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RECENT DECISIONS

EVIDENCE LAW—THE PSYCHOTHERAPIST-PATIENT PRIVILEGE IN FEDERAL COURTS

At the cornerstone of our judicial system is the belief that the trier of fact must have access to all relevant information in order to make a fair and accurate determination on the merits of each case. Since evidentiary privileges have the effect of withholding information from the court, they "are not lightly created nor expansively construed, for they are in derogation of the search for truth." The extent to which information should be deemed privileged has been the subject of continuing debate and disagreement. One specific privilege that has recently received attention is the psychotherapist-patient privilege.

The common law generally did not afford protection against disclosure of psychotherapist-patient communications, and state legislation has been the predominant method of affording the privilege in state courts. In 1975, Congress enacted comprehensive rules of evi-

1 For more than three centuries a fundamental maxim of the law has been that the public (in the words sanctioned by Lord Hardwicke) "has a right to every man's evidence." 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2192 (McNaughton rev. 1961); see Branzburg v. Hayes, 408 U.S. 665, 688 (1972); United States v. Bryan, 339 U.S. 323, 331 (1950).


dence for federal courts which included a general privilege rule, Rule 501. The rule provides that determination of privilege questions shall be governed by the principles of the common law except that in civil cases involving a claim or defense to which state law supplies the rule of decision, the privilege is to be determined according to state law. As Professor Wright has noted, the case law is in "considerable confusion."

This comment focuses on the psychotherapist-patient privilege in federal courts. Parts I and II examine privileges generally and the psychotherapist-patient privilege in particular. Part III, after having concluded that this relationship merits protection, discusses Rule 501 of the Federal Rules of Evidence. Since the courts have not agreed on the proper application of Rule 501, Part III also focuses on the legislative history of the rule in an attempt to ascertain the congressional intent that lies behind it. Part IV then analyzes the recent federal cases addressing the issue, particularly those cases in which federal law governs, to determine the trend of the law on psychother-

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5 Rule 501 as enacted reads as follows:

Rule 501. General Rule

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

FED. R. EVID. 501.

6 S. SALTZBURG & K. REDDEN, supra note 3, at 234.
apist-patient privilege. In conclusion, this comment suggests that the psychotherapist-patient relationship merits protection and can be best protected by a specific privilege rule. The legislative history of Rule 501 indicates that Congress, in rejecting the specific psychotherapist-patient privilege proposed by the Supreme Court in Rule 504 and in providing for case-by-case development of privilege rules, did not intend to freeze the law of privileges or to preclude submission of a new psychotherapist-patient rule. Since present Rule 501 has been inconsistently applied by the federal courts and leaves protection of confidential communications largely to the discretion of the trial judge, enactment of a specific psychotherapist-patient privilege rule is advisable.

I. Privileges Generally

A testimonial privilege is a "rule that gives a person a right to refuse to disclose information to a tribunal that would otherwise be entitled to demand and make use of that information in performing its assigned function."[7] In other words, a privilege allows a person to withhold from a court information which might otherwise be sufficiently relevant and accurate to justify its admission into evidence.

Since decisions on privileges may affect a person’s right to privacy[8] and to a fair trial, they have serious ramifications for both systemic interests and individual rights. Of course, making all relevant information available to the courts—that is, denying all privileges—would facilitate adjudication of issues. But granting privileges serves to promote other societal interests which may outweigh the interest in adjudicating issues.[9] The decision whether to grant a privilege is,

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7 23 C. Wright & K. Graham, Federal Practice and Procedure § 5422 (1980). Of course, as Professor Wright points out, a privilege may include the right to prevent another person from disclosing the information or may give its possessor the right to refuse to become a witness. Id. at 667 n.5.

8 [P]rivacy entails voluntary control over the extent of one’s intellectual isolation and a secure ability to control how much information is disseminated about oneself, as well as the scope and circumstances of its communication.

... Individuals constantly seek a balance between personal secrecy and social participation. The right of privacy permits them to seek their own balance without being forced to choose between the extremes of total secrecy or total disclosure. By providing individuals with a tool to control the limits of the dissemination of personal information they choose to disclose, testimonial privileges serve as important protectors of the right of privacy.


9 Privileges are important, according to Professor Louisell, because
in the final analysis, the outcome of a delicate balancing test, in which individual rights are weighed against a court's right and need to know the truth.

With respect to individual rights, privilege rules attempt to protect two broad areas—confidential professional relationships and an individual's zone of privacy. These areas are interrelated and they may or may not be present in any of the relationships where a privilege is asserted. Both arise in the setting of the psychotherapist-patient relationship.

II. The Psychotherapist-Patient Privilege

For the purposes of this article, the term "psychotherapist" includes psychiatrists, psychologists, psychotherapists, and licensed or certified counselors, as well as physicians to the extent that they serve their patients in a counseling capacity. Where it is recognized, a psychotherapist-patient privilege protects the confidential communications between a psychotherapist and his patient by assuring that the historic privileges of confidential communication protect significant human values in the interest of the holders of the privileges, and the fact that the existence of these guarantees sometimes results in the exclusion from a trial of probative evidence is merely a secondary and incidental feature of the privileges' vitality. These convictions contrast with much recent thinking which regards the privileges chiefly from the viewpoint of their exclusionary function in litigation, and deprecates their social and moral significance and worth.


10 Green and Nesson classify privileges into two distinct types. The first is based on the professional counseling relationship between the holder of the privilege and the individual for the purpose of fostering the effective rendering of the professional service. Privileges of this type include the lawyer-client, physician-patient, and priest-penitent as well as the accountant-client, social worker-client, and stockbroker-client. The second type seeks to throw a veil of secrecy around specific zones of privacy to protect individual autonomy and human dignity. The marital privilege and the privilege against self-incrimination are the most common of this type. E. Green & C. Nesson, Problems, Cases and Materials on Evidence 525-26 (1983). The underlying rationales for the privileges are unchanged whether privileges are treated broadly as protecting these two areas or classified into the two types as Green and Nesson have.

