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Federal Rules of Evidence 413-415 and the Struggle for Rulemaking Preeminence

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FEDERAL RULES OF EVIDENCE 413-415
AND THE STRUGGLE FOR RULEMAKING
PREEMINENCE

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This Article considers Federal Rules of Evidence 413-415, which govern admissibility of similar crimes evidence in sexual assault and child molestation cases in federal courts. Enacted by Congress in 1995 despite the objections of the Judicial Conference, the American Bar Association, and many legal scholars, and in contravention of the established process for promulgating rules of procedure and evidence set out in the Rules Enabling Act, these rules carve an exception out of the rule against the use of propensity evidence where the acts are sexual in nature. In the ten years that the rules have been in effect, the issue that has emerged is the proper scope of trial court discretion to exclude similar acts evidence in sexual assault cases under the general supervisory authority of Rule 403. The issue invites a broader consideration of which branch of government ought to have primacy in the area of evidence rulemaking. Recent years have seen a contraction in the scope of congressional delegation contained in the Rules Enabling Act. This Article considers the question of which branch should enjoy rulemaking preeminence from the perspective not of power, but of institutional competence, considering the nature and purpose of particular evidentiary rules rather than determining the question categorically. I conclude that the rules regarding similar acts involve interests that are fundamentally judicial rather than legislative, and that, accordingly, courts should implement a robust Rule 403 balancing inquiry when presented with similar acts evidence under Rules 413-415.

I. INTRODUCTION

Imagine that, in response to a growing public perception that homicides were too frequently going unpunished, and that rules of

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evidence unreasonably insulated juries from the graphic horror of the crime of murder,2 Congress passed a statute that amended the Federal Rules of Evidence to provide as follows:

**Rule 416. Autopsy Photos**

Any photograph of the body of a victim of an alleged homicide, including any photograph taken during a medical examination, shall be admissible on any matter to which it is relevant.

How would autopsy photos offered at a homicide trial after the effective date of this amendment be treated by the trial court?3 What would be the

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1 Such a sentiment is the subtext of much of the victims’ rights legislation that has been enacted over the last quarter century. See, e.g., Douglas E. Beloof & Paul G. Cassell, *The Crime Victim’s Right to Attend the Trial: The Reascendant National Consensus*, 9 LEWIS & CLARK L. REV. 481, 503-17 (2005) (reviewing victims’ rights statutes and the history of victim participation at trials); John W. Gillis & Douglas E. Beloof, *The Next Step for a Maturing Victim Rights Movement: Enforcing Crime Victim Rights in the Courts*, 33 McGEORGE L. REV. 689, 690 (2002) (noting that the “modern Crime Victims’ Rights Movement began thirty years ago” and that “[s]ince 1982, thousands of federal and state statutes governing the rights and interests of crime victims have been enacted, and thirty-two states have amended their constitutions to guarantee basic rights for crime victims’); Katie Long, Note, *Community Input at Sentencing: Victim’s Right or Victim’s Revenge*, 75 B.U. L. REV. 187, 188 (1995) (noting that there has been “a growing battle for control of the criminal justice system” due in part to “intensifying outrage over crime and increasing skepticism about the efficacy of the criminal justice system”).

2 See, e.g., State v. Bocharski, 22 P.3d 43, 49 (Ariz. 2001) (reviewing trial court’s exercise of discretion to admit six “gruesome, highly inflammatory” autopsy photos and noting that judges “have an obligation to weigh the prejudice caused by a gruesome picture against its probative value”).

Recent scholarship also suggests that an increased legislative interest in autopsy photos might result from the so-called “CSI effect,” which heightens juror expectations of viewing scientific and other forensic evidence at trial. See, e.g., United States v. Fields, 483 F.3d 313, 355 n.39 (5th Cir. 2007) (“The ‘CSI effect’ is a term that legal authorities and the mass media have coined to describe a supposed influence that watching the television show *CSI: Crime Scene Investigation* has on juror behavior. Some have claimed that jurors who see the high-quality forensic evidence presented on *CSI* raise their standards in real trials, in which actual evidence is typically more flawed and uncertain.” (citing Tom R. Tyler, *Viewing CSI and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction*, 115 YALE L.J. 1050 (2006) (explaining that the existence of a “CSI effect” is plausible but has not been proven empirically))); see also Old Chief v. United States, 519 U.S. 172, 188 (1997) (“[B]eyond the power of conventional evidence to support allegations and give life to the moral underpinnings of law’s claims, there lies the need for evidence in all its particularity to satisfy the jurors’ expectations about what proper proof should be.”).

nature and scope of the trial court’s review of those photos under Federal Rule of Evidence 403? Are the answers to these questions determinable exclusively by reference to the language of the amended rule, or the language of the entire body of rules of evidence? Could the answers be found by reference to the legislative history of the amendment, and if so, what weight would the unanimous opposition of the judiciary and the bar have in that analysis? How should the fact of congressional amendment—as opposed to judicial amendment—of the rules affect the longstanding practice of weighing the probative value of all relevant evidence against the danger of unfair prejudice posed by that evidence?

Although no such amendment has, in fact, been enacted, it would be surprising if trial courts implementing such a rule did not resist, to some degree, congressional imposition of a categorical approach to admissibility in a context in which individualized determinations of probativeness and prejudice by a trial judge have been the norm. It would be still more surprising if trial courts began routinely admitting autopsy photos on the theory that the new rule expressed an “underlying legislative judgment . . . that [such evidence] is normally not outweighed by any risk of prejudice or other adverse effects.” Most surprising would be the

Evidence Code Mandating Admission of In-Life Victim Photographs in Homicide Cases, 56 OKLA. L. REV. 383, 385 (2003) (arguing that the new rule “undermines the historical discretion of the trial judge” under Oklahoma’s version of Rule 403).

4 Rule 403 provides that “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” FED. R. EVID. 403.


6 See infra Part V (noting that courts considering Rules 413-415 have focused on the testimony of its sponsors and not on the unanimous opposition of bench and bar); see also Randolph N. Jonakait, Text, Texts, or Ad Hoc Determinations: Interpretation of the Federal Rules of Evidence, 71 IND. L.J. 551, 553 (1996) (“Although it often nods at a textualist approach, the Court does not treat the Federal Rules of Evidence as a text. Instead, the Court interprets them too often as if the Rules were only a collection of isolated provisions, as if they were only a compilation of segregated texts.”).

7 United States v. Mound, 149 F.3d 799, 802 (8th Cir. 1988) (quoting 140 CONG. REC. H8991 (daily ed. Aug. 21, 1994) (statement of House sponsor Rep. Molinari) [hereinafter Statement of Rep. Molinari]); see infra note 142 (citing additional cases in which courts have given evidence offered under Rule 413-415 a presumption of probativeness); see also Aviva Orenstein, Deviance, Due Process, and the False Promise of Federal Rule of
complete failure of reviewing courts to recognize the rule as a manifestation of the now long-simmering feud between Congress and the courts over the politics of evidence rulemaking.\(^8\)

I pose this hypothetical because federal trial and appellate courts’ implementation of the rules relating to evidence of similar crimes in sexual assault and child molestation cases\(^9\) has produced precisely these surprising outcomes.\(^10\) Like autopsy photos, evidence of similar crimes to prove character or propensity has provided the paradigmatic context for the exercise of judicial discretion under Rule 403 to exclude evidence that, although relevant, is also highly prejudicial.\(^11\) Accordingly, a congressional amendment that would, as Rules 413-415 have done, radically alter the legal landscape and impose a rule of categorical admissibility for propensity evidence poses many of the questions that the hypothetical rule regarding autopsy photos might provoke.

Almost a dozen years into the life of the special Federal Rules of Evidence governing the use of similar evidence in sexual assault cases,\(^12\) rules whose enactment by Congress was heatedly contested both

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\(^8\) See generally Eileen A. Scallen, Analyzing “The Politics of [Evidence] Rulemaking,” 53 Hastings L.J. 843, 843-44 (2002) (noting that “recent changes to federal evidence law, such as the addition of rules on the admissibility of a defendant’s prior sexual conduct,... have highlighted the political and controversial aspects of procedural rulemaking”).

\(^9\) Congress enacted Rules 413, 414, and 415 of the Federal Rules of Evidence in 1994, and they took effect on July 9, 1995. Rule 413 governs criminal cases “in which the defendant is accused of an offense of sexual assault,” a term defined by reference to sections of the United States Code and analogous sections of state law. FED. R. EVID. 413(a), (d). Similarly, Rule 414 applies to criminal cases “in which the defendant is accused of an offense of child molestation,” defined within the Rule. FED. R. EVID. 414. Rule 415 applies to civil cases in which a claim “is predicated on a party’s alleged commission of conduct constituting an offense of sexual assault or child molestation... as provided in Rule 413 and Rule 414 of these rules.” FED. R. EVID. 415.

\(^10\) See infra Part V (citing cases).

\(^11\) See, e.g., Old Chief v. United States, 519 U.S. 172, 191-92 (1997) (finding it error to admit evidence of defendant’s prior felony conviction where other, less prejudicial evidence was available for that proposition); Huddleston v. United States, 485 U.S. 681, 685 (1988) (noting the rules of evidence “generally prohibit the introduction of evidence of extrinsic acts that might adversely reflect on the actor’s character, unless that evidence bears upon a relevant issue in the case such as motive, opportunity, or knowledge”); Michelson v. United States, 335 U.S. 469, 489 (1948) (“General bad character, much less bad reputation, has not yet become a criminal offense in our scheme.”).

\(^12\) The new rules provide that such evidence is to be “admitted on any matter to which it is relevant.” FED. R. EVID. 413-415.
substantively\textsuperscript{13} and procedurally,\textsuperscript{14} and whose rationale remains elusive,\textsuperscript{15} the battleground has shifted. The question now presented is not whether such rules should be enacted, but how, in trials alleging sexual violence, the


\textsuperscript{15} Other than a desire to see more convictions in sexual assault and child sexual abuse cases, there is no persuasive rationale for treating similar crimes evidence in sexual offense cases differently from similar crimes evidence in other categories of case. See \textit{Report of the Judicial Conference}, \textit{supra} note 13, at 850 (noting that the concerns underlying them "are already adequately addressed in the existing Federal Rules of Evidence"; that "the new rules . . . are not supported by empirical evidence"; that the new rules "could diminish significantly the protections that have safeguarded persons accused in criminal cases and parties in civil cases against undue prejudice" and would result in "mini-trials within trials"; and that, if the new rules were construed to preclude the application of Rule 403 to similar act evidence in sexual assault cases, "serious constitutional questions would arise"). See generally Katharine K. Baker, \textit{Once a Rapist? Motivational Evidence and Relevancy in Rape Law}, 110 Harv. L. Rev. 563 (1997) (opposing rules from feminist perspective); James S. Liebman, \textit{Proposed Evidence Rules 413 to 415—Some Problems and Recommendations}, 20 U. Dayton L. Rev. 753, 756 (1995) (opposing rules as logically incoherent); Leonore M.J. Simon, \textit{The Myth of Sex Offender Specialization: An Empirical Analysis}, 23 New Eng. J. on Crim. & Civ. Confinement 387, 401 (1997) (opposing rules based upon empirical analysis). But see Karp, \textit{supra} note 13, at 15 (supporting rules).
general supervisory authority of the trial court under Rule 403 intersects
with the broad congressional mandate to admit similar acts evidence of
prior sexual assault "on any matter to which it is relevant."16 The problem
can be approached in a number of ways, from one of ordinary statutory
construction17 to one of constitutional due process.18 This Article proposes
to consider trial and appellate court struggles to integrate the similar acts
rules with Rule 403 as an episode in the long history of conflicts rooted in

