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In 1934, Congress initially authorized the Supreme Court to formally promulgate rules of evidence. For almost forty years, the Supreme Court exercised that power without incident. There was an excellent working relationship between Congress and the Court; and Congress raised no objections when the Court released the Federal Rules of Civil and Criminal Procedure. Congress' acquiescence was remarkable, since the Civil Rules in particular were highly innovative. However, that working relationship suddenly broke down in 1973 when the Supreme Court approved the proposed Rules of Evidence drafted by the Advisory Committee and transmitted them to Congress. For the first time, Congress intervened and substantially revised rules proposed by the Court.

The congressional intervention was understandable. The Watergate affair was just beginning to unfold. The affair not only made Congress jealous of its prerogatives; Congress found itself battling the President in the federal courts over claims of executive privilege. The proposed Rules included Rule 509 regulating government privilege. In the words of the District of Columbia Conference Committee, Rule 509 proposed "a shockingly broad privilege." That rule provoked more criticism than any other provision of the proposed rules.

2. Id.
3. Id.
4. Id.
9. WEINSTEIN & BERGER, supra note 7, at 509-1.
10. Id. ¶ 509[01], at 509-10.
11. Id. at 509-3.
negative\textsuperscript{12} reaction to Rule 509 was "violent."\textsuperscript{13} Given the Watergate confrontation between Congress and the President over claims of executive privilege,\textsuperscript{14} Congress decided to delay the effective date of the proposed rules, including Rule 509, for two years.\textsuperscript{15} The opposition to Rule 509 was so substantial and vehement that "in itself" it was probably "sufficient" to prompt Congress' decision.\textsuperscript{16} Both the House and Senate then held hearings on the rules.

In the hearings, the privilege provisions in Article V of the proposed rules became the primary target for criticism.\textsuperscript{17} There was a furor over Article V;\textsuperscript{18} the privilege provisions generated an enormous\textsuperscript{19} outcry.\textsuperscript{20} Even before the congressional hearings, the provisions had been an object of intense criticism. The Advisory Committee had released a preliminary March 1969 draft and a revised March 1971 draft of the rules.\textsuperscript{21} Many bar organizations submitted comments on the drafts to the committee. In both rounds of comments, the bar organizations expressed more disagreement with the privilege rules than with any other provisions.\textsuperscript{22} When Representative Podell introduced the legislation delaying the effective date of the proposed rules, he explained his reasons for doing so.\textsuperscript{23} The first consideration he mentioned was his objection to the privilege provisions.\textsuperscript{24} Even former Supreme Court Justice Arthur Goldberg appeared to testify against Article V.\textsuperscript{25} According to Judge (then Representative) Hug- gate, who chaired the House hearings, "50% of the complaints in our committee related to the [article] on privileges."\textsuperscript{26} The official Senate Judiciary Committee staff memorandum on the proposed rules labeled that article "extremely controversial."\textsuperscript{27} The Senate Judiciary Com-

\textsuperscript{12} Id.
\textsuperscript{13} Id. \textsuperscript{¶} 509(.02), at 509-14.
\textsuperscript{14} Id. \textsuperscript{¶} 509(.01), at 501-18. \textit{See also id. at 509-3} (observing that it was "a most inopportune time to require congressional acquiescence for a rule such as Rule 509").
\textsuperscript{15} Id. at 509-3.
\textsuperscript{16} Id. \textsuperscript{¶} 501(01), at 501-18.
\textsuperscript{17} Id. \textsuperscript{¶} 501(01), at 501-15.
\textsuperscript{18} Id. \textsuperscript{¶} 501(01), at 501-14.
\textsuperscript{19} 2 DAVID W. LOISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE \textsection 200, at 635 (1985).
\textsuperscript{20} WEINSTEIN \& BERGER, supra note 7, \textsuperscript{¶} 501(06), at 501-83.
\textsuperscript{21} Id. \textsuperscript{¶} 502(01) at 502-3.
\textsuperscript{23} Id. at 5-6.
\textsuperscript{24} Id. at 6-7.
\textsuperscript{25} Id. at 142-53.
\textsuperscript{26} Senate Hearing, supra note 1, at 6.
\textsuperscript{27} Id. at 356.
mittee used exactly the same language in its final report. In the
form eventually approved by Congress, the privilege article was rad-
ically revised; it was amended more extensively than any other pro-
vision of the proposed rules.

Article V dealing with privileges was not only the most contro-
sensual part of the proposed rules; in the minds of many, that article was
the most important part of the rules. Most evidentiary rules affect
only behavior in the courtroom. The rules determine whether a liti-
gant may introduce certain evidence at trial, but they have little im-
 pact on conduct outside the courtroom. Privilege rules are different. They affect prelitigation behavior such as the freedom with which
patients divulge information to their physicians; they influence every-
day activity such as the interaction between husband and wife. Privilege doctrines thus impact the conduct of citizens outside the
courtroom to a greater extent than other evidentiary rules. While other evidentiary rules focus on the institutional legal objective of ac-
accurate factfinding, privilege doctrines promote extrinsic social val-
ues. In former Justice Goldberg's words, privilege doctrine is "not
only the concern of the bar. It is the concern of the public at large."

The rub is that as important as privilege doctrine is, it is extraordi-
narily difficult for the courts to determine the content of privilege doc-
trine under the Federal Rules. As proposed by the Supreme Court,
Article V consisted of thirteen rules, including detailed rules giving
the courts affirmative guidance as to the application of such privileges
as spousal, attorney-client, and psychotherapist-patient. However,
Congress enacted only one provision, Rule 501 which now reads:

Except as otherwise required by the Constitution of the United States or pro-
vided by Act of Congress or in rules prescribed by the Supreme Court pursu-
ant 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

31. Louisell & Mueller, supra note 19, § 204, at 700.
32. Senate Hearing, supra note 1, at 88-89, 92 (testimony of Prof. J. Francis Paschal,
School of Law, Duke University).
33. Id. at 89.
34. House Hearing I, supra note 22, at 158, 172 (testimony of Charles R. Halpern and
George T. Frampton, Jr., appearing on behalf of the Washington Council of
Lawyers).
35. Louisell & Mueller, supra note 19, § 200, at 641; Wright & Graham, supra
note 6, § 5422, at 680.
36. Wright & Graham, supra note 6, § 5422, at 668.
37. Id.; Weinstein & Berger, supra note 7, ¶ 501(01), at 501-16.
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.40

The text of Rule 501 grants the courts a power to determine federal privilege law but is devoid of even a suggestion as to how the courts are to exercise that power.41 The one indisputable item of legislative history is Congress' negative refusal to enact the provisions proposed by the Court. However, the courts have traditionally been leery of relying on legislative inaction as evidence of congressional intent.42 As one state supreme court recently remarked, "Legislative inaction is a weak reed upon which to lean . . . ."43 The Supreme Court itself has cautioned that it is "slow to attribute significance" to Congress' failure to enact a piece of proposed legislation.44 There are so many possible explanations for Congress' inaction45 that the failure may be "an unreliable indicator of legislative intent."46

In light of the difficulty of this task of statutory construction, it should come as no surprise that the courts are currently badly divided over the proper interpretation of Rule 501. On the one hand, some lower federal courts have recognized privileges which were not codified in the Supreme Court's proposal; these courts have gone "well beyond" the list of privileges established at common law before the adoption of the Federal Rules.47 On the other hand, as one of the leading commentators on federal privilege law, Professor Daniel Capra, has pointed out, several federal courts have embraced the polar extreme position.48 Some have erected "a strong presumption" against the recognition of new privileges,49 and one has gone to the length of ruling that Rule 501 precludes the courts from recognizing any privi-

40. FED. R. EVID. 501.
41. WRIGHT & GRAHAM, supra note 6, § 5422, at 691.
43. People v. King, 851 P.2d 27, 38 (Cal. 1993). See also Proviso Corp. v. Alcoholic Beverage ControlAppeals Bd., 869 P.2d 1163 (Cal. 1994)("Unpassed bills have little value as evidence of legislative intent.").
47. LOUSSELL & MUELLER, supra note 19, § 201, at 647.
49. United States v. Burtrum, 17 F.3d 1299, 1302 (10th Cir. 1994); Capra, supra note 48, at 35.
lege which did not exist at common law prior to the enactment of the Federal Rules. The upshot is that privilege doctrine continues to be "the most controversial area of federal evidence law." Although the Supreme Court has handed down more decisions construing Article V than any other part of the Federal Rules, this sharp split of authority persists.