11 Some other areas in which privileges have been asserted include: newsmen and their sources, see Branzburg v. Hayes, 408 U.S. 665 (1972); researchers and their sources, see United States v. Doe, 460 F.2d 328 (1st Cir. 1972), cert. denied sub nom. Popkin v. United States, 411 U.S. 909 (1973); draft counselors and their clients, see In re Verplank, 329 F. Supp. 433 (D.D. Cal. 1971); Rosenblatt v. Northwest Airlines, Inc., 54 F.R.D. 21 (S.D.N.Y. 1971); Harris v. United States, 413 F.2d 316 (9th Cir. 1969); insurance companies and their insureds, see Gottlieb v. Bresler, 24 F.R.D. 371 (D.D.C. 1959); and accountants and their clients, see United States v. Wainwright, 413 F.2d 796 (10th Cir. 1969), cert. denied, 396 U.S. 1009 (1970); Himelfarb v. United States, 175 F.2d 924 (9th Cir. 1949); United States v. Schmidt, 343 F. Supp. 444 (M.D. Pa. 1972). S. Saltzburg & K. Redden, supra note 3, at 246.
psychologist cannot be compelled to divulge the communications in court.

Some federal courts have mistakenly equated the psychologist-patient privilege with the physician-patient privilege and immediately dismissed the former as unnecessary. The common law did not recognize a physician-patient privilege because "the considerations which relate to physicians and their patients do not require that an exception should be made to the general liability of all persons to give testimony upon all facts that are the subject of legitimate inquiry in the administration of justice." But there are two fundamental differences between the two relationships which require that they be treated separately.

First, the differing contexts in which the information becomes the subject of judicial inquiry suggest that the patient receiving psychiatric treatment requires more protection. Second, a patient's communications with his physician generally are not as potentially damaging as those with his psychotherapist. In fact, the very nature of the communications between psychotherapist and patient is such that confidentiality is critical to the patient, the psychotherapist, and society.

The information a physician has about his patient is usually not


14 Professor Wigmore formulated four tests as criteria for the validity of a privilege, saying that a negative answer to any one of the tests would leave the privilege without support. They are: (1) Does the communication in the usual circumstances of the given professional relation originate in a confidence that it will not be disclosed? (2) Is the inviolability of that confidence essential to the achievement of the purpose of the relationship? (3) Is the relation one that should be fostered? and (4) Is the expected injury to the relation, through the fear of later disclosure, greater than the expected benefit to justice in obtaining the testimony? 8 J. WIGMORE, supra note 1, § 2285. Wigmore contended that the physician-patient relationship succeeded only on the third test and therefore ought not to be privileged. Id. §§ 2380-91. Most legal scholars agree. See, e.g., Chafee, Privileged Communications: Is Justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand?, 52 YALE L.J. 607 (1943); Curd, Privileged Communications Between the Doctor and his Patient—An Anomaly of the Law, 44 W. VA. L.Q. 165 (1938).

Several writers have noted, however, that Wigmore's four tests are satisfied in the context of psychotherapist-patient relations. See, e.g., Slovenko, Psychiatry and a Second Look at the Medicat Privilege, 6 WAYNE L. REV. 175 (1960), cited in FED. R. EVID. 504 advisory committee note; see also Note, Confidential Communications to a Psychotherapist: A New Testimonial Privilege, 47 NW. U.L. REV. 384, 386-87 (1952); 4 GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, REPORTS AND SYMPOSIUMS, REPORT No. 45, 95 (1960) [hereinafter cited as REPORT No. 45].
the type of information a third party would bring into court unless the patient himself has made it the subject of litigation. Generally, medical records or a physician's testimony become the subject of judicial attention because the patient has sued someone in relation to his condition or has chosen to use such information as part of a defense.

A psychotherapist's records or testimony may, however, become the subject of judicial attention despite the fact that the patient himself does not bring them into issue. A third person may initiate involuntary commitment proceedings against a patient, or a parent involved in a custody battle may subpoena the psychiatric records of the other parent in an effort to establish that he is unfit to raise the child. Thus, while medical evidence generally comes into litigation at the patient's request, psychiatric evidence frequently comes into litigation at the request of another. The potential for prejudice and abuse is certainly heightened when a third party and not the patient seeks the information.

An even more important distinction between the physician-patient relationship and the psychotherapist-patient relationship lies in the type of information that each relationship produces. Medical evidence of high blood pressure or an irregular heartbeat would probably have no bearing at all on a court's decision as to competency or custody. Psychiatric evidence of depression or emotional instability might be instrumental in committing a person to an institution or denying a parent custody of his children. The very testimonial nature of the information produced in the psychotherapist-patient relationship requires confidentiality far beyond that which may be afforded to a physician and his patient. Indeed, safeguarding confidentiality protects legitimate interests of the patient, the psychotherapist, and society.

The patient has an interest in receiving effective treatment. To this end, confidentiality is crucial in psychotherapist-patient rela-

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16 An example of such a case is In re "B", 482 Pa. 471, 394 A.2d 419 (1978). A mother's psychiatric hospitalization records, subpoenaed in a child custody case, were deemed unprotected by a privilege statute. The doctor successfully resisted the subpoena, however, on the basis of a state constitutional right to privacy. See generally Slovenko, Psychological Testimony and Presumptions in Child Custody Cases, in Law and Ethics in the Practice of Psychiatry 167 (C. Hofling ed. 1981).

17 For a discussion of the increased incidence of psychiatric testimony, see Report No. 45, supra note 14, at 97-99.
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The patient also has a legitimate interest in protecting information about psychiatric treatment because of the social stigma attached to such treatment. Persons who have or who are perceived as having "mental afflictions" suffer stigmatization and discrimination. The

18 REPORT No. 45 recognized the psychiatrist's special need to maintain confidentiality: "His capacity to help his patients is completely dependent upon their willingness and ability to talk freely. This makes it difficult if not impossible for him to function without being able to assure his patients of confidentiality and, indeed, privileged communication." REPORT No. 45, supra note 14, at 92.

Judge Luther Alverson, in an address before the Connecticut Mental Health Association, stated that he believes there is more justification for the psychotherapist-patient privilege than any of the other privileges recognized by law.

The psychiatric patient confides more utterly than anyone else in the world. He lays bare his entire self, his dreams, fantasies, sins and shames . . . . It would be too much to expect them to do so if they knew that all they say, and all that the psychiatrist learns from what they say, may be revealed to the whole world from the witness stand.


For a discussion of the need for confidential communications in psychotherapist-patient relations, see M. GUTTMACHER & H. WEIHOFEN, supra, at 269-87. See also Denkowski, Client-Counselor Confidentiality: An Update of Rationale, Legal Status, and Implications, PERSONNEL & GUIDANCE J., Feb. 1982, at 371 (a view that the need for confidentiality to provide effective treatment does not of itself compel the conclusion that a privilege is warranted, but two other factors do compel this conclusion—protecting clients from social stigma and promoting vital client rights).