16 FED. R. EVID. 413.
17 See cases cited infra Part V. One source of guidance as to the interpretation of the new
rules has been the statement of the Bill's House sponsor, Rep. Susan Molinari, that "the
general standards of the rules of evidence will continue to apply, including the restrictions on
hearsay evidence and the court's authority under Evidence Rule 403 to exclude evidence
whose probative value is substantially outweighed by its prejudicial effect." 140 CONG. REC.
23603 (1994). At the time of the amendments' enactment, the availability of review under
Rule 403 was not perfectly clear. See, e.g., Bryden & Park, supra note 13, at 566 ("Whether
exclusion under Rule 403 would still be available to an accused seeking to challenge the
admissibility of [similar acts] evidence [offered under Rules 413-415] is unclear. The
proposed rules do not mention Rule 403, and one could plausibly construe the text of the bill
to create an exception to the rule. Instead of saying that the evidence 'may' be admissible,
as in Rule 404(b), the language of the proposed rules reads that the sexual history evidence
'is' admissible, and that jurors may consider the evidence 'on any matter to which it is
relevant.'"). Since its implementation, however, courts have uniformly concluded that Rule
403 applies to evidence offered under Rules 413-415. See, e.g., United States v. Enjady, 134
F.3d 1427, 1431 (10th Cir. 1998) (noting that "we agree with the Eighth Circuit that
adoption of this rule without any exclusion or amendment to Rule 403 makes Rule 403
applicable, as it is to other rules of evidence" (citing United States v. Sumner, 119 F.3d 658,
661-62 (8th Cir. 1997))); United States v. Mound, 149 F.3d 799, 801 (8th Cir. 1998)
(approving 10th Circuit holding in Enjady that "subject to the protections of Rule 403, Rule
413 did not violate the Due Process Clause").
18 See, e.g., Orenstein, supra note 7, at 1492-93 (arguing that Rule 403 is a bulwark
against encroachment on due process values and that, to the extent that Rules 413-415 are
construed to preclude a robust application of 403, they are constitutionally unsound). But
see id. at 1515 (noting that "although entertaining the argument, courts have uniformly
rejected such due process challenges to Rule 413 and Rule 414" (citing, inter alia, United
States v. Castillo, 140 F.3d 874, 881-83 (10th Cir. 1998); Mound, 149 F.3d at 801)); see also
Dowling v. United States, 493 U.S. 342 (1990) (holding that use of similar acts evidence
pursuant to Federal Rule of Evidence 404(b) does not violate the due process or double
jeopardy clause of the Constitution, even where evidence relates to conduct for which
defendant has been acquitted). The Supreme Court's treatment of uncharged crimes in
criminal cases under the due process clause has been somewhat uneven. Compare Apprendi
v. New Jersey, 530 U.S. 466 (2000) (finding sentence enhancement based upon uncharged
acts unconstitutionally violated defendant's Sixth Amendment right to trial by jury and proof
beyond a reasonable doubt), and Huddleston v. United States, 485 U.S. 681 (1988)
(requiring jury in criminal case to find similar act only to a preponderance in order to
consider it under Federal Rule of Evidence 404(b)), with Spencer v. Texas, 385 U.S. 554,
564 (1967) (rejecting due process challenge to Texas habitual criminal statute that permitted
introduction of evidence of similar crimes).
norms of institutional competency and separation of powers. Interestingly, the decisional law that has emerged since implementation of the special similar crimes rules demonstrates a very limited degree of judicial resistance to the reassertion of legislative power in this traditionally and structurally judicial space. This level of resistance is somewhat surprising given the long history of judicial primacy in the area of procedural rulemaking, as well as particular perceptions of institutional competency that these special similar acts rules are perceived to undermine. Whereas there are examples of legislative resistance to judicial encroachment on peculiarly legislative functions, and of

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Of the various structural elements in the Constitution, separation of powers, checks and balances, judicial review, and federalism, only concerning the last does there seem to be much uncertainty respecting the existence, and the content, of standards that allow the Judiciary to play a significant role in maintaining the design contemplated by the Framers. Although the resolution of specific cases has proved difficult, we have derived from the Constitution workable standards to assist in preserving separation of powers and checks and balances. These standards are by now well accepted. Judicial review is also established beyond question, and though we may differ when applying its principles, its legitimacy is undoubted.

See also Linda S. Mullenix, Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers, 77 Minn. L. Rev. 1283, 1299 (1993) (suggesting that cases involving the separation of powers tension between the legislative and judicial branches “tend to be more factually complicated and doctrinally elusive than those involving the executive branch” and require a functional rather than a formal approach to constitutional analysis). Professor Mullenix suggests that Mistretta v. United States, 488 U.S. 361, 371-74 (1989), challenging the validity of the Sentencing Reform Act of 1988, is the most apposite Supreme Court decision on the question of Congress’s authority to limit the rulemaking power of the judiciary. Mullenix, supra, at 1310-11. Although the Mistretta Court upheld the Sentencing Reform Act, Mullenix argues that a different result should be reached on the Civil Justice Reform Act since it unconstitutionally usurps judicial power to control judicial procedure by promulgating procedural rules. Id. at 1297 (“In enacting the Civil Justice Reform Act, then, Congress impermissibly removed most, if not all of the essential attributes of rulemaking power from Article III judges and vested that power in non-Article III adjuncts to the court.”).

20 See discussion of cases infra Part V.

21 See cases infra Part V; see also Orenstein, supra note 7, at 1492 (noting that “by relying on the legislative history of the new rules and announcing a presumption of admissibility, courts have forsaken the traditional operation of Rule 403”). But see United States v. Mound, 149 F.3d 799 (8th Cir. 1998) (constraining 403 review on the ground that Rules 413-415 instruct courts to adopt a broad presumption of admissibility).

22 See, e.g., Lopez, 514 U.S. at 562-63 (invalidating Gun-Free School Zones Act of 1990, Pub. L. No. 101-647, § 1702, 1990 U.S.C.C.A.N. (104 Stat.) 4844, 4844-45 (codified at 18 U.S.C. § 922(q) (2005)), as beyond congressional power under the commerce clause, due in part to the Court’s conclusion that, as the Government conceded, “[n]either the statute nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone,” and that, “to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity
legislative and judicial resistance to the assertion of executive power in spheres of judicial\textsuperscript{23} and legislative authority,\textsuperscript{24} so here one might expect courts to resist the congressional effort to strip them of their delegated authority to determine and construct the rules of admissibility in adjudicatory proceedings.\textsuperscript{25} This expectation is heightened by the subject matter of the rules enacted by Congress, since similar acts evidence has long been an area in which fact-specific weighing by an experienced trial judge has been deemed essential to a fair trial.\textsuperscript{26}
Moreover, beneath this debate over institutional competency is a foundational inquiry as to the nature of the rules themselves, and the corresponding political and prudential question of which branch of government is most competent to act with respect to those rules.\(^{27}\) Much turns on this prior question. The rules at issue may be viewed as instantiations of a policy preference that places the public interest in punishment of sexual offenses above the interest in accurate and just adjudication (obtained, in part, by preventing the prejudicial use of prior bad acts).\(^{28}\) That determination would seem to belong to the legislature—here, Congress—but only to the extent that it does not compromise fundamental constitutional norms of due process or separation of powers. If, however, the rules at issue do compromise constitutional norms, then they are plainly invalid and the proper subject of judicial attention.

As it happens, the constitutional question is a fairly easy one as a matter of law.\(^{29}\) The more difficult question arises when, as here, the rules are indeed reflective of a considered legislative preference, but one that is evidence admitted clearly has no bearing on any issue involved.” (quoting United States v. Claybourne, 415 F.3d 790, 797 (8th Cir. 2005))).

\(^{27}\) As I explain more fully below, this debate is best understood not as one of constitutional power but of prudence, since it is plain that Congress has the power to legislate in this area. See generally Stephen B. Burbank, The Rules Enabling Act of 1934, 130 U. PA. L. REV. 1015, 1022 (1982) (noting that “[e]ven in the literature specific to the proposed Federal Rules of Evidence, the arguments at times anticipated Congress’s action by obscuring the distinction between power and prudence in court rulemaking”); Enjady, 134 F.3d at 1432 (“[M]ost federal procedural rules are promulgated under the auspices of the Supreme Court and the Rules Enabling Act. But we must recognize that Congress has the ultimate power over the enactment of rules.”). However, having broadly delegated that power to the courts nearly a century ago, Congress has recognized the value of judicial input—if not judicial control—of court rulemaking, and it would seem that a reversal of that long-standing delegation is worthy of review.

\(^{28}\) Such an inference is plain from the statute of which the rules were a part, a federal “tough on crime” statute entitled “Violent Crime Control and Law Enforcement Act,” which contained a host of provisions addressing violent crime in general and violence against women in particular. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322 (1994). The statute, inter alia, expanded the Rape Shield Rule found in Rule 412 to civil cases, made car-jacking a federal criminal offense, enhanced sentences for assaults that could be characterized as “hate crimes,” and provided the death penalty for a host of federally prosecutable homicides including those relating to rape or child molestation. Id.

\(^{29}\) See infra text accompanying notes 62-64 (considering scholarly debate about power of Congress and courts to promulgate procedural rules); see also Scallen, supra note 8, at 872-73 (considering the question of “what is the constitutional ground upon which Congress could enact a provision such as Rule 412 [the Rape Shield Rule]” and concluding that if it were so substantive that the Supreme Court lacked the power to enact it, the rule could not also “be said to be ‘Necessary and Proper’ to carry out Congress’s power to [sic] ‘To constitute Tribunals inferior to the supreme [sic] Court,’” and questioning whether Rule 412 is instead “the kind of substantive provision, unjustifiable under an enumerated constitutional power, that is ‘reserved to the States’ under the tenth amendment’”).
ordiningly governed by a judicially determinable inquiry about relevance, probativeness, and prejudice. Returning to the autopsy photo hypothetical, the question is: should all such questions be left to the judiciary, or is the legislature wise to control or influence outcomes that hinge on such a balance? What is the proper scope of judicial review under the guise of the court’s general supervisory authority, contained in Rule 403, when the legislature has spoken so clearly? This Article explores that foundational question.30

Second, this Article considers whether a rule of judicial discretion like Federal Rule of Evidence 403 is the proper vehicle for reasserting judicial preeminence in an interbranch power struggle such as the one I describe.31 While the judiciary enjoys the power to alter the distribution of powers among the branches through its authority to adjudicate cases and controversies arising under the Constitution,32 the use of an evidentiary rule of discretion to curtail congressional rulemaking power raises its own issues of legitimacy. This Article explores the justifications for invoking Rule 403 to limit the admissibility of similar acts in sex offense cases when Congress has indicated that a rule of broad admissibility should ordinarily apply.

Finally, this Article reviews the decisional law of trial and appellate courts presented with the question of the scope of their authority under Rule 403 to exclude that evidence made admissible by the new similar act rules, concluding that although the approach that has emerged to date gives adequate, if limited, play to judicial discretion, it does so without rooting that exercise of discretion in the legitimacy analysis offered herein. Instead,

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30 A third theoretical frame would characterize the historic exclusion of similar acts evidence as constitutionally compelled and hence untrumpable by any legislative act, and would, correspondingly, cast the courts as exclusive monitors of that constitutional interest. See Orenstein, supra note 7, at 1505 & n.63-64. Such a theoretical frame has, however, consistently been rejected by courts asked to treat the interest in exclusion of prior acts evidence as constitutionally based. See infra Part V (decisions under 404 and 413).

31 This second question arises only after concluding, as courts have, that the judicial response to the new rules is not constitutionally based.

32 U.S. CONST. art. III, § 1 (“The judicial power shall extend to all cases, in law or equity, arising under this Constitution, [and] the laws of the United States . . . .”); see, e.g., Morrison v. Olsen, 487 U.S. 654, 696 (1988) (approving Ethics in Government Act of 1978, which created an office of Independent Counsel subject to limited oversight by Attorney General and Congress); Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 959 (1983) (invalidating “legislative veto” provisions for executive agency’s rulemaking processes, which veto could be accomplished by only one house of Congress, contrary to constitutional requirements for legislation); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 588-89 (1952) (rejecting presidential assertion of power that Court deemed legislative in character, in part for reasons of institutional competency); see also Yvette Barksdale, The Presidency and Administrative Value Selection, 42 AM. U. L. REV. 273, 335 (discussing separation of powers clashes and observing that some allocations of power are based upon perceived institutional competencies).
decisions under the new rules regarding similar acts evidence rest on a superficial and textualist rationale and do not explore the deeper question of authority that this clash between Congress and the courts evokes. I suggest that future decisions grounded in this prudential and frankly political analysis would enjoy greater coherence and legitimacy than those that rest exclusively on interpretive tools such a plain meaning and other norms of statutory construction. It would also legitimize a more robust exercise of Rule 403 discretion to exclude prior bad acts in sexual assault cases than has, to date, been applied under the new rules.

