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Acts of Emotion: Analyzing Congressional Involvement in the Federal Rules of Evidence

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ACTS OF EMOTION: ANALYZING CONGRESSIONAL INVOLVEMENT IN THE FEDERAL RULES OF EVIDENCE

Michael Teter⁺

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I. INTRODUCTION

The Federal Rules of Evidence are intended to signify Reason’s triumph over Emotion in the courtroom. In fact, the origin of evidentiary rules is often directly tied to concerns over the jury’s ability to render a verdict free of

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inflamed passions.¹ This distrust of the jury's capacity for properly weighing some types of evidence has deep roots in our legal system and expresses itself in many of today's Federal Rules of Evidence. The Federal Rules of Evidence, first enacted in 1975 after several years of careful consideration, represent the drafters' best effort to strike a delicate balance between the often competing interests of admissibility and preventing unfair prejudice to parties.²

This balance is largely preserved by the process established by the Rules Enabling Act³ for the promulgation of federal court rules. Under the procedure created by the Enabling Act, amendments to the Federal Rules of Evidence usually undergo a rigorously structured process that begins with the Advisory Committee on Rules of Evidence, proceeds to the Standing Committee on Rules of Practice and Procedure, then to the Judicial Conference, and ultimately to the Supreme Court.⁴ If the Court approves the amendment, the proposal is transmitted to Congress for acceptance or rejection.⁵ The overall process has been described as conservative and slow, and it takes at least two to three years from start to finish.⁶ The detailed attention paid to any amendment to the Federal Rules of Evidence and the acquired expertise of those proposing, analyzing, and recommending changes to the Rules help to maintain the balance between admissibility and preventing unfair prejudice.

But that equilibrium is threatened. Though Congress has generally left the process of amending the Federal Rules of Evidence to the procedures prescribed in the Rules Enabling Act, lawmakers have directly amended the

1. Laura Gaston Dooley, Essay, *Our Juries, Our Selves: The Power, Perception, and Politics of the Civil Jury*, 80 CORNELL L. REV. 325, 337 (1995) (stating that "the Federal Rules of Evidence rest on an assumption that the judge must protect the jury from certain evidence lest the jurors allow their emotional reaction to overpower their intellectual obligation to decide the case according to the judge's instructions"); Wallace D. Loh, *The Evidence and Trial Procedure: The Law, Social Policy, and Psychological Research*, in THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE 13, 15 (Saul M. Kassin & Lawrence S. Wrightsman eds., 1985) ("The need for any rules . . . is said to rest on three rationales: practical necessity, promotion of certain social values, and distrust of the jury."); see also JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 123 (Atheneum 1963) (1949) ("But there are other rules of exclusion which, no matter what their origin, have been perpetuated primarily because of the admitted incompetence of jurors.").

2. See Michael S. Ellis, Comment, *The Politics Behind Federal Rules of Evidence 413, 414, and 415*, 38 SANTA CLARA L. REV. 961, 963 (1998).

3. 28 U.S.C. § 2071-77 (2000).

4. See *id.* For a general summary of the process, see James C. Duff, Federal Rulemaking, <http://www.uscourts.gov/rules/proceduresum.htm> (last visited Oct. 22, 2008). Congress created the Conference of Senior Circuit Judges in 1922 to serve as the chief administration and policy-making body for the United States Courts. Judge Robert H. Hall, *Federal Circuit Judicial Councils: A Legislative History and Revisions Needed Today*, 11 GA. ST. U. L. REV. 1, 2 (1994). In 1948, Congress changed the name of this body to the Judicial Conference, but preserved the administration of the United States Courts as its fundamental purpose. *Id.*

5. 28 U.S.C. § 2074(b) (2000).

6. Symposium, *The Politics of [Evidence] Rulemaking*, 53 HASTINGS L.J. 733, 739 (2002) [hereinafter *Politics of Evidence Symposium*] (comments of Judge Fern Smith).

Rules several times.⁷ Without exception, the process through which these changes were made was a poor substitute for the cautious and deliberate approach followed by the Judicial Conference and its committees, and the Rules are the worse for it. What's more alarming, however, is that Congress appears more inclined than ever to involve itself directly in the Rules through legislation.⁸ Given this heightened interest in the Federal Rules of Evidence, now is an appropriate time to analyze Congress's behavior with regard to the Rules.

This brings me to the focus of the Article. Direct congressional involvement in the Federal Rules of Evidence has always been a source of consternation among legal scholars.⁹ And yet missing from these works is a thorough explanation as to why congressional efforts to amend the Federal Rules of Evidence are so troubling. This Article attempts to offer an analysis of Congress's actions regarding the Federal Rules of Evidence and to explain why, on both a theoretical and practical level, direct congressional participation in amending the Federal Rules of Evidence is problematic.

To do so, I begin by offering a brief description of the process through which amendments to the Federal Rules of Evidence are usually promulgated through the Rules Enabling Act. This method of altering the Federal Rules of Evidence, as we will see, is assiduous and thoughtful, offering a sharp contrast to Congress's approach. In fact, this difference alone may justify the call for Congress to refrain from directly involving itself in the upkeep of the Federal Rules of Evidence.

7. See *infra* Part IV.B.

8. During just the past two sessions of Congress there have been efforts to codify the attorney-client privilege (Attorney-Client Privilege Protection Act of 2007, S. 186 110th Cong. (2007); H.R. 3013 110th Cong. (2007)), the doctor-patient privilege (Patients' Privacy Protection Act of 2005, H.R. 6371, 109th Cong. (2006)), the parent-child privilege (Parent-Child Privilege Act of 2005, H.R. 3433, 109th Cong. (2005)), and several efforts to amend hearsay rules related to forfeiture for wrongdoing. See Violent Crime Control Act of 2007, S. 1860, § 723 110th Cong. (2007); H.R. 3156, 110th Cong. § 723 (2007); Fighting Gangs and Empowering Youth Act of 2007, S. 990, 110th Cong. § 310 (2007); H.R. 1692, 110th Cong. § 310 (2007); Gang Deterrence and Community Protection Act of 2007, H.R. 880 § 113, 110th Cong. (2007). Following the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), Congress also considered a series of legislative proposals relating to the expert witness rules—bills that “were so confused that they tried to both codify *Daubert* and codify *Frye* [*Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)] simultaneously.” *Politics of Evidence Symposium, supra* note 6, at 742 (comments of Gregory Joseph) (footnote omitted).

9. See, e.g., *Politics of Evidence Symposium, supra* note 6, at 741–43 (comments of Paul Rice and Gregory Joseph) (expressing opposing views regarding the extent of congressional involvement in amending the Federal Rules of Evidence); Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563, 563 (1997) (criticizing Congress's amendment to the Federal Rules of Evidence as related to the addition of Rule 413); James Joseph Duane, *The New Federal Rules of Evidence on Prior Acts of Accused Sex Offenders: A Poorly Drafted Version of a Very Bad Idea*, 157 F.R.D. 95, 95 (1994) (finding “most troublesome” the method by which the Rules were amended).

Part III lays out a juror-centric understanding of the Federal Rules of Evidence. Concerns over the abilities of the jury to properly consider certain types of evidence form the basis of evidentiary rules generally, and the Federal Rules specifically. At the same time, juries are treated with a reverence reserved for the most sacred of institutions. Appreciating the legal profession's ambivalence toward the jury helps to explain the purpose and function of the Rules. Moreover, in exploring the misgivings about juror behavior that led to evidentiary rules, one sees that those same traits influence congressional action involving the Rules of Evidence. Put simply, the Federal Rules of Evidence are designed largely to prevent juries from relying on inflamed passions, appeals to emotion, and flawed reasoning when rendering verdicts, and yet these are the dominant features of congressional decision-making with regards to the evidentiary rules.

Having put forward a juror-centric appreciation of the Rules, I turn to the main task at hand: establishing why Congress should limit its involvement in amending the Federal Rules of Evidence to affirming or rejecting changes promulgated by the Judicial Conference and its committees. My argument unfolds in three parts. To begin, I explore the many similarities that exist between Congress and juries in an effort to understand how those similarities help explain why the juror-centric concerns that form the basis for the Federal Rules of Evidence are equally applicable to Congress. These include the theoretical importance of the jury from the perspective of America's Founders, as well as structural and process-oriented similarities. All of these qualities are instructive in analyzing Congress's proper role in amending the Federal Rules of Evidence—rules, it must be remembered, that were formulated largely because of misgivings about juries.

Of course, examining past legislative involvement in the Rules provides the most useful tool in demonstrating why Congress should refrain from directly amending them. In 1994, Congress added Federal Rules of Evidence 413, 414, and 415.¹⁰ These rules, which expanded the admissibility of prior-act evidence in criminal and civil proceedings related to sexual crimes, demonstrate just how susceptible lawmakers are to making decisions based on inflamed passions, emotional appeals, and flawed reasoning. Ten years earlier, in response to the public outcry over the acquittal of attempted presidential assassin John Hinckley, Jr., Congress similarly acted to make ill-conceived changes to the Federal Rules of Evidence to address concerns over the testimony of mental health experts.¹¹ As we shall see, these legislatively imposed changes to the Federal Rules of Evidence were not only unnecessary and unwise, but served to disrupt the fragile balance between admissibility and guarding against unfair prejudice.

10. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320935(a), 108 Stat. 1796, 2135-37 (adding FED. R. EVID. 413-15).

11. Congress added subsection (b) to Federal Rule of Evidence 704. Act of Oct. 12, 1984, Pub. L. No. 98-473, § 406, 98 Stat. 1837, 2067-68 (amending FED. R. EVID. 704).

Part IV ends with an area of concern that cannot be ignored: the importance of the Federal Rules of Evidence in protecting defendants from unfair verdicts. Although many of the Rules are neutral on their face, in actuality, they are premised on ensuring that a jury does not convict a defendant on a basis other than a proper analysis of the factual evidence.¹² The balance achieved by the Federal Rules of Evidence between admissibility and unfair prejudice is focused primarily on this concern. Public-choice theory and concepts of representation teach us, however, that congressional action with regard to the Federal Rules of Evidence will almost invariably be aimed at disrupting this balance at the expense of defendants. This not only raises constitutional concerns, but jeopardizes the legitimacy of America's criminal trial system. The best way to avoid these problems is for Congress to restrict its involvement in the Federal Rules of Evidence.

Finally, recognizing that the suggestion that Congress should refrain from legislating in an area unquestionably within its domain will be greeted with skepticism, I end the Article with a brief section responding to anticipated criticisms of my arguments.

Let me offer one caveat before moving forward. Some may read this Article as an attack on juries or as a substantive critique of past congressional policy decisions. This is not what I intend. It is certainly true that I am, like many in the legal profession (and, perhaps, like many Americans), conflicted about the role of the jury. I see the jury system's many faults, but also appreciate its many virtues. But, ultimately, this article is not an attempt to assess the proper place for juries in our legal system. Similarly, this Article is not an effort to criticize Congress for policy decisions it has made in the past. The job of offering substantive criticism of these past decisions has been done, and done well.¹³ Instead, my purpose here is to provide important background relating to the functional goals behind the Federal Rules of Evidence and to argue that the juror-focused concerns underlying the Rules are equally applicable to Congress's involvement in the Federal Rules of Evidence. Only if Congress removes itself from its threatened perch of amending the Rules of Evidence will the delicate balance between admissibility and exclusion of unfairly prejudicial evidence be preserved.

II. THE GENESIS OF THE FEDERAL RULES OF EVIDENCE AND THE PROCESS BY WHICH THEY ARE AMENDED UNDER THE RULES ENABLING ACT

The starting point for analyzing congressional involvement in amending the Federal Rules of Evidence is to understand how changes to the Rules are usually adopted. Only then does one recognize how greatly congressionally enacted amendments deviate from the standard practice.

12. See John Leubsdorf, *Presuppositions of Evidence Law*, 91 IOWA L. REV. 1209, 1248–49 (2006); see also *supra* note 1.

13. See *supra* note 9.

The genesis of the Federal Rules of Evidence dates to the Rules Enabling Act of 1934,¹⁴ which gave the Supreme Court the authority to promulgate rules of practice and procedure.¹⁵ Despite holding the power to draft evidentiary rules as far back as 1934, the Supreme Court was originally in “no mood to tinker with the law of evidence.”¹⁶ Sensing this, the Judicial Conference and Standing Committee on Rules of Practice and Procedure (Standing Committee)¹⁷ focused its initial effort on promulgating the much-needed Rules of Civil Procedure, with little attention paid to questions of evidence.¹⁸ The 1946 drafting of the Criminal Rules of Procedure also avoided tackling issues of evidence.¹⁹ Efforts outside the Enabling Act structure to create uniform rules of evidence also met with little success.²⁰

The first significant movement toward the adoption of the Federal Rules of Evidence came in 1961, when the Judicial Conference approved the creation of a Special Committee on Evidence to examine the desirability of developing a set of evidentiary rules for the federal courts.²¹ Two years later, the Special Committee issued, and the Judicial Conference adopted, a report favoring the promulgation of federal evidence rules.²² The Judicial Conference created the Advisory Committee on Rules of Evidence (Advisory Committee)—a committee that took Chief Justice Earl Warren nearly two years to assemble.²³

The Advisory Committee produced a set of proposed rules in the form of a Preliminary Draft and, based on comments and suggestions to that draft, issued a Revised Draft in 1970.²⁴ The Judicial Conference approved the Revised Draft, sending it to the Supreme Court for final promulgation in accordance with the Rules Enabling Act.²⁵ Rather than taking action to finalize the Rules of Evidence, the Supreme Court sent the Revised Draft back to the Judicial

14. Pub. L. No. 73-415, 48 Stat. 1064 (1934) (codified at 28 U.S.C. § 2071-77 (2000)).

15. 21 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE: FEDERAL RULES OF EVIDENCE* § 5002, at 71-72 (2d ed. 2005).

16. *Id.* § 5002, at 75.

17. The Rules Enabling Act mandated that the Judicial Conference authorize appointment of the Standing Committee. *See* 28 U.S.C. § 2073(b) (2000).

18. The Civil Rules Advisory Committee offered only two rules touching on evidence law—what are now Civil Rules 43 and 44, which, respectively, set forth a general principle of inclusion and established a rule for proving an official record. *See* 10 JAMES WM. MOORE, *MOORE'S FEDERAL PRACTICE* § 5[5], at 30-31 (2d ed. 1996).

19. *Id.* § 9.