The authors of a work on psychiatry argue that a rough equivalence exists between the priest-penitent and psychotherapist-patient relationships in terms of the need for confidentiality. Both relationships are based on concern, sensible involvement, sympathy, and a respect for the dignity of the individual. This respect for dignity is expressed in part in the tradition of privileged communication, a tradition long upheld by custom, although seldom by law. Both patient and parishioner are encouraged to place full confidence in the psychiatrist or clergyman, and this confidence is almost absolutely necessary to effective treatment. J. EWALT & D. FARNSWORTH, TEXTBOOK OF PSYCHIATRY 299 (1963).

19 See Taylor v. United States, 222 F.2d 398, 401 (D.C. Cir. 1955) (while many physical ailments might be treated effectively by a doctor whom the patient does not trust, a psychiatrist must have his patient's confidence in order to help him); see also Slovenko, supra note 14, at 186.

20 A recent article concludes that guaranteeing confidentiality is necessary in the client-counselor relationship. Doing so helps motivate those who require treatment to seek it and prevents the stigmatization of clients who have sought therapy. Denkowski, supra note 18, at 372. This is a legitimate interest of the patient which adds force to the argument for protecting psychotherapist-patient confidentiality. However, this does not suggest that the fact of treatment should be within the scope of the privilege, and most cases have declined to extend the privilege this far. See In re Zuniga, 714 F.2d 632 (6th Cir. 1983), cert. denied, 104 S. Ct. 426 (1983); In re Pechworth, 705 F.2d 261 (7th Cir. 1983); Flora v. Hamilton, 81 F.R.D. 576 (M.D.N.C. 1978); Lora v. Board of Educ., 74 F.R.D. 565 (E.D.N.Y. 1977). At least one commentator, however, encourages extending the psychotherapist-patient privilege to cover the fact of treatment. See R. SLOVENKO, PSYCHOTHERAPY, CONFIDENTIALITY, AND PRIVILEGED COMMUNICATION 41-42 (1966); Slovenko, supra note 14, at 187-88.
public generally fears and dislikes the mentally ill and believes them to be unpredictable and untrustworthy.\textsuperscript{21} This social stigma is not attached to the physically ill, or at least not to the same degree.

The interests of the psychotherapist would also be best served by recognizing a psychotherapist-patient privilege. The psychotherapist's ability to provide effective treatment for his patients is impaired if his patients cannot trust him to keep their conversations absolutely confidential.\textsuperscript{22} Indeed, unlike the physician, the psychotherapist has a very special need for confidentiality, for "[h]is capacity to help his patients is completely dependent upon their willingness to talk freely. This makes it difficult if not impossible for him to function without being able to assure his patients of confidentiality and, indeed, privileged communication."\textsuperscript{23}

Additionally, forcing a psychotherapist to divulge his patient's secrets may put him in a morally intolerable position. One writer has contended:

\begin{quote}
[A]ny values to judicial administration inherent in attempts to force the psychotherapist to disgorge the secrets of his patients are over-balanced by: (1) the inducement to perjury implicit in such attempts and (2) the harm to the human personality, and hence to freedom, in governmental forcing of a serious conflict of conscience.\textsuperscript{24}
\end{quote}

Just as the patient and the psychotherapist have an interest in the availability of effective psychiatric treatment, so does society as a whole. It is possible that a mentally ill person will pose a danger to others.\textsuperscript{25} Even aside from this, society benefits from its members'
health, both in body and mind. The Court of Appeals for the Sixth Circuit has observed that "the inability to obtain effective psychiatric treatment may preclude the enjoyment and exercise of many fundamental freedoms . . . . The interest of the patient in exercising his rights is also society's interest, for society benefits from its members' active enjoyment of their freedom."26

Safeguarding psychotherapist-patient confidentiality promotes important individual, professional, and societal interests. The relationship, therefore, merits protection. However, it does not necessarily follow that a privilege is appropriate.27

A privilege is appropriate when the interests furthered by confidentiality in a particular relationship are substantial enough to outweigh the interest in presentment of all the evidence. Most courts and legal scholars agree that the attorney-client relationship meets this standard.28 Similarly, the substantial individual, professional, and societal interests advanced by protecting psychotherapist-patient confidentiality justify recognizing the privilege.

The Principles of Medical Ethics with Annotations Especially Applicable to Psychiatry, although promoting confidentiality of patient informa-

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26 In re Zuniga, 714 F.2d at 639.
27 If the communications were rarely or never sought for judicial purposes, a privilege would be unnecessary. Another possibility is that the psychotherapist should be deemed incompetent to testify or psychiatric records deemed irrelevant, on the grounds that the information is inherently unreliable.

Although absolutely necessary in treatment, data from free-association, or fantasies, or memories, are not reliable for use in court as they mostly represent the way the person experienced an event, and not how the event occurred. They are not 'facts.' Psychic reality is not the same thing as actual reality.

Slovenko, supra note 14, at 194.

28 See, e.g., United States v. Goldfarb, 328 F.2d 280 (6th Cir. 1964); Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314 (7th Cir. 1963).
tion, does not protect the patient in a judicial setting.\textsuperscript{29} It follows that the psychotherapist must be able to assert a privilege in order to fulfill his ethical duties to his patient,\textsuperscript{30} as well as to protect his professional relationship with the patient. Recognizing a psychotherapist-patient privilege is the only way to protect patients' rights in a judicial setting.\textsuperscript{31} The interest in protecting this relationship is sufficient to compel many legal scholars to agree that some form of privilege is appropriate under some circumstances; however, there is no general agreement beyond this.\textsuperscript{32}

The question of how certain professional relationships and the zone of privacy should be protected has been the subject of much debate among legal scholars. The debate covers the whole spectrum of analysis from Wigmore's utilitarian approach\textsuperscript{33} to Professor Alan

\textsuperscript{29} A.P.A. Ethical Standards, supra note 22. Ethical standards are frequently intended to protect the professions rather than to safeguard the rights of the clients. See Smith, Unfinished Business with Informed Consent Procedures, AM. PSYCHOLOGIST, Jan. 1981, at 22, col. 1.