II. WHICH BRANCH BEST CONTROLS RULES OF PROCEDURE AND EVIDENCE?

The question of which branch is best suited to promulgate rules of evidence for application in civil and criminal trials has at least two possible answers. Preliminarily, such rules, like the Rules of Civil Procedure and the Rules of Criminal Procedure, were enacted by Congress, and operate as code with the force of law; as such, they are pieces of legislation and ought, one would suppose, to originate with the legislative branch. Certainly, since their enactment, the Rules of Evidence have been accorded statutory authority and have been interpreted as would other legislatively enacted statutes.


34 Jonakait, supra note 6, at 552 n.6 (“While they are rules of procedure, they are also statutes passed by Congress and signed by the President. The rules of evidence are indeed statutes, but they are special statutes.”).

35 U.S. CONST. art. I, § 1 (“All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”); Youngstown, 343 U.S. at 589 (noting “[t]he Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times”); see also Stephen Burbank, Procedure, Politics and Power, 79 NOTRE DAME L. REV. 1677, 1681 (2004) (noting that “[t]he lawmaking powers of Congress under Article I... enable Congress to make prospective law throughout the broad field of procedure” and that “[t]his has been the consistently held and oft-articulated view of the Supreme Court since at least 1825”). Professor Burbank observes that “[i]ndeed, the puzzle is not where Congress gets its power, but rather, particularly in the case of supervisory court rules, how the exercise of power to promulgate prospective, legislation-like rules can be squared with the grant of Judicial power in Article III.” Id. at 1682 (citation omitted).

On the other hand, as Professor Linda Mullenix observed with respect to rules of civil procedure:

[F]or separation-of-powers purposes one may view the Rules Enabling Act as a codification of the constitutional limits. The constitutional limitation prevents Congress from compromising the constitutional independence of the judiciary by invading the inherent power of the judiciary to create rules of practice and procedure for the courts. The statutory limitation allocates the substantive law-making function to the legislative branch, and the procedural rule-making function to the courts.

By this reasoning, Congress may not enact legislation that purports to determine rules of procedure without violating separation of powers principles, which principles the judiciary is charged with overseeing. Most scholars and courts have found this argument insufficiently persuasive to support the conclusion that Congress lacks the authority to enact rules of procedure, even against the advice of the judiciary.

Despite its power to act in the areas of procedure and evidence, Congress chose to delegate its authority to the judiciary in its enactment of the Rules Enabling Act, which provides that “[t]he Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.” This delegation is clear and unambiguous in its breadth, but has generated ambiguity in interpretation of its scope, as defined by the phrase “rules of practice and procedure.” Those rules deemed to confer or infringe upon substantive rights have been correspondingly invalidated as beyond the judiciary’s power to promulgate them pursuant to this delegation.

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37 Mullenix, supra note 19, at 1330.

38 United States v. Enjady, 134 F.3d 1427, 1432 (10th Cir. 1998) (noting that “we must recognize that Congress has the ultimate power over the enactment of rules, which it exercised here” (citation omitted)); Burbank, supra note 35, at 1680-81 (contending that the “[t]he inability to perceive (or acknowledge the importance of) [an array of] distinctions is one reason why some discussions of the question, and in particular the role of the inherent powers of federal courts, are so thoroughly unsatisfactory”).


40 See 28 U.S.C. § 2072(b) (1988) (“Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect
course of acting under this grant of authority, the Judicial Conference of the United States Supreme Court, through an ad hoc committee and, later, through the advisory committee appointed to draft rules of evidence, twice determined that rules of evidence were indeed "procedural" within the language of the Enabling Act.\(^4\) This self-affirming conclusion provided the authority for promulgating the draft rules themselves.\(^4\)

The authority to consider and frame rules regarding admissibility and exclusion of evidence has, then, to the extent that such rules have been regarded as categorically procedural rather than substantive in nature, long been deemed to be peculiarly within the institutional competence of the judiciary rather than the legislature.\(^4\) Rules of both procedure and evidence applications of such rules have taken effect."); see also C.J. WARREN BURGER, COMMUNICATION FROM THE CHIEF JUSTICE OF THE UNITED STATES TRANSMITTING THE PROPOSED RULES OF EVIDENCE OF THE UNITED STATES COURTS AND MAGISTRATES, H.R. DOC. NO. 93-46, at III (1st Sess. 1973) (Douglas, J., dissenting from draft submission).

Categorically, there has been a vigorous debate since the earliest precursors to the Rules Enabling Act about whether the congressional delegation of rulemaking power was intended to encompass rules of evidence. See Burbank, supra note 27, at 1129-30 n.516 (observing that "rules of evidence were among the matters excluded from the rulemaking power in the 1926 Senate Report"); Geyh, supra note 39, at 1187 n.116 (noting that "[w]hether rules of evidence, particularly rules governing admissibility, modified a 'substantive right' and were thus outside the purview of the judiciary's rulemaking authority had been a question debated by judges and scholars alike") (citing Burbank, supra note 27, at 1137-43 (contending that the difficulty has been a "failure to mark the distinction between rules regulating taking and obtaining evidence (procedural) and rules regulating admissibility of evidence (substantive)").

Moreover, the Civil Justice Reform Act of 1990 transformed the rulemaking power of the courts as set forth in the Rules Enabling Act to such a degree that at least one commentator has argued that it "effectively overturns the Rules Enabling Act by the expedient of declaring procedural rules to be substantive law, thus stripping the judicial branch of the power to prescribe internal rules of procedure for the federal courts." Mullenix, supra note 19, at 1286.


\(^5\) See Scallen, supra note 8, at 852 (noting that the committee considering the question "not surprisingly, concluded that it was both feasible and desirable to promulgate uniform federal rules of evidence").

\(^4\) This authority was delegated by Congress to the Judiciary in 1934 through the Rules Enabling Act, 28 U.S.C. § 2072(a) (1990) (providing that "[t]he Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and
have, for nearly a century, been drafted by members of the judiciary or their appointed delegates, usually lawyers and legal scholars, and not by general legislatures, either state or federal. Despite the formal retention of veto authority for such rules, for some forty years Congress did not see fit to second-guess the judiciary and its appointees to the relevant committees who drafted those rules.

Many commentators have observed that the rules of evidence, compared to rules of procedure, are especially substantive and therefore more acutely the focus of legislative scrutiny. See Scallen, supra note 8, at 870 (noting that the “Evidence Rules have drawn more flak than other rules of procedure, probably because the Evidence Rules are more substantive than other procedural rules”) (citing Gregory P. Joseph, The Politics of [Evidence] Rulemaking, 53 HASTINGS L.J. 733, 750-51 (arguing that “the Rules of Evidence are heavily outcome-determinative and do, in fact, affect substantial rights of litigants”)).

28 U.S.C. § 2074 (1988) (explaining congressional veto). Significantly, section 2074 provides that rules of evidence transmitted to Congress by the Supreme Court “shall take effect” with no further congressional action, but that “[a]ny such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress.”

But see Burbank, supra note 27, at 1018 & n.4 (noting that “[t]he long-enduring pattern of congressional acquiescence in Federal Rules was broken in response to the proposed Federal Rules of Evidence in 1973 and has not been reestablished”) (citing 125 CONG. REC. H6376 (daily ed. July 23, 1979) (statement of Rep. Drinan that “[w]ithin six years, postponing the effective date of proposed amendments to Federal Rules had become ‘not a novel procedure’”).

Professor Scallen catalogued the following substantive changes to the Rules of Evidence since their enactment in 1975:

Rule 103 has been amended once (2000); Rule 404 has been amended twice (1991 and 2000); Rule 407 has been amended once (1997); Rule 410 has been amended once (1975) and then completely revised (1980); Rule 412 was added (1978) and amended twice (1988, 1994); Rules 413-415 were added (1995); Rule 609 was amended once (1990); Rule 701 was amended once (2000); Rule 702 was amended once (2000); Rule 703 was amended once (2000); Rule 704 was amended once (1984); Rule 705 was amended once (1993); Rule 801(d)(2) was amended once (1997); Rule 803(6) was amended once (2000); Rule 804(b)(6) was added (1997); Rule 807 was adopted to replace both Rules 803(24) and 804(b)(5) (1997); Rules 902(11) and 902(12) were
Not surprisingly given this provenance, the rules of procedure and evidence that have emerged are fundamentally different in character from the acts of a general legislature. As one commentator put it:

The Federal Rules of Evidence have very little in common with a typical statute. Most fundamentally, the Federal Rules of Evidence originated in, and were designed by, the judicial branch and not the legislative branch. In addition, the role of Congress in the process that generated the Federal Rules of Evidence was largely passive. Congress’s primary function was to enact into law the will and intent of the Supreme Court and its Advisory Committee. Moreover, the judicial branch designed the Federal Rules of Evidence to operate as guidance for the exercise of discretion within the federal judiciary, and consequently, the Rules’ intended function is very much unlike that of most statutes.

That the special rules regarding similar acts evidence in sexual assault and child molestation cases did not emerge from the process contemplated and repeatedly employed by Congress via the Rules Enabling Act is itself a red flag that the resulting rules have a political subtext and that they might not reflect the considered wisdom of those who preside over and practice before courts. Does it also suggest that Congress intended the special rules regarding similar acts in sexual assault cases to operate independently

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\(^{47}\) Jonakait, supra note 6, at 551 n.6 (citing Glenn Weissenberger, The Supreme Court and the Interpretation of the Federal Rules of Evidence, 53 OHIO ST. L.J. 1307 (1992)); Scallen, supra note 5, at 1741; see also Geyh, supra note 39, at 1169 (noting that “[t]he Rules Enabling Act of 1934 envisioned procedural rulemaking as an essentially technical undertaking best left in the expert hands of judges, and for nearly forty years thereafter, the judiciary exercised effectively exclusive rulemaking power”).

\(^{48}\) See Scallen, supra note 8, at 855 (noting that the Rules of Evidence “have been a continual source of controversy since their inception” and that the “most controversial of the recent Evidence Rules changes was the addition of Rules 413-415”).

\(^{49}\) See id. at 861 (noting that Rules 413-415 are “without precedent” in that they were enacted “over the express disapproval of the Federal Rules Advisory Committee, without empirical evidence of the enhanced reliability of this type of character evidence over other similar character evidence for which no specific rules have been enacted, and without demonstrated need in light of existing rules and practices” (citing Paul R. Rice, The Evidence Project: Proposed Revisions to the Federal Rules of Evidence, 171 F.R.D. 330, 364 (1997))). One result of this extraordinary procedural history is that there are no Advisory Committee Notes for Rules 413-415. See, e.g., CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, 2007 FEDERAL RULES OF EVIDENCE WITH ADVISORY COMMITTEE NOTES AND LEGISLATIVE HISTORY 108 (editor’s note that “there is no Advisory Committee’s Note for [Rules 413-415]”).
of the body of rules whose provenance is so different? At least a few commentators and courts have said yes.  

The Rules Enabling Act can certainly be seen to represent a determination by Congress that those who practice as judges and lawyers are best suited to make the rules of procedure and evidence that apply in those tribunals. It is a frank and complete delegation to the judiciary of the legislative process with respect to such rules, with only a supervisory approval role reserved for Congress itself. Indeed, during the period immediately following its enactment, from 1934 to 1974, Congress was entirely passive with respect to the Rules promulgated pursuant to the Enabling Act, including their drafting, enactment, and occasional amendment. It was not until 1973, when the Supreme Court submitted the proposed Rules of Evidence to Congress, that Congress reasserted its right to act in this arena.

50 Karp, supra note 13. But see Orenstein, supra note 7, at 1557-59 (arguing that “[d]istrust of legislative history in interpretation is particularly apt when considering Rules 413 and 414”).

