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"Importing" Restrictions from One Federal Rule of Evidence Provision to Another: The Limits of Legitimate Contextual Interpretation in the Age of Statutes

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"IMPORTING" RESTRICTIONS FROM ONE FEDERAL RULE OF EVIDENCE PROVISION TO ANOTHER: THE LIMITS OF LEGITIMATE CONTEXTUAL INTERPRETATION IN THE AGE OF STATUTES

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[T]he meaning of statutory language, plain or not, depends on context.

— King v. St. Vincent's Hospital[1]

No statute is an island unto itself.

— United States v. Collins[2]

Introduction

Until 1975, the federal law of evidence was largely common law in form. However, in 1975, the Federal Rules of Evidence took effect.[3] The current, restyled version of Federal Rule of Evidence 402 reads:

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1. 502 U.S. 215, 221 (1991).

2. 859 F.3d 1207, 1213 (10th Cir. 2017) (quoting United States v. Brune, 767 F.3d 1009, 1022 (10th Cir. 2014)).

3. RONALD L. CARLSON, EDWARD J. IMWINKELRIED, JULIE SEAMAN & ERICA BEECHER-MONAS, EVIDENCE: TEACHING MATERIALS FOR AN AGE OF SCIENCE AND STATUTES 15 (8th ed. 2018).

> Relevant evidence is admissible unless any of the following provides otherwise:
>
> - the United States Constitution;
> - a federal statute;
> - these rules; or
> - other rules prescribed by the Supreme Court.[4]

Rule 101(b)(5) states that a "'rule prescribed by the Supreme Court' means a rule adopted by the Supreme Court under statutory authority,"[5] such as the Rules of Civil and Criminal Procedure. Conspicuously absent from the list in Rule 402 is any mention of case or decisional law. That omission implies that federal courts no longer possess the common-law authority to create or enforce uncodified exclusionary rules. The Congress that enacted the Federal Rules of Evidence was a legislature jealous of its constitutional prerogatives, in part because it had recently battled Richard Nixon over claims of executive privilege in federal court during the Watergate investigation.[6] Three years after the enactment of the rules, the late Professor Edward Cleary, the Reporter for the Advisory Committee which drafted the rules, wrote: "In principle, under the Federal Rules no common law of evidence remains."[7] On two occasions, the United States Supreme Court has approvingly quoted that very passage.[8]

Most articles in the Federal Rules of Evidence contain several provisions. For example, Article VI lists multiple impeachment techniques.[9]

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4. FED. R. EVID. 402.

5. *Id.* 105(b)(5).

6. 26 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5661, at 465–67 (1992); 1 EDWARD J. IMWINKELRIED, THE NEW WIGMORE: A TREATISE ON EVIDENCE § 4.2.2.a, at 247 (3d ed. 2017) [hereinafter IMWINKELRIED, THE NEW WIGMORE].

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

8. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 587–88 (1993); United States v. Abel, 469 U.S. 45, 51–52 (1984); *see also* Edward J. Imwinkelried, *Federal Rule of Evidence 402: The Second Revolution*, 6 REV. LITIG. 129, 129 (1987) ("In each case documented in his article, Professor Rossi pointed to express language in the Rules' text or legislative history which manifested an intent to abolish a restrictive, common-law evidentiary rule.") (citing Faust F. Rossi, *The Silent Revolution*, LITIG., Winter 1983, at 13, 13–19) [hereinafter Imwinkelried, *Federal Rule of Evidence 402*].

9. FED. R. EVID. 608 (character for untruthfulness); *id.* 609 (prior conviction); *id.* 610 (religious beliefs); *id.* 613 (prior inconsistent statements).

Article VII includes Rule 703, which recognizes several different sources of information that an expert may rely on as a factual basis for an opinion.[10] For its part, Article VIII contains a large number of hearsay exemptions and exceptions.[11] In Article IX, Rule 901(b) illustrates adequate authentication foundations,[12] while Rule 902 catalogues a number of techniques for rendering an exhibit self-authenticating.[13] Finally, Article X, which governs the Best Evidence Rule, lists a number of excuses for nonproduction—that is, acceptable explanations for the proponent's failure to produce an original writing at trial.[14]

These evidentiary doctrines are set out in physically separate provisions—suggesting that the drafters intended for them to operate independently,[15] functioning as distinct theories of admissibility. Thus, even if the proponent could not produce a conviction to impeach a witness under Rule 609,[16] the proponent might be able to inquire into that witness's untruthful act under Rule 608(b).[17] Likewise, if the proponent could not introduce an item of evidence as an official record over a hearsay objection under Rule 803(8),[18] the proponent might be able to persuade a judge to admit the item as a business entry under Rule 803(6).[19] Similarly, although the proponent might be unable to find a lay acquaintance to authenticate a writing under Rule 901(b)(2),[20] the proponent could call a forensic examiner to authenticate the document under Rule 901(b)(3).[21] At first blush, each provision seems to be a stand-alone doctrine, and the provisions appear capable of serving as alternative theories of admissibility.

In a few cases, though, some courts have refused to treat the provisions as independent. As Part I demonstrates, all of these cases deal with a

10. *Id.* 703 (any fact personally observed or brought to the expert's attention if it is the reasonable practice in the expert's field to rely on reports from such sources).

11. *Id.* 801(d) (exemptions for a party-opponent's statements and a testifying witness's prior statements); *id.* 803 (exceptions that do not require proof of the declarant's unavailability at trial); *id.* 804 (exceptions that require proof of the declarant's unavailability at trial); *id.* 807 (the residual or catchall exception).

12. *Id.* 901(b).

13. *Id.* 902 (noting that self-authenticating items "require no extrinsic evidence of authenticity in order to be admitted").

14. *Id.* 1004–07.

15. *See* United States v. Oates, 560 F.2d 45, 66 (2d Cir. 1977).

16. FED. R. EVID. 609.

17. *Id.* 608(b).

18. *Id.* 803(8).

19. *Id.* 803(6).

20. *Id.* 901(b)(2).

21. *Id.* 901(b)(3).

variation of the same basic fact situation: The court analyzes two distinct provisions in the same article of the Federal Rules of Evidence; one provision expressly imposes a restriction on the introduction of evidence under that provision; the second provision does not contain that restriction; and the text of the first provision does not purport to extend the restriction to the second provision. Yet, in these cases, the court ultimately decides to apply the restriction stated in the first provision to the second provision and, on that basis, excludes the proffered evidence.

This Article concedes the importance of context in the process of statutory construction. As the Supreme Court commented in *King v. St. Vincent's Hospital*, context—the other parts of the same statutory scheme—can play a central role in statutory interpretation.[22] Yet, this Article argues that in the fact situation discussed in the preceding paragraph, contextual interpretation ordinarily does not provide an adequate justification for "importing" a restriction from one Federal Rule of Evidence provision into another. In the typical case, such a judicial importation amounts to a usurpation of legislative authority. More specifically, this Article contends that the courts may only import a restriction from another provision if the accompanying extrinsic legislative history very clearly manifests a legislative intention not merely to impose a restriction under the first provision but, more importantly, to absolutely bar the admission of a particular type of evidence under any theory.

The Article develops this thesis in three steps. Part I is descriptive and reviews three lines of authority in which the courts have imported restrictions from one Federal Rule provision to another: first, from Rule 609 to Rule 608(b); second, in which the courts have limited the scope of Rule 807 (the residual hearsay exception) in light of express restrictions codified in Rules 803 and 804; and third, from Rule 803(8) to Rule 803(6). In each of these cases, courts treated the provision setting out the imported restrictions as context for the second provision and, for that reason, read the restriction into the second provision.

Part II presents an overview of the general contemporary framework for statutory construction. Initially, Section II.A describes the modern textualist approach to statutory construction, which cautions against routinely consulting extrinsic legislative history and ascribing significant weight to such history. The approach emphasizes that only the statutory language has

22. 502 U.S. 215, 221 (1991) ("[T]he meaning of statutory language, plain or not, depends on context.") (citing Shell Oil Co. v. Iowa Dep't of Revenue, 488 U.S. 19, 26 (1988)).

the force of law and that extrinsic legislative history is vulnerable to manipulation by special interest groups. The ascendance of textualism has simultaneously decreased the importance of extrinsic legislative history and increased the importance of context. Like the specific text being construed, the context—other parts of the same legislative scheme—has the formal status of law. In some statutory construction texts, contextual interpretation is perfectly legitimate. For example, the contents of one provision can help clarify the meaning of an ambiguous word or phrase in another provision. Furthermore, context can be dispositive of the construction of one provision if a certain interpretation of that provision would render another provision nugatory. But context alone does not warrant transferring or importing restrictions from one provision in a statutory scheme into another. The bottom line is that the importation is justifiable only if the extrinsic history contains an extraordinarily strong showing of a certain type of legislative intent—namely, an intent to insert the restriction into the other provision.

After describing the general textualist approach to statutory construction, Section II.B proposes adapting that framework to the recurring fact pattern from Part I—specifically, situations in which the opponent urges the court to enforce a restriction stated in one provision of the Federal Rules of Evidence in the course of applying another Federal Rules provision. Part II illustrates situations in which a court may legitimately import the restriction into the second provision to either clarify the second provision or prevent the nullification of the first provision. However, absent such situations, Section II.B argues that a court may legitimately import a restriction only if the extrinsic legislative history powerfully manifests an intent to bar completely the admission of a type of evidence mentioned in the first provision—not merely to impose a restriction on the admissibility of such evidence under that provision.

Part III critically evaluates contextual interpretation and revisits the three lines of authority discussed in Part I. It critiques those lines of authority by applying the test proposed in Section II.B and concludes that only one is defensible. The other two lines of authority are flawed—one because the legislative history does not manifest the right type of intent, and the other because the extrinsic history is conflicted and falls short of qualifying as an extraordinarily clear showing of legislative intent.

The Article concludes by cautioning against the indiscriminate use of contextual interpretation—either as an approach to the construction of the Federal Rules of Evidence or more broadly. As Judge Calabresi famously

remarked, we are living in the age of statutes[23]—an era in which statutes have supplanted cases as the primary source of American law. To be sure, context has a useful role to play in the interpretation of comprehensive statutory schemes. However, importing restrictions from one statutory provision into another provision—absent an exceptionally powerful showing of a legislative intent to extend the restriction in the extrinsic history—amounts to an unconstitutional judicial amendment of the second provision. As Part II acknowledges, contextual interpretation has numerous, legitimate applications. But under the Federal Rules of Evidence, context, more often than not, does not justify importation.

I. A Description of Three Lines of Cases Relying on Contextual Interpretation to Justify Importing Restrictions from One Provision of the Federal Rules of Evidence into Another Provision

A. Importing Restrictions Under Federal Rule of Evidence 609 into Rule 608(b)

Federal Rule of Evidence 609 governs the use of a witness's prior convictions to impeach that witness's credibility.[24] Both the title and text of Rule 609(a) expressly refer to a "conviction." When the witness's prior conviction qualifies as a felony offense under Rule 609(a)(1), or involves "a dishonest act or false statement" under Rule 609(a)(2), the opposing attorney may cross-examine the witness about the conviction.[25] However, it is well-settled that when the opponent relies on Rule 609(a) as the method of impeachment, the scope of the opponent's inquiry is limited. While the opponent may question the witness about the fact of the conviction, the name of the underlying crime, and the sentence,[26] the opponent may not inquire about other damaging details or "facts underlying the prior conviction."[27] Those details are not "fair game" under Rule 609.[28]

Compare another impeachment statute. Rule 608(b) allows the cross-examiner to question "specific instances of a witness's conduct" "if they are

23. *See generally* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

24. FED. R. EVID. 609.

25. *Id.* 609(a)(1), (2).

26. United States v. Albers, 93 F.3d 1469, 1480 (10th Cir. 1996); United States v. DeLeon, 308 F. Supp. 3d 1229, 1235 (D.N.M. 2018).

27. *Albers*, 93 F.3d at 1480.

28. *See id.* ("However, the defendant was entitled to the protection of the rule that only the prior conviction, its general nature, and punishment of felony range were fair game for testing the defendant's credibility.").

probative of the character for truthfulness or untruthfulness of . . . the witness."[29] Note the differences between Rule 609 and Rule 608(b). While the text of Rule 609 explicitly refers to a "conviction," that noun does not appear in Rule 608(b). Moreover, the text of Rule 608(b) neither requires the opponent to show that the untruthful act has resulted in a conviction nor indicates whether the opponent may resort to Rule 608(b) when the act in question has resulted in a conviction. Hence, if courts were to treat the provisions independently, when a conviction qualifies under Rule 609 but the underlying act reflects unfavorably on the witness's character for untruthfulness, the opponent could presumably do the following: (1) under Rule 609, question the witness about the fact of a conviction, the name of the underlying offense, and the sentence; and (2) under Rule 608(b), inquire further about the specific details that suggest the witness's character trait or propensity for untruthfulness.

The rub is that there is a line of cases holding that when the witness has been convicted for the untruthful act, the applicability of Rule 609 precludes the opponent from also invoking Rule 608(b)[30] and questioning about the details that reflect adversely on the witness's character for truthfulness under Rule 609.[31] In other words, these courts limit the scope of Rule 608(b) to "specific instances of [untruthful] conduct not resulting in conviction . . . ."[32] They do so despite the fact that the words, "not resulting in a conviction," do not appear in the text of Rule 608(b). These courts have treated Rule 609 as essential context for construing Rule 608(b), looked to the restrictions under Rule 609, and (to a degree) imported them into Rule 608(b). Even if the nature of the underlying act would otherwise entitle the cross-examiner to inquire when the witness has been convicted under Rule 608(b), the Rule 609 restrictions control. According to this line of cases, Rules 608(b) and 609 do not represent alternative theories of admissibility that, given the right facts, can both come into play during a witness's cross-examination. The upshot of this view is that the two rules are considered mutually exclusive: Rule 609 applies when the witness has been convicted,

29. FED. R. EVID. 608(b).

30. *DeLeon*, 308 F. Supp. 3d at 1235 ("The United States Courts of Appeal disagree regarding whether introducing evidence of a witness' criminal conviction under rule 609 precludes rule 608(b) inquiry, on cross examination, regarding the specific instance of conduct that produced the conviction if that conduct is probative of the witness' character for truthfulness.").

31. *See Albers*, 93 F.3d at 1480.

32. United States v. Morales-Quinones, 812 F.2d 604, 613 (10th Cir. 1987).

and Rule 608(b) applies only when the witness's untruthful act has not resulted in a conviction.

B. Importing Restrictions from Rules 803 and 804 into Rule 807

When the Federal Rules of Evidence took effect in 1975, two provisions contained residual or "catchall" hearsay exceptions. Rule 803, which governs exceptions which do not require a showing of the declarant's availability at trial, concluded with a residual exception.[33] Likewise, Rule 804, which governs exceptions that require a showing of the declarant's unavailability at trial, also ended with a residual exception.[34] Eventually, however, the two exceptions were merged into a single provision, now designated Rule 807.[35] As restyled in 2011, Rule 807(a) reads as follows:

> (a) **In General**. Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:
>
> (1) the statement has equivalent circumstantial guarantees of trustworthiness;
>
> (2) it is offered as evidence of a material fact;
>
> (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and
>
> (4) admitting it will best serve the purposes of these rules and the interests of justice.[36]

Although the text of the rule affirmatively requires that the proffered evidence have "circumstantial guarantees of trustworthiness" that are "equivalent" to hearsay admitted under Rule 803 or 804, Rule 807 says nothing about the significance of whether the evidence fails to qualify under the specific hearsay exceptions found in Rules 803 or 804.[37] Despite this silence, a number of courts have adopted the so-called "near miss"

33. FED. R. EVID. 803 advisory committee's notes to 1974 enactment ("[T]he committee has adopted residual exceptions for rules 803 and 804(b) . . . .").

34. *Id.*

35. FED. R. EVID. 807.

36. *Id.*

37. *Id.*

doctrine.[38] According to this doctrine, if an item of evidence "almost"[39] or "nearly"[40] fit into a specific Rule 803 or 804 exception but "narrowly fail[ed]"[41] to satisfy that exception's restrictions, the item was automatically inadmissible. To a degree, the "near miss" doctrine read the restrictions of the pertinent Rule 803 or 804 exception into Rule 807.

The courts that adopted this view cited two reasons for embracing the doctrine. First, if the courts did apply the "near miss" doctrine, it would be too easy for proponents to circumvent the specific restrictions that the

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38. *See, e.g.*, United States v. Vigoa, 656 F. Supp. 1499, 1504 (D.N.J. 1987), *aff'd*, 857 F.2d 1467 (3d Cir. 1988) ("[N]either the Advisory Committee nor the Senate Judiciary Committee intended that the residual exceptions be used to qualify for admission evidence which is of a type covered by a specific exception, but which narrowly fails to meet the standards of the specific rule.") (quoting Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1190, 1263–64 (E.D. Pa. 1980)); *see also* Creamer v. Gen. Teamsters Local Union 326, 560 F. Supp. 495, 498 (D. Del. 1983) ("[W]here there is a specific hearsay exception applicable to a clearly defined category of evidence such as former testimony, but the evidence fails to satisfy the requirements of the specific exception, the evidence should not be admitted under the residual exception.") (citing *Zenith Radio*, 505 F. Supp. at 1263–64).

