ARTICLE

CLASSICAL RHETORIC, PRACTICAL REASONING, AND THE LAW OF EVIDENCE

EILEEN A. SCALLEN*

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* Associate Professor of Law, University of California, Hastings College of the Law. I would like to thank David Faigman, Ed Imwinkelried, Mary Kay Kane, David Leonard, Roger Park, Tom Morawetz, Deborah Tarn Steiner, and Eleanor Swift, who were kind enough to read and comment on earlier versions of this Article, and Valerie Barreiro, my research assistant. My research also has been supported by an award from the Roger Traynor Scholarly Publication Fund. Special thanks go to the editors and staff of *The American University Law Review*. This Article is dedicated to the memory of my grandfather, Raymond A. Scallen, a trial lawyer who proved that ethical legal argumentation is not an oxymoron.

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> For what is sillier than to talk about talking,
> since talking in itself is ever a silly business,
> except when it is indispensable.
>
> Cicero, *De Oratore*, I. xxiv. 112.

INTRODUCTION

There is a lot of talk about talking in the legal academy at present. Legal scholars are taken with the subject of interpretation of legal language in all of its forms—constitutions, statutes, judicial opinions, rules, and regulations.[1] The myriad of articles on interpretation of legal texts discuss many possible approaches, also discussed in this Article,[2] but they do not focus on the special context considered here—that of rules created to regulate the adversary system.

The advocacy context, in which courts interpret rules of procedure such as rules of evidence, is a wonderful forum to explore the problem of interpretation as it presents the debate in stark form: evidence rules have meaning only in the context of particular cases, so how shall we interpret abstract rules of evidence in concrete cases? This Article traces the debate over interpretation of legal texts back to its roots in the ancient law courts, demonstrates how the debate played out in the creation of the Federal Rules of Evidence, and illustrates how the debate plays out in current interpretations of the Federal Rules.

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1. Although one wonders whether significant others are listening. As one commentator notes:

> The Justices have not been reading their Derrida. Indeed, despite the lengthy importunings of legions of law professors, the Justices have been neglecting to read not only Derrida, but Foucault, Gadamer, Rorty, and Heidegger as well. Instead, as the statutory construction cases of the 1989 Term demonstrate, they have been spending their time reading (Noah) Webster, relying, both in fact and in articulated justification, on notions of plain meaning routinely derided in contemporary legal scholarship.

Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 S. CT. REV. 231, 231.

2. *See generally infra* Part II.

Other articles have criticized the United States Supreme Court's current approach to interpreting the "plain meaning"[3] of the Federal Rules of Evidence,[4] but the authors neither put the problem into the context offered here, nor advocate the alternative approach discussed here. In this Article, I will argue that of all the possible "schools" of interpretation, the best approach to the construction of the Federal Rules of Evidence is "practical reasoning," a school firmly rooted in the realm of classical rhetoric and the method best suited to the philosophical perspective of pragmatism that led to the creation of the Federal Rules of Evidence.[5] Although this Article is concerned primarily with the Federal Rules, its insights extend to any procedural system with a codified set of evidence rules, for codification creates a tension between the desire for predictability and certainty—provided, in the views of some, by a "hard" text—and the demand for flexibility posed by circumstances unforeseen by the drafters of the code.

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3. *See infra* Part II.C (discussing "plain meaning" rule of interpretation as applied by U.S. Supreme Court).

4. *See, e.g.*, Randolph N. Jonakait, *The Supreme Court, Plain Meaning, and the Changed Rules of Evidence*, 68 TEX. L. REV. 745, 749, 782-86 (1990) (explaining that application of "plain meaning" approach to Federal Rules of Evidence will initially alter Rules in ways unintended by drafters and will subsequently freeze powers of interpretation previously recognized as belonging to courts); *see also* Glen Weissenberger, *The Supreme Court and the Interpretation of the Federal Rules of Evidence*, 53 OHIO ST. L.J. 1307, 1319-32 (1992) (offering particularly critical review of Court's deference to legislature as rationale for using plain meaning); *cf.* Edward R. Becker & Aviva Orenstein, *The Federal Rules of Evidence After Sixteen Years—The Effect of "Plain Meaning" Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 60 GEO. WASH. L. REV. 857, 867-76 (1992) (sympathizing with clarity provided by plain meaning approach but noting weaknesses of approach when Congress has provided no clear intent to alter common law). *But see* Edward J. Imwinkelried, *A Brief Defense of the Supreme Court's Approach to the Interpretation of the Federal Rules of Evidence*, 27 IND. L. REV. 267, 268-78 (1993) (using Federal Rule of Evidence 402 to support and defend plain meaning approach). For direct response to Imwinkelried's assertions, see Glen Weissenberger, *Are the Federal Rules of Evidence a Statute?*, 55 OHIO ST. L.J. 393, 396-98 (1994) [hereinafter *Weissenberger's Reply*].

In a two-part article, Professor Taslitz argues that even when the Supreme Court says it is following the plain meaning of the Rules, frequently it is not. Andrew E. Taslitz, *Daubert's Guide to the Federal Rules of Evidence: Public Choice, Hermeneutics, and the Not-So-Plain Meaning Rules*, 32 HARV. J. ON LEGIS. 3 (1995) [hereinafter Taslitz, *Daubert*]; Andrew E. Taslitz, *Interpretive Method and the Federal Rules of Evidence: A Call for a Politically Realistic Hermeneutics*, 32 HARV. J. ON LEGIS. (forthcoming 1995).

5. Professor Taslitz mentions the practical reasoning approach with approval, but does not specifically apply it, preferring to discuss interpretation of evidence rules under the broader rubrics of hermeneutics and the dynamic process of statutory interpretation advocated by Professor Eskridge, who emphasizes interpreting statutes within their larger societal, political, and legal contexts. Taslitz, *Daubert*, *supra* note 4, at 7; *cf.* William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479 (1987) (advocating application of dynamic approach to statutory, constitutional and common law interpretation). Practical reasoning is certainly consistent with and encompassed within these broader approaches, but I find it useful to discuss the ramifications of practical reasoning specifically, especially given its tight connection with the classical history of legal advocacy.

In Part I, I develop the historical and philosophical context of the interpretative problem, first tracing the roots of the interpretation debate back to its beginnings—in the law courts of ancient Greece and Rome—and then showing how similar issues, resulting tension, and resolutions surrounded the creation of the Federal Rules of Evidence. In Part II, I trace the debate to its modern context, as it plays out in approaches to statutory interpretation, and argue that the best resolution of the problem is its ancient one, practical reasoning. In Part III, I will explain, illustrate, and critique the use of practical reasoning as an approach to interpreting evidence rules, focusing on five United States Supreme Court cases: *Beech Aircraft Corp. v. Rainey*,[6] *United States v. Salerno*,[7] *Daubert v. Merrell Dow Pharmaceuticals*,[8] *Williamson v. United States*,[9] and *Tome v. United States*.[10]

I. BACK TO THE BEGINNING: HISTORICAL AND PHILOSOPHICAL ORIGINS OF INTERPRETATION DEBATES

A central message of this Article is that the current problems in interpreting the Federal Rules of Evidence arise in part from our failure to recall the historical and philosophical perspectives that are central to the advocacy context: rhetoric and pragmatism. Thus, in this Part, I aim to refresh our recollection of these historical and philosophical issues, for this context is helpful in deciding how to interpret modern evidence rules. I begin with the origin of the interpretative debate in classical rhetorical theory, which developed from the needs of ancient law courts and lawyers, and attempt to show how similar issues, concerns, and solutions surfaced during the creation of the Federal Rules of Evidence.

A. *Classical Rhetorical Theory and the Interpretation of Legal Texts*

The history of Western advocacy systems and Western rhetoric go hand in hand. Nevertheless, the links between law and classical rhetoric are seldom acknowledged.[11] I think this is in large part

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6. 488 U.S. 153 (1988).
7. 112 S. Ct. 2503 (1992).
8. 113 S. Ct. 2786 (1993).
9. 114 S. Ct. 2431 (1994).
10. 115 S. Ct. 696 (1995).
11. *See* WILLIAM TWINING, RETHINKING EVIDENCE 219 (1990) (suggesting that legal profession no longer values the study of rhetoric). As Twining's citations indicate, some notable exceptions exist. *See generally, e.g.*, PETER GOODRICH, READING THE LAW 168 (1987); PETER GOODRICH, LEGAL DISCOURSE 1 (1986); BERNARD JACKSON, LAW, FACT AND NARRATIVE COHERENCE 85-124 (1988); BERNARD JACKSON, SEMIOTICS AND LEGAL THEORY 12 (1985); CHAIM PERELMAN & L. OLBRECHTS-TYTECA, THE NEW RHETORIC 20-23 (1971).

because rhetoric suffers from a confusing variety of definitions, to the point where even scholars of rhetoric tend to eschew the term, preferring to use "the art of advocacy"[12] or simply "communication."[13]

Definitions of rhetoric are plentiful and often not particularly helpful; they are either too narrow or too broad, and never just right to suit another's intellectual taste.[14] One can use "rhetoric" in its most pejorative sense: empty bombast, hot air, all form and no substance, or language that seeks to manipulate and hoodwink the unsuspecting listener.[15] Additionally, one can move to a slightly less negative (but more banal) notion of "rhetoric" as style: the presentation of the message.[16] One can also use "rhetoric" in a more utilitarian sense: the art of using language to persuade, that is, to seek agreement, cooperation, or action.[17] Finally, one can view "rhetoric" in its broadest sense: a synonym for communication and the culture that is created through communication.[18]

Several other useful exceptions exist. *See, e.g.*, John E. Simonett, *Forensic Rhetoric and Irving Younger*, 73 MINN. L. REV. 805, 805 (1989) (stating that legal profession has not placed adequate value on art of rhetoric); Gerald B. Wetlaufer, *Rhetoric and Its Denial In Legal Discourse*, 76 VA. L. REV. 1545, 1549 (1990) (employing rhetoric as method of studying legal thinking); James B. White, *The Ethics of Argument: Plato's Gorgias and the Modern Lawyer*, 50 U. CHI. L. REV. 849, 871-94 (1983) (using Plato's comparison between rhetoric and dialectic as method for analyzing legal profession).

Martha Nussbaum, a philosopher and classicist, recently critiqued the legal literature on practical reasoning. *See* Martha C. Nussbaum, *Skepticism About Practical Reason in Literature and the Law*, 107 HARV. L. REV. 714, 715 (1994). Nussbaum equates the work of modern advocates of practical reasoning, such as Judge Richard Posner, with the position of radical, or Pyrrhonic, skepticism, while she sets up her own version of practical reasoning as neo-Aristotilian. *Id.* at 717-18, 729. Nussbaum, however, curiously omits reference to the sophists discussed in this Article.

The most notable omission is Isocrates, with his emphasis on the moral quality of the orator. *See infra* notes 51-58. My own argument is that modern advocates of practical reasoning are returning to both the pragmatic philosophy and the belief in the importance of rhetoric in civic discourse that marked the sophistical strain that follows into Aristotle's (and later, Cicero's and Quintilian's) work. *See infra* notes 20-112 and accompanying text (examining works of early rhetoricians).

12. Simonett, *supra* note 11, at 805.

13. RICHARD D. RIEKE & RANDALL K. STUTMAN, COMMUNICATION IN LEGAL ADVOCACY 32 (1990).

14. *See* Wayne Booth, *The Scope of Rhetoric Today: A Polemical Excursion*, *in* THE PROSPECTS OF RHETORIC 93-114 (Lloyd F. Bitzer & Edwin Black eds., 1971). Wayne Booth frames the problem in terms of fish and nets. If we use too large a net, we will catch some fish we might want to discard; if we use too small a net, we will miss some fish we want to catch. *Id.* at 95.

15. SONJA K. FOSS ET AL., CONTEMPORARY PERSPECTIVES ON RHETORIC 1 (2d ed. 1991).

16. *See* RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION 272 (1988).

17. *See infra* notes 48-91 and accompanying text. This view is, in part, shared by Isocrates, Aristotle, Cicero, and Quintilian, although one senses in their discussion of the moral excellence of the orator that rhetoric has a broader meaning.

18. *See* KENNETH BURKE, A RHETORIC OF MOTIVES 43 (1969) (characterizing rhetoric as "the use of language as a symbolic means of inducing cooperation in beings that by nature respond to symbols"). To Burke, rhetoric is a part of the larger category of "symbolic action," which also

In this Article, I return to the ancient Greco-Roman understanding of rhetoric, looking to its blend of the utilitarian use of rhetoric and the creative quality of rhetoric, for the guidance that it may shed on today's task of interpreting rules of evidence. The value of a look to the past is manifold, and is discussed later in more detail,[19] but can be quickly summarized here. First, it gives us a more complete view of the context of the debates over the proper interpretation of legal texts. Second, it tends to humble us, lest we fool ourselves into believing we are discovering something radically new about legal interpretation. Third, it expands our frame of reference so that we may bring a deeper understanding to the problem of applying abstract rules to concrete cases.

A brief look at the history of classical rhetoric reveals the inexorable bond between rhetoric and law.[20] Possibly the first "theorist" of legal rhetoric was Corax of Syracuse, who wrote and taught in approximately 465 B.C.E.[21] Corax's view of rhetoric arose in the context of a specific judicial problem in Syracuse, a Greek colony on the island of Sicily. As a democratic government had recently overthrown a dictatorship,[22] the courts were faced with disputes over property: who was the rightful property owner, the owner before the dictatorship or the owner given the property by the dictatorship? These legal disputes increased the need for training in forensic rhetoric.[23] In ancient Greece, citizens could not hire advocates; they were required

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includes poetics, science, and philosophy. *Id.* Yet Burke distinguishes rhetoric from three types of symbolic action: "rhetoric is concerned with persuasion and identification, poetics is concerned with symbolic action in and for itself, science is concerned with symbolic action in relation to the ends of factual knowledge, and philosophy is concerned with symbolic action in relation to discussions of first principles." FOSS ET AL., *supra* note 15, at 174. James Boyd White, a classicist and legal scholar, notes that often rhetoric "is thought of either as a second rate way of dealing with facts that cannot really be properly known or as a way of dealing with people instrumentally or manipulatively, in an attempt to get them to do something you want them to do." James B. White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 687-88 (1985). For White, however, rhetoric is something much broader; it is "an art of constituting culture and community." *Id.* at 692. In his view, the way the members of the legal community talk to and about each other, clients, and the world constantly creates the identity of the community and culture. *Id.* at 690.

19. *See infra* notes 97-112 and accompanying text.

20. For a discussion of the link between classical rhetoric and law, see generally HAROLD BARRETT, THE SOPHISTS 5 (1987); THOMAS M. CONLEY, RHETORIC IN THE EUROPEAN TRADITION 1-52 (1990); JAMES L. GOLDEN ET AL., THE RHETORIC OF WESTERN THOUGHT 6-7 (4th ed. 1987); GEORGE A. KENNEDY, CLASSICAL RHETORIC AND ITS CHRISTIAN AND SECULAR TRADITION FROM ANCIENT TO MODERN TIMES 31 (1980) [hereinafter KENNEDY, CLASSICAL RHETORIC]; GEORGE A. KENNEDY, A NEW HISTORY OF CLASSICAL RHETORIC 15 (1994) [hereinafter KENNEDY, NEW HISTORY]; JOHN POULAKOS, SOPHISTICAL RHETORIC IN CLASSICAL GREECE 14 (1995).

21. *See* FOSS ET AL., *supra* note 15, at 1.

22. *See* GOLDEN ET AL., *supra* note 20, at 6-7.

23. *See* FOSS ET AL., *supra* note 15, at 1-2. *But cf.* CONLEY, *supra* note 20, at 4-5 (questioning historical validity of Corax's role in origin of rhetorical theory).

to argue their own cases in court, before large juries drawn by lot.[24] Trials consisted chiefly of a speech by the plaintiff or prosecutor[25] and a speech by the defendant.[26] There were no judges; the jury decided both issues of fact and law.[27] Trials could last only one day.[28] There were no appeals; the only ground for relief from judgment was the discovery of new evidence.[29] Forensic oratory skill was an essential part of the life of a Greek citizen.[30] Teachers of rhetoric, such as Corax and his student Tisias, who brought Corax's teachings to Athens, offered instruction in the art of legal advocacy.[31]

Corax and Tisias are best known for developing the argument from probability as the basis for forensic proof, in which matters of fact could not be demonstrated with absolute certainty.[32] They encouraged their students to use probability to argue on either side of a case.[33] For example, a plaintiff suing for assault might argue that because he feared his assailant, he would never have attacked first. The alleged assailant would argue that the plaintiff was more likely to strike first because he would want the advantage of the first blow. Interestingly, the Greeks preferred this kind of circumstantial reasoning, for they "deeply distrusted direct evidence in both criminal and civil cases because of a knowledge that it could be faked or bribed."[34]

Corax and Tisias were the forerunners of the class of teachers of rhetoric known as the sophists.[35] The sophists, actually the first legal educators, have a bad reputation in modern times for many reasons,

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24. KENNEDY, CLASSICAL RHETORIC, *supra* note 20, at 18. Women, noncitizens, and physically disabled individuals, however, had to be represented in criminal cases by another. KENNEDY, NEW HISTORY, *supra* note 20, at 15. In criminal cases, juries could include up to 500 citizens. *See* GOLDEN ET AL., *supra* note 20, at 7 (noting that "[j]ury panels of 6000 were regularly on call").

25. There were only private prosecutors; criminal cases were pursued by persons with a personal stake in the case. KENNEDY, NEW HISTORY, *supra* note 20, at 15.

26. GOLDEN ET AL., *supra* note 20, at 7.

27. KENNEDY, NEW HISTORY, *supra* note 20, at 15.

28. KENNEDY, NEW HISTORY, *supra* note 20, at 16. The time allotted for each side "was measured by a water clock." *Id.*

29. KENNEDY, NEW HISTORY, *supra* note 20, at 15.

30. GOLDEN ET AL., *supra* note 20, at 7.

31. GOLDEN ET AL., *supra* note 20, at 7.

32. FOSS ET AL., *supra* note 15, at 2.

33. FOSS ET AL., *supra* note 15, at 2.

34. KENNEDY, CLASSICAL RHETORIC, *supra* note 20, at 21.

35. FOSS ET AL., *supra* note 15, at 1; *see also id.* at 2 (noting that "*sophos* means knowledge or wisdom"); *cf.* BARRETT, *supra* note 20, at 3 (noting that term sophist also was sometimes used respectfully to refer "to poets, musicians, wise men, philosophers or other accomplished and admired persons").

primarily historical.[36] Many of the sophists were not Greek citizens, but itinerant foreigners, and the Greeks mistrusted foreigners.[37] Moreover, some of the sophists claimed that they could teach wisdom or virtue for a price.[38] This was doubly offensive to the Greeks, who believed that virtue could not be taught or transmitted, and certainly could not be purchased for a fee.[39] Plato, a philosopher and a wealthy member of the Athenian elite, seized on these aspects of the sophists and ridiculed most of them in his dialogues.[40] Plato reviled the sophists, who he blamed for the kind of rhetoric that led to the death of his teacher Socrates at the command of an Athenian jury.[41]

Two sophists in particular were favorite targets of Plato. Protagoras of Abdera (480-411 B.C.E.) is best known for the fragment of his thought that survived: "Man is the measure of all things," which conveyed a relativistic perspective that Plato, a believer in divine and absolute truth, found reprehensible.[42] Plato was similarly opposed to the radical relativism of Gorgias of Sicily (480-375 B.C.E.).[43] Gorgias was obsessed with the structure and sound of language.[44] As Professor George Kennedy noted, "On Gorgias' lips oratory became a tintinnabulation of rhyming words and echoing rhythms."[45] Because of his stylistic excesses, Gorgias was an easy target for Plato.[46] When we think of sophistry today, we thus generally think of it in terms of the vile picture that Plato painted of Gorgias: a manipulative, scheming con artist.[47]

The real sophists, as opposed to those portrayed by Plato, had a world view close to the philosophical perspective of pragmatism, the basis of the "school" of interpretation called practical reasoning.[48] "The sophists envisioned an incomplete, ambiguous, and uncertain world, interpreted and understood by means of language."[49] Despite its uncertainties, the world of the sophists was a practical world,

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36. *See* POULAKOS, *supra* note 20, at 16-18.
37. *See* POULAKOS, *supra* note 20, at 16-18.
38. *See* FOSS ET AL., *supra* note 15, at 2.
39. *See* FOSS ET AL., *supra* note 15, at 2.
40. *See* POULAKOS, *supra* note 20, at 74 (citing Plato, *Gorgias*, *in* PLATO 258 (W.R.M. Lamb. trans., 1929)).
41. BERNARD KNOX, THE OLDEST DEAD WHITE EUROPEAN MALES AND OTHER REFLECTIONS ON THE CLASSICS 97 (1993).
42. *See* FOSS ET AL., *supra* note 15, at 2-3.
43. KENNEDY, CLASSICAL RHETORIC, *supra* note 20, at 29.
44. *See* FOSS ET AL., *supra* note 15, at 3.
45. KENNEDY, CLASSICAL RHETORIC, *supra* note 20, at 29.
46. *See* POULAKOS, *supra* note 20, at 74.
47. *See* FOSS ET AL., *supra* note 15, at 4.
48. *See infra* Part II.D (describing practical reasoning as means of actualizing pragmatism).
49. FOSS ET AL., *supra* note 15, at 3.

concerned with concrete argumentation and decisionmaking in the realms of law and politics.[50]

This strain of sophistry appears most prominently in the work of Isocrates (436-338 B.C.E.),[51] who shared the sophistic interest in rhetoric, but avoided the excesses and vices of some other sophists.[52] Isocrates advocated rhetoric as the core of Greek citizens' education.[53] Isocrates' notion of rhetoric, however, included what we would consider today the study of liberal arts: philosophy, science, mathematics, literature, history, and communication.[54] In his work, *Against the Sophists*,[55] Isocrates advocates the pursuit of practical wisdom, for which moral character is essential.[56] Isocrates, in contrast to many of his contemporaries, believed that moral character could not be taught, but that "the study of speech and politics . . . [could] help to encourage and train moral consciousness."[57] This idea of the good, or moral, orator is essential to later classical rhetoricians, such as Cicero and Quintilian, and may be useful in determining what makes for the "best" interpretation of evidence rules.[58]

The philosopher and scientist Aristotle (384-322 B.C.E.), although a student of Plato, adopted the sophistic emphasis on the contingent, the contextual, and the practical elements of rhetoric in his treatise, *On Rhetoric*.[59] In *On Rhetoric*, Aristotle sought to systemize rhetoric, which he defined as "an ability, in each [particular] case, to see the available means of persuasion."[60] Aristotle contrasted demonstrative reasoning, which aims at scientific certainty, with practical reasoning, which he termed dialectical reasoning, in *The Rhetoric*, *The Topics*, and *On Sophistical Refutations*.[61] Rhetoric, however, also belongs to the

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50. *See* FOSS ET AL., *supra* note 15, at 3.

51. *See* FOSS ET AL., *supra* note 15, at 3. Interestingly, Isocrates, the founder of a school of rhetoric, was himself afraid to speak in public, and thus began his career as a writer of speeches. *Id.*

52. *See* FOSS ET AL., *supra* note 15, at 3.

53. KENNEDY, CLASSICAL RHETORIC, *supra* note 20, at 31. According to Kennedy, "Isocrates made rhetoric the permanent basis of the educational system of the Greek and Roman world and thus of many centuries as well, and he made oratory a literary form." *Id.*

54. GOLDEN ET AL., *supra* note 20, at 54-55.

55. Isocrates, *Against the Sophists*, *in* ISOCRATES 163 (George Norlin trans., 1929).

56. *See* KENNEDY, CLASSICAL RHETORIC, *supra* note 20, at 32.

57. KENNEDY, CLASSICAL RHETORIC, *supra* note 20, at 32.

58. *See infra* notes 218-34 and accompanying text (discussing relationship between modern school of practical reasoning and classical rhetoric).

59. ARISTOTLE, ON RHETORIC (George A. Kennedy trans., 1991); *see also* FOSS ET AL., *supra* note 15, at 4.

60. ARISTOTLE, *supra* note 59, at 36; *see also* FOSS ET AL., *supra* note 15, at 4.

61. *See* George A. Kennedy, *Introduction* to ARISTOTLE, ON RHETORIC, *supra* note 59, at 3, 12-13.

realm of practical reasoning. Professor George Kennedy discussed the difference between Aristotle's view of dialectic and rhetoric:

> Dialectic proceeds by question and answer, not, as rhetoric does, by continuous exposition. A dialectical argument does not contain the parts of a public address; there is no introduction, narration, or epilogue, as in a speech—only proof. In dialectic only logical argument is acceptable, whereas in rhetoric . . . the impression of character conveyed by the speaker and the emotions awakened in the audience contribute to persuasion. While both dialectic and rhetoric build their arguments on commonly held opinions (*endoxa*) and deal only with the probable (not with scientific certainty), dialectic examines general issues (such as the nature of justice) whereas rhetoric usually seeks a specific judgment, (e.g., whether or not some specific action was just or whether or not some specific policy will be beneficial).[62]

Logic and dialectic are pure "tools" or "methods" in Aristotle's categories of knowledge;[63] they "are applicable to all study but with no distinct subject matter of their own."[64] Rhetoric, in Aristotle's view, however, is a blend of method, theory, and practice.[65] Rhetoric is in part a method (like dialectic), and yet reflects the theoretical and normative aspects of ethics and politics; rhetoric is communication that moves the listener toward practical applications.[66] Rhetoric, more than the classical sense of dialectic, approximates the task of the judge and advocate.

Aristotle identified three types of rhetoric: deliberative, judicial, and epideictic.[67] Although these types of oratory shared some common questions, they each served specific functions: deliberative rhetoric was political discourse in which the listener was asked to evaluate a proposed future action;[68] judicial rhetoric was forensic discourse in which the listener was asked to judge a past action;[69] and epideictic rhetoric was ceremonial discourse in which the listener, as spectator, judged the artistic ability of the speaker.[70] Modern

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62. Kennedy, *supra* note 61, at 26.
63. *See* Kennedy, *supra* note 61, at 12.
64. Kennedy, *supra* note 61, at 12.
65. *See* Kennedy, *supra* note 61, at 12-13.
66. *See* Kennedy, *supra* note 61, at 12-13.
67. ARISTOTLE, *supra* note 59, at 48.
68. ARISTOTLE, *supra* note 59, at 48. "The deliberative speaker is fundamentally concerned to establish that a course of action will be expedient for the audience, or at least not harmful to it. He may have something to say about justice, but that is secondary to his purpose." Kennedy, *supra* note 14, at 72.
69. *See* ARISTOTLE, *supra* note 59, at 48.
70. ARISTOTLE, *supra* note 59, at 48. The final cause, or end, of epideictic speech, which concerns present blame or praise of an individual, is demonstration of the honorable or the shameful. *Id.*

debates have treated interpretation as a combined deliberative and judicial question, sometimes emphasizing a reading of a text that would provide the most useful effects in the future, and sometimes emphasizing a particular reading as the "historically" accurate one, in the sense of the drafter's original intent or purpose.[71]

Deborah Tarn Steiner, a Columbia University classics professor, recently noted the ambivalence of fifth and fourth (B.C.E.) century Greeks toward legal texts in a democracy.[72] On the one hand, "*[i]sonomia*, the equality of citizens before the law, depends in part on the existence of a written legal code, a single standard of justice accessible and visible to all."[73] On the other hand, a written code, standing alone, could become an instrument of tyranny; it

> threatens to obscure its single or collective authors, and introduces a new authority to supplant the citizen's voice. Athens and Sparta both take measures to protect themselves against the ability of writing to silence and to overrule: Lycurgus directs that the Spartan laws not be written down, and in democratic Athens inscribed decrees present themselves in the form of spoken discourse and include a reference to the living voice of the lawmakers.[74]

Ancient writers dealt in different ways with the potential of written legal texts for good and evil. Plato, a vigorous critic of democracy, recognized that a written code provides stability and order in civic life, but argued that it was only a second-rate alternative to authority exercised by a true ruler, informed by "royal *episteme*," skill and wisdom.[75] Plato warned that the second-rate legislation reflects the debased nature of the popular democracy.[76] Moreover, this evil is compounded: "Because writing freezes words in lasting form, and makes laws wholly independent of their author, it encourages the fetishizing of its text."[77]

Aristotle's approach was to draw a distinction between the two types of law and to emphasize the importance of argumentation about the meaning of the law.[78] The *idios nomos* were the written laws.[79] The

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71. *See infra* notes 176-301 and accompanying text.

72. DEBORAH TARN STEINER, THE TYRANT'S WRIT 7 (1994).

73. *Id.*

74. *Id.* at 247.

75. *Id.* at 235; *see also id.* (noting that royal *episteme* is possessed by few, and is generally found in governments consisting of single or small-group rule).

76. *See id.* at 236-37.

77. *Id.* at 236.

78. *See id.* at 232-33. "Where these unwritten laws are evoked, they are associated with the rights of the people and stand as bulwarks against autocracy." *Id.* at 232.

79. *See id.* at 233 n.142.

koinos nomos[80] were laws that although unwritten, seem "to be agreed to among all."[81] Within this context, Aristotle discussed the "topics" or propositions on which to base an argument about the meaning of legal texts. He recognized that arguments about the definition or interpretation of the terms of a text are critical to judicial outcomes:

> Since people often admit having done an action and yet do not admit to the specific terms of an indictment or the crime with which it deals—for example, they confess to have "taken" something but not to have "stolen" it or to have struck the first blow but not to have committed "violent assault" . . . —for this reason, [in speaking, we] should give definitions of these things: what is theft? What [is] violent assault? . . . In so doing, if we wish to show that some legal term applies or does not, we will be able to make clear what is a just verdict.[82]

Aristotle suggested how to argue for an interpretation beyond the "plain meaning" of the text and legislative intent:

> Fairness, for example, seems to be just; but fairness is justice that goes beyond the written law. This happens sometimes from the intent of the legislators but sometimes without their intent when something escapes their notice; and [it happens] intentionally when they cannot define [illegal actions] accurately but on the one hand must speak in general terms and on the other hand must not but are able to take account only of most possibilities; and in many cases it is not easy to define the limitless possibilities, for example, how long and what sort of weapon has to be used to constitute "wounding;" for a lifetime would not suffice to enumerate the possibilities. If then, the action is undefinable when a law must be framed, it is necessary to speak in general terms, so that if someone wearing a ring raises his hand or strikes, by the written law he is violating the law and does wrong, when in truth he has [perhaps] not done any harm, and this [latter judgment] is fair. . . .
>
> And [it is also fair] to look not to the law but to the legislator and not to the word but to the intent of the legislator, and not to the action but to the deliberate purpose and not to the part but to the whole, not [looking at] what a person is now but what he has been always or for the most part. . . . On the subject of things that are fair let definitions be made in this way.[83]

Thus, Aristotle's pragmatic response to the potential tyranny of legal text was to demonstrate that it could be made more flexible and equitable through the use of rhetoric. Such fairness was reached

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80. *See id.*
81. ARISTOTLE, *supra* note 59, at 88.
82. ARISTOTLE, *supra* note 59, at 104.
83. ARISTOTLE, *supra* note 59, at 105-06.

through constructing arguments about a text by looking to different sources of interpretation.