51 This congressional judgment is very much a product of its time, resting, as one commentator put it, “on the familiar axioms of the Progressive procedural ideology. The trial is a scientific search for the truth, not a political method of resolving disputes. As such it should be firmly under the control of the only unbiased expert in the courtroom—the trial judge.” Scallen, supra note 8, at 848 (citing 21 WRIGHT & GRAHAM, supra note 46, § 5005 at 79 (characterizing the conclusions of the Commonwealth Fund Evidence Committee report of 1927)). But see 1988 Amendment of Rules Enabling Act (adding more legislative input to the rulemaking process); Senate Judiciary Report on 1988 Amendment (setting out the substance-procedure line); Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (codified as amendment to 28 U.S.C. §§ 2072, 2074 (1988)).

52 See Imwinkelried, supra note 33, at 47 (noting that “[f]or forty years, Congress passively acquiesced while the Supreme Court promulgated court rules without any legislative intervention”).

53 BURGER, supra note 40, at III; see also Geyh, supra note 39, at 1169 (noting that judicial exclusivity “ended in 1973, when Congress suspended the proposed Rules of Evidence” and that “[s]ince then, Congress has remained actively involved in procedural rulemaking, frequently amending rules proposed or previously promulgated by the judiciary and thereby heightening appreciably the level of interaction between the first and third branches”).

54 Congress rejected the Court’s submission, passing a statute whose label itself revealed the basis of congressional concern: Act to Promote the Separation of Powers by Suspending Rules of Evidence, Pub. L. No. 93-122, 87 Stat. 9 (1973) (repealed 1988). See also Geyh, supra note 39, at 1187 n.116 (observing “that the substance-procedure distinction was at the forefront of Congress’s mind is reflected in the act suspending the proposed rules” and in the fact that “Congress deferred the effective date of the rules with explicit reference to Justice Douglas’s dissent from the Court’s decision to approve the rules” on the grounds that they were “substantive in nature”); Burbank, supra note 27, at 1019 (noting that, after the rejection of the proposed Rules of Evidence, “two of our most distinguished proceduralists opined that federal rulemaking was ‘in serious trouble’ and ‘in very deep trouble’” (quoting Charles Alan Wright, Book Review, 9 ST. MARY’S L.J. 652 (1978))); Proceedings of a
This episode is itself telling in its foreshadowing of the conflict over Rules 413-415: many observers have noted that congressional disapproval of the draft Rules of Evidence was centered on and exacerbated by the proposed rules regarding privilege, and might not have been as intense had the drafters avoided this minefield of interest politics with its long history of state legislative preeminence. As the Senate Judiciary Committee explained, a number of commentators had “questioned the wisdom of promulgating rules of evidence under the Rules Enabling Act, on the ground that in their view, the codification of the law of privilege should be left to the regular legislative process.” To the degree that the interests at play in the debate about similar acts evidence can be likened to the concerns that surrounded proposed federal privilege rules, the institutional tensions between Congress and the courts are predictable and

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55 See Scallen, supra note 8, at 854 (observing that “[t]iming, they say, is everything,” and that the proposed Rules of Evidence, “contain[ing] proposals for expanded governmental privileges,” were met with congressional hostility in no small part because of the unfolding Watergate scandal, in which President Nixon sought to assert a broad executive privilege).


Others, however, suggest that it was not merely the inclusion of rules of privilege that provoked congressional reassertion of primacy in evidentiary rulemaking but that, instead, “Congress was faithful to the original understanding [of the Rules Enabling Act] in refusing to acquiesce in the proposed Federal Rules of Evidence in 1973.” Burbank, supra note 27, at 1138.

57 S. REP. No. 1277, at 56, reprinted in 1974 U.S.C.C.A.N. at 7053; see also id. (enumerating areas of privilege law, including husband-wife, doctor-patient, secrets of state, and newsman’s [sic] privilege, that were “extremely controversial”). Others were concerned that federal court enacted rules of privilege, to the extent that they trumped state privilege rules, might be unconstitutional or “contrary to the concept of federalism.” WEISSENBERGER & DUANE, supra note 13, at § 501.1 n.2 (citing 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE § 501.01 (Joseph M. McLaughlin ed., 2d ed. 1997)).

Congress eventually resolved these concerns by stripping the privilege provisions out of the proposed rules and substituting in their place a rule of decision that allows state privilege law to control in those cases in which state law supplies the rule of decision of a federal case. See FED. R. EVID. 501, HOUSE COMM. ON THE JUDICIARY, 93d Cong., 1st Sess., REPORT ON ARTICLE V (Comm. Print 1973) (providing that federal common law shall control questions of privilege except “in civil actions and proceedings with respect to an element of a claim or defense as to which State law supplies the rule of decision”).
Correspondingly, to the degree that rules regarding similar acts evidence can be conceptually distinguished from those regarding privilege, the question of institutional competency and corresponding preeminence should be answered quite differently.

A second wave of congressional pushback in the area of rules drafting occurred after the implementation of the Federal Rules of Evidence, and these Congress-enacted rules again focused on matters as to which there was a congressional consensus that they were more substantive than procedural.

Since that time, there has been vigorous advocacy of the notion that the substance-procedure line is illusory; that, as one scholar has explained, it is impossible to assert “that civil process is normatively

See infra Part II.C (discussing rules of privilege and separation of powers). The success with which rules regarding similar acts, such as Rules 413-415, can be analogized to rules of privilege might well determine the underlying validity of the assertion of congressional power. To the degree that the rule regarding similar acts evidence operates as a rule of exclusion of relevant evidence based upon some superseding policy interest unrelated to adjudication, its rationale is legislative in nature, and its effect is correspondingly substantive. Moreover, the treatment of similar acts evidence in cases alleging sexual assault or child sexual abuse differently from the treatment of like evidence in other kinds of cases also smacks of a legislative policy-driven rationale, rather than one sounding in concerns about relevance or prejudice.

See infra Part II.D (discussing similar acts evidence and its rationales). On balance, however, a more persuasive argument can be made that the rule regarding similar acts evidence in sexual assault cases is no more than a reversal of the historic ban on the use of propensity evidence. Viewed as such, it is a usurpation of an appropriately judicial determination of both logical relevance as well as of the balance of relevance against competing institutional concerns regarding confusion and waste of time. Any competing policy interest should be considered illegitimate as a matter of law, and a problematic infringement on the due process rights of litigants.


Indeed, as to the Rules of Evidence themselves, it has been observed that “[i]f the Rules had been adopted by the Supreme Court, they would be open to challenge on whether they exceeded the Enabling Act.” 21 WRIGHT & GRAHAM, supra note 46, § 5006 at 109 n.96. There are instances in which state evidence law has been held to be sufficiently substantive as to require its application in federal cases in which the court exercises diversity jurisdiction. Scallen, supra note 8, at 870 (citing, inter alia, Hottle v. Beech Aircraft Corp., 47 F.3d 106 (4th Cir. 1995) (excluding defendant’s internal manuals under state law where federal law would permit them)); Carota v. Johns Manville Corp., 893 F.2d 448 (1st Cir. 1990) (admitting evidence of settlement where permitted by Massachusetts rule and barred by federal rule)).
independent of substance, an idea that justified court rulemaking at its inception and sustained it through much of [the twentieth] century. Still others contend that the Rules Enabling Act does not so much delegate additional legislative power to the judiciary as it does codify those rulemaking powers that the Constitution itself contemplated would be exercised by the courts under Article III. Nevertheless, Congress has asserted that the power to promulgate rules of procedure is exclusively legislative, even as that assertion has been dismissed as “nonsense.”


62 Burbank, supra note 27, at 1119 (noting that the 1926 Senate Report on the precursor bill to the Rules Enabling Act “indicated that the ambit of rulemaking power conferred was coextensive with the power the Court would have in the absence of enabling legislation” (citing S. Rep. No. 1174 (1926) (approving state statutes authorizing state courts to promulgate rules of “practice and procedure” and noting that those state courts “have never assumed to make rules relating to limitations of actions, attachment or arrest, juries or jurors or evidence” and that “in using the words ‘practice or procedure’ Congress only intended to confer the power to make such rules of practice and procedure as the court itself could make without enabling legislation” (emphasis added))); see also Mullenix, supra note 19, at 1287 (arguing that the 1990 Civil Justice Reform Act, which created alternative mechanisms for promulgating rules of court procedure, “revokes the Rules Enabling Act sub silentio and authorizes unconstitutional rulemaking” and violates the separation-of-powers doctrine by substantially impairing the federal courts’ inherent Article III power to control their internal process and the conduct of civil litigation,” and arguing that “Congress is wrong in declaring—as it does in the legislative history to the Act—that it has exclusive federal rulemaking power”). But see Mistretta, 488 U.S. at 425 (Scalia, J., dissenting) (noting with concern that Congress cannot properly delegate rulemaking authority it does not constitutionally possess and that, by similarly improper reasoning, “[i]f an ‘independent agency’ such as [the U.S. Sentencing Commission at issue] can be given the power to fix sentences previously exercised by district courts, I must assume that a similar agency can be given the powers to adopt rules of procedure and rules of evidence previously exercised by this Court. The bases for distinction would be thin indeed”); Stephen B. Burbank, Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions About Power, 11 Hofstra L. Rev. 997, 1005 (1983) (criticizing the proposition that courts have inherent power to promulgate rules of procedure and noting that such inherent powers should be exercised with restraint because they are shielded from direct democratic control); Mullenix, supra note 19, at 1319 (“One will have difficulty grounding a separation-of-powers argument against the Civil Justice Reform Act on an explicit assignment of judicial power in Article III. Article III does not speak to the federal courts’ rulemaking authority, and the cases dealing with congressional delegations of power and modification of federal court jurisdiction are largely unavailing in resolving the issue of the Act’s legitimacy.”).

A. LEGISLATIVE HISTORY AS EVIDENCE OF INTERBRANCH CONFLICT

A brief overview of the process of rule enactment and amendment set out in the Rules Enabling Act is warranted here in order to highlight the very different provenance of the special rules regarding similar acts in sexual assault cases. Not only did Congress not delegate the drafting of such rules to the Supreme Court's Judicial Conference and its constituent committees, but Congress actually drafted these rules on its own and then enacted them in the teeth of explicit opposition from that body to Congress's *fait accompli.* It would be hard to imagine a more complete repudiation of the Rules Enabling Act's design for delegation of rulemaking authority. Accordingly, it is somewhat surprising that courts confronted by these special rules regarding similar acts in sexual assault cases, and mindful of their unique legislative history, have not chafed under their implementation in the trials they oversee.

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64 Mullenix, *supra* note 19, at 1326 (“[T]he Senate Judiciary subcommittee's claim in the legislative history to the Civil Justice Reform Act that Congress has exclusive rulemaking power is nonsense. This assertion blatantly ignores the British historical antecedents to American procedural reform, the federalists' concern with ensuring institutionally the existence of an independent judiciary, and over two hundred years of practical experience with judicial rulemaking. Our constitutional history demonstrates that from the earliest days of the republic, while Congress has exercised consistently its legislative authority under Article III to constitute the inferior federal courts, and to confer on them procedural rulemaking authority, it has not engaged in procedural rulemaking itself and can hardly lay claim to an exclusive constitutional claim to do so.”).

65 *See Report of the Judicial Conference, supra* note 13; *see also* Major Bruce D. Landrum, *Military Rule of Evidence 404(b): Toothless Giant of the Evidence World,* 150 Mil. L. Rev. 271, 352 (1995) (observing that “[a]t about the same time, the American Bar Association House of Delegates adopted a resolution opposing the new rules of evidence” (citing Myrna S. Raeder, *American Bar Association Criminal Justice Section Report to the House of Delegates,* 22 Fordham Urb. L.J. 343 (1995))). Major Landrum explains that [t]he Judicial Conference submitted its report, exactly 150 days after enactment, on February 9, 1995. Recommending that Congress reconsider its decision to change the rules at all, the report also provided alternative amendments to Rules 404 and 405, designed to achieve congressional intent without the "drafting ambiguities" and "possible constitutional infirmities" noted in the new rules. *Id.* at 311.

66 One commentator has described the pedigree of these rules as “remarkable,” observing that “Congress suspended the effective date of the rules it enacted for 150 days in order to permit Judicial Conference review, thereby effectively turning the Rules Enabling Act (which calls for a seven-month suspension of Supreme Court-approved rules, pending congressional review) on its head.” Geyh, *supra* note 39, at 1190 n.128; *see also* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320935(a), 108 Stat. 2135 (establishing *nisi* period for rules to take effect).

