WADING IN *ERIE*'S MURKY WATERS: A FEDERAL COURT'S CONSTITUTIONAL DUTY TO DENY SUPPLEMENTAL JURISDICTION WHEN FACED WITH A CONFLICT OF PRIVILEGE LAW

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I. INTRODUCTION

Federal Rule of Evidence 501 governs the scope of privilege in federal court.[1] The rule provides that in cases where federal law supplies the rule of decision, privileges are determined by federal common law developed through the "reason and experience" of federal judges,[2] and when state law supplies the rule of decision, privileges are determined according to state law.[3] The rule does not address which body of law applies when a federal court exercises supplemental jurisdiction[4] over related state law claims. When evidence is relevant to joined state and federal claims, and state law recognizes the privilege but federal law does not, how should a federal court rule? To be sure, a jury could be instructed to consider the evidence only as it applies to the federal claim, but such a rule is impractical. A juror presented with certain information cannot reasonably be expected to erase it from their

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1. FED. R. EVID. 501.
2. *Id.*
3. *Id.*
4. 28 U.S.C. § 1367(a) (2018).

memory when deciding a state law claim. Perhaps more importantly, privilege does more than protect information from reaching the jury; it protects it from discovery.[5] So once a federal court admits evidence relevant to the federal claim, a limiting instruction cannot cure the breach that has already taken place by allowing opposing counsel access in discovery.[6]

If for example, evidence of a doctor's notes and course of treatment is admitted relative to the federal claim (because there is no federal doctor–patient privilege),[7] the confidence of the doctor–patient relationship is broken. Once the relationship has been breached, is the jury now entitled to "every man's evidence"?[8] On the other hand, if the purpose of state law in federal court is to provide a neutral forum,[9] and to be faithful to state law so that federal resolution yields the same outcome,[10] does it make sense for federal courts to override state interests that recognize the importance of doctor–patient confidentiality?

These questions were debated at the time Federal Rule of Evidence 501 was enacted, but the text of the rule provides no guidance to this question, and in the fifty years since the rule's passage, the Supreme Court has not answered it. In *Jaffee v. Redmond*,[11] the Supreme Court acknowledged the question in a footnote, but declined to address it because the parties had not raised the issue.[12] Relatively few circuit or district courts have addressed the issue either because it infrequently arises or because litigants are failing to spot it.[13] Even when raised, most courts are not conducting a thorough inquiry and the scholarly commentary on the subject is sparse.[14] While the majority approach applies federal privilege to both claims, this method is dismissive of the state interests that sought to protect certain relationships.

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5. FED. R. CIV. P. 26(b)(1).

6. *See* FED. R. EVID. 105.

7. *E.g.*, Cappetta v. GC Servs. Ltd. P'ship, 266 F.R.D. 121, 126 (E.D. Va. 2009).

8. Jaffee v. Redmond, 518 U.S. 1, 9 n.8 (1996). For a discussion of the phrase "every man's evidence," see *id.*

9. 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3601 (3d ed. 2019).

10. Guar. Tr. Co. of N.Y. v. York, 326 U.S. 99, 109 (1945).

11. *Jaffee*, 518 U.S. at 1.

12. *Id.* at 15 n.15. The Court observed that:

> Indeed, if only a state-law claim had been asserted in federal court, the second sentence in Rule 501 would have extended the privilege to that proceeding. We note that there is disagreement concerning the proper rule in cases such as this in which both federal and state claims are asserted in federal court and relevant evidence would be privileged under state law but not under federal law. Because the parties do not raise this question and our resolution of the case does not depend on it, we express no opinion on the matter.

Id. (citation omitted).

13. *See, e.g.*, *id.* (noting the issue sua sponte); *In re* Sealed Case (Med. Records), 381 F.3d 1205, 1213 (D.C. Cir. 2004) (noting that the parties had not raised or briefed the issue but resolving the question on other grounds).

14. *See* Stephanie Rubstello, Comment, *Predictable Protection for Mediated Pendent State Claims: A Judicial Solution*, 90 OR. L. REV. 855, 884 (2012). For a discussion of a related issue, *see also* John Bergstresser, *When Evidentiary Rules Enforce Substantive Policies: Same-Sex Marital Privilege Under Federal Rule of Evidence 501 in Diversity Cases*, 46 NEW ENG. L. REV. 303 (2012).

While theoretically a conflict could run both ways (state law could recognize the privilege where federal law does not, or federal law could recognize the privilege where state law does not), the reality is that federal courts recognize far fewer privileges than state courts.[15] Because states are the laboratories of social experimentation[16] and federal courts will recognize a privilege only when their "reason and experience" compel them,[17] federal courts will, as a general matter, lag behind states in recognizing a new privilege. *Jaffee*, decided in 1996, is the last time the Supreme Court recognized a new privilege, and it did so only after concluding that all fifty states recognized some form of a psychotherapist–patient privilege.[18] Because federal courts inherently lag in recognizing a new privilege, a conflict between state and federal privilege necessarily coincides with questions of federalism.

This Article hopes to present federal courts with the doctrinal considerations that arise when litigation involves a vertical conflict of privilege law. A thorough analysis compels the conclusion that a federal court addressing the issue must tread carefully to avoid *Erie Railroad Co. v Thompkins*'s constitutional command that overriding state interests with conflicting federal judge-made law denies states the "equal protection of the law."[19] This Article proceeds in four parts. Part I addresses the presence of state law in federal court, noting the importance of the *Erie* doctrine to deter forum shopping and to ensure that federal resolution of state law yields the same outcome as state court resolution.[20] Part II looks at privilege law in general, documenting Congress's passage of Federal Rule of Evidence 501, which I argue is a procedural rule even though privileges are arguably substantive in nature.[21] However, the inquiry does not end there. Rule 501 does not dictate the conflict described because a vertical conflict of privilege law is the result of a federal judicial decision. Therefore, the Rules Enabling Act does not test the validity of a federal court's decision to apply federal privilege over conflicting state law as it would if the conflict arose from a congressional act.[22] Instead, the question tests the reach of federal judicial power, making "*Erie*'s murky waters"[23] central to a court's analysis. With

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15. Rubstello, *supra* note 14, at 860 n.19 (citing Raymond F. Miller, Comment, *Creating Evidentiary Privileges: An Argument for The Judicial Approach*, 31 CONN. L. REV. 771, 775–76 (1999)) ("[T]he Supreme Court has recognized nine federal privileges while Connecticut state law recognizes twenty-nine privileges.").

16. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

17. FED. R. EVID. 501.

18. *Jaffee*, 518 U.S. at 5–6.

19. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 75 (1938).

20. *See infra* Part I (discussing *Erie*'s twin aims).

21. *See infra* Part II (explaining the history of Federal Rule of Evidence 501).

22. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 406 (2010) (differentiating between the methods of testing constitutionality of federal court's decisions that supplant state law and acts of Congress that do the same).

23. *Id.* at 398.

this background in mind, Part III discusses how various courts have resolved the question and poses a critique of those rulings.[24] Finally, Part IV proposes a solution: A federal court should refrain from applying federal privilege to both federal and state claims unless it concludes that doing so will not "significantly affect the result of [the] litigation" or undermine *Erie*'s twin aims.[25] Unless a court determines that this is so, a federal court should decline its exercise of supplemental jurisdiction.

II. STATE LAW IN FEDERAL COURTS

Congress provided federal courts with jurisdiction to hear claims arising under state law when it established diversity jurisdiction.[26] Despite strong antifederalist opposition to diversity, the First Congress wanted to provide litigants with a neutral forum, thereby protecting them from local bias.[27] But diversity is not the only reason that federal courts look to state law. Congress also provided jurisdiction for supplemental claims—claims that are so closely related to a federal claim as to "form part of the same case or controversy."[28] If diversity jurisdiction is justified on the policy of providing a neutral forum for litigants, supplemental jurisdiction appeals to a wholly different policy: judicial efficiency.[29] It encourages resolution of all related claims in a single trial to conserve resources when doing so furthers "judicial economy, convenience, fairness, and comity."[30]

A. Vertical Choice of Law: The Erie *Doctrine*

In federal court, state law is governed by the *Erie* doctrine. The *Erie* doctrine guides vertical choice of law questions; that is, whether state or federal law controls. In *Erie Railroad Co. v. Tompkins*,[31] the plaintiff, Tompkins, sued the Erie Railroad Company in federal court for injuries he sustained while walking along a railroad track in Pennsylvania.[32] Pennsylvania common law provided no liability for trespass to private property, but federal common law had no such rule.[33] At the time, vertical

24. *See infra* Part III (critiquing various court rulings surrounding the reach of federal judicial power).

25. Guar. Tr. Co. of N.Y. v. York, 326 U.S. 99, 109 (1945); *see infra* Part IV (urging federal courts to refrain from applying federal privilege to federal and state claims).

26. 28 U.S.C. § 1332 (2018).

27. WRIGHT ET AL., *supra* note 9, at § 3523.

28. 28 U.S.C. § 1367(a) (2018).

29. WRIGHT ET AL., *supra* note 9, at § 3523.

30. Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 (1988) (citing United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726 (1966)).

31. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

32. *Id.* at 69–70.

33. *Id.* at 70.

conflicts were governed by *Swift v. Tyson*[34] which required federal courts to follow state law only when there was a state statute on point.[35] So under state law Tompkins lost, but under federal law Tompkins had a chance. As a result, Tompkins won at trial and won again on appeal.[36] The Supreme Court, however, reversed the lower court's decision, overruling *Swift v. Tyson* and its progeny.[37] The Supreme Court held that the practice of looking to state law only when there was a statute on point "rendered impossible equal protection of the law."[38] So *Erie* came to stand for the seemingly straightforward principle that a federal court applies *state* substantive law but *federal* procedural law.

In application, it is not always easy to tell whether a rule is one of substance or procedure. The first case to bring a challenge to the Court's substance and procedure dichotomy was *Sibbach v. Wilson & Co*.[39] Three years after the passage of the Federal Rules of Civil Procedure, a personal injury plaintiff in federal court on diversity challenged the validity of the Rules in light of Congress's authority under the Rules Enabling Act.[40] Under the Rules Enabling Act, Congress delegated authority to the Supreme Court to create rules of procedure to govern in federal courts so long as those rules do not "abridge, enlarge or modify any substantive right."[41] After being ordered to submit to a physical examination under Rule 35, the plaintiff argued that Rule 35 exceeded the scope of the Rules Enabling Act because it abridged her substantive right to be free from physical examination.[42] In a 5–4 decision, the Supreme Court rejected her contention.[43] Though the Court recognized that the right to be free from physical examination was no doubt "important" and "substantial," it was not "substantive" within the meaning of the rules.[44] The majority opinion announced that the Rules Enabling Act's command not to "abridge, enlarge, nor modify [any] substantive right[]" tests "whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."[45]

While the *Sibbach* majority expressed its certainty that Rule 35 is a purely procedural rule, the Court has, at other times, expressed less certainty about the difference between substance and procedure.[46] In *Guaranty Trust*

34. Swift v. Tyson, 41 U.S. 1 (1842), *overruled by Erie*, 304 U.S. 64.
35. *Erie*, 304 U.S. at 69–70.
36. *Id.* at 70.
37. *Id.* at 80–81.
38. *Id.* at 75.
39. Sibbach v. Wilson & Co., 312 U.S. 1, 4 (1941).
40. *Id.* at 7–8.
41. 28 U.S.C. § 2072 (2018).
42. *Sibbach*, 312 U.S. at 6–7.
43. *Id.* at 9–10.
44. See *id.* at 11, 13.
45. *Id.* at 7–8, 14.
46. *See* Guar. Tr. Co. of N.Y. v. York, 326 U.S. 99 (1945).