20. *See, e.g.*, AM. LAW INST., *MODEL CODE OF EVIDENCE* (1942); JOHN HENRY WIGMORE, *A POCKET CODE OF THE RULES OF EVIDENCE IN TRIALS AT LAW* (1st ed. 1910); THE NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, *UNIFORM RULES OF EVIDENCE* (1953).

21. 21 WRIGHT & GRAHAM, *supra* note 15, § 5006, at 171.

22. *Id.* § 5006, at 179-80.

23. *Id.* § 5006, at 180.

24. *Id.* § 5006, at 186-87.

25. *Id.* § 5006, at 187, 193 n.130.

Conference for publication and comment prior to official promulgation.²⁶ After adopting a number of changes pressed by the Department of Justice, the Judicial Conference again forwarded the proposed rules to the Supreme Court.²⁷ On November 20, 1972, the Supreme Court approved the Federal Rules of Evidence, authorizing Chief Justice Warren Burger to transmit them to Congress.²⁸

While both the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure became effective after Congress took no action within ninety days following transmittal from the Supreme Court,²⁹ the Federal Rules of Evidence sparked more controversy, largely because they were labeled “substantive” and contained rules of privilege.³⁰ Congress, therefore, enacted legislation that provided that the Rules would not become effective until expressly approved by Congress and signed by the President.³¹ Intense lobbying over the proposed rules of privilege and the precise language of several other rules led to several modifications.³² After a House and Senate Conference Committee ironed out differences between the two chambers’ versions of the rules, Congress approved the new Federal Rules of Evidence in December 1974.³³ President Ford signed the legislation on January 2, 1975, making the Rules effective on July 1, 1975.³⁴

The process of promulgating new rules or amendments to the Federal Rules of Evidence generally flows upstream. It begins with the Advisory Committee on Rules of Evidence,³⁵ which studies the rules and is the initial source of proposed changes.³⁶ The Advisory Committee is made up of twelve members of the legal community, representing the judiciary, trial attorneys, and the

26. *Id.* § 5006, at 187. The Conference’s Revised Draft was published at 51 F.R.D. 315 (1971).

27. 21 WRIGHT & GRAHAM, *supra* note 15, § 5006, at 191.

28. *Id.* § 5006, at 193. This was done over the dissent of Justice William Douglas, who contended that the substance of the proposed rules exceeded the scope of the Rules Enabling Act, and the Court lacked the competency to pass them. *Id.* § 5006, at 193 & n.129.

29. STEPHEN A. SALTZBERG ET AL., FEDERAL RULES OF EVIDENCE MANUAL 4 (9th ed. 2006).

30. *Id.*

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

32. 21 WRIGHT & GRAHAM, *supra* note 15, § 5006, at 197. The proposed rules of privilege were struck from the final version of the Rules. *Id.* § 5006, at 200.

33. *Id.*

34. *Id.*; see also Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926.

35. The Supreme Court disbanded the Advisory Committee on Evidence following submission of the proposed rules to Congress in 1973. See SALTZBERG ET AL., *supra* note 29, at 7. In response to repeated calls from the legal community, the Judicial Conference reestablished the Advisory Committee in 1993. *Id.*

36. *Politics of Evidence Symposium*, *supra* note 6, at 738 (comments of Judge Fern Smith). Judge Smith was the chair of the Advisory Committee on Rules of Evidence from 1996 to 1999. *Id.* at 733.

Department of Justice.³⁷ The Committee is expected to “carry on a continuous study of the operation and effect” of the Federal Rules of Evidence.³⁸ From the Advisory Committee, a proposal goes to the Standing Committee, which may approve the rule for public hearing and comment.³⁹ After the public weighs in, and if the Standing Committee supports the rule, it is sent to the Judicial Conference.⁴⁰ Once the Judicial Conference endorses the proposed change, the Supreme Court receives it.⁴¹ Assuming the Court approves the rule, it is transmitted to Congress for acceptance or rejection.⁴²

The evidentiary rulemaking process is inherently conservative.⁴³ To the chagrin of some scholars,⁴⁴ amending the Federal Rules of Evidence is “time consuming”—taking at least two to three years to complete.⁴⁵ Moreover, the Advisory Committee is said to take the “if it ain’t broke, don’t fix it” approach.⁴⁶ While some scholars may be critical of this slow pace,⁴⁷ the time it takes to amend the Rules is better recognized as a demonstration of the deliberation and thoughtfulness put into any substantive changes to the Rules of Evidence. Indeed, this approach is preferable to rash and ill-considered changes.

The careful process contemplated by the Rules Enabling Act, however, can be ignored by Congress at will. As will be discussed in greater detail in Part IV, when Congress decides to directly amend the Federal Rules of Evidence, the process is anything but deliberative and thoughtful. Rather, congressional action with regard to the Rules is often based on reactions to major events⁴⁸ or

37. Paul R. Rice & Neals-Erik William Delker, *Federal Rules of Evidence Advisory Committee: A Short History of Too Little Consequence*, 191 F.R.D. 678, 684 n.62 (2000).

38. 28 U.S.C. § 331 (2000).

39. *Politics of Evidence Symposium*, *supra* note 6, at 738 (comments of Judge Fern Smith).

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. See, e.g., Paul R. Rice, *Advisory Committee on the Federal Rules of Evidence: Tending to the Past and Pretending for the Future?*, 53 HASTINGS L.J. 817, 838 (2002) (“Law by committee, particularly through the bureaucratized process under the Rules Enabling Act, is inherently less responsive and vital . . .”). Professor Rice has also led the charge to encourage major changes to the Federal Rules of Evidence through the Evidence Project Report, a thorough compilation of proposed revisions to the Federal Rules of Evidence, with accompanying commentary. See *The Evidence Project: Proposed Revisions to the Federal Rules of Evidence*, 171 F.R.D. 330 (1997), available at <http://www.wcl.american.edu/pub/journals/evidence/toc.html>.

45. *Politics of Evidence Symposium*, *supra* note 6, at 739 (comments of Judge Fern Smith).

46. Rice, *supra* note 44, at 823.

47. See, e.g., *id.* (calling the slow amendment process “perverse”).

48. See, e.g., Daniel J. Capra, *A Recipe for Confusion: Congress and the Federal Rules of Evidence*, 55 U. MIAMI L. REV. 691, 692–93 (2001) (describing congressional reaction to “a few poster child cases in which evidence of a defendant’s prior sexual assaults was excluded from trial”).

out of desires to appeal to constituencies.⁴⁹ Further, congressional hearings are rarely held, debate is limited, and the comments and concerns of the legal community are largely ignored.⁵⁰ Put simply, the rushed and politically driven congressional process for amending the Federal Rules of Evidence stands in stark contrast to the Advisory Committee's careful development of the Rules. Understanding these differences is the aim of the remainder of this Article.

III. DEVELOPING A JUROR-CENTRIC RATIONALE FOR THE FEDERAL RULES OF EVIDENCE

As with many codes of law, the Federal Rules of Evidence signify a broad, ambitious effort to establish a general framework to promote an effective and efficient legal process. In part because of the breadth of the Federal Rules of Evidence, scholars often find it useful to develop an analytic framework for studying the Rules that recognizes the important functional differences among the various provisions.⁵¹

Toward that end, there are a variety of approaches that one may take to explain and categorize the Federal Rules of Evidence. The structure of the Rules themselves offers the most obvious starting point for understanding how each rule operates in relation to the others. They are divided into eleven Articles,⁵² offering a functional breakdown of the Rules. Of course, even without this self-categorization, it would be relatively easy to discern the function of each Rule. Nevertheless, the groupings by Article do offer some insight into how the drafters viewed the operation of particular Rules.⁵³

A refined method divides the Rules into slightly more dynamic categories of understanding: relevancy, reliability, exclusions, and administration.⁵⁴ This perspective allows one to anticipate the critical issues that may arise with a

49. See *Politics of Evidence Symposium*, *supra* note 6, at 741–42 (comments of Paul Rice).

50. See, e.g., 140 CONG. REC. 15208 (1994) (statement of Rep. Hughes) (observing the lack of formal review, hearings, and debate).

51. See, e.g., CLIFFORD S. FISHMAN, *JONES ON EVIDENCE: CIVIL AND CRIMINAL* § 1.1, at 2–3 (7th ed. 1992) (instructing that an attorney should “routinely appl[y] a consistent analytical approach”); SALTZBURG, *supra* note 29, at xv–xxvi (dividing the Rules into groups for greater practical explanation).

52. Article I (General Provisions), Article II (Judicial Notice), Article III (Presumptions in Civil Actions and Proceedings), Article IV (Relevancy and Its Limits), Article V (Privileges), Article VI (Witnesses), Article VII (Opinions and Expert Testimony), Article VIII (Hearsay), Article IX (Authentication and Identification), Article X (Contents of Writings, Recordings, and Photographs), and Article XI (Miscellaneous Rules). FED. R. EVID., at xi–xiv (Table of Contents).

53. For example, Rule 610's exclusion of evidence regarding the religious views of witnesses is placed in Article VI (Witnesses), rather than Article IV (Relevancy and Its Limits), which informs courts that the Rule states an absolute requirement of exclusion that is not subject to the balancing test of Rule 403. 28 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, *FEDERAL PRACTICE AND PROCEDURE* § 6152, at 310 (3d ed. 1993).

54. Credit belongs to Professor George Fisher for offering such a framework during the course he teaches on evidence.

given Rule and to better understand how the Rules interact with one another to promote functionality. Taking this approach even further, one can get to the core issue of the Federal Rules of Evidence by dividing the Rules into those that are inclusionary, and therefore widen the scope of admissible evidence and into those that are exclusionary, thereby serving to restrict the scope of admissible evidence. This approach illustrates the basic function of the Federal Rules of Evidence: establishing what evidence gets admitted and what evidence does not. Examining the Rules as either inclusionary or exclusionary helps to place each rule in its proper context.

Dean Wallace Loh has offered a more imaginative rubric for understanding the function of the Federal Rules of Evidence.⁵⁵ He places the rules into the following categories: (1) “[R]ules that pertain[] to communicators”; (2) Rules that “address the nature and presentation of the communication”; (3) Rules that cover “the admission or exclusion of [particular types of] evidence”; and (4) “[R]ules that guide the deliberation[] of the jury.”⁵⁶ Dean Loh believes that dividing the Rules as he does helps to explain each Rule’s design and importance by focusing on the type and form of evidence at issue.⁵⁷

I have offered only a very brief discussion of the various approaches to analyzing the Federal Rules of Evidence, but each provides an important and useful perspective for breaking down and better understanding the Rules. At the same time, these schemes are focused largely on the subject matter of each Rule, rather than on each Rule’s impetus. They therefore fail to address important motivating factors for the adoption of the Federal Rules of Evidence and ignore one primary catalyst for development of evidentiary rules—the legal profession’s love-hate relationship with the jury.⁵⁸ As I will discuss

55. See Loh, *supra* note 1, at 14–15.

56. *Id.*

57. See *id.* at 13–19.

58. See *supra* note 1. See also John H. Langbein, *Historical Foundations of the Law of Evidence: A View From the Ryder Sources*, 96 COLUM. L. REV. 1168, 1169, 1172, 1194 (1996) (“From the Middle Ages to our own day, the driving concern animating the Anglo-American law of evidence has been to protect against the shortcomings of trial by jury.”). Professor Langbein offers important insights into the origins of evidentiary rules by reviewing the judge’s notes of Sir Dudley Ryder, Chief Justice of King’s Bench from 1754–1756. *Id.* at 1172. According to Professor Langbein, Chief Justice Ryder’s notes reveal that the modern law of evidence “was largely nonexistent as late as the middle decades of the eighteenth century.” *Id.* Because the jury system can be traced as far back as the twelfth century, Professor Langbein calls the effort to tie the development of evidentiary law to the origins of the jury “awkward.” *Id.* at 1169–70. Indeed, Professor Langbein makes a strong case that the advance of modern evidentiary law is more directly related to the development of adversary criminal procedures in the late eighteenth century. *Id.* at 1197–1200. Adversary procedure pushed judges toward a more neutral role in the trial than they had otherwise occupied. *Id.* at 1198. This, in turn, gave the jury more control over determining the outcome of trials. *Id.* at 1198–99. Furthermore, the nature of the form of evidence proffered by parties transitioned from written to oral. *Id.* at 1183–84. Evidentiary rules prior to these developments were limited largely to questions relating to written evidence and the best evidence rule. *Id.* at 1173–74. As oral testimony replaced written evidence as the dominant means of conveying information to the jury, evidentiary standards in the form of exclusionary

below, the Federal Rules of Evidence are chiefly inspired or perpetuated by a distrust of the jury.⁵⁹ In fact, evidentiary rules in general exist principally out of a belief that jurors cannot be relied upon to give proper consideration to certain types of evidence.⁶⁰ As I will more fully develop, recognizing that this motivation underlies many of the evidentiary rules helps to explain why Congress should refrain from direct intervention in the Federal Rules of Evidence.

Legal professionals have long harbored misgivings about the ability of jurors to limit their reliance on evidence to the particular purposes for which that evidence is admitted. Moreover, there is—and always has been—a fear that jurors are susceptible to allowing passions and emotions to determine the outcome of legal proceedings.⁶¹ Indeed, juries have been labeled “stupid,” and “capricious,” and treated as if they are “low grade morons.”⁶² Jerome Frank, the respected jurist, devoted multiple chapters in his classic work *Courts on Trial* to the problems of the jury system and stated that “the jury is the worst possible enemy of [the] ideal of the ‘supremacy of [the] law.’”⁶³ Frank suggested that jurors make decisions “according to arbitrary will” and “their worst prejudices,” and that the jury system “almost completely wipes out the principle of ‘equality before the law.’”⁶⁴ Frank noted that his concerns regarding the jury were shared by such notables as James Bradley Thayer, Judge Learned Hand, and Justice Cardozo.⁶⁵

In fact, the American legal profession’s ambivalence toward the jury can be traced as far back as this nation’s founding. On one hand, the Founders believed that juries represented popular control over the judiciary.⁶⁶ During the debate over ratification of the Constitution, both Federalists and Anti-

rules developed to keep the jury in line. *Id.* at 1196. Thus, although the modern law of evidence did not appear at the same time as the jury system, it remains true that evidentiary rules arose out of concerns over juries’ abilities to properly weigh certain types of evidence. *Id.* at 1194.

