambers v. NASCO, Inc.*[143] that it would not "'lightly assume that Congress has intended to depart from established principles' such as the scope of a court's inherent powers."[144] In *Chambers* the Supreme Court affirmed the trial court's use of inherent powers to impose sanctions not otherwise stipulated in Federal Rule of Civil Procedure 11 or in 28 U.S.C. section 1927.[145] The trial court found both the rule and the federal statute to be inadequate, and imposed sanctions under its inherent judicial power.[146] The Court found nothing in the rule or statue which

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[142] *See, e.g.*, United States v. Payner, 447 U.S. 727 (1980) (exclude evidence tainted by illegal search); United States v. Nobles, 422 U.S. 225 (1975) (require production of previously recorded witness statements); Illinois v. Allen, 397 U.S. 337 (1970) (bar criminal defendant from trial); Link v. Wabash R.R. Co., 370 U.S. 626 (1962) (dismiss a suit *sua sponte* for failure to prosecute); Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944) (vacate judgment upon proof that it was obtained by fraud); Ex Parte Robinson, 86 U.S. (19 Wall.) 505 (1874) (punish for contempt); Ex Parte Burr, 22 U.S. (9 Wheat.) 529 (1824) (control admission to the bar and discipline attorneys); Anderson v. Dunn, 19 U.S. (6 Wheat.) 204 (1821) (impose silence, respect, and decorum); G. Heilman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648, 653 (7th Cir. 1989) ("Inherent authority remains the means by which district judges deal with circumstances not proscribed or specifically addressed by rule or statute, but which must be addressed to promote just, speedy, and inexpensive determination of every action.").

[143] 111 S. Ct. 2123 (1991).

[144] *Id.* at 2134 (quoting Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982)).

[145] *Id.* at 2140.

[146] *Id.* at 2131. Chambers and his attorneys attempted to deprive the trial court of jurisdiction by acts of fraud, filed false pleadings, and attempted expensive, harassing, and oppressive conduct before, during, and after trial to force NASCO to give up its suit. *Id.* NASCO sought the assistance of the trial court and moved for contempt and sanctions against Chambers and his attorneys under Federal Rule of Civil Procedure 11, 28 U.S.C. § 1927, and the court's inherent authority. *Id.* at 2130–31. The trial court had found that

repealed, modified, or substituted for the trial court's inherent power which, it stated, "[may] be invoked even if procedural rules exist which sanction the same conduct."[147] Therefore, the Court concluded that where "neither the statute nor the rules are up to the task, the court may safely rely on its inherent power"[148] which "must continue to exist to fill in the interstices."[149] Evident from decisions such as *Chambers* is that legislation on a particular subject will not in itself preempt inherent judicial discretion which would address the same matter. Applying this reasoning to the Federal Rules of Evidence, nothing in the Federal Rules appears designed to limit in any way courts' inherent judicial powers. In fact, the developmental history of the Rules, which has been discussed in the previous section, demonstrates that the broad range of judicial powers exercised under the common law were intended to be integral in the operation of the Federal Rules of Evidence. Because the Federal Rules of Evidence were designed not only to preserve but to implement the inherent powers of the federal trial judge, their application depends upon a horizon of latitude that is not, and probably cannot be, specified within the "plain language" of the Rules. Rather, inherent judicial powers are a contextual background within which the Rules are to be interpreted and applied, and the textual language of the Rules must be measured accordingly.

The appropriate consideration of inherent judicial power in the interpretation of the Federal Rules of Evidence is illustrated by an examination of the function of Rule 403. Rule 403 codifies the long standing power of the trial judge to exclude evidence where the relevancy of the evidence is substantially outweighed by unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence.[150] Rule 403, while plain enough

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Federal Rule of Civil Procedure 11, being limited to papers filed with the court, could not reach Chambers' out-of-court conduct. *Id.* at 2131. Statutory sanctions, under 28 U.S.C. § 1927, were not sufficient because they applied only to attorneys and could not be used to sanction Chambers himself. *Id.*

[147] *Id.* at 2135; *see also* G. Heilman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648, 653 (7th Cir. 1989) (holding that district judges retain inherent authority to deal with circumstances "not proscribed or specifically addressed by rule or statute").

[148] *Chambers*, 111 S. Ct. at 2136.

[149] *Id.* at 2134.