Co. of New York v. York, Justice Frankfurter observed that "'substance' and 'procedure' are the same key-words to very different problems. Neither 'substance' nor 'procedure' represents the same invariants. Each implies different variables depending upon the particular problem for which it is used."[47] In short, the difference between substance and procedure depends on the circumstances.[48] The question in *Guaranty Trust* was whether a state statute of limitation (which is procedural in nature) would be applied to bar a state claim in federal court where the state statute of limitation had already run.[49] In other words, the question was whether federal courts could provide relief to litigants that were time-barred in state court because a statute of limitation is a purely procedural rule.[50] While it would seem that the answer under *Erie* would permit federal courts the opportunity to afford state litigants relief, *Guaranty Trust* transformed the *Erie* doctrine by concluding that when the question involved a conflict-of-law analysis, the substance–procedure debate was not conclusive, and instead, a federal court should look to state law because "the outcome of the litigation in the federal court should be substantially the same . . . as it would be if tried in a State court."[51] The Court concluded that when the federal forum offers one party a better deal than that party would otherwise get in state court, federal courts should apply state law without regard to whether a rule is one of substance or procedure.[52]

The final case to significantly address this question was *Hanna v. Plumer*.[53] Refining *Guaranty Trust*'s "'[o]utcome-determination' analysis" further, Chief Justice Warren, writing for the majority, concluded that when a conflict involves purely judge-made law, a federal court should yield to state law if it concludes that doing so will further "the twin aims of the Erie rule: discouragement of forum shopping and avoidance of inequitable administration of the laws."[54]

B. Erie*'s Uncertain Constitutional Origin*

Erie declared the *Swift* doctrine "an unconstitutional assumption of powers by the Courts of the United States"[55] because it "rendered impossible equal protection of the law."[56]

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47. *Id.* at 108 (citing Home Ins. Co. v. Dick, 281 U.S. 379, 409 (1930)).
48. *Id.*
49. *Id.* at 99–101.
50. *Id.*
51. *Id.* at 109.
52. *Id.* at 110.
53. Hanna v. Plumer, 380 U.S. 460 (1965).
54. *Id.* at 466–68.
55. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79 (1938) (quoting Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).
56. *Id.* at 75.

Beyond this statement, however, the Court's opinion in *Erie* did not rely on a constitutional analysis, leaving scholars and lower courts to speculate as to the precise source of the *Swift* doctrine's constitutional infirmity.[57] Despite its invocation of "equal protection," few scholars have seriously argued that *Erie* addressed a violation of the Fifth Amendment's Due Process Clause.[58] In response to those who have, Professor Bradford Clark easily refutes the idea.[59] First, he reminds us to pay attention to the headings: *Erie*'s comment about equal protection occurred in a section of the Court's opinion addressing "the 'political and social' defects of the *Swift* doctrine," not the section dealing with its constitutionality.[60] More importantly, he refutes the idea on historical grounds: the Fifth Amendment's reverse incorporation of the Equal Protection Clause against the federal government did not exist in 1938.[61]

Professor John Hart Ely does not believe that the *Erie* doctrine is grounded in the Constitution at all.[62] In an oft-cited article, he argues that *Erie* endorses basic notions of federalism—not as a constitutional matter, but as policy.[63] The constitutional "myth of Erie," according to Professor Ely, is best articulated in Justice Harlan's concurring opinion in *Hanna v. Plumer*, which described a state enclave of purely local affairs.[64] Justice Harlan explained that "our constitutional system leaves [certain matters] to state regulation," such as law governing domestic relations and implicating purely local concerns.[65] Justice Harlan went on to note that a federal court violates state interests when it "make[s] substantive law affecting state affairs beyond the bounds of congressional legislative powers."[66]

To refute the state enclave theory as a constitutional matter, Professor Ely looked no further than the text of the Tenth Amendment,[67] which provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively . . . ."[68] Because the text defines state powers as only that which is left after the federal government's powers are stretched to their maximum,

57. *See* Bradford R. Clark, Erie's *Constitutional Source*, 95 CAL. L. REV. 1289, 1296 (2007).

58. *Id.* at 1299 (first citing Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L.J. 929, 998–99 (1996) (discussing the Fifth Amendment's equal protection component as a possible basis for the Court's decision in *Erie*); and then citing John R. Leathers, Erie *and its Progeny as Choice of Law Cases*, 11 HOUS. L. REV. 791, 795–96 (1974) (same)).

59. *Id.*

60. *Id.*

61. *Id.* at 1299–1300.

62. John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 712–13 (1974).

63. *Id.* at 698, 702.

64. *Id.* at 701–04.

65. Hanna v. Plumer, 380 U.S. 460, 475 (1965) (Harlan, J., concurring).

66. *Id.* at 474–75.

67. Ely, *supra* note 62, at 702.

68. U.S. CONST. amend. X.

the Tenth Amendment cannot provide an additional external check on judicial or legislative powers.[69]

Professor Ely did not, however, reject the state enclave theory entirely.[70] In fact, he believed that Congress codified this theory in the Rules of Decision Act and Rules Enabling Act.[71] The Rules of Decision Act commands federal courts to respect state law where state law provides the rule of decision,[72] and the Rules Enabling Act authorizes the Supreme Court to create rules of procedure so long as those rules do "not abridge, enlarge or modify any substantive right."[73] Professor Ely argued that these two Acts impose the primary constraints on vertical conflicts.[74]

Others have not been so quick to dismiss *Erie*'s constitutional flavor.[75] Professor Paul Mishkin, writing in response to Ely, argued that *Erie* arises out of the structure of the Constitution's separation of powers.[76] The argument goes like this: Because "*Erie* involved the constitutional power of federal courts to supplant state law with judge-made rules,"[77] and because states are represented in the legislature but not within the judiciary, if federal judges override state interests by failing to recognize state law, there is no check on the reach of Article III powers.[78] Professor Mishkin believed that the Constitution limits congressional power but also places a "distinctive, independently significant limit on the authority of the federal courts to displace state law."[79]