59. See Leubsdorf, *supra* note 12, 1248–49.

60. Professor Leubsdorf discusses the jury-centered basis for a number of evidentiary rules, including those that control expert evidence, hearsay, character evidence, and even the authentication requirement (stating that “Wigmore ascribes even the authentication requirement to the tendency of credulous jurors to accept any document placed before them at its full apparent value”). *Id.* at 1248–49.

61. See *infra* notes 81–87 and accompanying text (discussing early English and American case law demonstrating concerns about juries).

62. Edmund M. Morgan, *Foreword* to MODEL CODE OF EVIDENCE 6 (1942) (Morgan states that “[t]he charge is seldom made that modern juries are corrupt, but complaints of stupid and capricious action are frequent. The low intellectual capacity of the jury is commonly put forward to justify some, if not all, of our exclusionary rules.”). Morgan disagreed with this common assessment of the jury. *Id.* at 6–7.

63. FRANK, *supra* note 1, at 132.

64. *Id.* (first internal quotation marks omitted).

65. *Id.* at 124.

66. See *infra* notes 113–19 and accompanying text (discussing early American concepts of the jury).

Federalists embraced the importance of the jury.⁶⁷ Even champions of the common man's role in the judiciary, however, had serious misgivings about juries. Take for example that "quintessential democrat, radical leader, and enlightened law reformer," Thomas Jefferson.⁶⁸ Legal scholars—and, in fact, even the Supreme Court—have often quoted Jefferson's statement that, "Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative."⁶⁹ This, however, is hardly a complete picture of Jefferson's view of juries. Rather, Jefferson harbored serious misgivings about the role of juries "because they could be beguiled and seduced by emotional, irrational appeals."⁷⁰ In fact, Jefferson's endorsement of juries seems based more on his distrust of "biased" Federalist judges than on any virtues he believed juries inherently possessed.⁷¹ And while Jefferson certainly preferred the "common sense of '12 honest men'" over that of "a judge whose mind is warped by any motive whatever," Jefferson nevertheless considered the likelihood of a jury's reaching a correct outcome as not much greater than chance.⁷² Indeed, even as Jefferson articulated a preference for jurors over judges, he recognized that a juror's "'ignorance [may] render[him] pliable to the will and designs of power."⁷³ Thus, the current ambivalence toward the jury that pervades the legal profession is easily traced as far back as our nation's founding.

The legal profession's concern that juries lead to "arbitrary injustice" continues to this day.⁷⁴ At the same time, both historically and today, the jury

67. See *infra* notes 116–19 and accompanying text.

68. Daniel D. Blinka, *Jefferson and Juries: The Problem of Law, Reason, and Politics in the New Republic*, 47 AM. J. LEGAL HIST. 35, 37 (2005).

69. See, e.g., *Blakely v. Washington*, 542 U.S. 296, 306 (2004) (quoting Letter from Thomas Jefferson to the Abbé Arnoux (July 19, 1789), reprinted in 15 THE PAPERS OF THOMAS JEFFERSON 282, 283 (Julian P. Boyd & William H. Gaines, Jr. eds., 1958)); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1188 (1991); Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 221 n.105 (1995); Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 57 (2003); William P. Quigley, *The Necessity Defense in Civil Disobedience Cases: Bring in the Jury*, 38 NEW ENG. L. REV. 3, 64 n.224 (2003); Daniel C. Richman, *Essay, Old Chief v. United States: Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939, 969 (1997).

70. Blinka, *supra* note 68, at 37.

71. *Id.* at 38, 98–99.

72. *Id.* at 98–99 (quoting THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 130 (William Peden ed., Norton 1972) (1787)). Jefferson actually compared jury decisions with "cross and pile"—an eighteenth century game equivalent to a coin toss. *Id.*

73. *Id.* at 101 (quoting 2 THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON, 1776–1826, at 1077 (James Morton Smith ed., 1995)).

74. See Dooley, *supra* note 1, at 325. In fact, Professor Dooley discusses how the disdain for the jury has been building recently both in the legal profession and among the citizenry. She

is held in lofty esteem—a body in which enormous faith is placed.⁷⁵ For example, that reliance can be seen not only in the fact that the jury is provided for in three of the first ten Amendments to the Constitution,⁷⁶ but also in how we have shaped our legal framework with the role of the jury in mind. For instance, despite evidence to the contrary, jurors are believed to be able to correctly discern truth-tellers from perjurers.⁷⁷ They are expected to understand and abide by jury instructions and to accurately apply the law to the facts.⁷⁸ And, once a jury has heard from a witness, the determination of whether that person told the truth rests exclusively in the jury's hands.⁷⁹

Thus, as one scholar has noted, Americans—including those in the legal profession—can truly be said to have a love-hate relationship with the jury.⁸⁰ Indeed, the Federal Rules of Evidence, perhaps more than any other legal undertaking, demonstrate the profession's ambivalence toward the jury. For this reason, and because the Rules are inspired in large part by a distrust of the jury, it is important to keep this juror-centric motivation in mind when examining the function and purpose behind them. Of course, appreciating this fact not only respects the historical basis for the evidentiary rules, but also assists in the main task at hand: analyzing Congress's involvement in amending the Federal Rules.

As I have stated, the evidentiary rules are generally shaped by a distrust of the jury.⁸¹ Some rules, of course, are more directly tied to misgivings about the jury than others. These rules are properly labeled “juror-centric”: meaning that even with an understanding that evidentiary rules as a whole were inspired in part by concerns over juries, there are particular Rules that are based almost

documents and analyzes modern judicial opinions, legal scholarship, and the popular press to demonstrate the cultural fear of the jury as irrational. *See generally id.*

75. *See infra* notes 113–19 and accompanying text.

76. U.S. CONST. amend. V–VII.

77. *See* George Fisher, *The Jury's Rise as Lie Detector*, 107 *YALE L.J.* 575, 577–78 (1997).

78. Leubsdorf, *supra* note 12, at 1251–52.

79. Fisher, *supra* note 77, at 577. Juries originally were not permitted to settle issues of witness credibility, but instead were expected to treat all testimony as truthful. *Id.* at 580. While perhaps absurd by today's standards, this approach was made possible because of the tremendous faith that was historically placed in the ability of the sworn oath to produce truthful testimony. *Id.* Professor Fisher also traces the process through which the jury rose from this historic role as truth acceptor to its current inception as “lie detector.” *Id.* at 581. In documenting this “evolutionary process,” Professor Fisher makes note of two important facts: that it was remarkably slow and that it “was not principled” or “driven by a conviction that the jury can and should resolve credibility conflicts,” but that instead “faith in the jury's powers of lie detection only followed the force of events.” *Id.* Thus, even the authority juries hold today came less from intrinsic belief in their abilities than it does from other considerations. *See id.*

80. Dooley, *supra* note 1, at 329.

81. Interestingly, legal systems in which judges generally are responsible for rendering verdicts often have limited or no rules of evidence. Kenneth Williams, *Do We Really Need the Federal Rules of Evidence?*, 74 *N.D. L. REV.* 1, 22–24 (1998) (describing the systems employed in France, Germany, and the International Tribunals).

exclusively on such juror-focused fears. The Rule of Evidence that most unmistakably displays the legal profession's concerns about juries is Rule 403.⁸² As Professor Edward Imwinkelried has stated:

Underlying Rule 403 is a model of optimal jury behavior. Ideally, we want the jury to: use admitted items of evidence as proof of only the factual propositions the judge admits them to prove, ascribe the proper probative weight to each item of evidence, and concentrate on the historical issues in dispute in the case.⁸³

Rule 403 is a demonstration of distrust in the jury's ability to meet this model of behavior; otherwise the rule would not be necessary.⁸⁴

Indeed, nearly every discussion of the policy behind Rule 403 centers on the rule's purpose of preventing unfair prejudice to a party that can occur when a jury inappropriately uses certain types of evidence.⁸⁵ In each example of unfair prejudice, Weinstein and Berger incorporate the jury.⁸⁶ This approach

82. Rule 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

83. EDWARD J. IMWINKELRIED, *EVIDENTIARY FOUNDATIONS* § 5.01, at 205–06 (7th ed. 2008).

84. So important is Rule 403 that it has been called the "cornerstone" of the entire Federal Rules of Evidence. See Victor J. Gold, *Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence*, 58 WASH. L. REV. 497, 497 & n.5 (1983). And this cornerstone has ancient roots. Thayer traced it to the thirteenth century. See JAMES BRADLEY THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* 516 (1898). A rule calling for the exclusion of evidence out of fear of its effects on the jury was formulated at least as early as the late 1600s. See, e.g., *Trial of Ambrose Rookwood*, (1696) 13 Howell's St. Trials 139, 209–12 (K.B.) (excluding evidence that might lead to juror confusion). Concerns over a piece of evidence's tendency to inflame passions of the jury are also deeply rooted. See, e.g., *People v. Dye*, 16 P. 537, 539–40 (Cal. 1888) (excluding evidence that would expose the defendant to jurors' contempt); *People v. Corey*, 42 N.E. 1066, 1071 (N.Y. 1896) (excluding evidence regarding the defendant's syphilis because it might arouse jurors' passions and create a feeling of antipathy toward the defendant).

85. See, e.g., *Old Chief v. United States*, 519 U.S. 172, 181–82 (1997) (noting that evidence should be excluded if it could cause a jury to convict on the basis that "a bad person deserves punishment" (quoting *United States v. Moccia*, 681 F.2d 61, 63 (1st Cir. 1982))); *United States v. Astling*, 733 F.2d 1446, 1457 (11th Cir. 1984) (observing that emotional evidence might lead a jury to an irrational decision); see also 1 JACK B. WEINSTEIN & MARGARET A. BERGER, *WEINSTEIN'S FEDERAL EVIDENCE* § 403App.01[1]–[3] (Joseph M. McLaughlin ed., 2007) (providing historical analysis and policy background); 1 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 21, at 931–34 (Peter Tillers rev., Little, Brown & Co. 1983) (stating that the proper approach "focuses on the probable effect . . . on the jury's deliberations"); 1A *id.* § 28, at 975 ("[T]he trial judge [has] extensive discretionary power to exclude relevant evidence for reasons such as . . . undue prejudice . . .").

86. Weinstein and Berger provide examples of the policies underlying Rule 403:

Evidence such as the following has been found unfairly prejudicial:

- Evidence that appeals to the jury's sympathies.
- Evidence that arouses jurors' sense of horror. . . .
- Evidence that provokes a jury's instinct to punish.

comports with the Advisory Committee Notes to Rule 403, which explain: “‘Unfair prejudice’ within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.”⁸⁷ In fact, any doubt that distrust of juries forms the basis for Rule 403’s unfair prejudice exclusion should be dispelled because the Rule’s unfair prejudice protections are arguably inapplicable in bench trials without juries.⁸⁸ Thus, the Advisory Committee, the courts, and legal scholars all recognize that Rule 403’s primary concern is with a jury’s ability to properly consider evidence that may inflame its passions or otherwise unfairly prejudice the jury’s decisions.

Examining the historical basis of the remaining Federal Rules of Evidence reveals that many of them can also rightly be labeled juror-centric. For example, Rule 404⁸⁹ is based on the same jury-focused concerns as those of

- Evidence that triggers other intense human reactions.
- The appellate court may also conclude that “unfair prejudice” occurred because an insufficient effort was made at trial to avoid the dangers of prejudice.

2 WEINSTEIN & BERGER, *supra* note 85, § 403.04[1][c] (footnotes omitted). Indeed, Weinstein and Berger state that “[u]nfairness may be found in any form of evidence that may cause a jury to base its decision on something other than the established propositions in the case.” 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE § 403.04[1][b] (Joseph M. McLaughlin ed., 1998).

87. FED. R. EVID. 403 advisory committee’s notes.

88. *See, e.g.*, *Schultz v. Butcher*, 24 F.3d 626, 632 (4th Cir. 1994) (“Adopting the position taken in *Gulf States*, we hold that in the context of a bench trial, evidence should not be excluded under 403 on the ground that it is unfairly prejudicial.”); *Gulf States Util. Co. v. Ecodyne Corp.*, 635 F.2d 517, 519 (5th Cir. Unit A Jan. 1981) (The court held that “[t]he exclusion of this evidence under Rule 403’s weighing of probative value against prejudice was improper. This portion of Rule 403 has no logical application to bench trials”).

89. Federal Rule of Evidence 404 provides:

(a) Character Evidence Generally. Evidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of Accused. In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(2) Character of Alleged Victim. In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

(3) Character of Witness. Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive,

Rule 403.⁹⁰ The Supreme Court noted in *Michelson v. United States* that the common-law tradition excluded propensity evidence to establish guilt.⁹¹ As the Court stated, such evidence “is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge.”⁹²

These two Rules, 403 and 404, are the Rules mostly directly tied to concerns over a jury’s ability to weigh evidence. They are the quintessential juror-centric rules in that they are designed to exclude evidence otherwise admissible out of a fear over the effect such evidence may have on the jury’s decision-making.

opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

FED. R. EVID. 404.

90. See, e.g., *Old Chief*, 519 U.S. at 181–82 (stating that Rule 404(b) reflects the same common-law tradition as Rule 403); 1 GEORGE E. DIX ET AL., MCCORMICK ON EVIDENCE § 185, at 737–38 (Kenneth S. Broun ed., 6th ed. 2006) (“[E]vidence of convictions for prior, unrelated crimes might lead a juror to think that since the defendant already has a criminal record, an erroneous conviction would not be quite as serious as it would otherwise be.”); Gold, *supra* note 84, at 524–25 (noting the similarities between Rules 403 and 404).

91. *Michelson v. United States*, 335 U.S. 469, 475 (1948).

92. *Id.* at 475–76 (footnote omitted).

The exclusionary Rules 407,⁹³ 408,⁹⁴ 409,⁹⁵ 410,⁹⁶ 411,⁹⁷ and

93. Federal Rule of Evidence 407 provides:

When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

FED. R. EVID. 407.

94. Federal Rule of Evidence 408 provides:

(a) Prohibited Uses. Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:

(1) furnishing or offering or promising to furnish—or accepting or offering or promising to accept—a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.

(b) Permitted Uses. This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.

FED. R. EVID. 408.

95. Federal Rule of Evidence 409 provides: "Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury." FED. R. EVID. 409.

96. Federal Rule of Evidence 410 provides:

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(1) a plea of guilty which was later withdrawn;

(2) a plea of nolo contendere;

(3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or

(4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

FED. R. EVID. 410.