The Advisory Committee Note accompanying the new amendment to Federal Rule of Evidence 807 mentions that some courts have "consider[ed] whether the statement is a 'near miss' of one of the Rule 803 or 804 exceptions." FED. R. EVID. 807 advisory committee's notes to 2019 amendment. As amended, Rule 807 no longer includes a reference to "equivalent circumstantial guarantees of trustworthiness." Rather, amended Rule 807 instructs the judge to determine whether "the statement is supported by sufficient guarantees of trustworthiness." FED. R. EVID. 807(a)(1) (effective Dec. 1, 2019). The Report of the Advisory Committee on Evidence Rules, submitted to the Supreme Court, states:

> [T]he Committee addressed a dispute in the courts about whether the residual exception could be used when the hearsay is a "near-miss" of a standard exception. A change to the text and Committee Note as issued for public comment provides that a statement that nearly misses a standard exception can be admissible under Rule 807 so long as the court finds that there are sufficient guarantees of trustworthiness.

Memorandum from the Advisory Comm. on Evidence Rules to the Comm. on Rules of Practice and Procedure (May 14, 2018), *in* Judicial Conference Comm. on Rules of Practice & Procedure, June 2018 Meeting Materials 397, 400 (June 12, 2018), https://www.uscourts.gov/sites/default/files/ev_report_1.pdf. The Report thus makes it clear that it is not fatal to the admissibility of a statement that it is a "near-miss" to an enumerated, standard exception.

39. 7 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 807.1, at 831–36 (7th ed. 2012).

40. 5 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 8:141, at 281 (3d ed. 2007).

41. GRAHAM, *supra* note 39, at 831–36.

drafters had included in the Rule 803 and 804 exceptions.[42] Second, the courts stressed the fact that at several junctures in the congressional deliberations over the residual exceptions, legislators feared that the residual exception would confer excessive discretion on trial judges and hoped that courts would use the exception sparingly in rare, extraordinary circumstances.[43] Rather than conducting the overall assessment of circumstantial trustworthiness mandated by Rule 807(a)(1), these courts imported into Rule 807 the specific restrictions in the Rule 803 or 804 exception most analogous to the fact situation. As a result, if the proponent's foundation falls just short of satisfying those restrictions, exclusion under Rule 807 is mandatory.

C. Importing Restrictions from Federal Rule of Evidence 803(8) into Rule 803(6)

Federal Rules of Evidence 803(6) and 803(8) both fall under Rule 803, which is the overall provision listing hearsay exceptions that do not require a foundational showing of the declarant's unavailability at the time of trial.[44] Specifically, Rule 803(6) codifies the business entry exception. As restyled in 2011, the rule explicitly requires proof of the following foundational facts:

- "[T]he record was made at or near the time" of the recorded event;
- The ultimate source of the information in the record was an individual with personal knowledge;
- "[T]he record was kept in the course of a regularly conducted activity of a business;" and

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42. *Id.* at 837; *see* United States v. Dent, 984 F.2d 1453, 1467 (7th Cir. 1993) (Easterbrook, J. & Bauer, C.J., concurring) ("Temptation to get 'round this limitation by moving to Rule 804(b)(5) . . . should be resisted."); Latson v. Clarke, 346 F. Supp. 3d 831, 857 (W.D. Va. 2018) (noting that a liberal interpretation of the residual exception "would easily cause the exception to swallow the rule") (quoting United States v. Dunford, 148 F.3d 385, 394 (4th Cir. 1998)).

43. Edward J. Imwinkelried, *The Scope of the Residual Hearsay Exceptions in the Federal Rules of Evidence*, 15 SAN DIEGO L. REV. 239, 247–52 (1978) (reviewing the congressional deliberations over the proposed residual exceptions) [hereinafter Imwinkelried, *Scope of the Residual Hearsay*]; *see Latson*, 346 F. Supp. 3d at 856–57 ("The residual exception 'is a narrow exception that should not be construed broadly' . . . .") (quoting *Dunford*, 148 F.3d at 394).

44. FED. R. EVID. 803(6), (8).

- It was the "regular practice of that activity" to prepare that type of record.[45]

The definition of "regularly conducted activity" in a Rule 803(6)(B) "business, organization, occupation, or calling,"[46] is expansive enough to include a government organization. The rule does not contain any language barring the use of an otherwise admissible business entry in criminal cases.

On its face, restyled Rule 803(8) applies to government organizations.[47] Rule 803(8)(A)(i) authorizes the receipt of records that reflect "the office's [own] activities," such as office transactions.[48] With one exception, Rule 803(8)(A)(ii) permits the admission of records documenting "a matter observed while under a legal duty to report," even if the observation occurs outside the office.[49] Such evidence is admissible unless it concerns "a matter observed by law-enforcement personnel" during a criminal case.[50] Similarly, Rule 803(8)(A)(iii) allows the introduction of records stating "factual findings from a legally authorized investigation."[51] However, Rule 803(8)(A)(iii) permits the admission of factual findings in all civil cases "or against the government in a criminal case."[52] In other words, the exception provides that otherwise admissible factual findings are inadmissible against the criminally accused.

Like Rules 608 and 609, Rules 803(6) and 803(8) appear to be independent provisions, thus raising the possibility that a proponent may invoke Rule 803(6) even when Rule 803(8) is inapplicable. Yet, the Second Circuit opened a contrary line of authority when it held otherwise in its 1977 decision, *United States v. Oates*.[53] In *Oates*, a drug prosecution case, the prosecution offered a report and worksheet prepared by a United States Customs Service chemist at trial.[54] The report stated that the powder seized from the defendant was heroin.[55] The prosecution proffered the report on two theories.[56]

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45. *Id.* 803(6).
46. *Id.* 803(6)(B).
47. *Id.* 803(8).
48. *Id.* 803(8)(A)(i).
49. *Id.* 803(8)(A)(ii). On its face, the provision is not limited to matters observed on the office's premises.
50. *Id.*
51. *Id.* 803(8)(A)(iii).
52. *Id.*
53. 560 F.2d 45, 68 (2d Cir. 1977).
54. *Id.* at 63–64.
55. *Id.* at 63.
56. *See id.* at 64–66.

The first theory was that the report qualified as an official record under Rule 803(8), but the court rejected that theory on two grounds.[57] First, the court stated that the conclusions in the report were clearly "factual findings resulting from an investigation made pursuant to authority granted by law."[58] Consequently, the conclusions were excluded under then-existing Rule 803(8)(C),[59] which corresponds to the current Rule 803(8)(A)(iii).[60] Second, the court ruled that the report's conclusions were also inadmissible under then-existing Rule 803(8)(B),[61] which corresponds to the current Rule 803(8)(A)(ii).[62] The court reasoned that the report fell within Rule 803(8)(B)'s exception for "matters observed by police officers and other law enforcement personnel."[63] In the court's view, the Customs Service agents were "law enforcement personnel" under the statute.[64] The court stated it had to "read [the exception] broadly enough to make its prohibitions against the use of government-generated reports in criminal cases coterminous with the analogous prohibitions contained in FRE 803(8)(C)."[65]

The prosecution's second theory was that the chemists' report constituted an admissible business entry under Rule 803(6).[66] Rule 803(6) did not contain either of the express exceptions set out in Rule 803(8); nevertheless, the court stated that it must bar the report under Rule 803(6) as well.[67] The court asserted that "there [was] a clear congressional intent that such documents be inadmissible against a" criminal defendant, despite the fact "that the chemist's documents might appear to be within the literal

57. *Id.* at 66–68.

58. *Id.* at 67.

59. *Id.*

60. *See supra* notes 51–52 and accompanying text.

61. *Oates*, 560 F.2d at 67 ("Though with less confidence, we believe that the chemist's documents might also fail to achieve status as public records under FRE 803(8)(B) because they are records of 'matters observed by police officers and other law enforcement personnel.'").

62. *See supra* notes 49–50 and accompanying text.

63. *Oates*, 560 F.2d at 67.

64. *Id.* at 68 (construing the language "to include, at the least, any officer or employee of a governmental agency which has law enforcement responsibilities").

65. *Id.* at 67–68 (citing United States v. Smith, 521 F.2d 957, 968–69 n.24 (D.C. Cir. 1975)).

66. *Id.* at 66; *see also id.* at 74–80.

67. *Id.* at 68 ("Our conclusion that the chemist's report and worksheet do not satisfy the standards of FRE 803(8) comports perfectly with what we discern to be clear legislative intent not only to exclude such documents from the scope of FRE 803(8) but from the scope of FRE 803(6) as well.").

language of FRE 803(6)."[68] The court read the extrinsic legislative history, and found the drafters had manifested a firm intention in the legislative history of Rule 803(8)[69] to render such reports absolutely inadmissible under any theory: "The result Congress intended was the absolute inadmissibility of records of this nature . . . ."[70]

The court pointed to passages in both the Advisory Committee Note accompanying Rule 803(8) and passages in the congressional deliberations over the rules. The court quoted the Advisory Committee's statement that the exceptions stated in Rule 803(8) were needed because of the "almost certain collision with [Sixth Amendment] confrontation rights which would result from [the] use [of such reports] against an accused in a criminal case."[71] The court then noted passages in the House and Conference Committee proceedings in which legislators who played prominent roles in proposing the 803(8) exceptions voiced a wide concern on confrontation clause grounds,[72] which would be equally applicable whether the court admitted the record as an official record or business entry. The court reasoned that the legislative history dictated a ruling that if the conclusions in a government document constituted inadmissible findings under then-existing Rule 803(8)(C) (the current Rule 803(8)(A)(iii)), the document had to be "similarly disqualified under any exception to the hearsay rule."[73] The court frankly acknowledged that it was reading the Rule 803(8)(C) restriction into Rule 803(6).[74]

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68. *Id.* at 75.

69. *See id.* at 79 ("We thus consider it clear that Congress has expressed a firm intention that, if there are plausible doubts that evidence fitting within the literal terms of a hearsay exception could survive confrontation analysis, the hearsay exception should be construed with considerable flexibility so that the court can, if possible, avoid deciding the constitutional question.").

70. *Id.* at 69; *see also id.* at 72, 77. *See also* Jeffrey Bellin & Shevarma Pemberton, *Policing the Admissibility of Body Camera Evidence*, 87 FORDHAM L. REV. 1425, 1446 (2019) (referring to "the so-called 'law enforcement' exception to the public records hearsay exception").

71. *Oates*, 560 F.2d at 79 (quoting Rules of Evidence for the United States Courts and Magistrates, 56 F.R.D. 183, 313 (1972)).

72. *See id.* at 69–73.

73. *Id.* at 72.

74. *Id.* at 78 ("Even if the remarks of Representatives Hungate and Dennis were not as clear as they are, we could still reach the same conclusion that, in view of the articulated purpose behind the narrow drafting of FRE 803 in general and FRE 803(8) in particular, FRE 803(6) must be read in conjunction with FRE 803(8)(B) and (C).").

II. The Modern Textualist Approach to Statutory Construction: The Role of Context and Extrinsic Legislative History in General and in the Specific Setting of the Federal Rules of Evidence

It is true that there have been and, in some jurisdictions, still are, approaches to statutory construction other than textualism. For a long period in modern American legal history, the prevailing view was the legal process school of thought.[75] That approach presumed that legislators act in good faith and in pursuit of the public good.[76] Given that benign presumption, courts routinely attached great weight to extrinsic legislative history material; if legislators almost always act in bona fides, the legislative history materials they generate ought to be just as reliable as the statutory text they vote on. As a result, during this period, courts often based interpretive decisions on legislative history and disregarded the apparent plain meaning of the statutory text.[77]

However, law and economics scholars and political scientists sharply criticized this approach as idealistic[78] to the point of being unrealistic.[79] Their analyses and research demonstrated that, in many cases, legislation represents an amoral deal between particular reelection-minded legislators[80] and special interest groups.[81] That insight led to the emergence of textualism, the now dominant approach, especially in federal court—which has led to a rethinking of the wisdom of relying on extrinsic legislative history material.[82] It is undeniable that textualism has its critics.[83] However,

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75. Edward J. Imwinkelried, *Moving Beyond "Top Down" Grand Theories of Statutory Construction: A "Bottom Up" Interpretive Approach to the Federal Rules of Evidence*, 75 OR. L. REV. 389, 399–400 (1996) [hereinafter Imwinkelried, *Moving Beyond*].

76. *Id.*

77. *See, e.g.*, William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 628 (1990) (noting that "strongly contradictory legislative history can trump plain meaning").

78. WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 609 (1988).

79. *See id.* at 572.

80. *Id.* at 333–34.

81. *See id.* at 710 (discussing lobbyists attempt to modify language of legislative reports).

82. *See* Imwinkelried, *Moving Beyond*, *supra* note 75, at 400–04; *see also infra* note 84.

83. *See generally* Joseph Kimble, *Ideological Judging: The Record of Textualism*, NAT'L L.J., Aug. 2018, at 79; Stephen F. Ross, *The Limited Relevance of Plain Meaning*, 73 WASH. U.L.Q. 1057 (1995); Andrew E. Taslitz, Daubert's *Guide to the Federal Rules of Evidence: A Not-So-Plain-Meaning Jurisprudence*, 32 HARV. J. LEGIS. 3 (1995); Glen Weissenberger, *The Supreme Court and the Interpretation of the Federal Rules of Evidence*, 53 OHIO ST. L.J. 1307 (1992).

a review of the Statutes headnotes in any recent Federal Reporter or Federal Supplement advance sheet will readily demonstrate that, today, federal judges overwhelmingly apply a textualist approach to legisprudential issues.[84] Although one of the Court's more conservative jurists, Justice Scalia, was one of the early advocates of textualism, one of the more liberal jurists, Justice Kagan, has remarked, "We're all textualists now."[85] For that reason, because of the emergence and continued foreseeable dominance of textualism, this article looks to evaluate the three lines of federal authority discussed in Part I through a textualist lens.

A. Textualism in General

1. The Decline in the Importance of Extrinsic Legislative History

As previously stated, this is the Age of Statutes.[86] Increasingly, legal disputes are resolved by an interaction between the judicial and legislative branches—namely, a judge's interpretation of a rule crafted by a legislature, rather than a rule formulated by a court. The increased frequency of such interactions intensifies the focus on the constitutional doctrine of separation

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84. For example, the most recent federal court advance sheets indicate a number of opinions stating textualist views. *See, e.g.*, Reed v. Taylor, 923 F.3d 411, 415–16 (5th Cir. 2019); Warner v. Experian Info. Sols., Inc., 931 F.3d 917, 921 (9th Cir. 2019). The same pattern is evident in the most recent federal supplement advance sheets. Paczkowski v. My Choice Family Care, Inc., 384 F. Supp. 3d 991, 993 (W.D. Wis. 2019); Dorbor v. United States, 379 F. Supp. 3d 765, 768–69 (W.D. Wis. 2019); Urbain Pottier v. Hotel Plaza Las Delicias, Inc., 379 F. Supp. 3d 130, 134 (D.P.R. 2019).

One is hard pressed to find any reference to the older legal process approach to statutory construction. *See* Edward R. Becker & Aviva Orenstein, *The Federal Rules of Evidence After Sixteen Years—The Effect of "Plain Meaning" Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 60 GEO. WASH. L. REV. 857, 867 (1992) (noting an increase in "scholarly attention . . . to theories of statutory interpretation, particularly in light of the Court's recent trend toward plain meaning"); *see also* 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 (1993) ("In adopting the moderate textualist approach, most of the current Justices have rejected the traditional, legal process approach to statutory construction."); Randolph N. Jonakait, *The Supreme Court, Plain Meaning, and the Changed Rules of Evidence*, 68 TEX. L. REV. 745, 745 (1990) ("The Supreme Court has imposed the plain-meaning standard of statutory interpretation on the Federal Rules of Evidence."). *See generally* Eskridge, *supra* note 77; William N. Eskridge, Jr. & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691 (1987).

85. Bryan A. Garner, *It Means What It Says*, ABA J., Apr. 2019, at 28, 28 (quoting Justice Elena Kagan).

86. *See generally* CALABRESI, *supra* note 23.

of powers.[87] In part, that focus may well have contributed to the emergence of the modern textualist approach to statutory construction.

Simply stated, the touchstone of the textualist approach is the primacy of the text—the language of the statute being interpreted.[88] As a formal matter, unlike extrinsic legislative history, such as committee reports and testimony at congressional hearings, the text of the statute has the force of law; the statutory language *is* the law.[89] Legislators vote on and approve the text of a statute,[90] not their personal thoughts about the statute.[91] As Justice Jackson urged almost seventy years ago, the judge performing the interpretive task should conduct an "analysis of the statute instead of by psychoanalysis of Congress."[92] Admittedly, extrinsic legislative history can sometimes help

87. United States v. All Funds on Deposit in United Bank, 188 F. Supp. 2d 407, 411 (S.D.N.Y. 2002) ("The language . . . is plain on its face; and where that is so, then not only is there no need to resort to legislative history, but also, under the constitutional doctrine of separation of powers, it is inappropriate to do so."); *see* Jim Chen, *Law as a Species of Language Acquisition*, 73 WASH. U.L.Q. 1263, 1296–98 (1995); Mark I. Schwartz, *Conquering Separation Anxiety*, LEGAL TIMES, Aug. 7, 1995, at 26.