The Greek writing on rhetoric of the fifth and fourth centuries B.C.E. had an enormous impact on the Roman legal culture. Marcus Tullius Cicero (106-43 B.C.E.)[84] and M. Fabius Quintilian (35-95 C.E.)[85] were Roman lawyers, philosophers, and educators who synthesized and built upon the work of Isocrates, Plato, and Aristotle.[86] In the era of Cicero and Quintilian, classical rhetorical theory in the legal context reached its peak. Each wrote handbooks of rhetoric that advocated rhetoric as the basis for all dealings in civic and practical matters.[87] They also argued for the unification of philosophy and rhetoric, culminating in Quintilian's definition of the ideal orator as "the good man speaking well."[88]

For Isocrates, Aristotle, Cicero, and Quintilian, the utililitarian uses of rhetoric were not the sole measure of the "good" orator. They all stressed that the orator, in his arguments, teaches through example.[89] While these ancient rhetoricians offered various formulations of the moral themes a speaker could adopt, they all argued that part of being a "good" orator was participating actively in the process of government, putting the interests of the political community above self-interest.[90] In doing so, the orator influences and inspires the moral consciousness of his audience.[91]

The interest in classical rhetoric waxed and waned through the early Christian period (150-400 C.E.), the Middle Ages, the Renaissance, and the Enlightenment.[92] While rhetoric was recognized as an essential route to knowing and acting in the world of practical affairs in the Italian Renaissance, during the other periods, it was primarily relegated to issues of style and delivery.[93]

In early America, however, Cicero and Quintilian had profound influence on lawyers.[94] During the colonial period, the American

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84. *See* FOSS ET AL., *supra* note 15, at 5 (noting that leading Roman rhetoritician Cicero commonly drew from Isocrates' ideas on rhetorical style).

85. *See* FOSS ET AL., *supra* note 15, at 5 (tracing influence of Plato, Aristotle, Isocrates, and Cicero in development of Quintilian's rhetorical style).

86. *See* FOSS ET AL., *supra* note 15, at 5.

87. Cicero wrote *De Inventione* (87 B.C.E.) and *De Oratore* (55 B.C.E.), while Quintilian wrote *Institutes of Oratory* (93 C.E.). FOSS ET AL., *supra* note 15, at 5.

88. *See* FOSS ET AL., *supra* note 15, at 5.

89. *See* PATRICIA BIZZELL & BRUCE HERZBERG, THE RHETORICAL TRADITION 33, 35-36 (1990).

90. *See id.*

91. *See id.* at 36.

92. *See* FOSS ET AL., *supra* note 15, at 6-8.

93. *See* FOSS ET AL., *supra* note 15, at 7-11.

94. *See* ROBERT A. FERGUSON, LAW AND LETTERS IN AMERICAN CULTURE 72-84 (1984); *see also* JOHN C. ROLFE, CICERO AND HIS INFLUENCE 11-17 (1963). Oddly, with all the attention in recent

Revolution, the Constitutional Convention, and the ensuing years, these classical authors, focusing on the link between law, politics, and rhetoric, were the backbone of the new republic:[95]

> The vitality of neoclassicism drew upon a premise that the lawyer-writer took as his guiding principle in republican culture: namely, that literature and politics belonged together within a higher sense of civic purpose. As always, Cicero served as reference and inspiration. *De Officiis*—John Quincy Adams called it the manual of every republican—declared that "the chief end of all men" was "to make the interest of each individual and of the whole body politic identical," and that the means to this end was "reason and speech," which united men "in a sort of natural fraternity." It followed that public eloquence on political themes was the highest duty of the educated citizen. Here Cicero placed particular onus upon the legal profession because it was so closely connected to "the gift of eloquence."[96]

The ideal of the eloquent citizen/lawyer, originating in classical rhetoric, became the ideal of early American intellectuals.

This discussion of legal classical rhetorical theory is not a naive and nostalgic argument for a return to the good old days. For all its insight, classical rhetoric is permeated by a sense of elitism; certain individuals are deemed better suited for the role of citizen/statesman/lawyer, and not surprisingly, they have tended to be educated males in charge of their households.[97] Moreover, the concerns of today seem far removed from the ancient city-states and even the early American republic.

Still, to understand the modern value of the practical reasoning approach to interpretation, it is helpful to understand its roots in classical rhetorical theory, which was, in turn, tied to legal discourse. The ancient philosophers understood that interpretation is a rhetorical act; it is a human activity, not a process of nature.[98] Moreover, they believed that how one speaks influences the moral

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legal scholarship to the "republican revival," there has been very little discussion of its relationship to rhetorical theory in the ancient Greek and Roman legal context. For an analysis of the "republican revival" movement, see generally G. Edward White, *Reflections on the "Republican Revival": Interdisciplinary Scholarship in the Legal Academy*, 6 YALE J.L. & HUMAN. 1 (1994).

95. *See* FERGUSON, *supra* note 94, at 73.

96. FERGUSON, *supra* note 94, at 76 (citing JOHN QUINCY ADAMS, 1 LECTURES ON RHETORIC AND ORATORY, DELIVERED TO THE CLASSES OF SENIOR AND JUNIOR SOPHISTERS IN HARVARD UNIVERSITY 1, 136 (1810)).

97. *See* ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 37-42 (1993); *see also* Miriam Galston, *Taking Aristotle Seriously: Republican-Oriented Legal Theory and the Moral Foundation of Deliberative Democracy*, 82 CAL. L. REV. 329, 396 (1994) (condemning Arisotle's "best regime" for its policy of excluding women and "natural slaves").

98. *See supra* notes 48-91 and accompanying text.

quality of one's community.[99] After the legal realist and critical legal studies movements, this insight should be as obvious as the discovery that we generally speak in prose.[100] Yet many modern advocates and judges still tend to deny[101] what the Greeks and Romans knew: interpretations of legal texts are not found objects; interpretations of legal texts are created and defended through rhetoric.[102] Moreover, a good number of the advocates and judges denying the rhetorical nature of interpretation and advocating the desirability of "plain meaning" are talking about evidence rules.[103]

Advocates engage in rhetoric to persuade a judge to apply a rule—for example, to admit or to exclude evidence. Judges, in turn, use rhetoric in justifying their decision to interpret an evidence rule one way or another.[104] We generally only refer to interpretation as "rhetorical" when we mean it is bad rhetoric, empty bombast masking other agendas. But the process of interpretation is really a process of argumentation, rhetoric in its broader, less pejorative sense.[105] One cannot *practically* separate the moment of adjudication from the process of justification. In theory, one can separate them, but the moment of decision is subject to analysis, if at all, only by psychoanalysts.[106] Yet the actual judgment, the exercise of power and authority, is expressed through language. Sometimes that language is curt: "affirmed," "reversed," "granted," or "denied." But more often a judgment is accompanied by detailed justification.[107] Criticism of the rhetoric of interpretation focuses our attention on the adequacy of the justification.

"Theories" of statutory interpretation, such as intentionalism, purposivism, public choice analysis, textualism, and practical reasoning, are simply rhetoric. I deliberately use "simply" rather than "mere" in this context. As the history of Western thought indicates,

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99. *See supra* notes 89-91 and accompanying text.

100. MOLIERE, THE WOULD-BE GENTLEMAN act 2, sc. 4, *in* THE MISANTHROPE & OTHER PLAYS (Signet Classic Paperback ed., Donald M. Frame ed., 1968).

101. *See* Wetlaufer, *supra* note 11, at 1562-66.

102. *See* Wetlaufer, *supra* note 11, at 1563-64.

103. For an example of such cases, see generally *infra* Part III.B-D.

104. *See* Wetlaufer, *supra* note 11, at 1557-66.

105. *See* Wetlaufer, *supra* note 11, at 1556-57 & nn.33, 35 (illustrating constructive and useful nature of rhetoric by incorporating "rhetorical notes" as means of revealing author's own bias).

106. While this sounds a bit like classical legal realism, my position, with its emphasis on the persuasive power and educative responsibilities connected to the Court's *ethos*, is distinct. *See infra* notes 266-301 and accompanying text.

107. *See* Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757, 760 (1995).

there is nothing "mere" about rhetoric.[108] Yet I say that interpretation is "simply" rhetoric, in that we sometimes get carried away by our theorizing and our search for the universal, the certain, and the predictable. We fail to remember that we are engaged in a process of justification that is, at the core, rhetorical, contextual, and fluid. Classical rhetoricians are important because they understood and accepted this; we should build on their insights.

Finally, classical rhetoric provides a lesson in ethical pedagogy. The classical authors, apart from Plato, viewed rhetoric as an amoral process, but all stressed the importance and positive moral influence of studying and emulating "good," in the sense of ethical, speakers.[109] There is a renewed interest in this theme on the part of legal scholars who believe it matters a great deal how courts talk.[110]

I will suggest that judges who interpret, or talk about, evidence rules could do so in a more ethical way;[111] a view based on a concept from classical rhetoric: the concept of *ethos*.[112] *Ethos* is the persuasive power that comes from the credibility of the speaker, credibility that the speaker brings to a situation, and, then, either builds upon or loses through her speech. I argue that the way the Supreme Court currently talks about evidence rules damages its *ethos*. This is harmful because it both reduces the Court's persuasiveness and detracts from the Court's power as an educative institution. That discussion is postponed until one sees what interpretative options the Court has available to it. In order to evaluate those options, it is important to set forth the vision that the drafters of the Federal Rules of Evidence had for their code, for one can see a clear link to the classical tradition, which has since been ignored but which could provide guidance in resolving problems of interpretation.

B. *Pragmatism in the Creation of the Federal Rules of Evidence*

I demonstrate in this section how issues regarding the interpretation of legal texts were confronted during the early attempts to codify evidence rules, the American Law Institute's (ALI) Model Code of

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108. *See* STANLEY FISH, DOING WHAT COMES NATURALLY 484-85 (1989).

109. *See* Galston, *supra* note 97, at 376-77; Isocrates, *supra* note 55, at 171 (condemning those who "attempt to teach others when they are themselves in great need of instruction").

110. *See generally, e.g.*, MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 57-79 (1991); KRONMAN, *supra* note 97, at 11-52; Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. REV. 961, 964-72 (1992); Jerry Frug, *Argument as Character*, 40 STAN. L. REV. 869, 871-82 (1988); Mark Tushnet, *Style and the Supreme Court's Educational Role in Government*, 11 CONST. COMMENT. 215, 215 (1994).

111. *See infra* notes 266-301 and accompanying text.

112. *See* ARISTOTLE, *supra* note 59, at 48.

Evidence[113] and the 1953 Uniform Rules of Evidence,[114] and during the development of the Federal Rules of Evidence themselves.[115] The perspective of pragmatism provided the resolution of those issues, and pragmatism is tied inexorably to the legacy of classical rhetoric. In rejecting absolutist theories of reality while also rejecting the despair of radical skeptical philosophy,[116] pragmatism follows the rhetorical tradition of Protagoras, Isocrates, Aristotle, Cicero, and Quintilian: this tradition emphasized the contingent and contextual nature of reality while recognizing the practical, and sometimes conflicting, desires to act in one's self-interest and in the interest of the community.[117]

Pragmatism is almost as difficult to define as rhetoric. An initial problem is that what might be called pragmatism goes by many names, such as neopragmatism,[118] practical reason,[119] practical

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113. MODEL CODE OF EVIDENCE (1942).

114. UNIF. R. EVID. (1953).

115. *See* STEPHEN A. SALTZBURG & MICHAEL M. MARTIN, FEDERAL RULES OF EVIDENCE MANUAL (5th ed. 1990 & Supp. 1994).

116. *See* Hilary Putnam, *A Reconsideration of Deweyan Democracy*, 63 S. CAL. L. REV. 1671, 1672 (1990); *see also* Michael Ariens, *Progress Is Our Only Product: Legal Reform and the Codification of Evidence*, 17 LAW & SOC. INQUIRY 213, 247-52 (1992) (discussing intellectual history and rejection of skepticism in context of codification of evidence rules); Michael L. Seigel, *A Pragmatic Critique of Modern Evidence Scholarship*, 88 NW. U. L. REV. 995, 998 (1994) (discussing belief that contemporary evidence scholarship can be traced to "optimistic rationalism").

117. *See supra* notes 49-50 and accompanying text.

118. Neopragmatism is the most recent strain of pragmatism. Its best known advocates are Richard Rorty, Richard J. Bernstein, and Hilary Putnam. *See generally* RICHARD J. BERNSTEIN, BEYOND OBJECTIVISM AND RELATIVISM (1983); RICHARD RORTY, CONSEQUENCES OF PRAGMATISM (1982); Putnam, *supra* note 116. Modern neopragmatists build on the work of the earlier American pragmatism of Charles Peirce, William James, and John Dewey. To compare these earlier authors, see generally JOHN DEWEY, LOGIC: THE THEORY OF INQUIRY (1938); WILLIAM JAMES, PRAGMATISM AND FOUR ESSAYS FROM THE MEANING OF TRUTH (1942); Charles S. Peirce, *What Pragmatism Is*, *in* COLLECTED PAPERS OF CHARLES SANDERS PEIRCE Vol. 5, p.1 (Charles Hartshorne & Paul Weiss eds., 1965).

Neopragmatists, however, distinguish themselves from this earlier tradition in two ways. First, neopragmatists "talk about language instead of experience or mind or consciousness, as the old pragmatists did. The second respect is that we have all read Kuhn, Hanson, Toulmin, and Feyerabend, and have thereby become suspicious of the term 'scientic method.'" Richard Rorty, *The Banality of Pragmatism and the Poetry of Justice*, 63 S. CAL. L. REV. 1811, 1813 (1990). In this respect, the neopragmatists also differ from the early legal realists, who were obsessed with the psyche and the possibilities of the empiricial method and the social sciences. For more on this distinction, see generally JEROME FRANK, LAW AND THE MODERN MIND (Anchor Books 1963) (1930). The link between legal realism and the older version of pragmatism is apparent in Justice Oliver Wendell Holmes, who some have labelled a realist and some have called a pragmatist. *Compare* POSNER, *supra* note 16, at 287 (labeling Holmes as legal realist) *with* Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 793 (1989) (labeling Holmes as pragmatist). I would add another difference between the new or "neo" pragmatism and the old. Some neopragmatists have stressed the dimension of self-consciousness, a concept encompassing the realization of the political effect that one's gender, sexual orientation, race, and so forth can have on one's perspective. *See* Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1725 (1990). While the early pragmatists/realists emphasized the psychological dimensions of decisionmaking, they did not seem to be as open about their *own* contexts and

wisdom,[120] and skepticism.[121] Nevertheless, the common denominator of pragmatism, whatever its label, is the rejection of foundationalist theories of truth and knowledge. "The goal of foundationalism is to provide a uniform and objective method for judges (and presumably scholars) to answer difficult legal questions."[122] The dominant foundationalist view in evidence law is "optimistic rationalism,"[123] which is "the belief that the overarching function of evidence law is to maximize the (already fairly high) probability that factfinders in our adjudicatory system will accurately determine objective historical truth."[124] In Part III of this Article, I will show how optimistic rationalism pervades the Supreme Court's current attempts to interpret the Federal Rules of Evidence, with sometimes poor, and sometimes disastrous, results. In the next section of this Article, I argue that the drafters of the Federal Rules

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self-awareness. Hence some neopragmatists tend to be more autobiographical in their "theoretical" writing. Moreover, these writers stress that in the "conversations" or "dialogue" advocated by other neopragmatists, politically and economically oppressed groups do not get the same opportunity to talk, whether about talking or anything else.

Neopragmatism has been embraced by legal scholars. *See generally* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE (1990); Steven J. Burton, *Law as Practical Reason*, 62 S. CAL. L. REV. 747 (1989); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990); Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331 (1988); Daniel A. Farber & Philip P. Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615 (1987); Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137 (1990); Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827 (1988); Eileen A. Scallen, *Constitutional Dimensions of Hearsay Reform: Toward a Three-Dimensional Confrontation Clause*, 76 MINN. L. REV. 623 (1992); Joseph Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984); *Symposium on the Renaissance of Pragmatism in American Legal Thought*, 63 S. CAL. L. REV. 1569 (1990).

119. *See* Burton, *supra* note 118, at 776-84. Practical reason, in my view at least, is a philosophical perspective or outlook. Practical reasoning, as discussed in this Article, is a method of argumentation used to justify a particular interpretation. One argues under the method of practical reasoning because of one's adherence to pragmatism or practical reason—a belief in the unavailability of universal, absolute, objective truth, yet a rejection of nihilism.

120. "Practical wisdom" is an especially confusing term because some scholars seem to use it as a synonym for a perspective that views truth and knowledge as contextual and contingent. *See* POSNER, *supra* note 118, at 287-88 (identifying common sense, custom, precedent, intuition, history, and time as contextual sources for practical wisdom). Others add the dimension of moral character to the term. *See, e.g.*, Galston, *supra* note 97, at 371-72 (emphasizing "excellence of the soul"); KRONMAN, *supra* note 97, at 41-44 (looking to qualities of sobriety, fair-mindedness, and incorruptability); Nussbaum, *supra* note 11, at 717 (adding quality of compassion to practical reasoning).

121. The use of the term skepticism is troubling, for there are (and were in classical terms) various types of philosophical outlooks called skepticism, ranging from the most paralyzing, nihilistic philosophies to the sophistic and Ciceronian belief in action based on the best available sources in the face of an uncertain and unpredictable world. *See* A COMPANION TO EPISTEMOLOGY 457-64 (Jonathan Dancy & Ernest Sosa eds., 1992) (distinguishing among traditional, contemporary, and modern views of skepticism).

122. Seigel, *supra* note 116, at 1010.

123. TWINING, *supra* note 11, at 75.

124. Seigel, *supra* note 116, at 996.

drafted the Rules from the perspective of pragmatism. Practical reasoning, a mode of argumentation based in classical rhetoric and reflecting the perspective of pragmatism, is accordingly the most appropriate means of interpreting the Federal Rules.

Several writers have done a thorough job of tracing the development of the Federal Rules of Evidence,[125] and I will only briefly summarize their efforts in order to show the connection between the philosophical perspective of classical rhetoricians and the drafters of the Federal Rules of Evidence. Professor Thomas Mengler notes that the Federal Rules strike "'a middle course between vague generalities and constricting particularity.'"[126] After reviewing the Advisory Committee Notes, the drafters' testimony before both houses of Congress, and congressional materials, he concludes that there is no clear direct evidence of why the drafters chose the "middle course,"[127] but argues that there is strong circumstantial evidence that the reasons were similar, if not identical, to the reasons advanced for the ALI's Model Code of Evidence and the 1953 Uniform Rules of Evidence.[128]

The debate over the scope of codification of evidence rules began at the ALI in 1940.[129] Professor Edmund Morgan, the Model Code's Reporter, set out several options.[130] The first was Dean Wigmore's proposal of a catalog of rules, "so detailed that few, if any, situations not covered by the Code should arise."[131] The primary virtues of this detailed code were that it increased stability and predictability in evidentiary decisions and provided the most disciplined means for controlling the truth-finding process of the trial.[132] A second alternative was that of Judge Charles E. Clark, who proposed "a simple creed," which consisted of "'one broad rule of admissibility

125. *See, e.g.*, Ariens, *supra* note 116, at 247-52; David P. Leonard, *Power and Responsibility in Evidence Law*, 63 S. CAL. L. REV. 937, 952-68 (1990); Thomas M. Mengler, *The Theory of Discretion in the Federal Rules of Evidence*, 74 IOWA L. REV. 413, 414-16 (1989).

126. Mengler, *supra* note 125, at 414 (quoting *Proposed Rules of Evidence: Hearings Before the Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 91 (1973) [hereinafter *House Hearings*] (testimony of Professor Edward W. Cleary, Reporter to the Advisory Committee)).

127. Mengler, *supra* note 125, at 415-24.

128. *See* Mengler, *supra* note 125, at 437.

129. *See* Mengler, *supra* note 125, at 432.

130. *See* Mengler, *supra* note 125, at 433.

131. Mengler, *supra* note 125, at 433 (citing John H. Wigmore, *The American Law Institute Code of Evidence Rules: A Dissent*, 28 A.B.A. J. 23, 24-27 (1942)).

132. *See* Mengler, *supra* note 125, at 433 (citing Edmund M. Morgan, *Discussing Code of Evidence Tentative Draft No. 1*, 17 A.L.I. PROC. 1, 66 (1940)).

of relevant evidence' and a few subordinate rules to clarify the main rule."[133]

Morgan's proposal fell in between Dean Wigmore's and Judge Clark's. Morgan offered "a 'series of rules in general terms,' without attempting 'to frame rules of thumb for specific situations.'"[134] Morgan's rationale for this approach was threefold, and in total reflects a pragmatist perspective. First, Morgan took basic issue with Wigmore's foundationalist theory of rationalism. He argued that "a lawsuit is not, and cannot be made, a scientific investigation for the discovery of the truth,"[135] because the parties may choose not to present all of the available evidence, the evidence that is presented may be inherently defective (such as the product of a weak memory or skillful liar), and "as in all other experiences of individuals in our society, the emotions of the person involved—litigants, counsel, witnesses, judges, and jurors—will play a part."[136] For these reasons, Morgan argued that even detailed evidence rules could not make a trial a "pure" objective and analytical search for the truth.[137] Instead, evidence law should aim at allowing the factfinder to "hear and consider those data which reasonable men confronted with the necessity of acting in a matter of like importance in their everyday life would use in making up their minds what to do."[138] Yet Morgan pointed out that this perspective could only be implemented on a contextual basis; "drafting fine-tuned rules of evidence to deal with every case was impossible."[139]

Morgan added two other reasons to reject Wigmore's proposal. He argued that Wigmore's detailed and complex code would interfere with the efficient operation of trials, where evidence decisions have to be made quickly and in the heat of the moment.[140] Finally, Wigmore's detailed code was accompanied by his insistence that there

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133. Mengler, *supra* note 125, at 433 (quoting Morgan, *supra* note 132, at 82 (statement by Judge Clark)). Judge Clark's appeal for simplicity and brevity was similar to the philosophy behind the then-existing Federal Rules of Civil Procedure, of which he was the principle architect. *Id.*

134. Mengler, *supra* note 125, at 436 (quoting Edmund M. Morgan, *Forward* to MODEL CODE OF EVIDENCE 1, 7 (1942)).

135. Morgan, *supra* note 134, at 3, *quoted in* Mengler, *supra* note 125, at 433.

136. Morgan, *supra* note 134, at 7, *quoted in* Mengler, *supra* note 125, at 433.

137. Morgan, *supra* note 134, at 4, *quoted in* Mengler, *supra* note 125, at 433.

138. Morgan, *supra* note 134, at 7, *quoted in* Mengler, *supra* note 125, at 435; *cf.* Cal. Code Regs. tit. 22, § 5038(c) (1995). Section 5038(c) sets the following standard of evidence in administrative law proceedings: "Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions." *Id.*

139. Morgan, *supra* note 134, at 7, *quoted in* Mengler, *supra* note 125, at 435.

140. *See* Mengler, *supra* note 125, at 435.

be no appellate review, lest appellate courts feel compelled to reverse a trial court for any deviation from the code.[141] Morgan argued that it was unacceptable to cut off all judicial review of evidence rulings—a litigant ought to have some recourse to appellate review, to prevent "material prejudice to . . . substantial rights."[142] Thus, Morgan would not sacrifice appellate review—which he regarded as a necessary check on the fairness of the trial court proceedings—for judicial efficiency.

For this same reason, Morgan rejected Judge Clark's proposal of a creed, which also made evidentiary rulings unreviewable.[143] In addition, Morgan pointed out that if the proposal was amended by adding appellate review to the creed, each "new evidence situation would invite appeal and lead to a common law of evidence,"[144] thus eliminating the practical stabilizing value of codification.[145]

While the Advisory Committee to the Federal Rules of Evidence never explicitly announced that it was adopting the philosophical basis of the Model Code and Uniform Rules,[146] its members, two of whom had participated in drafting the Uniform Rules,[147] consistently restated Morgan's rationale for the Model Code in explaining the form of the proposed Federal Rules.[148] Moreover, the Reporter of the Advisory Committee, Professor Edward W. Cleary, later wrote an article on the interpretation of the newly enacted Federal Rules of Evidence, which echoes Morgan's perspective.[149]

In stating his reasons for rejecting Wigmore's detailed code and Clark's general creed, Morgan virtually echoes the philosophical perspective of the sophists, Aristotle, and the pragmatists, who view knowledge as uncertain and context-dependent, yet acknowledge that practical action is possible, and indeed necessary, in the face of this uncertainty.[150] Professor Steven Smith has noted that if pragmatists are to be taken seriously, then "we are all pragmatists," for any

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141. *See* Mengler, *supra* note 125, at 435.
142. Morgan, *supra* note 134, at 15, *quoted in* Mengler, *supra* note 125, at 435.
143. *See* Mengler, *supra* note 125, at 435.
144. Mengler, *supra* note 125, at 435.
145. *See* Mengler, *supra* note 125, at 435.
146. Professor Mengler speculates that this was because the Advisory Committee wished to avoid the political wrangling that occurred over the Model Code and the Uniform Rules. Mengler, *supra* note 125, at 437.
147. The two participating members were the Chair of the Advisory Committee, Albert Jenner, and Judge Joe E. Estes. Mengler, *supra* note 125, at 436.
148. *See* Mengler, *supra* note 125, at 436-37 (describing relationship between Model Code and Uniform Rules).
149. *See generally* Edward W. Cleary, *Preliminary Notes on Reading the Rules of Evidence*, 57 NEB. L. REV. 908 (1978).
150. *See* Eskridge & Frickey, *supra* note 118, at 323.

reasonable person can accept its tenets.[151] He argues that the utility of pragmatism is simply exhortatory, as it calls on "scholars and judges to avoid intellectual vices that they already acknowledge as such but are nonetheless prone to commit."[152]

In the next Part of this Article, I set forth the interpretative methods, or argumentative strategies, the Court could use in interpreting evidence rules. Then in Part III, I demonstrate that while Professor Smith might be right that the members of the Supreme Court are all pragmatists at heart, they do not talk like pragmatists when they interpret the Federal Rules of Evidence. They do not sound like Professor Morgan. They do not sound like Professor Cleary. I argue that the Supreme Court's recent efforts to interpret evidence rules have created a level of serious confusion, generating the kind of unpredictability and uncertainty that the Court supposedly wants to eliminate. Moreover, the approach the Supreme Court currently takes in interpreting evidence rules unnecessarily diminishes its *ethos*. A practical reasoning approach, I argue, is consistent with the pragmatism that gave rise to the Federal Rules. As Professor Morgan noted, such a perspective does not eliminate uncertainty; it acknowledges uncertainty and tries to work as well as possible despite the realization that it will never produce perfect results.[153] I will add that practical reasoning has an additional benefit: using practical reasoning would add to the Court's *ethos*, which in turn affects its ability to persuade and to educate.

II. THE CONTEMPORARY "SCHOOLS" OF STATUTORY INTERPRETATION

The basic arguments in the rhetoric of interpretation are well established.[154] I will attempt to capture them here, as they apply to evidence rules. Despite their differences in emphasis, all of the theories share the concern that in "interpreting" a statute or rule, a court is trespassing on the function of the democratically elected legislature.[155] Professors Eskridge and Frickey diagnose this as

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151. Steven Smith, *The Pursuit of Pragmatism*, 100 YALE L.J. 409, 446 (1990).

152. *Id.* The essence of Smith's criticism is that pragmatism is a tremendous grasp of the obvious. *Id.* His response reminds me of my graduate school days, teaching public speaking and argumentation at a midwestern university. My students often said, "but this is all common sense." I replied, "yes, a good part of it is. But if it is *just* common sense, then why do you complain so often and so bitterly about misunderstandings and miscommunication? It may be common sense, but it's not so common." (Apologies to Mark Twain).

153. *See* Mengler, *supra* note 125, at 431-38 (discussing rationale of Morgan's Model Code).

154. A concise summary of these approaches is available in Phillip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241 (1992) [hereinafter Frickey, *Big Sleep*], and Eskridge & Frickey, *supra* note 118.

155. *See* Eskridge & Frickey, *supra* note 118, at 325.

> a form of "countermajoritarian anxiety": As unelected judges, applying statutes enacted by our elected legislators, they feel some pressure to tie their results rigorously to the expectations that legislators had when they enacted the statute. Any result not related to majoritarian expectations may seem illegitimate in a democracy.[156]

Professor Glen Weissenberger has argued that such anxiety is inappropriate when the Supreme Court interprets evidence rules because the rules are created for the use of the court system and the Supreme Court participated in the drafting of the rules.[157] A similar argument has been made regarding the interpretation of the Federal Rules of Civil Procedure.[158] While this view of the Supreme Court's autonomy in the rulemaking process may have been true for the Federal Rules of Civil Procedure at one time, it is no longer the case for those rules[159] and was never completely true for the Federal Rules of Evidence.[160]

Congress', or to be more accurate, members of Congress', interest in the Federal Rules of Evidence is evident from the history of the Rules. The Rules initially were drafted under the Supreme Court's power and under the procedure set forth in the Rules Enabling Act of 1934.[161] Professor Weissenberger traces the origin of Rules from the first Special Committee on Evidence (which, from 1961 to 1963, studied the need for a uniform code of evidence)[162] to the Advisory Committee's work drafting the rules,[163] and finally to their submis-

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156. Eskridge & Frickey, *supra* note 118, at 324.