97. Federal Rule of Evidence 411 provides:

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule

412⁹⁸ are all also based, at least in part, on concerns over the jury's use of certain types of evidence.⁹⁹ And it is not just exclusionary rules that fit within the category of "juror-centric" rules. The Federal Rules concerning expert

does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

FED. R. EVID. 411.

98. Federal Rule of Evidence 412 provides, in relevant part:

(a) Evidence generally inadmissible. The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.

(2) Evidence offered to prove any alleged victim's sexual predisposition.

(b) Exceptions.

(1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:

(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence;

(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

(C) evidence the exclusion of which would violate the constitutional rights of the defendant.

(2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.

FED. R. EVID. 412 (a)-(b).

99. See Leubsdorf, *supra* note 12, at 1248-49; see also *Columbia & Puget Sound Ry. Co. v. Hawthorne*, 144 U.S. 202, 207 (1892) (stating that the concept behind excluding subsequent remedial measures is, in part, that such evidence "is calculated to distract the minds of the jury from the real issue, and to create a prejudice against the defendant"); FED. R. EVID. 411 advisory committee's note (such evidence "would induce juries to decide cases on improper grounds"); 1 EDMUND M. MORGAN, *BASIC PROBLEMS OF EVIDENCE* 212 (1961) ("But the chief reason for preventing reception of the evidence [of insurance policies] is the supposed inclination of jurors to make the insurance company bear the loss because it has been paid for taking the risk, it is well able to pay, and it will spread the loss among its policy holders."); 2 WEINSTEIN & BERGER, *supra* note 85, § 408.02 (discussing the purposes behind Rule 408); 23 WRIGHT & GRAHAM, *supra* note 15, §§ 5282, 5362 (Supp. 2008) (discussing the policy rationale of Rules 407 and 411).

testimony—Rules 702,¹⁰⁰ 703,¹⁰¹ and 704¹⁰²—are also crafted with an eye toward limiting juror use of certain forms of evidence.¹⁰³ As such, these rules are also properly labeled juror-centric.¹⁰⁴

Additionally, Rule 610,¹⁰⁵ many of Article VIII's hearsay rules, and even the authenticity rules of Article IX, relate (in part) to concerns of how jurors will use particular types and forms of evidence.¹⁰⁶

100. Federal Rule of Evidence 702 provides:

If scientific, technical, or otherwise specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

FED. R. EVID. 702.

101. Federal Rule of Evidence 703 provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

FED. R. EVID. 703.

102. Federal Rule of Evidence 704 provides:

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

FED. R. EVID. 704.

103. See *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1310 (11th Cir. 1999); *United States v. Addison*, 498 F.2d 741, 744 (D.C. Cir. 1974); see also Joseph Sanders, *The Merits of the Paternalistic Justification for Restrictions on the Admissibility of Expert Evidence*, 33 SETON HALL L. REV. 881, 907–08 (2003) (challenging the assumption that juries must be protected from expert opinion).

104. This is not to say that other policy considerations did not factor into the adoption of these Rules. A review of each Rule's advisory committee notes reveals as much. Nevertheless, I brand these rules "juror-centric" because the manner in which they operate is to keep otherwise admissible evidence out of the hands of the jury, in large part because of misgivings about how the jury would use such information.

105. Federal Rule of Evidence 610 provides: "Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced." FED. R. EVID. 610.

106. See Leubsdorf, *supra* note 12, at 1248–49; see also 28 WRIGHT & GOLD, *supra* note 53, § 6152 (identifying concerns about jury treatment of information related to the witness's religious faith).

Knowing the legal profession's ambivalence toward the jury and the historical roots of that uneasiness, one begins to see what the drafters were attempting to accomplish by incorporating those concerns into the Federal Rules of Evidence. Simply put, the primary purpose was to ensure that the jury would render a verdict largely free of emotion and passion—a verdict based only on a reasoned analysis of the facts properly before it.¹⁰⁷ The drafters' goal, therefore, was to achieve balance between admissibility and unfair prejudice. This was not an easy task to accomplish given that the central concept of the Rules is one of inclusiveness, while, of course, the very purpose of trials is to ensure fairness, equality, and the "right" outcome.¹⁰⁸ To achieve this sought-after balance, the drafters constructed rules that, while generally favoring admissibility, created categories of exclusion aimed at the evidence considered most likely to inflame the jury's passions and emotions. The drafters also included the catchall provision of Rule 403 as a means of excluding the most prejudicial evidence.¹⁰⁹ In fact, one could rightly view the balancing test of Rule 403 as an embodiment of the drafters' own need to harmonize the often competing interests of admissibility and unfair prejudice.

As a whole, therefore, the Federal Rules of Evidence can be said to strike a careful and deliberate balance of competing concepts that form the foundation of our legal system. On the one hand, the jury lies at the heart of the American trial as the people's representative within the judiciary, and great faith is placed in its ability to discern truthful from untruthful testimony.¹¹⁰ On the other hand, the very basis of evidentiary rules is significant distrust over the jury's ability to properly weigh certain types of evidence while reaching a verdict of reason, free of emotion. The Federal Rules of Evidence seek to balance the opposing goals of promoting liberal admissibility of evidence with the need to exclude certain evidence out of fear of unfair prejudice.

The Federal Rules of Evidence may best be imagined as a textual version of the Lady Justice: delicately balancing the counterweights of admissibility and exclusions. As with any scale so carefully calibrated, even the lightest of touches may disrupt that balance. However, Congress's involvement in the Federal Rules of Evidence has been hardly delicate or light.

IV. THE CASE FOR CONGRESSIONAL DISENGAGEMENT FROM THE FEDERAL RULES OF EVIDENCE

It is appropriate now, after laying out a juror-centric rationalization for the Federal Rules of Evidence, to explain more fully why Congress should limit its involvement in the Rules to ratifying or rejecting proposals adopted by the

107. See Gold, *supra* note 84, at 503–06; Leubsdorf, *supra* note 12, at 1250–51.

108. See *infra* note 110 (discussing that the "right" outcome does not necessarily mean the outcome that comports with the actual events that led to the trial).

109. See Gold, *supra* note 84, at 497, 503, 505.

110. See Fisher, *supra* note 77, at 577.

Judicial Conference and its committees. My reasoning rests on both theoretical and practical considerations, all of which are intrinsically tied to the juror-centric view of the Federal Rules of Evidence. Recent examples of congressional interference with the Federal Rules of Evidence, however, offer the most instructive means of showing just how problematic such involvement can be. The two instances I discuss, the addition of Rules 413–415 and the addition of subsection (b) to Rule 704, both show how susceptible lawmakers are to the very behaviors that the Rules attempt to eliminate from trials. The inflamed passions, faulty reasoning, and outcome-oriented decision-making that pervade congressional actions involving the evidentiary rules provide strong support for the suggestion that Congress remove itself from the process of direct intervention in amending the Federal Rules of Evidence.

Finally, one of the important functions of the Federal Rules of Evidence is to ensure defendants receive a fair trial, one in which the jury reaches the “right” outcome for the “right” reason.¹¹¹ The careful balance between admissibility and prevention of unfair prejudice is jeopardized if Congress directly amends the Rules—especially if it does so with a particular outcome in mind. Not only do such changes pose constitutional concerns, but they also threaten the perceived legitimacy of our legal system.

For all of these reasons, Congress should refrain from directly amending the Rules and should instead limit its involvement to adopting or rejecting those changes proposed by the Judicial Conference and forwarded to Congress by the Supreme Court.

A. Theoretical and Practical Similarities Between Juries and Congress

America’s Founders held strong views regarding the importance of the jury. As Professor Akhil Amar has noted, juries are mentioned in no fewer than three of the ten amendments constituting the Bill of Rights,¹¹² and are also provided for in Article III’s requirement that “[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury.”¹¹³ In short, “juries were at the heart of the Bill of Rights.”¹¹⁴

The importance of the jury to the Founders was rooted in a strongly held belief that juries embody popular control within the judiciary.¹¹⁵ Put another

111. I place quotation marks around “right” because I wish to distinguish between truth-verifying outcomes (verdicts that comport with the actual events giving rise to the trial) and verdicts that satisfy our desired goals of fairness and justice (verdicts that *seem* truthful). See Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1362 (1985). It is the latter concern to which I am referring.

112. Akhil Amar, *supra* note 69, at 1190; *see also* U.S. CONST. amends. V–VII.

113. U.S. CONST. art. III, § 2, cl. 3.

114. Akhil Amar, *supra* note 69, at 1183.

115. *See, e.g.*, Letter from the Federal Farmer No. 15 (Jan. 18, 1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 315, 320 (Herbert J. Storing ed., 1981) (“If the conduct of judges shall be severe and arbitrary, and tend to subvert the laws, and change the forms of government,

way, jurors are the people's representatives within the judicial branch just as congressmen and senators are the people's representatives within the legislature. In fact, the idea of common control over the judicial branch was so important during the time of our nation's founding that the failure of the Constitutional Convention to provide a guarantee of civil trial by jury in the original document stoked considerable opposition to ratification.¹¹⁶ The Anti-Federalist Federal Farmer wrote that:

The jury trial . . . is by far the most important feature in the judicial department in a free country, and the right in question is far the most valuable part, and the last that ought to be yielded, of this trial. Juries are constantly and frequently drawn from the body of the people, and freemen of the country; and by holding the jury's right to return a general verdict in all cases sacred, we secure to the people at large, their just and rightful controul in the judicial department. . . . This, and the democratic branch in the legislature, . . . are the means by which the people are let into the knowledge of public affairs—are enabled to stand as guardians of each others [sic] rights, and to restrain, by regular and legal measures, those who otherwise might infringe upon them.¹¹⁷

Federalists agreed with—or at least accepted—the notion of the jury as the people's representative within the judiciary and as a protector of liberty.¹¹⁸ John Adams wrote that “the common people, should have as complete a control . . . in every judgment of a court of judicature” as in the legislature.¹¹⁹ It was this shared view of the jury, even among political opponents, that placed the jury at the center of the Bill of Rights. To this day, the concept of the jury

the jury may check them . . .”); THE FEDERALIST NO. 83, at 458–60 (Alexander Hamilton) (E.H. Scott ed., 1898) (noting use of the jury for civil cases in the states at the time); *see also* Akhil Amar, *supra* note 69, at 1183–85, 1187–89 (discussing the centrality of juries to the Bill of Rights).

116. *See* Letter from the Federal Farmer No. 15, *supra* note 115, at 319–22 (asserting that the failure to guarantee civil trial by jury rendered the proposed Constitution “of little or no importance”); THE FEDERALIST NO. 83 (Alexander Hamilton), *supra* note 115, at 453 (“The objection to the plan of the Convention, which has met with most success in this State [New York], is relative to the want of a constitutional provision for the trial by jury in civil cases.”).

117. Letter from the Federal Farmer No. 15, *supra* note 115, at 320 (footnote omitted).

118. In responding to Federal Farmer, Alexander Hamilton wrote:

The friends and adversaries of the plan of the Convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury. Or if there is any difference between them, it consists in this; the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government.

THE FEDERALIST NO. 83 (Alexander Hamilton), *supra* note 115, at 456.

119. 2 WORKS OF JOHN ADAMS 253 (Charles Francis Adams ed., 1850).

as representatives of the people maintains its importance in our legal framework.¹²⁰

Even beyond the theoretical, republican underpinnings of the role of the jury, there are basic structural similarities between juries and Congress. For example, prior to being empanelled, potential jurors are first questioned by attorneys and the judge through voir dire.¹²¹ Based on the answers to these questions, individuals are either rejected or selected to serve on the jury.¹²² This process can be viewed as the judicial branch's equivalent to the election of Congress. Potential office-holders are quizzed by each other, the media, and citizens and, on Election Day, are rejected or selected to serve in Congress.

Once on a jury, a juror has tremendous authority and ultimate responsibility for deciding the outcome of a case. Nevertheless, a set of rules constrain a jury's authority. Obviously, the Federal Rules of Evidence restrict the information a jury may hear before rendering its verdict, and a jury is expected to follow the law as explained to it by the judge.¹²³ In addition, there are a number of ways in which the jury's ultimate authority may be restricted in civil proceedings, through procedural devices such as the Judgment as a Matter of Law,¹²⁴ a motion for a new trial,¹²⁵ or the concept of remittitur.¹²⁶ These constraints are comparable to the checks and balances that limit Congress's authority, as well as the various other institutional rules, such as the filibuster,¹²⁷ which affect Congress's effectiveness and, therefore, its power.¹²⁸

Finally, the process that leads to deliberative decision-making is, or at least can be, strikingly similar between juries and Congress. At trial, jurors hear from witnesses with opposing interests and ideas, listen to evidence, and seek to determine the truth—the right from the wrong. Congress, too, through its committee system, takes testimony from witnesses with contrasting views, reviews the facts, and decides the proper course to take. And just as a single juror cannot act alone to reach an ultimate decision, but instead requires either absolute or near unanimity among her peers, representatives and senators too must largely act together if Congress is to act. Of course, this description

120. See, e.g., *Apprendi v. New Jersey*, 530 U.S. 466, 483–84 & n.10 (2000) (“The judge’s role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury.”).

121. See FED. R. CIV. P. 47(a).

122. See FED. R. CIV. P. 47(b).

123. Of course, a jury may disregard a judge’s instructions. In the civil setting, however, a jury’s decision to ignore the law may result in an alteration or amendment of the judgment. See FED. R. CIV. P. 59.

124. See FED. R. CIV. P. 50.

125. See FED. R. CIV. P. 59.

126. See FED. R. CIV. P. 59(e).

127. See *STANDING RULES OF THE SENATE*, S. DOC. NO. 110–9, R. XXII, at 15–17 (2007), available at <http://rules.senate.gov/senaterules/Rules091407.pdf>.

128. While the filibuster dramatically increases the power of each individual senator, the device limits the Senate’s ability to act as an institution.

oversimplifies the process. Nevertheless, simply recognizing the similarities between these two idealized versions of how Congress and juries operate shows how concerns over inflamed passions and emotional appeals may make their way into the decision-making process of both institutions.