67 *See infra* Part V (considering cases).
1. The Rules Enabling Act Process

The delegation of power to the Supreme Court in the Rules Enabling Act is clear and complete: it provides that "[t]he Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals." Ordinarily, under the process designed by the Act, the Judicial Conference authorizes the appointment of a standing committee on rules of evidence which reviews recommendations regarding those proposals and makes recommendations to the Judicial Conference. The Act further provides that the Supreme Court:

shall transmit to the Congress not later than May 1 of the year in which a rule prescribed under section 2072 is to become effective a copy of the proposed rule. Such rule shall take effect no earlier than December 1 of the year in which such rule is so transmitted unless otherwise provided by law.

That is, rules promulgated under this process need only be transmitted to Congress to become effective; Congress's role is a passive one.

Since the enactment of the Rules Enabling Act, hundreds of rules and amendments to rules have taken effect through precisely this process, with the judiciary taking the active role and Congress passively acquiescing. Such a history would be likely to, and in fact did, create a political culture of entitlement on the part of the judiciary that prefigured its response to Congress's assertion of greater autonomy in the area of rulemaking.

2. The Legislative History of Rules 413-415

Rules 413-415 were enacted as part of a larger anti-crime initiative, the Violent Crime Control and Law Enforcement Act of 1994. Prior versions of the amendments appeared as early as 1991, in the Women's Equal Opportunity Act bill, and later, in the 102nd and 103rd Congresses, in the

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69 28 U.S.C. § 2073(b). Subsection (d) of that provision requires that the standing committee "provide a proposed rule, an explanatory note on the rule, and a written report explaining the body's action, including any minority or other separate views." 28 U.S.C. § 2073(d).
70 28 U.S.C. § 2074(a) (emphasis added).
71 Id. The sole exception to this automaticity pertains to rules of privilege, for which the Act requires an affirmative approval by Congress. 28 U.S.C. § 2074(b) ("Any such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress."). Such an affirmation by Congress underscores the unique status of rules of privilege in the substance-procedure debate that has pervaded the history of the Act. See infra Part II.C.
Sexual Assault Prevention Act bills, all sponsored by Representative Susan Molinari and Senator Robert Dole. The Violent Crime Control and Law Enforcement Act was adopted on September 13, 1994, and became effective on July 9, 1995, 150 days after the Judicial Conference of the United States fulfilled its obligation under the congressional directive to “transmit to Congress a report containing recommendations for amending the Federal Rules of Evidence as they affect the admission of evidence of a defendant’s prior sexual assault or child molestation crimes in cases involving sexual assault and child molestation.” The Act explicitly provided that “[t]he Rules Enabling Act shall not apply to the recommendations made by the Judicial Conference” in the report it was ordered to prepare. Instead, although the Act contemplated and even compelled a report from the Judicial Conference, it also anticipated that, in the event that the recommendations contained in the report “[were] different than the amendments” made under the Act, the language of the Act “shall become effective 150 days after the transmittal of the recommendations unless otherwise provided by law.” That is, Congress provided itself with a 150-day *nisi* period in which to respond to judicial input, but with a default of automatic enactment in 150 days. This statutory posture was hardly calculated to demonstrate to the Judicial Conference how eagerly its recommendations were anticipated by Congress, and stands in marked contrast to the procedures contemplated by the Rules Enabling Act itself.

The Judicial Conference Report that resulted from this Act indicated that, although its review was compressed into the 150-day period allotted by Congress, it was nevertheless “thorough.” The Report recited its mandate from Congress to prepare a secondary report, diplomatically characterizing it as an “invitation,” while also observing that, by that Act, “[c]onsideration of Rules 413-415 by the Judicial Conference was specifically excepted from the exacting review procedures set forth in the Rules Enabling Act.” Before making its substantive recommendations,
the Judicial Conference explained that the amendments had been reviewed by the Advisory Committees on Criminal, Civil, and Evidence Rules and, later, by the Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee), and that "[t]he overwhelming majority of judges, lawyers, law professors, and legal organizations who responded opposed" the new rules. 80 Similarly, the Advisory Committees on Criminal, Civil, and Evidence Rules were "unanimous except for a dissenting vote by the representative of the Department of Justice." 81

Turning to the merits of the proposed amendments, the Report recommended that the new rules not be enacted but that, instead, "Congress reconsider its policy determinations" underlying the proposed rules. 82 The Judicial Conference concluded that the concerns "expressed by Congress and embodied in new Evidence Rules 413, 414, and 415 are already adequately addressed in the existing Federal Rules of Evidence," in particular Rule 404(b). 83 The Report explained that Rule 404(b) appropriately allowed the use of prior acts for a long list of non-propensity uses, but that a different rule allowing broader use of prior acts posed a significant "danger of convicting a criminal defendant for past, as opposed to charged, behavior or for being a bad person." 84 The Report observed that the new rules also posed the threat of "mini-trials within trials concerning those acts" that were not the subject of a conviction, and that the rules were inconsistent with "protections [against the use of such evidence that] form a fundamental part of American jurisprudence and have evolved under long-standing rules and case law." 85

Notwithstanding the "highly unusual unanimity" and breadth of these objections, the Report nevertheless recognized the political reality that "Congress [might] not reconsider its decision on the policy question." 86 In that apparently likely event, the Judicial Conference proposed an alternative form for the new rules, by which they would fit within existing exceptions to the use of character evidence, such as those rules allowing proof of character of the defendant and character of the victim. 87 In the Note

80 Id.
81 Id. at 849-50.
82 Id. at 851.
83 Id. at 850.
84 Id. The Report observed that the new rules were "not supported by any empirical evidence," and that they "could diminish significantly the protections that have safeguarded persons accused in criminal cases and parties in civil cases against undue prejudice." Id.
85 Id.
86 Id.
87 Id. at 851. The Report recommended that the new rules appear as subsection (4) to existing Rule 404(a). Rather than announcing a general rule of admissibility "on any matter to which [they are] relevant," the Report recommended that the new rule should require that
accompanying these alternative changes, the Judicial Conference suggested that “[t]hese modifications do not change the substance of the congressional enactment,” but that the changes were instead designed:

   to integrate the provisions both substantively and stylistically with the existing Rules of Evidence; to illuminate the intent expressed by the principal drafters of the measure; to clarify drafting ambiguities that might necessitate considerable judicial attention if they remained unresolved; and to eliminate possible constitutional infirmities.88

This tactful language did not persuade Congress, and the proposed rules were enacted in their original form.89

B. RULES OF EVIDENCE IN GENERAL

A plausible argument can be made that the determination of what evidence ought properly to be heard in adjudicatory proceedings is best made by those charged with the general supervision of trials, namely judges.90 Indeed, there is a compelling argument that federal courts enjoy the power to make such rules even in the absence of congressional

prior act evidence be “otherwise admissible under these rules” and should “expressly enumerate” the factors to be weighed in determining the “probative value” of a prior act of sexual assault or sexual molestation:

   (i) proximity in time to the charged or predicate misconduct;
   
   (ii) similarity to;
   
   (iii) frequency of the other acts;
   
   (iv) surrounding circumstances;
   
   (v) relevant intervening events; and
   
   (vi) other relevant similarities or differences.

FED. R. EVID. 413. This language made plain that the determination of admissibility in the revised formulation offered by the judiciary was to be made by trial courts pursuant to Rule 403’s standard of weighing probative value against the risk of unfair prejudice and other values.

88 REPORT OF THE JUDICIAL CONFERENCE, supra note 13, at 852. The language regarding “constitutional infirmities” apparently referred to the expressed concern that, if the proposed rules were read as mandatory, unconstrained by either the hearsay rules or rule 403, “serious constitutional questions would arise.” Id. at 852-53.


90 See Geyh, supra, note 39, at 1169 (noting that the Rules Enabling Act manifested a belief that procedural rulemaking was “an essentially technical undertaking best left in the expert hands of judges”); see also Bone, supra note 61, at 888 (observing that “[t]he ideal of nationally uniform procedural rules promulgated by the Supreme Court after consideration by expert committees—commonly known as ‘court rulemaking’—has been the cornerstone of civil rulemaking in the federal courts since adoption of the Rules Enabling Act in 1934”).
delegation of that power. In part, this is due to the procedural dimension of such rules, which distinguishes them from typical legislative concerns and recognizes judges' role as experts. In addition, as a practical matter, because of their somewhat arcane nature, it had historically been difficult, notwithstanding their urgency from a judicial perspective, to attract sustained legislative attention to the procedural concerns of courts.

This generalization masks a more nuanced recognition of the many different agendas to which rules of evidence are directed. Rules of evidence cover topics as wide as logical relevance, the balance of probative and prejudicial values, the exclusion of relevant evidence for

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91 See Burbank, supra note 27, at 1088-89 (quoting S. REP. NO. 1174 (1926) (concluding that "Congress only intended to confer the power to make such rules of practice and procedure as the court itself could make without enabling legislation . . .").

92 Some have suggested that this recognition of judicial expertise in the realm of procedural rules and the corresponding retreat of Congress from the area had its genesis with Dean Roscoe Pound's speech to the American Bar Association in 1906, entitled "The Causes of Popular Dissatisfaction with the Administration of Justice":

The difficulty of procuring legislative action with reference to even the most crying needs of judicial procedure is notorious. Legislatures today are so busy . . . that it is idle to expect [them] to take a real interest in anything so remote from newspaper interest, so technical, and so recondite as legal procedure . . . . When a judicial council or a committee of a bar association comes to a court with a project for rules of procedure, they will not have to call in experts to tell the judges what the project is about . . . . When rules of procedure are made by judges, they will grow out of experience, not the ax-grinding desires of particular lawmakers.

Quoted in Geyh, supra note 39, at 1186 & n.101; see also Bone, supra note 61, at 888 (questioning whether the court rulemaking process enjoys contemporary democratic legitimacy, and noting that "[u]nder the pressure of these changing views, court rulemaking has moved toward a legislative model and away from the traditional model based on reasoned deliberation and expertise"); Nicholas Quinn Rosenkrantz, Federal Rules of Statutory Interpretation, 115 Harv. L. Rev. 2085, 2089 (2002) (noting that "the federal rulemaking process . . . combines the expertise of the courts with the democratic legitimacy of Congress").

93 See Jack Friedenthal, The Rulemaking Power of the Supreme Court: A Contemporary Crisis, 27 Stan. L. Rev. 673, 675 (1975) (noting congressional indifference to rulemaking proposals); Mullenix, supra note 19, at 799 (noting "widespread ennui regarding judicial rulemaking"); see also Geyh, supra note 39, at 1186.

Other commentators do not see the issue as one of congressional disinterest:

[A]s the discussions of Rule 704(b) [the Hinckley Amendment] and Rules 413-415 demonstrate, the problem is not Congress's lack of interest in rulemaking. Congress clearly has an interest in the evidence rules when it serves a political constituency. Indeed, the essential problem with Congressional involvement in rulemaking is that the judicial branch does not appear to have the influence it ought to have with Congress on the subject of federal rules of practice and procedure.

Scallen, supra note 8, at 864.

94 Fed. R. Evid. 401, 402.

95 Fed. R. Evid. 403.
reasons unrelated to probativeness, the assessment of the credibility of witnesses, the admissibility of lay and expert testimony, the authentication of evidence, and rules of privilege. It would be difficult indeed to assign identical rationales of institutional competence to courts or legislatures with respect to so broad an array of rules. A more cogent understanding of the primacy of court or legislature must, accordingly, turn on the particular thrust of the rule at issue.

Moreover, it has been widely recognized that, unlike their true statutory cousins, the rules of evidence generally operate as broad statements of guidance of judicial discretion. Although this has created difficulties with respect to the interpretation of the rules, it underscores the preeminent role of courts in the determination of questions of admissibility. In order to be effective, consistent, and just, trial courts must be permitted to exercise their discretion in a manner that is attuned to the factual exigencies of individual cases.