Fortunately, understanding the precise constitutional nature of *Erie* has not, thus far, been essential for federal courts to navigate in application, and *Shady Grove Orthopedic Associates of Pennsylvania v. Allstate Insurance Company* suggests an outcome to the question posed here.[80] *Shady Grove* addressed a conflict between Federal Rule of Civil Procedure 23 and a New York statute that governed class certification.[81] Under the federal rules, class certification was allowed, but under New York law it was not.[82] Because Congress had enacted Federal Rule of Civil Procedure 23 (a purely procedural rule) "*Erie*'s murky waters" were not implicated, and Federal Rule of Civil Procedure 23 would control, unless it was an invalid exercise

69. Ely, *supra* note 62, at 702.
70. *Id.* at 704.
71. *Id.*
72. 28 U.S.C. § 1652 (2016).
73. *Id.* § 2072.
74. Ely, *supra* note 62, at 704.
75. Paul J. Mishkin, Comment, *Some Further Last Words on* Erie*–The Thread*, 87 HARV. L. REV. 1682, 1685 (1974).
76. *Id.*
77. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 406 (2010).
78. *Id.*
79. Mishkin, *supra* note 75, at 1682.
80. *Shady Grove*, 559 U.S. at 393.
81. *Id.* at 399.
82. *Id.*

of Congress's power or invalid under the Rules Enabling Act.[83] While resolution of the issue allowed the Court to sidestep *Erie*, *Shady Grove* provided a crucial insight into how the Justices might view a conflict under Federal Rule of Evidence 501.[84] The Court noted that "*Erie* involved the constitutional power of federal courts to supplant state law with judge-made rules. In that context, it made no difference whether the rule was technically one of substance or procedure; the touchstone was whether it 'significantly affect[s] the result of a litigation.'"[85]

III. PRIVILEGES, IN GENERAL

Privileges are different from the other rules of evidence.[86] While most rules of evidence function to promote the accuracy of information, privilege law seeks to conceal otherwise probative and relevant evidence for reasons wholly unrelated to its accuracy.[87] Privilege law circumvents the truth-seeking function of trial and "contravene[s] the fundamental principle that 'the public . . . has a right to every man's evidence.'"[88] For this reason, privileges are disfavored and "strictly construed."[89] Federal courts will recognize a privilege "only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth."[90]

But privileges are different in an additional sense.[91] While evidence generally governs courtroom behavior, privilege is the only area of evidence aimed primarily at affecting "prelitigation behavior."[92] Privilege seeks to encourage parties to freely communicate by assuring them that confidential communications will be kept out of court.[93] For this reason, some scholars argue that privileges are rules of substance rather than procedure.[94]

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83. *Id.* at 398.

84. *Id.* at 406.

85. *Id.*

86. *See* Donald W. Price, Comment, *A Choice of Law Analysis of Evidentiary Privileges*, 50 LA. L. REV. 157, 158 (1989).

87. *Id.*

88. Trammel v. United States, 445 U.S. 40, 50 (1980) (quoting United States v. Bryan, 339 U.S. 323, 321 (1950)).

89. Weil v. Inv. Indicators, Research & Mgmt., Inc., 647 F.2d 18, 24 (9th Cir. 1981).

90. *Trammel*, 445 U.S. at 50 (quoting Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)).

91. *See* Edward J. Imwinkelried, *An Hegelian Approach to Privileges Under Federal Rule of Evidence 501: The Restrictive Thesis, the Expansive Antithesis, and the Contextual Synthesis*, 73 NEB. L. REV. 511, 514 (1994).

92. *Id.*

93. *Id.*

94. *See id.* at 541.

A. The Passage of Federal Rule of Evidence 501

Pursuant to the Rules Enabling Act, the Supreme Court first exercised its authority to propose and transmit to Congress the Federal Rules of Civil Procedure in 1937 and Criminal Procedure in 1946.[95] The Supreme Court turned its attention to developing rules of evidence in the late 1960s.[96] Chief Justice Warren appointed a drafting committee to develop and propose draft rules.[97] When it came to privileges, the Advisory Committee's draft included thirteen rules defining the following nine non-constitutional privileges: required reports, lawyer–client, psychotherapist–patient, husband–wife, communications to clergymen, political vote, trade secrets, secrets of state and other official information, and identity of informer.[98] The Committee intended these to be the only privileges recognized in federal court, regardless of whether a court was applying state law and regardless of whether state law recognized additional privileges.[99] The Advisory Committee believed that the *Erie* doctrine did not control because the Rules of Evidence were clearly procedural rules.[100] Despite criticism that its proposal slighted state interests, the Committee advanced its draft to the Judicial Conference, and ultimately to the Supreme Court, who voted to transmit the rules to Congress.[101]

It was simply bad luck that the rules reached Congress at the same time that President Nixon was embroiled in the Watergate scandal.[102] Significantly, the proposed privileges contained a governmental privilege that was "shockingly broad," and many feared would hamper the Watergate investigation.[103] Largely for this reason, Congress quickly proposed and passed legislation that would halt the rules from taking effect for two more years.[104]

Meanwhile, the House began to hold hearings on the proposed rules, and those same federalist concerns that were voiced against the Advisory Committee's draft emerged again in the House.[105] Chief Judge Friendly of the Second Circuit Court of Appeals emerged as a harsh critic of the "Advisory Committee's attempt to federalize privilege law" and argued that the current approach was "offensive" to state interests.[106] Others believed that the *Erie* doctrine required application of state privilege law because

95. George H. Dession, *The New Federal Rules of Criminal Procedure: I*, 55 YALE L.J. 694, 694 (1946).
96. Imwinkelried, *supra* note 91, at 512.
97. *Id.* at 517.
98. FED. R. EVID. 501 advisory committee's note.
99. Imwinkelried, *supra* note 91, at 518.
100. FED. R. EVID. 501 advisory committee's note.
101. Imwinkelried, *supra* note 91, at 518–19.
102. *Id.* at 519.
103. *Id.* at 512
104. *Id.* at 513.
105. *Id.* at 520.
106. *Id.*

privileges were substantive in nature.[107] The committee believed "that in civil cases in the federal courts where an element of a claim or defense is not grounded upon a federal question, there is no federal interest strong enough to justify departure from State policy."[108] The House committee also feared that the Advisory Committee's approach would encourage forum shopping.[109]