88. United States v. Maturino, 887 F.3d 716, 723 (5th Cir. 2018) ("Text is the alpha and the omega of the interpretive process."); Chen, *supra* note 87, at 1302 ("[T]he textualist recipe puts statutory language at the head of its interpretive sentences.").

89. Owens v. Republic of Sudan, 174 F. Supp. 3d 242, 261 (D.D.C. 2016) ("Statutes are law . . . .") (quoting *In re* Sinclair, 870 F.2d 1340, 1343 (7th Cir. 1989)); Ariz. Contractors Ass'n v. Candelaria, 534 F. Supp. 2d 1036, 1046 (D. Ariz. 2008), *aff'd sub nom.* Chicanos Por La Causa, Inc. v. Napolitano, 544 F.3d 976 (9th Cir. 2008) ("The language of the statute . . . controls.") (citing Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005); Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 150 n.4 (2002); Sprietsma v. Mercury Marine, 537 U.S. 51, 62–63 (2002)); *see also* Sterk v. Redbox Automated Retail, LLC, 806 F. Supp. 2d 1059, 1068 (N.D. Ill. 2011), *rev'd*, 672 F.3d 535 (7th Cir. 2012) ("[T]he authoritative statement is the statutory text . . . .") (citing *Exxon Mobil*, 545 U.S. at 568); United States v. Cochran, 640 F. Supp. 2d 934, 937 (N.D. Ohio 2009) (noting that the text is an "authoritative statement") (citing *Exxon Mobil*, 545 U.S. at 568); United States v. Smith, 593 F. Supp. 2d 948, 954 (E.D. Ky. 2009) ("[T]he authoritative statement is the statutory text.") (quoting City of Cookeville v. Upper Cumberland Elec. Membership Corp., 484 F.3d 380, 390 n.6 (6th Cir. 2007)).

90. Kaufman v. Holder, 686 F. Supp. 2d 40, 43 (D.D.C. 2010); People v. Hunt, 88 Cal. Rptr. 2d 524, 528 (Cal. Ct. App. 1999) ("[I]t is the language of the statute itself that has successfully braved the legislative gauntlet.") (quoting Halbert's Lumber, Inc. v. Lucky Stores, Inc., 8 Cal. Rptr. 2d 298, 300 (Cal. Ct. App. 1992)).

91. *See* United States v. Mitra, 405 F.3d 492, 495 (7th Cir. 2005) ("Legislation is an objective text approved in constitutionally prescribed ways; its scope is not limited by the celebrations of those who voted for or signed it into law.").

92. United States v. Pub. Utils. Comm'n of Cal., 345 U.S. 295, 319 (1953) (Jackson, J., concurring).

one construe the language, but only the statute has the status of law.[93] In light of the doctrine of separation of powers,[94] courts have a formal, constitutional obligation to respect the linguistic choices made by the legislature[95] because those words are the best reflection of the legislature's policy choices embedded in the statute.

The case for textualism, though, rests on more than formalism. Since World War II, political science research has exposed the extent to which special interest groups can influence—and manipulate—the process which generates legislative history materials such as committee reports.[96] The Supreme Court has even recognized that practical danger and cautioned against uncritical reliance on extrinsic legislative history material.[97]

Given these formal and practical considerations, two schools of textualism have developed. The more extreme school takes the position that if a judge reviews the text and context of a statute and concludes that the language has a plain meaning, the judge's interpretive analysis is complete[98] and ceases.[99] In that event, the judge treats the plain meaning as

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93. *Hunt*, 88 Cal. Rptr. 2d at 528 ("Not even the most reliable document of legislative history has the force of law.") (citing City of Sacramento v. Pub. Emps.' Ret. Sys., 27 Cal. Rptr. 2d 545, 549 (Cal. Ct. App. 1994)).

94. United States v. All Funds on Deposit in United Bank, 188 F. Supp. 2d 407, 411 (S.D.N.Y. 2002).

95. Russell v. Choicepoint Servs, Inc., 302 F. Supp. 2d 654, 664 (E.D. La. 2004); Oyuela v. Seacor Marine (Nigeria), Inc., 290 F. Supp. 2d 713, 724 (E.D. La. 2003), *aff'd*, 201 F. App'x 269 (5th Cir. 2006) (per curiam).

96. Lujan v. Regents of Univ. of Cal., 69 F.3d 1511, 1518 (10th Cir. 1995) ("Statutes may have multiple purposes and may represent a compromise between competing considerations.") (citations omitted); *In re* Vizio, Inc., Consumer Privacy Litig., 238 F. Supp. 3d 1204, 1221 (C.D. Cal. 2017) (noting there are "pitfalls that plague too quick a turn to the more controversial realm of legislative history") (quoting Lamie v. U.S. Tr., 540 U.S. 526, 526 (2004)); United States v. Smith, 593 F. Supp. 2d 948, 954 (E.D. Ky. 2009) (explaining that legislative history has "limited utility and reliability") (quoting City of Cookeville v. Upper Cumberland Elec. Membership Corp., 484 F.3d 380, 390 n.6 (6th Cir. 2007)); *see also* Eileen A. Scallen, *Classical Rhetoric, Practical Reasoning, and the Law of Evidence*, 44 AM. U. L. REV. 1717, 1744 (1995); Andrew E. Taslitz, *Interpretive Method and the Federal Rules of Evidence: A Call for a Politically Realistic Hermeneutics*, 32 HARV. J. ON LEGIS. 329, 356–57 (1995) (discussing Arrow's Paradox).

97. Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568–70 (2005).

98. United States v. One 1997 Toyota Land Cruiser, 248 F.3d 899, 903 (9th Cir. 2001) ("When the words of a statute are unambiguous, . . . this first canon is also the last: judicial inquiry is complete.") (quoting Conn. Nat'l Bank v. Germain, 503 U.S. 249, 254 (1992)); Rodriguez v. Carson, 377 F. Supp. 3d 401, 409 (S.D.N.Y. 2019) ("When the words of a statutes are unambiguous, then, this first canon is also the last: judicial inquiry is complete.") (quoting Hedges v. Obama, 724 F.3d 170, 189 (2d Cir. 2013)).

99. United States v. Ng Lap Seng, 934 F.3d 110, 122 (2d Cir. 2019); Beevan & Assocs., LPA, Inc. v. Yost, 929 F.3d 366 (6th Cir. 2019) ("Where 'the meaning of a statute is unambiguous and definite, it must be applied as written and no further interpretation is necessary.'") (quoting State *ex rel.* Prade v. Ninth Dist. Court of Appeals, 2017-Ohio-7651, ¶ 14, 87 N.E.3d 1239, 1242); Doe v. BlueCross BlueShield of Tenn., Inc., 926 F.3d 235, 260 (6th Cir. 2019) ("If the intent of Congress is clear, that is the end of the matter.") (quoting Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 842 (1984)); Warner v. Experian Info. Sols., Inc., 931 F.3d 917, 921 (9th Cir. 2019) ("Thus, our inquiry begins . . . , and ends . . . if the statutory text is unambiguous.") (quoting Satterfield v. Simon & Schuster, Inc., 569 F.3d 946, 951 (9th Cir. 2009)); Wadler v. Bio-Rad Labs., Inc., 916 F.3d 1176, 1187 (9th Cir. 2019) ("When . . . 'a statute's language is plain and unambiguous, our inquiry ends.'") (quoting Christie v. Ga.-Pac. Co., 898 F.3d 952, 958 (9th Cir. 2018)); Sucic v. Wilkie, 921 F.3d 1095, 1098 (Fed. Cir. 2019) ("Our inquiry ceases 'if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'") (quoting Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002)); Hall v. United States, 677 F.3d 1340, 1346 (Fed. Cir. 2012) (quoting *Conn. Nat'l Bank*, 677 F.3d at 254); *see, e.g.*, Paczkowski v. My Choice Family Care, Inc., 384 F. Supp. 3d 991, 993 (W.D. Wis. 2019) ("'Statutory interpretation begins with—and, absent ambiguity, is confined to—the language of the statute' . . . .") (quoting Fuchsgruber v. Custom Accessories, Inc., 2001 WI 81, ¶ 10, 244 Wis.2d 758, 628 N.W.2d 833); Urbain Pottier v. Hotel Plaza Las Delicias, Inc., 379 F. Supp. 3d 130, 134 (D.P.R. 2019) ("Statutory construction in Puerto Rico begins with the text of the underlying statute, and ends there as well if the text is unambiguous.") (quoting Oquendo-Lorenzo v. Hosp. San Antonio, Inc., 256 F. Supp. 3d 103, 107 (D.P.R. 2017)); Thompson v. Does 1-5, 376 F. Supp. 3d 1322, 1326 (N.D. Ga. 2019) ("A determination of what the [statute] requires 'begins with the statutory text, and ends there as well if the text is unambiguous.'") (quoting BedRoc Ltd. v. United States, 541 U.S. 176, 183 (2004)); Town of Dutch John v. Daggett Cty., 367 F. Supp. 3d 1290, 1297 (D. Utah 2019) ("'[I]f the statutory language is unambiguous and the statutory scheme is coherent and consistent,' the court's inquiry ends there.") (quoting *Barnhart*, 534 U.S. at 450); Glob. Tropical Imps. & Exps. LLC v. Bernhardt, 366 F. Supp. 3d 110, 115 (D.D.C. 2019) ("The Court's inquiry 'begins with the statutory text' and 'ends there as well if the text is unambiguous.'") (quoting *BedRoc*, 541 U.S. at 183); United States v. Patara, 365 F. Supp. 3d 1085, 1088 (S.D. Cal. 2019) ("Thus, our inquiry begins with the statutory text, and ends there as well if the text is unambiguous.") (quoting *Satterfield*, 569 F.3d at 951); League of Conservative Voters v. Trump, 363 F. Supp. 3d 1013 (D. Alaska 2019) ("Judicial 'inquiry begins with the statutory text, and ends there as well if the text is unambiguous.'") (quoting *BedRoc*, 541 U.S. at 183); Tugaw Ranches, LLC v. U.S. Dep't of Interior, 362 F. Supp. 3d 879, 881 (D. Idaho 2019) ("Where the statutory language is unambiguous, the court's inquiry is at an end.") (citing Nat'l Ass'n of Mfrs. v. Dep't of Def., 138 S. Ct. 617, 631 (2018); Wade v. Burns, 361 F. Supp. 3d 306, 310 (D. Conn. 2019) ("Our inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent.") (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997)); Jax Leasing, LLC v. Xiulu Ruan, 359 F. Supp. 3d 1129, 1137 (S.D. Ala. 2019) ("Although the rule is not always honored, 'our inquiry into the meaning of [a] statute's text ceases when the statutory language is unambiguous and the statutory scheme is coherent and consistent.'") (quoting Matal v. Tam, 137 S. Ct. 1744, 1756 (2017)).

conclusive of the statute's interpretation.[100] Unless the judge finds that the statutory language is ambiguous[101] and lacks a plain meaning, the judge need not (and should not) even consider extrinsic legislative history material,[102] which might suggest a contrary meaning.[103] Finding that the statutory text lacks a plain meaning is a condition precedent to resorting to extrinsic material; and if the judge finds a plain meaning, the judge may not turn to extrinsic material—no matter how favorably the material points to a different interpretation.[104]

Although the strict textualist school has adherents, a more moderate version of textualism enjoys greater popularity among the courts. Moderate textualists believe that a judge may at least consider extrinsic material, even when the statute superficially[105] appears to have a plain meaning.[106] However, moderate textualists respect the primacy of the statutory language

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100. Electrolux Holdings, Inc. v. United States, 491 F.3d 1327, 1330 (Fed. Cir. 2007).

101. *See In re* W. Iowa Limestone, Inc., 538 F.3d 858, 863 (8th Cir. 2008) ("A statute . . . is ambiguous if reasonable minds could differ or be uncertain as to the meaning of the statute.") (quoting City of Waterloo v. Bainbridge, 749 N.W.2d 245, 248 (Iowa 2008)); Carter Tr. *ex rel.* Forston v. United States, 256 F. Supp. 2d 536, 540 (N.D. Tex. 2003) (starting analysis with the interpretation of the statutory language).

102. *In re* Larson, 513 F.3d 325, 329 (1st Cir. 2008) ("[L]egislative history does not trump unambiguous statutory text.") (citing Lamie v. U.S. Tr., 540 U.S. 526, 534 (2004)); Galloway v. United States, 492 F.3d 219, 224 (3d Cir. 2007) (noting that when "the language of the statute is clear and unambiguous, [the court] will not create an ambiguity through the use of legislative history"); United States v. Trainor, 376 F.3d 1325, 1330 (11th Cir. 2004); *Toyota Land Cruiser*, 248 F.3d at 903 ("If the statute's meaning is clear, we will not consider legislative history.").

103. *See, e.g.*, United States v. McCall, 439 F.3d 967, 971 (8th Cir. 2006) (reviewing Congress's construction of a statute to determine the meaning of the language and finding ambiguity in the history contradicted the plain meaning).

104. *In re* Universal Seismic Assocs., Inc., 288 F.3d 205, 207 (5th Cir. 2002) ("This Circuit has also noted that when a plain reading of a statute precludes one party's interpretation, 'no legislative history—be it ever so favorable—can redeem it.'") (quoting Nalle v. Comm'r, 997 F.2d 1134, 1140 (5th Cir. 1993)).

105. United States Telecom Ass'n v. FBI, 276 F.3d 620, 625 (D.C. Cir. 2002) ("Of course, legislative history may 'shed new light on congressional intent, notwithstanding statutory language that appears superficially clear.'") (quoting Nat. Res. Def. Council v. Browner, 57 F.3d 1122, 1127 (D.C. Cir. 1995)).

106. APA Excelsior III L.P. v. Premiere Techs., 476 F.3d 1261, 1268 (11th Cir. 2007) (explaining that the court may look beyond plain text to ensure the statute's purpose is fulfilled); Cal. Sch. Emps. Ass'n v. Governing Bd. S. Orange Cty. Cmty. Coll. Dist., 21 Cal. Rptr. 3d 451, 459 (Cal. Ct. App. 2004) ("[I]n rare cases, statutory ambiguity is not a condition precedent to further interpretation, and the literal meaning of the words may be disregarded to avoid absurd results.").

by recognizing a strong,[107] albeit rebuttable,[108] presumption in favor of the apparent plain meaning. Although this school of thought permits the judge to consider extrinsic material, it still sets a high bar[109] and imposes an onerous burden on the party urging the court to reject the plain meaning interpretation.[110] Given the practical risks of relying on extrinsic material, the judge must proceed cautiously[111] because appellate courts have cautioned trial judges that the cases in which legislative history trumps

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107. Tyler v. Douglas, 280 F.3d 116, 123 (2d Cir. 2001) (quoting Greene v. United States, 79 F.3d 1348, 1355 (2d Cir. 1996)); United States v. Koh, 199 F.3d 632, 637 (2d Cir. 1999) ("The 'strong presumption that the plain language of the statute expresses congressional intent' can only be rebutted 'when a contrary legislative intent is clearly expressed.'") (quoting Ardestani v. INS, 502 U.S. 129, 135–36 (1991)); United States v. Mack, 164 F.3d 467, 471–72 (9th Cir. 1999) (citing *Ardestani*, 502 U.S. at 135); United States v. Wallace, 476 F. Supp. 2d 1129, 1132 (D. Ariz. 2007) (citing *Ardestani*, 502 U.S. at 135); *In re* Worldcom, Inc. Secs. Litig., 308 F. Supp. 2d 236, 244 (S.D.N.Y. 2004) (finding that a clear, contrary legislative intent can rebut the strong presumption in favor of the statutory text) (citing Lander v. Hartford Life & Annuity Ins. Co., 251 F.3d 101, 110 (2d Cir. 2001)).

108. United States v. Bloch, 762 F. Supp. 2d 115, 119–20 (D.D.C.), *rev'd on other grounds*, 800 F. Supp. 2d 165 (D.D.C. 2011) (finding the rebuttable presumption exists when proponent can show "Congress did not mean what is appears to have said, or that, as a matter of logic and statutory structure, it almost surely could not have meant it") (internal citation marks omitted) (quoting United States v. Ron Pair Enterp., Inc., 489 U.S. 235, 242 (1989)); Lingenfelter v. Cty. of Fresno, 64 Cal. Rptr. 3d 378, 385 (Cal. Ct. App. 2007) ("The presumption . . . is not conclusive.").

109. Forte v. Wal-Mart Stores, Inc., 763 F.3d 421 (5th Cir. 2014), *aff'd in part, vacated in part*, 780 F.3d 272 (5th Cir. 2015) ("The 'bar for reworking the words our Legislature passed into law is high.'") (quoting Combs v. Health Care Servs. Corp., 401 S.W.3d 623, 630 (Tex. 2013)); Consumer Elecs. Ass'n v. FCC, 347 F.3d 291, 298 (D.C. Cir. 2003) (noting "the bar is high") (quoting Williams Cos. v. FERC, 345 F.3d 910, 914 (D.D.C. 2003)).