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96 See, e.g., FED. R. EVID. 407 (subsequent remedial measures); see also infra text accompanying note 115.
97 FED. R. EVID. art. VI.
98 FED. R. EVID. art VII.
99 FED. R. EVID. art. V.
100 Jonakait, supra note 6, at 551 (observing that “evidence law gives wide discretion to trial courts, with the result that the Rules of Evidence are more a draft of general principles than a code like other statutes” (citing Imwinkelried, supra note 5, at 289 (“It is imperative that any body of Evidence law accord the trial judge a significant measure of discretion in applying the Rules. No matter how hard they try, the drafters of any evidence code can never anticipate all the variations of the record that a trial judge will encounter.”))); David P. Leonard, Power and Responsibility in Evidence Law, 63 S. CAL. L. REV. 937, 956-57 (1990) (“[R]ulemakers have recognized the unique position of the trial judge, who observes the context in which particular evidentiary issues arise and who is therefore in the best position to weigh the potential benefits and harms accompanying the admission of particular evidence.”); Thomas M. Mengler, The Theory of Discretion in the Federal Rules of Evidence, 74 IOWA L. REV. 413, 457 (1989) (“[T]he Federal Rules of Evidence are intended to provide some guidance to trial courts and litigants, but cannot be consulted for the definitive answers to many questions.”); cf. Victor J. Gold, Do the Federal Rules of Evidence Matter?, 25 LOY. L.A. L. REV. 909, 919 (1992) (“[C]ourts have recognized discretion where it does not exist or expand discretion beyond the scope granted . . . .”).
101 Weissenerberger, supra note 47, at 1307 (“[T]he judicial branch designed the Federal Rules of Evidence to operate as guidance for the exercise of discretion within the federal judiciary, and consequently, the Rules’ intended function is very much unlike that of most statutes.”).
102 See Scallen, supra note 8, at 875 (noting that “Congress needs to let trial judges do their jobs without undue interference” and that “the drafters of the Evidence Rules built a substantial amount of discretion into those rules in order to ‘empower,’ in the cliché of today’s world, trial judges to deal with new or unforeseen or case-specific problems they encounter” (citing Henry M. Hart & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 179 (1958) (“Discretion is a vehicle of
Preliminarily, pure questions of relevance are subject to rational analysis\textsuperscript{103} and, in fact, the general authority to admit evidence that is relevant assigns to the trial judge the determination of that logical problem.\textsuperscript{104} In addition, Rule 403 stands as a general rule of exclusion of evidence, even if relevant, where that evidence poses a "danger of unfair prejudice" or imposes other administrative burdens such as confusion, waste of time, or needless presentation of cumulative evidence.\textsuperscript{105} None of these determinations invites legislative input, since neither preliminary relevance nor the balancing of probative value against unfair prejudice or other administrative concerns are inquiries that touch upon interests outside the adjudicatory process itself.

C. RULES OF PRIVILEGE

Rules of privilege are unique among rules of evidence in their capacity to exclude relevant information from the consideration of the trier of fact for reasons unrelated to probativeness, and rooted instead in interests that might be said to be best weighed by legislatures. For this reason, it was rules of privilege that provoked the congressional rebellion against the forty-year autonomy of the courts to promulgate rules of procedure.\textsuperscript{106} Notwithstanding one's view as to the procedural nature of other rules of

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\textsuperscript{103} See generally David Crump, On the Uses of Irrelevant Evidence, 34 HOUSTON L. REV. 1, 3-4 (1997) (observing that the "Federal Rules of Evidence are liberal in admitting evidence with low probative value," that the definition of relevance under the Rules "is impossibly broad if taken literally," but that this "low level of vigilance about minimal probative value can be justified if the concern rarely arises in practice").

\textsuperscript{104} Federal Rule of Evidence 401 allows that "[a]ll relevant evidence is admissible, except as provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible." This threshold determination of admissibility is, according to the Rules, controlled by the court. FED. R. EVID. 104(a) (stating that "[p]reliminary questions concerning . . . the admissibility of evidence shall be determined by the court . . .").

\textsuperscript{105} FED. R. EVID. 403; Old Chief v. United States, 519 U.S. 172, 188 (1997). Importantly, only where probative value is "substantially outweighed" by these enumerated concerns does the trial court have the authority to exclude relevant evidence. FED. R. EVID. 403; see also Scallen, supra note 8, at 880-81 (contending that there should be no special balancing rule or presumption of admissibility for similar acts evidence offered under Rules 413-415, since Rule 403 "is already 'tilted' in favor of admissibility" by its use of the word "substantially," contrasting the special balancing tests contained in Rule 609 regarding impeachment by conviction).

evidence, one might well reach a different conclusion about rules of privilege.

Commentators have disagreed about which branch is best suited to promulgate rules of privilege. While there is some concern that legislatures acting in this area will confer privileges on those with greatest access to legislative power, who have the political influence to obtain extraordinary treatment, there is also a concern that courts will discount the importance of protecting confidential relationships in their quest for all relevant evidence. As one scholar explained the legislative preeminence position:

[T]he legislature has the comparative advantage because formulating privilege law involves a balancing of public policies which should be left to the legislature. A compelling reason is that while courts... find it easy to perceive value in public policies such as those favoring the admission of all relevant and reliable evidence which directly assist the judicial function of ascertaining the truth, it is not their primary function to promote policies aimed at broader social goals more distantly related to the judiciary. This is primarily the responsibility of the legislature.

Not surprisingly, those jurists charged with drafting rules of evidence, the Advisory Committee, viewed privileges as “hindrances” which should be curtailed and accordingly believed that any “privileges contained in the rules of evidence [ought to] be narrow.”

In the end, Congress resolved the tension surrounding the federal-state conflict regarding rules of privilege by enacting Rule 501, which operates

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107 See, e.g., 8 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE § 2286 (McNaughton revision 1961), at 532-36 (expressing this concern about how privileges are conferred). One law professor testifying at the House Subcommittee on the draft rules of evidence explicated Wigmore’s position that “many statutory privileges are the product of effective lobbying by special interest groups which simply want the prestige of a privilege.” Imwinkelried, supra note 33, at 46 (citing Rules of Evidence: Hearings Before the Spec. Subcomm. on Reform of Fed. Crim. Laws of the Comm. on the Judiciary, 93d Cong. 74, 555-56 (1973) (statement of Edward W. Cleary)); see also Scallen, supra note 8, at 867-68 (noting that one former member of the Evidence Rules Advisory Committee “expressed a well-founded concern about opening the door to Congress to codify privilege law... suggesting that members of Congress are likely to stuff the Evidence Rules with privileges favored by all sorts of special interest groups”).

108 See, e.g., CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE 75, 282 (John Strong ed., 4th ed. 1992) (“It may be argued that legitimate claims to confidentiality are more equitably received by a branch of government not preeminently concerned with the factual results obtained in litigation and that the legislatures provide an appropriate forum for the balancing of the competing social values necessary to sound decisions concerning privilege.”).

109 Schneyer, supra note 44, at 454-55 (citing People v. Sanders, 457 N.E.2d 1241, 1245 (Ill. 1983)).

110 23 WRIGHT & GRAHAM, supra note 46, § 5422 at 685 (quoting 2 JACK WEINSTEIN & MARGARET BERGER, WEINSTEIN’S EVIDENCE 501-12 (1975), cited in Imwinkelried, supra note 33, at 46 & n.47).
as a rule of decision, rather than attempting to codify rules of privilege within the Rules of Evidence.\textsuperscript{111} However, the legislative-judicial conflict with respect to such rules was unambiguously resolved in favor of the courts, to whom Congress delegated the power to create, eliminate, and modify privileges through their common law decisions "in the light of reason and experience."\textsuperscript{112} If a second delegation were necessary, in addition to that contained in the Rules Enabling Act, this would seem to be it.

\section*{D. SPECIALIZED RULES OF EXCLUSION}

Much of what can be said about judicial competence to determine rules of admissibility in adjudication\textsuperscript{113} loses its force when the rules at issue are rules of exclusion of relevant evidence. In this respect, such rules are much closer to rules of privilege in that they represent a policy interest, unrelated to adjudication, that a democratically constituted legislature has found to trump the adjudicatory interest in having all relevant evidence available to the finder of fact.\textsuperscript{114} So, for example, the rule regarding subsequent

\textsuperscript{111} Rule 501 provides that:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

\textsuperscript{112} Id.

\textsuperscript{113} See supra text accompanying notes 101-06.

\textsuperscript{114} The debate about which branch is best suited to frame rules of privilege has been particularly vigorous. See, e.g., Schneyer, supra note 44, at 454 (observing that "[a] substantial body of scholarship and case law has addressed whether the judiciary or the legislature is the better policymaking branch to decide whether to create evidentiary privileges and how broad they should be" (citing MCCORMICK, supra note 108, at 282 ("It may be argued that legitimate claims to confidentiality are more equitably received by a branch of government not preeminently concerned with the factual results obtained in litigation and that the legislatures provide an appropriate forum for the balancing of the competing social values necessary to sound decisions concerning privilege."))); 8 WIGMORE, supra note 107, § 2286 at 532-36 (suggesting that legislatures too often confer privileges on powerful occupational groups seeking to protect their particular interests)). As Professor Schneyer explains:

There is a sharp disagreement, largely because participants in the debate tend to emphasize one side of the privilege equation and disregard the other. Those who argue that the judiciary is the better policy maker are preoccupied with the cost side—the loss of evidence that privileges cause in legal proceedings. In Professor Edmund Morgan's view, for example, privilege law should be set by the judiciary because privileges are nothing more or less than privileges to suppress the truth, and no officers of any department of government, other than the judiciary, have the
remedial measures is designed to incentivise repair of dangerous conditions at the expense of potentially relevant information on the issue of fault or negligence.  Similarly, the rule regarding offers in compromise is designed to incentivize settlement negotiations and comes at the cost of potentially relevant evidence on the issues of fault or damages.

That these decisions are driven by a frank weighing of competing policy interests suggests legislative, rather than judicial, preeminence. Indeed, a contrary balance would raise concerns about democratic legitimacy, given the very limited opportunity for input in the judicial rulemaking process.

This analysis only explains the phenomenon of legislative preeminence with respect to rules of exclusion; Rules 413-415 operate as exceptions to a rule of exclusion, but do not themselves compel admission

constant opportunity to observe them in operation and the skill to determine how far and in what respects they interfere with the orderly and effective administration of justice. For others, however, the salient point about privileges is their capacity to foster valuable social relationships, e.g., doctor-patient relationships, that thrive on confidentiality. According to the Illinois Supreme Court, for example, the legislature has the comparative advantage because formulating privilege law involves a balancing of public policies which should be left to the legislature. A compelling reason is that while courts . . . find it easy to perceive value in public policies such as those favoring the admission of all relevant and reliable evidence which directly assist the judicial function of ascertaining the truth, it is not their primary function to promote policies aimed at broader social goals more distantly related to the judiciary.

Id. at 454-55.

See Fed. R. Evid. 407 (excluding evidence of "measures that, if taken previously [to a harm or injury] would have made the injury or harm less likely to occur . . . [if offered] to prove negligence, culpable conduct, a defect in a product's design, or a need for a warning or instruction"); see also Fed. R. Evid. 407 advisory comm. note (observing that "[The rule rests on two grounds. (1) The conduct is not in fact an admission, since the conduct is equally consistent with injury by mere accident or through contributory negligence. . . . (2) The other, and more impressive, ground for exclusion rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety" (citing Judson F. Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutgers L. Rev. 574, 590 (1956))); see, e.g., Thais L. Richardson, Comment, The Proposed Amendment to Federal Rule of Evidence 407: A Subsequent Remedial Measure That Does Not Fix the Problem, 45 Am. U. L. Rev. 1453, 1454 (1996) (observing that Rule 407 "departs from the liberal policy of admissibility embodied in the Federal Rules of Evidence by advancing the social policy of encouraging people to take steps in furtherance of added safety by freeing them from the fear that such steps will be used against them in a future lawsuit").

Fed. R. Evid. 408 (excluding "[e]vidence of (1) furnishing or offering or promising to furnish or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to validity or amount [if offered] to prove liability for or invalidity of the claim or its amount"); see also Fed.R. Evid. 408 advisory comm. note (observing that, like Rule 407, the rule rests on two grounds, one of relevance, and the other and "more consistently impressive ground[, promotion of the public policy favoring the compromise and settlement of disputes").