157. *See* Weissenberger, *supra* note 4, at 1319.

158. *See* Karen Nelson Moore, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039, 1061-72 (1993).

159. *See* Richard L. Marcus, *Of Babies and Bathwater: The Prospects For Procedural Progress*, 59 BROOK. L. REV. 761 (1993).

160. *See* Weissenberger, *supra* note 4, at 1309.

161. Rules Enabling Act of 1934, 28 U.S.C. § 2072 (1988). The Enabling Act grants the Supreme Court the power to promulgate rules regarding the practice and procedure of the federal courts, but prohibits the Court from abridging, enlarging, or modifying any substantive right. *Id.*

162. Weissenberger, *supra* note 4, at 1319. This Committee, established by Chief Justice Earl Warren, recommended the adoption of a uniform set of federal rules of evidence in its 1963 report. *Id.*

163. *See* Weissenberger, *supra* note 4, at 1319 & nn.62-64. Following the rulemaking procedure the Court has adopted, the proposed rules drafted by the Advisory Committee were also approved, first by the Standing Committee on Rules of Practice and Procedure, and then by the entire Judicial Conference. *See* 21 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5006, at 101-04 (1977). The proposed rules were also subject to extensive public comment. *See id.* After some additional changes by the Advisory Committee, the rules were sent to the Supreme Court, who then transmitted the rules to Congress. *See id.*

sion to the Supreme Court.[164] At this point, however, some members of Congress raised questions about whether the Court had exceeded its authority under the Rules Enabling Act.[165] Congress avoided any potential problems when it enacted a statute that provided that the rules could not take effect until Congress expressly approved them.[166] After several modifications,[167] Congress enacted the rules, and President Ford signed them into law on January 3, 1975.[168] Professor Friedenthal suggests that Congress' active role in the creation of the evidence rules in 1974 "may have spelled the end of the autonomous role held by the Supreme Court for the past 40 years."[169]

Professor Weissenberger argues that "[e]xcept in instances in which it modified the text of certain Rules [of evidence], Congress' intent was to ratify and enact the intent of the Supreme Court and its Advisory Committee."[170] He then argues that the Advisory Committee and the Supreme Court never meant the "traditional tools of statutory construction" to apply to the rules of evidence.[171] While it is questionable whether this is an accurate statement of the intent of the original Advisory Committee and the Supreme Court as of 1974,[172] this argument is self-defeating. If Congress meant to defer to the intent of the Advisory Committee and the Supreme Court, then the Supreme Court has the power to choose whatever method of interpretation it wishes for "its" rules, and it predominantly appears to wish to apply the "plain meaning" of the rules, as I discuss below. Moreover, several theorists have argued that the best way to give effect to the intent of a special interest group that has drafted legislation,

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164. *See* Weissenberger, *supra* note 4, at 1319 nn.63 & 69 (tracing complete history of drafting of Rules).

165. *See* Jack H. Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673, 682-85 (1975).

166. Pub. L. No. 93-12, 87 Stat. 9 (1973) (reprinted at 28 U.S.C. § 2074 notes).

167. *See* Weissenberger, *supra* note 4, at 1320 n.69.

168. *See* Weissenberger, *supra* note 4, at 1320 n.69.

169. Friedenthal, *supra* note 165, at 675.

170. Weissenberger, *supra* note 4, at 1324.

171. *See* Weissenberger, *supra* note 4, at 1325. Professor Weissenberger affirmed his views in a follow-up article. *See Weissenberger's Reply*, *supra* note 4, at 402 (answering the question "Are the Federal Rules of Evidence a Statute?" emphatically "no"). I argue here that the Federal Rules are statutes, but that they are special statutes; the Court, which ordinarily is wholly independent of the drafting process of the statutes it construes, is intimately involved with the creation and evolution of the Federal Rules of Evidence.

172. *See* Cleary, *supra* note 149, at 909; *see also id.* at 919 (averring that "the accepted rules of statutory interpretation are in general being applied by the courts [of appeals] to the Rules with skill and thought"). Professor Cleary did not endorse one particular approach to statutory interpretation, but I think his discussion of the alternative sources of interpretation, coupled with his belief that the Rules did not speak for themselves, suggests that he might have agreed with the practical reasoning approach.

a description that would appear to encompass the Advisory Committee, is to strictly enforce the language of the rule as drafted.[173] Thus, if Professor Weissenberger is correct, then he cannot criticize, as he does, the Court's choice of interpretative schemes.

The bottom line is that any approach to interpreting the Federal Rules of Evidence will have to confront the problem that while they are rules of procedure, they are also statutes passed by Congress and signed by the President. The rules of evidence are indeed statutes, but they are special statutes. At the moment, the Court and Congress appear to share the rulemaking process, which means that while the Court may be concerned with the practical functioning of the rule, it will not, and probably should not, ignore the problem of its "countermajoritarian anxiety."[174]

The following is a summary of the leading theories of statutory interpretation, and the chief critiques of those theories. In the final section, which outlines the practical reasoning approach, I draw from these theories and strike a balance between the Court's concern about its role *vis a vis* Congress, and Professor Weissenberger's concern that the Court has abandoned "the wisdom of the common-law history of the Federal Rules of Evidence and the capability of enlightened growth."[175] By openly returning to the rhetorically based method of practical reasoning, the Court may finally find the right tone.

A. *Intentionalism*

The school of intentionalism acknowledges that legal language often does not "speak for itself" and holds that a court should act as the legislature's faithful agent, interpreting a statute in light of what the drafters intended.[176] There are at least three forms of intentionalism. The first looks to the actual, original intent of the legislative body,[177] while the other two versions resort to a legal fiction of intent.[178]

The first type of intent, actual intent, has been called "a myth, or more accurately an oxymoron, or contradiction in terms, like military justice or slam dancing. How can 535 legislators have an intent about anything?"[179] The second type of intentionalism therefore acknowl-

173. *See infra* notes 195-200 and accompanying text (discussing public choice theory).
174. Eskridge & Frickey, *supra* note 118, at 324.
175. Weissenberger, *supra* note 4, at 1338.
176. *See* Eskridge & Frickey, *supra* note 118, at 325.
177. *See* Eskridge & Frickey, *supra* note 118, at 326.
178. *See* Eskridge & Frickey, *supra* note 118, at 326.
179. Frickey, *Big Sleep*, *supra* note 154, at 248.

edges that it is absurd to talk about "the" intent of a large legislative body, whose members may "vote for bills out of many unknowable motives, including logrolling, loyalty or deference to party and committee, desire not to alienate blocks of voters, and pure matters of conscience."[180] Most intentionalists thus really resort to a conventional, but fictional notion of legislative intent, represented by statements in committee reports and speeches on the floor.[181]

The third type of intentionalism, most recently advocated by Judge Richard Posner, holds that even conventional legislative intent is corrupt, in that the evidence of "legislative" intent, such as committee reports, speeches, and articles, can be manipulated by special interest groups to reflect their preferred interpretation.[182] Because of the impossibility of determining legislative intent through this evidence, Judge Posner argues that a court must engage in "imaginative reconstruction."[183] That is, a judge must imagine how the legislators at the time of enactment would have answered the question had they considered it.[184]

Professors Eskridge and Frickey argue that although the imaginative reconstruction approach to legislative intent makes more sense than other versions, it is flawed in three ways. First, it requires judges to "recreate the historical understanding of a past legislature."[185] Unfortunately, it may be impossible for a modern interpreter, who brings all of her biases and values to the problem, to do this in a reliable way.[186] Second, the theory puts the judge in an impossible bind. Assumptions about law and society that ground certain statutes may turn out to be wrong.[187] If this happens, the judge is left

180. Eskridge & Frickey, *supra* note 118, at 326.

181. *See* Eskridge & Frickey, *supra* note 118, at 326-27.

182. *See* RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 279 (1985).

183. *See* POSNER, *supra* note 182, at 286. Judge Posner has linked the imaginative reconstruction approach to Aristotle. "Aristotle described his method of interpretation as the method of 'equity' (epieikeia); imaginative reconstruction would enable judges to avert injustices that literal interpretation would create." Richard A. Posner, *Legislation and its Interpretation: A Primer*, 68 NEB. L. REV. 431, 432 (1989).

184. Professor Frickey cites Justice Stevens' opinion in Green v. Bock Laundry Mach. Co., 490 U.S. 504 (1989), interpreting FED. R. EVID. 609(a)(1), as an example of imaginative reconstruction. Frickey, *supra* note 154, at 256 n.67. He also describes Justice Scalia's opinion, concurring in the judgment, as a textualist approach, moderated by the canon of avoiding absurd consequences. *Id.*; *see also* Veronica Dougherty, *Absurdity and the Limits of Literalism*, 44 AM. U. L. REV. 127, 128 (1994) (noting "almost universal endorsement" of absurd result principle, even by those, like Justice Scalia, "who are the most critical of judicial discretion and most insistent that the words of the statute are the only legitimate basis of interpretation"). Dougherty describes Justice Blackmun's dissent, joined by Justices Brennan and Marshall, as the purposive approach. *Id.*

185. Eskridge & Frickey, *supra* note 118, at 330.

186. *See* Eskridge & Frickey, *supra* note 118, at 330.

187. Eskridge & Frickey, *supra* note 118, at 330.

wondering whether to ask how the legislature would have answered the question operating under its mistaken assumptions, or whether to ask how the legislature would answer the questions under current conditions.[188] Finally, Eskridge and Frickey argue that as conditions and circumstances change, statutes ought to be interpreted to be consistent with those changes whenever practical, and a historical "reconstruction" of original legislative intent prevents this.[189]

B. Purposivism

A second method of statutory interpretation is identified with its chief proponents, Professors Henry Hart and Albert Sacks. In *The Legal Process,* Hart and Sacks attempted to remain faithful to the will of the legislature, while avoiding the problems of intentionalism.[190] Under this approach, a judge is to read legal language carefully, then think up the plausible purposes of the language, which are to be rational, because the judge has to assume that the legislature consisted of "reasonable persons pursuing reasonable purposes reasonably."[191] The judge may consult legislative history, but should only use it as a last resort, and then only to help select among possible functions of the provision.[192]

Purposivism has been criticized on several grounds. First, it allows a judge too much discretion in determining the purpose of the statute, which may lead the judge to substitute her own values for those of the actual legislature.[193] Second, it allows a judge to move too freely beyond the text of the statute, which is the only concrete evidence of the legislature's will and which provides the only stable source of information on the rights and duties of the governed.[194]

In addition, a significant challenge to both intentionalism and purposivism has come from scholars of public choice theory, which analyzes legislation using the methodology of economics.[195] From a public choice theory perspective, legal language is simply the result of compromises struck by special interest groups that control the

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188. *See* Eskridge & Frickey, *supra* note 118, at 330-31.
189. *See* Eskridge & Frickey, *supra* note 118, at 331-32.
190. *See generally* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (1994).
191. *Id.* at 1415.
192. *See id.* at 1284-86.
193. *See* Eskridge & Frickey, *supra* note 118, at 336-37.
194. *See* Eskridge & Frickey, *supra* note 118, at 336-37.
195. *See* Frickey, *Big Sleep, supra* note 154, at 250.

legislature's agenda, so it is ridiculous to talk about *the* "legislative" intent or *the* "legislature's" purpose.[196]

According to Frickey, public choice theory holds significant implications for statutory interpretation. From the perspective of public choice theory,

> the deals struck in the legislature and embodied in statutes depend upon interest group strength, which is not attributable to the sheer numbers of people represented by the group, but rather by whether the group can organize easily to promote its ends and whether it can limit the benefits gained from its lobbying to its membership. Small groups likely to receive discrete benefits or suffer disproportionate burdens are more likely to organize and lobby effectively than the diffuse public. Hence, rather than assume, along the lines of Hart and Sacks, that all statutes embody broad public-interest purposes, we should expect to find lots of statutes that provide concentrated unjustified benefits to small groups at the expense of the general public.[197]

Public choice theory generally has led its proponents in one of two directions. Some public choice adherents, such as Judge Frank Easterbrook, use the public choice critique to justify textualism.[198] They argue that if statutes represent political compromises bargained for by small but powerful interest groups, then the role of a court can only be to enforce those bargains as they are written.[199] The other approach resulting from the public choice critique is practical reasoning, which is discussed below.

Public choice theory, which may make most obvious sense in the environmental or other heavily regulated fields, may seem inapplicable to the procedural context, with its aura of neutrality. Recent experience with the discovery rules, however, shows that the plaintiffs' bar and defendants' bar are quite capable of intensive lobbying for their respective interest groups.[200]

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196. Frickey, *Big Sleep*, *supra* note 154, at 250-51; *see also* Dougherty, *supra* note 184, at 131 (terming attempts to attribute intent or purpose to legislature "more fiction than fact").

197. Frickey, *Big Sleep*, *supra* note 154, at 250-51.

198. *See* Frickey, *Big Sleep*, *supra* note 154, at 253-54 (citing Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 546-51 (1983)).

199. *See* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 89-102 (1991). For a recent example of Judge Easterbrook's textualism applied to evidence rules, see United States v. Dent, 984 F.2d 1453, 1465-67 (7th Cir. 1993) (Easterbrook, J., concurring) (arguing that using residual exception of FED. R. EVID. 804(b)(5) to admit testimony that would not be admissible under prior testimony exception (FED. R. EVID. 804(b)(1)) results in "slighting" Rule 804(b)(5)). The introductory language of Rule 804(b)(5) allows "[a] statement not specifically covered by any of the foregoing exceptions" to be admissible under a hearsay exception.

200. *See* Marcus, *supra* note 159, at 805-12.

C. *Textualism and the Plain Meaning Rule*

In a textualist approach, one interprets a legal text simply by resorting to its "plain meaning."[201] A delightful irony is that there is no plain meaning to the "plain meaning rule" or "textualism." There are at least three versions of textualism and the plain meaning rule, all requiring reliance on the text.[202] The oldest version, however, prohibits the use of any extrinsic material to interpret a legal text, unless that reading would lead to absurd consequences,[203] while the "New Textualism"[204] looks to a text as simply the best evidence of legislative intent or purpose.[205] Thus, under this new version, a court will apply the plain meaning of statutory language unless the legislative history provides clear evidence that it should be interpreted differently.[206] Both of these versions of the plain meaning rule focus on whether the language is ambiguous, whereas the third version of the rule acknowledges that while the language may be ambiguous, the "plain meaning" in the sense of the "ordinary meaning" ought to be the reading that controls.[207] One could call this the "most or plainest meaning rule"; it can be seen in those cases where the Justices all purport to be applying the "plain meaning rule,"

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201. *See* Eskridge & Frickey, *supra* note 118, at 340-41.

202. *See, e.g.*, Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59 (1988) (identifying plain meaning as first step in statutory interpretation); William Eskridge, *The New Textualism*, 37 UCLA L. REV. 621, 621 (1990) (describing text as "most important consideration in statutory interpretation"); Clark D. Cunningham et al., *Plain Meaning and Hard Cases*, 103 YALE L.J. 1561, 1561 (1994) (book review) (discussing how linguists may help judges in "a principled and objective way that remains grounded in the textual language").

203. *See, e.g.*, Caminetti v. United States, 242 U.S. 470, 490 (1917) (holding that when "language [is] plain, and leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent"). At times, Judge Frank Easterbrook echoes this view. As he believes that the idea of legislative intent or purpose is incoherent, the only alternative is to strictly construe legal language to produce more certainty and predictability. Easterbrook, *supra* note 202, at 59.

204. Eskridge, *supra* note 202, at 623.

205. *See, e.g.*, United States v. American Trucking Ass'ns, 310 U.S. 534, 543 (1940) ("There is no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes."), *quoted in* Huffman v. Western Nuclear, 486 U.S. 663, 672 (1988).

206. *See* Eskridge, *supra* note 202, at 655 (stating that New Textualism drastically limits use of legislative history); *see also* Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892, 902 (1982) (noting that "absent explicit authorization, the Court will not depart from statutory words").

207. *See* Cunningham et al., *supra* note 202, at 1564. This "ordinary meaning" approach to statutory text is also reflected in Justice Scalia's "new textualism." *See* Eskridge, *supra* note 202, at 655.

but come up with different views of the plain meaning of the language and argue that their definition ought to control.[208]

Textualism has generated enormous controversy. Several arguments support applying the plain meaning of a statutory provision. The first two can be characterized as practical considerations, while the last three reflect "countermajoritarian anxiety." First, respecting the plain or ordinary meaning of a legal text gives effect to the expectations and understanding of those citizens or officials who must follow or administer the legislation.[209] Second, by enforcing the "ordinary" community's linguistic choices, the plain meaning rule serves coordinating and stabilizing functions, preventing the substitution of idiosyncratic and contingent choices by individual judges.[210] Third, the text is said to be the most reliable evidence of the intent of all of the participants in the legislative process (special interest lobbyists, legislators, and the Executive).[211] Fourth, textualism narrows the scope of government action, allowing more opportunity for private ordering, and is thus "consistent with the liberal principles underlying our political order."[212] Finally, limiting interpretation to plain meaning prevents a judge from grafting her own values onto the legal text, substituting her views for those of the democratically elected legislature and Executive.[213]

The arguments against the plain meaning approach are similarly powerful. First, there is the realist and post-modern critique that words simply do not have plain meaning.[214] Professors Eskridge and Frickey argue that: (1) terms are often susceptible of multiple definitions; (2) the meaning of a term is influenced by its context; and (3) an interpretation of the "plain meaning" of a word will not be objective (its central virtue) because "the interpreter's perspective will always interact with the text and historical context."[215] At the

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208. *See* Schauer, *supra* note 1, at 242-43 (discussing cases in which "grounds for debate . . . were not whether plain meaning would dominate, but just what the plain meaning was" (citing California v. American Stores, Inc., 110 S. Ct. 1853 (1990) and United States v. Energy Resources Co., 110 S. Ct. 2759 (1990))).

209. *See* Eskridge, *supra* note 202, at 623.

210. *See* Schauer, *supra* note 1, at 232; *see also* Clark Cunningham, *A Linguistic Analysis of the Meanings of 'Search' in the Fourth Amendment: A Search for Common Sense*, 77 IOWA L. REV. 541 (1988) (arguing that following ordinary meaning rule may result in more internally coherent case law).

211. Eskridge, *supra* note 202, at 623.

212. Easterbrook, *supra* note 198, at 544-52.

213. *See* Easterbrook, *supra* note 198, at 544-52.

214. Eskridge & Frickey, *supra* note 118, at 341-43; *see also* Towne v. Eisner, 245 U.S. 418, 425 (1918) ("[A] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.").

215. Eskridge & Frickey, *supra* note 118, at 343.

other side of the political perspective, even Judge Frank Easterbrook argues that, while a moderate textualist position is defensible, the strict "plain meaning" rationale is not:

> Plain meaning as a way to understand language is silly. In interesting cases, meaning is not "plain"; it must be imputed; and the choice among meanings must have a footing more solid that [sic] a dictionary—which is a museum of words, an historical catalog rather than a means to decode the work of the legislature.[216]

Second, courts have been accused of selective application of the plain meaning rule, resulting in uncertainty and unpredictability rather than stability.[217] Third, the plain meaning rule can produce harsh results, unexpected by the drafters of the legislation.[218] And, in the case of the Federal Rules of Evidence, the rule "will take away much of evidence law's dynamic quality, forcing courts to decide cases without considering evidentiary policy."[219]

D. Practical Reasoning

Practical reasoning, with its origins in classical rhetoric, predates the use of the term "pragmatism."[220] But as I noted earlier, the philosophical perspective of classical rhetoricians who advocated the use of practical reasoning is a close kin to pragmatism.[221] Practical reasoning, as I use the term and as it was used in classical rhetorical theory, is an approach to argumentation; through it, one puts pragmatism into action.[222]

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216. Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 67 (1994).

217. *See, e.g.*, BFP v. Resolution Trust Corp., 114 S. Ct. 1757, 1767-68 (1994) (Souter, J., dissenting) (criticizing Justice Scalia's majority opinion for abandoning "plain meaning" of bankruptcy code); Arthur W. Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299, 1308-12 (1975) (criticizing 10th Circuit's application of plain meaning in context of federal nuclear program as causing uncertainty).

218. *See* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 509-11 (1989); *see also* Jonakait, *supra* note 4, at 747-48 (identifying case in which strict application of statute resulted in fine of over $300,000 for refusal to pay wages of $412 (citing Griffin v. Oceanic Contractors, 458 U.S. 564, 576 (1982))).

219. Jonakait, *supra* note 4, at 749; *see also* Weissenberger, *supra* note 4, at 1311 (asserting that application of plain meaning doctrine to evidentiary rules "will distort the complex and richly textured nature of judicial discretion which historically has been central to the operation of all evidentiary rules").

220. *See* PHILIP P. WEINER, EVOLUTION AND THE FOUNDERS OF PRAGMATISM 190-204 (1965).

221. *See supra* notes 116-22 and accompanying text.

222. Thus, as I use the term, "practical reasoning" is not always co-extensive with "practical wisdom," which is the ideal set out by Aristotle (and in a sense, Cicero and Quintilian) of the eloquent speaker who also possesses moral excellence. *See* Galston, *supra* note 97, at 351 (defining Aristotle's practical wisdom as form of prudence). As I argue later, however, the best use of practical reasoning can add to a speaker's *ethos*, and in turn can contribute to the ethical

As with pragmatism, practical reasoning has been described in various ways.[223] The common denominator of the descriptions is that the practical reasoning approach rejects the notion that one particular method of interpretation, such as consulting only the "plain meaning" of statutory or constitutional language, should apply in all circumstances.[224] Judge Posner describes his view of practical reasoning as "a grab bag of methods, both of investigation and of persuasion. It includes anecdote, introspection, imagination, common sense, intuition . . . , empathy, imputation of motives, speaker's authority, metaphor, analogy, precedent, custom, memory, 'induction' . . . , [and] 'experience.'"[225]

Professors Eskridge, Farber, and Frickey have focused more on the sources of interpretation in describing practical reasoning. In their view, the interpreter, whether interpreting a statute or constitutional language, tries to bring to bear on the language at issue all of the possibly relevant sources for statutory or constitutional interpretation.[226] In American legal culture, these sources may include: the actual text (both in content and structure), the intentions of the drafters or framers of the provision, the historical context of the provision, the instrumental aspects of potential interpretations,[227] and the evolution of the language over time.[228]

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development of the audience. In other words, consistent use of practical reasoning contributes to practical wisdom. *See infra* notes 266-301 and accompanying text.

223. *See infra* notes 225-28 and accompanying text (highlighting various approaches to practical reasoning, including investigative inquiry and contextual interpretation).

224. *See* Eskridge & Frickey, *supra* note 118, at 322.

225. Posner, *supra* note 118, at 838.

226. *See, e.g.*, Eskridge & Frickey, *supra* note 118, at 354-62 (advocating use of text, history, and investigative inquiry in statutory interpretation); Farber & Frickey, *supra* note 118, at 1646-47 (endorsing situational approach to legal analysis); Frickey, *supra* note 118, at 1208 (rejecting foundational approach to Indian law and advocating shared values or "community's web of beliefs").

227. One scholar has defined "practical reasoning" in terms of "reasoning from ends to means." Seigel, *supra* note 116, at 1027; *see also* Vincent A. Wellman, *Practical Reasoning and Judicial Justification: Toward an Adequate Theory*, 57 U. COLO. L. REV. 45, 88-92 (1985). As Professor Wellman states: "We are not concerned whether some state of affairs is true or false, but whether instead the plan or decision will serve our purposes and gratify our desires." *Id.* at 90. Certainly this means-end rationality figured heavily in the outlook of traditional pragmatists, such as William James and John Dewey. *See, e.g.*, WILLIAM JAMES, PRAGMATISM 197-236 (1907) (describing pragmatism as understood by practical consequences of actions); John Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17, 26 (1924) (stating that logic of judicial decisions must be evaluated "relative to consequences"); Grey, *supra* note 118, at 804-06 (describing pragmatism as rooted in context and expectations where legal answers will vary based on desired social purpose). In the classical sense of practical reasoning, however, the consequences of the argument are just one consideration, one factor to be stressed in the process of persuading an audience to choose one proposition over another. I think Eskridge, Farber, and Frickey are closer to this sense of practical reasoning, as am I.

228. *See* Farber & Frickey, *supra* note 118, at 1645-47.

In examining these various sources, the interpreter has to keep an open mind and attempt to reconcile any inconsistencies as best she can.[229] The resulting decision is

> likely to be the product of a congeries of supporting, interactive arguments, rather than a single deductive conclusion from one source of meaning. In this way, statutory "construction" takes on a somewhat literal meaning and often consists of supporting arguments working like the "legs of a chair and unlike the links of a chain."[230]

The "construction" metaphor is critical. A rule is written in the abstract. When the abstract rule is asserted in a concrete case, the decisionmaker must resolve a dispute between the values presented by the abstract rule and the compelling presence of the facts of the case, all presented through the prisms of the advocates' arguments.

When a judge thus confronts a rhetorical situation, which version of reality will she advocate?[231] As others have pointed out, some arguments will be easy because the "constructions" all really look the same.[232] There will, for example, be a fairly strong consensus, in a community that looks to the Federal Rules of Evidence, that to qualify for the ancient documents hearsay exception, the document must be at least twenty years old.[233] In other situations, the rhetorical dilemma will be more challenging. If a document is nineteen years and 364 days old, should it qualify for admission under the residual

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229. Farber & Frickey, *supra* note 118, at 1647. This is not an easy process, which may account in part for the "motivational" tone of Farber and Frickey's description of practical reason:

> [Practical reason includes] a concern for history and context; a desire to avoid abstracting away the human component in judicial decisionmaking; an appreciation of the complexity of life; some faith in dialogue and deliberation; a tolerance for ambiguity, accommodation, and tentativeness, but a skepticism of rigid dichotomies; and an overall humility.

Id. at 1646. This is a perspective that is especially appealing to those who are familiar with the reality of a courtroom.

230. Frickey, *supra* note 118, at 1209 (discussing significance of practical reason in context of "dynamic" statutory construction in which statutory meaning can vary according to time and place (quoting ROBERT SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY 156 (1982))).

231. Judge Becker and Professor Orenstein, in an influential 1992 article, set out many problems with the language of the Federal Rules of Evidence and called for the creation of an Advisory Committee on the Rules of Evidence. *See* Becker & Orenstein, *supra* note 4, at 864-68. The Advisory Committee was in fact later established. *See* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 80 (1992) (approving recommendation to request Chief Justice to reactivate Advisory Committee). While I agree that the new Advisory Committee will help to clarify language that has posed problems, I am more concerned with the question of what a *court* should do when it is faced with competing interpretations of the language of an evidence rule.

232. *See* Posner, *supra* note 118, at 838-40; *see also* Seigel, *supra* note 116, at 1028-29 (stating that practical reasoning often reflects consensus of normative and descriptive statements).

233. FED. R. EVID. 803(16). Note that in another interpretative community, say of thirtysomethings, 20 years old would never be considered "ancient."

exceptions to the hearsay rule?[234] In this situation, the judge's rationale will become

> part of a dialogue or conversation among the individuals participating in a practical endeavor. For some period of time, the techniques of practical reason will lead different participants to incompatible conclusions. As to issues of this sort, practical reason will not yield a definitive answer because there is a lack of consensus. If the issue is particularly intractable, consensus might take years or even generations to develop. In the meantime, since action cannot be suspended, participants in the dialogue will act upon their individual practical judgments.[235]

Moreover, as part of this conversation, the judge's rationale is subject to criticism by advocates (appealing the decision or in arguing other cases), other judges, and scholars.[236]

The concept of a judge participating in a conversation or a dialogue rather than issuing a ruling on a difficult question of evidence may seem rather strange. The pace of most American trials does not seem to allow for the relaxed, thoughtful, deliberative kind of discourse connoted by a "conversation."[237] Indeed, the trial context appears to call for just the opposite: quick and decisive rulings, so that the trial may proceed.[238] While textualism and its "plain meaning" approach may seem more appropriate for the trial context, practical reasoning is the most appropriate. Practical reasoning takes into account both the need for speedy decisions and the need for more deliberation and argumentation on difficult issues. It does so through a recognition of the diverse sources of arguments over the meaning of a legal text and the different contexts faced by the speaker and audience.

Eskridge and Frickey identify several sources of arguments about the meaning of statutes,[239] and note that the Supreme Court resorts to them in a certain order, forming a "funnel of abstraction," moving from the most common and "concrete" source, the text itself, to more

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234. FED. R. EVID. 803(24), 804(b)(5); *cf.* United States v. Dent, 984 F.2d 1453, 1466-68 (7th Cir. 1993) (Easterbrook, J., concurring) (arguing that to admit hearsay under residual exception when it does not qualify under separate exception results in "slighting" Congress' specific language).

235. Seigel, *supra* note 116, at 1029.

236. *See* Seigel, *supra* note 116, at 1029.

237. *Cf.* Robert J. Lipkin, *Kibitzers, Fuzzies, and Apes Without Tails: Pragmatism and the Art of Conversation in Legal Theory*, 66 TUL. L. REV. 69, 109-11 (1991) (positing "conversationalism" as superior alternative to legal reasoning).

238. *Cf.* United States v. Williams, 809 F.2d 1072, 1087 (5th Cir. 1987) (noting that trial judge must "exercise tight control over the presentation of evidence to the jury" to maintain trial's pace).

239. *Cf.* Eskridge & Frickey, *supra* note 118, at 353-62.

abstract sources.[240] They argue that the Court seems to rely most heavily on textual language, then on original expectations of the drafters, the statute's purpose, the evolution of the statute, and finally, on current values.[241] Professor Cleary, the Reporter to the original Advisory Committee that drafted the Federal Rules of Evidence, argued for similar consideration of these sources in interpreting the Rules.[242]

The funnel of abstraction is a helpful concept in the evidence context. Text comes first, not because it "speaks for itself," but because it is the touchstone.[243] In federal court, when we need to know if evidence is hearsay we can all look to Rule 801.[244] While advocates, judges, and scholars may go on to argue about its "real" meaning, looking to the text first provides some degree of continuity and stability.[245] But the text of an evidence rule was never meant to be both the beginning and the end of the discussion.[246] The drafters of the rules understood that this was impossible.[247]

The next most likely source to be cited is the drafters' understanding of the rules,[248] as reflected in the Advisory Committee Notes and the reports of the House Judiciary Committee, the Senate Judiciary

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240. Eskridge & Frickey, *supra* note 118, at 353-62; *see also* Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1115 (1992) (confirming that Supreme Court does use sources of interpretation with frequency identified by Eskridge and Frickey's funnel of abstraction).