\textsuperscript{30} The American Medical Association (AMA) Principles of Medical Ethics prohibits physicians from divulging confidential information about their patients outside of a courtroom setting. AMERICAN MEDICAL ASSOCIATION, OPINIONS & REPORTS OF THE JUDICIAL COUNCIL, Principles of Medical Ethics 5-66 (1969). Since the nature of the information held by physicians is such that it rarely becomes an issue unless the patient himself has made it so, the AMA Principles of Medical Ethics generally is adequate to protect the privacy interests of the patient.

In contrast, psychiatric information frequently becomes the subject of judicial inquiry. Therefore, the A.P.A. Ethical Standards, which carry no weight in the face of a court order to testify or produce records, are inadequate to protect the psychiatric patient. A.P.A. Ethical Standards, supra note 22.

\textsuperscript{31} One writer has suggested that patients should be given a Miranda-type warning alerting them to the possibility that complete confidentiality might be abandoned under certain circumstances. Powledge, The Therapist as Double Agent, PSYCHOLOGY TODAY, July 1977, at 44, col. 1. One such circumstance would be if the patient has become a danger to himself or to others. The warning would put the patient on notice that the psychotherapist is not the exclusive servant of the patient but has obligations to society as well.

While such a warning might be a good idea, it actually would do little or nothing to protect the patient. The purpose of a Miranda warning is to alert the arrestee to the consequences of his words so that he might choose to avoid incriminating himself. See Miranda v. Arizona, 384 U.S. 486 (1966). A person undergoing psychiatric treatment, however, cannot and should not be expected to avoid incriminating revelations. In fact, this result would tend to defeat the purpose of the treatment. "The essence of psychotherapy is confidential personal revelations about matters which the patient is and should be reluctant to discuss." Slovenko, supra note 14, at 184. Thus, such a warning does nothing more than tell the patient in advance that his privacy rights may be violated, which ought not to be confused with protecting his rights.

\textsuperscript{32} Many commentators agree that recognizing a psychotherapist-patient privilege is appropriate when the information sought relates to actual communications between the psychotherapist and his patient and the cost to judicial administration is insubstantial. See, e.g., 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE \S 504[01]-[08] (1982 & Supp. 1983); Slovenko, supra note 14.

\textsuperscript{33} See note 14 supra.
Westin's focus on humanistic values. Wigmore focuses on the instrumental purpose of the communication and the cost/benefit effect on the litigation process. Proponents of the humanistic approach criticize Wigmore's approach as overvaluing accuracy in the judicial process while undervaluing other important values such as privacy, dignity, intimacy, anonymity, and individuality.

At least two authors, however, propose that it is unnecessary to choose sides in the debate and that perhaps neither side can provide a satisfactory explanation for recognition of some privileges and refusal to recognize privileges in seemingly similar relationships. Privileges may, instead, be allocated to segments of society through exercise of relative power and influence. This debate notwithstanding, Congress, in 1975, chose to protect professional relationships and privacy interests through a general privilege rule, leaving the extent of particular privileges to be developed by the federal courts.

III. Federal Rule of Evidence 501

Today, one rule of evidence governs all questions of privilege in federal courts. Rule 501 of the Federal Rules of Evidence provides that the question of privilege will "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." The rule also states that in civil actions "with respect to an element of a claim or defense to which state law supplies the rule of decision, the privilege shall be determined in accordance with State law." Basically, the rule means that in diversity cases, state law concerning privileges

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34 According to Professor Westin, important functions are furthered by privacy in communications in modern democratic societies. These functions include: personal autonomy, which in turn permits sheltered experimentation and testing of ideas; emotional release, by affording relaxation from role-playing pressures, opportunity for rest, and venting of anger without fear of being held accountable; self-evaluation, by giving an individual time to process information and decide when to make more general publications; and limited and protected communications with those he trusts. E. GREEN & C. NESSON, supra note 10, at 522.

35 Id. at 522; see Krattenmaker, Testimonial Privilege in Federal Courts: An Alternative to the Proposed Federal Rules of Evidence, 62 GEO. L.J. 61, 85-94 (1973) (criticizing the Supreme Court's approach, including a general discussion of the modern trend toward an instrumental view of privileges).

36 Id. at 526.

37 E. GREEN & C. NESSON, supra note 10, at 525. Privileges in the lawyer-client, physician-patient, and priest-penitent relationships have been generally recognized but not in the accountant-client, social worker-client, and stockbroker-client relationships. Id.

38 Id. at 526.

39 See note 5 supra.

40 Id.
will apply and with respect to federal question cases, federal law will apply.\textsuperscript{41}

Rule 501 as enacted by Congress amounted to a congressional repudiation of the Advisory Committee's views.\textsuperscript{42} It is helpful, therefore, when examining how the privilege rules should be applied, to look to the history of the proposed rules, their intended effect, and the Advisory Committee's rationale for the rules.

By order of the United States Supreme Court, on November 20, 1972, the proposed rules of evidence were transmitted to Congress.\textsuperscript{43} They were the culmination of seven years' work by the Advisory Committee on Rules of Evidence, appointed by Chief Justice Earl Warren.\textsuperscript{44} The Supreme Court's\textsuperscript{45} proposal consisted of thirteen rules, including nine specific privileges.\textsuperscript{46} Rule 501 provided that only privileges required by the Constitution, enacted by Congress, or adopted in rules by the Supreme Court would be available in the federal courts.\textsuperscript{47} Rules 502-510 set forth specific privileges includ-
ing a psychotherapist-patient privilege in Rule 504. Through the proposed rules the Committee sought to do away with the common

Except as otherwise required by the Constitution of the United States or provided by Act of Congress, and except as provided in these rules or in other rules adopted by the Supreme Court, no person has a privilege to:

1. Refuse to be a witness; or
2. Refuse to disclose any matter; or
3. Refuse to produce any object or writing; or
4. Prevent another from being a witness or disclosing any matter or producing any object or writing.


Proposed Rule 504 provided:

**Rule 504. Psychotherapist-Patient Privilege**

(a) Definitions.

(1) A “patient” is a person who consults or is examined or interviewed by a psychotherapist.

(2) A “psychotherapist” is (A) a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a mental or emotional condition, including drug addiction, or (B) a person licensed or certified as a psychologist under the laws of any state or nation, while similarly engaged.

(3) A communication is “confidential” if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the psychotherapist, including members of the patient’s family.

(b) General rule of privilege. A patient has a privilege to refuse to disclose and prevent any other person from disclosing confidential communications, made for the purpose of diagnosis or treatment of his mental or emotional condition, including drug addiction, among himself, his psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient’s family.