Why does it matter that Congress and the jury share similar structures and constraints? How does the fact that Congress and the jury originate from a common view of popular control over the government factor into the question of Congress's involvement in amending the Federal Rules of Evidence? The answer becomes clearer when one remembers that a primary motivation for enactment of evidentiary rules is distrust of the jury's ability to properly weigh certain types of evidence before it. The juror-centric exclusionary rules were drafted despite the compelling—and deeply rooted—belief of the importance of the jury as the people's representative within the judicial branch, as protectors of liberty, as "guardians of each others rights."¹²⁹ If the Federal Rules of Evidence are drafted in such a way as to curtail the reach of the jury by limiting certain types of evidence that they may hear, does it make sense for Congress, the other representatives *of the same people* to alter those rules to widen the jury's reach? The answer, I believe, is no—a conclusion that the next several Parts support.¹³⁰

B. Misleading by Example: Two Illustrations of Congressional Interference with the Rules of Evidence

An appreciation for the theoretical and practical similarities between Congress and the jury is useful in understanding why Congress should be

129. Letter from the Federal Farmer No. 15, *supra* note 115, at 320.

130. Representation theory provides an additional basis for Congress to refrain from involving itself in the juror-centric Federal Rules of Evidence. Thomas Hobbes's idea of representation distinguishes between "natural" and "artificial" persons, between "actors" and "authors." THOMAS HOBBS, *LEVIATHAN* 105 (Michael Oakshott ed., Basil Blackwell 1957). "A natural person is one whose words and actions are considered his own;" an "artificial person is one whose words or actions are considered those of someone else." HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 15 (1967). Representatives, we see through Hobbes's notion, are persons authorized to act on behalf of another; they are, in other words, "artificial" persons. HOBBS, *supra*, at 105. When a group of representatives act—when, for example, Congress amends the Federal Rules of Evidence—they are doing so with authority granted by the people who elected them. The representatives may be the actors, but the people own the act. Taking this Hobbesian view, Hannah Pitkin has said: "The representative must act in such a way that, although he is independent, and his constituents are capable of action and judgment, no conflict arises between them. He must act in their interest, and this means that he must not normally come into conflict with their wishes." PITKIN, *supra* at 166. If one accepts that elected representatives are often no more than actors committed to taking the actions demanded and expected by their constituents, then one must also accept that the very concerns that form the basis for the Federal Rules of Evidence—inflamed passions, emotional responses, and outcome-oriented decision-making—are likely to manifest themselves in congressional actions. If we are to continue to attempt to keep juror emotion and passion from interjecting themselves into the courtroom, we must also limit congressional emotion and passion from interjecting themselves into the Federal Rules of Evidence.

restrained by the same rules as those that restrain juries. Still, the most fundamental rationale for urging Congress to refrain from altering the careful balance achieved through the Federal Rules of Evidence is that Congress, like the jury, exhibits the same tendency toward inflamed passions, flawed reasoning, and outcome-oriented decision-making that the Rules were designed to prevent in jurors.

The best way to demonstrate that Congress itself is susceptible to the same (or worse) decision-making-by-passion as a jury is to examine the recent history of congressional involvement in the Federal Rules. Several times since the initial enactment of the Federal Rules of Evidence in 1975, Congress has taken to amending the Rules directly—sometimes in the face of the express advice and guidance of the Judicial Conference.¹³¹ Two of the most recent examples are Congress's decision to add Federal Rules of Evidence 413, 414, and 415 in 1994 and to amend Federal Rule of Evidence 704 ten years earlier. An examination of the process and motivations leading to the enactment of these Rules provides powerful support for the conclusion that Congress should limit its role in altering the Federal Rules of Evidence.

1. Rules 413–415: Shock and Awe in the Legislative Battleground

In 1994, Congress passed, and President Clinton signed, the Violent Crime Control and Law Enforcement Act of 1994.¹³² Also known as the “Crime Bill,”¹³³ this legislation extended the death penalty to sixty federal offenses,¹³⁴ adopted a three-strikes provision for felonies,¹³⁵ banned the manufacture or transfer of nineteen semi-automatic weapons or copies,¹³⁶ and authorized nearly \$7.9 billion for prison construction,¹³⁷ \$8.8 billion to hire 100,000 new police officers,¹³⁸ and \$377 million for crime prevention programs.¹³⁹ The law

131. The Judicial Conference urged Congress to reconsider its adoption of Rules 413–415, calling the proposed changes unnecessary and unsupported by empirical evidence. See JUD. CONF. OF THE U.S., REPORT OF THE JUDICIAL CONFERENCE ON THE ADMISSION OF CHARACTER EVIDENCE IN CERTAIN SEXUAL MISCONDUCT CASES, 159 F.R.D. 51, 52–53 (1995).

132. Pub. L. No. 103-222, 108 Stat. 1796 (codified as amended in scattered sections of 2, 8, 12, 15, 16, 18, 20, 21, 26, 28, 42 U.S.C.).

133. Kenneth J. Cooper, *House Passes \$30 Billion Crime Bill, 235 to 195*, WASH. POST, Aug. 22, 1994, at A1.

134. Violent Crime Control and Law Enforcement Act §§ 60003–24.

135. *Id.* § 70001.

136. *Id.* § 110102.

137. *Id.* § 20109.

138. *Id.* § 10003.

139. *Id.* § 30202.

also amended the Federal Rules of Evidence to include Rules 413,¹⁴⁰ 414,¹⁴¹

140. Federal Rule of Evidence 413 provides:

(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule and Rule 415, "offense of sexual assault" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved—

(1) any conduct proscribed by chapter 109A of title 18, United States Code;

(2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;

(3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body;

(4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or

(5) an attempt or conspiracy to engage in conduct described in paragraphs (1)–(4).

FED. R. EVID. 413.

141. Federal Rule of Evidence 414 provides:

(a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule and Rule 415, "child" means a person below the age of fourteen, and "offense of child molestation" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved—

(1) any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child;

(2) any conduct proscribed by chapter 110 of title 18, United States Code;

(3) contact between any part of the defendant's body or an object and the genitals or anus of a child;

(4) contact between the genitals or anus of the defendant and any part of the body of a child;

(5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or

and 415.¹⁴² These rules essentially supersede Rule 404 and centuries of common law by rendering admissible evidence of a defendant's past similar acts in civil or criminal cases involving accusations of sexual assault or child molestation.¹⁴³

Adoption of these new rules generated fierce opposition in the legal community. Much of the hostility to Rules 413–415 was based on concerns that the rules resulted in an unconstitutional denial of due process.¹⁴⁴ A significant portion of the opposition to Rules 413–415, however, was a result of the process by which the changes were adopted, the motivations of the new rules' supporters, and the passions and flawed reasoning that provided the impetus for the amendments.¹⁴⁵ In short, the very concerns that the drafters of the Federal Rules held for jury decision-making were on display as Congress enacted Federal Rules 413–415. These new rules disrupted the delicate balance between admissibility and unfair prejudice, the very fabric of the Federal Rules of Evidence.

a. Process

During the summer of 1994, the presidency of Bill Clinton was floundering, and President Clinton and the Democratic leadership in Congress desperately sought to enhance their public standing. The vehicle they settled on was a

(6) an attempt or conspiracy to engage in conduct described in paragraphs (1)–(5).

FED. R. EVID. 414.

142. Federal Rule of Evidence 415 provides:

(a) In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these rules.

(b) A party who intends to offer evidence under this Rule shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

FED. R. EVID. 415.

143. See 140 CONG. REC. 15208–09 (1994) (statement of Rep. Hughes).

144. See, e.g., *id.* at 15209 (“Frankly, Mr. Speaker, . . . it raises serious constitutional questions.”); Duane, *supra* note 9, at 107–08 & n.71 (suggesting violation of constitutional due process); Mark A. Sheft, *Federal Rule of Evidence 413: A Dangerous New Frontier*, 33 AM. CRIM. L. REV. 57, 58–59 (1995) (contending that Rule 413 impinges due process and equal protection). These concerns proved to be well-founded, as courts upheld the new rules only after determining that Rule 403's balance test still applies. See, e.g., *United States v. Mound*, 149 F.3d 799, 800–02 (8th Cir. 1998); *United States v. Castillo*, 140 F.3d 874, 883 (10th Cir. 1998); *United States v. Enjady*, 134 F.3d 1427, 1434 (10th Cir. 1998).

145. See discussion *infra* Part IV.B.1.a.

crime bill.¹⁴⁶ In early August, however, a coalition of congressional representatives voted to block the passage of the Democratic legislation.¹⁴⁷ Republican Representative Susan Molinari—who voted with that coalition—announced that she had done so because the Democratic legislation did not include her proposal to add Rules 413–415 to the Federal Rules of Evidence.¹⁴⁸ As the Democratic leadership faced increasing pressure to pass a crime bill prior to the August recess, they looked to Representative Molinari and a handful of other Republicans for the votes necessary to secure passage.¹⁴⁹ During this “frantic hunt” for votes, congressional negotiators worked nearly non-stop—not in an effort to improve the legislation, but to logroll their way to enough votes.¹⁵⁰ After an exhausting marathon weekend of negotiating—and in the face of increasing pressure to find a workable compromise—the Democratic leadership gave in to Rep. Molinari’s demand to include Federal Rules 413–415 in the Crime Bill.¹⁵¹ Though many Democrats considered the proposed rules unconstitutional and “ridiculous,”¹⁵² they included the new rules in the Crime Bill, a piece of legislation they felt had to be passed for political reasons.¹⁵³

Even at first glance, the process by which Federal Rules 413–415 were added to the Federal Rules of Evidence is troublesome. Congress took to adding Rules 413–415 through a game of political posturing, logrolling, and partisan electoral calculations.¹⁵⁴ The problems of this approach are even more pronounced when one remembers the deliberative process through which proposed rules normally advance. Generally, a rule proceeds through no fewer than five levels of review before it is enacted.¹⁵⁵ Thus, a practice that often takes three years or more and inspires serious comment and debate within the legal community was completed after twenty minutes of floor debate in the United States Senate, after one exhaustive marathon weekend in the House of Representatives, with no public hearings held on the matter, and with no serious consideration of the potential ramifications of the changes.

146. Duane, *supra* note 9, at 96.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 96–97.

151. Jill Zuckman, *Negotiators in House Outline Deal on Crime Bill*, BOSTON GLOBE, Aug. 21, 1994, at 1 (cited in Duane, *supra* note 9, at 96).

152. 140 CONG. REC. 15209 (1994) (statement of Rep. Hughes). Representative Molinari responded to this statement by saying, “I think if we talked to any one of the victims or the parents of the victims whose assailant has been allowed to go free because of a technical difficulty, they would not deem this measure ridiculous.” *Id.*

153. See Zuckman, *supra* note 151.

154. See *id.*

155. See Duff, *supra* note 4.

b. Inflamed Passions

To the extent there was debate over the wisdom of adding Rules 413–415 to the Federal Rules of Evidence, supporters of the changes relied on emotional pleas rather than reasoned argument. A review of the Congressional Record during the debates surrounding Rules 413–415 reveals that supporters of the new rules used little more than inflammatory language and appeals to passion in an effort to secure passage. The preferred modus operandi of these supporters was the anecdote so horrifying, whether accurate or not, that it could only be intended to leave the listener wondering why anyone accused of a sexual crime is not immediately imprisoned for life—skip the trial! A few examples include:

Senator Bob Dole:

Take the 1988 case of Getz versus State.^[156] In Getz, the Supreme Court of Delaware^[157] overturned the defendant's conviction of raping his 11-year-old daughter because evidence that he had also molested her on other occasions was improperly admitted. The court went on to hold that the disputed evidence was impermissible evidence of "character" and could not be admitted under the State's evidentiary standards. The tragic result: the defendant walked.^[158]

Similar tragedies have been repeated in other courts and in other States.

....

If you turn on television today, if you read the morning newspaper, or listen to the radio you have heard the sad story of 7-year-old Megan Kanka, who was recently strangled near her home in Mercer County, NJ. The police have arrested a twice-convicted sex offender. According to press reports, the person arrested for this vicious crime had been sentenced to 10 years in prison, but was released after serving just 6 years.

Should the killer's prior offense be admitted at trial? You bet.¹⁵⁹

156. 538 A.2d 726 (Del. 1988).

157. One should note that all of the anecdotal evidence provided by congressional supporters of the changes to the *Federal Rules of Evidence* dealt with cases or crimes handled in *state* court. This is because the responsibility for the prosecution of sexual crimes rests principally with the states. In fact, in the year before Rules 413–415 were added, there were only 155 federal prosecutions for sexual offenses. See 23 WRIGHT & GRAHAM, *supra* note 15, § 5412, at 463, 473 n.7 (Supp. 2008).

158. As Professor Duane has noted, Mr. Getz did not walk far. Duane, *supra* note 9, at 101. Getz was retried and convicted without the objectionable evidence, leading one to question the supporters' claims of the necessity of this information to secure convictions. *Id.*

159. 140 CONG. REC. 18929 (1994).

Representative Molinari:

The People versus Hansen.^[160] In this case the defendant, Hansen, was found guilty of inducement of child prostitution and attempted sexual assault on a child. Hansen had been the subject of a police investigation after parents complained that he had engaged in obscene telephone conversations with their pre-teen daughters.

....

The evidence at the trial included testimony by two other young girls that the defendant had also solicited sex with them in phone conversations. However, the appellate court held that admission of the testimony with the other two girls was reversible error because this evidence was "unnecessary to establish intent" and hence, in the court's view, "was without a valid purpose."

Mr. Speaker, this happens time and time again in sexual assault and in child molestation cases¹⁶¹

Representative Jon Kyl:

On May 4, 1986, Suzanne Harrison, an 18-year-old honor student in Texas, three weeks away from high school graduation, was abducted. The next day she was found raped[,], brutally beaten[,], and strangled to death. She was murdered by a parolee named Jerry Walter McFadden, a man who calls himself "Animal." McFadden had been convicted of two 1973 rapes and sentenced to two 15-year sentences. Paroled in 1978, he was again sentenced to 15 years in 1981 for a three-count crime spree in which he kidnapped, raped, and sodomized a Texas woman. Released on parole again in July of 1985, even though his record now contained three sex-related convictions and two prison sentences, McFadden raped and murdered Suzanne Harrison less than one year later.^[162]

....

Tonight we have the opportunity . . . to make a small but important change to our criminal justice system so that victims of

160. 708 P.2d 468 (Colo. Ct. App. 1985).

161. 140 CONG. REC. 15208 (1994).