After considerable debate, the House committee deleted all thirteen specific privileges and instead provided a single rule:

> [T]he privilege of a witness . . . 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: Provided, That in civil actions, with respect to a claim or defense as to which State law supplies the rule of decision . . . shall be determined in accordance with State law.[110]

The committee then sent this draft to be voted on the floor, and with a few non-substantive amendments, the language passed.[111]

The House's draft was initially received by the Senate without enthusiasm.[112] The Senate shared the same concerns over the Advisory Committee's approach, but felt that the rules should provide enumerated privileges, and many interest groups lobbied to demand specific privileges.[113] In the end, left with no better idea, the Senate committee generally adopted the House's approach with one considerable difference.[114] The committee felt that the phrase "with respect to a claim or defense as to which State law supplies the rule of decision" was "pregnant with litigious mischief" and would be difficult to apply.[115] The committee understood this language to mean generally that state privilege law applied under diversity but noted that there were many circumstances where state law ends up in federal court, including on supplemental jurisdiction or federal question cases where state law is embodied within a federal claim or defense.[116] Feeling that this approach would lead to potentially conflicting privileges, the Senate proposed a cleaner path: "[I]n civil actions and proceedings arising under 28 U.S.C. § 1332 . . . the privilege of a witness, person, government, State or political subdivision thereof is determined in accordance with State law,

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107. *Id.*
108. FED. R. EVID. 501 advisory committee's notes.
109. *Id.*
110. Imwinkelried, *supra* note 91, at 521.
111. *Id.*
112. *Id.*
113. *Id.* at 521–22.
114. *Id.* at 522.
115. *Id.* at 521–22 (citing FED. R. EVID. 501 advisory committee's notes).
116. *Id.*

unless with respect to the particular claim or defense, Federal law supplies the rule of decision."[117]

Commenting on its approach, the Senate committee explained that its rule:

> [P]rovides that in criminal and Federal question civil cases, federally evolved rules on privilege should apply since it is Federal policy which is being enforced. [It is also intended that the Federal law of privileges should be applied with respect to pendant State law claims when they arise in a Federal question case.] . . . [While such a situation might require use of two bodies of privilege law, federal and state, in the same case, nevertheless the occasions on which this would be required are considerably reduced as compared with the House version, and confined to situations where the Federal and State interests are such as to justify application of neither privilege law to the case as a whole. If the rule proposed here results in two conflicting bodies of privilege law applying to the same piece of evidence in the same case, it is contemplated that the rule favoring reception of the evidence should be applied.[118]

So in the event of a conflict between federal and state privilege law the Senate committee recommended that federal law (or the rule most likely to favor the admission of the evidence) controlled.[119] In the final step, a conference committee convened to resolve the differences between the House and Senate drafts.[120] The committee ultimately rejected the Senate's approach; it did not share the Senate's concerns that the House's version would lead to confusion.[121] It acknowledged that a conflict might arise in diversity cases, but in such cases a federal court should apply state privilege law to the state claim and federal privilege law to the federal claim.[122] But "where a federal court adopts or incorporates state law to fill interstices or gaps in federal statutory phrases, the court generally will apply federal privilege law."[123]

B. Privilege Law and the Substance–Procedure Debate

There is good reason to suggest that privileges are, in fact, substantive. This argument was made by then-Professor (now federal judge) Jack B. Weinstein, who argued that privileges are substantive in nature because they

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117. *Id.* at 523 (alteration in original) (citing FED. R. EVID. 501 Senate committee's notes).

118. FED. R. EVID. 501 Senate committee's note to 1974 amendment (second and third alterations in original).

119. *Id.*

120. Imwinkelried, *supra* note 91, at 523.

121. FED. R. EVID. 501 advisory committee's note to 1974 amendment.

122. *Id.*

123. Imwinkelried, *supra* note 91, at 523 (citing conference committee's notes).

pervert substantive rights.[124] By concealing relevant information, privileges subvert an area of substantive law.[125] Take for example an insurance fraud case brought in a state such as New York that recognizes a doctor–patient privilege.[126] Where an insurer needs medical records to prove its fraud case, an insurer's substantive fraud claim is substantially weaker in New York than in say New Jersey where there is no doctor–patient privilege.[127] If a federal court sitting in New York were to admit communications between a doctor and patient, the federal court will have enlarged the insurer's substantive fraud claim beyond what the legislature intended.[128] The truth of this is made all the more apparent by the fact that the New York legislature yielded to the insurance lobby when it passed a law requiring persons who enter into insurance contracts to waive the doctor–patient privilege in advance, thus re-enlarging the substantive law of fraud for insurers.[129]

While the Advisory Committee deemed privileges purely procedural when it drafted proposed Federal Rule of Evidence 501, Congress expressly rejected this approach by providing an *Erie* like analysis in the text of Rule 501.[130] For the reasons noted by Professor Weinstein, there is good reason to argue that privileges are substantive.[131] Professor Weinstein further observed that privileges ought to be considered substantive because they fit the various descriptions the Court has provided: Privileges "are one of 'those rules of law which characteristically and reasonably affect people's conduct at the stage of primary private activity'; they 'have a material influence upon the outcome of litigation'; avoiding or taking advantage of them 'would more likely than not lead to or encourage forum-shopping.'"[132]

Ultimately, the question of whether privileges are substantive or procedural may not be essential if the Court views a conflict under Rule 501 as suggested in *Shady Grove*.[133]

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124. Jack B. Weinstein, *Recognition in the United States of the Privileges of Another Jurisdiction*, 56 COLUM. L. REV. 535, 541 (1956).

125. *Id.*

126. *Id.* at 539.

127. *Id.*

128. *Id.* at 540.

129. *Id.* at 541.

130. David E. Seidelson, *The Federal Rules of Evidence: Rule 501,* Klaxon *and the Constitution*, 5 HOFSTRA L. REV. 21, 26–29 (1976).