The purpose of this Article is to explore that split of authority. Part I of the Article is descriptive. It reviews the history of the privilege provisions of the Federal Rules and traces the evolution of those provisions from their initial proposal by the Advisory Committee to their final enactment by Congress.

Part II of the Article is evaluative. This Part analyzes the merits of the question of the interpretation of Rule 501. The analysis proceeds in the fashion of an Hegelian dialectic. It was the eighteenth and nineteenth century German philosopher Hegel who argued that truth can emerge from the clash of a thesis and its antithesis by yielding a synthesis incorporating the elements of truth in the thesis and antithesis. The question of the interpretation of Rule 501 lends itself to an Hegelian mode of analysis. Section II.A of this Article critiques the thesis that Rule 501 should be construed as foreclosing or discouraging the recognition of new privileges. Section II.B considers the competing antithesis that the rule permits or even encourages the courts to formulate new privileges. Finally, section II.C develops the synthesis that the context of Rule 501—the bias implicit in the other articles of the Federal Rules strongly favoring the admission of relevant evidence—compels the conclusion that the federal courts should exercise great caution in announcing new privileges. The Article concludes that the courts which champion a restrictive approach to the interpretation of Rule 501 are right but for the wrong reason.

50. Capra, supra note 48, at 35 (citing In re Grand Jury Proceedings, 867 F.2d 562 (9th Cir.), cert. denied, 493 U.S. 906 (1989)).
52. Id.
53. Capra, supra note 48, at 32.
55. ALBUREY CASTELL, AN INTRODUCTION TO MODERN PHILOSOPHY 452 (2d ed. 1963). Hegel was born in 1770 and died in 1831. 3 THE ENCYCLOPEDIA OF PHILOSOPHY 435 (Paul Edwards, ed. 1967).
56. 3 THE ENCYCLOPEDIA OF PHILOSOPHY, supra note 55, at 443-46; DURANT, supra note 54, at 295-96 ("thesis, antithesis, and synthesis").
57. Capra, supra note 48, at 35.
58. Id. at 35-36.
59. In re Dinnan, 661 F.2d 426, 429-30 (5th Cir. 1981); 23 WRIGHT & GRAHAM, supra note 6, § 5425, at 225 (1993 Supp.).
60. WRIGHT & GRAHAM, supra note 6, § 5425, at 710-11.
I. THE PAST HISTORY OF THE ENACTMENT OF ARTICLE V OF THE FEDERAL RULES OF EVIDENCE

A. The Drafting of the Proposed Rules by the Judicial Branch

In early 1961, the standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States recommended the establishment of an Advisory Committee to consider the feasibility and advisability of promulgating uniform evidentiary rules for federal courts. The Judicial Conference approved the proposal, and the Chief Justice then appointed the committee. In late 1961, the committee filed its report, advocating that the Supreme Court exercise its rulemaking authority, conferred by Congress, to formulate uniform federal evidentiary rules.

In 1965, the Chief Justice appointed an Advisory Committee to draft such rules. In March 1969, the committee submitted its preliminary draft. The draft included Article V devoted to privileges. Article V was comprised of thirteen rules. Nine of the rules concerned specific privileges: 5-02 required reports, 5-03 lawyer-client, 5-04 psychotherapist-patient, 5-05 spousal, 5-06 communication to clergypersons, 5-07 political vote, 5-08 trade secrets, 5-09 state secrets, and 5-10 identity of informer. Three other rules related to such general issues as waiver (5-11 and 5-12) and adverse comment upon a privilege (5-13).

Although the above rules attracted some attention, the most revealing rule was 5-01. Rule 5-01 read:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress, and except as provided in these rules and in the Rules of Civil and Criminal Procedure, no person has a privilege to:

(a) Refuse to be a witness; or
(b) Refuse to disclose any matter; or
(c) Refuse to produce any object or writing; or
(d) Prevent another from being a witness or disclosing any matter or producing any object or writing.

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62. Id. The conference approved the proposal at its March 13-14, 1961 session.
63. Id. at vi.
64. Id. at x. The report was filed in December 1961.
66. WEINSTEIN & BERGER, supra note 7, ¶ 502[01], at 502-3.
67. WRIGHT & GRAHAM, supra note 6, § 5421, at 647.
68. Id. § 5421, at 647-48.
69. Id. § 5421, at 648 n.2.
Even standing alone, Rule 5-01 would have had several dramatic effects. To begin with, it would have required federal courts to apply federal privilege law—even in cases in which state substantive law supplied the rule of decision. Moreover, the exceptive language in the introductory phrase of the statute would have frozen federal privilege law;70 the federal courts would have been denied the power to create new privileges.71 Since the rules nowhere codified a general medical privilege or a privilege for confidential interspousal communications, those privileges would have been abolished.72 Even though Rules 5-02 through 5-10 recognized some privileges, many of the statutory versions of those privileges were rather narrow;73 and Rule 5-01 would have curtailed the federal courts' power to expand the privileges to their pre-Federal Rules scope.74

In March 1971, the Advisory Committee released a revised draft of the rules.75 The 1971 draft retained all thirteen rules in Article V. The draft made one change in what was newly designated Rule 501.76 The draft substituted "other rules adopted by the Supreme Court" for "the Rules of Civil and Criminal Procedure" in the exceptive phrase at the beginning of the statute.77

Both drafts of Article V touched off a flurry of criticism.78 One thrust of the criticism was that it was at the very least unwise to depreciate state interests by thoroughly federalizing privilege law.79 Critics argued that if state interests were weighty enough to require the application of state substantive law, the interests also warranted the recognition of state evidentiary privileges. Another line of criticism attacked the elimination of such traditional privileges as those shielding the spousal and physician-patient relationships.80

Despite these criticisms, the Advisory Committee remained intransigent.81 The criticism did not deter the committee from forwarding the proposed rules, including the committee's version of Article V on privileges, to the Judicial Conference.82 The committee succeeded in "push[ing] Rule 501 through the Judicial Conference and the Supreme

70. Id. § 5422, at 686.
71. Id. § 5422, at 678.
72. LOUISELL & MUELLER, supra note 19, § 200, at 637; WRIGHT & GRAHAM, supra note 6, § 5422, at 686.
73. WEINSTEIN & BERGER, supra note 7, § 501(01), at 501-15.
74. LOUISELL & MUELLER, supra note 19, § 200, at 637.
75. WEINSTEIN & BERGER, supra note 7, § 502(01), at 502-3.
76. WRIGHT & GRAHAM, supra note 6, § 5421, at 651.
77. Id.
78. Id. § 5421, at 648, 651.
79. Id. § 5421, at 648-50. The related questions were whether it was constitutional to do so and whether the Rules Enabling Act authorized the courts to do so.
80. LOUISELL & MUELLER, supra note 19, § 200, at 639.
81. WRIGHT & GRAHAM, supra note 6, § 5421, at 652.
82. Id. § 5421, at 651.
Court without further change." The draft rules were sent to the Supreme Court in November 1971. A year later in November 1972, the Court approved the proposed rules by an 8-1 vote and transmitted them to Congress. The lone dissenter was Justice Douglas. He questioned whether the Court's statutory rulemaking power authorized the promulgation of evidentiary rules. Justice Douglas asserted:

There are those who think that fashioning of rules of evidence is a task for the legislature, not for the judiciary. Wigmore thought the task was essentially a judicial one . . . and I share that view, leaving the problem for case-to-case development by the courts or by Congress.

B. The Revision of the Proposed Rules by Congress

The complaints lodged during the rulemaking phase against Article V obviously did not persuade the Advisory Committee or the Court to revise the privilege provisions. However, the complaints resurfaced when the draft of the proposed rules reached Congress. As previously stated, the draft rules had the misfortune of reaching Congress when the Watergate confrontation between Congress and the President was developing. The inclusion of a broad government privilege provision, Rule 509, in Article V virtually ensured the draft a cool reception on the Hill. Legislation was quickly introduced to extend the time for congressional consideration of the proposed rules. Representative Bertram Podell of New York was one of the sponsors of the legislation. In his remarks, he cited six evidentiary issues which, in his judgment, required special congressional attention. Four of those issues related to privileges. With Watergate lurking in the background, the legislation passed easily.

After Congress acted to delay the implementation of the rules, the House and Senate held hearings on the rules.