241. *See* Eskridge & Frickey, *supra* note 118, at 353-54.

242. *See* Cleary, *supra* note 149, at 909-17 (discussing sources of interpretation, including text of rule, draft of Rules transmitted by Court to Congress, preexisting common law, Advisory Committee Notes and other types of legislative history, Rules taken as whole, and context of adversary system).

243. *See* Eskridge & Frickey, *supra* note 118, at 354.

244. FED. R. EVID. 801.

245. Thus, first looking to the text of the rule satisfies practical concerns. *See* Cleary, *supra* note 149, at 911.

246. *See* Edmund M. Morgan, *Foreward* to MODEL CODE OF EVIDENCE 1, 7 (1942) ("[D]rafting fine-tuned rules of evidence to deal with every case was impossible.").

247. *See* Cleary, *supra* note 149, at 911. Professor Cleary criticizes the plain meaning approach by stating:

> If what is meant [by the plain meaning rule] is that meaning is to be ascertained by reading the statute with the aid only of a dictionary and such aphorisms of construction as *noscitur a sociis* and *ejusdem generis* as may be suitable, then it must be discarded as unrealistic. The slipperiness of meaning combines with the ingenuity and resourcefulness of the legal profession to render the evolution of a plain meaning by this approach unlikely in any disputed situation, and if one should appear the chance is greatly against its being acceptable. If, however, the plain meaning rule is read as mandating the text of the statute as the prime source of meaning to be read in such context as may be relevant, then plain meaning becomes a useful tool.

Id.

248. *See* Eskridge & Frickey, *supra* note 118, at 356-57.

Committee, and the Conference Committee.[249] This legislative history is the next best source of interpretation in the case of evidence rules because it represents the opinions of the evidence "experts" on what the rules mean and what they were intended to accomplish.[250] The views of the legal community, as reflected by precedents interpreting the rules, weigh in next as the most "persuasive" authority,[251] followed by the alteration of the rules' language and the scholarly community's analysis of the rules over time.[252] These sources, and the actual impact of the rules on the adversary process, all serve as alternative sources of arguments about what a particular rule means, providing additional support or "legs" for a decision one way or another.

Resort to the funnel of abstraction also addresses the problem of "countermajoritarian anxiety."[253] It allows the court to value the enacted text, and thus respect congressional or executive actions, while recognizing the unique quality of evidence rules.[254] The Federal Rules of Evidence are statutes, but statutes written mostly by and for the use of courts, a characteristic that provides a strong basis

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249. For the Federal Rules of Evidence, these are H.R. REP. NO. 650, 93d Cong., 1st Sess. (1973), *reprinted in* 1974 U.S.C.C.A.N. 7075; S. REP. NO. 1277, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051; and H.R. REP. NO. 1597, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 7098.

250. Textualists, such as Justice Scalia, often mock legislative history because it often represents the statements of young congressional staffers and special interest groups more than it represents the "intent" or the "purpose" of the Congress. *See* Frickey, *Big Sleep*, *supra* note 154, at 255. While this may be true, one could look at it in a different light. This legislative history may represent the thoughts of those who were the most knowledgeable about the legislation in dispute. Truly controversial legislation is unlikely to draw comments from only one side of the issue.

More important, whatever validity the textualist argument has for general types of legislation, it breaks apart when it comes to evidence rules, most of whose legislative history was created by "experts," distinguished scholars, lawyers, and judges appointed by the Supreme Court to its Advisory Committee. Indeed, this legislative history (in the form of Advisory Committee Notes) was reviewed by the Committee on Rules of Practice and Procedure, the Judicial Conference of the United States, and the Supreme Court itself before it transmitted the Rules and the Notes to Congress. Cleary, *supra* note 149, at 913. Moreover, the Notes "were carefully scrutinized by the involved congressional committees and subcommittees." *Id.* While many members of Congress are lawyers, one expects that the members of the House and Senate Judiciary Committees in particular are dominated by members of the legal profession. Professor Cleary regarded the congressional committee reports on the evidence rules to be "helpful and highly authoritative." *Id.* at 914; *see also* Eileen A. Scallen, *Interpreting the Federal Rules of Evidence: The Use and Abuse of the Advisory Committee Notes*, 28 LOY. L.A. L. REV. 1283 (1995).

251. *See* Zeppos, *supra* note 240, at 1114-15. Note the metaphors we use in the legal community; authority can be "binding" and "controlling" or it can be merely "persuasive." But what makes the authority "binding" is the persuasive argument that a precedent is sufficiently similar that it "controls" the result, or that a particular statute applies and "controls" the outcome. Our language reflects the classic dilemma of the tyrant's writ—do the texts control us or do we control the text through our arguments about it? *Cf.* STEINER, *supra* note 72, at 23.

252. *See* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 504-27 (1989).

253. *See supra* notes 156-58 and accompanying text.

254. *See supra* note 174 and accompanying text.

for looking for interpretative guidance beyond the language of the text.[255] This guidance is reflected in the House and Senate committee reports and the Advisory Committee Notes, as well as the common law development and treatment of the rules.

In developing the funnel of abstraction, Eskridge and Frickey focus on Supreme Court decisions.[256] But practical reasoning accommodates the special decisional and rhetorical situations facing a trial court and an appellate court as they interpret evidence rules. While the caseload of most courts is increasing, there can be no doubt that a trial court has much less time to rule on a question of evidence than an appellate court. Thus, a trial court, following a practical reasoning approach, will reach a result much like a textualist, relying primarily on a fast reading of the rule's text, and only occasionally resorting to extrinsic sources such as legislative history.[257] While the outcome may look the same, the rationale for the process is actually quite different. Strict textualists cut off the discussion after deciding that the text is "plain," and moderate textualists may cast an additional glance at the legislative history,[258] but the discussion ends there for the political reasons I discussed earlier.[259] Trial judges using practical reasoning may also cut off the discussion at text or legislative history, but generally only to get through the trial in a reasonable amount of time.

Moreover, while some trial judges might engage in arguments from the "plain meaning" of the rule, thoughtful trial judges know that they are operating not only from the text, but also from their

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255. *See* Cleary, *supra* note 149, at 910-14. Professor Cleary also viewed the Federal Rules as special statutes. He noted the extensive common law history surrounding the federal rules and its special audience: "[T]he Rules were working old ground, and ground that was near and dear to much of the profession. By way of comparison, civil rights and antitrust involve new ground, with no great accumulation of judge-made precedent, and regulate the behavior of clients rather than lawyers and judges." *Id.* at 909. He noted, however, that the rules were statutes, and that "[t]he primacy of the Congress with regard to procedural matters has never been seriously contested." *Id.* at 910. In addition, he tried to show that while the rules are subject to traditional tools of statutory interpretation, those tools were never meant to stifle what Cleary saw as an inevitable process of evolution:

> In principle, under the Federal Rules no common law of evidence remains. "All relevant evidence is admissible, except as otherwise provided . . . ." In reality, of course, the body of common law knowledge continues to exist, though in the somewhat altered form of a source of guidance in the exercise of delegated power.

Id. at 915 (quoting FED. R. EVID. 402). Thus, while the federal courts were no longer "bound" by case law existing before the passage of the federal rules, they could still be "persuaded" by it. *Id.*

256. Eskridge & Frickey, *supra* note 118, at 353 n.123.

257. A trial judge might, for example, take the time to consult legislative history or a scholarly treatise on a motion *in limine*, briefed just before or during the trial.

258. *See* Imwinkelried, *supra* note 4, at 269-71.

259. *See supra* notes 209-13 and accompanying text.

experience on the bench and in practice. They weigh the potential harm to the litigants from letting the evidence in or keeping the evidence out, and they undoubtedly weigh the likely effect that an erroneous ruling would have on the entire case on appeal.[260] These considerations are not of the kind used by textualists.[261]

A trial judge also faces less pressure to issue a full justification for her decision on a point of evidence. While a trial judge may state the basis or alternative grounds for her ruling for the benefit of an appellate court, time often does not permit extensive discussion. Today, it is accepted that an appellate court or the Supreme Court issues an opinion, justifying or explaining its decision.[262] But this was not always the case; early American courts did not engage in the kind of justification that modern courts do.[263] As the complexity of legal issues and the "countermajoritarian anxiety" of the courts has grown, judicial opinions have grown in length and complexity.[264]

A trial court, under time pressure, is much more justified in citing the text of a rule alone than is an appellate court, particularly the Supreme Court, which faces evidence questions only when they have continued to be hard, case after case. Courts of appeal and the Supreme Court should always be willing to look beyond text for the most complete and persuasive interpretation possible.[265] They have more of an obligation than a trial court to consider other sources of interpretation and to justify their decisions to use or to reject them. But what is the source of this obligation?

The responsibility of courts to engage in practical reasoning stems from the importance of their *ethos*, which in turn affects their ability to persuade and educate.[266] Aristotle's use of the term *ethos* can be translated as "character"[267] or "credibility."[268] Aristotle divided the sources of persuasion or "proofs" into two types, nonartistic and

260. That is, how much discretion do they have? Would this ruling be considered an abuse of discretion? If so, would it be harmless error?

261. *See supra* notes 209-13 and accompanying text.

262. *See* HAIG BOSMAJIAN, METAPHOR AND REASON IN JUDICIAL OPINIONS 29 (1992) (discussing utility of formal opinion in shaping appellate review).

263. *See id.* at 15-34.

264. *See id.*

265. *See infra* notes 302-637 and accompanying text. A longer Article could have compared the Supreme Court's efforts with those of lower courts, but it would not have been published in my lifetime.

266. *See* Eisgruber, *supra* note 110, at 1009 (discussing educative responsibilities of courts); *cf.* BOSMAJIAN, *supra* note 262, at 30 (writing that function of judicial opinion "is its contribution to the continuity of society").

267. ARISTOTLE, *supra* note 59, at 37 n.40.

268. GOLDEN ET AL., *supra* note 20, at 31.

artistic.[269] Nonartistic proofs include testimony or documents, while artistic proofs are provided through the speaker and her methods; "thus, one must *use* the former and *invent* the latter."[270] Aristotle further divided the artistic proofs into three types: *logos*, appeals based on reason and logic; *pathos*, appeals based on the emotions; and *ethos*, appeals based on the character or credibility of the speaker.[271] Today, *logos* is often elevated to the most important and noble part of persuasion,[272] but Aristotle stressed that the three elements were all essential and inexorably linked to successful persuasion.[273] Indeed, in Aristotle's view, if any aspect of persuasion dominated, it was *ethos*.[274]

A speaker begins with certain *ethos* in the eyes of audience members, which depends upon the speaker's prior interaction with the audience, the reputation of the speaker, the expertise the speaker possesses, the context of the speech, and the way the speaker conducts him- or herself even before the speech begins.[275] *Ethos* can then be built up or lost through the content of the speech.[276]

The Supreme Court's power rests upon its ability to persuade.[277] As a result, the development of its *ethos* is of central practical importance; if the Court wishes to have its opinions implemented, it can only do so by convincing its audience to respect them. While the Court brings to its task over two hundred years of experience as an institution, its *ethos* is at stake each time it speaks or issues an opinion. According to Aristotle, there is persuasion "through character whenever the speech is spoken in such a way as to make the speaker worthy of credence."[278]

The Supreme Court's *ethos* is important for a second reason. Many scholars have argued that the Court has a role as an educator, citing

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269. ARISTOTLE, *supra* note 59, at 37 n.37. Later writers referred to nonartistic and artistic proofs as extrinsic and intrinsic proofs, respectively. *Id.*

270. ARISTOTLE, *supra* note 59, at 37.

271. ARISTOTLE, *supra* note 59, at 37-38.

272. *See* KENNEDY, NEW HISTORY, *supra* note 20, at 11-12.

273. ARISTOTLE, *supra* note 59, at 38-39.

274. *See* ARISTOTLE, *supra* note 59, at 38. Aristotle appeared hesitant, however, to set out a hierarchy, writing that "character is almost, so to speak, the controlling factor in persuasion." *Id.*

275. ARISTOTLE, *supra* note 59, at 38. Aristotle himself did not give weight to the audience's prior knowledge of the speaker in evaluating the speaker's *ethos*, stressing that *ethos* was revealed and built through speech itself. *Id.* Professor Kennedy suggests that this is an historical anomaly, resulting from the Greek law that litigants had to represent themselves and thus often possessed no external authority. *Id.* at 38 n.43.

276. ARISTOTLE, *supra* note 59, at 38.

277. *See* Eisgruber, *supra* note 110, at 1005; *see also* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15-16 (1959).

278. ARISTOTLE, *supra* note 59, at 38.

Dean Rostow's point that the "Supreme Court is, among other things, an educational body, and the Justices are inevitably teachers in a vital national seminar."[279] While scholars may debate the content of the Court's "curriculum,"[280] they agree that the Court's "educative responsibilities . . . depend upon the excellence of its arguments."[281] While the Court may teach different "subjects" over time, it both reflects and alters its *ethos* by *how* it teaches, or *how* it argues. But then the question becomes, if the Court is an educator, who are its students?

The Supreme Court obviously has multiple audiences. The parties read the decision to see which side has won and why.[282] Lawyers in other cases will read a decision to see whether it supports their arguments or whether they will have to distinguish it away as, for example, "mere dicta."[283] There are, however, long-range audiences too. Courts sometimes address "people who reflect back on the controversy after the heat of conflict has passed."[284] Indeed, dissenting opinions, with no "binding effect" whatsoever, are directed at this audience. Included in this "class" of long-range audiences for judicial opinions are undergraduates and law students.[285]

Professor Eisgruber stresses the importance of the Court's educative responsibility toward this audience:

> [E]ven if only aspiring lawyers were to read the Court's opinions, the Court's teaching may significantly influence public opinion. Lawyers exercise considerable power in American society. If the Court were able to inculcate in tomorrow's most powerful lawyers a disposition to honor constitutional principles, that lesson could provide both the Court and the Constitution with significant protection in a crisis. These influential lawyers might, moreover, reiterate and spread the Court's lessons, in contexts ranging from client counseling to political speeches.[286]

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279. Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952); *see also* Eisgruber, *supra* note 110, at 962 n.2 (collecting citations to Rostow's claim by "liberals, conservatives, communitarians, republicans, and feminists").

280. *See* Galston, *supra* note 97, at 380-81.

281. Eisgruber, *supra* note 110, at 964.

282. *See* Eisgruber, *supra* note 110, at 1008; *see also* BOSMAJIAN, *supra* note 262, at 28. This highlights the rhetorical quality of a judicial opinion; if the parties were the only audience, a court might well issue just the actual judgment, i.e., affirmed, reversed, etc.

283. *See* BOSMAJIAN, *supra* note 262, at 34. Lawyers use this technique to avoid opinions that contradict their clients' needs, just as we sometimes try to dismiss an argument by labelling it "mere rhetoric." The irony is that we use the tool to try to destroy the effectiveness of the tool.

284. Eisgruber, *supra* note 110, at 1009.

285. Eisgruber, *supra* note 110, at 1009.

286. Eisgruber, *supra* note 110, at 1009.

While I believe that the project of identifying the core "constitutional principles" that the Court ought to teach is an ongoing one, Professor Eisgruber's observation that students learn the lessons of the Supreme Court through the example it sets echoes the classical rhetoricians, who were concerned with how to best educate the lawyer-citizen.[287] Isocrates, Aristotle, Cicero, and Quintilian all stressed that a student could become a "good" orator, in the sense of an ethical leader, by following the example of other "great" orators.[288] They emphasized that a speaker must cultivate moral excellence because of the lesson one's performance conveys to others.[289]

I see the impact of the current Supreme Court's lessons on my evidence students; it is not favorable. As do many evidence teachers, I teach the hearsay rule, its exceptions, and Supreme Court's cases interpreting the Confrontation Clause, in that order. By the time we study the Supreme Court opinions, my students are extremely critical (as are evidence scholars)[290] of the reliability rationales behind certain hearsay exceptions, such as "excited utterances."[291] Excited utterances are supposedly reliable because they are made without the time or presence of mind to fabricate a lie.[292] This rationale, however, does not account for the negative effect stress and excitement have on perception and memory, which has been well-documented for quite some time by social science research.[293] Yet my students read Supreme Court opinions that reiterate the traditional rationale for this exception[294] but fail to acknowledge the weakness of the rationale, and their cynicism is palpable. The Supreme Court's *ethos* is diminished by these cases. As a result, the Court both fails to persuade and abdicates its educative responsibilities.

The use of practical reasoning to interpret evidence rules can add to a court's *ethos* in a way that the other approaches to statutory interpretation do not, in part because practical reasoning stresses

287. *See* KENNEDY, CLASSICAL RHETORIC, *supra* note 20, at 33-35.

288. *See* KENNEDY, CLASSICAL RHETORIC, *supra* note 20, at 33.

289. *See supra* notes 51-58 and accompanying text.

290. *See, e.g.*, Eleanor Swift, *Smoke and Mirrors: The Failure of the Supreme Court's Accuracy Rationale in* White v. Illinois *Requires A New Look at Confrontation*, 22 CAP. U. L. REV. 145, 152 (1993) (criticizing Supreme Court's reliance on categorical reliability rationales of hearsay exceptions). Swift notes that "[m]any evidence classes in law schools are spent analyzing the *weaknesses* in the generalizations about declarants' sincerity, perception, memory and narrative ability that underlie the categorical hearsay exceptions." *Id.*

291. The "excited utterance" exception is found in FED. R. EVID. 803(2). For more on cases discussing this exception, see Maryland v. Craig, 497 U.S. 836, 857 (1990), and White v. Illinois, 502 U.S. 346, 354-56 (1992).

292. *White*, 502 U.S. at 354-56.

293. *See* Swift, *supra* note 290, at 154 n.38.

294. *See* Swift, *supra* note 290, at 152-54.

completeness and candidness. Completeness, which involves addressing all of the possible interpretations of a rule, is necessary because the most persuasive "construction" will have multiple "legs" on which to stand.[295] Moreover, as every law professor tries to teach, a "good" lawyer is the one who can see, and argue, all sides of an issue.[296] One should ask, therefore, whether the Court attempted to address all of the competing interpretations of a rule.

The need for candidness is related to the requirement of completeness. When there are competing and conflicting sources of interpretation, does the Court explain why it chooses one over the other?[297] Candidness increases a speaker's *ethos.* An audience is more willing to believe a speaker who it believes is telling the truth. Aristotle stressed this instrumental quality of *ethos*: "[W]e believe fair-minded people to a greater extent and more quickly [than we do others] on all subjects in general and completely so in cases where there is not exact knowledge but room for doubt."[298] The candor that marks a practical reasoning approach thus contributes to the integrity of the Court. Other scholars have argued for increased judicial candor on this ground.[299] An educator who is intellectually dishonest fails to set any kind of positive example for his or her students.

Of course, determining whether the Court is being candid is difficult, but discussing all possible interpretations would prevent the Court from distinguishing away a rationale that is actually its basis for decision. The Roman rhetorician Quintilian noted that "however we try to conceal it, insincerity will always betray itself, and there was never in any man so great eloquence as would not begin to stumble and hesitate as soon as his words ran counter to his inmost thoughts."[300] While Quintilian's observation is not correct in all cases, and determining candidness is difficult, his insight certainly holds true as to the Supreme Court's decisions involving evidence rules, for the Court virtually trips itself up, as I will discuss below.

Foundationalist approaches to interpretation, such as textualism, intentionalism, or purposivism, end the discussion prematurely by

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295. *See supra* note 230 and accompanying text; *cf.* ARISTOTLE, *supra* note 59, at 36 (defining rhetoric as discovery of *all* available means of persuasion).

296. This lesson is frequently misinterpreted as seeing "both sides" of an issue, ignoring the possibility that there may be more than two sides to a complex issue.

297. *See infra* notes 304-45 and accompanying text.

298. ARISTOTLE, *supra* note 59, at 38.

299. *See generally* David L. Shapiro, *Courts, Legislatures, and Paternalism,* 74 VA. L. REV. 519, 556 (1988); David L. Shapiro, *In Defense of Judicial Candor,* 100 HARV. L. REV. 731, 738 (1987); Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation,* 78 GEO. L.J. 353, 400 n.272 (1989).

300. GOLDEN ET AL., *supra* note 20, at 50 (quoting Quintilian) (internal quotation marks omitted).

asserting that there is "true" or "correct" interpretation of a rule. Although this kind of argumentation might seem to bolster the Supreme Court's *ethos* by suggesting that the Court "discovers" rather than "makes" law, such argumentation can actually diminish the Court's *ethos* because the persuasive power of such arguments depends on the suppression of competing arguments.[301] Competing arguments, however, are hard to suppress, and the Court's *ethos* wanes when they surface through a concurring or dissenting opinion or a work of legal scholarship.

The process of practical reasoning invites judges to be open about their argumentation and the criticism they may receive for their efforts. By adhering to the qualities of completeness and candor, a court shows that it is not discovering the true or correct interpretation, but that it is constructing the best interpretation possible in a particular context. As it does, the court builds upon its *ethos*; it increases the persuasiveness of its position and teaches us how we might approach similar problems. I have tried to describe practical reasoning in the abstract. In the spirit of pragmatism, however, it is best to explain practical reasoning by contrasting it with other schools of interpretation in the context of particular cases.

III. APPLYING PRACTICAL REASONING

In the late 1980s, the United States Supreme Court began to take a strong interest in the proper interpretation of the Federal Rules of Evidence. The Court consistently has held that only a "plain meaning," textualist approach to interpretation is appropriate for evidentiary rules.[302] I have chosen *Beech Aircraft Corp. v. Rainey*, *United States v. Salerno*, *Daubert v. Merrell Dow Pharmaceuticals*, *Williamson v. United States*, and *Tome v. United States* to suggest how a court might profit from a practical reasoning approach to legal language. I argue that *Beech Aircraft Corp.* provides a flawed paradigm of the practical reasoning approach, while *Salerno* highlights problems in applying the plain meaning approach to the Rules of Evidence. The Supreme Court's most recent cases, *Daubert*, *Williamson*, and *Tome*, show the Court struggling with its moderate textualism.[303] I argue that

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301. *Cf.* ARISTOTLE, *supra* note 59, at 38 n.44 (noting that some classical rhetoricians advised speakers to adopt one-sided approach because "fair-mindedness" gives impression of weakness, while Aristotle argued that appearance of fair-mindedness gives speaker initial advantage).

302. *See generally* Jonakait, *supra* note 4 (discussing effect of plain meaning standard on federal evidence law).

303. The Supreme Court's moderate textualist approach to interpretation of the Federal Rules of Evidence is explained in Imwinkelried, *supra* note 4, at 270-71.

practical reasoning would have produced better decisions in these cases.

A. Beech Aircraft Corp. v. Rainey: *A Flawed Paradigm*

In *Beech Aircraft Corp. v. Rainey*,[304] the Supreme Court interpreted Federal Rule of Evidence 803(8)(C), the public records and reports exception to the hearsay rule. The plaintiffs sued over the deaths of their spouses, a Navy flight instructor and her student, who were killed when their plane banked sharply to avoid another plane, lost altitude, and crashed.[305] The issue in this products liability case was whether the crash was caused by human error or faulty equipment manufactured by the defendants.[306] The defendants offered into evidence most of a Navy investigative report (the "JAG Report"), including a statement, labelled as an "opinion," that the most likely cause of the accident was pilot error.[307] The trial court admitted these "opinions" over plaintiffs' objection that "opinions" are not admissible under Rule 803(8)(C).[308]

Rule 803(8)(C) exempts the following from the prohibition on hearsay:

> records, reports, statements or data compilations, in any form, of public offices or agencies, setting forth . . . in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.[309]

The Court of Appeals for the Eleventh Circuit reversed and remanded for a new trial, holding that Rule 803(8)(C)'s language did not cover the JAG Report's evaluative conclusions or opinions.[310] The United States Supreme Court, in turn, reversed, holding that

> portions of investigatory reports otherwise admissible under Rule 803(8)(C) are not inadmissible merely because they state a conclusion or opinion. As long as the conclusion is based on a factual investigation and satisfies the Rule's trustworthiness

304. 488 U.S. 153, 156 (1988).
305. *See* Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 156 (1988).
306. *Id.* at 156-57.
307. *See id.* at 157-58.
308. *See id.* at 157-59.
309. FED. R. EVID. 803(8)(C).
310. Beech Aircraft Corp. v. Rainey, 784 F.2d 1523, 1528, 1530 (11th Cir. 1986), *aff'd on reh'g*, 827 F.2d 1498 (11th Cir. 1987) (en banc), *rev'd*, 488 U.S. 153 (1988).

> requirement, it should be admissible along with other portions of the report.[311]

In justifying its holding, the Court came as close as it ever has to reflecting the practical reasoning approach to interpreting evidence rules.

Justice Brennan's opinion for the Court relied on several different sources of interpretation. Justice Brennan introduced the opinion by acknowledging openly the countermajoritarian problem: "Because the Federal Rules of Evidence are a legislative enactment, we turn to 'the traditional tools of statutory construction' in order to construe their provisions,"[312] and the Court began by examining the text of the Rule.[313] The Court noted one court of appeals opinion that read Rule 803(8)(C) strictly, drawing a sharp dichotomy between "fact" and "opinion."[314] The Supreme Court, however, took a very different approach to the text.

Justice Brennan did initially resort to a dictionary definition, but only to show that there was more than one plausible interpretation of the "factual findings" language in Rule 803(8)(C):

> [I]t is not apparent that the term "factual findings" should be read to mean simply "facts" (as opposed to "opinions" or "conclusions"). *A common definition* of "finding of fact" is, *for example*, "[a] conclusion by way of reasonable inference from the evidence." Black's Law Dictionary 569 (5th ed. 1979). To say the least, *the language of the Rule does not compel us to reject the interpretation* that "factual findings" includes conclusions or opinions that flow from a factual investigation.[315]

Using a dictionary in this manner, rather than substituting the authority of a dictionary for the arguments of the Court, opened up

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311. *Beech Aircraft Corp.*, 488 U.S. at 170. Chief Justice Rehnquist and Justice O'Connor, concurring in part and dissenting in part, dissented only on a separate issue of impeachment. *Id.* at 176-78.

312. *Id.* at 163 (citation omitted).

313. *See id.*

314. *Id.* (citing Smith v. Ithaca Corp., 612 F.2d 215, 221-22 (5th Cir. 1980)). The court in *Smith* took an intentionalist approach, noting that Congress used the phrase "opinions" in the business records exception, FED. R. EVID. 803(6), but not in Rule 803(8)(C), and concluded that "[s]ince these terms are used in similar context within the same Rule, it is logical to assume that Congress intended that the terms have different and distinct meanings." *Smith*, 612 F.2d at 222. Justice Brennan, however, refuted that interpretation by looking to the development of Rule 803(6), noting that the Advisory Committee was concerned that there might be ambiguity as to whether diagnoses and test results ought to be admissible under the business records exception. *Beech Aircraft Corp.*, 488 U.S. at 163 n.8. In order to make clear that they were admissible, the Advisory Committee had specifically included language stressing the admissibility of "'diagnoses and opinions.'" *Id.* (quoting FED. R. EVID. 803(6) advisory committee notes). Justice Brennan notes that the Advisory Committee did not have the same concern in Rule 803(8)(C), and thus it was not strange that it did not use the same language. *Id.*

315. *Beech Aircraft Corp.*, 488 U.S. at 163-64 (emphasis added).

the discussion. Moreover, the Court went on to interpret the phrase "factual findings" in the context of the sentence in which the phrase appears: "Contrary to what is often assumed, the language of the Rule does not state that 'factual findings' are admissible, but that '*reports* . . . setting forth . . . factual findings' (emphasis added) are admissible."[316] Thus, using the common textualist approach of resorting to a dictionary and a close reading of the disputed phrase in its immediate context, the Court showed that the "language of the Rule does not create a distinction between 'fact' and 'opinion.'"[317]

Although the Court began with the text of the Rule, it did not end its discussion there. The Court went on to look to the legislative history of Rule 803(8)(C), only to find that the Judiciary Committees of both the House and Senate issued conflicting remarks on the exact issue in dispute and made no attempt to reconcile their views either through amending the Rule's text or through the Conference Committee report.[318] The House Judiciary Committee was quite clear that while it would not change the Rule as transmitted by the Court, it "intend[ed] that the phrase 'factual findings' be strictly construed and that evaluations or opinions contained in public reports shall not be admissible."[319] The Senate Judiciary Committee responded equally directly:

> The [Senate] committee takes strong exception to [the restrictive House interpretation]. We do not think it reflects an understanding of the intended operation of the rule as explained in the Advisory Committee notes to this subsection. . . . We think the restrictive interpretation of the House overlooks the fact that while the Advisory Committee assumes admissibility in the first instance of evaluative reports, they are not admissible if, as the rule states, "the sources of information or other circumstances indicate lack of trustworthiness."
>
> . . .
>
> The [Senate] committee concludes that the language of the rule together with the explanation provided by the Advisory Committee furnish sufficient guidance on the admissibility of evaluative reports.[320]

316. *Id.* at 164 (quoting FED. R. EVID. 803(8)(C)).
317. *Id.*
318. *Id.*
319. H.R. REP. NO. 650, 93d Cong., 2d Sess. 14 (1973), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7088, *and cited in Beech Aircraft Corp.*, 488 U.S. at 164-65.
320. S. REP. NO. 1277, 93d Cong., 2d Sess. 18 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7064, *cited in Beech Aircraft Corp.*, 488 U.S. at 165.

Thus, the Court in *Beech* was left with "no definitive guide to the congressional understanding," although it noted that "the Senate understanding is more in accord with the wording of the Rule and with the comments of the Advisory Committee."[321]

This section of the *Beech* opinion illustrates how the Court can use multiple, and sometimes conflicting, sources of interpretation to "construct" the meaning of a disputed phrase. At this point, the Court had stressed the importance of the text, while acknowledging that it cannot be the end of the discussion. The Court had searched for evidence of intent of the Congress that enacted the Rule. Also note that while one approach to the conflicting Committee reports might have been just to let them cancel each other out and rely on alternative sources, the Court tried to weigh each report against the other sources of interpretation in order to reach a resolution.[322] Here, it argued that the Senate report was the more persuasive authority because it was consistent with both the text and the Advisory Committee Notes.[323] Hence, the Court not only used multiple sources of interpretation, but also carefully and openly compared and evaluated them against each other. The Court's argumentation, even at this point, reflected both completeness and candidness.