110. *See, e.g.*, *Bloch*, 762 F. Supp. 2d at 120 (finding that proponent did not show any contrary intent).

111. United States v. Locke, 471 U.S. 84, 95–96 (1985) ("Going behind the plain language of a statute in search of a possibly contrary congressional intent is a step to be taken cautiously even under the best circumstances.") (quoting Am. Tobacco Co. v. Patterson, 456 U.S. 63, 75 (1982)) (internal quotation marks omitted); United States v. Phillips, 543 F.3d 1197, 1207 (10th Cir. 2008) ("Going behind the plain language of a statute in search of a possibly contrary congressional intent is a step to be taken cautiously . . . .") (quoting *Locke*, 471 U.S. at 95–96); Violette v. P.A. Days, Inc., 427 F.3d 1015, 1017 (6th Cir. 2005) (quoting *Am. Tobacco*, 456 U.S. at 75); Burlington N. & Santa Fe Ry. Co. v. Bhd. of Maint. of Way Emps., 286 F.3d 803, 805 (5th Cir. 2002) ("[E]ven in its secondary role legislative history must be used cautiously.") (quoting Aviall Servs., Inc. v. Cooper Indus., Inc., 263 F.3d 134, 140–41 (5th Cir. 2001)).

statutory text should be few[112] and rare.[113] There is a wealth of authority that has held that judges should find the presumption is rebutted only in exceptional cases[114] where the party opposing the plain meaning interpretation can make a compelling,[115] overwhelming,[116] or extraordinarily[117] powerful showing that the statute's seemingly plain meaning is at odds with the legislative intent.[118]

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112. U.S. Fleet Servs., Inc. v. City of Fort Worth, 141 F. Supp. 2d 631, 640 (N.D. Tex. 2001).

113. United States v. Tobeler, 311 F.3d 1201, 1203 (9th Cir. 2002) (quoting Middle Mountain Land & Produce, Inc. v. Sound Commodities Inc., 307 F.3d 1220, 1223 (9th Cir. 2002)); Hillman v. IRS, 263 F.3d 338, 342 (4th Cir. 2001) ("[E]xceptions to the Plain Meaning Rule . . . 'are, and should be, exceptionally rare.'") (quoting Sigmon Coal Co. v. Apfel, 226 F.3d 291, 304 (4th Cir. 2000)); Minnesota *ex rel.* Hatch v. Fleet Mortg. Corp., 181 F. Supp. 2d 995, 999 (D. Minn. 2001) ("Upon a finding that the statutory terms are unambiguous, further judicial inquiry is only called for in rare and exceptional circumstances . . . .") (citing Demarest v. Manspeaker, 498 U.S. 184, 190 (1991)); United States v. Siart, 178 F. Supp. 2d 1171, 1173 (D. Or. 2001) ("This presumption is 'rebutted only in rare and exceptional circumstances, when a contrary legislative intent is clearly expressed.'") (quoting Ardestani v. INS, 502 U.S. 129, 135–36 (1991)).

114. *See* Martinez v. Sec'y, Dep't of Homeland Sec., 670 F. Supp. 2d 1325, 1327–28 (M.D. Fla. 2009) ("If, after doing so, the meaning of the text is clear, in all but highly exceptional cases the analysis is complete and goes no further.") (citing Garcia v. United States, 469 U.S. 70, 75 (1984)).

115. Joseph v. J.J. MacIntyre Cos., LLC, 238 F. Supp. 2d 1158, 1163 (N.D. Cal. 2002) ("In some situations, however, what would otherwise appear to be plain language is interpreted contrarily where there are compelling indications of legislative intent.") (citing Cty. of L.A. v. Frisbie, 122 P.2d 526 (Cal. 1942)).

116. Michetti Pipe Stringing, Inc. v. Murphy Bros. Inc., 125 F.3d 1396, 1398 (11th Cir. 1997), *rev'd on other grounds sub nom.* Murphy Bros. Inc. v. Michetti Pipe Stringing, Inc. 526 U.S. 344 (1999) ("It is true that '[i]n rare and exceptional circumstances, we may decline to follow the plain meaning of a statute because overwhelming extrinsic evidence demonstrates a legislative intent contrary to the text's plain meaning.'") (quoting Boca Ciega Hotel, Inc. v. Bouchard Transp. Co., 51 F.3d 235, 238 (11th Cir. 1995)).

117. Salinas v. United States, 522 U.S. 52, 57 (1997) ("[O]nly the most extraordinary showing of contrary intentions in the legislative history will justify a departure from that language.") (quoting United States v. Albertini, 472 U.S. 675, 680 (1985)) (internal quotation marks omitted); FTC v. Shire Viropharma, Inc., 917 F.3d 147, 156 (3d Cir. 2019) ("When the statute's language is plain, the sole function of the courts—at least where the disposition required by the [text] is not absurd—is to enforce it according to its terms.") (quoting Murphy v. Millennium Radio Grp. LLC, 650 F.3d 295, 302 (3d Cir. 2011)); *Murphy*, 650 F.3d at 302 (same) (quoting *In re* Phila. Newspapers, LLC, 599 F.39 298, 314 (3d Cir. 2010)); Standiferd v. U.S. Tr., 641 F.3d 1209, 1213–14 (10th Cir. 2011) ("Only the most extraordinary showing of a contrary legislative intent can justify our departure from the plain meaning of the statutory language.") (citing Garcia v. United States, 469 U.S. 70, 75 (1984)); United States v. Marcus, 628 F.3d 36, 44 (2d Cir. 2010) ("Absent ambiguity in the

2. The Increased Importance of Context and Its Legitimate Uses

Context has always played an important role in statutory construction. However, that observation is even truer today; at the same time that textualism has depreciated extrinsic legislative history, textualism has also enhanced the importance of context. Like statutory text—and unlike extrinsic material—context has the force of law because it is found in other parts of the same statutory scheme. Moreover, while special interest groups may exert manipulative influence over committee material behind the scenes and out of the public view, like the text that must be interpreted, the context must be voted on publicly.

The maxim *noscitur a sociis* reflects the traditionally understood importance of context:[119] it "should be determined by words immediately surrounding it"[120] or "a word is known by the company it keeps."[121] The basic tenet of "whole act"[122] or contextual interpretation is that the

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statutory text, '[o]nly the most extraordinary showing of contrary intentions in the legislative history will justify a departure from [the statutory] language.'") (quoting *Albertini*, 472 U.S. at 680); United States v. Sabri, 326 F.3d 937, 943 (8th Cir. 2003), *aff'd*, 541 U.S. 600 (2004) (same) (quoting *Albertini*, 472 U.S. at 680); Perrone v. Gen. Motors Acceptance Corp., 232 F.3d 433, 435 (5th Cir. 2000) ("In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished.") (quoting Estate of Cowart v. Nicklos Drilling, Co., 505 U.S. 469, 475 (1992)); New York v. Niagara Mohawk Power Corp., 263 F. Supp. 2d 650, 659 n.15 (W.D.N.Y. 2003) (same) (citing *Garcia*, 469 U.S. at 70); United States v. Nipper, 198 F. Supp. 2d 818, 821 (W.D. La. 2002) (same) (citing *Garcia*, 469 U.S. at 75); S. States Coop. Inc. v. I.S.P. Co., Inc., 198 F. Supp. 2d 807, 813 (N.D. W. Va. 2002) ("Furthermore, where a statute is unambiguous, legislative history is 'instructive only upon "the most extraordinary showing of contrary intentions."'") (quoting Olmsted v. Pruco Life Ins. Co., 283 F.3d 429, 435 (2d Cir. 2002)).

118. *See, e.g.*, *In re* Pharm. Indus. Average Wholesale Price Litig., 582 F.3d 156, 169–70 (1st Cir. 2009); *In re* Palmer, 219 F.3d 580, 584–85 (6th Cir. 2000); Red Lake Band of Chippewa Indians v. U.S. Dep't of Interior, 624 F. Supp. 2d 1, 24–26 (D.D.C. 2009).

119. *See* People v. Hernandez, 215 Cal. Rptr. 3d 880, 885 (Cal. Ct. App. 2017) (describing the term to mean that "a word takes meaning from the company it keeps") (quoting People v. Drennan, 101 Cal. Rptr. 2d 584, 588 (Cal. Ct. App. 2000)); Ass'n of Irritated Residents v. San Joaquin Valley Unified Air Pollution Control Dist., 85 Cal. Rptr. 3d 590, 602 (Cal. Ct. App. 2008) ("[T]he meaning of a word may be enlarged or restrained by reference to the intent of the whole clause in which it is used.") (citing People v. Stout, 95 Cal. Rptr. 593, 596 (Cal. Ct. App. 1971)).

120. *Noscitur a sociis*, BLACK'S LAW DICTIONARY (11th ed. 2019).

121. SBC Inc. v. FCC, 414 F.3d 486, 506 (3d Cir. 2005) (quoting Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307 (1961)).

122. *See* United States v. Salim, 287 F. Supp. 2d 250, 335–37 (S.D.N.Y. 2003) (discussing the Whole Act rule).

interpretation of statutory text is a holistic endeavor.[123] The text should not be viewed atomistically,[124] in isolation,[125] or in a vacuum.[126] Rather, the text

123. United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 371 (1988) ("Statutory construction, however, is a holistic endeavor."); R. H. Donnelley Corp. v. United States, 641 F.3d 70, 76 (4th Cir. 2011) ("[W]e consider all the words employed and do not review isolated phrases.") (quoting United States v. Ide, 624 F.3d 666, 668 (4th Cir. 2010)); Vectra Fitness v. TNWK Corp., 162 F.3d 1379, 1383 (Fed. Cir. 1998) ("[S]tatutory interpretation is a 'holistic endeavor' that requires consideration of a statutory scheme in its entirety.") (quoting *United Sav. Ass'n*, 484 U.S. at 371); Trs. of the Chi. Truck Drivers, Helpers and Warehouse Workers Union (Ind.) Pension Fund v. Leaseway Transp. Corp., 76 F.3d 824, 828 (7th Cir. 1996) ("Indeed, statutory interpretation 'is a holistic endeavor and, at a minimum, must account for a statute's full text, language as well as punctuation, structure, and subject matter.'") (quoting U.S. Nat'l Bank of Or. v. Indep. Ins. Agents, 508 U.S. 439, 454–56 (1993)); Goodman Mfg., L.P. v. United States, 69 F.3d 505, 510 (Fed. Cir. 1995) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . .") (quoting *United Sav. Ass'n*, 484 U.S. at 371); *see, e.g.*, Filush v. Town of Weston, 266 F. Supp. 2d 322, 327, 330 (D. Conn. 2003) (reading Title II of the ADA "in the context of the overall . . . statutory scheme" led the court to a different conclusion than the majority of courts).

Over the decades, the courts have found numerous, colorful ways of capturing this notion. Some of the most distinguished American jurists have virtually waxed poetic about this notion:

- Towne v. Eisner, 245 U.S. 418, 425 (1918) (Holmes, J.) ("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.") (citing Lamar v. United States, 240 U.S. 60, 65 (1916)).
- NLRB v. Federbush Co., Inc., 121 F.2d 954, 957 (2d Cir. 1941) (L. Hand, J.) ("Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used . . . .").

124. *In re* Jacqueline L., 39 Cal. Rptr. 2d 178, 185 (Cal. Ct. App. 1995) (ordered not published) ("Also, proper textual exegesis requires that a statute be construed as a whole, rather than in atomistic bits.").

125. Martinez v. Mukasey, 519 F.3d 532, 541 (5th Cir. 2008) ("Act[s] of Congress . . . should not be read as a series of unrelated and isolated provisions.") (quoting Soliman v. Gonzales, 419 F.3d 276, 282 (4th Cir. 2005)); Mendoza v. Nordstrom, Inc., 393 P.3d 375, 381 (Cal. 2017) ("We do not construe statutory language in isolation . . . .") (quoting Dep't of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd., 145 P.3d 462, 468 (Cal. 2006)); People v. Dorsey, 89 Cal. Rptr. 2d 498, 501–02 (Cal. Ct. App. 1999) ("[E]ach sentence must be read not in isolation but in light of the statutory scheme . . . .") (quoting Lungren v. Deukmejian, 755 P.2d 299, 304 (Cal. 1988)).

126. Passamaquoddy Tribe v. Maine, 75 F.3d 784, 789 (1st Cir. 1996) ("Put simply, courts must recognize that Congress does not legislate in a vacuum.") (citing Thinking Machs. Corp. v. Mellon Fin. Servs. Corp. #1 (*In re* Thinking Machs.), 67 F.3d 1021, 1025 (1st Cir. 1995)); Loving v. IRS, 917 F. Supp. 2d 67, 75 (D.D.C. 2013), *aff'd*, 742 F.3d 1013

to be construed should be viewed as part of the entire statutory scheme[127] in order to ensure its overall rational coherence.[128] Hence, in a given case, the context can be crucial in divining the meaning of the dispositive statutory text.[129]

a) The Broad Meaning of "Context"

On one hand, courts construe "context" broadly. Given the breadth of the notion of "context," courts may interpret: a word in a statutory sentence in light of other words in the sentence;[130] a sentence in a statute in light of other sentences in the same clause or subsection of the statute;[131] one clause

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(D.C. Cir. 2014) ("Statutory language 'cannot be construed in a vacuum.'") (quoting Roberts v. Sea-Land Servs., Inc., 566 U.S. 93, 101 (2012)); Gonzales-Gomez v. Achim, 372 F. Supp. 2d 1062, 1069 (N.D. Ill. 2005) ("At the same time, 'statutory language cannot be construed in a vacuum.'") (quoting Davis v. Mich. Dep't of Treasury, 489 U.S. 803, 809 (1989)).

127. *See* United States v. Rigel Ships Agencies, Inc., 432 F.3d 1282, 1289 (11th Cir. 2005) (per curiam) ("In any question of statutory interpretation, '[w]e do not look at one word or term in isolation, but instead we look to the entire statutory context.'") (quoting United States v. DBB, Inc., 180 F.3d 1277, 1281 (11th Cir. 1999)); *Vectra Fitness*, 162 F.3d at 1384 (reading a statute in light of case law to determine a section is unambiguous); *Mendoza*, 393 P.3d at 381 ("Statutory context also matters.").

128. *Mendoza*, 393 P.3d at 381 ("We do not construe statutory language in isolation, but rather as a thread in the fabric of the entire statutory scheme of which it is a part.") (quoting *Dep't of Alcoholic Beverage Control*, 145 P.3d at 468; Berkeley Hillside Pres. v. City of Berkeley, 343 P.3d 834 (Cal. 2015)); Lyon v. Chase Bank USA, N.A., 656 F.3d 877, 890 (9th Cir. 2011) ("Our goal in interpreting a statute is to understand the statute as a symmetrical and coherent regulatory scheme . . . .") (quoting Am. Bankers Ass'n v. Gould, 412 F.3d 1081, 1086 (9th Cir. 2005)) (internal citation marks omitted); Ass'n of Irritated Residents v. U.S. EPA, 632 F.3d 584, 596 (9th Cir. 2011) (discussing step one of *Chevron*) (citing Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984)); Greenbaum v. U.S. EPA, 370 F.3d 527, 535–36 (6th Cir. 2004) ("A court must therefore interpret the statute as [] symmetrical and coherent . . . .") (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132–33 (2000)); United States v. Murphy, 35 F.3d 143, 145 (4th Cir. 1994) ("If the statutory language is unambiguous, then provided that 'the statutory scheme is coherent and consistent,' our inquiry terminates.") (quoting United States v. Ron Pair Enters., Inc., 489 U.S. 235, 240–41 (1989)).

129. *See generally*, Edward J. Imwinkelried, *Using a Contextual Construction to Resolve the Dispute over the Meaning of the Term "Plan" in Federal Rule of Evidence 404(b)*, 43 U. KAN. L. REV. 1005 (1995).

130. Smith v. United States, 508 U.S. 223, 229 (1993) ("The meaning of a word that appears ambiguous if viewed in isolation may become clear when the word is analyzed in light of the terms that surround it.").

131. Westwood Apex v. Contreras, 644 F.3d 799, 804 (9th Cir. 2011) ("Given that 'any' and 'all' are used in relation to one another, they should be read that way and interpreted consistently with the sentence's structure.").

or subsection in light of other clauses or subsections;[132] one major subdivision or title in a legislative scheme in light of other titles;[133] and even a provision in one code in light of other codes that are deemed in pari materia[134] because they address similar policy considerations. Thus, contextual interpretation has a long reach.

b) The Uses of "Context"

On the other hand, even contextual interpretation has its limits. The use of context to interpret ambiguously worded provisions and to define the scope of provisions can be a beneficial tool for the judiciary. However, courts can abuse context by importing restrictions from one provision into another, effecting what amounts to an amendment of the legislated scheme.