(c) Who may claim the privilege. The privilege may be claimed by the patient, by his guardian or conservator, or by the personal representative of the deceased patient. The person who was the psychotherapist may claim the privilege but only on behalf of the patient. His authority so to do is presumed in the absence of evidence to the contrary.

(d) Exceptions.

(1) Proceedings for hospitalization. There is no privilege under this rule for communications relevant to an issue in proceedings to hospitalize the patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization.

(2) Examination by order of judge. If the judge orders an examination of the mental or emotional condition of the patient, communications made in the course
law rules of privileges and to freeze the privilege rules in the federal system in order to narrow interpersonal rights and broaden governmental and institutional rights.

Even as they were being promulgated by the Supreme Court, the rules were questioned. In his dissent to the order promulgating the rules, Justice Douglas expressed the view that the Supreme Court lacked authority to submit proposed rules of evidence since they were beyond "practice and procedure" as authorized by the Rules Enabling Act. Further, he felt that the rules of evidence should be developed on a case-by-case basis by the courts or legislated by Congress.

The proposed rules were controversial in two major respects. First, they raised the issue of federalism. Proposed Rule 501 would have mandated that, in the federal courts, rules of privilege would only be governed by the Constitution, Acts of Congress, and the Federal Rules as adopted by the Supreme Court. Privileges created by state law would have been ignored. Congress resolved this contro-

50 23 C. Wright & K. Graham, supra note 7, at 648.
51 Privileges which generally protect individuals were "eviscerated" or wholly omitted, but privileges usually asserted by corporations were given "carefully widened latitude," with the federal government given the unlimited right to keep its information out of the federal courts. Krattenmaker, supra note 36, at 66-67.
52 The rules were first promulgated Nov. 20, 1972, pursuant to enabling statutes whereby Congress empowered the Court to prescribe rules of "practice and procedure." 28 U.S.C. §§ 2072, 2075 (1976); Hearings, supra note 43, at 1.
53 56 F.R.D. at 185.
56 The pertinent language states: "Except as otherwise required by the Constitution of the United States or provided by Act of Congress, and except as provided in these rules or in other rules adopted by the Supreme Court, . . .", 56 F.R.D. at 230.
57 Many in Congress, the legal community, and some members of the Judicial Conference Committee opposed this change. 119 Cong. Rec. 7643 (1973) (remarks of Rep. Rodino); id. at 7645 (remarks of Rep. Hungate); and id. at 7648 (remarks of Rep. Holtzman). The Committee of the American College of Trial Lawyers proposed a substitute rule which would have made state law controlling on all issues of privilege except when the privileged communication took place in federal territory: "Any claim that a witness is privileged from testifying as to a confidential communication shall be determined in accordance with the law of the State, District of Columbia, or territory of the United States in which the communica-
versy by adopting a compromise. Under present Rule 501, state privilege law controls in diversity cases, but privilege issues in other cases will be governed by federal or state law, depending on the particular element of the claim or defense and whether state law supplies the rule. 58

Second, the proposed rules sparked controversy concerning the allocation of power in society. Some believed the proposed rules gave the rights of governmental and corporate entities preeminence over individual rights. 59 The Committee wished to restrict privileges benefitting individuals but expand privileges for groups which it represented. 60 The proposed rules, therefore, included privileges for trade secrets, secrets of state, and other official information.

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58 C. WRIGHT & K. GRAHAM, supra note 7, at 654. According to Weinstein and Berger, however, Rule 501, as adopted, requires that even in diversity cases a determination be made whether state law supplies the rule of decision on the particular element of the claim or defense. This is because Congress felt that applying state law in diversity cases and federal law in federal question cases would not meet the test under Erie R.R. v. Tompkins, 304 U.S. 64 (1938), which Congress was seeking to incorporate. 2 J. WEINSTEIN & M. BERGER, supra note 32, at 501-21. Problems of interpretation may arise as to what is an "element," whether evidence will be admissible for one purpose but not another in cases based on federal and state law, and which state's privilege law will apply. Id. Rule 501 as enacted made no change in criminal practice. This is because the rule is based on Rule 26 of the Federal Rules of Criminal Procedure, which provided for utilization of "the principles of the common law... in the light of reason and experience" in handling evidentiary matters, including questions of privilege. Id. at 501-49 to 501-20; see also 120 CONG. REC. 7058 (1974).

59 Many commentators argued that the privileges afforded to government were too broad for the executive branch. 2 J. WEINSTEIN & M. BERGER, supra note 32, at 501-17. In its debates, however, Congress recognized the fact that the privileges impact on the rights of individual citizens. 119 CONG. REC. 7642-43 (1973) (remarks of Rep. Rodino); id. at 7648 (remarks of Rep. Holtzman).

60 23 C. WRIGHT & K. GRAHAM, supra note 7, at 687. By ignoring state-created privileges, the Committee sought to curtail use of individual privileges which it found to be "hindrances" and to enlarge governmental and corporate privileges. 2 J. WEINSTEIN & M. BERGER, supra note 32, at 501-12. Weinstein cites three reasons for the Advisory Committee's choice of treatment of privileges. First, by curtailing privileges, the Committee sought to advance the policy behind the rules of admitting all relevant evidence to enhance the likelihood of accurate and just determinations. Second, if the state's interest in obtaining all relevant evidence was to be sacrificed, an overriding policy must exist. Privileges which were incorporated in the rules either encouraged the furnishing of information (such as the required reports and identity of informer rules) or had values which were deemed meritorious. Third, the Advisory Committee assumed that the federal interest in adoption of "sound rules
The controversy surrounding the rules on privilege prompted Congress, for the first time, to intervene in the rule-making process. Under the Rules Enabling Act, the proposed rules would have taken effect automatically had Congress not acted within ninety days. Congress amended the Rules Enabling Act to require its approval for any amendment of the rules on privilege only. Approval was not required for the amendment of any other rules.

Because passage of the entire package of evidence rules was threatened, Congress chose to compromise and adopt present Rule 501. This seemed to be the only rule on which everyone could agree, since it would "leave the [f]ederal law of privilege where we found it. The [f]ederal courts are to develop the law of privilege on a case-by-case basis." While Rule 501 does not create a psychotherapist-patient privilege, it is clear from the report of the Senate Judiciary Committee that Rule 501 does not proscribe the recognition of the privilege. The report states:

It should be clearly understood that, in approving this general rule as to privileges, the action of Congress should not be understood as disapproving any recognition of a psychiatrist-patient, of evidence" authorized the adoption of rules which repudiate state legislative or judicial judgment. 2 J. Weinstein & M. Berger, supra note 32, at 501-46 to 501-57.