The Court also exemplified this style of argumentation in its footnote regarding the weight given the Advisory Committee Notes in this situation: "As Congress did not amend the Advisory Committee's draft in any way that touches on the question before us, the Committee's commentary is *particularly relevant in determining the meaning of the document Congress enacted*."[324] This footnote is telling. The Court openly set out the degree of persuasive force it was giving to the Advisory Committee Notes, suggesting that while the Notes might always have some relevance, they are "particularly relevant" where Congress has made no effort to change the language the Committee drafted.[325] Moreover, the Court made no pretense that it was using the Notes as evidence of Congress' intent or Congress' purpose; the Court openly argued that it was engaged in constructing

321. *Beech Aircraft Corp.*, 488 U.S. at 165.

322. *See supra* note 321 and accompanying text (citing Court's comparative analysis of House and Senate interpretations, and finding Senate interpretation more consistent with text of Rule and comments of Advisory Committee).

323. *Beech Aircraft Corp.*, 488 U.S. at 165.

324. *Id.* at 165 n.9 (emphasis added).

325. *Cf. infra* notes 589-90 and accompanying text (discussing Justice O'Connor's opinion for the Court in Williamson v. United States, 114 S. Ct. 2431 (1994), which ignores respectful treatment previously given to Advisory Committee Notes in *Beech Aircraft Corp.*).

"the meaning of the document Congress enacted."[326] The Court thus acknowledged its responsibility to define the text of the evidence rule enacted by Congress: while Congress has its role, the Court has one as well.

The Court continued to argue in this manner in examining the Advisory Committee Notes, taking care to consider the entire context of the interpretative problem and being open about the values it assigned to the sources of meaning. The Court found "no mention of any dichotomy between statements of 'fact' and 'opinions' or 'conclusions'" in the Committee Notes, but found instead a concern with whether what the Committee called "evaluative reports" ought to be admissible.[327] Moreover, the Court looked not only to the Notes, but also to "the focus of scholarly debate on the official reports question prior to the adoption of the Federal Rules," which stressed the problem that evaluative reports often contained "the investigator's conclusions."[328]

The Court examined the precedents discussed by the Committee, and noted that all of the "evaluative reports" at issue stated conclusions.[329] The Court also noted that the Committee ultimately concluded that the Rule presumes the admissibility of "evaluative reports" unless "'sufficient negative factors are present.'"[330] The Court pointed to the Committee's "provision for escape" from admissibility in the final part of the Rule: the reports are admissible "unless the sources of information or other circumstances indicate lack of trustworthiness."[331]

Thus, the Court stressed the underlying practical concern of the evidentiary rule:

> This trustworthiness inquiry—and not an arbitrary distinction between "fact" and "opinion"—was the Committee's primary

326. *Beech Aircraft Corp.*, 488 U.S. at 165 n.9.

327. *Id.* at 166.

328. *Id.* at 166 n.10 (citing, as "influential article relied upon by the Committee," Charles T. McCormick, *Can the Courts Make Wider Use of Reports of Official Investigations?*, 42 IOWA L. REV. 363, 365 (1957)).

329. *Beech Aircraft Corp.*, 488 U.S. at 166.

330. *Id.* at 167 (quoting FED. R. EVID. 803(8) advisory committee notes).

331. FED. R. EVID. 803(8), *cited in Beech Aircraft Corp.*, 488 U.S. at 167. The Court cites the considerations that the Advisory Committee suggested might make an evaluative report untrustworthy: "(1) the timeliness of the investigation; (2) the investigator's skill or experience; (3) whether a hearing was held; and (4) possible bias when reports are prepared with a view to possible litigation." *Beech Aircraft Corp.*, 488 U.S. at 167 n.11 (citing FED. R. EVID. 803(8) advisory committee notes). The Court explicitly contrasted an earlier case, in which a JAG Report was found to be untrustworthy because of the inexperience of the investigator, with the case before it, in which the district court found the JAG Report to be trustworthy. *Id.* at 167-68 n.11 (citing Fraley v. Rockwell Int'l Corp., 470 F. Supp. 1264, 1267 (S.D. Ohio 1979)).

> safeguard against the admission of unreliable evidence, and it is important to note that it applies to all elements of the report. Thus, a trial judge has the discretion, and indeed the obligation, to exclude an entire report or portions thereof—whether narrow "factual" statements or broader "conclusions"—that she determines to be untrustworthy.[332]

The Court supported this functional or practical interpretation by looking to the structure of the rules and pointing to other "safeguards" of trustworthiness, such as Rules 401[333] and 403,[334] which allow a court to exclude irrelevant or unduly prejudicial evidence.[335]

The Court then turned to the broadest source of interpretation it has in the evidence context, the philosophy of the adversary system: "[I]t goes without saying that the admission of a report containing 'conclusions' is subject to the ultimate safeguard—the opponent's right to present evidence tending to contradict or diminish the weight of those conclusions."[336] While it may "go[] without saying," this assertion added to the sense that the Court had considered the full context of the interpretative problem. Moreover, it taught as it persuaded. By fully confronting all of the possible arguments for and against a particular interpretation of "factual findings," the Court practiced what it preached: that truth in the advocacy context is created through the presentation and evaluation of opposing views.

The Court's final argument was a remarkably candid one, flawed only by a careless remark in conclusion. The Court noted that, at this point, it had built a practical construction of Rule 803(8)(C) that did not call for "a distinction between 'fact' and 'opinion'"—an interpretation that was "strengthened by the analytical difficulty of drawing such a line."[337] After citing numerous scholars in support of this proposition,[338] the Court illustrated the practical difficulty of distinguishing between fact and opinion.[339] The Court noted that

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332. *Id.* at 167.

333. FED. R. EVID. 401.

334. FED. R. EVID. 403.

335. *Beech Aircraft Corp.*, 488 U.S. at 168. The Court built on this argument later in the opinion by referring to the opinion testimony provisions in Rules 702-705. *Id.* at 169 (citing FED. R. EVID. 702-705); *see also infra* note 345 and accompanying text (noting Court's willingness to interpret FED. R. EVID. 803(8)(C) broadly, in manner similar to broad interpretation of Rules 702-705).

336. *Beech Aircraft Corp.*, 488 U.S. at 168.

337. *Id.*

338. *Id.* (citing EDWARD W. CLEARY, MCCORMICK ON EVIDENCE 27 (3d ed. 1984); WILLARD L. KING & DOUGLAS PILLINGER, OPINION EVIDENCE IN ILLINOIS 4 (1942), *cited in* 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE 701-03 (1994); R. LEMPERT & S. SALTZBURG, A MODERN APPROACH TO EVIDENCE 449 (2d ed. 1982)).

339. *See id.* at 168-69.

the trial court admitted a statement in the JAG Report that "'[a]t the time of impact, the engine of 3E955 was operating but was operating at reduced power.'"[340] While the trial court presumably felt this was a "factual finding," the Court argued that it "could also be characterized as an opinion, which the investigator presumably arrived at on the basis of clues contained in the airplane wreckage."[341] The Court simply refused to "draw some inevitably arbitrary line between the various shades of fact/opinion that invariably will be present in investigatory reports."[342] One cannot imagine a more candid expression of the Court's approach to interpretation. The Court could have stated a bright line: facts are facts and opinions are opinions. Bright line distinctions convey a stronger image of certainty and predictability; but a bright line would have been a false image in this context, as the Court admitted. Its candor here is consistent with the historical and philosophical heritage of pragmatism, which in turn rests on the same awareness of the contingent nature of reality that marks much of classical rhetoric.

The Court, however, slid backward in its very next phrase, thus producing a flawed example of practical reasoning. Although it had looked far beyond the text, the Court insisted on resorting to the "plain language" argument:

> [W]e believe the Rule instructs us—as its plain language states—to admit "reports . . . setting forth . . . factual findings." The Rule's limitations and safeguards lie elsewhere: First, the requirement that reports contain factual findings bars the admission of statements not based on factual investigation. Second, the trustworthiness provision requires the court to make a determination as to whether the report, or any portion thereof, is sufficiently trustworthy to be admitted.[343]

The Court damaged its argument by attempting to make the Rule "speak for itself," suggesting a level of certainty about the proper interpretation of the Rule that the Court itself had shown did not exist.[344] The Court, however, immediately returned to constructing the Rule by resorting to alternative sources. In the next paragraph, the Court pointed to the "Federal Rules' general approach of relaxing the traditional barriers to 'opinion' testimony" in Rules 702-705, and

340. *Id.* at 169 (quoting Rainey v. Beech Aircraft Corp., 827 F.2d 1498, 1504 (11th Cir. 1987)).
341. *Id.*
342. *Id.*
343. *Id.* (quoting FED. R. EVID. 803(8)(C)).
344. *See supra* note 317 and accompanying text (noting Court's recognition that language of FED. R. EVID. 803(8)(C) creates no distinction between "fact" and "opinion").

noted that there is "no reason to strain to reach an interpretation of Rule 803(8)(C) that is contrary to the liberal thrust of the Federal Rules."[345]

Apart from the Court's use of the "plain language" argument, the opinion in *Beech Aircraft Corp. v. Rainey* shows how a court can argue for an interpretation under the practical reasoning approach. The Court's interpretation of Rule 803(8)(C) considered several sources: (1) the text, including both the disputed phrase "factual findings" and its context; (2) the legislative history, including both the congressional reports and the Advisory Committee Notes; (3) the case law, both before and after the creation of the Federal Rules; (4) the role of Rule 803(8)(C) in relationship to other Federal Rules of Evidence; (5) the context of the adversarial system; and (6) the practical impossibility of drawing a justifiable distinction between "factual findings" and "opinions" or "conclusions." Further, in considering the alternative bases for its construction, the Court constantly revealed the weight it was attaching to each source and why it was doing so. The resulting opinion was persuasive in the breadth and depth of its arguments. Moreover, the Court taught a lesson about the role of the Court in interpreting evidence rules and the limits of that interpretative power. By revealing the sources of its interpretation, by openly setting out its choice to value some more than others, and by acknowledging its practical constraints, the Court's opinion contributed positively to its *ethos.*

B. United States v. Salerno: *Plainly and Poorly Argued*

Unfortunately, the Court's subsequent performance in interpreting evidence rules has not been as admirable as the *Beech* decision. In this section, I contrast the Court's argumentation in *Beech* with its arguments in *United States v. Salerno.* In *Salerno,* the Court used the plain meaning approach to construe the "former testimony" exception to the hearsay rule.[346] This approach was flawed; applying the practical reasoning approach instead would have built the Court's *ethos.*

The defendants in *Salerno* were charged with a variety of federal criminal offenses arising from mob efforts to rig bidding on construction projects in Manhattan.[347] These construction contracts were

345. *Beech Aircraft Corp.*, 488 U.S. at 169.

346. FED. R. EVID. 804(b)(1).

347. United States v. Salerno, 112 S. Ct. 2503, 2505-06 (1992). The most serious counts alleged violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(b) (1988). *Salerno*, 112 S. Ct. at 2505-06.

then purportedly allocated to a "'Club' of six concrete companies in exchange for a share of the proceeds."[348] Two owners of the Cedar Park Concrete Construction Corporation testified before the grand jury under a grant of immunity.[349] Under questioning by the Assistant United States Attorney, the two owners of Cedar Park "repeatedly stated that neither they nor Cedar Park had participated in the Club."[350]

During the trial, the prosecution presented evidence from various sources that Cedar Park was a member of the Club.[351] In response, the defendants tried to have the two owners of Cedar Park repeat their exculpatory grand jury testimony.[352] The witnesses, however, refused, asserting their Fifth Amendment privilege.[353] The defendants then tried to have the witnesses immunized so that they would have to testify.[354] The prosecution refused to grant the witnesses immunity for their trial testimony, and the trial court was powerless to order the prosecution to do so.[355] The defendants then argued that the witnesses were "unavailable" to testify under the terms of Federal Rule of Evidence 804(a)(1),[356] and that they should be able to submit the grand jury transcripts under the former testimony exception to the hearsay rule, Federal Rule of Evidence 804(b)(1), which provides:

> The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

348. *Id.* at 2506.

349. *Id.* A note on grand jury practice and immunity may be helpful. In a federal grand jury proceeding, the witnesses are questioned under oath in the presence of the grand jury and court reporter, and only by the prosecution. GRAND JURY PROJECT, INC. OF THE NATIONAL LAWYERS GUILD, REPRESENTATION OF WITNESSES BEFORE FEDERAL GRAND JURIES 51.10(a) (3d ed. 1994). Witnesses or prospective defendants, known as "targets," may not be accompanied by counsel. *Id.* When a witness is granted "use immunity," he or she may no longer assert the Fifth Amendment protection against self-incrimination because the Government is precluded from using their grand jury testimony to prosecute them. *See* MCCORMICK ON EVIDENCE § 143 (John W. Strong ed., 4th ed. 1992). The immunity granted to the witnesses in *Salerno* thus forced them to testify.

350. *Salerno*, 112 S. Ct. at 2506.

351. *See* United States v. Salerno, 937 F.2d 797, 804 (2d Cir. 1991), *rev'd*, 112 S. Ct. 2503 (1992). The Court of Appeals noted that this evidence was crucial to the Government's case against the defendants. *Id.* at 808. Cedar Park was "one of the largest contractors in the metropolitan New York City concrete industry," and without Cedar Park, "there could be no 'club' of concrete contractors." *Id.* Without the "Club," the RICO charges would "simply dissolv[e]." *Id.*

352. *See id.* at 804.

353. *See id.*

354. *See id.*

355. *See id.*

356. FED. R. EVID. 804(a)(1) (declaring that witnesses are deemed unavailable if they assert existence of privilege not to testify, such as Fifth Amendment or attorney-client privilege).

> (1) *Former Testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.[357]

The defendants argued that this hearsay exception applied to grand jury testimony.[358]

The trial court reasoned that, in questioning a witness before the grand jury during the investigatory stages of a case, the Government did not have a "similar motive to develop the testimony" of the witness that it would have at trial.[359] The trial court thus excluded the testimony offered by the defendants, and the jury convicted the defendants on all counts.[360]

The Court of Appeals for the Second Circuit reversed,[361] holding that while the Government may have had no motive to impeach the witnesses, the Government's motive was irrelevant.[362] The court reasoned "that in order to maintain 'adversarial fairness,' Rule 804(b)(1)'s similar motive requirement should 'evaporat[e]' when the government obtains immunized testimony in a grand jury proceeding from a witness who refuses to testify at trial."[363] The United States Supreme Court granted certiorari to review the appellate court's interpretation of Federal Rule of Evidence 804(b)(1).[364]

Professor Jonakait has suggested that if the Supreme Court truly wished to adhere to the plain meaning standard, individuals with *no* knowledge of the history, policy, or reasons for the rules of evidence would be best suited to apply them (because they would not be distracted from plain meaning): "[W]e may now find it useful to turn to the neophyte in evidence to discover the content of the law."[365] Although Professor Jonakait was being facetious, Chief Justice Rehnquist seems to have taken him seriously as he assigned the newest Justice, Clarence Thomas, to write the 8-1 majority opinion.[366] The Supreme Court reversed and remanded the case, holding that because "we must enforce the words that [Congress]

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357. FED. R. EVID. 804(b)(1).
358. *See* United States v. Salerno, 937 F.2d at 804.
359. *See id.*
360. *See id.* at 802, 804.
361. *Id.* at 813.
362. *Id.* at 806.
363. *Salerno*, 112 S. Ct. at 2506.
364. 112 S. Ct. 931 (1992).
365. Jonakait, *supra* note 4, at 783-84.
366. *See Salerno*, 112 S. Ct. at 2509 (Stevens, J., dissenting).

enacted," each element of Rule 804(b)(1) must be satisfied; a court may not dispense with the "similar motive" requirement in the name of "adversarial fairness."[367] The Court remanded the case for consideration of whether the United States had a "similar motive," because the record was not fully developed on that issue.[368]

In using a plain meaning interpretative approach in *Salerno*, the Supreme Court damaged its *ethos*. The Court appeared to be hiding behind the "plain meaning" of the Rule instead of addressing the serious substantive problems with the application of the Rule in this case. Had the Court used a practical reasoning approach, it not only might have come to a different result, but also might have provided a more fulfilling justification, one that both persuaded and taught. In doing so, it would have protected and enhanced its *ethos*.

Justice Thomas began his argument with this fundamental premise:

> When Congress enacted the prohibition against admission of hearsay in Rule 802, it placed 24 exceptions in Rule 803 and 5 additional exceptions in Rule 804. Congress thus presumably made a careful judgment as to what hearsay may come into evidence and what may not. To respect its determination, we must enforce the words that it enacted. The respondents, as a result, had no right to introduce DeMatteis and Bruno's former testimony under Rule 804(b)(1) without a showing of "similar motive." This Court cannot alter evidentiary rules merely because litigants might prefer different rules in a particular class of cases.[369]

This statement represents a dramatic and fundamental shift from the Court's approach in *Beech*, in which the Court accepted its responsibility to actually determine "the meaning of the document Congress enacted."[370] Here, the Court reduced its role to a mere "enforcer" of the language Congress enacted. The *Salerno* defendants challenged this view, arguing that, in fact, courts do "alter" the rules as they are written.[371] The defendants pointed out that courts have implied a requirement that statements admitted under Rule 804(b)(1) be made under oath, even though that requirement is not stated in the Rule.[372] Justice Thomas responded, however, by arguing that an oath is implicit in the fact that the Rule applies to "testimony," which

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367. *See id.* at 2507.
368. *Id.* at 2508-09.
369. *Id.* at 2507.
370. Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 165 n.9 (1988).
371. *See Salerno*, 112 S. Ct. at 2507.
372. *See id.*

"refers only to statements made under oath or affirmation," and cited *Black's Law Dictionary* as authority.[373]

One might think it unnecessary to resort to a dictionary if the meaning of "testimony" were so plain. Justice Thomas was really engaging in the kind of textualism that tacitly acknowledges that the text is ambiguous and then looks to a dictionary for the "ordinary" or "most plain meaning." But as Professor Eskridge points out, this simply replaces legislative history with "dictionaries and grammar books . . . and the common sense God gave us."[374]

By choosing to rely on *Black's Law Dictionary*, Justice Thomas made a rhetorical choice to provide a certain definition without acknowledging or justifying his choice. Instead, he presented his argument as the only conceivable and natural result. Had Justice Thomas chosen to consult another favorite source of textualists, *Webster's Dictionary*, he would have learned that "testimony" could just refer to narratives given in the first person.[375] Although *Webster's Dictionary* initially supports Justice Thomas' reading, it also provides alternative meanings to "testimony": "2. evidence in support of a fact or statement; proof. 3. open declaration or profession as of faith."[376] Neither of those definitions of "testimony" requires that it be given under oath.[377]

Moreover, a recent article jointly authored by a law professor and several linguists stresses that dictionaries are inherently unreliable for determining the "most plain meaning."[378] They point out, for example, that "[d]ictionary-making is an inexact art, and it often happens that usages are common for some time before lexicographers happen to collect enough of them and realize that they represent a distinct usage, and decide to revise an entry to include that usage."[379] In addition, they stress the practical constraints on dictionary-makers: "Dictionary entries are severely limited by time and space constraints . . . . Whether a particular usage is listed first or last in an entry has no bearing on whether it is the 'plainest' meaning for

373. *Id.* (citing BLACK'S LAW DICTIONARY 1476 (6th ed. 1990)).

374. Eskridge, *supra* note 202, at 669.

375. WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 1467 (1989) [hereinafter WEBSTER'S DICTIONARY]; *see also* Note, *Looking it Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437 (1994) [hereinafter *Looking it Up*].

376. WEBSTER'S DICTIONARY, *supra* note 375, at 1467.

377. WEBSTER'S DICTIONARY, *supra* note 375, at 1467.

378. Cunningham et al., *supra* note 202, at 1614-15.

379. Cunningham et al., *supra* note 202, at 1615. The authors suggest that more empirical sources, such as searches of the NEXIS database or surveys, would provide more help in determining the "plainest" meaning of a word. *Id.*; *see also id.* at 1591.

the word in the context in question."[380] Another commentator notes that "[t]here are a wide variety of dictionaries from which to choose, and all of them usually provide several entries for each word. The selection of a particular dictionary and a particular definition is not obvious and must be defended on some other grounds of suitability."[381]

Where the Court in *Beech* used a dictionary entry to show that the phrase "factual findings" was subject to multiple interpretations, and went on to justify its construction,[382] the Court in *Salerno* used the dictionary to suggest a determinate meaning of the phrase "testimony."[383] Dictionaries have become, for the Court, a way of ending the conversation, but they are neither as authoritative nor as useful for determining the plain meaning of a term as the Court suggests. Moreover, if the Court fails to provide a justification for its use of a particular dictionary or definition within a dictionary,[384] it is not persuading and it is not teaching—it merely imposes its preferred meaning without justifying its preference.[385] This tactic not only violates the criteria of completeness and candor, thus damaging the Court's *ethos*, but also underscores the countermajoritarian problem; the Court has imposed its own value choice in the guise of enforcing the plain meaning of Congress' language.

Indeed, Justice Thomas' entire response to the defendants' argument that courts do alter the Federal Rules of Evidence through interpretation reflected the same incomplete and evasive techniques. Instead of openly discussing the essential problem raised by the defendants—how should the Court interpret the Federal Rules of

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380. Cunningham et al., *supra* note 202, at 1615; *see also* A. Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 71 (1994) (noting indeterminacy and circularity of dictionary definitions).

381. *Looking it Up*, *supra* note 375, at 1445.

382. Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 164 (1988); *see also Looking it Up*, *supra* note 375, at 1452 ("There is nothing wrong with employing dictionaries to identify the general outlines of word meanings and then relying on contextual arguments from text, structure, history, or policy to determine which meaning is appropriate.").

383. *See* United States v. Salerno, 112 S. Ct. 2503, 2507 (1992) (noting that word "testimony" "simply . . . refers only to statements made under oath or affirmation").

384. The Court in *Beech* expressly stated that it was using the dictionary definition of "factual findings" as an "example" of "a common definition." *Beech*, 488 U.S. at 164. While the dictionary was used as persuasive authority, it was given light weight; it was used only as an illustration of the common meaning of the phrase. *See id.*

385. *See Looking it Up*, *supra* note 375, at 1446 ("[D]ictionaries can mask fundamental arbitrariness with the appearance of rationality and make the subjectivity of judicial decisions even more difficult to confront.").

Evidence?[386]—Justice Thomas diverted the discussion into the validity of the defendants' specific example.[387]

In *Salerno*, the Court's most problematic arguments, however, were those that attempted to confront the defendants' contentions that "adversarial fairness" required the Court to dispense with a formal showing of "similar motive."[388] The defendants first pointed out that although evidentiary rules may specifically prohibit the introduction of certain evidence, a party may "waive" the protection of these rules by relying on the substance of that evidence in its case (known as "opening the door" to the evidence).[389] While there is no specific rule on waiver, the defendants argued that the United States had "opened the door" in this case by presenting testimony from other sources that Cedar Park was a member of the Club.[390] Justice Thomas simply refused to address the issue of "adversarial fairness" raised by this argument. He dodged it by contending first, that the waiver doctrine was limited to the rules of privilege[391] (which is an incorrect statement of the law[392]), and second, that even if the waiver doctrine did apply, the United States had not opened the door because it had not relied on the grand jury witnesses' testimony; instead, it had used other sources to make its point that Cedar Park was in the Club.[393] While this strict application of the waiver doctrine may be justifiable, Justice Thomas made no attempt to justify it; he just asserted it as dogma. He specifically failed to explain why it is equitable for the Government to raise and introduce evidence on an issue without allowing the defendants to rebut that evidence with other, exculpatory evidence in the Government's possession.

Justice Thomas also rejected the defendants' argument that "adversarial fairness" required that the Government be barred from suppressing the presentation of exculpatory evidence.[394] The defendants made a two-part argument on this issue. They cited a case in which the Court required the Government to turn over transcripts of a grand jury proceeding because "'it is rarely justifiable for the

386. Or, to paraphrase the Advisory Committee, how much "play" is there in the "joints" of the Federal Rules of Evidence? *See infra* note 686 and accompanying text (noting comments of Advisory Committee's chair on how Federal Rules of Evidence should be interpreted).
387. *See Salerno*, 112 S. Ct. at 2507.
388. *See id.*
389. *See id.* at 2507-08.
390. *See id.* at 2508.
391. *Id.* at 2507-08.
392. *See* MCCORMICK ON EVIDENCE, *supra* note 349, § 55.
393. *Salerno*, 112 S. Ct. at 2508.
394. *Id.*

prosecution to have exclusive access to relevant facts.'"[395] The defendants also advanced a practical policy argument: a "plain meaning" reading of the former testimony exception would allow the Government to manipulate the presentation of evidence through its power to grant immunity.[396] The defendants noted that if a witness inculpates a defendant in testimony given during a grand jury proceeding, the Government can immunize the witness, forcing the witness to testify at trial.[397] But if a witness exculpates a defendant, as the witnesses did in *Salerno,* the Government can simply refuse to immunize the witness and attempt to exclude the grand jury testimony on the basis of hearsay.[398]

Justice Thomas responded only by pointing out that the case cited by the defendants construed a rule of criminal procedure, not a rule of evidence.[399] He did not attempt to explain the significance of this distinction, merely reiterating that the language of Federal Rule of Evidence 804(b)(1) did not support the defendants' argument.[400] The Court therefore remanded the case to the court of appeals to determine whether there was a sufficient showing of "similar motive."[401]

On remand, a three-member panel of the Second Circuit Court of Appeals found that the Government did have a "similar motive" in questioning the witness before the grand jury as it would have at trial, and the court remanded the case to the trial court for further proceedings.[402] The Second Circuit, however, agreed to rehear the issue *en banc.*[403] The three-member panel decision was vacated when the Second Circuit determined that the Government did not have a sufficiently "similar motive,"[404] and upheld the defendants' convictions.[405]

The Court in *Salerno* appeared to believe that its argument was strengthened by its terse response to defendants, but in fact just the opposite was true. With its "plain" response, the Court missed its chance to persuade and teach. Would a practical reasoning approach

395. *Id.* (quoting Dennis v. United States, 384 U.S. 855, 873 (1966)).
396. *See id.*
397. *See id.*
398. *See id.*
399. *Id.*
400. *Id.*
401. *Id.* at 2509.
402. United States v. Salerno, 974 F.2d 231, 241 (2d Cir. 1992), *vacated on reh'g sub nom.* United States v. DiNapoli, 8 F.3d 909 (2d Cir. 1993) (en banc).
403. *DiNapoli,* 8 F.3d 909.
404. *Id.* at 915.
405. *Id.*

to this case have made a difference? I think it would have in several ways. Under the practical reasoning approach, Justice Thomas could not properly have suppressed relevant arguments. For example, he would have had to acknowledge that even dictionaries prove that words may have more than one plain meaning;[406] he would have been forced to acknowledge that the court-created waiver doctrine applies to evidence rules other than those of privilege, and that the waiver doctrine could be applied in a broader fashion than the one he suggested.[407] Moreover, he would have had to openly address the defendants' argument that the Government was unfairly manipulating the rules of evidence through strategic use of its power to grant or withhold immunity.[408]

Most important, however, under a practical reasoning approach, Justice Thomas would have had to justify his decision to value the language of the Rule over all other considerations.[409] Justice Thomas argued that the Court cannot alter the language passed by Congress, a view that reflects "countermajoritarian anxiety."[410] But Justice Thomas missed the opportunity to understand, explain, and teach what was really at stake. He could have differentiated rules of evidence from other statutes. As Professor Weissenberger notes, the Rules of Evidence are created by and for the use of courts.[411] The Supreme Court did not ignore its role in creating the Rules of Evidence in the *Beech* decision;[412] it should not have done so in *Salerno.* The Federal Rules of Evidence may no longer be the sole province of the Court, but neither are they the sole province of Congress.

By rigidly "enforcing" the text of the former-testimony exception, Justice Thomas failed to acknowledge the history and rationale behind the "similar motive" language, which was set forth in the court of appeals' opinion.[413] The Government objected to the introduction of the grand jury testimony because it was hearsay.[414] The general

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406. *See supra* notes 376-80 and accompanying text.

407. *See supra* notes 389-93 and accompanying text.

408. *See supra* notes 396-98 and accompanying text. Another potential factor in the Court's decision, which is unstated in its opinion, but was raised by one of the dissenting judges on the appellate court, was that a finding that the grand jury testimony was erroneously and prejudicially excluded would lead to a very expensive retrial. United States v. Salerno, 952 F.2d 624, 624 (1991) (Newman, J., dissenting from denial of rehearing en banc). The original trial took 13 months. *Id.*

409. United States v. Salerno, 112 S. Ct. 2503, 2507 (1992).

410. *See* Eskridge & Frickey, *supra* note 118, at 324.

411. Weissenberger, *supra* note 4; *see also supra* note 172.

412. *See supra* note 370 and accompanying text.

413. United States v. Salerno, 937 F.2d 797, 806-07 (2d Cir. 1991).

414. *See id.* at 804.

prohibition of hearsay rests on the belief that hearsay statements generally are unreliable for several reasons: (1) hearsay statements are not made under oath; (2) they are made outside the presence of the trier of fact who thus cannot evaluate the witness' demeanor; (3) they are not subject to cross-examination before the trier of fact; and (4) the statements have been made out of the presence of the opponent of the evidence.[415] Despite these problems, much hearsay is admissible through one or more of the many exceptions or exemptions to the hearsay rule.[416] The court of appeals in *Salerno* pointed out that, of all the possible exceptions, the former testimony exception relied on by the defendants "is arguably 'the strongest hearsay,' because of all the ideal conditions for the giving of testimony (oath, opportunity for cross-examination, presence of trier of fact, and presence of opponent), only the latter is absent."[417] In *Salerno,* even the latter was present; the Government (the opponent of the evidence) was the *only* party present to examine the grand jury witnesses.[418]

Moreover, Justice Thomas ignored the purpose of the specific "similar motive" language that the court of appeals had declined to enforce strictly.[419] According to the Advisory Committee, the function of the Rule's requirement that "the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination"[420] is to insure fairness in "imposing, upon the party against whom [the testimony is] now offered, the handling of the witness on the earlier occasion."[421] When this purpose is considered in light of the facts of this case, in which the former testimony was offered against the prosecution, which was the only party in the grand jury proceeding that had a chance to examine the witnesses, the Government's objection to admitting the grand jury testimony seems much less valid.[422] This argument goes to the heart of the defendants' assertion that "adversarial fairness" required that the language of the Rule not be applied blindly.