131. Weinstein, *supra* note 124, at 545–46.

132. *Id.* (footnotes omitted) (first quoting HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 634 (1st ed. 1953); then quoting Edmund M. Morgan, *Choice of Law Governing Proof*, 58 HARV. L. REV. 153, 195 (1944); and then quoting Harold W. Horowitz, Erie R.R. v. Tompkins*—A Test to Determine Those Rules of State Law to Which Its Doctrine Applies*, 23 SO. CAL. L. REV. 204, 215 (1950)).

133. *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393 (2010).

C. Federal Rule of Evidence 501 and the Substance–Procedure Debate

If the Advisory Committee's version had passed and federal privilege law applied regardless of whether a federal court sat in diversity or federal question jurisdiction, then the conflict would be purely legislative and the relevant question would be whether Congress's decision to replace state privilege law was a valid exercise of Congress's powers.[134] "Congress has undoubted power to supplant state law, and undoubted power to prescribe rules for the courts it has created, so long as those rules regulate matters 'rationally capable of classification' as procedure."[135] If a rule meets *Hanna*'s "arguably procedural" test, it is still subject to the standard provided in the Rules Enabling Act.[136] That standard requires that the "arguably procedural" rule not "abridge, enlarge or modify any substantive right"—which the Court takes to mean the rule must "really regulat[e] procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."[137]

So the test, more or less, has two parts: is a rule "arguably procedural"?[138] If so, does it "really regulate procedure"?[139] If this test seems redundant—or if it seems to render the phrase "abridge, enlarge or modify any substantive right" virtually meaningless (in other words, surplusage)[140] the reader is not alone in thinking so.[141] Many scholars have noted that the Court's failure to give this clause of the Rules Enabling Act any teeth is both frustrating and poorly conducted statutory construction.[142]

Nonetheless, this test does not control the outcome here. Even though privileges may be substantive, it's clear that Rule 501 *itself* is procedural.[143] As the Court has described it, a procedural rule dictates the "process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."[144] A procedural rule is one that "governs only 'the manner and the means' by

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134. *Id.* at 398–400.

135. *Id.* at 406 (quoting Hanna v. Plumer, 380 U.S. 460, 472 (1965)).

136. *Hanna*, 380 U.S. at 476 (Harlan, J., concurring).

137. *Shady Grove Orthopedic Assocs., P.A.*, 559 U.S. at 407 (2010) (alteration in original) (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941)).

138. *Hanna*, 380 U.S. at 476 (Harlan, J., concurring).

139. *Shady Grove*, 559 U.S. at 406.

140. For a discussion on the importance of avoiding a construction that renders certain words of phrases "surplusage" see ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 174 (1st ed. 2012).

141. Bergstresser, *supra* note 14, at 315; Ely, *supra* note 62, at 719; Olin Guy Wellborn III, *The Federal Rules of Evidence and the Application of State Law in the Federal Courts*, 55 TEX. L. REV. 371, 404 (1977).

142. Bergstresser, *supra* note 14, at 315; Ely, *supra* note 62, at 719; Wellborn, *supra* note 141, at 404.

143. FED. R. EVID. 501.

144. *Shady Grove*, 559 U.S. at 407 (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941)).

which the litigants' rights are 'enforced.'"[145] Rule 501 is a procedural rule because it merely directs traffic. It instructs courts where to look to find whether a privilege applies: Either federal common law or state law.

When a federal court hearing a claim on supplemental jurisdiction looks to Rule 501 to determine whether, for example, medical records may be admitted, it potentially receives conflicting instructions. Those medical records could be admissible to the federal claim but privileged as to the state claim. A literal application of the rule would require the court to simultaneously recognize and disregard the privilege. Recognizing that this result is impractical, very few courts resolve the issue here.[146] In determining whether this conflict requires a federal court to recognize state law, it is important to note that the conflict does not arise as the result of a congressional act; the conflict arises as a result of purely judge-made law—here, the federal court's lack of recognition for a doctor-patient privilege.[147] If a federal court were to apply federal privilege law to both claims, as is the majority approach, the question becomes whether this exceeds the reach of federal *judicial* power. While *Shady Grove* sidestepped "*Erie*'s murky waters,"[148] because it involved a question of federal congressional power, *Erie* is front and center here.

IV. PRIVILEGE CONFLICTS & SUPPLEMENTAL JURISDICTION

When it comes to vertical conflicts under Federal Rule of Evidence 501, there are two troubling trends. The first is that litigants are not raising the issue as often as they should. The second is that when they do, they are failing to make constitutional arguments.[149] As a result, the majority of federal courts are applying federal privilege to both claims without recognizing the question as one of constitutional powers.[150] Both themes are apparent in the D.C. Circuit's opinion in *In re Sealed Case* (*Medical Records*).[151] The case involved a discovery dispute after two plaintiffs sued various state entities under 42 U.S.C. § 1983 with related state-based negligence claims.[152] The plaintiffs, intellectually disabled wards of the state, alleged that that the defendant, also a ward, sexually assaulted them and that they reported this abuse to various entities who allowed it to continue.[153] The plaintiffs

145. *Id.* (quoting Miss. Publishing Corp. v. Murphree, 326 U.S. 438, 445 (1946)).

146. *See, e.g.*, Research Inst. for Med. & Chemistry, Inc. v. Wis. Alumni Research Found., 114 F.R.D. 672, 675 n.2 (W.D. Wis. 1987).

147. *See supra* notes 7–8 and accompanying text (noting there is no federally recognized doctor–patient privilege).

148. *Shady Grove*, 559 U.S. at 406.

149. *See In re* Sealed Case (Medical Records), 381 F.3d 1205 (D.C. Cir. 2004).

150. *See id.*

151. *See id.*

152. *Id.* at 1207.