The hearsay chapter was also controversial. However, the chairman of the Subcommittee estimated that half of the complaints they received dealt with issues of privilege. 23 C. Wright & K. Graham, supra note 7, at 652.

The rule gives the court the power to prescribe rules of civil procedure. The rules were proposed under § 2072, which governs rules of civil procedure. Effective Jan. 2, 1975, by the addition of § 2076 concerning rules of evidence, the Supreme Court has power to prescribe amendments to the Federal Rules of Evidence. However, the amendment cannot take effect for 180 days after the amendment is reported to Congress by the Chief Justice and shall not take effect "if either house of Congress within that time shall by resolution disapprove any amendment so reported. . . ." Id. The validity of this act, however, may be questionable since the Supreme Court has held the one-house veto unconstitutional. Immigration & Naturalization Serv. v. Chadha, 103 S. Ct. 2764 (1983).

The outcry over Rule 501 in Congress and the press, stimulated in large measure by the Watergate affair, may in itself have been sufficient to delay adoption of the rules and to cause deletion of article V. 2 J. Weinstein & M. Berger, supra note 32, at 501-17.


or any other of the enumerated privileges contained in the Supreme Court rules. Rather, our action should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship and other privileges should be determined on a case-by-case basis.\(^6\)

Congress could have chosen to enact specific rules of privilege (such as those proposed by the Supreme Court) and thus create an inflexible but certain body of privilege law. With specific rules, individuals could confidently divulge certain information knowing the information would be protected in the courts.

Congress' decision to reject the proposed specific rules of privilege was essentially a rejection of a set of rules which would have restricted individual privileges\(^6\)\(^8\) in favor of a general rule which al-

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68 See note 51 supra. The following hypothetical illustrates the inadequacy of the Proposed Rule 504, Psychotherapist-Patient Privilege:

Mr. X, who is experiencing difficulties in his marriage, asks his wife to go to a marriage counselor. She refuses, so he goes alone. During the course of his counseling sessions, Mr. X reveals that he and his wife have an extremely strained relationship and that he often feels violent toward her. Mr. X also visits his family doctor and learns that he has ulcers. The doctor prescribes medication. He tells the doctor that his marriage is on the rocks and that he sometimes wants to hit his wife. Subsequently, Mr. X is charged with assaulting his wife. The prosecutor seeks to compel the testimony of both the counselor and the family doctor. Both claim, on behalf of their client and patient, that this information is privileged.

The conversations between the patient and the marriage counselor and family physician, although expected to be confidential, would not have been privileged under Proposed Rule 504. See note 49 supra. The marriage counselor does not fit the definition of psychotherapist under Rule 504 unless he is, or the patient reasonably believes him to be, authorized to practice medicine or licensed or certified as a psychologist. In either case, he must be engaged in the diagnosis or treatment of a mental or emotional condition. Counseling a person concerning his marriage would probably not be classified as diagnosis or treatment of a mental or emotional illness. The family physician would be excluded from the rule because he is treating a physical condition (ulcers) and only “treating” the emotional problems incidentally, if at all. Cf. 2 J. Weinstein & M. Berger, supra note 32, at 504-11 (interpreting the rule to “include the medical general practitioner who necessarily practices some form of psychotherapy in treating many of his patients”).

Further, even if the communication to the marriage counselor was deemed privileged under Proposed Rule 504, that privilege may have been waived by the patient under Rule 511 as soon as he communicated any significant part of the information to his family physician. Proposed Rule 511 reads:

A person upon whom these rules confer a privilege against disclosure of the confidential matter or communication waives the privilege if he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication. This rule does not apply if the disclosure is itself a privileged communication.

56 F.R.D. at 258. Since the disclosure to his physician was voluntary and not itself a privileged communication, he would be conferred no privilege under the proposed rules. See Proposed Fed. R. Evid. 511 advisory committee note, which states: “The central purpose of
ows federal courts great flexibility in determining whether to recognize a privilege.

Some relationships lend themselves to case-by-case treatment while others can best be protected by a specific privilege rule. These approaches to privilege law need not be mutually exclusive. Privileges with a long history of judicial recognition and widely-accepted underlying rationale could be embodied in specific rules while others would be subject to a general rule.

The attorney-client relationship rests on a foundation of trust and confidentiality which is essential to its effectiveness. The attorney-client privilege is relatively uncontroversial and generally accepted by the courts. Therefore, it is a good candidate for conversion to a specific rule. This could form the basis of discussion and development of other specific rules in the future. And while proposed Rule 504 did not adequately protect the psychotherapist-patient relationship, it is quite possible to fashion a specific rule that does.

most privileges is the promotion of some interest or relationship by endowing it with a supporting secrecy or confidentiality. It is evident that the privilege should terminate when the holder by his own act destroys this confidentiality.” One wonders how requiring a psychotherapist to divulge information given to him in confidence merely because the same (or similar) information was given to someone else promotes the relationship between the patient and his psychotherapist. If the information is available from another source, why hinder the relationship by requiring that the psychotherapist be the one required to divulge the information?

69 The attorney-client and priest-penitent relationships can best be protected through a specific rule. Privileges which are fairly recent developments in the law, such as the trade secrets and identity of informer rules, require case-by-case treatment until the parameters of the privilege are satisfactorily developed.

70 Rule 501 should be amended to allow federal courts to decide privilege questions “in the light of reason and experience” except with regard to the areas of privilege addressed by specific rules. The amended rule could be fashioned after the Proposed Rule 504 with some modifications, as follows:

**PSYCHOTHERAPIST-PATIENT PRIVILEGE**

(a) Definitions.

(1) A “patient” is a person who consults or is examined or interviewed by a psychotherapist.

(2) A “psychotherapist” is a psychiatrist, physician, psychologist, psychotherapist or a licensed or certified counselor, or a person reasonably believed by the patient to be any of the above, while engaged in serving the patient in a counseling capacity, including counseling for drug addiction.

(3) A communication is “confidential” if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, of persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the psychotherapist, including members of the patient’s family.