In February and March 1973, the Special Committee on Reform of Federal Criminal Laws of the House Judiciary Committee, chaired by

83. Id. § 5421, at 652.
84. Senate Hearing, supra note 1, at 311 (testimony of Herbert Semmel, Washington Council of Lawyers).
85. COMMUNICATION, supra note 5, at v.
86. Id. at vi.
87. Id.
88. LOUISELL & MUELLER, supra note 19, § 200, at 639.
89. Id.
91. Id. at 6-7.
92. Id. at 6-7.
Representative Hungate, held hearings on the rules.\textsuperscript{93} That committee was later renamed the Subcommittee on Criminal Justice and held further hearings.\textsuperscript{94} Several themes emerged from the hearings.

One theme was sharp disagreement with the Advisory Committee's attempt to federalize privilege law. One of the most outspoken critics of the committee's draft of Rule 501 was Chief Judge Friendly of the United States Court of Appeals for the Second Circuit. He testified in the first set of House hearings.\textsuperscript{95} To be sure, he attacked several specific privilege provisions. For example, he faulted Rule 504 for omitting a general medical privilege,\textsuperscript{96} while contending that Rule 509 on government privilege and Rule 510 on informers were excessively broad.\textsuperscript{97} However, he made it abundantly clear that his "most serious objection" was to Rule 501's purported ouster of state privilege law from federal court.\textsuperscript{98} He declared that when a federal court sits "to enforce a state-created right," it would be "offensive" to disregard state evidentiary privileges.\textsuperscript{99}

The other theme—which Judge Friendly had touched upon—was the unsoundness of many of other rules in Article V dealing with particular privileges.\textsuperscript{100} As shall be seen in greater detail in section II.B, the testimony related to specific privileges was conflicting. However, as a generalization, there were several principal variations on this theme during the testimony. In some cases, witnesses argued that the Advisory Committee erred in failing to codify particular privileges, such as those for the accountant-client,\textsuperscript{101} physician-patient,\textsuperscript{102} and spousal\textsuperscript{103} relationships, and a shield law for newperson.\textsuperscript{104} In other cases, witnesses urged that the Advisory Committee had codified an unduly narrow version of a privilege. Witnesses cited the attorney-client,\textsuperscript{105} psychotherapist-patient,\textsuperscript{106} clergyperson-penitent,\textsuperscript{107} and trade secret\textsuperscript{108} privileges as illustrative. In still other cases, wit-

\textsuperscript{93} Id.
\textsuperscript{95} House Hearing I, supra note 22, at 246-65.
\textsuperscript{96} Id. at 263-64.
\textsuperscript{97} Id. at 264.
\textsuperscript{98} Id. at 263.
\textsuperscript{99} Id.
\textsuperscript{100} WeinsTeiN & BERGaR, supra note 7, ¶ 501[01], at 501-17.
\textsuperscript{101} House Hearing I, supra note 22, at 533.
\textsuperscript{102} Id. at 7, 192, 204, 242, 342, 449, 468; House Hearing II, supra note 94, at 45, 66.
\textsuperscript{103} House Hearing I, supra note 22, at 7, 204, 241.
\textsuperscript{104} Id. at 7, 240, 367-68, 544-45, 584; House Hearing II, supra note 94, at 23.
\textsuperscript{105} House Hearing II, supra note 94, at 76, 79, 89-90, 277.
\textsuperscript{106} House Hearing I, supra note 22, at 236, 449-73, 475, 499, 513.
\textsuperscript{107} House Hearing II, supra note 94, at 118.
\textsuperscript{108} Id. at 75, 79.
nesses took the position that the scope of the privilege was too broad. Rules 509 on government privilege and 510 on informers were subjected to that criticism.

When the dust settled at the end of the House hearings, it was apparent that the committee, and Chairperson Hungate in particular, agreed with Judge Friendly that the Federal Rules should not supplant state privilege law in diversity cases. In addition, the committee discovered that it was much easier to attack the specific privilege rules than to devise acceptable substitutes. The committee voted to approve a June 28, 1973 print deleting all the specific provisions rules, namely, Rules 502-13. Only Rule 501 remained, and the new print of Rule 501 read:

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: Provided, That in civil actions, with respect to 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.

This language is substantially similar to the wording finally approved by Congress.

The committee sent its draft, including the newly worded Rule 501, to the floor of the House. The House amended the bill to specifically provide that the Supreme Court could not adopt privilege rules without affirmative approval by Congress. That provision now appears in Federal Evidence Rule 1102 and 28 U.S.C. § 2074. The amended bill won House approval.

2. Senate Action on the Proposed Rules

The scene then shifted to the Senate. The Senate Committee on the Judiciary held hearings in early June 1974. Even before the hearings, there were strong inklings of Senate dissatisfaction with the

110. House Hearing I, supra note 22, at 125-27, 228, 236, 253, 264.
111. WRIGHT & GRAHAM, supra note 6, § 5421, at 654.
112. Id. § 5421, at 653.
114. WRIGHT & GRAHAM, supra note 6, § 5421, at 654 n.39.
115. Id. § 5421, at 654.
116. Id. § 5421, at 657.
117. Id. § 5421, at 658.
118. Fed. R. Evid. 1102.
120. WRIGHT & GRAHAM, supra note 6, § 5421, at 658.
121. Senate Hearing, supra note 1.
proposed rules. Several senators either testified or submitted comments during the House hearings. Judge (then Senator) Ervin noted the controversies swirling around the rules. Senators Abourezk and McClellan singled out the proposed government privilege rules for criticism.

The same themes that had surfaced in the House hearings reoccurred in the Senate hearings. Senators Abourezk and McClellan singled out the proposed government privilege rules for criticism.

The Senate hearings, though, the Senate committee found itself in general agreement with the House. Its report stated that with two notable exceptions, it agreed with the main thrust of the House amendment of the Advisory Committee's draft. One exception was the House provision requiring congressional approval of any rule changes related to privileges. The Senate substitute authorized either house to defer a Court-proposed change, but it would not have required affirmative congressional approval. The second, more important exception was the final proviso in the House version, discussing the recognition of state evidentiary privileges in federal court. The Senate committee was concerned that the language used in the House amendment was vague and therefore "could be difficult to apply." The committee report stated:

The question of what is an element of a claim or defense is likely to engender considerable litigation. If the matter in question constitutes an element of a claim, State law supplies the privilege rule; whereas if it is a mere item of proof with respect to a claim, then, even though State law might supply the rule of decision, Federal law on the privilege would apply. Further, disputes will arise as to how the rule should be applied in an antitrust action or in a tax case where the Federal statute is silent as to a particular aspect of the substantive law in question, but Federal cases had incorporated State law by reference to State law.

In the committee's opinion, the phrasing of the House bill was "pregnant with litigious mischief."

123. Id. at 388.
124. Id. at 317-23.
125. Senate Hearing, supra note 1, at 91.
126. Id. at 280-81, 356.
127. Wright & Graham, supra note 6, § 5421, at 658-59.
130. Id. at 642 n.21.
132. Id. at 12.
133. Id.
134. Id.
To remedy that problem, the Senate committee drafted its own version of Rule 501. Its draft reworded the concluding proviso to read:

"In civil actions and proceedings arising under 28 U.S.C. § 1332 or 28 U.S.C. § 1335 or between citizens of different States and removed under 28 U.S.C. § 1441(b) the privilege of a witness, person, government, State or political subdivision thereof is determined in accordance with State law, unless with respect to the particular claim or defense, Federal law supplies the rule of decision."

The Senate approved that version of Rule 501 without debate.

3. Conference Committee Action on the Proposed Rules

The Conference Committee convened to work out the differences between the House and Senate versions of the proposed rules. The committee filed its report in late 1974. The Conference Committee opted for the House version of Rule 501. The committee believed that the wording of the House version was sufficiently clear. The committee added that in cases "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." It is true that in such cases, the federal court may be applying a rule originating in state law; "but in the final analysis [in such cases] its decision turns upon the law of the United States, not that of any state." Rule 501 then took its present form, set out in the introduction to this Article.

II. AN HEGELIAN ANALYSIS OF THE IMPLICATION OF PAST HISTORY FOR THE FUTURE OF ARTICLE V OF THE FEDERAL RULES OF EVIDENCE

As Professor Capra has noted, many lower federal courts are now advancing the thesis that Rule 501 should be construed restrictively, either precluding or at least discouraging the recognition of new privileges. Following Hegel's example, the initial section of this Part of the Article critiques that thesis. The next section analyzes the antithetical, expansive view; under that view, Rule 501 encourages the formulation of new privileges or at least grants the courts full common-law power to do so. The third and final section arrives at the correct interpretation of Rule 501 by synthesizing the elements of truth in the thesis and antithesis.