Bone, supra note 61, at 889 (noting the argument of critics of judicially drafted rules that "rulemaking is 'political' and therefore legitimate in a democracy only with broad public participation and accountability").
of any particular evidence, and indeed cannot do so without falling afoul of constitutional due process concerns. Instead, the rules regarding similar acts in sexual assault cases ought to be viewed as restoring this class of similar acts evidence to the status quo ante regime of Rules 401 and 403, requiring that evidence be relevant and that its probative value not be outweighed by the risk of unfair prejudice, confusion, or waste of time.

The question, then, is not whether Congress can place certain categories of evidence beyond the scope of a rule of exclusion, but instead whether it can direct the courts to reduce the level of judicial scrutiny under these two core rules.

E. RULES 404, 413, 414, AND 415: A SPECIAL CASE

A harder question is how to view the rule of exclusion embodied in Rule 404 and later trumped by Congress in Rules 413-415. The prohibition against the use of propensity evidence in Rule 404 may be viewed in a number of different ways, only some of which track the rationale and effect of other miscellaneous rules of exclusion contained in Article IV of the Rules. While, as a matter of structure, Rule 404 tracks those other rules of exclusion, prohibiting the use of similar acts evidence if offered for a certain purpose and then enumerating other, permissible uses of that same evidence, it need not be viewed as rooted in the kinds of conduct incentives that, for example, rules relating to subsequent remedial measures or offers in compromise represent. Instead, the rationale behind the long-standing rule excluding similar acts evidence has usually been described as manifesting a specific instance of the concerns broadly embraced by Rule 403.

As Justice Jackson famously explained in *Michelson v. United States*:

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118 See United States v. Enjady, 134 F.3d 1427, 1433 (10th Cir. 1998) (noting that "without the safeguards embodied in Rule 403 we would hold [Rule 413] unconstitutional").

119 FED. R. EVID. 401, 403.

120 That rule provides that "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion," and then lists certain exceptions. FED. R. EVID. 404(a). The prohibition is expanded and repeated later in the rule: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may however be admissible for other purposes . . ." FED. R. EVID. 404(b).

121 Additionally, rules of exclusion, such as those regarding subsequent remedial measures or offers in compromise, do not prove what a jury might assume they prove, and hence they too are instances of categorical weighing of probative value against unfair prejudice, confusion, and waste of time. However, that these rules function as incentives to conduct unrelated to the adjudicatory process places them peculiarly within the sphere of legislative preeminence.
The state may not show the defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice. For example, one rationale for the propensity ban has been the recognition that similar acts evidence is, logically, so minimally relevant that its probative value is, as a matter of law, unlikely to outweigh its prejudicial effect if presented to jurors. Such a rationale sounds within Rule 403’s balancing frame, rather than being categorical in the way of other specific rules of exclusion, and therefore seems an improbable fit within the legislative, interest-balancing sphere.

A different rationale for the propensity ban, that it invites the finder of fact to punish the offender for conduct unrelated to the crime charged, raises due process concerns that are also best left to the protection of the courts rather than the legislature. Each such situation is factually unique, and the process of weighing the relative value of evidence of a particular prior bad act against its potential to tempt a jury to punish for the act rather than the crime charged can hardly be done prospectively by a legislature.

Yet another rationale is rooted in the administrative concerns that Rule 403 polices: there is a risk, with similar acts evidence, of a confusing mini-

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122 335 U.S. 469, 475-76 (1948) (footnotes omitted), cited in Old Chief v. United States, 519 U.S. 172, 181 (decided after the enactment of Rules 413-415); see also Spencer v. Texas, 385 U.S. 554, 560-61 ("The rules concerning evidence of prior offenses are complex, and vary from jurisdiction to jurisdiction, but they can be summarized broadly. Because such evidence is generally recognized to have potential for prejudice, it is usually excluded except when it is particularly probative in showing such things as intent; an element in the crime; identity; motive; a system of criminal activity; or when the defendant has raised the issue of his character, or when the defendant has testified and the State seeks to impeach his credibility.") (citations omitted).

123 See, e.g., Susan Estrich, Teaching Rape Law, 102 Yale L.J. 509, 519 (1992) (observing that "[t]he danger with such evidence is not that it proves so little, but that it may prove too much").

124 See Orenstein, supra note 7, at 1550 (observing that "[w]hen federal appellate judges give district court judges abstract instructions about how prior sexual offense balancing tests should come out, they are sending those judges the wrong message," since they should instead be told to "engage in a specific balance, considering various factors that might mitigate against the probative value or exacerbate the unfair prejudice"); see also People v. Frazier, 107 Cal. Rptr. 2d 100, 109 (Cal. Ct. App. 2001) (noting that "a jury might punish the defendant for his uncharged crimes regardless of whether it considered him guilty of the charged offense especially where... the uncharged offenses... were much more serious than the charged offense").
trial in which the jury will be asked to resolve questions about the factual sufficiency of the similar act allegation in order to make use of such evidence for the permissible purposes enumerated by Rule 404(b). Again, an assessment of the administrative burden of these mini-trials seems essentially judicial, not legislative. The judgment cannot be made categorically, but instead depends upon the totality of the circumstances of a particular case. If this is the basis of the rule regarding similar acts, then it seems as a prudential matter to lie outside the institutional competency of a legislature.

Only in those instances in which propensity evidence is offered for some non-propensity purpose, such as (but not limited to) those purposes listed in Rule 404(b), may the court exercise its discretion under 403 to weigh the non-propensity use against other competing concerns about prejudice and confusion or waste of time. Rules 413-415 do not purport to create an additional non-propensity use of similar acts evidence in sexual assault cases, but instead reiterate the baseline evidentiary rule of 402 that

125 See, e.g., Roger C. Park, Symposium: Character at the Crossroads, 49 HASTINGS L.J. 717, 746-47 (1998) (noting that “given limited resources, there is good reason to hesitate before opening the door to expensive, adversarially-generated evidence of dubious probative value”); see also Huddleston v. United States, 485 U.S. 681, 689 n.6 (1988) (holding that the jury may not consider similar acts evidence as bearing on the crime charged unless it finds to a preponderance that the defendant did in fact engage in the conduct that is the subject of that evidence). The difference in the burden of proof that obtains in determining the sufficiency of the evidence of a similar act (preponderance) and the sufficiency of the evidence of the crime charged (proof beyond a reasonable doubt) poses an additional risk of juror confusion, and burdens the court with the need for additional jury instructions. But see Orenstein, supra note 7, at 1544-49 (suggesting that the Huddleston standard of proof to a preponderance for similar crimes evidence ought not to apply to evidence offered pursuant to 413-415, but that the higher standard of proof—clear and convincing—more accurately ensures appropriate use of such evidence). Any threshold other than proof beyond a reasonable doubt invites the risk of confusion to which judicial discretion under Rule 403 is directed.

126 See, e.g., United States v. Guardia, 135 F.3d 1326, 1332 (10th Cir. 1998) (affirming trial court’s exclusion of similar acts evidence under Fed. R. Evid. 413 where “jury will be required to evaluate expert testimony regarding the medical propriety of each examination to determine whether [defendant gynecologist] acted within the scope of his patients’ consent”).

127 FED. R. EVID. 404(b); see, e.g., Huddleston, 485 U.S. at 681 (discussing admissibility of similar acts evidence and noting that the Rules Advisory Committee “indicated that the trial court should assess such evidence under the usual rules for admissibility: ‘the determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403’”’) (quoting Advisory Committee’s Notes on FED. R. EVID. 404(b), 18 U.S.C. App., at 691)); see also id. at 688 (stating “it is anticipated that with respect to permissible uses for such evidence, the trial judge may exclude it only on the basis of those considerations set forth in Rule 403, i.e., prejudice, confusion, or waste of time” (quoting S. REP. NO. 93-1277, at 25 (1974))).
“all relevant evidence is admissible,”128 including propensity evidence, if it is propensity for sexual assault or child molestation.129

For all these reasons, it seems plain that similar acts evidence is better conceived as presenting an array of problems that are best addressed by a flexible balancing rule such as Rule 403, and that they do not fit the model of specific rules of exclusion that might appropriately be the subject of a categorical legislative policy choice. Accordingly, the susceptibility of any subset of similar acts evidence to a categorical rule of admissibility seems highly doubtful.

Indeed, in order to conceive of the similar acts rules as within the special competency of Congress, like other specialized rules of exclusion, one would have to make an extraordinary contortion of reasoning. Other rules in Article IV require the exclusion of otherwise relevant evidence, because the cost of admitting it would be borne in areas unrelated to the adjudication but that are the appropriate subject of legislative concern.130 The similar acts rules set out in 413 and 414 purport to compel admission of evidence; the impact of erroneous admission is felt entirely within the adjudicatory process with no corresponding extra-judicial interest furthered by the rules' application.131 Accordingly, it is inaccurate to claim that the rules are a legitimate exercise of legislative interest-balancing.

III. THE RELATIONSHIP OF RULE 404(B) TO RULE 403

Structurally, the Rules of Evidence provide that, except in certain circumstances,132 proof of character is prohibited unless it is offered for a

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128 FED. R. EVID. 402.
129 The theory behind this difference in treatment of similar crimes evidence in sexual assault and child molestation cases is one that is not borne out by empirical evidence that there is a higher recidivism rate for these crimes justifying the use of a propensity inference by the finder of fact. Cf REPORT OF THE JUDICIAL CONFERENCE, supra note 13. See also Lannan v. State, 600 N.E.2d 1334, 1336-37 (Ind. 1992) (rejecting lustful disposition exception to propensity rule noting that “[i]f a high rate of recidivism cannot justify a departure from the propensity rule for drug defendants, logic dictates that it does not provide justification for departure in sex offense cases”).
130 Again, the concern about property owners making all necessary repairs, or the concern about the number of cases being taken to trial rather than settled or resolved by a guilty plea, are two clear examples of this legislative interest-balancing. See FED. R. EVID. 407, 408, 409.
131 The interest, such as it is, in “getting tough on crime” cannot be offered as a legitimate legislative interest since linking the means (requiring admissibility of prior crimes evidence) and the end (more convictions) requires the occasional if not frequent conviction of individuals based upon prejudicial reasoning.
132 See, e.g., FED. R. EVID. 404(a)(1) (character of accused); 404(a)(2) (character of victim); 404(a)(3) (character of a witness).
purpose other than propensity. If, however, evidence of similar crimes is offered for a purpose other than proving character and propensity, then that evidence is subject to the weighing provisions of Rule 403.

IV. USING RULE 403 AS A TOOL FOR RECALIBRATING THE DISTRIBUTION OF RULEMAKING AUTHORITY AMONG POLITICAL BRANCHES

Whatever may be said about courts’ institutional supremacy in the area of evidentiary rulemaking in general, or rulemaking regarding similar acts evidence in particular, an independent issue arises when considering the courts’ use of Rule 403 to remedy what might be perceived as legislative overreaching in that area. The directive of Rules 413-415—that similar acts evidence be admitted in cases of sexual assault and sexual harassment “on any matter to which it is relevant”—makes no reference to any other rules of evidence, and, in particular, does not expressly invite courts to apply Rule 403 to such similar acts evidence. This omission has been the subject of some judicial attention, but is not itself determinative of the availability or scope of judicial discretion to exclude similar sexual assault acts evidence under Rule 403. Instead, the theoretical inquiry should be as to whether a rule of discretion, which is what Rule 403 purports to be, can also serve as a tool for recalibrating the balance of rulemaking power between the legislative and judicial branches.

If Congress acted properly within its sphere of expertise in drafting Rules 413-415, then the use of Rule 403 to limit admissibility of similar acts evidence that those rules make admissible would seem to be an abuse
of discretion that, intentional or not, thwarts Congress's legitimate decision to make such evidence broadly admissible.139

If, on the other hand, Congress erred in rescinding properly delegated judicial authority to promulgate rules of procedure and in attempting to control the particularistic concerns about probative and prejudicial uses of evidence by means of a categorical rule of admissibility, then the use of Rule 403 to place similar acts evidence in sexual assault cases on a similar evidentiary footing to such evidence in other kinds of cases seems both necessary and appropriate.140

V. JUDICIAL DECISIONS UNDER RULES 413-415: AN EXERCISE IN RESTRAINT

Since the enactment of the special rules regarding the admissibility of similar acts evidence in cases of sexual assault and child sexual abuse, a significant number of decisions have been entered that purport to reconcile the language of those rules with the Rules of Evidence as a whole, and Rule 403 in particular.141 Yet none of these decisions has considered the scope of courts' Rule 403 discretion as informed by the fundamental prudential question of competence that should, it would seem, be at the heart of the question. Instead the decisions have been superficial in that they regard the scope of discretion under 403 as determined solely by the language of that rule and that of the special rules regarding similar acts. This fundamentally textualist approach to the question can only be partially satisfactory.