(b) General rule of privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made dur-
Congress' amendment of the Rules Enabling Act to require its approval of rules on evidentiary privileges indicates that it wanted the opportunity to review major changes in privilege law. If the Supreme Court desires to effect a radical alteration of privilege law, it can submit its proposal to Congress in the form of a rule, as provided in the Rules Enabling Act. The lower federal courts, however, do not have the option to submit proposed privilege rules to Congress. They must, therefore, effect any substantial changes they deem necessary and leave it to the appellate process to make any needed revisions. Courts can make less radical changes in privilege law, however, on a case-by-case basis. The psychotherapist-patient priv-

(c) Who may claim the privilege. The privilege may be claimed by the patient, by his guardian or conservator, or by the personal representative of the patient's estate if the patient is deceased. The person who was the psychotherapist may claim the privilege but only on behalf of the patient. His authority so to do is presumed in the absence of evidence to the contrary.

(d) Exceptions.

(1) Proceedings for hospitalization. There is no privilege under this rule for communications relevant to an issue in proceedings to hospitalize the patient for mental illness, if the psychotherapist in the course of diagnosis or treatment had determined that the patient is in need of hospitalization.

(2) Examination by order of judge. If a judge of competent jurisdiction orders an examination of the mental or emotional condition of the patient, communications made in the course thereof are not privileged under this rule with respect to the particular purpose for which the examination is ordered unless the judge orders otherwise.

(3) Condition an element of claim or defense. There is no privilege under this rule as to communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense.

Many scholars believe, however, that because of the political nature of privileges and the lack of accountability of judges and juries, the proper allocation of power through privileges should be determined by the legislature rather than by the judicial branch. Members of the Committee on Privacy and Confidentiality of the California State Psychological Association reached the following conclusion:

Case law, defined as the body of decisions that have been handed down by the courts in the process of adjudicating both civil and criminal cases, has become the medium by which many of the rules of our society concerning confidentiality are made; in this respect, case law has far outraced statutory law, and since case law is made by judges and juries instead of legislators, their decisions are not directly accountable to the people through the political process. (Although many judges hold elective, as opposed to appointive, positions, judicial elections are seldom won or lost on the basis of specific decisions that have been handed down by the judge in question.)
ilege is no longer an especially controversial one, and federal courts could recognize it without thwarting congressional intent. This would promote substantial interests of psychotherapists, their patients, and society in general.

The federal courts as a whole, however, have not definitively recognized the psychotherapist-patient privilege. When faced with a claim of privilege, the individual court is left to fend for itself on a case-by-case basis under the standards (or lack of them) set forth under Rule 501. On the question of psychotherapist-patient privilege the approaches have been quite diverse and the results inconsistent.

IV. Psychotherapist-Patient Privilege Treatment in the Federal Courts

The federal cases confronting the psychotherapist-patient privilege have approached the issue from various directions. Rule 501 provides that privileges shall be governed by the principles of the common law as they may be interpreted by the courts in the light of reason and experience.

Some courts have equated the psychotherapist-patient privilege with the physician-patient privilege and immediately dismissed the former. United States v. Williams involved proceedings to enforce a subpoena of a psychologist's telephone message slips. The court refused to enforce the subpoena because it was overbroad. Nevertheless, it addressed the psychologist's contention that this information was protected by a psychotherapist-patient privilege. The court said that the psychologist-patient privilege, if one existed, would be a form of doctor-patient privilege. Since numerous cases have held that no doctor-patient privilege existed at common law, the court concluded that the privilege did not apply in federal courts in the absence of statute. Although this view was dictum in Williams, two other courts of appeals have based their holdings that a psychotherapist-patient privilege does not exist on identical reasoning.

A federal district court in California, in United States v. Layton, Everstine, Privacy and Confidentiality in Psychotherapy, AM. PSYCHOLOGIST, Sept. 1980, at 838, col. 1. Congress’ enactment of Rule 501 is nothing more than a delegation to the judicial branch of the power to determine the validity of privileges.
also interpreted Rule 501 as adhering to the common law position. The court declined to recognize as privileged tapes of conversations between the defendant and his psychiatrist, stating that

the psychotherapist-patient privilege is inapplicable . . . . [I]n federal courts privileges are defined by reference to the common law. See Fed. Rule Evid. 501. The federal courts have universally recognized that no such privilege existed at common law and that therefore [it] does not exist in federal courts.\(^{76}\)

These cases fail to recognize the inherent and important differences between the physician-patient and psychotherapist-patient relationships.\(^{77}\) Additionally, they interpret Rule 501 as aligned strictly with the common law position on privileges. This assumes that enactment of Rule 501 caused privilege law to solidify, or even to return to the position of the English common law, which recognized only the attorney-client privilege and certain governmental privileges. However, as the Senate report on the new federal rules clearly indicates, Congress did not intend to end the progression of privilege law or to return to the common law.\(^{78}\)

In other cases, courts have been willing to consider factors other than the common law position in reaching a decision on whether a psychotherapist-patient privilege existed. In *Lora v. Board of Education*,\(^{79}\) the plaintiffs sought to show discriminatory conduct on the part of the school district in its treatment of emotionally handicapped children. In deciding whether students’ diagnostic and referral files were privileged, the court looked to a number of different factors.

While the state law on privilege was not controlling, the *Lora* court stated that the federal courts should recognize state privileges where this can be done at no substantial cost to federal substantive and procedural policy.\(^{80}\) The *Lora* court also looked to the rejected proposed Rule 504 for guidance:

Our opinion is strongly buttressed by consideration of Rule 504 of the Federal Rules of Evidence as promulgated by the Supreme Court. . . . Although Rule 504, along with other specific privilege rules, was rejected by Congress in favor of the more

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76 Id. at 525.
77 See notes 12-26 supra and accompanying text.
78 See text accompanying note 67 supra. For a suggestion on how to interpret the “common law” component of Rule 501, see 23 C. WRIGHT & K. GRAHAM, supra note 7, § 5425, at 704-11.
80 Id. at 576.
The court cited the fact that proposed Rule 504 would not have protected the material sought in *Lora* as support for its decision that the files were not privileged.82

In holding that the files were not privileged, the *Lora* court employed a balancing test, weighing the interests for and against the privilege. The majority of courts called upon to decide whether a psychotherapist-patient privilege exists have taken the same approach.83 The *Lora* court noted that the privacy interest of the individual and society’s interest in fostering the psychotherapist-patient relationship supported the recognition of a privilege, but that these had to be weighed against the “need for full development of the facts in federal litigation in order that the paramount public interest in the fair administration of justice be served.”84

It is arguable that the considerations in favor of recognition of a psychotherapist-patient privilege so consistently outweigh the interest in getting all the evidence before the court that the privilege ought to be generally recognized. This would eliminate the necessity of going through the balancing process in each and every case. However, as long as Rule 501 is in force, case-by-case consideration will be necessary. Working within this framework, the balancing approach taken by the *Lora* court promotes a fair resolution of privilege questions.