A. The Restrictive Thesis

1. The View that Rule 501 Precludes the Courts from Recognizing New Privileges

At least one federal court has adopted the strict view that Rule 501 forecloses the possibility of recognizing any privilege which did not exist at common law before the adoption of the Federal Rules. As Professor Capra concedes, that view is a plausible reading of the language of Rule 501. According to the text of Rule 501, “the principles of the common law” govern federal privilege doctrine. If “principles” means “rules,” Rule 501 arguably requires the federal courts to follow the earlier, common-law privilege rules. Indeed, in the House hearings, one witness criticized the proposed wording of Rule 501 precisely because it was susceptible to this interpretation.

There is a real danger . . . that the reference to “common law principles” will be construed to deny automatically recognition of any claim of privilege not grounded in 19th Century common-law decisions.

Passages in several Supreme Court privilege decisions lend support to this interpretation. In two opinions applying the attorney-client privilege, the Court emphasized that it is “the oldest” common-law privi-

146. Id. at 35 (citing In re Grand Jury Proceedings, 867 F.2d 562 (9th Cir.), cert. denied, 493 U.S. 906 (1989)). Professor Capra observes that this view is consistent with the holdings in the cases refusing to recognize claims for novel privileges such as one for academic scholars and self-critical assessment by corporations. Id. at 36.
147. Id. at 35. See also WRIGHT & GRAHAM, supra note 6, § 5425, at 708 (noting that Rule 501 may be interpreted to mean only the American common law).
Similarly, in its decision refusing to recognize a federal privilege for official acts of state legislators, the Court noted that the privilege lacked "historical antecedents" at common law; the doctrine was not an "established" one, "indelibly ensconced in our common law."

On balance, however, this restrictive interpretation is flawed. The text and context of Rule 501 as well as the relevant extrinsic legislative history dictate the conclusion that this interpretation is unsound.

The text of Rule 501 employs the word, "principles," not "rules" or "privileges." Admittedly, "principles" is ambiguous. However, the word normally denotes a proposition at a higher level of generality than a mere rule. A narrow proposition such as the statement that the attorney-client privilege extends to a client's conversations with her attorney's aides would constitute a "rule." However, we would classify as a "principle" the more generalized proposition that a court should adjudicate privilege claims by balancing the loss of relevant evidence against the extrinsic social values promoted by the privilege. The text of many other Federal Rules uses the expression, "rules." In fact, in its final proviso, Rule 501 includes the term, "rule." When a legislature uses different terms, it is normally assumed that the legislature meant different things. Congress' selection of the term "principles" presumably indicates that it meant something other than the common-law privilege rules in effect at the time of the adoption of the Federal Rules.

The context of the term "privileges"—that is, the rest of Rule 501—is consistent with that presumption.

A useful technique in analyzing ... language ... is to redraft it twice, staying as faithful to the original as possible, so that it would clearly require a decision, first for one [legal outcome], then for the other. Which comes closer to ... the language [actually] used?

It would have been a simple matter for the drafters to word Rule 501 to state that federal privilege questions would be governed by "com-

152. Id. at 368.
153. Id. at 366.
154. Id. at 368.
156. CARLSON, supra note 8, at 732-34.
mon-law rules” or “privileges recognized at common law.” Congress chose different, lengthier language (“the principles of the common law as they may be interpreted ... in the light of reason and experience”). That choice is at odds with the assumption that Congress wanted to confine the courts to privileges which were settled fixtures at common law.

Like the text and context, the legislative history material undercuts the restrictive view. Negatively, that material demonstrates that Congress repudiated the Advisory Committee’s view that federal privilege law should be frozen. The Advisory Committee’s draft of Rule 501 would have expressly mandated that the courts recognize only the privileges codified in proposed Rules 502-10 and in other statutes. Whatever else Congress did, it rebuffed that version of Rule 501.

As the Supreme Court observed in its 1980 decision in Trammel v. United States, [i]n rejecting the proposed Rules and enacting Rule 501, Congress manifested an affirmative intention not to freeze the law of privilege. Its purpose rather was to “provide the courts with the flexibility to develop rules of privilege on a case-by-case basis,” and to leave the door open to change.

Affirmatively, the legislative history strongly suggests that Congress used the term “principles” in a methodological sense; rather than referring to a static set of common-law privilege rules, Congress meant a dynamic methodology that the courts could use to evolve privilege doctrine. Many witnesses expressed opposition to any attempt to freeze privilege doctrine. One of the leading American authorities on privilege law, the late Professor David Louisell, urged Congress to authorize the courts to use “the common law evolutionary method” to develop privilege doctrine. Other witnesses concurred, adding that that method would empower the courts to “expand on” existing privilege doctrine. Representative Holtzman, one of the most vociferous critics of the Advisory Committee’s draft, voiced her hope that the House version of Rule 501 would reinstate the common-law “tradition.”

161. Wright & Graham, supra note 6, § 5422, at 686-88.
162. Id. at 688.
165. Wright & Graham, supra note 6, § 5422, at 667.
166. Louisell & Mueller, supra note 19, § 201, at 655; Wright & Graham, supra note 6, § 5422, at 709-10.
167. Weinstein & Berger, supra note 7, ¶ 501[01], at 501-17.
169. Senate Hearing, supra note 1, at 305.
170. Wright & Graham, supra note 6, § 5422, at 689. See also Louisell & Mueller, supra note 19, § 201, at 655 (referring to the endorsement of the common law tradition).
of legal reasoning. The Senate committee report endorsed “evolved” privilege rules. Citing the Senate and House reports, the Court in Trammel v. United States declared that “[t]he Federal Rules of Evidence acknowledge the authority of the federal courts to continue the evolutionary development of testimonial privileges . . . .”

The very genesis of the language of Rule 501 shows that Rule 501 was intended to enable the federal courts to employ a dynamic common-law methodology. The language, “principles of the common law as they may be interpreted by the federal courts in the light of reason and experience,” derived immediately from Federal Rule of Criminal Procedure 26. In the note accompanying its version of Rule 501, the Advisory Committee specifically cited that language and explained why it had refused to include that language in its version. In turn, the wording of Criminal Rule 26 is traceable to the Supreme Court’s 1934 decision in Wolfe v. United States. Citing a still earlier opinion, Funk v. United States, the Court in Wolfe referred to “common law principles as interpreted and applied by the federal courts in the light of reason and experience.” The reference in Wolfe was incorporated almost verbatim into the wording of Rule 501 finally approved by Congress. In Trammel, the Supreme Court identified Wolfe as the immediate source of the key language in Rule 501. In the Funk opinion itself, the ultimate source of the language, the Court made it clear that the “principle[s]” of common law notably include a methodology. Those “principle[s]” give the common law its “characteristic” flexibility and capacity for growth and adaptation.” In the Court’s words, that methodology facilitates “progressive growth and wise adaptation.”

172. SENATE REPORT, supra note 28, at 12.
174. Id. at 47.
175. WEINSTEIN & BERGER, supra note 7, ¶ 501[01], at 501-21.
176. Id. at 501-7 to 501-8.
177. LOUISELL & MUELLER, supra note 19, § 201, at 646.
178. 291 U.S. 7 (1934).
179. 290 U.S. 371 (1933).
181. LOUISELL & MUELLER, supra note 19, § 201, at 646.
184. Id. at 383.
185. Id.
186. Id. at 382.
187. Id.
In conclusion, the restrictive view, precluding the recognition of new privileges, cannot be reconciled with the text, context, or legislative history of Rule 501.

2. The View that Rule 501 at Least Discourages the Courts from Recognizing New Privileges.

As Professor Capra has pointed out, some courts embracing the restrictive thesis have stopped short of holding that Rule 501 absolutely forecloses the recognition of new privileges. These courts take the position that Rule 501 erects "a strong presumption" against the creation of novel privileges.188 The lower federal courts have frequently blocked attempts to fashion new privileges.189 In 1990, in *University of Pennsylvania v. Equal Employment Opportunity Commission*,190 the Supreme Court avowed that it was "disinclined" to exercise its power under Rule 501 "expansively."191 The proponents of the restrictive thesis argue that Rule 501 mandates that the federal courts exercise such caution in evaluating claims of novel privileges.

However, like the view that Rule 501 altogether precludes the recognition of new privileges, this view is spurious. The view runs afool of both the text and the legislative history of Rule 501.