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415. *See generally* MCCORMICK ON EVIDENCE, *supra* note 349, § 245.
416. *See* MCCORMICK ON EVIDENCE, *supra* note 349, § 245.
417. *Salerno,* 937 F.2d at 804.
418. *Id.*
419. *See supra* note 413 and accompanying text.
420. FED. R. EVID. 804(b)(1).
421. *See* FED. R. EVID. 804(b)(1) advisory committee's note.
422. *See id.* ("[One should] recognize direct and redirect examination of one's own witness as the equivalent of cross-examining an opponent's witness.").

Additionally, unlike its approach in *Beech*, the Court in *Salerno* failed to set the evidentiary problem within the context of the adversary system.[423] The Court in *Salerno* ignored the observation in *Beech* that in addition to the Rules of Evidence, the adversary system provides its own safeguard: "the ultimate safeguard—the opponent's right to present evidence tending to contradict or diminish the weight of those conclusions."[424] The Court in *Salerno* failed to explain why this safeguard, so obvious in *Beech* that it almost went "without saying,"[425] no longer warranted attention.

While Justice Thomas was certainly entitled to rely on the text of the Rule, he should not have relied on it to the exclusion of all other possible sources of interpretation. To craft the most persuasive and candid opinion, Justice Thomas should have confronted all of the relevant bases for interpretation, and justified his decision to enforce rigidly the "similar motive" language. He did not even offer one of the most common rationales for "enforcing" the plain meaning of a rule: that the rule should, in theory, result in predictable and clear results.[426] Perhaps Justice Thomas neglected this rationale because it would have discredited his position; the Court in *Salerno* could not agree on whether there was evidence that the plain meaning of Rule 804(b)(1) had been satisfied.[427] Justice Thomas, writing for the majority, said that there was no evidence of a finding of "similar motive."[428] Justice Stevens, on the other hand, argued in dissent that the plain terms of the Rule *had* been met; he argued that the Government "clearly had an 'opportunity and similar motive' to develop by direct or cross-examination the grand jury testimony" of the witnesses.[429]

By failing to address all of the potential interpretations of the former testimony exception, the implications of the defendants' proffered interpretation, and the decision to enforce language that served no apparent purpose in this particular adversarial context, the Court in *Salerno* damaged its *ethos*. The Court attempted to "enforce" rather than persuade; it failed to live up to its educative role. The Latin roots of the word "education" mean "to lead or to draw out

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423. *See* United States v. Salerno, 112 S. Ct. 2503, 2507 (1992).
424. Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 168 (1988).
425. *Id.*
426. *See supra* text accompanying notes 209-13.
427. *Salerno*, 112 S. Ct. at 2508-09.
428. *Id.*
429. *Id.* at 2509 (Stevens, J., dissenting).

of."[430] The Court in *Salerno* was more intent on forcing the "similar motive" language upon this context than in drawing or leading out the meaning of the language for this context. In doing so, the Court was untrue to the historical and philosophical context of the Federal Rules of Evidence.

C. Daubert v. Merrell Dow Pharmaceuticals: *A Mixed Bag*

The Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals* is more faithful to the historical and philosophical roots of the Federal Rules of Evidence than the decision in *Salerno,* but the opinion ultimately fails by trying to blend a pragmatic approach with a plain meaning approach. This section explains why Justice Blackmun, the author of the majority opinion, and the Court as a whole, damaged their *ethos* through their approach, and how they might have addressed the problem better by using a consistent practical reasoning approach.

In *Daubert,* the Supreme Court considered whether, to be admissible, scientific evidence was subject to the test of "general acceptance" in the scientific community.[431] The question was whether this test, commonly known as the *Frye* test,[432] had been incorporated into the Federal Rules of Evidence.[433] The Supreme Court held that *Frye* had been superseded by the Federal Rules, and that trial court judges bear the responsibility of insuring that a scientific expert's testimony is relevant and reliable.[434]

In approaching the problem, Justice Blackmun stated, "We interpret the legislatively-enacted Federal Rules of Evidence as we would any statute."[435] In support of this statement, the Court cited *Beech Aircraft Corp. v. Rainey.*[436] This choice of support is interesting; Justice Blackmun instead could have cited *Salerno,* which the Court decided the previous term. Although Justice Blackmun did not comment on his choice, it was apt because the approach to statutory interpretation taken in parts of *Daubert* resembles *Beech* more than it does *Salerno.* Because Justice Blackmun was inconsistent in his approach to statutory interpretation in *Daubert,* however, he failed to

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430. WEBSTER'S DICTIONARY, *supra* note 375, at 454. This is an appropriate context for using a dictionary: providing the etymology of a word. The Latin roots of "educate" are "e" (out) and "ducere" (to draw or to lead). *Id.*

431. Daubert v. Merrell Dow Pharmaceuticals, 113 S. Ct. 2786, 2791 (1993).

432. *See* Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).

433. *Daubert,* 113 S. Ct. at 2793.

434. *Id.* at 2793, 2794-95.

435. *Id.* at 2793.

436. *Id.* (citing Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 163 (1988)).

produce an opinion as well-argued as *Beech*, reducing rather than building his personal *ethos* and that of the Court.

Justice Blackmun's opinion began very differently than Justice Thomas' in *Salerno*. At the outset, immediately following the statement of the facts and the issue, Justice Blackmun set forth the context of the scientific testimony problem.[437] He noted both the extensive criticism of *Frye* in law review commentary, and the debate in both case law and commentary as to whether *Frye* was incorporated in the Federal Rules of Evidence.[438] Only after setting out the context in this fashion did Justice Blackmun turn to the text of the Rules.[439]

Justice Blackmun looked both to Rule 402, the basic rule of admissibility,[440] and to Rule 702 itself.[441] There he found no reference to the *Frye* "general acceptance" test.[442] Then, without finding that these Rules were ambiguous, Justice Blackmun considered the possible meaning of the Rules by examining their drafting history.[443] Again, he found no reference to *Frye*.[444] But Justice Blackmun did not stop at textual or legislative history sources. He noted that reading a "general acceptance" test into the Federal Rules would be "at odds with the 'liberal thrust' of the Federal Rules and their 'general approach of relaxing the traditional barriers to "opinion" testimony.'"[445]

Soon afterward, Justice Blackmun endangered his credibility and that of the Court in dealing with the Court's case law concerning common law evidence principles. He began by distinguishing *United States v. Abel*,[446] in which the Court recognized a common law doctrine to allow the admission of extrinsic evidence of bias.[447]

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437. *Daubert*, 113 S. Ct. at 2792-93.

438. *Id.* at 2792-93 & nn.4-5.

439. *Id.* at 2793.

440. *Id.* Rule 402 provides: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible." FED. R. EVID. 402.

441. *Daubert*, 113 S. Ct. at 2794. Rule 702 provides: "If scientific, technical, or other 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." FED. R. EVID. 702.

442. *Daubert*, 113 S. Ct. at 2793-94.

443. *Id.* at 2794.

444. *Id.*

445. *Id.* (quoting Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 169 (1988)).

446. 469 U.S. 45 (1984).

447. United States v. Abel, 469 U.S. 45 (1984). Professor Imwinkelried argues that *Abel* is consistent with the plain language of Rule 402, which holds that all relevant evidence is admissible unless there is a rule, statute, or constitutional provision excluding it, because *Abel* involved a common law doctrine allowing the *admission* of evidence, rather than the *exclusion* of

Justice Blackmun argued that the common law doctrine applied in *Abel* was "entirely consistent" with Rule 402's general provision admitting all relevant evidence (unless specifically excluded by another rule, statute, or constitutional provision), and the Court "considered it unlikely that the drafters had intended to change the rule."[448] Justice Blackmun then noted that in *Bourjaily v. United States*,[449] which dealt with whether a conspiracy must be proven by independent evidence before the hearsay statement of a co-conspirator could be admitted,[450] the Court had failed to find this common law "independent-evidence" doctrine in the Federal Rules of Evidence and thus had held that the common law doctrine had been superseded by the Federal Rules.[451]

By dealing in this manner with *Abel*, and particularly with *Bourjaily*, Justice Blackmun failed to live up to the criteria of completeness and candidness. In doing so, he damaged his personal *ethos* and the *ethos* of the Court by exposing his argument to easy impeachment. While Justice Blackmun used *Bourjaily* to support his argument, in fact he had written a powerful dissent in *Bourjaily*, joined by Justices Brennan and Marshall, in which he had criticized the majority for its "overly rigid interpretive approach," and had argued for "a more complete analysis."[452]

In *Bourjaily*, Justice Blackmun clearly set forth his view of the Court's role in interpreting evidence rules:

> I agree that a federal rule's "plain meaning," when it appears, should not be lightly ignored or dismissed. The inclination to accept what seems to be the immediate reading of a federal rule, however, must be tempered with caution when, as in the case of a Federal Rule of Evidence, the rule's complex interrelations with other rules must be understood before one can resolve a particular interpretive problem.[453]

In the remainder of his dissent, Justice Blackmun performed his own "more complete analysis" of the co-conspirator exemption,[454] which is worth examining closely because it approximates the practical reasoning approach and provides a contrast to Justice Blackmun's approach in the remainder of his *Daubert* opinion.

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evidence. Imwinkelried, *supra* note 4, at 283-84.

448. *Daubert*, 113 S. Ct. at 2794.

449. 483 U.S. 171 (1987).

450. Bourjaily v. United States, 483 U.S. 171, 173 (1987); *see also* FED. R. EVID. 801(d)(2)(E).

451. *Daubert*, 113 S. Ct. at 2794.

452. *Bourjaily*, 483 U.S. at 187-88 (Blackmun, J., dissenting).

453. *Id.* at 187.

454. *Id.* at 188-202 (analyzing FED. R. EVID. 801(d)(2)(E)).

In *Bourjaily*, Justice Blackmun began not with the text of the co-conspirator exemption, but with the common law history and evolution of that exemption.[455] He engaged in an exhaustive discussion of pre- and post-federal rules case law, scholarly commentary, the Advisory Committee Notes, the American Law Institute's version of the exemption (which was rejected by the Advisory Committee), and the general legislative history. He concluded that there was no evidence that the drafters of the co-conspirator exemption intended to eliminate the independent-evidence requirement and that there was evidence that the drafters intended to incorporate that requirement.[456]

Justice Blackmun then confronted the *Bourjaily* majority's argument that "the plain meaning" of Federal Rule of Evidence 104(a) allows a judge to consider any nonprivileged evidence, including hearsay statements, in ruling on the admissibility of evidence.[457] The majority's view of its role was similar to the Court's view in *Salerno*: the Court is the enforcer, not the interpreter, of the congressional language in the Federal Rules of Evidence.[458] The majority in *Bourjaily* argued:

> Petitioner claims that Congress evidenced no intent to disturb the bootstrapping rule, which was embedded in the previous approach, and we should not find that Congress altered the rule without affirmative evidence so indicating. It would be extraordinary to require legislative history to confirm the plain meaning of Rule 104. The Rule on its face allows the trial judge to consider any evidence whatsoever, bound only by the rules of privilege. We think that the Rule is sufficiently clear that to the extent it is inconsistent with [Supreme Court case law recognizing the bootstrapping rule], the Rule prevails.[459]

Justice Blackmun responded to this argument by asserting that the Rules can only be construed in light of several interpretative sources and the interrelationship of the language and purposes of the Rules.[460] Thus, while Justice Blackmun was candid and open about

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455. *Id.* at 188-91.

456. *Id.* at 192-94 (citations omitted). Justice Blackmun might have noted that the Reporter of the Advisory Committee supported his argument. *See* Cleary, *supra* note 149, at 918.

457. *Bourjaily*, 483 U.S. at 178. Rule 104(a) provides:

> Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

FED. R. EVID. 104(a).

458. *See* United States v. Salerno, 112 S. Ct. 2503, 2507 (1992).

459. *Bourjaily*, 483 U.S. at 178-79.

460. *See id.* at 187 (Blackmun, J., dissenting).

the difficulty of the Court's role as interpreter of the Rules, he showed how the Court could legitimately reach a resolution:

> Although one must be somewhat of an interpretive funambulist to walk between the conflicting demands of these Rules in order to arrive at a resolution that will satisfy their respective concerns, this effort is far to be preferred over accepting the easily available safety "net" of Rule 104(a)'s "plain meaning." The purposes of both Rules can be achieved by considering the relevant preliminary factual question for Rule 104(a) analysis to be the following: "whether a conspiracy that included the declarant and the defendant against whom a statement is offered has been demonstrated to exist on the basis of evidence independent of the declarant's hearsay statements." This resolution sufficiently answers Rule 104(a)'s concern with allowing a trial court to consider hearsay in determining preliminary factual questions, because the only hearsay not available for its consideration is the statement at issue. The exclusion of the statement from the preliminary analysis maintains the common-law exemption unchanged.[461]

Justice Blackmun concluded this section of his dissent by confronting the majority's appeal to the "real world" need to use hearsay statements of co-conspirators in prosecutions, noting that this need is counterbalanced by the "real world" use of unreliable statements.[462] He advanced the practical argument that simply adding the hearsay statement to other evidence of conspiracy is no guarantee of reliability because the hearsay statement "will serve the greatest purpose, and thus will be introduced most frequently, in situations where all the other evidence that the prosecution can muster to show the existence of a conspiracy will not be adequate."[463] Thus, Justice Blackmun added his "real world" sensitivity to the realities of the criminal courtroom from the perspectives of both prosecutor and defendant.

Justice Blackmun's dissent in *Bourjaily* reflected complete consideration of the interpretative problem: respect for the language of Rule 104(a), without being a slave to it; respect for the history and purpose of the co-conspirator exemption as reflected in the scholarly commentary; respect for the intent of the Advisory Committee and Congress; respect for the Supreme Court precedents on the "bootstrapping" problem;[464] respect for the ten years of appellate court decisions that found the "independent evidence" requirement to be

461. *Id.* at 194-95.
462. *See id.* at 196-97.
463. *Id.* at 198.
464. Bootstrapping is the problem of relying on the content of the statement itself in determining whether the statement satisfies the hearsay exemption.

consistent with the Federal Rules; and respect for the practical realities of prosecutors' need to use hearsay evidence of conspiracies and defendants' need to protect themselves from unreliable evidence. Moreover, Justice Blackmun was honest about the difficulty of reconciling these elements while forging ahead and doing so in the best way he could. His approach was persuasive; it educated us by bringing out the complexity of the problem rather than cutting off the discussion. Because he wrote as a dissenter, however, Justice Blackmun built his own *ethos* (and that of Justices Brennan and Marshall, who signed his dissent) rather than the Court's.

Unfortunately, Justice Blackmun's argument in *Daubert* was not as consistent as his argument in *Bourjaily*. In *Daubert*, he vacillated between "a more complete"[465] contextual approach and a plain meaning approach.[466] At times he admitted to the Court's interpretative role, as he did in his *Bourjaily* dissent, but at other times he resorted to the role of "the enforcer."[467] As noted above, while he began his discussion within the context of the debate over *Frye*, he shifted in mid-opinion to the very type of textual argument[468] he criticized in *Bourjaily*. After citing the majority's approach in *Bourjaily*, Justice Blackmun quoted Federal Rule of Evidence 702,[469] which deals with expert testimony, and then commented that "[n]othing in the text of [Rule 702] establishes 'general acceptance' as an absolute prerequisite to admissibility. Nor does respondent present any clear indication that Rule 702 or the Rules as a whole were intended to incorporate a 'general acceptance' standard."[470]

Justice Blackmun did depart from the *Bourjaily* majority's approach, looking beyond the text and noting that the drafting history made no mention of *Frye*.[471] Venturing into more abstract sources of interpretation, Justice Blackmun noted that the restrictive *Frye* requirement of "'general acceptance'" would conflict with the "liberal thrust" of the Federal Rules and their "general approach of relaxing the traditional barriers to 'opinion' testimony."[472]

465. *Compare id.* at 188.

466. Daubert v. Merrell Dow Pharmaceuticals, 113 S. Ct. 2786, 2793-94 (1993).

467. United States v. Salerno, 112 S. Ct. 2503, 2507 (1992); *see Daubert*, 113 S. Ct. at 2795.

468. *Daubert*, 113 S. Ct. at 2794 ("Nothing in the text of this Rule establishes 'general acceptance' as an absolute prerequisite to admissibility.").

469. *See* FED. R. EVID. 702.

470. *Daubert*, 113 S. Ct. at 2794.

471. *See id.* at 2790.

472. *Id.* (quoting Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 169 (1988)). *But see* David L. Faigman et al., *Check Your Crystal Ball at the Courthouse Door, Please: Exploring the Past, Understanding the Present, and Worrying About the Future of Scientific Evidence*, 15 CARDOZO L. REV. 1799, 1810-11 (1994) (arguing that *Frye* is not inherently more restrictive test than Federal Rules

Justice Blackmun did not mention that the majority of courts of appeals had found that the Federal Rules of Evidence incorporated *Frye*.[473] Nor did he confront his own argument in *Bourjaily* that the silence of the Advisory Committee regarding the "independent evidence" rule was circumstantial evidence that they incorporated the rule rather than rejected it.[474] Thus, while he engaged in "a more complete" analysis than Justice Thomas did in *Salerno*, or Chief Justice Rehnquist did in *Bourjaily*, Justice Blackmun was neither as complete nor as candid about the difficulty of his interpretative problem in *Daubert* as he could have been,[475] and as a result, his approach became more problematic as the opinion continued.

Had Justice Blackmun's argumentation reflected the analysis in *Salerno*, he could have stopped, and should have stopped, once he failed to find "general acceptance" in the language of the Rules. But Justice Blackmun did not follow the *Salerno* approach and, much to Chief Justice Rehnquist's displeasure, did not stop.[476] Given the raucous debates over the appropriateness of expert testimony,[477] Justice Blackmun appears to have been determined to provide some limitations on the admissibility of expert testimony. Yet, he did so by inexplicably resorting, albeit surreptitiously, to a "plain meaning" approach.

Justice Blackmun argued that scientific expert testimony must be relevant to be admissible and, to be relevant, scientific testimony must be reliable.[478] The reliability of scientific testimony, in Justice

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approach).

473. *See* Faigman et al., *supra* note 472, at 1809-10.

474. *See* Bourjaily v. United States, 483 U.S. 171, 194-95 (Blackmun, J., dissenting).

475. *See* Paul C. Giannelli, Daubert: *Interpreting the Federal Rules of Evidence*, 15 CARDOZO L. REV. 1999, 2019 (1994). Professor Giannelli writes:

> The Supreme Court should have acknowledged that Congress and the federal drafters had simply overlooked *Frye*, and then proceeded to decide the issue on the merits. In this respect, Judge Becker's opinion in *Downing* is more convincing: "We conclude that the status of the *Frye* test under Rule 702 is somewhat uncertain, but reject that test for reasons of policy." This approach would have compelled the Supreme Court to consider the justifications underlying the *Frye* rule, and then determine whether the reliability approach is superior.

Id. (quoting United States v. Downing, 753 F.2d 1224, 1232 (3d Cir. 1985)).

476. *See Daubert*, 113 S. Ct. at 2798. Chief Justice Rehnquist, joined by Justice Stevens, dissented from this section of the opinion. *Id.* at 2799 (asserting that substance of briefs dealt more with scientific interpretation than statutory interpretation and therefore beyond scope of judiciary). He argued that the guidance the majority offered, beyond resolving the question presented, could only raise more problems and confusion. *Id.* at 2800 (questioning whether judges can assume role of "amateur scientist" when ruling on admissibility of evidence).

477. *See* Faigman et al., *supra* note 472, at 1811 (pointing to work by "[v]arious commissions, committees, task forces," and "educational programs," as well as "[proposed] rule changes," and "litigation" as evidence of debates over admission of expert testimony).

478. *Daubert*, 113 S. Ct. at 2795.

Blackmun's view, could only be determined through the scientific method.[479] How did he know this? First, Rule 702 refers explicitly to "scientific . . . knowledge,"[480] which suggests that the testimony has to be based on "the methods and procedures of science."[481] Moreover, he turned to *Webster's Third New International Dictionary* to note that the term "knowledge" applies "to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds."[482] Justice Blackmun asserted that "in order to qualify as 'scientific knowledge,' an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation— i.e., 'good grounds,' based on what is known."[483]

Justice Blackmun set forth four nonbinding factors to help a trial court evaluate whether scientific testimony is relevant and reliable. First, the court should determine whether the scientific evidence has been tested for "'falsifiability, or refutability, or testability.'"[484] Second, the court should look to see "whether the theory or technique has been subjected to peer review and publication."[485] Third, the court should check "the known or potential rate of error . . . and the existence and maintenance of standards controlling the technique's operation."[486] Finally, Justice Blackmun "resurrected" *Frye*'s "general acceptance" standard, noting that "[w]idespread acceptance can be an important factor" in holding a particular piece of evidence to be reliable.[487]

This part of Justice Blackmun's opinion was the most disappointing. He made the judge the "gatekeeper" for scientific evidence. In doing so without adequately explaining why,[488] Justice Blackmun utilized the very plain meaning approach he criticized in *Bourjaily*,[489] and at the same time demonstrated the incoherence of a "pure" textual

479. *See id.* at 2795-96 n.9 ("In a case involving scientific evidence, evidentiary reliability will be based upon scientific validity.").

480. FED. R. EVID. 702.

481. *Daubert*, 113 S. Ct. at 2795.

482. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1252 (1986), *quoted in Daubert*, 113 S. Ct. at 2795.

483. *Daubert*, 113 S. Ct. at 2795.

484. *Id.* at 2796 (quoting KARL POPPER, CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE 37 (5th ed. 1989)). We might assume that the Court meant to include replication of results, as that is also part of the scientific method.

485. *Id.*

486. *Id.* (citation omitted).

487. *Id.*

488. Justice Blackmun chastised Chief Justice Rehnquist for recognizing that the judge has a "gatekeeping" role without explaining "the nature and source of the duty." *Id.* at 2794 n.7. Yet one can make a similar criticism of Justice Blackmun.

489. Bourjaily v. United States, 483 U.S. 171, 186-88 (1987) (Blackmun, J., dissenting).

reading of evidence rules. Justice Blackmun just asserted that, under Rule 104(a), the determination of reliability was for the trial judge.[490] He did not explain why Rule 104(a) applied. Moreover, he did not discuss the possibility that the relevance of scientific testimony could be a question for the jury under Rule 104(b).[491]

Professor Jonakait, writing three years before *Daubert*, predicted that the "plain meaning" interpretation of Rule 104 would make the question of scientific evidence a question for the jury under Rule 104(b):

> The problem is that someone has to determine whether a scientific test is reliable before a juror can rely on it. This preliminary issue seems difficult, especially because trial judges will seldom have the expertise to assess scientific worth, but the solution to this difficulty under the plain-meaning standard is that the judge does not decide scientific reliability. The admission of scientific evidence is a question of conditional relevancy. Testimony based on the scientific test aids the jury if it is relevant; it is relevant only if the test is reliable. . . . The trial judge only "decides whether the jury could reasonably find the conditional fact." Therefore, relevant scientific evidence based upon tests of uncertain accuracy and validity are admissible if the jury could reasonably find the tests to be reliable.[492]

As Professor Jonakait's argument points out, Justice Blackmun's conclusion that the relevance of scientific testimony was for the judge to decide is far from obvious and warrants more discussion than it received.[493] As it stands, Justice Blackmun's conclusion did not rest on an argument; he simply chose to enforce the language of Rule 104(a).

Although there may be an explanation for Justice Blackmun's strategy, Justice Blackmun's approach reflects negatively on his *ethos* as well as the Court's *ethos*. Justice Blackmun's conclusion that the trial judge must decide the admissibility of scientific testimony under Rule 104(a) appears to contradict the Court's holding in *Huddleston v. United States*.[494] In *Huddleston*, the Supreme Court held that the

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490. *Daubert*, 113 S. Ct. at 2795 (citing FED. R. EVID. 104(a)).
491. *See* FED. R. EVID. 104(b).
492. Jonakait, *supra* note 4, at 767 (quoting Huddleston v. United States, 488 U.S. 681, 690 (1988)).
493. *See* Bert Black et al., *Science and the Law in the Wake of* Daubert: *A New Search for Scientific Knowledge*, 72 TEX. L. REV. 715, 748 (1994) ("The convoluted structure of Rule 104 seems to indicate at least the possibility that disputed scientific evidence might be admitted conditionally, subject to a jury's finding it valid and helpful. *Daubert*, however, does not even consider this possibility.").
494. 485 U.S. 681 (1988).

admissibility of evidence of acts by the defendant, offered to prove a material issue other than character, is controlled by Rule 104(b) rather than Rule 104(a).[495] Chief Justice Rehnquist, writing for the majority, reasoned that "other act" evidence is admissible only if relevant, and it "is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor."[496] He pointed out that where the relevance of a piece of evidence depends on a finding of fact, the issue is left to the jury under Rule 104(b), providing the jury could reasonably find that fact.[497] Chief Justice Rehnquist rejected the defendant's argument that because other or "similar" act evidence carries an obvious danger of unfairly prejudicing the jury, the trial court ought to decide the admissibility of the evidence under Rule 104(a).[498] Chief Justice Rehnquist added that the defendant's argument "superimposes a level of judicial oversight that is nowhere apparent from the language of" Rule 404(b).[499] Thus, the Supreme Court held that the evidence of the other act was to be admitted if there was sufficient evidence to support a finding by the jury that the defendant committed the other act, and that there actually was such a showing in the case.[500]

In *Daubert*, Justice Blackmun squarely located the issue of scientific testimony within the concept of relevance.[501] He argued that, to be relevant, scientific testimony must be valid.[502] Moreover, he set out his "general observations" on how scientific validity is to be determined, but he did not explain or justify why these factors are to be examined by the judge rather than argued to the jury (assuming that enough evidence has been presented to support a finding of the validity of the scientific testimony).[503]

There are good arguments both for and against giving the judge the responsibility of determining whether scientific evidence is valid. One could argue that the determination of scientific validity is not a question of historical "fact" in the sense meant by Rule 104(b).[504]

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495. *Huddleston*, 485 U.S. at 689.
496. *Id.*
497. *Id.*; *see also* FED. R. EVID. 104(b) ("When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.").
498. *Huddleston*, 485 U.S. at 687.
499. *Id.* at 687-88.
500. *Id.* at 689.
501. *See* Daubert v. Merrell Dow Pharmaceuticals, 113 S. Ct. 2786, 2795 (1993).
502. *See id.*
503. *See id.* at 2796.
504. Thus, the determination of the scientific validity of expert testimony is unlike the issues in *Huddleston*, which dealt with the use of evidence of other acts of the defendant.

Also, one could argue that determining the scientific validity of an expert's theory is necessary for the judge to determine "the qualification of a person to be a witness"[505] under Rule 104(a). Finally, the Court had precedent for making this a Rule 104(a) determination. In *Bourjaily v. United States*, the Court had held that the admissibility of a co-conspirator's statement under the co-conspirator exception was to be decided by the judge under Rule 104(a): "Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court."[506] One could argue that the admissibility of expert testimony similarly falls under Rule 104(a). Had Justice Blackmun raised this argument, however, he would have been forced to reconcile the Court's decision in *Huddleston* (treating the admissibility of other act evidence under Rule 104(b)) with *both Bourjaily* and *Daubert*, making the Court's inconsistency even more apparent.

On the other hand, it is not obvious that Rule 104(b) is limited to determinations of historical fact, and even if it is, that scientific validity is not, at least in part, a question of historical fact. Moreover, one could point out that Rule 104(a) is "subject to the provisions of subdivision (b),"[507] suggesting that if an issue of qualification depends on a question of fact (as does scientific validity), then Rule 104(b) controls. Finally, scientific validity seems less like a mixed question of fact and law, as are those questions decided under Rule 104(a),[508] and more like a mixed question of fact and science. While the *Daubert* majority was "confident that federal judges possess the capacity to undertake this review,"[509] others, including Chief Justice Rehnquist, were less confident about the role of federal judges as "amateur scientists."[510]

Conversely, there are good arguments both for and against granting the jury the responsibility of determining the reliability (and hence, the relevance) of scientific evidence. There are the textual arguments that this role is or is not for the judge under Rule 104(a). As Professor Farrell suggests, however, there are political and societal

505. FED. R. EVID 104(a).

506. *Id.*, *quoted in* Bourjaily v. United States, 483 U.S. 171, 175 (1987).

507. *Id.*

508. *See id.*

509. *Daubert*, 113 S. Ct. at 2796.