162. Representative Kyl's example is characteristic of the anecdotes offered by supporters of Federal Rules 413-415 in that they often seem to be using the debate over these three rules of evidence as a cathartic release of their pent up frustration with the entire criminal justice system. Here, Representative Kyl's example is horrific, but it is an indictment of the Texas parole system, not the Federal Rules of Evidence. In fact, the criminal justice system and the Texas Rules of Evidence appear to have worked without concern in the case of Jerry Walter McFadden: he was tried, convicted, and sentenced to death for the murder of Suzanne Harrison. He was executed on October 14, 1999. Michael Graczyk, *McFadden Executed for Killing in 1986*, DALLAS MORNING NEWS, Oct. 15, 1999, at 33A.

sexual abuse and child molestation are not re-victimized once they bring charges against a perpetrator and enter into the court system.¹⁶³

Representative Molinari:

I will cite one more case study and then I will close.

State v. Pace, 275 S.E.2d 254 (N.C. App. 1981). In this case, the victim, Cynthia Hairston, was an acquaintance of the defendant Pace. Pace encountered the victim while she was waiting for a bus, and invited her to wait in his car because it was cold in the bus station. When she got into the car, he drove to a dead end street, and there twice raped her and forced her to perform oral sex. The victim attempted to resist but was limited in her ability to do so by the fact that she was eight months pregnant at the time.

At the trial of Pace for assaulting Cynthia Hairston, the government also presented another witness, Vickie Rorie, who testified that Pace had raped her about two months earlier.

....

In relation to both incidents, Pace admitted engaging in sex with the victims at the times in question, but stated that it had been consensual. This defense was disbelieved, and Pace was convicted.

Because of the law as it stands today, the conviction was reversed on appeal. The appellate court said the testimony of Vickie Rorie only “tended to show the bad character of the defendant and his disposition to commit sex crimes,” and hence was deemed inadmissible, and the case was overturned.¹⁶⁴

In just these four anecdotes (however incomplete or inaccurate), we have a father accused of raping his eleven-year-old daughter, a pedophile, the brutal murder of a young woman, and the rape of a woman eight-months pregnant. The supporters of Federal Rules 413–415 loaded the debate with these stories as a way of inflaming the passions of their fellow officeholders and provoking an emotion-based response.¹⁶⁵ But they did not stop there. In addition to playing to emotions by offering these accounts of heinous criminals potentially going free, supporters also layered the debate with passionate cries to protect

163. 140 CONG. REC. 15209 (1994).

164. 140 CONG. REC. 15211 (1994).

165. As Representative William J. Hughes—one of the few public opponents of the new rules—stated in response to the onslaught of inflammatory rhetoric: “It is very difficult to argue against something that would suggest that in some way we are going to make it easier for child molesters and sexual abusers to walk.” 140 CONG. REC. 15208 (1994). Representative Hughes could perhaps afford to lead the House fight against the proposed rules, because he was retiring at the end of the term. Thomas J. Fitzgerald, *State’s Senior Congressman Says He’ll Retire*, N. J. RECORD, Jan. 25, 1994, at A3.

women and children,¹⁶⁶ while attempting to paint sexual assault defendants as “depraved psychopaths” who will undoubtedly rape again.¹⁶⁷ No reasonable person can dispute that these are reprehensible crimes for which any alleged perpetrator should be tried and, if convicted, severely punished. But as the examples offered by Rules 413–415’s supporters illustrate, the proposed changes were either unrelated to the real problems surrounding the crimes, or were unnecessary because the defendants were convicted without the past-act evidence. In fact, proponents of the new rules offered the examples for no other reason than to evoke outrage and inflame passions.

c. Flawed Reasoning

Perhaps one of the reasons why supporters of Federal Rules 413–415 relied so heavily on emotional pleas was the sheer absence of a quantifiable need for the proposed changes to the Federal Rules of Evidence. Representative Molinari and Senator Dole put forward three basic rationales for singling out sexual crimes within the Federal Rules of Evidence: (1) sexual crimes are committed by a “small class of depraved criminals”;¹⁶⁸ (2) these “depraved criminals” are more likely than their criminal counterparts to repeat their acts;¹⁶⁹ and (3) evidence of the defendant’s prior bad act in sexual assault cases

166. For example, Representative Molinari declared that passage of the new rules would be “first and foremost a triumph for the public—for the women who will not be raped and the children who will not be molested because we have strengthened the legal system’s tools for bringing the perpetrators of these atrocious crimes to justice.” 140 CONG. REC. 23602 (1994). Responding to Democratic criticism that such significant changes to the Federal Rules of Evidence should advance through the traditional process of the Judicial Conference and adoption by the Supreme Court, another supporter of the changes, then-Representative Rick Santorum, stated that he

[could] not believe what we are saying here tonight is that we are going to allow a serial rapist, a serial sexual assaulter, a serial child molester the opportunity to continue without having that relevant evidence brought before the judge because the process of the Supreme Court and the committee that judges rules of evidence has not gotten around to dealing with this issue.

140 CONG. REC. 15211 (1994). If the rules had been changed earlier, according to Representative Kyl, “Suzanne Harrison and thousands of other victims might be alive today.” 140 CONG. REC. 15209 (1994). Further, according to Representative Kyl, “[a]llowing the prosecution to bring to trial similar child molestation crimes of the accused will certainly help these young victims bring their attacker to justice.” *Id.* at 15210. The new rules should be enacted “[f]or the thousands of individuals who are victims of sexual violence every year.” *Id.*

167. Baker, *supra* note 9, at 589.

168. David J. Karp, *Evidence of Propensity and Probability in Sex Offense Cases and Other Cases*, 70 CHI.-KENT L. REV. 15, 24 (1994). Senator Dole and Representative Molinari relied heavily on the work of David Karp, a Senior Counsel at the Office of Policy Development at the U.S. Department of Justice during the first Bush Administration. Baker, *supra* note 9, at 568 n.24. In fact, the article by Mr. Karp cited above was placed into the Congressional Record by Senator Dole as part of the legislative history of Rules 413–415. 140 CONG. REC. 24799 (1994).

169. See 140 CONG. REC. 24799 (1994) (statement of Sen. Dole); Karp, *supra* note 168, at 20.

is necessary to enhance the credibility of the victim's testimony.¹⁷⁰ In her detailed analysis of these rationales, Katharine Baker provides both the quantitative¹⁷¹ and qualitative¹⁷² evidence to expose the flawed rationales offered by Rules 413–415's promoters.

Beyond being wrong about why sexual crimes should be treated differently under the Rules of Evidence, the law's supporters relied on the supposed need for such evidence to secure and affirm convictions.¹⁷³ I critique the desire to simply assist prosecutors earn convictions, apparently at all costs, more fully below. Here, it is enough to say that supporters pushed this goal despite abundant evidence disproving that changes to the Rules were necessary to convict defendants of sexual crimes.¹⁷⁴

In short, Representative Molinari, Senator Dole, and the other proponents of Rules 413–415 relied on incorrect assumptions about sex crime defendants, the nature of such crimes, and the need for changes in the Federal Rules of Evidence to secure convictions. The supporters provided no empirical data to support the new Rules; in fact, their arguments in favor of enactment defied the evidence demonstrating lower recidivism among rapists and a high conviction rate for such crimes. Indeed, beyond the narrative accounts meant to inflame passions—accounts that were largely erroneous and misleading—the proponents of Rules 413–415 offered little more than flawed reasoning to support the changes.

d. Seeking to Influence Trial Outcomes

Since 1975, changes to the Federal Rules of Evidence have largely been based on real problems that relate to the application or administration of the Rules.¹⁷⁵ Supporters of Federal Rules 413–415, however, were explicit in their

170. 140 CONG. REC. 24799 (1994) (statement of Sen. Dole).

171. For example, to demonstrate the falsity of the first rationale, Baker cites to several national surveys, all of which indicate that sexual assault is anything but an act of a "small class of depraved criminals." Baker, *supra* note 9, at 576. One study of 6100 college students revealed that one in twelve men admitted to committing rape. *Id.* at 576 (citing Mary P. Koss, *Hidden Rape: Sexual Aggression and Victimization in a National Sample of Students in Higher Education*, in 2 RAPE AND SEXUAL ASSAULT 1, 11 (Ann Wolbert Burgess ed., 1988)). Baker also provides the Bureau of Justice Statistics recidivism rates showing that "only 7.7% of released rapists [a]re rearrested for rape," while the recidivism rates for other crimes are markedly higher (33.5% for larceny, 31.9% for burglary, and 24.8% for drug offenses). *Id.* at 578.

172. Baker presents eight narrative accounts of rape to emphasize the important differences, not just among the various crimes, but between how society often views that crime and the reality of the act itself. *Id.* at 569–73.

173. See 140 CONG. REC. 7817 (1994) (statement of Rep. Molinari).

174. Duane, *supra* note 9, at 100 (citing government statistics showing an 83 percent conviction rate at trial for federal prosecution of sexual offenses).

175. See generally 21 WRIGHT & GRAHAM, *supra* note 15, § 5008 (giving amendments and history to the Federal Rules of Evidence). For example, Rule 609 was amended in 1990 to resolve an ambiguity as to the relationship of Rules 609 and 403 with respect to impeachment of witnesses other than a defendant. See FED. R. EVID. 609 advisory committee's note. The

desire to affect the *outcome* of criminal trials against those accused of sexual assault or child molestation. Representative Molinari suggested that absent a change in the rules, the government would be unable to secure convictions of alleged rapists.¹⁷⁶ Another supporter of Rules 413–415, Representative Bill McCullum, stated that “there is a problem with the rules of evidence with regard to the ability to get the kind of background necessary to get rape convictions in this country.”¹⁷⁷ Representatives Molinari and McCullum made these pronouncements even though figures from 1992, compiled by the United States District Courts, showed that the conviction rate for sex offense cases was 84%.¹⁷⁸ In comparison, the United States government obtained convictions in 78.2% of larceny and theft cases, in 75.8% of homicide cases, and in 64.7% of assault cases.¹⁷⁹ Nevertheless, proponents of the changes clearly wanted the new rules to increase the number of convictions in sexual assault or child molestation cases, without any apparent concern for the accuracy of the verdict.¹⁸⁰

Beyond wanting to ease convictions, supporters of Rules 413–415 also sought to minimize the number of reversals on appeal.¹⁸¹ According to Representative Molinari, “serial rapists and child molesters go free because current law encourages reversals.”¹⁸² Putting aside the lack of support for this assertion, a more fundamental problem exists. It is inappropriate for Congress to amend the Federal Rules of Evidence to make a particular outcome more likely, especially when singling out a specific type of crime. After all, the Federal Rules of Evidence, more than any other procedural code, very much affect the outcome of trials.¹⁸³ In part because of this—and also out of the

amendment was in response to the Supreme Court’s holding in *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 527 (1989), that felony convictions used to impeach witnesses other than a defendant could not be excluded under Rule 403. Another example is the degenderization of the Rules that occurred in 1987 and 1988. See 21 WRIGHT & GRAHAM, *supra* note 15, § 5008, at 344.

176. 140 CONG. REC. 7817 (1994).

177. *Id.* at 15211.

178. Duane, *supra* note 9, at 100.

179. *Id.*

180. In fact, absent from the comments of supporters of Federal Rules 413–415 is any discussion of the possibility that a sexual assault or child molestation defendant could be wrongly accused. In the minds of Senator Dole and Representatives Molinari, McCullum, Kyl, and Santorum, accusation is synonymous with guilt. For a compelling discussion of why such thinking is misplaced, see Baker, *supra* note 9, at 581.

181. Again, this goal, in and of itself, may be quite laudable. The problem was that the drafters of Federal Rules 413–415 saw appellate affirmation of convictions as an end unto itself, rather than as a process toward ensuring that innocent defendants are not wrongly convicted. Attempting to prevent reversals on appeal by amending the Rules of Evidence to permit wider types of evidence ignores one of the very purposes of the Rules and disrupts the balance between admissibility and unfair prejudice.

182. 140 CONG. REC. 7817 (1994).

183. *Politics of Evidence Symposium*, *supra* note 6, at 750 (comments of Gregory Joseph).

recognition of the importance of a fair trial and need for legitimacy—the Federal Rules of Evidence have always been aimed at providing a neutral ground for the determination of the admissibility of evidence. Federal Rules 413–415 are a striking reversal of the effort to ensure fairness and balance within the Rules. The supporters of these changes were guided primarily by a desire to ensure more convictions. Congress drafted and encouraged the enactment of these Rules with an eye toward making it easier to convict those accused of sexual crimes. Again, there was no discussion from the new rules’ proponents about the right of defendants to receive a fair trial, or of the potential for convicting innocent persons. Rather, Congress aimed to achieve a particular result—more convictions regardless of cost.

In passing Rules 413–415, Congress demonstrated just how susceptible it is to the very characteristics that inspired the adoption of evidentiary rules. Lawmakers injected their own passions and emotions into the Rules, forsaking reason at the expense of the Rules themselves.

2. *Rule 704(b): Taking Offense at the Insanity Defense*

The decision to adopt Rules 413–415 in 1994 was not the first time Congress bypassed the Judicial Conference and the Rules Enabling Act to quickly amend the Federal Rules of Evidence. A decade earlier, Congress passed the Insanity Defense Reform Act of 1984.¹⁸⁴ The legislation essentially adopted the *M’Naghten* test for insanity, thereby substantially narrowing the definition of legal insanity and placing the burden on the defendant to prove the insanity by clear and convincing evidence.¹⁸⁵ In addition, the law amended Federal Rule of Evidence 704 to include subsection (b), which restricts the ability of experts to testify regarding the mental state or condition of a defendant in criminal proceedings.¹⁸⁶ The impetus for this legislation was the 1981 assassination attempt on President Ronald Reagan and the subsequent acquittal by reason of insanity of John Hinckley, Jr. During Hinckley’s trial

184. Pub. L. No. 98-473, 98 Stat. 2057 (codified at 18 U.S.C. § 17 (2000)).

185. Named after the guidelines established by the House of Lords in *M’Naghten’s Case*, (1843) 8 Eng. Rep. 718 (H.L.). The standard provides that

- 1) A person is not responsible for criminal conduct if, at the time of the offense;
- 2) the defendant suffered from a mental disease or defect;
- 3) that caused the defendant either:
 - (a) not to know the nature and quality of the act he or she committed; or
 - (b) knowing the quality of the act, nonetheless not to know that the act was wrong.