To begin with, the text of the rule does not state or imply that in exercising the power conferred by Rule 501, the courts are to entertain a bias against novel privilege claims. Other Federal Rule provisions state explicit biases. For example, when the judge is balancing the probative value of relevant evidence against any attendant probative dangers under Rule 403, the statute generally provides that the judge may exclude the evidence only if the probative value "is substantially outweighed by the" probative risks.192 When the question is balancing the probative value of an old conviction proffered for impeachment purposes, Rule 609(b) directs the judge to bar the evidence of whatever the witness is disinclined to answer on the ground that the answer would be damaging to him or because he claims to be privileged.

191. *Id.* at 189.
193. *Fed. R. Evid.* 609(b). A conviction is old or remote in time under the statute if "a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date." *Id.*
unless "the probative value of the conviction . . . substantially outweighs its prejudicial effect." Thus, when Congress wanted to bias the courts' exercise of discretionary powers under the Federal Rules in a particular direction, Congress often did so explicitly. Congress did not do so in the text of Rule 501.

Furthermore, this restrictive view runs afoot of the legislative history of the rule. The tenor of most of the negative comments voiced during the congressional hearings was that the Advisory Committee had gone too far in restricting evidentiary privileges. To be sure, there was some criticism of the breadth of proposed Rules 509 and 510 relating to government privilege. However, any fair reading of the House and Senate hearings demonstrates that the vast majority of the criticisms levelled against Article V faulted the Advisory Committee for cutting back on evidentiary privileges. In some cases, the witnesses took the committee to task for abolishing traditional privileges such as the medical privilege and the privilege for confidential spousal communications. Other witnesses contended that the rules embodied undesirably narrow versions of the privileges for the attorney-client, psychotherapist-patient, and clergyperson-penitent relationships. The Senate committee report cited the Advisory Committee's "controversial . . . restrictions upon common law privileges" as one of the foremost reasons for the committee's rejection of the early draft of Article V. In light of this legislative history, it is untenable to argue that Rule 501 itself decrees that the courts follow a "strong formal presumption against new privileges."

B. The Expansive Antithesis

The preceding section reviewed the position of the courts favoring a restrictive interpretation of Rule 501. Other courts prefer an expansive interpretation of the statute. This preference takes two forms.

194. Id.
195. WRIGHT & GRAHAM, supra note 6, §§ 5425, at 710. See also id. § 5422, at 690.
196. E.g., House Hearing II, supra note 94, at 122, 191.
197. House Hearing I, supra note 22, at 228, 236-37, 253, 264.
199. House Hearing I, supra note 22, at 7, 240.
200. WEINSTEIN & BERGER, supra note 7, ¶ 503[01], at 503-14 n.5.
203. SENATE REPORT, supra note 28, at 11.
204. Capra, supra note 48, at 36.
205. Note, supra note 51, at 1351.
1. The View that Under Rule 501, the Courts Should Be More Receptive to Privilege Claims Than They Were at Common Law Before the Enactment of the Federal Rules.

One form of the expansive view is that the federal courts should be more open to novel privilege claims than they were before the passage of the Federal Rules. During the House and Senate hearings, the bulk of the criticism of the Advisory Committee draft was that the draft did not go far enough in extending the protection of privileges; critics complained that the draft of Article V abolished a number of traditional privileges, drastically pruned others, and failed to incorporate some more contemporary privileges such as a shield law for journalists. Congress seemingly agreed with this criticism; and, in the minds of some commentators, that apparent agreement "suggests that Congress intended that courts should be more receptive to novel claims of privilege than they have been in the past." Again, the Senate committee report stated that in part, the Advisory Committee draft was unacceptable because it contained "controversial... restrictions" on privileges. On the House floor, one of the conferees explaining the Conference Committee version of Rule 501 stated: "The language of Rule 501 permits the courts to develop a privilege for newspaperpeople on a case-by-case basis. The language cannot be interpreted as a congressional expression in favor of having no such privilege . . . ."

Some lower federal court decisions are best explicable under this expansive view. They recognize privileges which were not accepted under the common law prevailing at the time of the adoption of the Federal Rules. The advocates of this expansive view can also find some comfort in two 1980 Supreme Court opinions construing Rule 501. In one, the Court stated that Rule 501 "provide[s] the courts with greater flexibility in developing rules of privilege." In the other de-

206. WRIGHT & GRAHAM, supra note 6, § 5425, at 710.
207. LOUISELL & MUELLER, supra note 19, § 200, at 639; WRIGHT & GRAHAM, supra note 6, § 5425, at 710.
208. WEINSTEIN & BERGER, supra note 7, ¶ 501[01], at 501-15.
209. WRIGHT & GRAHAM, supra note 6, § 5425, at 710.
210. Id.
211. Senate Report, supra note 28, at 11.
212. WRIGHT & GRAHAM, supra note 6, § 5421, at 663-64 n.73 (citing 120 CONG. REC. 40891 (1974)).
cision, the Court not only stated that Rule 501 authorizes "the federal courts [to] develop] testimonial privilege law;"\textsuperscript{215} the Court even averred that "Congress encouraged such development."\textsuperscript{216}

Although these judicial opinions and legislative materials bolster the expansive view, this view is as fallacious as the restrictive views discussed earlier. The fallacy is assuming that Congress manifested any bias on the merits of the question of whether the federal courts should be receptive or hostile to novel privilege claims. As we shall see, the most realistic reading of the legislative history is that Congress adopted a neutral stance on that question.

On the one hand, Congress undeniably reached the merits of the question of whether federal law should displace state evidentiary privileges in federal court. The Advisory Committee's draft of Rule 501 would have largely supplanted state evidentiary doctrine in federal trials. However, Congress was obviously in sympathy with the state interests underlying state evidentiary privileges.\textsuperscript{217} Congress displayed that sympathy in the text of its version of Rule 501. In the House and Senate reports, the respective committees directly addressed the merits of that question and indicated their disagreement with the Advisory Committee. The second sentence of the final version of Rule 501 expressly answers the question of when state privilege law controls.

On the other hand, neither the text, context, nor legislative history of the first sentence of Rule 501 indicates that Congress resolved the merits of the question of how liberally the federal courts should sustain privilege claims when federal privilege law controls.

The text does not manifest any congressional resolution of the merits of that question. Section II.A. pointed out that there is no language in the statutory text which requires the federal courts to erect a "strong formal presumption"\textsuperscript{218} against new privileges. It is equally true that there is no wording mandating that the courts adopt an hospitable attitude toward claims of novel privilege. The text is silent on the question; there is no explicit legislative directive for a bias in favor of either abolishing or creating privileges.

At least part of the context also supports the conclusion that there is no statutory bias in either direction. At the Conference Committee's suggestion, the package of Federal Rules legislation was amended to reinstate the House provision that any amendment creating, abolishing, or modifying a privilege rule must be affirmatively approved by an

\textsuperscript{215} Trammel v. United States, 445 U.S. 40, 47 n.8 (1980).
\textsuperscript{216} Id.
\textsuperscript{217} Louisell & Mueller, supra note 19, § 204, at 694; Wright & Graham, supra note 6, § 5421, at 653.
\textsuperscript{218} Capra, supra note 48, at 36.
act of Congress.\textsuperscript{219} The provision was originally inserted in 28 U.S.C. § 2076,\textsuperscript{220} but in 1988 the provision was shifted to 28 U.S.C. § 2074(b). The provision reads: “Any such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress.”\textsuperscript{221} On its face, the provision makes no distinction between the creation, abolition, or restriction of a privilege. It is no easier to create a privilege than it is to abolish or restrict one. Any change is treated in the same manner procedurally, and the similar procedural treatment suggests that there is no substantive policy bias in favor of creation and against abolition or restriction.

Finally, the extrinsic legislative history of the congressional deliberations over Article V demonstrates that Rule 501 does not embody the expansive view. That history includes the witness testimony in the congressional hearings and the congressional action itself. A close examination of the testimony and the congressional action undercuts the expansive view.