510. *Id.* at 2796-800 (Rehnquist, C.J., concurring in part and dissenting in part) ("I defer to no one in my confidence in federal judges; but I am at a loss to know what is meant when it is said that the scientific status of a theory depends on its 'falsifiability,' and I suspect some of them will be too."); *see also* Margaret G. Farrell, Daubert v. Merrell Dow Pharmaceuticals, Inc.: *Epistemiology* [sic] *and Legal Process*, 15 CARDOZO L. REV. 2183, 2202 (1994) ("The Supreme Court's decision in *Daubert* calls for a discussion of new procedures, including the use of judicial assistants to bridge the gap between scientists and lawgivers.").

arguments to be considered in allocating the question of scientific validity to a judge or jury:

> In sociological and political terms, the debate over the admission of scientific evidence, particularly novel scientific evidence, can be seen largely as a struggle for power—a contest between the legal and scientific communities and, within the legal community, between judges and juries, over who will redistribute wealth. Those who hold the first, positivistic world view, . . . would contend that it is either unreasonable or unconscionable to require a party to compensate another's loss if, as a matter of scientific fact, there is no demonstrable connection between the two and the compensating party could neither have prevented nor ameliorated the loss. Requiring compensation in such a case would amount to nothing more than a random tax. If this view is accepted, then legal responsibility may be found, if and only if, it is based on scientific fact, and scientists will tell judges, juries, and lawyers when they may or may not find legal liability.
>
> If one holds the alternate, constructionist view, juries would be permitted to find a connection between the defendants' conduct and the plaintiffs' loss based, in part, on a sense of fairness, intuition, and community norms, a process not necessarily credited by scientists for their purposes. If so, then a finding of scientific fact (statistically significant association, for instance) is not a necessary condition to the finding of legal fact (proximate cause), and power is at least shared by the scientific and legal communities. This result is legitimate if we believe that a civil trial is not only a search for historical truth, but also a kind of popularly approved umpired game or ritual for the peaceful settlement of disputes.[511]

Professor Farrell's distinction between the competing epistemologies of positivism and constructionism, as applied to the scientific evidence problem, reflects the classical interpretation debate between the positivist view of a pure text "speaking for itself," and the constructionist view of a text being constructed through rhetoric. In Professor Farrell's view, Justice Blackmun's opinion in *Daubert* is unsuccessful because it mixes the two epistemologies, producing an incoherent opinion that fails to provide adequate guidance to lower courts.[512]

I agree that the *Daubert* opinion reflects inconsistent epistemologies. I have tried to show how this is revealed in Justice Blackmun's language, through his mixing of a plain meaning approach and a practical reasoning approach. My evaluation of the opinion, however, goes beyond the instrumental criticism that it fails to provide clear

511. Farrell, *supra* note 510, at 2205-06.
512. Farrell, *supra* note 510, at 2207.

guidance. I argue that, by trying to argue "both ways" without revealing the conflict, uncertainty, and difficulty with his position, Justice Blackmun's opinion is less clear and less persuasive, and his own integrity is damaged. Justice Blackmun demonstrated in his *Bourjaily* opinion that he is capable of a more complete and candid approach. Moreover, in failing to acknowledge the majority's retreat from the unanimous *Huddleston* decision, he allowed the Court's *ethos* to wane through its unjustified inconsistency.[513]

The defect in Justice Blackmun's approach is highlighted in his conclusion, where he tried to ameliorate the concerns raised by both parties. For the defendant, who opposed the abandonment of *Frye*'s "general acceptance" test, Justice Blackmun pointed out the elements of the adversarial system traditionally used to test legal evidence and prevent juries from reaching irrational results:

> Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence. Additionally, in the event the trial judge concludes that the scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true, the court remains free to direct a judgment, Fed. Rule Civ. Proc. 50(a), and likewise to grant summary judgment, Fed. Rule Civ. Proc. 56.[514]

While ordinarily these insights would be consistent with a practical reasoning approach, in that they consider the scientific evidence question in the context of other procedural rules and the adversarial system in general, here Justice Blackmun merely highlighted his inconsistency. These "conventional devices," which serve as the adversarial system's "safeguards," would justify giving the role of determining the reliability of the scientific evidence, and thus its relevance, to the jury.[515]

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513. *Cf.* Ralph Waldo Emerson, *Self-Reliance*, *in* I MAJOR WRITERS OF AMERICA 510, 513 (Perry Miller ed., 1962) ("A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and devines.").

514. *Daubert*, 113 S. Ct. at 2798.

515. Moreover, Justice Blackmun failed to mention an additional safeguard that he had stressed earlier; Federal Rule of Evidence 403 allows a court to exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." *Id.* Justice Blackmun quoted with approval Judge Weinstein's opinion that "[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses." Jack B. Weinstein, *Rule 702 of the Federal Rules of Evidence Is Sound; It Should Not Be Amended*, 138 F.R.D. 631, 632 (1991), *quoted in Daubert*, 113 S. Ct. at 2798.

Justice Blackmun then turned to the concerns of the plaintiffs and amici.[516] In doing so, he tried to show sensitivity to the pragmatic and rhetorical quality of the adversarial system, but ended up embracing a conflicting epistemology. In responding to the plaintiff's and amici's concern that giving the judge the role of evaluating scientific evidence would "sanction a stifling and repressive scientific orthodoxy and will be inimical to the search for truth,"[517] Justice Blackmun argued that "there are important differences between the quest for truth in the courtroom and the quest for truth in the laboratory. Scientific conclusions are subject to perpetual revision. Law, on the other hand, must resolve disputes finally and quickly."[518] In stressing the practical needs of litigants and the judicial system, however, he did not explain why having a jury evaluate scientific evidence, together with the "safeguards" he listed, would *not* produce "a quick, final, and binding judgment."[519]

I must speculate at this point about Justice Blackmun's failure to explain, but I should point out that my need to speculate is a result of Justice Blackmun's failure to be complete and candid. In giving the judge rather than the jury the "gatekeeping role" over scientific evidence, Justice Blackmun demonstrated the adversarial system's love/hate relationship with the jury system. Society embraces the jury system because it allows us to recognize the importance of community values and other "extralogical" concerns in the resolution of disputes. At the same time, society fears the jury's potential for "irrational" and "inconsistent" verdicts.[520] Hence, we have the "jury control" devices Justice Blackmun discussed in *Daubert*: Federal Rule of Evidence 403, directed verdicts, and summary judgments.[521]

Justice Blackmun's decision to give the "gatekeeping role" to the judge may simply reflect a fear of uneducated and uneducatable juries dealing with complex issues of scientific evidence that has been manipulated by the opposing experts and advocates. While this fear might be well-founded if based on a comparison of the average juror's reasoning abilities with those of the average judge, Justice Blackmun did not make that case. Perhaps he did not make it because it smacks of elitism, which is a type of countermajoritarianism: unelected

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516. *See Daubert*, 113 S. Ct. at 2798.

517. *Id.*

518. *Id.*

519. *Id.*

520. *See* Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1376 (1971) (discussing difficulty juries have in employing intuition and other "humanizing functions" when faced with mathematical testimony).

521. *Daubert*, 113 S. Ct. at 2798.

federal judges elevating their wisdom over the uneducated masses.[522] Indeed, it is reminiscent of Plato's argument that rhetoric corrupts the masses through its tricks and appeals to emotion.[523] Justice Blackmun had shown in his *Bourjaily* dissent, however, that the world of the courtroom is not Plato's world of absolute Truth.

Resolving the substantive issue of whether judges or juries ought to evaluate scientific testimony is not the purpose of this Article. Rather, I seek to demonstrate that Justice Blackmun did not even try to explain his decision to have the judge determine that the evidence is scientifically valid before the jury can hear it. By simply asserting that it was a Rule 104(a) decision,[524] he avoided discussing the conflict between his opinion and the unanimous opinion of the Court in *Huddleston*. Moreover, Justice Blackmun failed to acknowledge his discomfort in allowing either the jury (because of his fear of the difficulty, if not impossibility, of educating juries on evaluating scientific evidence) or the scientists (because of their nonjudicial status) to determine the reliability, relevancy, and admissibility of scientific evidence. As a result, despite his occasional efforts to acknowledge the larger context of the scientific evidence problem,[525] Justice Blackmun failed to provide the completeness and the candidness that mark the practical reasoning approach.

Finally, in a footnote, Justice Blackmun created confusion over the Court's role in interpreting rules of evidence by comparing "judicial interpretation, as opposed to adjudicative factfinding" to "the scientific endeavor."[526] The difficulty is that one cannot tell what he meant by the "scientific endeavor." He could have meant the positivist tradition in science—the belief that "there are value-free, empirically ascertainable facts that exist independent of the minds that perceive them."[527] Or he could have meant what Professor

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522. *See* Farrell, *supra* note 510, at 2207 n.113. Professor Farrell discusses this problem:

> *Daubert* is as much a case of class struggle between common jurists and elite judges as a struggle between the scientific and legal communities. Judges have long exercised their prerogative to limit the normative judgments juries may make, both by providing them instructions on the law and by determining what evidence they may hear. To the extent that rules of evidence permit the liberal admission of evidence about the fact of causation and other facts, juries are freer to base their judgments on those facts and thus freer to impose liability and shift wealth from defendants to plaintiffs. To the extent that judges reflect the political philosophy of classes more economically advantaged than those of jury members, a class struggle can be seen in this microcosm as well.

Id.

523. *See supra* notes 40-41 and accompanying text.

524. *Daubert*, 113 S. Ct. at 2796.

525. *See id.* at 2796-98.

526. *Id.* at 2799 n.13.

527. Farrell, *supra* note 510, at 2189.

Farrell calls the constructionist tradition, and what I would call the rhetorical tradition, in science—the belief that "there are no objective, value-free facts, but only contingent statements of probability made by particular communities."[528] Justice Blackmun quoted Justice Cardozo's observation that "[t]he work of a judge is in one sense enduring and in another ephemeral. . . . In the endless process of testing and retesting, there is a constant rejection of the dross and a constant retention of whatever is pure and sound and fine."[529] Yet this citation seems to suggest a Platonic view of legal interpretation more than a rhetorical view. It suggests that in interpreting rules, judges are forever moving forward to "discover" the true meaning of the text, rather than engaging in a process of argumentation that "creates" the meaning of the text in a particular moment of time, ever subject to change. I am not sure this interpretation accurately captures Justice Cardozo's philosophy, but I am quite sure that it contradicts the view of interpretation Justice Blackmun stated in his *Bourjaily* dissent[530] and the view of interpretation Justice Brennan stated for the entire court in *Beech*.[531]

Justice Blackmun's opinion in *Daubert* failed to embrace consistently the pragmatic and classical rhetoric tradition that he expressed in his dissent in *Bourjaily* and that the Court expressed in *Beech*. To Justice Blackmun's credit, he refused to apply a strict plain meaning approach and did not end the discussion once he concluded that *Frye's* test of "general acceptance" was not incorporated into the Federal Rules of Evidence. Moreover, he demonstrated an awareness of the need to provide some guidance for determining the admissibility of scientific evidence, a pressing issue for the adversary system, and tried to provide it through his "general observations" on the scientific method. Chief Justice Rehnquist, and some commentators, have criticized the majority opinion in *Daubert* for the uncertainty and additional questions that its "factors" raised.[532] Yet had the *Daubert*

528. Farrell, *supra* note 510, at 2193.

529. *Daubert*, 113 S. Ct. at 2799 n.13 (quoting BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 178 (1921)).

530. *See supra* notes 452-63 and accompanying text.

531. *See supra* notes 304-45 and accompanying text.

532. *Daubert*, 113 S. Ct. at 2799-2800 (Rehnquist, C.J., concurring in part and dissenting in part); *see also, e.g.*, Robert G. Bloomquist, *The Dangers of "General Observations" on Expert Scientific Testimony: A Comment on* Daubert v. Merrell Dow Pharmaceuticals, Inc., 82 KY. L.J. 703, 728 (1994) (arguing that *Daubert* factors go beyond text of Rules and will create "profound ambiguity"); Alan W. Tamarelli, Daubert v. Merrell Dow Pharmaceuticals: *Pushing the Limits of Scientific Reliability—The Questionable Wisdom of Abandoning the Peer Review Standard for Admitting Expert Testimony*, 47 VAND. L. REV. 1175, 1197 (1994) (arguing that *Daubert* factors will create "problems" in federal district courts, lead to greater amount of scientific testimony, and waste time); Diana K. Sheiness, Note, *Out of the Twilight Zone: The Implications of* Daubert v. Merrell

majority adhered to the plain meaning approach, it simply would have invalidated *Frye*.[533] This would have resulted in far more questions and uncertainty; if *Frye* is gone, but relevancy and reliability are required, how should the courts measure it?

A true textualist would respond that this decision is the legislature's to make. "Plain" readings of the text put Congress' feet to the fire; if Congress does not like the Court's interpretation, Congress should change the rule.[534] But here is where the special quality of the Federal Rules of Evidence, statutes created by and for the use of the federal courts, becomes important. The Supreme Court, through its committees, is responsible for generating new versions of its rules of procedure.[535] It makes no practical sense for the Court to say that it cannot give guidance until it promulgates a revised rule on expert testimony. While the *Daubert* decision (regardless of how it was argued) would probably cause some uncertainty, Justice Blackmun's opinion was an attempt "to balance greater judicial access against the potential for abuse via manipulation of juries and the judicial system."[536]

His efforts were flawed, however, in that he attempted to ground the resolution of the scientific evidence problem in the language of Rules 702 and 104(a), arguing that they incorporate the scientific method (as described by his "general observations") and command the judge to use the method in evaluating scientific evidence.[537] While Justice Blackmun never said explicitly that he was using a textual approach in *Daubert*, he argued like a textualist, and a bad textualist at that,[538] and as a result, he failed to guide and persuade as well as he could have.

Finally, Justice Blackmun's *Daubert* opinion damaged his and the Court's *ethos* in its failure to acknowledge the difficulty of the problem, other possible resolutions of the problem, the opinion's inconsistency with precedent, and, above all, its abandonment of its

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Dow Pharmaceuticals, Inc., 69 WASH L. REV. 481, 488 (1994) (arguing that *Daubert* factors will create "confusion" if not applied consistently by courts).

533. *See supra* notes 467-70.

534. *See supra* notes 198-99.

535. *See supra* notes 161-68.

536. Kaushal B. Majmudar, Note, Daubert v. Merrell Dow: *A Flexible Approach to the Admissibility of Novel Scientific Evidence*, 7 HARV. J.L. & TECH. 187, 203 (1993).

537. *Daubert*, 113 S. Ct. at 2799-800 (Rehnquist, C.J., concurring in part and dissenting in part).

538. *See supra* notes 492-93 and accompanying text (discussing commentators' argument that "plain meaning" readings of Rules 702 and 104 would have sent issue of scientific evidence to jury under Rule 104(b)); *see also supra* notes 494-500 and accompanying text (noting that majority in United States v. Huddleston, 485 U.S. 681 (1988), required jury to determine admissibility of prior act evidence under Rule 104(b)).

earlier acknowledgment that it has a responsibility to interpret, rather than to enforce, the Federal Rules of Evidence. As any teacher knows, clearly contradicting oneself, and failing to clarify one's position, diminishes one's stature in the classroom. If the Court appears afraid, or worse, unwilling, to admit that it was wrong or that it has changed its mind, its persuasiveness is diminished and it teaches only unintentionally, by its bad example.

D. Williamson v. United States: *A Step Backward*

The Supreme Court's interpretation of the Federal Rules of Evidence in *Williamson v. United States* was, to be candid, a complete mess. The Court splintered 6-2-1-4-3, issuing four different opinions[539] discussing the interpretation of Federal Rule of Evidence 804(b)(3), the hearsay exception for statements against interest. The facts of the case presented a fairly common scenario in criminal cases. Reginald Harris, the central witness against the defendant, Fredel Williamson, was stopped in a rental car after a deputy sheriff noticed his car weaving on the highway.[540] Harris consented to a search of the car, which turned up nineteen kilograms of cocaine in two suitcases in the car's trunk.[541] After his arrest, Harris was interviewed twice by a Drug Enforcement Administration (DEA) Agent, Donald Walton, first by telephone and then in person.[542]

In the first interview, Harris told Agent Walton that he had obtained the cocaine from a Cuban in Fort Lauderdale, and that he was in the process of delivering it to Williamson at a certain dumpster that evening.[543] In the second interview, several hours later, Harris essentially repeated the same story, but when Agent Walton started to arrange a controlled delivery of the cocaine, Harris changed his story.[544] Harris then told Agent Walton that he had lied about the Cuban and the circumstances of the delivery because he was afraid of Williamson.[545] Harris said that actually he was transporting the cocaine to Atlanta for Williamson, that Williamson had been driving ahead of him in another car, and that Williamson had turned around and driven by Harris' car while it was being searched.[546] Thus,

539. *See* text accompanying *infra* notes 557-60.
540. *See* Williamson v. United States, 114 S. Ct. 2431, 2433 (1994).
541. *See id.*
542. *See id.*
543. *See id.*
544. *See id.*
545. *See id.* at 2434.
546. *See id.* at 2433.

Harris explained, it would be futile to try to arrange a delivery.[547] Harris did not want his story to be recorded, and he refused to sign a written version of his statement.[548]

Harris refused to testify at Williamson's trial, even after the prosecution granted him use immunity.[549] The court then ordered him to testify, and held him in contempt when he still refused.[550] At this point, the trial court held that Harris was "unavailable," and allowed Agent Walton to testify as to what Harris had said to him pursuant to Federal Rule of Evidence 804(b)(3), the hearsay exception for statements against interest.[551] Rule 804(b)(3) provides for the admissibility of a

> statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.[552]

Williamson was convicted of possessing cocaine with intent to distribute, conspiring to possess cocaine with intent to distribute, and traveling interstate to promote the distribution of cocaine.[553] He then appealed, arguing that the admission of Harris' statements violated Rule 804(b)(3) and the Confrontation Clause.[554] The

547. *See id.*

548. *See id.* at 2434.

549. *See id.*

550. *See id.*

551. *See id.* The trial court held that Harris was unavailable under Rule 804(a), that the statements "clearly implicated" Harris and were thus "against his penal interest," and, as required by Eleventh Circuit precedent, found that there were "sufficient corroborating circumstances in this case to ensure the trustworthiness of his testimony." *Id.* (citing FED. R. EVID. 804(a); United States v. Maurell, 788 F.2d 1524 (11th Cir. 1986)). Rule 804(b)(3) requires that there be corroboration where the declarant exculpates the accused, but does not contain an express requirement that there be corroboration where the declarant inculpates the accused. FED. R. EVID. 804(b)(3). Some courts of appeals, however, have found that such corroboration is required. *E.g.*, United States v. Taggart, 944 F.2d 837, 840 (11th Cir. 1991); United States v. Alvarez, 584 F.2d 694, 701 (5th Cir. 1978).

552. FED. R. EVID. 804(b)(3).

553. *See Williamson*, 114 S. Ct. at 2434.

554. *See id.*; *see also* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .").

Eleventh Circuit affirmed without opinion,[555] and the Supreme Court granted certiorari.[556]

The interpretation issue in *Williamson* resulted in four different opinions. Justice O'Connor delivered the opinion of the Court, which was joined in full only by Justice Scalia.[557] Justice Scalia also wrote a separate concurrence.[558] Justice Ginsburg wrote an opinion concurring in part and concurring in the judgment, joined by Justices Blackmun, Stevens, and Souter.[559] Justice Kennedy wrote an opinion concurring in the judgment, joined by Chief Justice Rehnquist and Justice Thomas.[560] These opinions, individually and collectively, highlight the need for the Supreme Court to develop a consistent approach to interpreting the Federal Rules of Evidence. They also indicate that the best approach is practical reasoning, to which only Justice Kennedy's opinion comes near, and yet still misses by a substantial margin.

As Justice Kennedy pointed out, all four opinions agreed that self-inculpatory statements are admissible under Rule 804(b)(3) because "reasonable people do not make those statements unless believing them to be true."[561] But the opinions divided over how broadly to apply the exception.[562] Justice O'Connor's opinion for the majority held that "only those declarations or remarks within the confession that are individually self-inculpatory" are admissible under Rule 804(b)(3).[563] The majority would exclude "non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory."[564] In so holding, the majority argued for a textualist approach to Rule 804(b)(3) that is not only impractical but also incoherent.

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555. United States v. Williamson, 981 F.2d 1262 (11th Cir. 1992), *vacated*, 114 S. Ct. 2431 (1994).

556. 114 S. Ct. 681 (1994).

557. *Williamson*, 114 S. Ct. at 2433-38.

558. *Id.* at 2438 (Scalia, J., concurring).

559. *Id.* at 2438-40 (Ginsburg, J., concurring in part and concurring in the judgment).

560. *Id.* at 2440-45 (Kennedy, J., concurring in the judgment).

561. *Id.* at 2441.

562. Justice Scalia wrote a separate concurrence to rebut Justice Kennedy's concern that the Court's narrow reading of Rule 804(b)(3) would render the exception useless. *Id.* at 2438 (Scalia, J., concurring) (quoting *id.* at 2443 (Kennedy, J., concurring in the judgment)). Justice Ginsburg, joined by Justices Blackmun, Stevens, and Souter, agreed with the approach of the majority, but concluded that Harris' statements were too self-serving to be against his interest because he made them after arrest and "in a way that minimized his own role and shifted blame to petitioner Fredel Williamson." *Id.* at 2439 (Ginsburg, J., concurring in the judgment). She concurred in the judgment to vacate the decision and remand because she believed that, while the admission of Harris' statements was an error, the Government should have had the chance to argue that it was harmless error. *Id.* at 2440.

563. *Id.* at 2434-35.

564. *Id.* at 2435.

Justice O'Connor began with the text, trying to analyze how broadly the Court should read Rule 804(b)(3)'s reference to a "statement."[565] Quite reasonably, she looked to the definition within the Rules of Evidence themselves, and found that the hearsay rule does have its own definition of "statement" in Rule 801(a)(1): "an oral or written assertion."[566] Justice O'Connor did not make the plausible argument that this definition does not address the problem of which statements can be considered against the penal or pecuniary interest of the declarant, and that it therefore requires alternative sources of interpretation. Instead, she simply resorted to the textualists' favorite source, *Webster's Third New International Dictionary*.[567] She noted that definition 2(a) defines a statement as "a report or narrative,"[568] so that "Harris' entire confession—even if it contained both self-inculpatory and non-self-inculpatory parts—would be admissible so long as in the aggregate the confession sufficiently inculpated him."[569] Justice O'Connor appears to have forgotten definition 2(a) after this section of the opinion, while Justice Scalia, writing a concurring opinion, seems to have missed it completely, stating that "a reading of the term 'statement' to connote an extended declaration . . . is unsupportable."[570] Justice O'Connor chose to focus on the narrower definition of "statement," which is 2(b) in *Webster's*: "a single declaration or remark."[571] This narrower definition "would make Rule 804(b)(3) cover only those declarations or remarks within the confession that are individually self-inculpatory."[572]

Justice O'Connor's next paragraph was extraordinary. She purported to find the solution in the text of Rule 804(b)(3), but ultimately justified her conclusion through arguments without a textual basis.[573] She admitted that "the text of the Rule does not directly" dictate how much of Harris' confession was admissible, and then conflated the textualist and purposive approaches, asserting that

565. *See id.* at 2434-35.

566. FED. R. EVID. 801(a)(1), *quoted in Williamson*, 114 S. Ct. at 2434.

567. *See Looking it Up*, *supra* note 375, at 1439 n.12 ("The various printings of Webster's Third New International Dictionary, with 40 references, and the sixth edition of Black's Law Dictionary, with 35 citations, have been most frequently cited over the past five Terms.").

568. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, *supra* note 482, at 2229, *quoted in Williamson*, 114 S. Ct. at 2434.

569. *Williamson*, 114 S. Ct. at 2434.

570. *Id.* at 2438 (Scalia, J., concurring).

571. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, *supra* note 482, at 2229, *quoted in Williamson*, 114 S. Ct. at 2434.

572. *Williamson*, 114 S. Ct. at 2434-35. Justice O'Connor followed this dictionary definition with the definitions of "assertion" (defined in *Webster's* as a "declaration") and "declaration" (defined in *Webster's* as a "statement"). *Id.* at 2435 (citations omitted).

573. *See id.* at 2435.

"the principle behind the Rule, so far as it is discernible from the text, points clearly to the narrower reading."[574] She then went on to restate the "commonsense" basis of Rule 804(b)(3), that "reasonable people, even reasonable people who are not especially honest" do not say things against their interest unless "they believe them to be true."[575] While this was an accurate paraphrase of Rule 804(b)(3), it did not explain why the text "points clearly to the narrower reading" of "statement." Justice O'Connor did not argue here; she just asserted that the notion that reasonable people do not make statements against their interest

> simply does not extend to the broader definition of "statement." The fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts. One of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature.[576]

Although Justice O'Connor invoked the text of the Rule to the extent of looking only to the text for the Rule's purpose, she had no difficulty in making comments about how one lies most effectively without tying her comments to the text of the Rule, or any text for that matter.[577]

Justice O'Connor continued to blend the textualist and purposive approaches, arguing that only individually self-inculpatory statements could be considered reliable because the text says they are the only statements a person would not make unless they were true.[578] She noted that Congress could have, "subject to the constraints of the Confrontation Clause," expanded Rule 804(b)(3) to cover more statements "based on their proximity to the self-inculpatory statements."[579] Here she revealed her view of the Court as the enforcer rather than the interpreter of the Rules of Evidence. She, and the Court, will take "the most faithful reading of Rule 804(b)(3)": the narrow interpretation limiting Rule 804(b)(3) to individual self-inculpatory statements.[580]

Justice O'Connor rejected Justice Kennedy's attempt to use the Advisory Committee Notes as evidence of the meaning of Rule

574. *Id.*

575. *Id.*

576. *Id.*

577. Indeed, it is difficult to comprehend why Justice Scalia, the textualist's textualist, signed on to Justice O'Connor's opinion.

578. *See Williamson*, 114 S. Ct. at 2435.

579. *Id.*

580. *See id.*

804(b)(3).[581] She quoted extensively from the Advisory Committee Notes, including the following passage:

> [T]he third party confession . . . may include statements implicating [the accused], and under the general theory of declarations against interest they would be admissible as related statements. . . . [Supreme Court cases] by no means require that all statements implicating another person be excluded from the category of declarations against interest. *Whether a statement is in fact against interest must be determined from the circumstances of each case.*[582]

Justice O'Connor found that this language "is not particularly clear,"[583] although she did not explain why it was unclear. Instead, she focused on the Committee's citation to Dean McCormick's treatise, *The Law of Evidence.*[584]

Justice O'Connor argued that McCormick's treatise supported her reading because, while he would admit "'contextual statements, neutral as to interest, giving meaning to the declaration against interest,'" he would exclude "self-serving" statements.[585] She did not explain how McCormick's treatise supported her narrow reading of the Rule. The only way it could have supported her conclusion is if all non-self-inculpatory statements are to be viewed as "self-serving." But, in fact, McCormick argued just the opposite, that the court should have a "certain latitude" to admit some statements, which he described as "contextual, . . . neutral as to interest, giving meaning to the declaration against interest."[586] Justice Kennedy pointed out that McCormick's position was that some statements, seemingly against interest, can actually be self-serving if they are made in a certain context, such as post-arrest statements to law enforcement officials.[587] Justice O'Connor did not explain why her narrow reading was consistent with, let alone supported by, McCormick, who would give a court discretion to admit some non-self-inculpatory statements.[588]

Justice O'Connor engaged in the classic textualist approach of asserting rather than arguing when she simply refused to decide "exactly how much weight to give the [Advisory Committee] Notes in

581. *Compare id.* at 2435-36 *with id.* at 2442 (Kennedy, J., concurring in the judgment).
582. FED. R. EVID. 804(b)(3) advisory committee's note (emphasis added), *quoted in Williamson*, 114 S. Ct. at 2435-36.
583. *Williamson*, 114 S. Ct. at 2436.
584. *See id.*
585. *Id.* (quoting CHARLES MCCORMICK, THE LAW OF EVIDENCE, § 256, at 551-53 (1954)).
586. MCCORMICK, *supra* note 585, at 551-53.
587. *Williamson*, 114 S. Ct. at 2444 (Kennedy, J., concurring in the judgment).
588. *See* MCCORMICK, *supra* note 585, at 553 (stating that decision to preserve self-serving and inculpatory parts of contextual statement is within court's discretion).

this particular situation" because "the policy expressed in the statutory text points clearly enough in one direction that it outweighs whatever force the Notes may have."[589] But because Justice O'Connor never discussed what weight the Notes might have, we never understand why the text, which she conceded earlier was "ambiguous,"[590] outweighs the express belief of the Advisory Committee that some "collateral," "contextual," or "related" statements would be admitted.[591]

Justice O'Connor stated that "whether a statement is self-inculpatory or not can only be determined by viewing it in context. Even statements that are on their face neutral may actually be against the declarant's interest."[592] She failed to understand, however, the implication of her comment and, thus, why her position was both impractical and inconsistent. The Advisory Committee, taking the classical rhetoric and pragmatic perspective, noted that a statement against interest could only be evaluated for reliability within a specific context.[593] The Committee cited Dean McCormick to illustrate that even some seemingly self-inculpatory statements could be self-serving, and therefore unreliable, depending on the circumstances surrounding the making of the statement.[594]

Justice O'Connor admitted that statements can only be interpreted contextually, but insisted that only "individual self-inculpatory statements" can be admitted.[595] What she refused to acknowledge was that the Rule, as it was written, was not expected to solve the interpretative problem posed by "collateral" statements. The language of the Rule (supported by the notes of its drafters) invites the judge considering a statement or statements in a specific case to rule based upon whether a reasonable person in this situation would have made the statement or statements if they were not true.

Justice O'Connor, purportedly following the text of Rule 804(b)(3), tried to make it say something it does not say: that the Rule is limited to "individually self-inculpatory" statements.[596] In doing so, she tried to duck the true interpretative problem. Although she paid lip service to the importance of "context," she rendered context irrelevant by

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589. *Williamson*, 114 S. Ct. at 2436.
590. *Id.* at 2435.
591. FED. R. EVID. 804(b)(3) advisory committee notes.
592. *Williamson*, 114 S. Ct. at 2436-37.
593. *See* FED. R. EVID. 804(b)(3) advisory committee notes.
594. *See id.* (citing MCCORMICK, *supra* note 585).
595. *Williamson*, 114 S. Ct. at 2436.
596. *See id.*

adopting the narrowest possible reading of the Rule.[597] By her inconsistency, Justice O'Connor diminished the persuasiveness and usefulness of both the Court's opinion and its *ethos.*

The major difference between Justice O'Connor's opinion for the Court and Justice Kennedy's opinion concurring in the judgment is that while the majority opinion excluded *all* statements that are not "individually self-inculpatory" (the majority would admit no "collateral" statements),[598] Justice Kennedy argued about which collateral statements would be admissible.[599] Though Justice Kennedy drew on a much wider variety of interpretive sources and was more candid about the difficulty of the task, he too failed to understand the historical and philosophical perspective behind Rule 804(b)(3), and indeed, the Rules generally.