Henry F. Fradella, *From Insanity to Beyond Diminished Capacity: Mental Illness and Criminal Excuse in the Post-Clark Era*, 18 U. FLA. J.L. & PUB. POL’Y 7, 16–17 (2007).

186. Subsection (b) of Federal Rule of Evidence 704 provides:

No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

FED. R. EVID. 704(b).

for the shooting that seriously injured President Reagan, Press Secretary James Brady, and two others, a number of expert witnesses testified as to Hinckley's ability to form the mental state specific to the crimes he was alleged to have committed.¹⁸⁷ These witnesses, couching their opinions in the relevant legal terms of the day, offered competing analyses as to whether Hinckley was mentally sane.¹⁸⁸ After three days of deliberation, the jury acquitted Hinckley.¹⁸⁹ The jury's finding that Hinckley was not guilty by reason of insanity prompted sharp public outrage.¹⁹⁰ Public opinion and the White House placed significant pressure on Congress to take quick action.¹⁹¹

Congress responded to that pressure. Declaring a need to "eliminate the confusing spectacle of competing expert witnesses testifying to directly contradictory conclusions as to the ultimate legal issue to be found by the trier of fact,"¹⁹² Congress took the step of amending Federal Rule 704 without significant debate, an opportunity for public comment or consideration, or the benefit of hearing from the legal community.

a. Process

While the enactment of Federal Rule of Evidence 704(b) was not as controversial as the adoption of Rules 413–415, the process surrounding approval of the change still proves troublesome. The most obvious concern is that in enacting Rule 704(b), Congress responded to political considerations by making changes to address perceived problems within the Rules. Of course, to quote Justice Holmes, "hard cases make bad law."¹⁹³ Here, based on a trial that garnered national attention and an outcome that both the public and its elected officials found shocking (and probably did not understand), Congress chose to amend the Rules of Evidence. In other words, Congress was responding to inflamed passions and pressure from within the political environment when it altered the Federal Rules to include Rule 704(b).

This leads to another troublesome aspect of the effort to amend Rule 704: Congress's actions were in response to a single unsatisfactory outcome that

187. LINCOLN CAPLAN, *THE INSANITY DEFENSE AND THE TRIAL OF JOHN W. HINCKLEY, JR.* 64–68 (1984).

188. *Id.* at 63–72.

189. Rita R. Carroll, *Insanity Defense Reform*, 114 MIL. L. REV. 183, 184 (1986).

190. CAPLAN, *supra* note 187, at 116; see also Carroll, *supra* note 189, at 184 & n.9 (discussing the fact that five of the Hinckley jurors testified before the Senate Judiciary Committee's Subcommittee on Criminal Law just three days after the verdict and quoting several senators expressing frustration with the Hinckley verdict).

191. See Herbert H. Denton, *President Leans Toward Review of Insanity Defense*, WASH. POST, July 2, 1982, at A4; Peter Perl, *Public That Saw Reagan Shot Expresses Shock at the Verdict*, WASH. POST, June 23, 1982, at A8.

192. S. REP. NO. 98-225, at 230 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3412.

193. *N. Sec. Co. v. United States*, 193 U.S. 197, 400 (Holmes, J., dissenting).

would rarely, if ever, be repeated.¹⁹⁴ Figures from 1981, the year of the attempted assassination, showed that only four federal defendants were acquitted of charges based on a successful insanity defense.¹⁹⁵ This was hardly a pressing matter. Further, one need only examine the Insanity Defense Reform Act in its entirety to recognize that Congress's purpose in changing Rule 704 was to make it harder for defendants to escape conviction by claiming insanity.¹⁹⁶ The Federal Rules of Evidence are not the appropriate vehicle for pursuing such outcome-driven goals.

b. Flawed Reasoning

As with any legislative idea inspired by political and emotional passions and pushed through relatively quickly, the reasoning behind Federal Rule of Evidence 704(b) is also flawed. Two justifications were offered in support of subsection (b).¹⁹⁷ The first is that a jury may not be capable of rationally deciding between experts who offer competing conclusions as to the legal mental state of defendants.¹⁹⁸ The feared consequence of such confusion is that the jury would simply adopt the opinion of one of the experts without giving independent rational thought to the matter. The expert would, in essence, be usurping the jury's function.¹⁹⁹

194. One could argue that Congress's motivation was, as the Senate Report stated, eliminating the "confusing spectacle of expert witnesses contradicting each other as to the ultimate legal issue." S. REP. NO. 98-225, at 230. The difficulty with accepting this explanation is that the proposed change to Rule 704 addresses only issues involving mental health testimony in criminal trials. If Congress were truly concerned about competing experts regarding the ultimate issue, there was no reason to limit the amendment to mental health testimony and no reason to restrict its application to criminal trials. Another way to expose the true motivation of the proponents of the change to Rule 704 is simply to ask the question: had Hinckley been found guilty, would Congress have amended the Rule? If the answer is no, the amendment must have been inspired, at least in part, to influence the outcome in favor of future convictions.

195. CAPLAN, *supra* note 187, at 104. The number of acquittals at the state level was similarly low. *See id.* at 102-08.

196. I do not intend this as a criticism of Congress's effort to make insanity defenses more difficult. As noted above, Congress was largely codifying the *M'Naghten* standard for proving legal insanity that had been in existence for over a century. In fact, the policy goals underlying the bulk of the Insanity Defense Reform Act may be sensible and, moreover, are undoubtedly within the purview of Congress. Rather, the problem is that Congress abandoned the standard process for amending the Federal Rules of Evidence and did so based on emotional considerations and with an outcome-driven motivation.

197. 29 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE, § 6282, at 365 (1997).

198. *Id.* § 6282, at 369; *see also* United States v. Austin, 981 F.2d 1163, 1166 (10th Cir. 1992) (stating that the rule is intended to "prevent[] a confusing 'battle of the experts'"); United States v. Kristiansen, 901 F.2d 1463, 1466 (8th Cir. 1990) (stating that the "purpose of rule 704(b) is to prevent a jury adjudicating an insanity claim from becoming thoroughly confused by medical experts' testimony about the ultimate legal issues").

199. 29 WRIGHT & GOLD, *supra* note 197, § 6282, at 369; *see also* United States v. DiDomenico, 985 F.2d 1159, 1164 (2d Cir. 1993) (holding that Rule 704(b) "recognizes that

This, however, is hardly a compelling justification for subsection (b). Juries will still be subjected to competing opinions on such matters because the Rule simply confines the expert to offering opinion testimony through medical terminology rather than through the language of legal conclusions.²⁰⁰ Moreover, as mentioned earlier, there is no articulated reason for why subsection (b) is limited to mental health testimony. In fact, while the subject of insanity or intent may be complex and potentially confusing matters for a jury to grasp, that is the very reason for expert testimony.²⁰¹ Indeed, subsection (b) does nothing to solve the problems associated with juror confusion over competing expert testimony and instead makes the situation all the more frustrating for jurors by not allowing experts to complete the analysis.²⁰²

The second justification offered by supporters of subsection (b) is that psychiatrists and psychologists are experts in their respective fields, not in the law.²⁰³ This rationale is, at least on its face, more convincing than the fear of juror confusion over competing expert testimony.²⁰⁴ Opinions by medical experts on the ultimate legal issues often take the form of simple "parrot[ing of] the legal formulas for sanity or intent"²⁰⁵ and are therefore outside the scope of a psychiatrist's and psychologist's expertise.²⁰⁶ The problem with placing too much reliance on this justification for subsection (b) is that to do so

expert testimony concerning a defendant's mental state poses a uniquely heightened danger of intruding on the jury's function").

200. 29 WRIGHT & GOLD, *supra* note 197, § 6282, at 369.

201. See FED. R. EVID. 702 advisory committee's note.

202. Capra, *supra* note 48, at 696-97.

203. 29 WRIGHT & GOLD, *supra* note 197, § 6282, at 370; see also S. REP. NO. 98-225, at 230-31 (1984), reprinted in 1984 U.S.C.A.N. 3182, 3412-13. The Senate Report relied on a statement by the American Psychiatric Association for the policy rationale:

[I]t is clear that psychiatrists are experts in medicine, not the law. As such, it is clear that the psychiatrist's first obligation and expertise in the courtroom is to "do psychiatry," i.e., to present medical information and opinion about the defendant's mental state and motivation and to explain in detail the reason for his medical-psychiatric conclusions. When, however, "ultimate issue" questions are formulated by the law and put to the expert witness who must then say "yea" or "nay," then the expert witness is required to make a leap in logic. He no longer addresses himself to medical concepts but instead must infer or intuit what is in fact unspeakable, namely, the probable relationship between medical concepts and legal or moral constructs such as free will. These impermissible leaps in logic made by expert witnesses confuse the jury.

Id. (alteration in original).

204. 29 WRIGHT & GOLD, *supra* note 197, § 6282, at 370.

205. *Id.* at 371.

206. S. REP. NO. 98-225, at 230; 29 WRIGHT & GOLD, *supra* note 197, § 6282, at 371; see also *United States v. Lipscomb*, 14 F.3d 1236, 1241 (7th Cir. 1994) ("[I]t is evident that Rule 704(b) was designed to avoid the confusion and illogic of translating the 'medical concepts' relied upon by 'psychiatrists and other mental health experts' into legal conclusions.").

essentially concedes the superfluous nature of the amendment.²⁰⁷ If psychiatrists and psychologists are not experts in the law, then their testimony relating to such issues would not assist the fact finder. As such, the testimony is not admissible under Federal Rule of Evidence 702.²⁰⁸ While given the emotional and political spark that ignited the push for a change in insanity, it may be “no surprise that Congress would be unwilling to rely on the efficacy of a general provision like Rule 702,”²⁰⁹ but that is hardly a justifiable reason for amending the Federal Rules.

c. Unintended Consequences

Finally, as is often the case with such efforts, the addition of subsection (b) to Rule 704 has had dramatic unintended consequences. For example, though Congress was clearly focused on the perceived problems of medical experts testifying regarding legal conclusions, the amendment to the Rule was drafted so that its reach extended beyond mental health experts. The Rule, therefore, has been applied to non-medical testimony, such as law enforcement officers offering expert testimony as to whether a defendant acted with the intent or knowledge required to commit the crime charged.²¹⁰ For example, prior to subsection (b)'s enactment, police officers routinely offered expert testimony as to whether a defendant possessing a certain amount of illegal drugs possessed those drugs with the intent to distribute them.²¹¹ Following the adoption of subsection (b), the admissibility of such testimony is less certain.²¹² Courts have split on the question of whether Rule 704(b) applies to

207. 29 WRIGHT & GOLD, *supra* note 197, § 6282, at 371.

208. *Id.*

209. *Id.* at 372.

210. See Dana Hassin, *How Much is Too Much? Rule 704(b) Opinions on Personal Use vs. Intent to Distribute*, 55 U. MIAMI L. REV. 667, 677–80 (2001).

211. See Deon J. Nossel, Note, *The Admissibility of Ultimate Issue Expert Testimony by Law Enforcement Officers in Criminal Trials*, 93 COLUM. L. REV. 231, 231–32 & nn.4–5 (1993) (discussing the federal prosecutor's reliance on expert law enforcement testimony and citing several pre-704(b) cases, such as *United States v. Young*, 745 F.2d 733 (2d Cir. 1984); *United States v. Pugliese*, 712 F.2d 1574 (2d Cir. 1983); *United States v. Jones*, 605 F. Supp. 513 (S.D.N.Y. 1984)).

212. See, e.g., *United States v. Boyd*, 55 F.3d 667, 672 (D.C. Cir. 1995) (holding that the trial court erred by admitting police officer testimony that the quantity of crack cocaine in a person's possession was consistent with an intent to distribute); *United States v. Mitchell*, 996 F.2d 419, 422 (D.C. Cir. 1993) (holding that trial court erred under Rule 704(b) by permitting a police officer to give expert testimony that, based on the packaging of the cocaine, the defendant intended to distribute the drugs). Still, most courts have concluded that Rule 704(b) does not bar such testimony. See, e.g., *United States v. Richard*, 969 F.2d 849, 854–55 (10th Cir. 1992) (“The rule does not prevent the expert from testifying to facts or opinions from which the jury could conclude or infer the defendant had the requisite mental state.”); *United States v. Foster*, 939 F.2d 445, 454 (7th Cir. 1991) (concluding that the testimony “merely assisted the jury,” as opposed to deciding for them); *United States v. Alvarez*, 837 F.2d 1024, 1031 (11th Cir. 1988) (“[T]he expert left this inference for the jury to draw. He did not expressly ‘state [the] inference.’” (alteration in

non-mental health experts.²¹³ The reason for this conflict rests with the limited legislative history behind the change and that history's apparent contradiction of the text of the Rule. The legislative history, which primarily consists only of a two-page Senate report on the rule change, indicates that Congress was concerned solely with mental health experts proffering opinions as to whether a defendant's mental state met a certain legal standard.²¹⁴ Nonetheless, the language of the Rule extends beyond the testimony of mental health experts and was instead drafted to include any expert testifying regarding a defendant's mental state or condition.²¹⁵ This language has led to problems of interpretation for courts, as some struggle to close the gap between the text of Rule 704(b) and the rather clear motivation for the rule's enactment.²¹⁶

The issues associated with applying Rule 704(b)—and the problem of unintended consequences—extend beyond just difficulties for the court. Take, for example, *United States v. West*.²¹⁷ There, the defendant was charged with bank robbery and his defense was insanity.²¹⁸ A court-appointed psychiatrist examined the defendant and concluded that: (1) he was suffering from “schizoaffective disorder,” a severe mental disease, but that (2) the defendant “understood the wrongfulness of his actions” when he robbed the bank.²¹⁹ The defendant's counsel cleverly sought to have the first finding (the medical disorder) admitted, while keeping the expert's conclusions as to the second finding (the ultimate issue) out.²²⁰ The government sought to keep the entire psychiatric testimony out under Rule 704(b) and the trial court agreed.²²¹ The Seventh Circuit reversed, reasoning that Rule 704(b) rendered inadmissible only the ultimate conclusion that the defendant knew right from wrong.²²² The court of appeals held that Rule 704(b) did not operate to exclude the remainder of the psychiatrist's testimony regarding the mental disease.²²³ This “outrageous” result would not have occurred absent Congress's enactment of subsection (b).²²⁴

original)); *United States v. Dotson*, 817 F.2d 1127, 1132 (5th Cir. 1987) (“[T]he responses of the expert were . . . focused on the evidence, rather than addressing the ultimate issue . . .”).