The proponents of the expansive view assert that during the testimony in the congressional hearings, most of the dissatisfaction expressed centered around the Advisory Committee’s attempts to abolish or restrict particular privileges.\textsuperscript{222} As a generalization, that assertion is correct. However, like many generalizations, it is an oversimplification and potentially misleading. Although the numerical majority of critical comments may have had that flavor, “no single rule promulgated by the Supreme Court provoked as strong a reaction—almost all of it negative—as did Rule 509.”\textsuperscript{223} The principal indictment of proposed Rule 509 was that it created a government privilege that was unprecedented\textsuperscript{224} in its broad scope.\textsuperscript{225}

Moreover, the proponents of the expansive view tend to oversimplify the tenor of the testimony relating to the other proposed rules. While the attacks on the Advisory Committee’s attempts to abolish and restrict privileges may have accounted for the majority of the complaints, the testimony was quite conflicting. Many witnesses simultaneously called for the expansion of some privileges and the narrowing of others.\textsuperscript{226} In addition, with the exception of proposed Rule 507 pro-

\begin{itemize}
  \item \textsuperscript{219} WEINSTEIN \& BERGER, \textit{supra} note 7, at 501-5.
  \item \textsuperscript{220} Id.
  \item \textsuperscript{221} 28 U.S.C. § 2074(b)(1988).
  \item \textsuperscript{222} WRIGHT \& GRAHAM, \textit{supra} note 6, § 5425, at 710.
  \item \textsuperscript{223} WEINSTEIN \& BERGER, \textit{supra} note 7, at 509-3. \textit{See also} House Hearing II, \textit{supra} note 94, at 118 (”Rule [509] has undergone more discussion . . . than any other Rule or Privilege.”).
  \item \textsuperscript{224} House Hearing I, \textit{supra} note 22, at 191.
  \item \textsuperscript{225} WEINSTEIN \& BERGER, \textit{supra} note 7, ¶ 509[01].
\end{itemize}
testing the secrecy of votes, there was some testimony complaining about the excessive breadth of every proposed privilege. For instance, witnesses attacked the allegedly broad scope of proposed Rules 502 (required reports), 503 (attorney-client), 504 (psychotherapist-patient), 505 (spousal), 506 (clergyperson), and 508 (trade secret). For that matter, there were some witnesses who argued that the scope of proposed Rules 509 (government privilege) and 510 (informers) was too narrow. To further complicate matters, some witnesses complained that at once, a particular privilege was too narrow in some respects while overly broad in others. In short, the tenor of the testimony was mixed. It is misleading to assert that there was any consensus among the witnesses on the merits that the scope of privileges should be expanded; based on the content of the witnesses' testimony, the only incontrovertible assertion possible is that there was an impressive amount of controversy among the witnesses.

As the hearings progressed and it became increasingly clear that Congress would jettison proposed Rules 502-13, witnesses began commenting on Congress' obvious intent to avoid taking a position on the merits of the question of a policy bias either for or against the creation of new privileges. Early in the second set of House hearings, one witness alluded to the widespread impression that Congress was about to abandon all the specific rules in Article V "in order to avoid conflict between Congressmen." Later in the same hearings, a representative of the Advisory Committee asserted that it appeared that Congress was inclined to adopt a temporary "expedient" approach.

The witnesses in the subsequent Senate hearings were equally blunt. One witness asserted that draft Rule 501 was a transparent attempt by Congress to avoid taking a policy stand on "difficult policy questions." In his words, the draft represented an effort to "side-

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228. House Hearing I, supra note 22, at 243, 415, 420, 483, 503; Senate Hearing, supra note 1, at 220, 251-52, 307-08.
229. House Hearing I, supra note 22, at 50-51, 276, 282; Weinstein & Berger, supra note 7, ¶ 504[02], at 504-15.
231. Id. at 51, 92.
233. Id. at 44, 322, 327, 340-41; House Hearing II, supra note 94, at 51-52.
235. E.g., House Hearing II, supra note 94, at 50-51.
236. See Wright & Graham, supra note 6, § 5421, at 658 ("[T]he Senators were undoubtedly impressed by the amount of controversy . . . ").
238. Id. at 293.
239. Senate Hearing, supra note 1, at 217.
step" the questions.\textsuperscript{240} Another witness stated that he understood that Congress had "sound political reasons" for preferring Rule \textsuperscript{241} 501.\textsuperscript{242} He characterized the adoption of Rule 501 as a "politic" course of action.\textsuperscript{243}

More importantly, several aspects of the congressional action indicate that Rule 501 was not intended to address the merits of the question of whether the courts should be receptive to novel privilege claims. When the House committee sent its draft to the floor, it did so "under an unusual rule that did not permit amendments."\textsuperscript{244} When asked to justify the extraordinary procedure, Representative Bolling explained that the procedure was necessary since the draft amounted to a compromise "that could easily blow up all over the place if amended."\textsuperscript{245}

Representative Hungate appeared as a witness in the Senate hearings. He frankly cautioned the Senate committee that the topic of privileges was "a very difficult matter."\textsuperscript{246} The House hearings had convinced him that "when you open this up, the social workers and the piano tuners want a privilege."\textsuperscript{247} Before formal action by the Senate committee, its staff prepared a memorandum for the committee.\textsuperscript{248} Echoing Representative Hungate, the memorandum stated that the entire subject of privileges had proven "extremely controversial."\textsuperscript{249} By way of example, the memorandum asserted that the medical privilege proposal "seemed to satisfy no one."\textsuperscript{250} The memorandum urged the adoption of Rule 501, "[i]n since it was clear that no agreement was likely to be possible as to the content of specific privilege rules, and ... the inability to agree threatened to forestall or prevent passage of an entire Rules package."\textsuperscript{251} The final Senate report approvingly quoted these passages from its staff's memorandum.\textsuperscript{252}

Perhaps some would say that Congress was guilty of political cowardice.\textsuperscript{253} However, political naiveté can get in the way of realistic

\begin{footnotes}
\item 240. Id. at 218.
\item 241. Id. at 193.
\item 242. Id.
\item 243. Wright & Graham, supra note 6, § 5421, at 657.
\item 244. Id. at 657-58 (citing 120 Cong. Rec. 1408 (1974)).
\item 245. Senate Hearing, supra note 1, at 6.
\item 246. Id.
\item 247. Id. at 355.
\item 248. Id. at 356.
\item 249. Id.
\item 250. Id. at 356-57.
\item 251. Senate Report, supra note 28, at 6.
\item 252. Such political cowardice may likely explain legislative inaction. Mengler, supra note 45, at 266. See also Louisell & Mueller, supra note 19, § 204, at 708-09 ("Unquestionably there were additional reasons behind the congressional action—. . . plain political pressure.").
\end{footnotes}
interpretation of legislative history material. During the hearings on the proposed rules, Congress discovered how terribly difficult it would be to redraft the privilege provisions. As the Senate staff memorandum observed, "it was clear that no agreement was likely to be possible as to the content of specific privilege rules" in the foreseeable future. It was not only evident that an attempt to reach agreement might substantially delay the implementation of the other less controversial articles of the proposed rules, Congress also had other major challenges to attend to, such as Watergate and the aftermath of the Vietnam war. The most sensible conclusion is that Congress understandably decided to adopt Rule 501 as a rational legislative choice or a weak political compromise without resolving the merits of the substantive policy question.

2. The View that Under Rule 501, the Federal Courts Are as Free as They Were at Common Law Before the Adoption of the Federal Rules to Recognize New Privileges.

The preceding paragraphs establish that Rule 501 does not incorporate the extreme expansive view that the federal courts are positively encouraged to formulate new privileges. However, the advocates of an expansive interpretation have a fallback position. They can contend that at the very least, Rule 501 preserves the courts' pre-Federal Rules, common-law power to create new privileges. At first blush, that contention squares nicely with both the text of Rule 501 and its legislative history. The text of the rule refers to "the principles of the common law." The text does not indicate any intent to diminish the courts' pre-Federal Rules power; and absent such an indication, statutes are ordinarily construed as leaving the common law intact. One witness in the Senate hearings opined that the enactment of Rule 501 would "leave[] the law of privilege in the

254. Wright & Graham, supra note 6, § 5421, at 653-54.
255. Senate Hearing, supra note 1, at 356.
256. See Weinstein & Berger, supra note 7, at 509-3.
257. Note, supra note 51, at 1350.
258. See Louise & Mueller, supra note 19, § 201, at 669 (stating that the congressional reports did not take issue "with the merits of the proposed version in formulating federal law"); Wright & Graham, supra note 6, § 5422, at 691 (stating that Congress granted the courts powers under Rule 501 "without any attempt to suggest how those powers should be exercised").
federal courts as it presently exists." The House report stated that Rule 501 “left the law of privileges in its present state.” When Representative Hungate testified before the Senate committee, he explained that the intent of the House drafters was that “the law of privilege[ ] is left where we found it.” The Senate staff memorandum described Rule 501 as “leaving the law in its current condition to be developed by the courts,” and the final Senate report adopted that precise description of the impact of Rule 501. Hence, it would appear that the plain meaning of Rule 501 is that the courts have the same freedom to frame new privileges which they enjoyed before the adoption of the Federal Rules.