153. *Id.*

requested all of the defendant's medical records.[154] The trial court granted the request and the defendant's guardian *ad litem* appealed the decision, arguing that the request was overbroad and invaded the defendant's privacy interests.[155] The guardian *ad litem* did not argue that a federal court was constitutionally required to protect this information under state law.[156] The court, sua sponte, raised the conflict between state and federal privilege law.[157] It noted that the legislative history of Rule 501 was inconclusive on the question but also observed that the majority of federal courts to face the issue have found that federal privilege law controls.[158] While the D.C. Circuit resolved the case on other grounds (and expressed its hesitancy to address this issue without the benefit of the parties briefing), the court signaled its amenability to the majority rule: "[W]here the primary source of the court's jurisdiction is the federal claim, to which the state claim is merely pendent (supplemental), it seems appropriate that the federal evidentiary interest—whether in privilege or production—should be primary as well."[159]

On one hand this rule makes sense. Where federal claims form the gravamen of a plaintiff's case, it does not make sense to allow secondary or peripheral claims to color the rest of the litigation. If there was no constitutional question, this would be a sound method for resolving the dispute. Even with the Constitution implicated, it does not follow that a litigant who fails to raise the claim and assert the privilege should prevail.[160] Personal jurisdiction is also a constitutional right (it arises under the Due Process Clause),[161] but a litigant must timely contest personal jurisdiction or the litigant waives it.[162] An analogy could be made. Perhaps when a litigant asks a federal court to exercise its discretion to hear the supplemental state claim, the litigant impliedly waives any right to the state-based privilege. Alternatively, when a litigant is forcefully removed to federal court, the same litigant impliedly waives the privilege by failing to timely raise the issue in a motion to remand. Although it is worth noting, such an approach would require the Court to better flesh out the constitutional nature of *Erie*, as questions of federal power are not typically conceived of as individual liberties to be free from federal overreach. If *Erie* is purely a powers question, a litigant's waiver is immaterial. Alternatively, perhaps *Erie* corrected an unconstitutional violation of procedural due process.

Some courts have addressed the issue by looking to the majority practice, policy, or legislative history to conclude that federal privilege law

154. *Id.*
155. *Id.* at 1208.
156. *See id.*
157. *Id.* at 1212.
158. *Id.*
159. *Id.* at 1213.
160. *See supra* notes 11–13 and accompanying text (noting how many litigants rarely spot this issue).
161. Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982).
162. FED. R. CIV. P. 12(h).

should prevail.[163] Many courts note that the majority rule applies federal law and simply follow suit.[164] But how persuasive is the majority rule when the majority of cases addressing the issue fail to give it thorough treatment or analysis?[165] Still other courts note that federal courts disfavor privileges as a matter of policy, so recognizing a state privilege to a federal claim where there is otherwise no federal privilege thwarts the jury's entitlement to every man's evidence.[166] This policy argument would be compelling if it could not be met with the counterargument that federalism is also an important policy. Finally, some courts invoke legislative history.[167] In *Vanderbilt v. Town of Chilmark*, a district court in Massachusetts resolved the issue by noting that the Senate intended "that the Federal law of privileges should be applied with respect to pendent State law claims when they arise in a Federal question case."[168] However, the court did not mention that the Senate's version had been specifically rejected.[169] How compelling is rejected legislative intent? A few courts have conducted a thorough inquiry into the legislative history and concluded that Congress was aware of the issue and generally believed that federal law would control the inquiry.[170] One court reasoned that where "a federal court chooses to absorb state law . . . . state law does not supply the rule of decision," making the state privilege inapplicable.[171]

This idea—that where state law fills an "interstice[] or gap[] in [a] federal statutory phrase[]," (such as a claim arising under the Federal Tort Claims Act) the federal law absorbs state law—is a handy conceptual device,[172] but it does not actually resolve the issue here. Federal law does not similarly absorb state claims brought into federal court on supplemental jurisdiction; they are separate, independent claims. To be sure, the legislative history of Rule 501 generally indicates that the House was willing to favor

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163. *E.g.*, Hancock v. Hobbs, 967 F.2d 462, 467 (11th Cir. 1992); Krolikowski v. Univ. of Mass., 150 F. Supp. 2d 246, 248 (D. Mass. 2001) (finding federal law controls and listing cases but conducting no analysis).

164. *E.g.*, *Hancock*, 967 F.2d at 467; *Krolikowski*, 150 F. Supp. 2d at 248 (finding federal law controls and listing cases but conducting no analysis).

165. *See, e.g.*, Religious Tech. Ctr. v. Wollersheim, 971 F.2d 364, 367 n.10 (9th Cir. 1992) (per curiam) (dismissing the issue in a footnote); Wm. T. Thompson Co. v. Gen. Nutrition Corp., 671 F.2d 100, 104 (3d Cir. 1982) (noting that this conflict raised "an interesting question of choice of law" which the parties did not raise, but concluding that because "[o]ne rule or the other must govern," the federal rule would control); Atteberry v. Longmont United Hosp., 221 F.R.D. 644, 646–47 (D. Colo. 2004); Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A., 160 F.R.D. 437, 441 (S.D.N.Y. 1995); Longenbach v. McGonigle, 750 F. Supp. 178, 180 (E.D. Pa. 1990) ("It is clear beyond argument that in such instances [where pendent claims are joined with state claims and there is a conflict between state and federal privileges] state law evidentiary claims of privilege do not apply.").

166. *See, e.g.*, *Hancock*, 967 F.2d at 467.

167. *See* Vanderbilt v. Town of Chilmark, 174 F.R.D. 225, 227 (D. Mass. 1997).

168. *Id.*

169. Tucker v. United States, 143 F. Supp. 2d 619, 623 (S.D. W. Va. 2001).

170. *See, e.g.*, *id.*

171. *Id.* (quoting Young v. United States, 149 F.R.D. 199, 203 (S.D. Cal. 1993)).