(1) Using Wording from One Statutory Provision to Eliminate Ambiguities in the Wording of Another Provision

The most common use of context is to help eliminate ambiguities in the wording of related statutes. There is consensus that courts may use the wording of one statutory provision to clarify[135] or illuminate[136] the meaning

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132. Va. Int'l Terminals, Inc. v. Edwards, 398 F.3d 313, 317 (4th Cir. 2005) ("[U]nder a longstanding canon of interpretation, adjacent statutory subsections that refer to the same subject matter . . . must be read *in pari materia* as if they were a single statue.") (citing United States v. Srnsky, 271 F.3d 595, 602 (4th Cir. 2001)); United States v. Broncheau, 759 F. Supp. 2d 682, 688 (E.D.N.C. 2010) (adopting the *Virginia International* approach to statutory interpretation); Action All. of Senior Citizens v. Johnson, 607 F. Supp. 2d 33 (D.D.C. 2009), *aff'd*, 607 F.3d 860 (D.C. Cir. 2010) ("'[A] statute is to be reads as a whole,' especially where construing adjacent subsections with remarkably similar structures.") (internal citations omitted) (quoting King v. St. Vincent's Hosp., 502 U.S. 215, 221 (1991)) (citing United States v. Atl. Research Corp., 551 U.S. 128 (2007)).

133. Mock v. S.D. Bd. of Regents, 267 F. Supp. 2d 1017, 1019 (D.S.D. 2003) (analyzing Title VI and Title IX interchangeably).

134. Jackson v. Albany Appeal Bureau Unit, 442 F.3d 51, 54 n.2 (2d Cir. 2006) ("Since § 2254 and 28 U.S.C. § 2255 'are generally seen as *in pari materia*,' the reasoning of cases in the context of § 2254 petitions applies equally to § 2255 petitions.") (quoting Kellogg v. Strack, 269 F.3d 100, 103 n.3 (2d Cir. 2001)); Asfaw v. Woldberhan, 55 Cal. Rptr. 3d 323, 332 (Cal. Ct. App. 2007) ("Statutes in one code may be considered with those in another code.") (citing Estate of Burden v. Agnew, 53 Cal. Rptr. 2d 390, 395 (Cal. Ct. App. 2007)); Poway Unified Sch. Dist. v. Superior Court, 73 Cal. Rptr. 2d 777, 782 (Cal. Ct. App. 1998) ("The principle of striving for harmony between disparate parts applies even though the two provisions are in separate codes.") (citing O'Brien v. Dudenhoeffer, 19 Cal. Rptr. 2d 826, 829 (Cal. Ct. App. 1993)).

135. *In re* Mouzon Enters., Inc., 610 F.3d 1329, 1333 (11th Cir. 2010) (finding that reviewing the whole statutory scheme together may help avoid conflict) (citing Burns v. Lawther, 53 F.3d 1237, 1241 (11th Cir. 1995)).

of another statutory provision. The wording of Federal Rule of Evidence 403 provides a salient example:

> The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.[137]

This wording poses several interpretive issues. For instance, what is the meaning of "probative value"? Some early commentators suggested that when assessing the probative value of an item of evidence under Rule 403, a judge could consider the credibility of the source.[138] However, later courts relied on contextual interpretation in rejecting that suggestion.[139] Federal Rule of Evidence 104(b) is part of the context of Rule 403; and Rule 104(b) makes it clear that when the judge determines issues of conditional relevance, such as the sufficiency of a lay witness's personal knowledge[140] or the authenticity of an exhibit,[141] the judge must accept the proponent's foundational testimony at face value.[142] Lay jurors without any legal training are competent to decide whether a witness has firsthand knowledge or whether a letter is authentic. But, in order to protect the jury's power to make the final decision on conditional relevance issues, the judge cannot consider the credibility of the evidence; the "judge must accept the

136. United States v. Webber, 536 F.3d 584, 593 (7th Cir. 2008) ("The 'plain meaning' of a statute, however, is often illuminated not only by its language but also by its structure.") (citing Alexander v. Sandoval, 532 U.S. 275, 288 (2001); Marie O. v. Edgar, 131 F.3d 610, 622 (7th Cir. 1997)).

137. FED. R. EVID. 403.

138. Calvin W. Sharpe, *Two-Step Balancing and the Admissibility of Other Crimes Evidence: A Sliding Scale of Proof*, 59 NOTRE DAME L. REV. 556, 589 (1984).

139. For example, in Adams v. Indiana Bell Tel. Co., 2 F. Supp. 2d 1077, 1089 (S.D. Ind. 1998), *aff'd in part, rev'd in part*, 231 F.3d 414 (7th Cir. 2000), the court narrowed the scope of probative value "because to do otherwise would usurp the jury's function." That passage is an implicit invocation of Rule 104(b), since 104(b) safeguards the jury's function in determining the weight of the evidence. Likewise, in Blackston v. Rapelje, 780 F.3d 340, 357 (6th Cir. 2015), the court stated that it would be a misapplication of Rule 403 to invoke that provision to shield the jury from testimony because the trial judge had doubts about the credibility and reliability of the testimony.

140. FED. R. EVID. 602.

141. *Id.* 901.

142. Edward J. Imwinkelried, *The Meaning of Probative Value and Prejudice in Federal Rule of Evidence 403: Can Rule 403 Be Used to Resurrect the Common Law of Evidence?*, 41 VAND. L. REV. 879, 887 (1988).

testimony at face value and inquire only whether, if believed,"[143] the testimony possesses sufficient probative worth to support a permissive inference that the witness has firsthand knowledge or that the exhibit is authentic.[144] In other words, if the jury elects to believe the testimony, will it support a rational, permissive inference of personal knowledge or authenticity? Given that understanding of Rule 104(b), courts have narrowed their interpretation of "probative value" under Rule 403.[145] Because Rule 403 applies to virtually every item of evidence,[146] including a lay witness's testimony and physical exhibits, if "probative value" encompassed the credibility of the source, a judge could do precisely what Rule 104(b) precludes judges from doing.

Similarly, Rule 403 presents the question of what "unfair prejudice" means. The Advisory Committee Note accompanying Rule 403 states that an item of evidence is unfairly prejudicial if it creates a significant risk that the jury will decide the case on an improper basis.[147] However, that statement begs the question: What is an improper basis? To at least partially answer that question, courts use contextual interpretation. Rules 404 and 405 are not merely context for Rule 403; they are immediately adjacent provisions. Those provisions announce a general rule that while the prosecution may introduce evidence of a defendant's uncharged misdeeds on a noncharacter theory of logical relevance, the prosecution may not proffer the evidence on the basis of simplistic character reasoning, such as "He or she did it once, therefore they did it again."[148] Testimony about a defendant's other crimes is always relevant to show the defendant's bad character, but what if the evidence is also relevant on a noncharacter theory

143. *Id.*

144. *See* CARLSON ET AL., *supra* note 3, at 296–97; *see also Blackston*, 780 F.3d at 357 ("[I]t was plainly a misapplication of Rule 403 to prevent the jury from hearing" testimony based on the judge's doubts about the credibility of the testimony.); *Adams*, 2 F. Supp. 2d at 1089 ("The weighing process under Rule 403 requires the judge to assume the credibility of a witness, because to do otherwise would usurp the jury's function. Thus, the probative worth of eyewitness testimony as to an ultimate fact is presumed to be 100%.") (internal citations omitted) (citing CHARLES A. WRIGHT & KENNETH W. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5214).

145. *See supra* note 143 and accompanying text.

146. Paul F. Rothstein, *Some Themes in the Proposed Federal Rules of Evidence*, 33 FED. B.J. 21, 29 (1974) ("For example, Rule 403, which apparently cuts across the entire body of the Rules, allows ad hoc exclusion where prejudice, time, and the like are deemed to outweigh probativity."). The exception is a conviction for an offense involving false statement or deceit under Rule 609(a)(2). FED. R. EVID. 609(a)(2).

147. FED. R. EVID. 403 advisory committee's notes to 1972 proposed rules.

148. *See* FED. R. EVID. 404–05.

because it is a similar offense that tends to show the defendant's intent or mens rea? If the judge nevertheless thinks that there is a substantial danger that the evidence will tempt the jury to lapse into forbidden character reasoning, the judge may exclude the evidence as unfairly prejudicial.[149] That might be the case if, albeit similar to the charged offense, the uncharged crime is much more heinous than the charged offense.[150] Thus, courts may quite properly consider context—the character prohibition codified in Rules 404 and 405—to inform the meaning of "unfair prejudice" in Rule 403.

(2) Using a Prohibition in One Statutory Provision to Limit the Scope of Another Provision

Clarifying the meaning of a separate statutory provision is not the only legitimate use of contextual interpretation. It may also be used to limit the meaning of one provision to prevent the effective nullification of another provision.[151] Consider Federal Rule of Evidence 410(a)(2), which purports to completely forbid the admission of testimony about a person's nolo contendere plea to a crime.[152] A litigant who seeks to introduce testimony about such a plea when suing that person might contend that the plea equals an admission or party-opponent statement that is admissible under Rule 801(d)(2)(A).[153] However, since Rules 410 and 801 are part of the same legislative scheme, Rule 410 is part of Rule 801's context. As context, Rule 410 precludes that interpretation of Rule 801. It is well-settled that in a coherent legislative scheme, one provision should not be construed to render another provision nugatory.[154]

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149. 2 EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 8:23 (rev. 2004) [hereinafter IMWINKELRIED, UNCHARGED MISCONDUCT].

150. *Id.* § 8:24, at 8–122 (citing John T. Johnson, *The Admissibility of Evidence of Extraneous Offenses in Texas Criminal Cases*, 14 S. TEX. L.J. 69, 74 (1972)); P.B. Carter, *The Admissibility of Similar Facts Evidence*, 69 L. Q. REV. 80, 92 (1953).

151. Horn v. CIR, 968 F.2d 1229, 1239–40 (D.C. Cir. 1992) ("A canon of interpretation cannot nullify part of a statute.")

152. FED. R. EVID. 410(a)(2).

153. *Id.* 801(d)(2)(A).

154. Courts use various expressions to convey this notion:

- The courts should not construe one provision as abrogating another. Sierra Club v. EPA, 294 F.3d 155, 161 (D.C. Cir. 2002) (quoting Engine Mfrs. Ass'n v. EPA, 88 F.3d 1075, 1088 (D.C. Cir. 1996); Appalachian Power Co. v. EPA, 249 F.3d 1032, 1041 (D.C. Cir. 2001)).
- The court should not read one provision as rendering another a dead letter. Collins v. Sutter Mem'l Hosp., 126 Cal. Rptr. 3d 193, 202 (Cal. Ct. App. 2011) ("Construction of a statute that would render it a dead letter is disfavored.")

(citing Goehring v. Chapman Univ., 17 Cal. Rptr. 3d 39, 56 (Cal. Ct. App. 2004)); Mabry v. Superior Court, 110 Cal. Rptr. 3d 201, 207 (Cal. Ct. App. 2010), *superseded by statute*, CAL. CIV. CODE § 2924.12(b), *as recognized in* Rockridge Tr. v. Wells Fargo, N.A., 985 F. Supp. 2d 1110 (N.D. Cal. 2013) ("California courts, quite naturally, do not favor constructions of statutes that render them advisory only, or a dead letter.") (citing Petropoulos v. Dep't of Real Estate, 47 Cal. Rptr. 3d 812, 823 (Cal. Ct. App. 2006); People v. Stringham, 253 Cal. Rptr. 484, 491 (Cal. Ct. App. 1988)).

- One provision should not be interpreted as destroying another. United States v. Rodriguez, 26 F.3d 4, 8 (1st Cir. 1994) ("The cardinal principle of statutory construction is to save and not to destroy.") (quoting United States v. Menasche, 348 U.S. 528, 538–39 (1955)); Delarosa v. Boiron, Inc., 818 F. Supp. 2d 1177, 1186 (C.D. Cal. 2011) (quoting *Menasche*, 348 U.S. at 538–39); Stupak-Thrall v. Glickman, 988 F. Supp. 1055, 1063 (W.D. Mich. 1997) ("The cardinal rule of statutory construction, however, is to save and not destroy.") (citing United States v. Bazel, 80 F.3d 1140, 1145 (6th Cir. 1996)).
- One provision may not emasculate another. United States *ex rel.* Thacker v. Allison Engine Co., Inc., 471 F.3d 610, 617 (6th Cir. 2006), *vacated on other grounds*, 553 U.S. 662 (2008) ("The 'cardinal principle of statutory construction,' however, is "to give effect, if possible, to every clause and word of a statute rather than to emasculate an entire section.'") (quoting Bennett v. Spear, 520 U.S. 154, 173 (1997)).
- One provision may not render another provision ineffective, inoperative, meaningless, or null. United States v. Thum, 749 F.3d 1143, 1147 (9th Cir. 2014) ("It is axiomatic that 'a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.'") (quoting Corley v. United States, 556 U.S. 303, 314 (2009)); Lucas v. Jerusalem Café, LLC, 721 F.3d 927, 937 (8th Cir. 2013) ("A reading that turns an entire subsection into a meaningless aside 'is inadmissible, unless the words required it.'") (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803)); United States v. Jonson, 325 F.3d 205, 209 (4th Cir. 2003) ("It is a well settled canon of statutory construction that 'a statute should be interpreted so as not to render one part inoperative.'") (quoting Colautti v. Franklin, 439 U.S. 379, 392 (1979)); United States v. Ahlers, 305 F.3d 54, 58 (1st Cir. 2002) ("[W]e will not readily adopt any construction that renders any such words or phrases meaningless, redundant, or superfluous.") (citing Lopez-Soto v. Hawayek, 175 F.3d 170, 173 (1st Cir. 1999)); N.M. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv., 248 F.3d 1277, 1285 (10th Cir. 2001) (citing Bridger Coal Co./Pac. Minerals, Inc. v. Dir., Office of Workers' Comp., 927 F.2d 1150, 1153 (10th Cir. 1991)); Mail Order Ass'n of Am. v. U.S. Postal Serv., 986 F.2d 509, 515 (D.C. Cir. 1993) ("First, we are to construe statutes, where possible, so that no provision is rendered 'inoperative or superfluous, void or insignificant.'") (quoting Pub. Citizen Health Research Grp. v. FDA, 704 F.2d 1280, 1285 (D.C. Cir. 1983)); J. E. Pierce Apothecary, Inc. v. Harvard Pilgrim Health Care, Inc., 365 F. Supp. 2d 119, 137 (D. Mass. 2005) ("An intention to enact a barren and ineffective provision is not lightly to be

(3) Incorporating a Restriction from One Statutory Provision to Rewrite Another

In the three lines of authority described in Part I, the courts did not employ either of the accepted uses of contextual interpretation. To begin with, they are not simply considering context to remove ambiguities in the express wording of the provisions into which they are incorporating restrictions. Moreover, the incorporated restrictions do not take the form of flat prohibitions on any use of a particular type of evidence, such as Rule 410's ban on the admission of testimony about nolo contendere pleas; rather, on their face, the restrictions purport to merely limit the scope of the evidentiary doctrine set forth in that provision.

As a general proposition, in the textualist era in these situations, it is unwarranted for the court to import restrictions from one provision into another. Standing alone, context does not give a court license to rewrite[155] one provision or to add[156] or insert[157] restrictions stated in another provision. Even if doing so would be consistent with the general "spirit" of

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imputed to the Legislature.") (quoting Ins. Rating Bd. v. Comm'r of Ins., 248 N.E.2d 500, 504 (Mass. 1969)); Pac Fung Feather Co., Ltd. v. United States, 911 F. Supp. 529, 536 (Ct. Int'l Trade 1995), *aff'd*, 111 F.3d 114 (Fed. Cir. 1997) (citing Dep't of Revenue of Or. v. ACF Indus., Inc., 510 U.S. 332 (1994)).

155. Schafer v. Astrue, 641 F.3d 49, 61 (4th Cir. 2011) ("Courts are not authorized to rewrite a statute . . . .") (quoting Badaracco v. Comm'r, 464 U.S. 386, 398 (1984)); Qayumi v. Duke Univ., 350 F. Supp. 3d 432, 437 (M.D.N.C. 2018) ("[I]t is not the function of this court to re-write the statute.") (quoting Cofield v. Crumpler, 179 F.R.D. 510, 516 (E.D. Va. 1998)); Barrientos v. CoreCivic, Inc., 332 F. Supp. 3d 1305, 1311 (M.D. Ga. 2018) ("But this Court cannot rewrite statutes to avoid what it may perceive to be an unintended consequence or even an absurd public policy result."); City of Susanville v. Ca. Dep't of Corr. & Rehab., 138 Cal. Rptr. 3d 721, 729 (Cal. Ct. App. 2012) ("We are not at liberty, however, to rewrite a statute to comport with our notion of wisdom or common sense.").

156. Fourstar v. Garden City Grp., Inc., 875 F.3d 1147, 1152 (D.C. Cir. 2017) ("It is not a judge's job to add to or otherwise re-mold statutory test to try to meet a statute's perceived policy objectives."); People v. Hill, 44 Cal. Rptr. 2d 11, 14 (Cal. Ct. App. 1995) ("We do not have the power to add to statute what the Legislature left out.") (citing Wells Fargo Bank v. Superior Court, 811 P.2d 1025 (Cal. 1991)).