[150] *See* FED. R. EVID. 403 advisory committee's notes; GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE §§ 1.7, 2.5 (1987); Marvin V. Ansubel, *Federal Rules of Evidence—Article IV Relevance and its Limits, in* RESOURCE MATERIALS ON FEDERAL RULES OF EVIDENCE 27, 30 (ALI-ABA ed. 1975); Mengler, *supra* note 127, at 427. Rule 403 reads: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or

in its language, cannot be appropriately interpreted except with an understanding of the inherent powers of a federal trial judge which had historically developed long before the adoption of the Federal Rules of Evidence. Rule 403 is a direct descendent of the antecedent common law, and its lineage is traceable through the Uniform Rules of Evidence and the Model Code of Evidence. Because the Model Code of Evidence was the first attempt to codify the Rules of Evidence, it necessarily drew upon the common-law traditions in evidence. In the Forward to the Model Code, Professor Morgan wrote that Model Rule 303, the predecessor to Federal Rule 403, tempers all the other Rules under which such evidence may be admissible.[151] The comment to Rule 303 stated that its application was case specific, and that other rules of evidence such as those governing hearsay and opinion evidence, which may operate to admit certain items of evidence, were subject to the exclusionary force of Model Rule 303.[152] The commentary supporting Model Rule 303 suggested that it was a restatement of established common-law practice, not a revision. Wherever the Model Code recommended a change from common-law traditions, the drafters inserted a section in the comment entitled, "Comparison with Existing Law,"[153] and the Comment to Model Rule 303 contains no such section.[154] In drafting the Federal Rules of Evidence, the Supreme Court's Advisory Committee expressly considered the Model Code and its successor, the Uniform Rules of Evidence,[155] and implemented those

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misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

151 MORGAN, *supra* note 118, at 14–15. Model Rule 303 provided:

> (1) The judge may in his discretion exclude evidence if he finds that its probative value is outweighed by the risk that its admission will
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> (a) necessitate undue consumption of time, or
>
> (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury, or
>
> (c) unfairly surprise a party who has not had reasonable ground to anticipate that such evidence would be offered.
>
> (2) All Rules stating evidence to be admissible are subject to this Rule unless the contrary is expressly stated.

152 *See* MODEL CODE OF EVIDENCE Rule 303 advisory committee's note (1942).

153 *See, e.g.*, MODEL CODE OF EVIDENCE Rule 301 and accompanying comment (1942).

154 *See* MODEL CODE OF EVIDENCE Rule 303 advisory committee's note (1942).

155 In the Uniform Rules of Evidence the principles embodied in Model Code Rule 303 were contained in Rule 45, which provided:

provisions of the Model Code and the Uniform Rules which, within its wisdom, would be consistent with the design and function of the Federal Rules of Evidence.[156] Rule 403 is the traceable descendent of Model Rule 303, embodying the same restatement of the common-law judicial power to exclude truth-corrupting evidence, including evidence otherwise admissible pursuant to a distinct rule.[157]

The incompatibility of the judicial power codified in Rule 403, the most fundamental rule of inadmissibility, with canons of statutory construction should be apparent.[158] Under statutory construction principles, the statute's language is effectuated in accordance with the plain meaning of the text.[159] Such an approach is at tension with a rule whose primary function is not to instruct the trial judge how to behave, but rather to declare the authority of the trial judge to exclude evidence within his or her discretion. The actual language of Rule 403 provides virtually no guidance whatsoever in establishing standards for the exclusion of evidence. The textual cataloguing of certain counterweights

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> Except as in these rules otherwise provided, the judge may in his discretion exclude evidence if he finds that its probative value is substantially outweighed by the risk that its admission will (a) necessitate undue consumption of time, or (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury, or (c) unfairly and harmfully surprise a party who has not had reasonable opportunity to anticipate that such evidence would be offered. This code has added the term "substantially," but retains the judge's basic discretion to exclude based on prejudice, time efficiency, and surprise.

UNIF. R. EVID. 45 (1945). The Uniform Rules added the term "substantially" to the language of Rule 303 of the Model Code.

[156] *See supra* note 150.

[157] In the first draft of the proposed Federal Rules of Evidence, the Rule mandatorily directed the trial judge to exclude otherwise relevant evidence if its probative value was substantially outweighed by danger of unfair prejudice, confusion or misleading the jury, while maintaining the judge's discretion pertaining to exclusion based upon considerations of time efficiency. *Preliminary Draft*, *supra* note 62, at 225 (1969). The Advisory Committee Notes which accompanied the draft called attention to the difference. *Id.* at 225–27. The Department of Justice and some senators, as well as members of the bench and bar, opposed the dichotomy, especially the mandated exclusion subpart. 2 DAVID W. LOUISELL AND CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE § 124 (Rev. ed. 1985); 1 JACK B. WEINSTEIN AND MARGARET A. BERGER, WEINSTEIN'S EVIDENCE § 403-07 (1988). During the period of comments to the Rules, these concerns were heard and the change was made to the current form.

[158] For a discussion of statutory construction principles, see *supra* notes 7–14 and accompanying text.