172. *Id.*

federal law in the event of a conflict but even this is not conclusive.[173] It is a principle of statutory construction that the subjective intent of the legislature does not control the meaning of a statute.[174] The *Shady Grove* majority observed that looking to subjective legislative intent "is an enterprise destined to produce 'confusion worse confounded.'"[175] If I am correct that a constitutional doctrine is implicated, proper statutory construction should urge a federal court to adopt an interpretation of Federal Rule of Evidence 501 that avoids an unconstitutional application.[176]

There is one final approach worth mentioning. The Eastern District of California has addressed this issue many times and concluded that federal courts should attempt to harmonize the law to respect state interests.[177] Quoting a Ninth Circuit opinion which held that "[i]n determining the federal law of privilege in a federal question case, absent a controlling statute, a federal court may consider state privilege law;"[178] one district court attempted to read the state and federal law together "in order to accommodate the legitimate expectations of the state's citizens."[179] While this approach has considerable appeal, it does not address the appropriate outcome when state and federal privileges are incompatible.

Because the majority of cases resolve the question by simply applying federal law, it begs asking why state interests are taking a back seat to federal interests? The D.C. Circuit's analysis is illustrative. Because that court viewed the basis for jurisdiction (the federal claim) to be primary, it assumed the federal interests were also primary.[180] In many cases this may be true. However, it is not difficult to imagine that litigants may prefer federal courts for reasons unrelated to the central interests sought in the litigation. Even setting *Erie* aside, where supplemental claims are joined for efficiency, state claims and state interests may be essential to the litigation. As a matter of policy, a federal court should not apply federal privilege law simply because it is more familiar with the law or because it prefers an easy-to-apply bright-line rule. True, privileges are disfavored, but federal courts who hear state claims have a duty to tread carefully around state interests as a matter of our constitutional system of dual sovereignty.

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173. *Id.* (quoting *Young*, 149 F.R.D. at 203).

174. SCALIA & GARNER, *supra* note 140, at 369–71.

175. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 404 (2010) (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941)).

176. SCALIA & GARNER, *supra* note 140, at 247.

177. *See* Hallon v. City of Stockton, No. CIV S-11-0462 GEB GGH, 2012 WL 394200, at *2 (E.D. Cal. Feb. 6, 2012).

178. *Id.* (quoting Lewis v. United States, 517 F.2d 236, 237 (9th Cir. 1975)).

179. *Id.* (quoting Pagano v. Oroville Hosp., 145 F.R.D. 683, 688 (E.D. Cal. 1993)).

180. *In re* Sealed Case (Med. Records), 381 F.3d 1205, 1213 (D.C. Cir. 2004).

V. A PROPOSAL

A federal court has discretion to deny supplemental jurisdiction of state law claims.[181] This discretion is available any time during litigation, even after trial.[182] Federal courts should exercise discretion to deny jurisdiction where the state claim is integral to the litigation, the evidence implicated is potentially outcome-determinative, and federal and state privilege law conflict. Federal courts are courts of limited jurisdiction, and not all actions are appropriate in federal court, even when jurisdiction is possible.[183] Constitutional principles constrain the application of judge-made law in federal court. Where there is doubt that supplemental jurisdiction may infringe on state sovereignty, a federal court has a duty to respect state interests. This duty is more important than the policy of judicial efficiency that supports the inclusion of supplemental claims.

This is not to say that it is never appropriate for federal courts to decide vertical conflicts for joined federal and supplemental claims. *Guaranty Trust* only restricts federal courts from applying federal law where it is outcome determinative or where, according to *Hanna*, the failure to recognize state law will lead to forum shopping and discrimination of state interests.[184] In light of this, a court facing a privilege conflict could analyze the evidence to determine whether permitting discovery and admission is likely to tip the scales in either party's favor. *Erie* is violated only when this occurs.[185]

Federal Rule of Evidence 501 was designed to respect state interests.[186] Supplemental jurisdiction provides litigants with a single forum for all related claims to promote "judicial economy, convenience, fairness, and comity."[187] But under the text of the rule granting supplemental jurisdiction, such jurisdiction is not proper where (1) the claim involves "novel or complex issue[s] of State law;" (2) the state claim substantially predominates the federal claim; (3) the district court dismissed the federal claim; and (4) "in exceptional circumstances, there are other compelling reasons for declining jurisdiction."[188] A federal court's conclusion that a privilege conflict is

181. 28 U.S.C. § 1367(c) (2018); Ameritox, Ltd. V. Millenium Labs., Inc., 803 F.3d 518, 532 (11th Cir. 2015) (citing Parker v. Scrap Metal Processors, Inc., 468 F.3d 733, 743 (11th Cir. 2006)).

182. *Ameritox*, 803 F.3d at 541.

183. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 505 (1947) (invoking the forum non conveniens doctrine).

184. *See* Hanna v. Plummer, 380 U.S. 460, 467–69 (1965); Guar. Tr. Co. of N.Y. v. York, 326 U.S. 99, 109 (1945).

185. *See Guar. Tr.*, 326 U.S. at 608–10.

186. *See* FED. R. EVID. 501; *see also supra* Part II.A (explaining the reasoning behind the enactment of Federal Rule of Evidence 501).

187. Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 (1988) (citing United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726 (1966)).

188. 28 U.S.C. § 1367(c)(1)–(4) (2018).

outcome-determinative is an "exceptional circumstance[]" which provides a "compelling reason[]" to decline jurisdiction.[189]

VI. CONCLUSION

Federal Rule of Evidence 501 governs the scope of privilege in federal courts and instructs those courts to apply federal privilege law to federal claims and state privilege law to state claims.[190] When federal and state claims are joined in litigation, and state law recognizes a privilege but federal law does not, Federal Rule of Evidence 501 offers conflicting instructions.[191] In such circumstances, a court should not automatically apply federal privilege law, as is the majority approach. Because this conflict arises as a result of judge-made law—as in, the federal court's failure to recognize the privilege—an *Erie* analysis is mandated. A federal court should resolve the inquiry by making a fact-based determination that the litigant will not be unduly prejudiced as a result of the admission of the evidence. If a court believes that failing to recognize the state privilege will affect the outcome of the litigation, the court should decline to exercise supplemental jurisdiction.

189. *Id.*
190. FED. R. EVID. 501.
191. *See supra* notes 75–86 and accompanying text (discussing the resolution of privilege conflict).