213. Compare *United States v. Lipscomb*, 14 F.3d 1326, 1241–42 (7th Cir. 1994) (limiting Rule 704(b)'s application to mental health experts), with *Boyd*, 55 F.3d at 672 (applying Rule 704(b) to non-mental health testimony), and *Richard*, 969 F.2d at 855 (same).

214. S. REP. NO. 98-225, at 230–31 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3412–13.

215. See 29 WRIGHT & GOLD, *supra* note 197, § 6283, at 375–76.

216. *Id.* § 6285, at 388.

217. 962 F.2d 1243 (7th Cir. 1992).

218. *Id.* at 1244.

219. *Id.* at 1245.

220. *Id.* at 1245, 1247.

221. *Id.* at 1245.

222. *Id.* at 1246–47.

223. *Id.* at 1247–48.

224. *Id.* at 1245 (quoting the trial judge). More commonly, the Rule has been applied at the defendant's expense. See, e.g., *United States v. Campos*, 217 F.3d 707, 712 (9th Cir. 2000)

Thus, just as with Rules 413–415, the examination of Rule 704(b) shows that when Congress acts to directly amend the Federal Rules of Evidence, the basis for the change is likely to be emotion-driven and outcome-oriented. Additionally, Rule 704(b) demonstrates another added problem of direct congressional involvement in the Rules: such action is typically done without much consideration and without much opportunity for input from the experienced legal community. Congressionally mandated changes therefore often result in poorly drafted, ill-considered rules that leave a trail of unintended consequences.²²⁵

As these two examples show, Congress is at least as susceptible to emotion-based decisions as are juries. Indeed, the approach taken in amending the Federal Rules of Evidence to include Rules 413–415 and subsection (b) to Rule 704 conclusively demonstrates the problematic nature of congressional involvement in amending juror-centric rules. A fear of juries relying on inflamed passions, misused or ignored evidence, and outcome-oriented decision-making to render verdicts contributed significantly to the development of the evidentiary rules. Yet these same objectionable bases for decision-making pervade congressional action on the Federal Rules of Evidence, and there is no reason to believe that the process through which Congress directly amends the Rules of Evidence will become any less politicized or emotion-driven. The only way to preserve the integrity of the careful compromise between admissibility and fairness is for Congress to refrain from interfering with the Rules absent recommendations from the Judicial Conference and its committees.

C. Taking Away a Defendant's Fair Trial

Besides the theoretical and practical similarities between Congress and juries and the recent illustrations of congressional evidentiary rulemaking-by-passion, another reason exists for Congress to refrain from amending the juror-centric Rules of Evidence. The balance between admissibility of evidence and preventing unfair prejudice that the juror-centric Federal Rules seek to achieve is directly related to the desire to ensure that defendants receive fair trials. The Rules therefore generally exclude evidence that may inspire juries to convict a defendant based on anything other than the facts before them.²²⁶

(upholding the exclusion of expert testimony regarding results of defendant's polygraph test); *United States v. Bennett*, 161 F.3d 171, 183 (3d Cir. 1998) (barring defendant's expert's testimony regarding defendant's intent to defraud the Internal Revenue Service).

225. A compounding problem is that rules directly adopted by Congress are viewed as somehow above reproach by the Advisory Committee, so that once a change has been made by Congress, it will almost certainly take another act of Congress to correct any unintended consequences. See Eileen A. Scallen, *Analyzing "The Politics of [Evidence] Rulemaking,"* 53 HASTINGS L.J. 843, 860–61 (2002).

226. See *Michelson v. United States*, 335 U.S. 469, 475–76 (1948); 1A WIGMORE, *supra* note 85, § 58.2, at 1212; see also Richard D. Friedman, *Minimizing the Jury Over-Valuation*

Of course, evidence excluded under these Rules is, by definition, relevant.²²⁷ For this reason, drafters of the Rules and the courts have taken particular care in achieving a balance between admissibility and unfair prejudice. Changes to the Rules disturb that balance. When that disruption follows thoughtful analysis and consideration, as it must when done through the Advisory Committee, and when careful attention is paid to the rights of defendants, changes to the juror-centric rules may be appropriate. Congressional action in this area, however, has always been inspired by a desire to disrupt that balance in favor of the government in prosecution of defendants. Although that may not always be the result, as demonstrated by the effects of Rule 704(b) on the prosecution of intent-required drug crimes, when Congress seeks to assist prosecutors at the expense of defendants, that objective will nearly always be accomplished. This aim not only raises constitutional concerns over whether defendants can receive a fair trial, but harms the perceived legitimacy of the criminal justice system.²²⁸ After all, few members of Congress stand up for defendants' rights.²²⁹ And, as public-choice theory instructs, legislation is becoming more and more interest-group driven.²³⁰ Few interest groups—at least with much clout on Capitol Hill—make the rights of defendants a top priority. Even if such a group did exist, it is hard to imagine a member of Congress paying much attention to it given the electoral benefits associated with being perceived as tough on crime.²³¹

Further, more than any other set of rules, the Federal Rules of Evidence may affect the outcome of a trial.²³² This is especially true of the juror-centric

Concern, 2003 MICH. ST. L. REV. 967, 979 (arguing that character-evidence causes a jury to lower the burden of proof because it does not like the defendant).

227. If the evidence is not relevant, no exclusionary rule is necessary. See FED. R. EVID. 402.

228. See, e.g., *Michelson*, 335 U.S. at 475–76; *United States v. Enjady*, 134 F.3d 1427, 1430–33 (10th Cir. 1998) (stating that “Rule 413 raises . . . serious constitutional due process” concerns, but that the Rule passed muster because the protections of Rule 403 still applied); see generally Louis M. Natali, Jr. & R. Stephen Stigall, “*Are You Going to Arraign His Whole Life?*”: *How Sexual Propensity Evidence Violates the Due Process Clause*, 28 LOY. U. CHI. L.J. 1 (1996) (examining the constitutionality of Rules 413–415, and concluding that the Rules “represent popular political fads which Congress enacted in order to satisfy the fears of constituents, without regard to protections afforded to defendants by the Constitution”).

229. Representative William Hughes and Senator Joe Biden spoke up strongly against Rules 413–415, but these exceptions prove the rule. Representative Hughes was retiring from Congress at the end of the 1993–1995 term, see *supra* note 165, and Senator Biden has not faced serious opposition since his first election to the Senate in 1972. See Mike McIntire & Serge F. Kovaleski, *An Everyman on the Trail, With Perks at Home*, N.Y. TIMES, Oct. 2, 2008, at A1.

230. Paul Kirgis, *A Legisprudential Analysis of Evidence Codification: Why Most Rules of Evidence Should Not Be Codified—But Privilege Law Should Be*, 38 LOY. L.A. L. REV. 809, 809–810 & n.5 (2005) (citing Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873 (1987)).

231. See *supra* note 165 (statement of Rep. Hughes). Few elected officials want to be attacked as soft on crime—an accusation more likely to be made (and to stick), if the lawmaker takes up the cause of criminal defendants.

232. *Politics of Evidence Symposium*, *supra* note 6, at 750 (comments of Gregory Joseph).

Rules because they tend to prevent otherwise admissible evidence from reaching the jury. Therefore, congressionally imposed changes to the Rules are more likely to be inspired by a desire to influence the outcome of criminal trials. Concerns over unconstitutional deprivations of due process and the questions about the legitimacy of criminal trials can only be avoided if Congress refrains from involving itself in the juror-centric Rules of Evidence.

V. ANTICIPATING CRITICISMS

A call for Congress to refrain from legislating in an area that is unquestionably within its purview will certainly generate criticism. In anticipation, I offer a brief response.

Undoubtedly, the first, loudest, and most obvious reaction this Article may generate is that it is hopelessly naive to believe Congress will voluntarily limit its role in the Federal Rules of Evidence. There is certainly some truth to that, but it may not be as unrealistic as one may at first think.²³³ Even during the debate surrounding the enactment of Rules 413–415, there were congressional voices urging disapproval of the amendments because they had not advanced through the process envisioned by the Rules Enabling Act.²³⁴ Further, some of the most recent proposals in Congress relating to the Rules avoid offering a specific amendment and instead direct the Judicial Conference to study particular areas of concern.²³⁵ And, of course, the Rules Enabling Act itself was a creation of Congress. These facts indicate that there is at least some

233. As a starting point, I should note it is undeniably true that Congress *can* amend the Federal Rules of Evidence as it sees fit, as long as those changes do not result in an unconstitutional denial of due process or equal protection. I am not arguing that Congress *cannot* amend the Rules of Evidence. Instead, I seek to make the case that Congress *should not* amend the Rules because congressional action involving evidentiary rules, especially those that are juror-centric, is an affront to the very purposes the Rules serve.

234. 140 CONG. REC. 15208 (1994) (statement of Rep. Hughes). Additionally, Democrats included within the legislation adding Rules 413–415 a provision to keep the new rules from taking effect immediately. 23 WRIGHT & GRAHAM, *supra* note 15, § 5411, at 454. The Judicial Conference was given 150 days to study and offer an opinion as to the new rules. *Id.* If the Judicial Conference took no action or opposed the changes, Rules 413–415 would not take effect for 150 days. *Id.* One can speculate that this provision was added to soothe the concerns of Democrats who believed they would be able to return to this issue after the 1994 elections and with the added weight of the Judicial Conference opposition behind them. *Id.* Democrats, obviously, did not anticipate losing control of both chambers of Congress as a result of that November's elections. Nevertheless, the decision to include a request for Judicial Conference comment and the 150-day stay of implementation are further demonstrations that many lawmakers prefer the process established by the Rules Enabling Act to that of direct congressional involvement in the Federal Rules of Evidence.

235. *See, e.g.*, Gang Abatement and Prevention Act of 2007, H.R. 1582, 110th Cong. § 205 (2007) (calling for the Judicial Conference to study the necessity and desirability of amending Federal Rule of Evidence 804(b) related to hearsay exceptions for wrongdoing); Adam Walsh Child Protection and Safety Act of 2006, H.R. 4472, 109th Cong. § 214 (2006) (directing the Judicial Conference to study amending the Rules to include marital communication and adverse spousal privileges).

recognition on Capitol Hill that the best approach toward amending the Federal Rules of Evidence travels through the Judicial Conference and its committees.²³⁶

Another likely criticism of this article is that many of the changes to the Federal Rules of Evidence are policy-driven and that Congress, not the Judicial Conference or its offshoots, is the appropriate vehicle for enacting policy preferences. There is some merit to this point as well. The problem, however, is that the only issues that seem to draw Congress's interest with regard to the Rules are those for which lawmakers can score electoral points at the expense of groups lacking political support or other resources to promote their own interests.²³⁷ Furthermore, Congress is often seeking to amend the Rules to upend policy pronouncements and legal protections that go back centuries. Just as the courts pay more respect to long-established precedents, especially those preserving basic rights, Congress, too, should give more consideration to the motivations and concepts on which the Federal Rules of Evidence are founded. Then, perhaps, lawmakers will defer to the experts in the field—the drafters and the Judicial Conference—rather than attempting to reshape the Rules of Evidence for political gain.

One final anticipated criticism that falls along a similar line is that the Advisory Committee on Rules of Evidence and the Judicial Conference have failed to properly maintain the Rules.²³⁸ Critics contend that the Committee's conservative approach to amending the Rules has left many problems unaddressed and that a process that takes over two years to complete is simply too slow to meet the need for changes to the Rules.²³⁹ These may be valid criticisms of the Advisory Committee, but do not affect my analysis for several reasons. First, as these very critics acknowledge, Congress has shown little interest in addressing real problems with the Rules and instead has focused on concerns that are politically motivated.²⁴⁰ Congress, therefore, is probably less inclined than even the Advisory Committee to correct technical or fundamental weaknesses in the Rules. Nor, for that matter, are lawmakers particularly well positioned for learning about and investigating perceived problems within the Rules. The Advisory Committee, on the other hand, is made up of trial lawyers and judges who are better placed to hear from the legal community and the courts if problems arise relating to the Rules of Evidence. Lastly, a five-step process that takes considerable time and careful analysis is preferable

236. Moreover, I am not suggesting that Congress pass a law restricting its involvement in amending the Rules of Evidence. Instead, my goal is much more modest. I hope that the next time Congress considers directly implementing changes to the Rules of Evidence, the considerations raised here will influence the debate and provide support to those who argue that the Rules are too important to be the subject of congressional impulses.

237. See *Politics of Evidence Symposium*, *supra* note 6, at 750 (comments of Paul Rice).

238. See Rice, *supra* note 44, at 819–25.

239. *Politics of Evidence Symposium*, *supra* note 6, at 739–40 (comments of Paul Rice).

240. *Id.* at 741–42.

to quick, election- or emotion-driven decisions when the issue involves the delicate balance between admissibility and preventing unfair prejudice.

This is just a sampling of the criticisms this Article will undoubtedly generate. Still, given the juror-centric foundation of the Federal Rules of Evidence, the theoretical concept of representation and the jury, and the recent history of congressional interference with the Rules, the case for congressional disengagement from the Federal Rules of Evidence proves strong.

VI. CONCLUSION

The Federal Rules of Evidence are more than just a procedural guide to admitting evidence at trial. Rather, these rules represent the law's deeply rooted ambivalence about the role of the jury. On the one hand, we believe—as our Founders did—in the importance of maintaining the people's voice within the judiciary. The jury's historical importance in protecting individual liberties and rights cannot be forgotten. On the other hand, fears that juries are susceptible to appeals to emotion and illogical passion are often justified. The Federal Rules of Evidence reconcile these competing concepts by establishing a delicate balance between giving the jury as much information as possible and excluding evidence that may inflame the jury's passions and unfairly prejudice a party. This balance, however, is threatened by congressional involvement in the Rules. Lawmakers have demonstrated an inclination toward emotion-driven amendments to the Federal Rules of Evidence. This is hardly surprising because juries and Congress are drawn from the same people and represent common constituencies.

To preserve the balance achieved through years of thoughtful analysis of the Rules, Congress should refrain from directly amending the Federal Rules of Evidence. I am under no illusion that such a suggestion will immediately take hold of congressional sensibilities and prevent further attempts at direct amendments to the Rules. I do hope, however, that the arguments put forward here will assist those who seek to safeguard the Rules and prevent them from becoming a vehicle for scoring easy political points at the expense of that important balance between admissibility and unfair prejudice.