However, as the Supreme Court has stressed, “the meaning of statutory language, plain or not, depends on context.” It has been stated that under Rule 501, the federal courts possess “common law-making powers.” However, that statement is plainly false. The courts no longer exercise an inherent common-law power unfettered by legislative constraints. Rule 501 is a statute. Thus, the courts are exercising a delegated legislative power. The delegation takes the form of a statute, a legislative act which is part of a larger statutory scheme. Rule 501 must be interpreted in context. Under “the whole act” maxim of statutory construction, in interpreting a particular statutory provision, the court must consider the entire statu-

261. Senate Hearing, supra note 1, at 305.
262. WRIGHT & GRAHAM, supra note 6, § 5422, at 690-91.
264. Senate Hearing, supra note 1, at 6. See WEINSTEIN & BERGER, supra note 7, ¶ 501[01], at 501-20.
265. Senate Hearing, supra note 1, at 357.
266. SENATE REPORT, supra note 28, at 6.
268. Note, supra note 51, at 1340.
269. WRIGHT & GRAHAM, supra note 6, §§ 5422, 5425, at 690, 711.
271. ESKRIDGE & FRICKEY, supra note 42, at 645-46.
HEGELIAN APPROACH TO PRIVILEGES

Like any other statute, Rule 501 must be interpreted contextually. When Albert Jenner, Jr., the chair of the Rules of Evidence Advisory Committee, appeared in the House hearings, he testified that Article V had to be viewed in the context of the overall "philosophy" of the rules. In 1989, in United States v. Zolin, the Supreme Court in effect applied "the whole act" maxim to the interpretation of Rule 501. In that case, the question presented was an aspect of the attorney-client privilege. To resolve the question, the Court read Rule 501 in light of other provisions of the Federal Rules of Evidence.

What insight can the context—the other provisions of the Federal Rules of Evidence—give into the correct interpretation of Rule 501? A review of the context demonstrates that in those other articles, Congress has increased the value attached to the factor the courts must balance under Rule 501 against the extrinsic values fostered by privileges: the norm that it is undesirable to exclude relevant, reliable evidence. As Mr. Jenner told Congress, the underlying "philosophy" of the Federal Rules places a premium on that norm.

The philosophy is evident in Article IV. Article IV begins with a trilogy of statutes, Rules 401 through 403, reflecting the heightened emphasis on the norm that the trier of fact should hear relevant, reliable evidence. Rule 401 incorporates an exceptionally broad definition of "relevant" evidence. Other evidence statutes such as California Evidence Code section 210 require that to be relevant, an item of evidence must pertain to a "disputed" issue in the case. The text of Rule 401 omits even that requirement. Rule 402 reinforces the empha-


276. Id. at 565-66, 568 (relying on Rules 104(a) and 1101(c) as well as Rule 501).


278. CAL. EVID. CODE § 210 (West 1966) (stating that the evidence must pertain to "any disputed fact that is of consequence to the determination of the action").

ysis by impliedly abolishing uncodified exclusionary rules of evidence.\textsuperscript{280} Rule 403 completes the trilogy; that rule gives the trial judge discretion to exclude relevant evidence only when the incidental probative dangers substantially outweigh the probative worth of the evidence.\textsuperscript{281} Albert Jenner told Congress that the "thrust" of rules such as Rule 403 was to "place the burden on he who seeks the exclusion of relevant evidence."\textsuperscript{282} In its 1988 decision dealing with evidence of an accused's uncharged crimes,\textsuperscript{283} the Supreme Court read the legislative history of still another Article IV statute, Rule 404, as manifesting an intent "to 'plac[e] greater emphasis on admissibility . . . .'"\textsuperscript{284}

The same bias favoring the admission of relevant evidence spills over into Article VI. The first sentence of Rule 601 sets the tone for the article by announcing that "[e]very person is competent to be a witness except as otherwise provided in these rules."\textsuperscript{285} Congress approved the rule's first sentence without the slightest change even though the accompanying Advisory Committee Note avowed the revolutionary intent to "eliminate[ ] all grounds of incompetency not specifically recognized in the succeeding rules of this Article."\textsuperscript{286} Rule 608 broadened the admissibility of impeaching evidence of a witness' untruthfulness by permitting the admission of opinion as well as reputation testimony.\textsuperscript{287} For its part, Rule 613 relaxed the standards for the introduction of evidence of a witness' prior inconsistent statements.\textsuperscript{288}

In the same vein, Article VII dealing with opinion testimony mirrors a greater stress on the admissibility of relevant, reliable evidence. In its celebrated 1993 decision, \textit{Daubert v. Merrell Dow Pharmaceuticals, Inc.,}\textsuperscript{289} the Supreme Court not only held that Rule 702 over-


\textsuperscript{282} \textit{House Hearing I, supra} note 22, at 87 (statement of Albert E. Jenner, Jr.).


\textsuperscript{284} \textit{Id.} at 688.

\textsuperscript{285} \textit{Fed. R. Evid.} 601.

\textsuperscript{286} \textit{Id.} at advisory committee's note.

\textsuperscript{287} Edward J. Imwinkelried, \textit{et al., Courtroom Criminal Evidence} § 707, at 186-87 (2d ed. 1993).

\textsuperscript{288} \textit{Id.} § 711, at 201-04.

\textsuperscript{289} 113 S. Ct. 2786 (1993).
turned the traditional, conservative general acceptance test for the introduction of scientific evidence; the Court also highlighted "the 'liberal thrust' of the Federal Rules" and "the Rules' permissive" character. Rule 703 also lowers barriers to the admission of relevant expert testimony. At early common law, an expert generally had to have personal, firsthand knowledge of the facts in the case which she was asked to evaluate; the only other option was to invite the expert to opine based on a hypothetical question and introduce independent evidence to prove up every element of the hypothesis. Rule 703 reformed that practice by allowing the expert to rely on hearsay reports when it is the customary practice of her specialty to do so. Lastly, Rule 704 laid to rest the ultimate fact prohibition which sometimes blocked the introduction of otherwise admissible opinions.

Like Articles IV, VI, and VII, Article VIII evidences greater receptivity to relevant, trustworthy testimony, in this case, hearsay. It was in an Article VIII case, *Beach Aircraft Corp. v. Rainey*, that the Court initially characterized the Federal Rules as having a "liberal thrust." In the same opinion, the Court alluded to the Rules' "general approach of relaxing the traditional barriers" to the admission of relevant evidence. Article VIII's provisions codify several hearsay exceptions which were distinct minority doctrines at common law. Furthermore, Article VIII liberalized the scope of some exceptions which had won common-law recognition.

A relevance bias is likewise implicit in Article IX of the Federal Rules. At common law, many jurisdictions imposed special, rigid restrictions on the authentication of certain types of evidence such as


292. Id. § 5-5(C), at 148-155.

293. Id. § 5-7, at 156-59.


295. Id. at 169.

296. Id.


tape recordings.\textsuperscript{299} Out of a fear of tampering, these courts demanded "extraordinarily detailed foundations."\textsuperscript{300} In contrast, Rule 901(a) states a minimal authentication standard; the test is merely whether the proponent has introduced "evidence sufficient to support a finding that the matter in question is what its proponent claims."\textsuperscript{301} The Federal Rules hence overturn these common-law restrictions.\textsuperscript{302}

Article X, codifying the best evidence rule, fits the same liberal mold. The Federal Rules loosened several of the strictures of the common-law best evidence rule. For instance, they expanded the definition of both "original"\textsuperscript{303} and "duplicate."\textsuperscript{304} Even if the proffered evidence does not fall within either definition, it may be easier to introduce secondary evidence; Article X codifies broad versions of several of the excuses for non-production. For example, Rule 1005 codifies an especially broad version of the excuse that the original writing is in official custody.\textsuperscript{305} Rule 1005 applies to private "document[s] authorized to be recorded or filed and actually recorded or filed"\textsuperscript{306} in addition to government documents.

In summary, as one of the witnesses in the Senate hearings testified, the Federal Rules display a definite "bias in favor of admissibility."\textsuperscript{307} That bias is "perhaps the predominant theme"\textsuperscript{308} of the statutory framework. The pattern in Articles IV and VI through X is unmistakable. The content of those articles bespeaks the twin assumptions that the primary objective of the judicial system is accurate fact-finding\textsuperscript{309} and that for the most


\textsuperscript{300} Id.

\textsuperscript{301} \textit{FED. R. EVID.} 901(a).


\textsuperscript{303} Id.

\textsuperscript{304} \textit{Id.} \$ 1505, at 429-30.