Moreover, decisions in several of the circuits have read Rules 413-415 to imply a presumption of probativeness that is more difficult to trump with concerns about unfair prejudice than similar acts evidence that is offered pursuant to Rule 404(b).142 This presumption of probativeness skews the

139 Of course, if 413-415 are read to preclude any judicial review of potential prejudice from the admission of similar acts evidence, then the concern would be constitutional in nature, hence within the court's competence as well as its authority. Instead, this discussion presumes that the question is not whether similar acts evidence in sexual assault cases is subject to 403 weighing, but to what degree 403 review should limit the admissibility of such evidence.

140 See supra note 62.

141 A LexisNexis search reveals that Rule 413 has been cited by federal courts in 134 cases; Rule 414 has been cited in 124 cases; and Rule 415 has been cited in 43 cases.

142 See, e.g., United States v. Enjady, 134 F.3d 1427, 1433 (10th Cir. 1998) (arguing "the exclusion of relevant evidence under Rule 403 should be used infrequently, reflecting Congress's legislative judgment that the evidence 'normally' should be admitted"); United States v. LeCompte, 131 F.3d 767, 768 (8th Cir. 1997) (applying Rule 403 to Rule 413 to "loosen to a substantial degree the restrictions of prior law on the admissibility of such evidence"); United States v. Meacham, 115 F. 3d 1488, 1492 (10th Cir. 1997) (noting "the courts are to 'liberally' admit evidence of prior uncharged sex offenses").
403 balance in the bulk of cases under Rules 413 and 414 in those circuits without offering a satisfactory explanation for the difference in treatment of similar acts evidence in sexual assault cases, other than the fact that Congress acted to promulgate those rules.\textsuperscript{143} A more persuasive rationale might rest upon the inherent superiority of Congress to draft rules that govern the balance between probativeness and prejudice; without demonstrating or even positing such institutional superiority, however, there is little compelling reason for the thumb on the scale that courts have assigned to similar acts evidence under Rules 413 and 414.

Typical of appellate courts’ analysis of evidence under the special similar act rules is the decision of the United States Court of Appeals for the Eighth Circuit in \textit{United States v. Mound}.\textsuperscript{144} There, the court held that there was “no inherent error in admitting under Rule 413 evidence that would be inadmissible under Rule 404(b): that is the rule’s intended effect.”\textsuperscript{145} Moreover, the court relied on the Rule’s dubious legislative history to conclude that “the risk of unfair prejudice—in light of Rule 413’s ‘underlying legislative judgment . . . that [such evidence] is normally not outweighed by any risk of prejudice or other adverse effects’—was small.”\textsuperscript{146} Although the court distinguished evidence of a prior act that was

\textsuperscript{143} See \textit{supra} text accompanying note 105 (explaining that Rule 403 itself already “tilts” the balance in favor of admissibility by requiring admission of evidence unless risks “substantially outweigh” probative value (citing Scallen, \textit{supra} note 8, at 880-81)).

\textsuperscript{144} 149 F.3d 799 (8th Cir. 1998).

\textsuperscript{145} \textit{Id.} at 802.

\textsuperscript{146} \textit{Id.} (quoting 140 CONG. REC. H8992); \textit{see also} \textit{United States v. Larson}, 112 F.3d 600, 604 (2d Cir. 1997) (holding that the Rule 403 balance is skewed in favor of admissibility (quoting Senator Dole (“The presumption is that the evidence admissible pursuant to these rules is typically relevant and probative, and that its probative value is not outweighed by any risk of prejudice.”) (alternation in original)). \textit{But see} \textit{United States v. Guardia}, 135 F.3d 1326, 1331 (10th Cir. 1998) (holding that Rule 413 “contains no language that supports an especially lenient application of Rule 403” reasoning that “courts apply Rule 403 in undiluted form to Rules 404(a)(1)-(3), the other exceptions to the ban on propensity evidence”).

The legislative history has been described as “rather unusual” in its elevation in a lecture by a Department of Justice official at the annual conference of law professors to “authoritative” status. Statement of Rep. Molinari, \textit{supra} note 7 (citing Karp, \textit{supra} note 13 (announcing that it should be treated “as part of the authoritative legislative history of Rules 413-415”)); \textit{see also} Orenstein, \textit{supra} note 7, at 1558 (“[T]he legislative history in this instance is truly troubling both in its content and origin. There is strong reason to doubt the integrity of how Congress generated the legislative history of the new rules. Statements made from the floor of the House and the Senate by the main sponsors of the new rules have a surreal sameness about them, mimicking the actual language and arguments of David Karp’s law review article.”); \textit{see also} Scallen, \textit{supra} note 8, at 877-78 & n.164 (“I suspect that it is beyond the wildest dreams of most authors to be ‘authoritative in the sense of having the first and last word on the meaning of a piece of legislation.’” (citing Johnson v. Elk Lake Sch. Dist., 283 F.3d 138, 155 n.10 (3d Cir. 2002) (noting that although “relying on the work fo a
not sufficiently "similar" as Rule 413 requires, holding that such evidence was properly excluded by the trial court, it affirmed the trial court's decision to admit a prior act that was factually similar to the crime charged.\textsuperscript{147}

The \textit{Mound} court, like other courts presented with this question, did not explain how a determination of the risk of prejudice in a particular case can be foreordained by a categorical congressional judgment.\textsuperscript{148} It also failed to broach the question of the power or propriety of Congress's act arrogating to itself the responsibility for balancing concepts of probative value and prejudice that is assigned to the courts by Rule 403 and the long pre-Rules history of judicial control of questions of relevance and admissibility. By omitting these critical inquiries and their resolution, the \textit{Mound} court produced a decision that is frustratingly unmoored to any coherent principles of institutional competence or constitutional structure.\textsuperscript{149}

Notably, the \textit{Mound} court determined the scope of the trial court's discretion under Rule 413 by reference to the Rule's language ("similar acts") and self-serving legislative history (the testimony of the Department of Justice spokesman and of the Rules' sponsors),\textsuperscript{150} and paid virtually no

\textsuperscript{147} \textit{Mound}, 149 F.3d at 802; \textit{see also} \textit{Elk Lake Sch. Dist.}, 283 F.3d at 156 (holding that, in a civil case in which prior acts were offered under Rule 415, a presumption of admissibility of such acts is "overly simplified"; that only if the prior act is both demonstrated with "specificity" and "sufficiently similar to the type of sexual assault allegedly committed by the defendant" should a court conclude that Congress "intended for the probative value of the evidence to outweigh its prejudicial effect," but that where these factors were missing, "its probative value is reduced and it may prejudice the jury unfairly, confuse the issues, mislead the jury, and result in undue delay and wasted time—all reasons for excluding evidence under 403").

\textsuperscript{148} \textit{See also} \textit{Sprint/United Mgmt. Co. v. Mendelsohn}, 2008 U.S. LEXIS 2195, at *14 (Feb. 26, 2008) ("Relevance and prejudice under Rules 401 and 403 are determined in the context of the facts and arguments in a particular case, and thus are generally not amenable to broad \textit{per se} rules.")

\textsuperscript{149} Equally unsatisfying are the decisions of those courts that reject the presumption of admissibility in the legislative history of Rule 413, but nevertheless resolve the question of the scope of Rule 403 review by reference to the text, not the function, of the Rules of Evidence. \textit{See, e.g.}, \textit{Guardia}, 135 F.3d at 1331 (noting that "courts apply Rule 403 in undiluted form to Rules 404(a)(1)-(3), the other exceptions to the ban on propensity evidence"). If only these decisions would set out the institutional rationale for a robust review under Rule 403, regardless of the preliminary determination of relevance, their decisions would carry the weight of logic rather than mere interbranch rivalry.

\textsuperscript{150} \textit{See also} \textit{Karp}, supra note 13, at 19 ("The underlying legislative judgment is that the sort of evidence that is admissible pursuant to proposed Rules . . . is typically relevant and
attention to the broader foundational question of which branch of government ought to determine questions about the probativeness or prejudicial effect of categories of proof, or about the balance between probativeness and prejudice in any particular case. Plainly, returning to the hypothetical that opened this paper, if there had been a “legislative judgment” (of similarly dubious pedigree) that autopsy photos should be admitted on any matter to which they might be relevant (tracking the language of Rule 413), no court would presume that such photos no longer carried the risk of unfair prejudice that they have always been understood to present to juries. No court would, in the face of such a “legislative judgment,” abandon its role as gatekeeper assessing the evidentiary value of any particular autopsy photo against the risk of prejudice that it posed in a particular case. That is in large part because courts have long held unchallenged preeminence on discretionary questions framed by Rule 403; no “legislative judgment” in this area, especially one so plainly against the grain of historical practice and logical reasoning with respect to a category of proof like autopsy photos, would trump that judicial role and cause the courts to accept the crabbed 403 review that they have acquiesced to in the area of similar acts evidence in sexual assault cases.

To date, only one court has recognized the inappropriateness of acquiescing in this way to a “diluted” form of Rule 403 review for similar acts evidence in sexual assault cases. In United States v. Guardia, the Tenth Circuit held that Rule 413 “contains no language that supports an especially lenient application of Rule 403” reasoning that “courts apply Rule 403 in undiluted form to Rules 404(a)(1)-(3), the other exceptions to the ban on propensity evidence.” This analogy to long-standing rules that permit proof by propensity with respect to character of the accused and character of the victim, acting as true exceptions to the rule of exclusion set forth in Rule 404(a) and 404(b), demonstrates with clarity that the Mound probative, and that its probative value is normally not outweighed by any risk of prejudice or other adverse considerations.” (citing unpublished analysis statement).

The Report of the Judicial Conference, quoted extensively supra Part II, is also part of the legislative history, and explicates some of the interbranch prudential questions that lie at the heart of the resolution of questions about Rule 403’s scope. It was unanimously supported by all participants save those from the Department of Justice. Nevertheless, the Mound court did not appear to factor those portions of the legislative record into its decision.

151 See also Sprint/United Mgmt. Co., 2008 U.S. LEXIS 2195, at *14 (“With respect to evidentiary questions in general and Rule 403 in particular, a district court virtually always is in the better position to assess the admissibility of the evidence in the context of the particular case before it.”)

152 135 F.3d at 1331.
court’s deference to the “legislative judgment” as a justification for constricting its own 403 review is entirely unwarranted.\footnote{153}{Indeed, the fact that the rules' sponsors understood that "the rules do not impose arbitrary or artificial restrictions on the admissibility of evidence," Statement of Rep. Molinari, \textit{supra} note 7, is a far cry from compelling the admission of such evidence. That Congress announced that "the presumption is in favor of admission," \textit{id.}, is as true of similar acts evidence as of any other relevant evidence under the "liberal thrust" of the rules, see, for example, \textit{Daubert v. Merrell Dow Pharmaceuticals, Inc.}, 509 U.S. 579, 588 (1993), but tells courts nothing at all about the very different question of how to balance probative value against unfair prejudice.}

Even the \textit{Guardia} court fails to grapple with the larger question of political power and preeminence in the rulemaking arena that is presented by the clash of Rule 413 and Rule 403. Using equally textualist tools to align Rules 413-415 with other exceptions to the propensity ban, the \textit{Guardia} court did not explain or even consider why it is preferable for courts to weigh similar acts evidence under the broad discretionary standard of Rule 403 rather than submit such evidence to the categorical rule of admissibility enacted by Congress.

\section*{VI. CONCLUSION}

Having demonstrated that the special rules regarding the admissibility of similar acts evidence in cases of sexual assault are within the sphere of special competence of the judiciary, as recognized by Congress in the Rules Enabling Act, the corollary conclusion follows, that admissibility of such evidence ought properly to be constrained by a robust application of Rule 403.