157. People v. Superior Court of Placer Cty., 153 Cal. Rptr. 3d 116, 125 n.6 (Cal. Ct. App. 2013) ("In the construction of a statute . . . , the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert [what] has been omitted") (quoting CAL. CODE CIV. PROC. § 1858); People v. U.S. Fire Ins. Co., 149 Cal. Rptr. 3d 196, 198 (Cal. Ct. App. 2012) ("When interpreting statutory language, the court may neither insert language that has been omitted nor ignore language that has been inserted.") (citing People v. Amwest Surety Ins. Co., 66 Cal. Rptr. 2d 29 (Cal. Ct. App. 1997)).

the legislative scheme,[158] redrafting[159] the provision in that fundamental fashion is an amendment[160] within the province and power of the legislature, not the judiciary. As the Supreme Court has repeatedly observed, one of the most firmly established principles of statutory interpretation is that when legislatures choose to include restrictions in one provision but not another, courts should usually assume that the legislature did so purposely.[161] With only slight overstatement, this principle has been described as "[a]n inveterate rule of statutory construction."[162] Courts broadly support this negative implication because it rests, in large part, on a common-sense inference.[163] The usual circumstances, including a legislature's express mention of a restriction in one provision but not another, make it very difficult to conclude that the omission of the restriction from the second provision is an oversight.[164] For that matter, several factors can strengthen the inference that the omission was intentional.

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158. *In re* Racing Servs., Inc., 779 F.3d 498, 504 (8th Cir. 2015) ("[W]e [cannot] disregard the letter of a 'clear and unambiguous' statute 'under the pretext of pursuing its spirit.'") (quoting Gadeco, LLC v. Indus. Comm'n of State, 380 N.W.2d 535, 541 (N.D. 2013)).

159. United States v. Crape, 603 F.3d 1237, 1247 (11th Cir. 2010) ("[T]he fact that Congress might have acted with greater clarity or foresight does not give courts a *carte blanche* to redraft statutes . . . .") (quoting United States v. Locke, 471 U.S. 84, 95 (1985)).

160. *In re Racing Servs.*, 779 F.2d at 505 (noting that the court "will not correct an alleged legislative 'oversight' by rewriting unambiguous statutes to cover the situation at hand") (quoting Estate of Christeson v. Gilstad, 829 N.W.2d 453, 457 (N.D. 2013)).

161. Barnhart v. Sigmon Coal Co., Inc., 534 U.S. 438, 452 (2002) (noting that it is generally held that when Congress includes or excludes something it is intentional) (citing Rusello v. United States, 464 U.S. 16, 23 (1983)); BFP v. Resolution Tr. Corp., 511 U.S. 531 (1994) ("[I]t is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another.") (quoting Chicago v. Envtl. Def. Fund, 511 U.S. 328, 338 (1994)); *Russello*, 464 U.S. at 23 (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972)).

162. Schering Corp. v. Sullivan, 782 F. Supp. 645, 649 (D.D.C. 1992), *vacated on other grounds*, 995 F.2d 1103 (D.C. Cir. 1993) (citing *Russello*, 464 U.S. at 23).

163. United States v. Olmos-Esparza, 484 F.3d 1111, 1114–15 (9th Cir. 2007) (noting the "maxim is 'a product of logic and common sense'") (quoting Longview Fibre Co. v. Rasmussen, 980 F.2d 1307, 1313 (9th Cir. 1992)); United States v. Crane, 979 F.2d 687, 690 (9th Cir. 1992) (noting the same) (citing Alcarez v. Block, 746 F.2d 593, 607 (9th Cir. 1984)).

164. United States v. Neal, 249 F.3d 1251, 1255 (10th Cir. 2001) ("Under normal statutory construction, we would not assume that the failure to include some item in a statute is an oversight that the court may correct.").

First, consider whether the provisions were enacted at the same time. If the provisions were adopted at different times, the drafter might not have consulted the earlier provision before drafting the second provision. Second, determine whether the provisions were part of a legislative scheme that Congress deliberated over for a substantial period of time. When legislation is hurried,[165] it is more plausible that the drafter was guilty of oversight. Finally, assess whether the provisions are proximate[166] or even adjacent in the legislative scheme.[167] Again, the closer the provisions are to each other, the weaker the inference of oversight.

Yet, this generalization should not be applied mechanically because there are exceptions to the general rule.[168] The inference of intentional omission is strong, but not necessary[169] or invariable.[170] As Judge Posner has noted, statutory omissions sometimes are inadvertent.[171] As previously stated, both extreme and moderate textualists are skeptical of extrinsic legislative history material.[172] However, moderate textualists ordinarily do not object to judges routinely considering extrinsic material, even absent a finding that the statutory text lacks a plain meaning.[173] As the Supreme Court has acknowledged, extrinsic evidence of congressional intent can occasionally be so strong that the court is justified in implying a restriction or exclusion

165. *See, e.g.*, Uniroyal Chem. Co. Inc. v. Deltech Corp., 160 F.3d 238, 246 (5th Cir. 1998) ("Due to its hurried passage, it is widely recognized that many of CERCLA's provisions lack clarity and conciseness.").

166. United States v. Brandon, 247 F.3d 186, 190 (4th Cir. 2001) ("This interpretation reflects the fundamental principle of statutory construction that 'courts are obligated' to give effect to Congress's decision to use 'different language in proximate subsections of the same statute.'") (quoting United States v. Barial, 31 F.3d 216, 218 (4th Cir. 1994)).

167. *See* case cited *supra* note 133 and accompanying text; *see also In re* Fireside Bank Cases, 115 Cal. Rptr. 3d 80, 86 (Cal. Ct. App. 2010) (noting that the courts should "look beyond neighboring law to the law as a whole") (quoting Peatros v. Bank of Am. NT & SA, 990 P.2d 539, 549 (Cal. 2000)).

168. *In re* Bourgeois, 902 F.3d 446, 447 (5th Cir. 2018) ("But the *expressio unius* canon is not meant to be mechanically applied."); United States v. Local 6A, Cement and Concrete Workers Union, 832 F. Supp. 674, 679 (S.D.N.Y. 1993) (noting that the general doctrine of *expression unius est exclusion alterius* "need not be mechanically applied") (citing Cheney R.R. v. ICC, 902 F.2d 66, 68–69 (D.C. Cir. 1990)).

169. Henry Ford Health Sys. v. Dep't of Health & Human Servs., 654 F.3d 660, 666 (6th Cir. 2011) ("[T]his canon creates a potential inference, not a necessary one.").

170. *In re* R.H., 88 Cal. Rptr. 3d 650, 699 (Cal. Ct. App. 2009) ("R.H. also overlooks the fact that the *expressio unius est exclusio alterius* principle of statutory construction is not applied invariably . . . .") (citing *In re* J.W., 57 P.3d 363, 369 (Cal. 2002)).

171. *See* RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 282 (1985).

172. *See supra* notes 99–119 and accompanying text.

173. *See supra* notes 106–10 and accompanying text.

that was omitted from the statutory language.[174] In extreme cases,[175] the legislative history can manifest a sufficiently powerful discernible legislative intent.[176]

B. The Application of the Textualist Framework to Decisions Whether to Import a Restriction Stated in One Federal Rule of Evidence into Another Rule

Although Section II.A may be lengthy, it enables us to develop an approach to analyze the recurring fact pattern discussed in Part I. Again, in this fact pattern,

- There are two provisions in the Federal Rules of Evidence;
- One provision expressly imposes a limitation on the evidentiary doctrine codified in that provision. The provision differs from Federal Rule of Evidence 410 completely barring evidence of nolo contendere pleas. Rather, the limitation purports to be a mere restriction on the scope of the doctrine set out in that provision;
- The second provision sets out a different evidentiary doctrine; and
- The second provision omits any mention of the restriction.

It is submitted that, without more, contextual interpretation cannot justify importing the restriction into the second provision in these situations. These

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174. *See* Chickasaw Nation v. United States, 534 U.S. 84, 94 (2001) (explaining that the canons are not mandatory rules but rather helpful tools and that "other circumstances evidencing congressional intent can overcome their force"); *see also* Dow Chem. Co. & Subsidiaries v. United States, 250 F. Supp. 2d 748, 826 (E.D. Mich. 2003) (accepting the language from *Chickasaw Nation*) (quoting *Chickasaw Nation*, 534 U.S. at 94).

175. *See* Settle v. State, 174 Cal. Rptr. 3d 925, 928 (Cal. Ct. App. 2014) ("We are compelled to add language only in extreme cases . . . .") (quoting People v. Buena Vista Mines, Inc., 56 Cal. Rptr. 2d 21, 23 (Cal. Ct. App. 1996)).

176. *See* People v. Quiroz, 131 Cal. Rptr. 3d 925, 930 (Cal. Ct. App. 2011) (finding that canons of statutory construction can be overcome when there is "a discernible and contrary legislative intent") (quoting People v. Anzalone, 969 P.2d 160, 163 (Cal. 1999)); Samantha C. v. State Dep't of Developmental Servs., 112 Cal. Rptr. 3d 415, 432 (Cal. Ct. App. 2010) ("But this rule does not apply if there is a discernible and contrary legislative intent.") (citing *In re* J.W., 57 P.3d 363, 369 (Cal. 2002)); Woodbury v. Brown-Dempsey, 134 Cal. Rptr. 2d 124, 132–33 (Cal. Ct. App. 2003) ("Similarly, the 'courts do not apply the *expressio unius est exclusio alterius* principle "if its operation would contradict a discernible and contrary legislative intent."'") (quoting *In re J.W.*, 57 P.3d at 369).

are not cases in which (a) the wording of the first provision is helpful to remove an ambiguity in the wording of the text of the second provision or (b) the application of the second provision will render the first provision nugatory unless the restriction is read into the second provision. Moreover, in this setting, drawing a negative implication from the presence of a restriction in one provision and its omission in another provision is especially warranted. All of the pertinent factors that solidify the inference of intentional omission are present: (1) the original Federal Rules of Evidence all took effect at the same time in 1975;[177] (2) the Advisory Committee and Congress spent years carefully deliberating over the wording of each provision;[178] and (3) in some cases, the lines of authority discussed in Part I relate to adjacent provisions. In these cases, the contextual argument for treating the omission as an oversight is clearly too weak to justify importing the restriction into the second provision. Therefore, in these situations, courts should import the restriction from the first provision into the second provision only if extrinsic legislative history materials manifest a certain type of intent: *an extraordinarily clear intent to altogether bar the admission of a particular type of evidence, not a qualitatively different, more limited intent to prevent the admission of that type of testimony under the evidentiary doctrine codified in the first provision*. Using that standard, which, if any, of the lines of authority described in Part I are tenable?

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177. CARLSON ET AL., *supra* note 3, at 15.

178. *See id.* at 14–15; *see also* Imwinkelried, *Moving Beyond*, *supra* note 75, at 418–19.

> Congress spent almost two full years considering the draft rules. The legislation initially blocking the Court's promulgation of the rules was dated March 30, 1973, and Congress finally approved the rules on January 2, 1975. During that period of time, the rules were considered by the House Special Committee on the Reform of Federal Criminal Laws, the House Subcommittee on Criminal Justice, the Senate Judiciary Committee, and a Conference Committee. Their consideration was thorough. . . . Congress added to some rules . . . , deleted other rules . . . , and modified still other rules . . . . Congress did not give the draft rules a perfunctory, quick perusal; rather, Congress put the draft under a microscope and dissected it. The evident care with which the statute authors chose their words weighs strongly in favor of attaching great weight to those words.

Id. (footnotes omitted).

III. A Critical Evaluation of the Three Lines of Cases Importing a Restriction from One Federal Rules of Evidence Provision into Another Provision

Section II.B proposed a test for determining when it is proper for a judge to import a restriction from one provision in the Federal Rules of Evidence into another provision. The test is a "both/and" proposition: the judge must find *both* that the extrinsic legislative history establishes a certain type of intent *and* that the history expresses that intent in an especially clear manner. The requisite intent must be to render a particular type of evidence completely inadmissible—not merely to impose a restriction under the first provision and bar the admission of that type of evidence under that provision. Moreover, following a textualist approach, the showing of intent must be compelling,[179] overwhelming,[180] or extraordinarily clear.[181] The question now becomes which, if any, of the three lines of authority described in Part I can withstand scrutiny under this standard. Do any amount to misreadings of the Federal Rules?

A. Importing Restrictions from Rule 609 into Rule 608

While Rule 609 refers to a witness's "conviction,"[182] Rule 608(b) refers to "specific instances of a witness's [untruthful] conduct"[183] with no language indicating that the Rule 609 restrictions apply under Rule 608(b) if the witness has been convicted of the untruthful act. Nevertheless, treating Rule 609 as context for Rule 608(b), several courts have held that Rule 609's restrictions are implicated when the witness has already suffered

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179. *See* Joseph v. J.J. MacIntyre Cos., LLC, 238 F. Supp. 2d 1158, 1163 (N.D. Cal. 2002) ("In some situations, however, what would otherwise appear to be plain language is interpreted contrarily where there are compelling indications of legislative intent.") (citing Cty. of L.A. v. Frisbie, 122 P.2d 526 (Cal. 1942)). *But see* United States v. All Funds on Deposit in United Bank, 188 F. Supp. 2d 407, 411 (S.D.N.Y. 2002) ("The language . . . is plain on its face; and where that is so, then not only is there no need to resort to legislative history, but also, under the constitutional doctrine of separation of powers, it is inappropriate to do so.").

180. Michetti Pipe Stringing, Inc. v. Murphy Bros. Inc., 125 F.3d 1396, 1398 (11th Cir. 1997), *rev'd on other grounds sub nom.* Murphy Bros. Inc. v. Michetti Pipe Stringing, Inc. 526 U.S. 344 (1999) ("It is true that '[i]n rare and exceptional circumstances, we may decline to follow the plain meaning of a statute because overwhelming extrinsic evidence demonstrates a legislative intent contrary to the text's plain meaning.'") (quoting Boca Ciega Hotel, Inc. v. Bouchard Transp. Co., 51 F.3d 235, 238 (11th Cir. 1995)).

181. *See* cases cited *supra* note 117.

182. FED. R. EVID. 609.

183. *Id.* 608(b).

a conviction for the act.[184] The consequence is that although the cross-examiner may pose to the witness the questions allowed by Rule 609—the date and place of the conviction, the name of the offense, and the sentence imposed—the cross-examiner may not inquire further to probe the specifically untruthful aspects of the offense.[185]

However, the extrinsic legislative history materials related to Rules 608 and 609 are devoid of any clear indication that the Advisory Committee or Congress intended that a judge must apply the limited scope of inquiry permitted under Rule 609 when the underlying act also qualifies as a permissible target of impeachment under Rule 608(b). A fair reading of the extrinsic materials proves only that the drafters intended to impose certain restrictions under Rule 608(b) and other restrictions under Rule 609. Research reveals no passage in the legislative history where the drafters signaled that they wanted the limitations on Rule 609 to spill over into Rule 608.

Perhaps the strongest hint in the legislative history of importing 609 restrictions into 608(b) is a passing reference to "[p]articular instances of conduct, though not subject to criminal conviction" in the second paragraph of the Advisory Committee Note to Rule 608(b).[186] Again, there is no such reference in the text of the rule. Furthermore, even that paragraph does not avow an intent to either completely foreclose the use of 608(b) when there has been a conviction or to authorize partially incorporating Rule 609 restrictions into Rule 608(b). Rather, the purpose of the paragraph is to discuss the probative dangers that can arise under Rule 608(b) and the safeguards in place to combat those dangers.[187]

The final sentence of that paragraph notes that "the overriding protection of Rule 403" is a safeguard that applies to the cross-examiner's inquiry.[188] The Rule 608(b) case law recognizes that the primary danger is a cross-examiner's bad faith attempt to besmirch the witness's character by

184. *See* United States v. Albers, 93 F. 3d 1469, 1480 (10th Cir. 1996); United States v. DeLeon, 308 F. Supp. 3d 1229, 1235 (D.N.M. 2018).

185. *See supra* notes 24–29 and accompanying text.

186. FED. R. EVID. 608(b) advisory committee's notes to 1972 proposed rules. Of course, when the cross-examiner has the witness's conviction for the act in hand, there is little risk that the act did not occur or that the witness did not commit it. Moreover, the availability of a certified copy of conviction to establish the act reduces the risk that cross-examination about the act will consume an undue amount of time, which is one of the dangers mentioned in Rule 403. If that is the primary danger posed by this type of evidence, there is all the more reason to permit inquiry when the act is the subject of a conviction.

187. *Id.*

188. *Id.*

referring to an act that either did not occur, or which the witness did not commit. As a safeguard, these cases hold that, on a proper objection outside the jury's hearing but on the record, the cross-examiner must recite a good-faith basis in fact for believing that the act occurred and that the witness was the actor.[189] Of course, when the cross-examiner has the witness's conviction for an act in hand, there is little risk that there was no act or that someone else committed the act. In addition, the availability of a certified copy of conviction reduces the risk that the cross-examination will consume an undue amount of time—one of the probative dangers mentioned in Rule 403. Thus, if the dangers mentioned in the Advisory Committee's Note are the primary reasons for circumscribing inquiry under Rule 608(b) about an untruthful act, there is all the more reason to allow inquiry when the witness has been convicted of the act.

Simply stated, the extrinsic materials do not establish the type of intent that would satisfy the test proposed in Section II.B. If such intent was established, when the witness has been convicted of an untruthful act, the judge ought to not only permit inquiry under Rule 608(b); but also the judge should not limit the scope of the inquiry to the questions permissible under Rule 609.[190] Therefore, this line of authority fails.