[159] For a discussion of the plain meaning doctrine, see *supra* note 12 and accompanying text.

of relevancy cannot, except symbolically, capture the literally infinite variety of multifaceted situations in which Rule 403 might be applied to exclude evidence. Rather, the text of Rule 403 serves the purpose of according, or more accurately, reaffirming the inherent authority of the trial judge to exclude evidence which might adversely affect the integrity of the fact finding process. Consequently, viewing the Federal Rules of Evidence as a statute subject to the constraints of statutory construction principles misconceives the role of the trial judge in applying the Rules and overly emphasizes the facial qualities of the text.[160] In this context, a critical analysis of the reasoning of the Supreme Court in *Green v. Bock Laundry*[161] is illustrative. Among the issues considered in *Green* was whether Rule 609(a) governs all prior felony impeachment, such that no discretion may be exercised to benefit civil parties, or in the alternative, whether the specific reference to the criminal defendant in Rule 609(a) leaves Rule 403 balancing available in the context of civil cases.[162] The Court resolved this issue by applying statutory construction principles to the textual language of Rule 609 and 403. The Court stated: "The 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."[163] Applying this principle of statutory construction, the Court concluded that Rule 403, the "general rule," does not apply in a civil case to felony convictions authorized to be admissible under the "specific rule," the version of Rule 609(a) then in effect.[164] Such a result, however, is inconsistent with the traditional conception of the discretion of a trial judge to exclude prejudicial and confusing evidence. Rule 403, when traced to its common-law origins, should be interpreted as a rule which reflects the trial judge's common law and inherent power to exclude evidence that is otherwise admissible pursuant to a distinct Federal Rule of Evidence.[165] This inherent and common-law authority of the trial judge, now codified in Rule 403, was found in *Green* to be inapplicable to Rule 609 because of statutory construction principles. Such a result, however, is contrary to the design of the Federal Rules of Evidence. Had the Court in *Green* not commenced its analysis with the initial premise that

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[160] *See* Waltz, *supra* note 127, at 1120 (questioning the ability of the trial judge to accurately assess probative value and countervailing prejudice, and advocating guidelines to assist judges in exercising their decision-making authority).

[161] 490 U.S. 504 (1989).

[162] *Id.* at 505.

[163] *Id.* at 524.

[164] *Id.* at 526.

[165] *See supra* notes 150–57.

the Federal Rules of Evidence are a "statutory enactment," it may have traced the history of the powers codified in Rule 403 through the Uniform Rule and the Model Code to its common-law origins. Such an approach would have resulted in the conclusion that Rule 403 may appropriately operate to exclude evidence otherwise admissible under Rule 609, and such an analysis would have been more fully consistent with the ideological structure of the Rules as envisioned by the Supreme Court's Advisory Committee and ratified by Congress. Nevertheless, the Court reached a result which is at odds with traditional notions of the inherent powers of a trial judge, and which is not mandated by the Federal Rules of Evidence. Accordingly, to understand the role of Rule 403, one must understand the role of a trial judge as preserved by the structural design of the Federal Rules of Evidence, and this role of the trial judge will be consistently subverted where the Federal Rules of Evidence are treated as a statute subject to statutory construction principles.[166]

V. CONCLUSION

In interpreting the Federal Rules of Evidence as a statute, the Supreme Court has not only commenced with an unfounded premise but it has also reached results never intended by the originators of the Rules. Consequently, by embracing the misplaced fiction that Congress possessed "legislative intent" in designing the Federal Rules of Evidence, the Court has discarded common-law safeguards in the admission of distinct criminal acts of the accused under Rule 404(b);[167] it has similarly abandoned safeguards attending the application of the conspirator hearsay exception;[168] it has misapplied the traditional function of Rule 403 in tempering all other Federal Rules of Evidence;[169] and it has diluted the traditional discretion of the federal trial judge.[170] Most significantly, it has recast the method of interpreting evidentiary principles in a manner that ignores the wisdom of the common-law history of the Federal Rules of Evidence and the capability of enlightened growth. Moreover, in

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166 Congress' action regarding the Rules of Evidence demonstrated no intent to alter the way in which both the Supreme Court and its Advisory Committee intended the Rules to be interpreted. Even where Congress modified certain textual provisions of the Rules, such as Rule 609(a), consistent with the overall design of the Rules promulgated by the Supreme Court and its Advisory Committee, Congress at least implicitly acknowledged that its own changes would be subject to the overall structural design of the Rules themselves.

167 *See supra* notes 40–49 and accompanying text.

168 *See supra* notes 50–59 and accompanying text.

169 *See supra* notes 27–30, 150–65 and accompanying text.

170 *See supra* notes 14, 127–32 and accompanying text.

assuming the Federal Rules of Evidence are a statute, the Court appears to have neither weighed the consequences nor examined the substantive and common sensical defects of this assumption.

This Article has sought to demonstrate that the keystone premise of the Supreme Court's method of interpretation of the Federal Rules of Evidence is so questionable that it warrants sober reevaluation by the Court. The characterization of the Federal Rules of Evidence as a statute is not supported by the developmental history of the Rules, nor does this characterization function effectively in fostering the growth of the law of evidence in a manner that is appropriately informed by the common-law heritage of the Rules or guided by the inherent discretionary powers of the federal trial judiciary.