\textsuperscript{305} \textit{Id.} \$ 1515, at 437-38.

\textsuperscript{306} \textit{FED. R. EVID.} 1005.

\textsuperscript{307} Senate Hearing, supra note 1, at 246.

\textsuperscript{308} Id.

\textsuperscript{309} Trammel v. United States, 445 U.S. 40, 50 (1980)(stating "the normally predominant principle of utilizing all rational means for ascertaining truth."); \textit{In re Din nan}, 661 F.2d 426, 427 (5th Cir.) ("The basis of justice is truth and our system frowns upon impediments to ascertaining that truth."); \textit{cert. denied}, 457 U.S. 1106 (1981); \textit{WRIGHT & GRAHAM}, supra note 6 \$ 5422, at 209 n.64 (1993 Supp.) (citing \textit{In re International Horizons, Inc.}, 689 F.2d 996, 1005 (11th Cir. 1982)("Truth is might above all things."); \textit{id.} at 677 (stating the Progressive ideal that "the truth comes first"). \textit{But see WEINSTEIN & BERGER, supra note 7, \$ 501[01], at 501-15 to 16 ("Numerous comments questioned the Advisory Committee's basic assumption that the goal of judicial truth-finding is superior to the extrinsic social values served by privileges.").
part, the admission of relevant, reliable evidence furthers that objective. Those assumptions should influence the manner in which the courts exercise their power under Rule 501.

C. The Contextual Synthesis

As section II.B demonstrated, the most realistic assessment of the text and legislative history of Rule 501 is that for political reasons, Congress chose not to reach the merits of the question of whether the courts should be receptive or hostile to privilege claims. Rather, Congress adopted a political compromise. In Rule 501 itself, Congress prescribed only a methodology for the courts to use to answer the question; Congress codified the common-law principle that a court should evaluate a privilege claim by balancing the loss of probative evidence against the extrinsic values fostered by privileges. In Trammel in 1980, the Court had to determine the extent to which Rule 501 furnishes privilege protection for the marital relationship. To make that determination, the Court resorted to classic common-law methodology and explicitly applied a balancing test.

Although Rule 501 furnishes the procedural methodology for adjudicating privilege claims, its context—the other articles of the Federal Rules—supplies a substantive policy bias favoring the admission of relevant, reliable evidence. The invocation of a privilege can bar the introduction of such evidence, and the loss of that evidence is the social cost of recognizing the privilege. The Federal Rules of Evidence have a built-in bias against that type of loss. As has been shown, however, that bias does not derive from the legislative history of Rule 501 itself; rather, it emanates from Rule 501's neighbors, Articles IV and VI through X. Rule 501 in effect requires the judge to weigh the competing interests on a scale; but Congress has placed a thumb on the relevance side of the scale and tipped it in favor of the admission of probative evidence.

In several cases, the Supreme Court has implicitly adopted this reasoning. In one passage in Trammel, the Court indicated that Rule

310. Of course, it is facile to assume that the introduction of additional evidence always promotes that objective. See Kenneth W. Graham, Jr., "There'll Always Be an England": The Instrumental Ideology of Evidence, 85 Mich. L. Rev. 1204, 1211 (1987). Some evidence comes attended by serious probative dangers that the jury will misuse the evidence and impede the search for truth. In effect, Federal Rule of Evidence 403 is an attempt to identify the point of diminishing returns—the point at which the admission of additional evidence runs counter to the objective.


312. Senate Hearing, supra note 1, at 308 (citing "the proper balance").


314. Id. at 51.
501 was the controlling provision of the Federal Rules. However, in another passage—without citing any Rule 501 legislative history—the Court declared that privileges must be strictly construed and accepted "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." A decade later in its 1990 decision, University of Pennsylvania v. Equal Employment Opportunity Commission, the Court stated that "we are disinclined to exercise" the Rule 501 "authority expansively." As in Trammel, the Court did not cite any Rule 501 legislative history discouraging the courts from expansively exercising Rule 501 powers. The point is that there is no such history. In Rule 501 itself, Congress adopted a neutral stance on the substantive policy question. However, perhaps instinctively, the Court has appreciated that there is a policy bias, originating from the context of Rule 501.

This position is an Hegelian synthesis. The proponents of the expansive view are partially right. Congress did not freeze federal privilege law. Rule 501 does not preclude the recognition of novel privileges, and its legislative history lacks a clear manifestation of congressional intention to even discourage recognition of such claims. However, the advocates of the restrictive view are partially right. To be sure, it would be wrong-minded for the courts to embrace the extreme restrictive view foreclosing new privilege claims. However, the advocates of the more moderate restrictive view are correct; there is a substantive policy bias against fashioning new privileges. They are right, though, for the wrong reason. While they strain to find that policy bias in the history of Rule 501, the policy has another, different source, the context of Rule 501.

III. CONCLUSION

To a greater extent than most philosophers, Georg Hegel was concerned with history. He had written, for example, that although he greatly admired Plato's work, in Hegel's day history made it impossible to be a Platonist. The most epochal events of Hegel's time—the collapse of the French Revolution and the advent of "heavy-handed" tyrannies in its wake—had convinced him that history could be a

315. Id. at 47.
316. Id. at 50 (citing Elkins v. United States, 364 U.S. 206, 234 (1960)).
318. Id. at 189.
319. 3 THE ENCYCLOPEDIA OF PHILOSOPHY, supra note 55, at 436.
320. Id.
321. CASTELL, supra note 55, at 451-52.
slaughter bench," and his own painful, personal experience reinforced that conviction. As a consequence of his interest in history, Hegel would probably have found it appropriate to apply his dialectical method to evaluate the history of Rule 501. The application of that method yields synthesis detailed in section II.C. Construing Rule 501 in the context of the policy bias implicit in Articles IV and VI through X, the federal courts should exercise caution in adjudicating privilege claims.

This cautionary note does not sound a death-knell for privileges in general or even for novel privileges in particular. The most fundamental common-law principle codified in Rule 501 is that the courts must determine privilege claims by the method of balancing the loss of probative evidence against the social value of the extrinsic policies fostered by the privilege. That principle does not authorize, much less compel, the courts to disregard or depreciate the extrinsic social values which are the raison d'être of privileges.

Those values fall into two broad categories. One category includes instrumental or utilitarian justifications for privileges. These justifications argue that privileges should be recognized as a means to the end of promoting certain types of out-of-court conduct such as candid consultations between patients and their physicians and clients and their attorneys. In the short term, the policy bias codified in the other articles of the Federal Rules will make it difficult to construct a case under Rule 501 that the courts should formulate new privileges based on this type of justification. A growing body of empirical research has called into question the underlying assumption that the existence of privileges has a significant impact on the out-of-court behavior of actors such as patients and clients.

The very weakness of the instrumental justifications makes the second category of extrinsic values all the more important. That category of justification includes "humanistic" rationales which treat privi-
leges as corollaries to the rights to privacy and personal autonomy. During the first set of House hearings, Professor Charles Black wrote to the committee. In his letter, he highlighted the role which privileges play in protecting citizens from "invasion of . . . human privacy." He argued that society's ethical sense of "decency" necessitates the recognition of privileges. In the long term, the federal courts' gauge of that sense may shape the future of privileges. Relying, in the words of Rule 501, on their "reason" and "experience," individual judges will have to assess the importance which American society attaches to that extrinsic social value. That assessment will enable the judge to adjust the Rule 501 balancing test to safeguard the freedom of citizens from invasions of privacy.

As a German idealist, Hegel championed the freedom of the mind. He not only personally prized that value; he thought that one of the essential functions of the state was to guarantee that freedom. As a former theological seminary student, Hegel was committed to the ethical sense to which Professor Black appealed. Hegel might well approve if the federal courts ultimately turn to such "ethical and moral considerations" as the extrinsic values to balance and protect under Rule 501.

329. Wright & Graham, supra note 6, § 5425, at 710-11. See also LoiSELL & MUELLER, supra note 19, § 201, at 656-59 (discussing the value of individual privacy to the spousal confidential communication privilege).
330. House Hearing I, supra note 22, at 240-44.
331. Id. at 242.
332. Id.
333. 3 The Encyclopedia of Philosophy, supra note 55, at 435-36.
334. Id. at 436; Castell, supra note 55, at 456-57.
335. 3 The Encyclopedia of Philosophy, supra note 55, at 442; Castell, supra note 55, at 463.
336. 3 The Encyclopedia of Philosophy, supra note 55, at 435; Durant, supra note 54, at 293.
337. LoiSELL & MUELLER, supra note 19, § 210, at 656.