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189. *See* United States v. Courtney, 439 F. App'x 383, 385 (5th Cir. 2011) (not selected for publication); United States v. Davis, 609 F.3d 663, 680–81 (5th Cir. 2010) ("A prosecutor is allowed to ask questions in cross examination provided he has 'some good-faith factual basis for the incidents inquired about.'") (quoting United States v. Bright, 588 F.2d 504, 512 (5th Cir. 1979)); United States v. McCallum, 885 F. Supp. 2d 105, 116–17 (D.D.C. 2012) ("Cross-examining counsel, however, 'must have a reasonable basis for asking questions on cross-examination which tend to incriminate or degrade the witness and thereby create an unfounded bias which subsequent testimony cannot fully dispel.'") (quoting United States v. Sampol, 636 F.2d 621, 658 (D.C. Cir. 1980)).

190. *See Courtney*, 439 F. App'x at 385; *Davis*, 609 F.3d at 680–81; *McCallum*, 885 F. Supp. 2d at 116–17. The courts' treatment of Rule 404(b) lends support to this conclusion. By its terms, Rule 404(b) allows the proponent to introduce evidence of "a crime, wrong, or other act" if the act is logically relevant on a noncharacter theory:

> (1) *Prohibited Uses*. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
>
> (2) *Permitted Uses*; . . . . This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

FED. R. EVID. 404(b). Thus, like Rule 608(b), Rule 404(b) refers to specific acts of conduct with no mention of the word "conviction." There is no authority that a proponent may not resort to Rule 404(b) if the act has resulted in a conviction. Quite to the contrary, the courts routinely accept the conviction as adequate proof of the act and, on that basis, permit the proponent to invoke Rule 404(b). 1 IMWINKELRIED, UNCHARGED MISCONDUCT, *supra* note

B. Importing Restrictions from Rules 803 and 804 into Rule 807

The importation of Rule 609's restriction is unjustifiable because the relevant legislative history does not suggest the right sort of intent—namely, an intent to altogether bar a type of evidence rather than to merely impose restrictions under a particular provision. Even when a judge can identify an indication of that intent in the extrinsic history, given the textualist devaluation of extrinsic history, the judge ought to import the restriction only if the history clearly and powerfully establishes that intent. In part, that is the problem with the "near miss" doctrine, which in effect imports restrictions from specific Rule 803 or 804 exceptions into Rule 807. The "near miss" cases read the history of the residual hearsay exception as manifesting an unmistakable legislative intent to invoke the exception only in extraordinary circumstances.[191] On closer examination, however, the history is more mixed.

The residual hearsay exception was not a creation of the Federal Rules of Evidence; the exception existed at common law. One of the leading cases applying the common-law residual exception was the 1961 decision *Dallas County v. Commercial Union Assurance Co.*[192] In that case, when the county courthouse collapsed, the county filed suit against its insurer alleging that a lightning strike—a risk covered by the defendant's policy—caused the collapse.[193] At trial, the county introduced evidence that the debris contained charred timbers.[194] In defense, the insurer contended that the collapse was caused by the courthouse's structural weakness—an excluded risk.[195] To explain the presence of charred timbers, the insurer proffered a copy of an article in the June 9, 1901, issue of the *Selma Morning Times*, which contained an article describing a fire at the courthouse while it was under construction.[196] The trial judge admitted the newspaper article over the county's hearsay objection.[197]

149, § 2:8, at 2-36–41 (rev. 2013). If it so happens that the act has led to a conviction that otherwise qualifies under Rule 609, the proponent can treat the act as evidence on the historical merits under Rule 404(b) and use the conviction as impeaching material under Rule 609.

191. *See supra* note 42 and accompanying text.

192. 286 F.2d 388 (5th Cir. 1961).

193. *Id.* at 390.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* at 391.

The Fifth Circuit, in an opinion authored by Judge Wisdom, upheld the trial judge's ruling.[198] Judge Wisdom stated that there is no legal "canon against the exercise of common sense in deciding the admissibility of hearsay evidence."[199] He characterized the hearsay in question as both reliable and necessary, and he found it "inconceivable . . . that a newspaper reporter in a small town would report there was a fire in the dome of the new courthouse—if there had been no fire. He [was] without motive to falsify, and a false report would have subjected . . . him to embarrassment in the community."[200] In addition, Judge Wisdom found that admitting hearsay evidence was necessary under these circumstances: Decades had elapsed since the 1901 fire, and it was highly unlikely that any witness with firsthand knowledge would be available.[201] With *Dallas County* as a benchmark, the common-law courts took a liberal,[202] flexible[203] approach to litigants' requests that courts admit demonstrably trustworthy hearsay that did not fall within any recognized hearsay exception.

When the Advisory Committee undertook to codify the common-law hearsay doctrine in Article VIII of the proposed Federal Rules of Evidence, the question naturally arose as to whether the Rules should include a residual exception.[204] The Advisory Committee's initial 1969 draft included a residual exception,[205] but one of the first organizations to respond to the release of the draft was the Committee of New York Trial Lawyers.[206] Although the Committee conceded that trial judges need some flexibility in

198. *Id.* at 397–98.

199. *Id.* at 397.

200. *Id.*

201. *Id.* at 396–97.

202. *See* Butler v. S. Pac. Co., 431 F.2d 77, 80 (5th Cir. 1970) ("[E]vidence that is necessary to a proper consideration of the case and that exhibits an intrinsic probability of trustworthiness ought to be admissible under the liberal federal practice . . . .") (citing *Dallas County*, 286 F.2d at 388).

203. *See* Walter Prince Rowe, Note, *Evidence—Government Advisory Materials Exception to Hearsay Rule*, 27 MERCER L. REV. 1219, 1221 (1976) (explaining that "*Dallas County* established an *approach* to admissibility of evidence based not on rigid rules but rather upon a flexible standard resting on practical considerations") (citing *Dallas County*, 286 F.2d at 397); G.G.R., Comment, *A Practitioner's Guide to the Federal Rules of Evidence*, 10 U. RICH. L. REV. 169, 192 (1975).

204. *See generally* Imwinkelried, *Scope of the Residual Hearsay*, *supra* note 43.

205. Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161, 345, 377 (1969) (both 8-03 and 8-04 contained a generic residual exception).

206. *See* Jon R. Waltz, *Present Sense Impressions and the Residual Exceptions: A New Day for "Great" Hearsay?*, LITIG., Fall 1975, at 22, 22.

administering evidentiary rules, it believed that the residual exception accorded judges too much discretion; the Committee feared that such extensive discretion would make hearsay rulings too unpredictable.[207] Despite this criticism, the Advisory Committee decided to retain the exception in its 1971 draft.[208] In its Note on Article VIII, the Committee stated that judges need the discretion conferred by the residual exception to deal with "presently unanticipated situations."[209] The Note specifically cited *Dallas County* as an example of how much discretion the provision was intended to accord trial judges.[210]

After the Supreme Court approved the draft Rules in 1972 and submitted them to Congress, Congress intervened to prevent the Rules from taking effect.[211] This was an unprecedented step because Congress had allowed the Court to promulgate the Federal Rules of Civil and Criminal Procedure without any congressional revision.[212] Congress's intervention created a veritable "crisis" in the rulemaking process, straining the relations between Congress and the federal courts.[213]

The House was the first to take up the Rules. The House referred the Rules to the Judiciary Committee's Subcommittee on Criminal Justice.[214] The Subcommittee prepared House Report 93-650, which recommended deleting the residual exception.[215] The Report stated that draft Rule 102, which generally directed courts to construe the Rules to promote the ascertainment of truth and just outcomes,[216] gave the trial judiciary adequate discretion. The Report added that a residual exception would

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207. *See id.*

208. Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates, 51 F.R.D. 315, 422, 439 (1971).

209. *Id.* at 437.

210. *Id.*

211. *See* H.R. REP. NO. 93-650, at 7077 (1973).

212. IMWINKELRIED, THE NEW WIGMORE, *supra* note 6, at 244. The primary motivation for congressional action was the extensive backlash against draft Article V privileges. IMWINKELRIED, THE NEW WIGMORE, *supra* note 6, at 244 (stating the draft privilege provisions proved to be "emotionally provocative").

213. Jack H. Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673, 675, 682–85 (1975). Congress had previously accorded the Court virtual autonomy in rulemaking.

214. KENNETH R. REDDEN & STEPHEN A. SALTZBURG, FEDERAL RULES OF EVIDENCE MANUAL 307 (1975).

215. Jon Waltz, *Rule 803—Hearsay Exceptions: Availability of Declarants Immaterial*, *in* FEDERAL RULES OF EVIDENCE IN CRIMINAL MATTERS 13, 40 (PLI Criminal Law & Urban Problems Court Handbook Ser. No. 94, 1977).

216. H.R. REP. NO. 93-650, at 7079 (1973).

inject "too much uncertainty into the law of evidence and [impair] the ability of practitioners to prepare for trial."[217] The full House eventually passed House Resolution 5463, approving a version of draft Rules but adopting the Subcommittee's recommendation to omit any residual exception.[218] If the legislative history of the issue ended here—if the Senate had simply endorsed the House position—the proponents of the "near miss" doctrine would have a much stronger case. Indeed, courts would not even need the "near miss" doctrine to cabin the residual exception because the residual hearsay exception would not exist.

However, since Rule 807 is part of the Federal Rules of Evidence, the Senate obviously did not wholeheartedly endorse the House position. Concededly, the Senate Report inveighs against giving trial judges "broad license"[219] or "unbridled discretion."[220] However, after resorting to that rhetorical flourish to assuage the House, the Senate voted to reinstate a residual exception.[221] The Report stated that without the benefit of a residual exception, trial judges might be tempted to "torture" the enumerated exceptions "beyond any reasonable circumstances which they were intended to include (even if broadly construed)."[222] The Report asserted that its drafters believed that trial judges would "very rarely" employ the exception.[223] However, like the Advisory Committee, the Senate Report cited the leading common-law decision, *Dallas County* as an "illustrat(ion)" of the discretion that trial judges would enjoy under the exception.[224] The Senate voted to approve the draft Rules, including residual hearsay exceptions in Rules 803 and 804, in late 1974.[225]

Since the House and Senate versions of the Rules differed, the matter went to Conference Committee. The Conference Committee was persuaded by the Senate Report.[226] In one respect, the Committee revised the wording proposed by the Senate Report. At the urging of the District of Columbia Bar's Committee with Respect to Article VIII,[227] the United States

217. *Id.*
218. S. REP. NO. 93-1277, at 7052 (1974).
219. *Id.* at 7066.
220. *Id.* at 7055.
221. *Id.* at 7066.
222. *Id.* at 7065.
223. *Id.* at 7066.
224. *Id.* at 7065.
225. The Senate Report is dated October 11, 1974.
226. H.R. REP. NO. 93-1597, at 7098–99 (1974) (Conf. Rep.).
227. Paul F. Rothstein, *The Proposed Amendments to the Federal Rules of Evidence*, 62 GEO. L.J. 125, 157 n.167 (1973).

Congress Conference Committee added a pretrial notice requirement.[228] With that one exception, the Conference Committee members adopted the Senate position that there should be a residual exception and its proposed wording for a residual exception found at the ends of both Rule 803 and Rule 804.[229]

The Conference Committee then resubmitted the legislation to the House and Senate. During the House debate, Representative Elizabeth Holtzman—who, as we shall soon see, played a role in the congressional deliberations over Rules 803(8)—voiced her opposition to the residual exception. She urged the House to reject the exceptions as unduly "casual [and] open-ended."[230] However, over her opposition, both the House and the Senate voted to approve the Conference Committee version of the draft Rules. The Federal Rules of Evidence, including the two residual exceptions, took effect on July 1, 1975.[231]

Eventually, the two residual hearsay exceptions were consolidated and moved to its current provision, Rule 807.[232] In its current form, Rule 807 requires the judge to determine whether the proffered hearsay possesses "circumstantial guarantees of trustworthiness" that are "equivalent" to hearsay admitted under the expressly enumerated exceptions.[233] That language certainly requires the judge to compare the overall trustworthiness of the proffered hearsay to that of the general trustworthiness of hearsay received under the specific exceptions. However, as Part I explained, the "near miss" doctrine goes further; under this doctrine, the proffered hearsay is inadmissible as a matter of law even if it falls just short of satisfying a specific foundational requirement for the enumerated exception that the judge deems most apposite to the instant case.

It is true that in both the House and Senate deliberations over the residual exceptions, some legislators voiced concern about the extent of judicial discretion under the exceptions, and some pleaded with Congress to omit any residual exceptions.[234] However, when the dust settled, both the House and Senate had rejected those pleas.[235] Moreover, both the Advisory

228. H.R. REP. NO. 93-1597, at 7105.
229. *Id.* at 7105–06.
230. 120 CONG. REC. 40891–93 (1974).
231. Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926.
232. *See supra* note 67 and accompanying text.
233. FED. R. EVID. 807.
234. *See supra* notes 219–29 and accompanying text.
235. *See supra* notes 219–29 and accompanying text.

Committee Note[236] and the Senate Report[237] pointed to the relatively liberal common-law decision in *Dallas County* as an example of how much discretion judges would wield under the statutes. Additionally, neither the Senate nor the Conference Committee Reports suggested that a judge should bar evidence under the residual exceptions merely on the ground that the proffered hearsay fell just short of satisfying the specific requirements of an enumerated hearsay exception in Rule 803 or 804.

In short, like the limitation that some courts have imposed on Rule 608(b) evidence when there has been a conviction for an untruthful act, the "near miss" doctrine fails the standard set forth in Section II.B. The imposition of the Rule 609 restriction into Rule 608(b) is unsound because the legislative history does not prove the right type of intent; that is, to altogether block the admission of a certain type of evidence. Similarly, the "near miss" doctrine fails because a careful review of the residual exception's legislative history does not establish that the drafters manifested an extraordinarily clear intent to narrow the discretion that judges possessed under progressive, common-law decisions such as *Dallas County*.

C. Importing Restrictions from Federal Rule 803(8) into Rule 803(6)

Part I pointed out that in *United States v. Oates*,[238] a drug prosecution, the Second Circuit contemplated the interaction between the official record hearsay exception codified in Rule 803(8) and the business entry exception set out in Rule 803(6).[239] The court decided to exclude a report by forensic chemists in the employ of the United States Customs Service.[240] En route to its final decision, the court reached a number of intermediate conclusions: (1) the chemists were "law enforcement personnel" within the ambit of then-existing Rule 803(8)(B)'s exclusion of matters observed by such personnel;[241] (2) the determination in the report that the substance analyzed was heroin was a "factual finding" under then-existing Rule 803(8)(C), which forbade the admission of such findings against a criminal accused;[242] and (3) there was a Congressional concern that the introduction of such reports would violate the Sixth Amendment's Confrontation Clause

236. *See* FED. R. EVID. art. VII advisory committee's notes to 1972 amendment.
237. *See* S. REP. No. 93-1277, at 7065 (1974).
238. *See* United States v. Oates, 560 F.2d 45 (2d Cir. 1977); *see supra* Part I.
239. *Oates*, 560 F.2d at 48, 68, 83–84.
240. *Id.* at 48–49.
241. *Id.* at 68.
242. *Id.* at 67, 84.

regardless of whether the reports were admitted under Rule 803(6) or Rule 803(8).[243]

Oates has proven to be a controversial decision.[244] For example, some courts have disagreed with *Oates*' characterization of laboratory chemists as "law enforcement personnel."[245] These courts reason that an intolerable concern about law enforcement bias in the preparation of the report exists only when the hearsay writing is a document—such as an arrest report that is the product of a directly adversarial confrontation between the police and a citizen. Other courts have distinguished *Oates*. They contend that the *Oates* court overstated the constraints imposed by the Sixth Amendment's Confrontation Clause.[246] According to these courts, a declarant's report should be admissible under Rule 803(6) at least when the declarant testifies and is subjected to cross-examination.[247] If the purpose of the exclusion is to safeguard Confrontation Clause rights, but the declarant appears in court and permits confrontation, it does not serve the purpose of the exclusion to apply the rule; the declarant's appearance as a witness satisfies the Confrontation Clause.

However, those issues are not our present concern. Our focus is on a particular aspect of the *Oates* decision: the court's conclusion that Congress had clearly manifested an intent that if a report was inadmissible under Rule 803(8), the report could not be admitted under Rule 803(6). *Oates*' detailed analysis of the legislative history presents a strong case for that proposition and, more to the point, makes out a persuasive case that satisfies the standard proposed at the end of Section II.B: an extraordinarily strong showing that Congress wanted to altogether bar a particular piece of evidence, not merely impose a restriction under Rule 803(8).

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243. *Id.* at 64, 79.

244. *See* 1 PAUL C. GIANNELLI, EDWARD J. IMWINKELRIED, ANDREA ROTH & JANE CAMPBELL MORIARTY, SCIENTIFIC EVIDENCE § 6.02[c], at 379 (5th ed. 2012).