Justice Kennedy began by quoting the text of Rule 804(b)(3), but he quickly moved to the scholarly debate on the real issue presented by the case: whether statements that are "collateral" to self-inculpatory statements are admissible.[600] He noted that there were three general views of the problem. Dean Wigmore took the broad approach, admitting all statements related to the statement against interest.[601] Dean McCormick took the middle approach, suggesting that while a court had the discretion to admit some collateral statements, which he labeled "neutral" (meaning that they did not directly inculpate the declarant), the court should exclude "self-serving" statements.[602] Professor Jefferson advanced the narrow view, adopted by the Court in *Williamson,*[603] that only individually self-inculpatory statements are admissible under this exception; no collateral statements should be admitted.[604]

Justice Kennedy displayed the candor that Justice O'Connor lacked by openly acknowledging the basic interpretive problem: "The text of the Rule does not tell us whether collateral statements are admissible . . . ."[605] While Justice O'Connor's response was to

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597. *See id.* Justice O'Connor asserted that "whether a statement is self-inculpatory or not can only be determined by viewing it in context." *Id.* She refused, however, to admit those collateral statements later deemed necessary to determine whether the statements are self-inculpatory. *Id.* Thus, because the trier of fact will not be permitted to hear collateral statements, the "context" of the self-inculpatory remarks is irrelevant under the Court's holding.

598. *Id.*

599. *See id.* at 2442-43 (Kennedy, J., concurring in the judgment).

600. *See id.* at 2440-41.

601. *See id.* at 2441 (citing 5 JOHN H. WIGMORE, EVIDENCE, § 1465, at 271 (3d ed. 1940)).

602. *See id.* (citing MCCORMICK, *supra* note 585, at 552-53).

603. *Id.* at 2435.

604. *Id.* at 2441 (Kennedy, J., concurring in the judgment) (citing Bernard S. Jefferson, *Declarations Against Interest: An Exception to the Hearsay Rule,* 58 HARV. L. REV. 1, 57 (1944)).

605. *Id.*

dodge the problem of collateral statements by creating a limitation that does not exist in the Rule,[606] Justice Kennedy's response was to tackle the problem head-on. Justice Kennedy noted the reason for the exception: the statements are presumed reliable because reasonable people would not make them unless they believed them to be true.[607] Yet Justice Kennedy argued that to use this as the limit to the exception's application would beg the question:

> Given that the underlying principle for the hearsay exception has not resolved the debate over collateral statements one way or the other, I submit that we should not assume that the text of Rule 804(b)(3), which is silent about collateral statements, in fact incorporates one of the competing positions. The Rule's silence no more incorporates Jefferson's position respecting collateral statements than it does McCormick's or Wigmore's.[608]

Justice Kennedy thus set out to give meaning to Rule 804(b)(3). He treated his role as building the language of the Rule rather than enforcing it.

Justice Kennedy used "three sources" to build his argument that the Rule "allows the admission of some collateral statements":[609] the Advisory Committee Notes, the common law history of the exception, and a maxim of statutory construction: that "Congress does not enact statutes that have almost no effect."[610] While Justice O'Connor found the Advisory Committee Notes to be "not particularly clear,"[611] Justice Kennedy found them to be "a forthright statement that collateral statements are admissible under Rule 804(b)(3)."[612] Moreover, Justice Kennedy argued that the Court should be clear about the weight it gives the Advisory Committee Notes, stressing that the Court historically has given them strong weight.[613]

Justice Kennedy continued, arguing that even if the Advisory Committee Notes had been silent on the admissibility of collateral statements, he had another source of interpretation.[614] He argued that "[a]bsent contrary indications, we can presume that Congress intended the principles and terms used in the Federal Rules of Evidence to be applied as they were at common law."[615] As even

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606. *See supra* note 596 and accompanying text.
607. *Williamson*, 114 S. Ct. at 2441 (Kennedy, J., concurring in the judgment).
608. *Id.* at 2441-42.
609. *See id.* at 2441.
610. *Id.* at 2442.
611. *Id.* at 2436.
612. *Id.* at 2442 (Kennedy, J., concurring in the judgment).
613. *Id.*
614. *See id.*
615. *Id.*

Professor Jefferson noted, at common law, "collateral statements connected with the disserving statements" were admissible.[616]

Justice Kennedy's final argument was based on the principle of statutory construction that when Congress enacts a statute, it intends that it should have meaningful effect.[617] Justice Kennedy then tried to show that the Court's narrow interpretation of the exception would make it practically useless.[618] While Justice Kennedy's hypotheticals may not have shown that the Court's interpretation makes the exception worthless,[619] they did show how impractical the Court's analysis is for a trial court. For example, it is unclear whether a court could admit the statement "John and I robbed the bank."[620] However, if the statements were instead: "I robbed the store. John was with me," it is fairly clear, albeit arbitrary, that under the Court's approach only the first sentence could be admitted.[621]

Justice Kennedy's approach to constructing the meaning of Rule 804(b)(3) is far more persuasive than Justice O'Connor's opinion, but fails in one respect. At points in his opinion, Justice Kennedy tried for the same kind of textual clarity that Justice O'Connor seemed to seek. Specifically, he tried to draw a distinction between "collateral neutral" and "collateral self-serving" statements. In his view, the former would be admissible, while the latter would not.[622] This position opened him up to ridicule by Justice Scalia, who argued that the purpose of the Rule is not advanced by such "manufactured categories."[623] Justice Scalia was correct here. In using this language, Justice Kennedy was guilty of the very problem he identified in Justice O'Connor's opinion; he tried to simplify the contextual nature of the inquiry by creating "types" of statements that are, or are not, admissible.[624] Justice Kennedy cited with approval cases in which courts have set out "categories" of situations in which the statement should be excluded because it is unreliable, such as a statement to law enforcement officials admitting guilt after a promise

616. Jefferson, *supra* note 604, at 57, *quoted in Williamson*, 114 S. Ct. at 2442 (Kennedy, J., concurring in the judgment).

617. *See* American Paper Inst. v. American Elec. Power Serv. Corp., 461 U.S. 402, 421 (1983) (stating that courts should not impute to Congress intent contrary to that expressed in statute).

618. *See Williamson*, 114 S. Ct. at 2443 (Kennedy, J., concurring in the judgment).

619. *See id.* at 2438 (Scalia, J., concurring) (rebutting Justice Kennedy's hypothetical).

620. *See id.* at 2436-37 (arguing that admissibility of similar statement, "Sam and I went to Joe's house," depends on its context).

621. *See id.* at 2435. Under the Court's approach, only the statement "I robbed the store" would be admissible because it is the only statement tending to inculpate the speaker.

622. *Id.* at 2444 (Kennedy, J., concurring in the judgment).

623. *Id.* at 2438 (Scalia, J., concurring).

624. *See id.* at 2441, 2444 (Kennedy, J., concurring in the judgment).

of leniency.[625] Yet in doing so, he lost sight of the Rule's underlying historical and philosophical perspective: the meaning of a statement (and in this case, its reliability) can only be determined in a contingent, fact-specific context, and this meaning will be created by the rhetoric of the advocates and the judge.[626]

In the conclusion of his opinion, however, Justice Kennedy regained a view of the context-bound quality of Rule 804(b)(3):

> [A]pplication of the general principles here outlined to a particular narrative statement often will require a difficult, fact-based determination. District Judges, who are close to the facts and far better able to evaluate the various circumstances than an appellate court, therefore must be given wide discretion to examine a particular statement to determine whether all or part of it should be admitted.[627]

Justice Kennedy here eschewed the easy route taken by the majority, which simply avoided the problem of collateral statements. Moreover, he suggested that the problem was more difficult than even his "collateral neutral" and "collateral self-serving" categories suggested. He was candid about the uncertain and fact-based nature of the application of this evidence rule; he made clear that the Rule does not speak for itself.

In excluding all non-self-inculpatory statements, or under Justice Kennedy's approach, all collateral self-serving statements, all of the Justices expressed concern over the trustworthiness of certain statements against interest. One senses that both Justice O'Connor and Justice Kennedy fought to resolve *Williamson* by interpreting the text of Rule 804(b)(3) because they were attempting to avoid the constitutional Confrontation Clause issue. Both Justice O'Connor's and Justice Kennedy's opinions read as if the Confrontation Clause serves no purpose in this situation.[628] In a section of her opinion joined only by Justice Scalia, Justice O'Connor refused to reach the Confrontation Clause issue raised by the defendant, but noted "that the very fact that a statement is genuinely self-inculpatory—which our reading of Rule 804(b)(3) requires—is itself one of the 'particularized guarantees of trustworthiness' that makes a statement admissible

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625. *Id.* at 2444 (citing United States v. Magana-Olvera, 917 F.2d 401, 407-09 (9th Cir. 1990); United States v. Scopo, 861 F.2d 339, 348 (2d Cir. 1988)).

626. *See supra* notes 102-07 and accompanying text.

627. *Williamson*, 114 S. Ct. at 2445 (Kennedy, J., concurring in the judgment).

628. *See id.* at 2437 (noting that, in light of its disposition, Court need not reach Confrontation Clause issue); *id.* at 2443 (Kennedy, J., concurring in the judgment) (failing to mention Confrontation Clause).

under the Confrontation Clause."[629] Given this statement, and the Court's earlier decision in *White v. Illinois*,[630] which made the reliability of the statement the sole issue under the Confrontation Clause,[631] the implication is that the Confrontation Clause serves as no barrier to the admission of "genuinely self-inculpatory statements" under Rule 804(b)(3).

Justice Kennedy similarly seemed oblivious to the relevance of the Confrontation Clause. His analytical approach to Rule 804(b)(3) was as follows:

> A court first should determine whether the declarant made a statement that contained a fact against penal interest . . . . If so, the court should admit all statements related to the precise statement against penal interest, *subject to two limits*. Consistent with the Advisory Committee Note, the court should exclude a collateral statement that is so self-serving as to render it unreliable (if, for example, it shifts blame to someone else for a crime the defendant could have committed). In addition, in cases where the statement was made under circumstances where it is likely that the declarant had a significant motivation to obtain favorable treatment, as when the government made an explicit offer of leniency in exchange for the declarant's admission of guilt, the entire statement should be inadmissible.[632]

Justice Kennedy found only two limits to the admission of statements directly against interest and related statements, both stemming from the Rule and its purpose, but he indicated no limitation posed by the Confrontation Clause.

The facts of *Williamson* present the paradigmatic case for Confrontation Clause concerns. The hearsay statements of the declarant Harris were put into evidence through testimony given by the DEA agent who had interviewed Harris.[633] Harris refused to allow his statements to be recorded or to sign a written version of his statement.[634]

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629. *Id.* at 2437.

630. 112 S. Ct. 736 (1992).

631. White v. Illinois, 112 S. Ct. 736 (1992). The broad holding of *White* is that the prosecution need no longer produce the declarant or show that the declarant is unavailable to satisfy the Confrontation Clause. *Id.* at 742 & n.8. The prosecution need only show that the hearsay statement is reliable, either because it falls within "a firmly rooted hearsay exception" or because there are "particularized guarantees of trustworthiness." *Id.*

632. *Williamson*, 114 S. Ct. at 2445 (Kennedy, J., concurring in the judgment) (emphasis added; citation omitted). In this case, the DEA agent testified that although he had promised to report Harris' cooperation to the prosecutor, he had not promised Harris "any reward or other benefit for cooperating." *Id.* at 2434.

633. *See id.* at 2434.

634. *See id.*

Professors Kirst and Berger have shown convincingly that a driving force behind the Confrontation Clause was the concern over the "procedural" problem; the framers of the clause were worried about evidence manufactured or orchestrated by the Government and put before the trier of fact through affidavits or other substitutes for live testimony.[635] I have elsewhere argued that the Confrontation Clause also contains a societal dimension, the belief that accusers ought to be compelled to confront the defendant out of concern for the quality of the relationship between the individual accuser and the defendant, and the relationship between the state-as-accuser and the defendant.[636] This belief reflects societal concerns about fairness wholly separate from reliability or procedural concerns.[637] The societal dimension inheres in the common demand that "if you are going to say something bad about me, say it to my face." In *Williamson*, the defendant was convicted in large part because of statements made by a witness who never had to say them to his face, statements that were repeated by a government agent with the opportunity to shape the statements to suit the case.

The point is that the *Williamson* opinions try, unconvincingly, to hide from these Confrontation Clause concerns through their treatment of the Rule.[638] The focus of the Rule, and of their discussion, is on reliability, which is only one value protected by the Confrontation Clause; the opinions ignore the procedural and societal concerns behind the Clause. While one could argue that the Court was simply following its principle of deciding cases on the narrowest possible grounds, the Court's tortured attempt to avoid the real problem of whether to admit statements related to statements against interest suggests that the Court might have produced a better opinion if it had dealt directly with the Confrontation Clause issue. As Justice Kennedy argued, the issue of whether a statement is against interest, and thus reliable, is really a question for trial courts;[639] the Supreme Court cannot make that determination as a matter of statutory interpretation.[640]

What the Supreme Court could have done, however, is argue well. In this case, that would have meant admitting that the text of Rule

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635. *See* Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557, 567-86 (1992); Roger W. Kirst, *The Procedural Dimension of Confrontation Doctrine*, 66 NEB. L. REV. 485 (1987).

636. *See* Scallen, *supra* note 118, at 635-48.

637. *See* Scallen, *supra* note 118, at 635-48.

638. *See supra* note 628 and accompanying text.

639. *Williamson*, 114 S. Ct. at 2445 (Kennedy, J., concurring in the judgment).

640. *See supra* note 627 and accompanying text.

804(b)(3) does not dictate the solution to the admissibility of Harris' statements. Moreover, a complete argument would have required the Court to reach and discuss all of the dimensions of the Confrontation Clause: reliability, procedural, and societal. If the Court had used a practical reasoning approach to this evidence problem, arguing completely and candidly, it would have produced a more persuasive opinion. It would have educated us on the limitations of appellate courts in ruling on evidentiary questions. It would not have damaged its *ethos* by pretending to solve the interpretative problem while actually begging fundamental questions about the fairness of admitting statements untested by cross-examination and elicited by a government agent out of the defendant's presence.

E. Tome v. United States: *One Step Forward, One Step Back*

Although Justice Kennedy could not convince a majority of the Court in *Williamson*, his broader approach to the interpretation of the evidence rules narrowly prevailed in the Court's most recent opinion, *Tome v. United States.* In *Tome*, the Court interpreted Federal Rule of Evidence 801(d)(1)(B), which allows for the admission of a prior consistent statement if "the declarant testifies at the trial or hearing and is subject to cross-examination" and if the statement is "offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive."[641] The precise question in *Tome* was whether, as under the common law, the statement had to have been made before the "improper influence or motive" arose. Justice Kennedy's arguments, while moving somewhat beyond Justice O'Connor's approach in *Williamson* by more openly weighing interpretative sources in addition to the text, ultimately proved unsatisfying. Like Justice Blackmun in *Daubert*, Justice Kennedy argued more under a practical reasoning than a textualist approach, but he finally purported to find the answer to the interpretative problem in the text of the Rule.

The prosecution charged that Tome, who was divorced from his four-year-old daughter's mother and had primary physical custody of the child, sexually abused the child, which the child disclosed to her mother while they were on vacation.[642] The defense argued that the allegations were fabricated so that the mother, who had unsuccessfully petitioned for primary custody of the child, would not have to return

641. FED. R. EVID. 801(d)(1)(B).
642. *See* Tome v. United States, 115 S. Ct. 696, 699 (1995).

the child to her father.[643] At the trial, the child, now six and a half years old, grew increasingly reticent in answering questions.[644] After she testified, the prosecution introduced seven different statements by the child to various witnesses, describing the sexual abuse, although it conceded that these statements were made after the alleged motive to fabricate them arose.[645] The trial court admitted the statements despite the defendant's objection, finding that the statements rebutted the defense's assertion that the statements were fabricated to allow the child to stay with the mother.[646] The Tenth Circuit Court of Appeals affirmed, stating that the "pre-motive requirement is a function of the relevancy rules, not the hearsay rules."[647] The Tenth Circuit held that "the relevance of the prior consistent statement is more accurately determined by evaluating the strength of the motive to lie, the circumstances in which the statement is made, and the declarant's demonstrated propensity to lie."[648]

A five-to-four majority of the United States Supreme Court rejected the Tenth Circuit's balancing approach, holding that Rule 801(d)(1)(B) incorporates the common law requirement that the statement be made before the motive to fabricate arose.[649] Justice Kennedy writing for the Court, began, not with the text of the Rule, but with the long history of the common law "pre-motive" requirement, and its endorsement by Justice Story and by the leading common law commentators, McCormick and Wigmore.[650] After this introduction to the pedigree of the pre-motive requirement, Justice Kennedy framed the issue before the Court as "whether Rule 801(d)(1)(B) embodies this temporal requirement. We hold that it does."[651]

After setting forth the Court's conclusion, Justice Kennedy spent the rest of the opinion setting forth various arguments to support this reading of the Rule. While Justice Kennedy's approach somewhat resembled practical reasoning, it was not, for he confidently asserted

643. *See id.*

644. *See id.*

645. *See id.*

646. *Id.* at 700. The trial court also admitted one of the statements, to a babysitter, under the residual exception, Rule 803(24), and statements to two doctors under the exception for statements made for the purpose of medical diagnosis or treatment, Rule 803(4). The Court noted that the prosecution had offered the statements of a social worker under both Rule 803(24) and Rule 801(d)(1)(B), but the trial court did not make clear on which ground it was admitting the statement. *Tome*, 115 S. Ct. at 700.

647. United States v. Tome, 3 F.3d 342, 350 (10th Cir. 1993), *rev'd*, 115 S. Ct. 696 (1995).

648. *Id.*

649. *Tome*, 115 S. Ct. at 700.

650. *Id.*

651. *Id.*

that the Rule "embodies" an element that it does not contain, rather than arguing that the Rule ought to be construed in a way that incorporates the temporal requirement he advocated.

Justice Kennedy first turned to the text of the Rule itself, and found that "[t]he language of the Rule, in its concentration on rebutting charges of recent fabrication, improper influence and motive to the exclusion of other forms of impeachment, as well as in its use of wording which follows the language of the common-law cases, suggests that it was intended to carry over the common-law pre-motive rule."[652] In this part of his argument, Justice Kennedy's opinion resembled that of Justice O'Connor's in *Williamson*; both Justices tried to argue that the language of the Rule imposes a particular limitation on the admissibility of hearsay.[653]

But where Justice O'Connor essentially ended her argument with the policy she found in the text of the Rule, Justice Kennedy continued to build his argument. He first carefully examined the placement of prior consistent statements within the special category of "nonhearsay" in Rule 801.[654] He noted that this allowed some prior consistent statements to be admissible as "substantive evidence, not just to rebut an attack on the witness' credibility."[655] He stressed that by limiting the type of prior consistent statements that would be considered nonhearsay to those that "rebut a charge of 'recent fabrication or improper influence or motive,'"[656] the Rule drafters emphasized the temporal requirement.[657] He stated that "[a] consistent statement that predates the motive is a square rebuttal of the charge that the testimony was contrived as a consequence of that motive."[658]

Justice Kennedy then made two additional arguments based on the language of the text, but looking to the intention of the drafters of the Rule. He stressed first that while Congress could have adopted a much broader rule, allowing in any prior consistent statement that is relevant to a witness' credibility, it chose instead much narrower language.[659] Then, Justice Kennedy noted that the language used by

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652. *Id.* at 702.
653. *Id.*
654. *Id.* at 701.
655. *Id.*
656. *Id.* (quoting FED. R. EVID. 801(d)(1)(B)).
657. *Id.* at 701.
658. *Id.*
659. *Id.* at 702.

the drafters "bears close similarity to the language used in many of the common law cases that describe the premotive requirement."[660]

In a part of his opinion joined only by Justices Stevens, Souter, and Ginsburg,[661] Justice Kennedy turned to the Advisory Committee Note to Rule 801(d)(1)(B) to support his conclusion that the Rule embodies the common law premotive requirement. He emphasized that where "'Congress did not amend the Advisory Committee's draft in any way . . . the Committee's commentary is particularly relevant in determining the meaning of the document Congress enacted.'"[662] Justice Kennedy also stressed the distinguished credentials of the Committee and that it had "consulted and considered the views, criticisms, and suggestions of the academic community in preparing the Notes."[663]

Justice Kennedy pointed out that the Advisory Committee drew heavily upon the common law as it was portrayed in the work of Wigmore and McCormick, and that when the Advisory Committee drafted a Rule that was a significant departure from the common law, "in general the Committee said so."[664] He illustrated this with several examples where the Committee had rejected the common law approach,[665] and stated that the Note for Rule 801(d)(1)(B) contained no indication that the Committee intended to depart from the common law pre-motive requirement.[666] Justice Kennedy interpreted this silence as an intent to incorporate that requirement, saying that "it is difficult to imagine that the drafters, who noted the new substantive use of prior consistent statements, would have remained silent if they intended to modify the premotive requirement."[667]

Justice Kennedy supported this argument by looking to the Advisory Committee's general approach in structuring Rule 801(d)(1), the Rule dealing with prior statements. He specifically relied on the Committee's rejection of Uniform Rule of Evidence 63(1), which

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660. *Id.*; *see also id.* at 701 (referring to this as "the same phrase used by the Advisory Committee in its description of the 'traditiona[l]' common law of evidence, which was the background against which the Rules were drafted").

661. Justice Scalia concurred only in the judgment and all parts of the opinion except this part, Part B. *Id.* at 706 (Scalia, J. concurring in part and in the judgment). Justice Scalia objected to Part B of Justice Kennedy's opinion because it referred to the Advisory Committee Notes as more than persuasive commentary, as evidence of the "intent" or "purpose" of the drafters. *Id.* He apparently missed the reference to the intent of Congress and the drafters in the part of the opinion he did join. *See id.* at 701-02.

662. *Id.* at 702 (quoting Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 165-66 n.9 (1988)).

663. *Id.*

664. *Id.*

665. *Id.*

666. *Id.* at 702-03.

667. *Id.* at 703.

would have allowed the introduction of any out-of-court statement by a declarant who testifies at the trial, subject to the other rules of evidence.[668] Justice Kennedy argued that if the Tenth Circuit's balancing approach was adopted in lieu of the pre-motive requirement, the distinction between Rule 801(d)(1)(B) and Uniform Rule of Evidence 63(1) would disappear, because any damaging testimony of a witness could be met by an allegation that the witness was fabricating, opening "the floodgates to any prior consistent statement that satisfied Rule 403."[669] Justice Kennedy concluded this section of the opinion by establishing a presumption: "'A party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change.'"[670]

In the next section of the opinion, which was joined by Justice Scalia as well, Justice Kennedy rejected the Government's attempt to rely on academic commentators who were critical of the limits on the use of prior statements when the declarant testified at trial.[671] These commentators suggested that courts should move toward a balancing approach for determining the admissibility of prior statements.[672] The Court rejected this argument in large part because the Advisory Committee also rejected it:

> The statement-by-statement balancing approach advocated by the Government and adopted by the Tenth Circuit creates the precise dangers the Advisory Committee noted and sought to avoid: It involves considerable judicial discretion; it reduces predictability; and it enhances the difficulties of trial preparation because parties will have difficulty knowing in advance whether or not particular out-of-court statements will be admitted. See Advisory Committee's Introduction [to Article VIII, 28 U.S.C. App.] at 771.[673]

Justice Kennedy concluded his argument by acknowledging the practical difficulty of applying the pre-motive requirement, but stressed that, "as the Advisory Committee commented," it was less of a burden and more predictable than the balancing approach suggested by the Government and the Tenth Circuit.[674] Moreover, Justice Kennedy candidly acknowledged the difficulty of determining "when a particular fabrication, influence, or motive arose," but

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668. *Id.*
669. *Id.*
670. *Id.* at 704 (quoting Green v. Bock Laundry Mach. Co., 490 U.S. 504, 521 (1989)).
671. *Id.*
672. *Id.*
673. *Id.* at 704-05 (citation omitted).
674. *Id.* at 705. He also sympathized with the problems of proof in child-abuse cases but noted that while the evidence rules cannot be altered for certain kinds of cases, the statements might be admissible under another hearsay exception, such as Rule 803(24). *Id.*

stressed that "a majority of common-law courts were performing this task for well over a century" and there had been no evidence presented that courts could not continue to do so.[675]

There is much to praise in Justice Kennedy's approach, but his attempt to argue that the answer to the interpretative problem was incorporated in the Rule itself is inconsistent with his concurrence in *Williamson* and the practical reasoning approach. Justice Kennedy argued in *Williamson* that the exception for statements against interest did not address the problem of collateral statements.[676] Similarly, the rule on prior consistent statements itself simply did not address the common law pre-motive requirement.

Justice Breyer's dissenting opinion, joined by Chief Justice Rehnquist and Justices O'Connor and Thomas, is more consistent with the practical reasoning approach, although he too insisted that the "plain words . . . mean exactly what they say."[677] Justice Breyer noted that the problem raised by the Rule and by Justice Kennedy's interpretation of the Rule was a problem of relevance, not hearsay.[678] Justice Breyer also turned first to the common law commentators McCormick and Wigmore, but only to point out that they had not characterized this as a hearsay problem, but one of impeachment or relevancy.[679] Justice Breyer argued that the text of Rule 801(d)(1)(B) simply does not deal with the relevancy problem.

Justice Breyer pointed out that some statements, such as those used to rebut a charge of faulty memory, could have rehabilitative effect no matter when they were made.[680] He also focused on the placement of Rule 801(d)(1)(B) in the category of nonhearsay statements, arguing that it had more to do with a jury's inability to separate the substantive value of a prior statement from its rehabilitative purpose than with the pre-motive requirement.[681]

Curiously, however, once Justice Breyer had dispensed with the language of the Rule, he went on to consider whether the pre-motive rule continued to exist as a matter of relevance.[682] Not surprisingly, he found that there is no absolute rule barring post-motive statements from being used to rehabilitate a witness; in his view, courts must analyze the problem on a case-by-case basis under the standards for

675. *Id.*
676. *Williamson*, 114 S. Ct. at 2441-42.
677. *Tome*, 115 S. Ct. at 708 (Breyer, J., dissenting).
678. *Id.*
679. *Id.* at 706.
680. *Id.* at 707.
681. *Id.*
682. *Id.* at 708.

determining relevancy in Rules 401 and 403.[683] What is surprising is that Justice Breyer found it necessary to discuss the issue at all.

One reason he might have reached the issue of whether the pre-motive requirement still existed was to show the relationship of this case to *Daubert*, and to argue that perhaps some common law rules of evidence do still exist after the passage of the Federal Rules of Evidence. In calling attention to *Daubert*, however, Justice Breyer highlighted the inconsistency of *Tome* with that case. The Court in *Daubert* explicitly held that the *Frye* test was not incorporated in the Federal Rules of Evidence.[684] Yet here, Justice Kennedy and a majority of the Court held that the common law pre-motive test, an unstated relevancy requirement, was embodied in the text of the Rule.

Justice Kennedy's efforts to place the text of the Rule in its common law context and the context of the language choices available to and made by the drafters, as well as his acknowledgement of the difficulty of application of the Rule to concrete cases, were all admirable. He demonstrated both completeness, in considering all possible sources of interpretation, and candidness, in acknowledging the weight those sources were to be given and the difficulties involved in considering them. By finding that the language of the rule "embodies" the pre-motive common law rule and by neglecting to reconcile his conclusion with *Daubert*, however, Justice Kennedy ultimately failed to create a solid "construction" of the Rule. By resorting to a plain meaning argument, he adopted the role of the enforcer, missing the chance to educate about the limits of a textualist approach, a lesson he began in *Williamson*.

CONCLUSION

It is best to end with the beginning, Federal Rule of Evidence 102:

> These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.[685]

How shall we interpret this Rule, which tells us how to interpret it and all of the others? The Chair of the Advisory Committee, Albert Jenner, stressed that Rule 102 was to be taken seriously:

> [It] is not mere rhetoric. It is not the language employed in the Civil Rules, Criminal Rules, or Appellate Rules; those rules

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683. *Id.* at 709.
684. *See supra* notes 441-51 and accompanying text.
685. FED. R. EVID. 102; *see also* FED. R. CIV. P. 1.

> emphasize uniformity. Here we are saying that the Law of Evidence should have a measure of flexibility if room for growth is to be afforded. We leave some play in the joints.[686]

However, Rule 102 is subject to different interpretations. To rely on the text alone is also to serve the ends of justice in the views of proponents of the plain meaning school of interpretation.

It will not suffice just to tell the Court to refrain from its textualist plain meaning talk. One must show the Court how and why its arguments could be improved. A practical reasoning approach to legal reasoning exposes the justificatory, persuasive, or argumentative quality of judicial interpretation in the most direct and honest manner. Moreover, while it does not mandate a particular and fixed substantive basis for evaluating interpretative choices, it does allow the critic both to identify and challenge the choices that were made and to argue for alternative choices. This kind of dialogue among courts and commentators may not provide the absolute certainty and predictability of results that some legal theorists would like, but then neither have the other approaches to statutory interpretation.

The Supreme Court has not lived up to the example it set for itself and for its audience in *Beech Aircraft Corp.* It has not lived up to the understanding of interpretation that grounded the classical theories of legal rhetoric and that grounded the drafters of the Federal Rules of Evidence. Unless the Supreme Court moves from its textualist arguments to the practical reasoning approach, it might be better off leaving the interpretation of evidence rules to the lower courts and the recently reestablished Advisory Committee on the Federal Rules of Evidence. Yet this deference would be both unfortunate and unsuccessful. It would be unfortunate because the Supreme Court, as the highest court in the land, has much to teach us about how "the truth may be ascertained and proceedings justly determined"[687] in trials. It would be unsuccessful because, with all due respect, no matter how diligent the Advisory Committee is, the nature of the law and language is such that it is seldom perfectly clear. The Court will always be called upon to interpret evidence rules. The Court's view of its role and how it executes its role will always invoke and influence its *ethos.* Ancient rhetoricians argued that moral character cannot be taught, in the sense of being transmitted, to others. But they also argued that a speaker does teach about character through the quality

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686. *Forum Discussion, The Proposed Rules of Evidence for the United States District Courts and Magistrates,* 37 INS. COUNS. J. 565, 571 (1970) (remarks of Advisory Committee Chairman Albert Jenner), *quoted in* Mengler, *supra* note 125, at 439.

687. FED. R. EVID. 102.

of the speech. As long as the Supreme Court issues opinions attached to its judgments, it will teach. As long as the Court teaches, it should strive to do the best possible teaching.