245. United States v. Wilmer, 799 F.2d 495, 500 (9th Cir. 1986); United States v. Gotti, 641 F. Supp. 283, 291 (E.D.N.Y. 1986) (citing United States v. Yakobov, 712 F.2d 20, 25 (2d Cir. 1983)); Bohsancurt v. Eisenberg, 129 P.3d 471, 481 (Ariz. Ct. App. 2006); Michael H. Graham, Commentary, *Business and Public Records Hearsay Exceptions, Fed. R. Evid. 803(6) and (8); Multiple Level Hearsay, Fed. R. Evid. 805*, 55 CRIM. L. BULL. 252, 269 (2019).

246. United States v. Bland, 961 F.2d 123, 127 n.3 (9th Cir. 1992).

247. *See* United States v. King, 613 F.2d 670, 673 (7th Cir. 1980) ("Confrontation rights are not violated where the out-of-court declarant testifies at trial and is subject to cross-examination.") (citing California v. Green, 399 U.S. 149, 155–62 (1970)); United States v. Sawyer, 607 F.2d 1190, 1194 (7th Cir. 1979) (Swygert, J., concurring).

Representative Elizabeth Holtzman played a central role in crafting the restrictions wrought into Rule 803(8).[248] In Section III.B, we saw that she was on the losing side of the congressional debate over the residual hearsay exception. In contrast, on this issue, she was on the winning side. During the House deliberations over Rule 803(8), Representative David Dennis sponsored an amendment forbidding the receipt of reports reflecting "matters observed by police officers and other law enforcement personnel" in criminal cases.[249] He contended that this restriction was necessary to protect defendants' Sixth Amendment Confrontation Clause rights,[250] and Representative Holtzman spoke in support of his contention.[251] Thus, two of the most vocal proponents of the restrictions both rested their argument on constitutional concerns that would arise regardless of whether the report was admitted as an official record or as a business entry. The majority of the House agreed and voted to include restrictive language in Rule 803(8).

The Senate voted to approve a variation of the restriction but reworded the restriction to be inapplicable when "the author of the report was 'unavailable' to testify."[252] As previously stated, the differing versions of the draft Federal Rules of Evidence—including the differing texts of Rule 803(8)—necessitated a Conference Committee.[253] While the Conference Committee sided with the Senate on the issue of the residual hearsay exceptions, the Committee came down on the side of the House for the Rule 803(8) restrictions.[254] After the conference, when Representative William Hungate, who was both the floor manager for the legislation and a member of the Conference Committee,[255] was explaining the status of reports barred by the restrictions crafted into Rule 803(8), he flatly and bluntly said, "As the rules of evidence now stand, police and law enforcement reports are not admissible against defendants in criminal cases."[256] Representative Dennis, another floor manager for the legislation and Conference Committee member,[257] expressed similar sentiments during the House deliberation on the final Conference version, which included the restriction he had sponsored. Commenting on the admissibility of a police report barred by his

248. *Oates*, 560 F.2d at 69.
249. *Id.* (quoting 120 CONG. REC. 2387 (1984)).
250. *Id.* at 69.
251. *Id.*
252. *Id.*
253. *Id.*
254. *Id.* at 70.
255. *Id.* at 69.
256. *Id.* at 70 (quoting 120 CONG. REC. H12254 (daily ed. Dec. 18, 1974)).
257. *Id.* at 71.

Rule 803(8) amendment, he broadly stated, "I cannot see how anybody could suggest that introducing such a report is possible or a thing that can be done under these rules."[258] Representative Dennis made that remark on the floor on the very day the House approved the Conference Committee version of the Federal Rules.[259] As the *Oates* court noted, the revised Advisory Committee Note to Rule 803(8) echoed the concern voiced by these legislators.[260] The Advisory Committee Note states that the rationale for the restriction on "findings" is that the "use [of such findings] against the accused in a criminal case" would result in an "almost certain collision with [Sixth Amendment] confrontation rights."[261] In summary, the Advisory Committee and leading figures in the congressional deliberations over Rule 803(8) made it abundantly clear that the drafters broadly intended to exclude a particular type of evidence, namely, law enforcement reports introduced against criminal defendants, on constitutional concerns that would be implicated regardless of whether the evidence was admitted under Rule 803(8) or Rule 803(6).

The legislative history related to the *Oates* issue is readily distinguishable from the history pertinent to the "near miss" doctrine. The history most supportive of the "near miss" doctrine consists of statements by legislators who were on the losing side of the debate over the wisdom of including a residual exception in the Federal Rules of Evidence. Moreover, even accepting those legislators' statements at face value, neither they nor any committee report stated that proffered hearsay should necessarily be excluded if the hearsay fell just short of satisfying the specific requirements of an enumerated exception. The Advisory Committee Note on the residual exception also does not contain such a statement.

In sharp contrast, the extrinsic history most supportive of importing Rule 803(8)'s restriction into Rule 803(6) consists of statements by legislators who were on the winning side of the debate over restricting the scope of Rule 803(8). Furthermore, on the face of the legislators' statements, they argued broadly for completely excluding a particular kind of evidence, not merely imposing a restriction under Rule 803(8). Finally, as the Advisory Committee Note acknowledges, the winning legislators' argument rested on a constitutional concern which would be present regardless of whether the court admitted hearsay evidence under Rule 803(8) or Rule 803(6). While the citation to *Dallas County* in the Advisory Committee Note on the

258. *Id.* at 72 (quoting 120 CONG. REC. H12254 (daily ed. Dec. 18, 1974)).
259. *Id.*
260. *Id.* at 68–69.
261. FED. R. EVID. 803(8) advisory committee's notes to 1972 amendments.

residual exceptions weakens the case for the "near miss" doctrine, here the Note lends support to the decision to import the Rule 803(8) restriction into Rule 803(6).

In sum, unlike the legislative history relevant to either the "near miss" doctrine or the doctrine importing Rule 609 restrictions into Rule 608(b), the history pertinent to the *Oates* issue passes muster under the test proposed at the end of Section II.B. Here, the extrinsic history contains a powerful showing of a broad legislative intent to bar a particular type of evidence, not a narrower intent to prescribe a restriction under a specific provision of the Federal Rules of Evidence.

IV. Conclusion

It is understandable that there is a nostalgia for the common-law era of Evidence in the United States. From a commentator's perspective, at common law it was exciting that it was possible for the commentator's proposal to temporarily become law if the commentator's writing could persuade one court—sometimes one judge—to embrace the view. From a judicial perspective, the advent of the Age of Statutes[262] represented a shift in power from the courts to the legislatures. Because of this shift, a court might be tempted to reclaim some of that power by straining the meaning of a statute to reach what the court considered a desirable result.[263] However, the separation of powers doctrine requires federal judges to make a conscious effort to resist that temptation because the amendment of statutes is a legislative function, not a judicial power.

As we have seen, a court may legitimately rely on contextual interpretation to construe statutes. It is perfectly legitimate for a court to look to one statutory provision to eliminate an ambiguity in the wording of a separate, but related, provision. Thus, courts may consider conditional relevance under Rule 104(b) preliminary factfinding to interpret "probative value" in Rule 403 and determine whether that expression includes the credibility of the source of the evidence. Likewise, contextual interpretation allows courts to narrow the meaning of one provision if doing so is necessary to prevent the negation of another. Hence, courts may limit the scope of Rule 801(d)(2)(A) to preserve Rule 410's blanket bar on the admission of testimony about nolo contendere pleas.

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262. *See generally* CALABRESI, *supra* note 23.

263. *See* Kenneth W. Graham, Jr., *California's "Restatement" of Evidence: Some Reflections on Appellate Repair of the Codification Fiasco*, 4 LOY. U. L. REV. 279 (1971).

However, without more—without an extraordinarily strong showing of a legislative intent to prevent the admission of a certain type of evidence—a court may not import a restriction from one Federal Rule of Evidence provision into another simply because the court believes that, as a matter of evidentiary policy, it would be wise to do so.[264] Contextual interpretation does not warrant that outcome, and courts lack the authority to "improve" statutes on that basis[265]—especially when construing the Federal Rules of Evidence. In this setting, it is entirely appropriate to apply the interpretive presumption that the drafters' omission is intentional if one provision is silent on a restriction expressly stated in another provision, particularly an adjacent one. As previously mentioned, all the Rules took effect simultaneously in 1975 after a long period of careful deliberation over the provisions' wording by both the Advisory Committee and Congress.

Worse still, the court's imposition of uncodified restrictions runs counter to the basic thrust of the Federal Rules to liberalize admissibility standards,[266] which is evident in many specific provisions in Articles IV–X.[267] More fundamentally, a bias in favor of admissibility is wrought into the trilogy of key relevance provisions at the very beginning of Article IV.

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264. *See* Richland/Wilkin Joint Powers Auth. v. U.S. Army Corps of Eng'rs, 279 F. Supp. 3d 846 (D. Minn. 2017) (supplying an omission from a statute "transcends the judicial function") (quoting Nichols v. United States, 136 S. Ct. 1113, 1118 (2016)); People v. Flores, 174 Cal. Rptr. 3d 390, 392 (Cal. Ct. App. 2014) (noting that the court does not sit as a "super [l]egislature") (citing Unzueta v. Ocean View Sch. Dist., 8 Cal. Rptr. 2d 614 (Cal. Ct. App. 1992)); City of Susanville v. Cal. Dep't of Corr. and Rehab., 138 Cal. Rptr. 3d 721, 729 (Cal. Ct. App. 2012) ("We are not at liberty, however, to rewrite a statute to comport with our notion of wisdom or common sense.").

265. Geisinger Cmty. Med. Ctr. v. Sec'y U.S. Dep't of Health & Human Servs., 794 F.3d 383, 393 (3d Cir. 2015) ("Our task is to apply the text, not to improve upon it.") (quoting Pavelic & LeFlore v. Marvel Entm't Grp., 493 U.S. 120, 126 (1989)); *In re* Bracewell, 454 F.3d 1234, 1240 (11th Cir. 2006) (noting the Supreme Courts warning against "'improving' plain statutory language"); *In re* Baker, 430 F.3d 858, 860 (7th Cir. 2005) ("[A] court's role is to apply the legislature's statutory scheme, not to improve upon it.") (citing *In re* Platter, 140 F.3d 676, 681 (7th Cir. 1998)); Muench Photography, Inc. v. Houghton Mifflin Harcourt Publ'g Co., 712 F. Supp. 2d 84, 94 (S.D.N.Y. 2010) ("The Court's 'task is to apply the text, not to improve upon it.'") (quoting *Pavelic & LeFlore*, 493 U.S. at 126).

266. *See generally* Imwinkelried, *Federal Rule of Evidence 402*, *supra* note 8.

267. The Advisory Committee Notes to various Rules indicate that the drafters resolved a large number of common-law splits of authority in favor of adopting more liberal standards. For example:

- Rule 404(b) adopts the inclusionary view that the proponent of evidence of an uncharged crime may offer the evidence on any noncharacter theory of logical relevance. FED. R. EVID. 404(b). Under the exclusionary conception that many courts followed at common law, there were a finite number of "exceptions"

Rule 401 sets out an especially broad definition of "relevant" evidence—namely, evidence pertaining to any "fact . . . of consequence."[268] The Advisory Committee Note expressly states that Rule 401 rejects the limitation, which some jurisdictions previously followed, that the fact in question had to be actively "disputed."[269]

As the Introduction to this Article noted, Rule 402 announces a general rule that relevant evidence is admissible unless it is excludable on one of the listed bases, such as the Constitution or statute.[270] Again, Rule 402 makes no mention of case or decisional law. As a witness predicted in the congressional hearings, the enactment of Rule 402 "will in all probability . . . prevent[]" the enforcement of uncodified evidentiary

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such as modus operandi and intent to a general rule of inadmissibility, and the evidence was admissible only if the proponent could fit his or her evidence into one of the pigeonhole exceptions. *See also* 1 IMWINKELRIED, UNCHARGED MISCONDUCT, *supra* note 149, § 2:37 (rev. 2013).

- Rule 703 allows an expert to base an opinion not only on personal knowledge and hypothetically assumed facts but also on secondhand, out-of-court reports if it is the reasonable practice of the expert's specialty field to consider such reports. FED. R. EVID. 703. At common law, many courts restricted the expert to firsthand knowledge and hypothetically assumed facts when other witnesses supplied admissible testimony as to those facts.
- Rule 801(d)(2)(D) permits the introduction of vicarious admissions if, while the agency relationship exists, the party-opponent's agent made a statement about the performance of his or her duties. *Id.* 801(d)(2)(D). At common law, many courts admitted only statements by spokesperson agents who were authorized to make statements on behalf of the principal.
- Rule 803(1) recognizes the present sense impression hearsay exception, which had been a distinct minority view at common law. *Id.* 803(1).
- Similarly, Rule 803(18) recognizes the learned treatise hearsay exception, another minority view at common law. *Id.* 803(18).
- Rule 901(b) made it clear that it treats many traditional common-law authentication techniques merely as "examples" of a broader, liberal standard set out in Rule 901(a): "To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." *Id.* 901(a); *see id.* 901(b).
- Rule 1001(e) liberalized the admissibility of duplicates under the best evidence rule by defining duplicates broadly as "any counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process." *Id.* 1001(e). The Rule dispenses with the common-law requirement that the duplicate be prepared at the same time as the original.

268. FED. R. EVID. 401.
269. *Id.* 401 advisory committee's notes to the 1972 proposed rules.
270. *Id.* 402.

restrictions.[271] As the introduction noted, in two cases, the Supreme Court has recognized that this prediction has turned out to be true.[272]

Finally, Rule 403 announces that while a judge may exclude relevant evidence on an ad hoc basis, due to its prejudicial character, the judge may do so only when the probative value of the evidence is "substantially outweighed" by such prejudice.[273] Congress's choice of the adverb "substantially" and the use of passive voice signaled its intent to place the burden—a heavy burden, in fact—on the party opposing the admission of logically relevant evidence.[274] At common law, many courts had allocated that burden to the proponent of evidence. However, in the early House hearings on the then-proposed Federal Rules, Albert Jenner, chair of the Advisory Committee, stated that "the overall philosophy" of the Rules is to "place the burden upon he who seeks the exclusion of relevant evidence."[275] In this light, the burden should unquestionably be on the opponent to establish that a provision contains an evidentiary restriction. Standing alone, the presence of a restriction in one Federal Rule provision does not empower the judge to import that restriction into a separate provision. If the opponent cannot persuade the judge that the restriction in the first provision helps clarify ambiguous language in the second provision, or that an absolute prohibition in the first necessitates a limiting construction of broad language in the second, importing a restriction is justifiable only when the

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271. 22A CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5199 n.22 (2019).

272. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 587–88 (1993) ("Nothing in the text of this Rule establishes 'general acceptance' [from *Frye*] 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."); United States v. Abel, 469 U.S. 45, 46–49 (1984) ("But the Rules do not by their terms deal with impeachment for 'bias,' although they do expressly treat impeachment by character evidence and conduct, Rule 608, by evidence of conviction of a crime, Rule 608, by evidence of conviction of a crime, Rule 609, and by showing of religious beliefs or opinion, Rule 610.").

273. FED. R. EVID. 403.

274. 1 EDWARD J. IMWINKELRIED, PAUL C. GIANNELLI, FRANCIS A. GILLIGAN, FREDRIC I. LEDERER & LIESA RICHTER, COURTROOM CRIMINAL EVIDENCE § 314, at 3-36–40 (6th ed. 2016).

275. Edward J. Imwinkelried, *The Need to Amend Federal Rule of Evidence 404(b): The Threat to the Future of the Federal Rules of Evidence*, 30 VILL. L. REV. 1465, 1478 (1985) (quoting *Rules of Evidence: Hearings Before the Special Subcomm. on Reform of Federal Criminal Laws of the H. Comm. on the Judiciary*, 93d Cong., 1st Sess. 77, 87 (1983)). When Rule 609 was amended in 1990, the accompanying Advisory Committee Note expressly stated that the burden is on the opponent. FED. R. EVID. 609 advisory committee's note on the 1990 amendments.

extrinsic legislative history very clearly establishes the sort of legislative intent described in Section II.B.

The advent of the Age of Statutes has made statutory construction a more important component of judicial decision-making than ever before. Given the shift from cases to statutes, legislation has emerged as the dominant source of American law. In turn, the advent of textualism has caused another shift. Given the profound textualist skepticism of extrinsic legislative history materials,[276] the priority in statutory construction has shifted from searching extrinsic history material to finding interpretive clues in the context of the same statutory scheme. As a result of this expanded role in statutory construction, the process of contextual interpretation deserves closer scrutiny. Contextual interpretation has limits as well as legitimate uses. It is true that no statute is an island unto itself and, thus, every statute has context.[277] Each statute is distinct, and courts must respect the particular linguistic choices[278] that the legislature opted to craft into the statute. This debate over contextual interpretation under the Federal Rules of Evidence is but a microcosm of the much larger debate over such interpretation in the Age of Statutes. Hopefully, this Article has made a small contribution to that debate by clarifying the uses and the limits of contextual interpretation in the particular setting of the Federal Rules of Evidence.

276. *See* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 544–52 (1983); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 362 (1990).

277. Even if the legislature enacts a single section into law, there will almost always be pre-existing statutes relating to the same general subject-matter. Consequently, those *in pari materia* statutes constitute context.

278. *See* cases cited *supra* note 101 and accompanying text.