Recently, the Court of Appeals for the Sixth Circuit, in *In Re Zuniga*,85 analyzed the privilege in depth and applied Rule 501 in accordance with congressional intent. The case involved consolidated appeals from decisions of two district courts. The district courts adjudged psychiatrists Zuniga and Pierce in civil contempt for failing to produce patient records subpoenaed by a grand jury. The psychiatrists were allegedly involved in schemes to defraud through billings submitted to Michigan Blue Cross-Blue Shield.86

The court began by recognizing the special needs of the psychi-
atric profession and deliberately avoided equating psychotherapists with physicians. The court stated: "In both Lindstrom and Meagher in which the Eleventh and Fifth Circuits refused to accept the privilege, the courts simply equated it with the physician-patient privilege without analyzing the unique aspects of the psychotherapist-patient relationship. This court, therefore, does not find these authorities persuasive." Instead, the Zuniga court recognized that Rule 501 gives federal courts the ability—indeed, the obligation—to participate in the continuing development of privilege law. Congress clearly did not intend to preclude judicial recognition of a psychotherapist-patient privilege.

The Zuniga court considered the privilege law of the states (part of the "common law" which governs privileges under Rule 501) and the rejected Rule 504. The court noted that the states have demonstrated a willingness to recognize the privilege; and indeed a substantial number of them have adopted some form of psychotherapist-patient privilege. The Zuniga court stated that although federal law controls, the Supreme Court has taken note of state privilege laws in determining whether to retain them in the federal system.

The court also focused on the legislative history of Rule 501, including the consideration and rejection of proposed Rule 504. Although the opinion does not spell out the role of rejected Rule 504, the court clearly viewed it as part of the "experience" in the light of which the courts are to interpret the common law under Rule 501.

The Zuniga court then balanced the societal interest in the availability of evidence to the courts against the interests promoted by a recognition of the privilege. These included the individual's interest in effective treatment and society's interests in its citizens' ability to exercise their freedoms and in reducing the threat to safety posed by mentally ill persons. This process of balancing the relevant interests

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87 In re Zuniga, 714 F.2d at 638.
88 See text accompanying note 67 supra.
89 See note 4 supra.
90 In re Zuniga, 714 F.2d at 639 (quoting United States v. Gillock, 445 U.S. 360, 369 n.8 (1980)).
91 Professor Wright outlined what he considered to be the proper role of the rejected rules: "At best, the Rejected Rules provide a useful starting point for research into questions of privilege, but it would be improper for courts to rely on them as authoritative or to incorporate them into Rule 501 without considering the criticisms of the rules that led Congress to reject them." 23 C. WRIGHT & K. GRAHAM, supra note 7, § 5422, at 692. The Zuniga court's approach comports with this view.
is fundamental to the proper application of Rule 501. The Zuniga court properly identified and executed its role in the decision-making process on privileges. Congress likely envisioned this kind of careful analysis and evaluation when it enacted Rule 501.

The conclusion of the court’s analysis, however, may be somewhat misleading. It suggests a general recognition of the psychotherapist-patient privilege, which would have ramifications extending beyond the facts of Zuniga. A careful reading of the opinion, however, reveals that this case leaves the law on psychotherapist-patient privilege exactly where it found it.

According to Professors Wright and Graham, Congress, in enacting Rule 501, was clear on only two points. First, Rule 501 was not intended to alter the pre-existing law of privilege, but rather to leave it in its present state, whatever that might be. Second, Rule 501 was not intended to freeze the present law of privilege; it was expected that the law would continue to be developed by the courts. "In short, Congress restored to the courts their common law powers with respect to privileges but without any attempt to suggest how those powers should be exercised."93

The courts, then, seem to have the power to recognize privileges not only in the limited context of particular cases, but also in a broader context. The broader form of recognition would eliminate the necessity of deciding the existence of the privilege in each case; subsequent cases would need only define the scope of the privilege.

Following its consideration of the important interests promoted by the psychotherapist-patient privilege, the Zuniga court found that "these interests, in general, outweigh the need for evidence in the administration of criminal justice. Therefore, we conclude that a psychotherapist-patient privilege is mandated by 'reason and experience.'"94 Since the court drew this conclusion before considering any of the particulars of the cases on appeal, its conclusion seems not intended to be limited to the facts of the two cases. Rather, the court seems to have chosen to advance the proposition that the common law includes a recognition of the psychotherapist-patient privilege.95

However, what the Zuniga court gives—or appears to give—with one hand, it takes away with the other. The court stated:

92 See text accompanying notes 81-84 supra.
93 23 C. Wright & K. Graham, supra note 7, § 5422, at 691.
94 In re Zuniga, 714 F.2d at 639 (quoting Fed. R. Evid. 501). Presumably, these interests would, in general, outweigh the need for evidence in civil matters, as well as criminal.
95 While no federal court has recognized a common law psychotherapist-patient privilege, the Supreme Court of Alaska has done so in Allred v. State, 554 P.2d 411 (Alaska 1976).
“Having recognized the compelling necessity for the privilege, it remains for the Court to determine its applicability to the instant action . . . Just as the recognition of privileges must be undertaken on a case-by-case basis, so too must the scope of the privilege be considered.”

The court then went on to find that the facts of the particular case were not appropriate for application of the privilege, reducing its previous “holding” to dictum.

Even more disappointing, however, are the ramifications of the phrase, “[j]ust as the recognition of privileges must be undertaken on a case-by-case basis.” This makes it clear that, for all its initial appearance to the contrary, this case does not depart—even in dictum—from any previous decisions. Questions of psychotherapist-patient privilege will continue to be made on a case-by-case analysis. What the Zuniga decision does do, however, is provide an excellent model for case-by-case analysis under Rule 501.

While the Zuniga court found that the privilege did not apply to the facts before it, the language suggested that the court would be likely to find actual communications between psychotherapist and patient privileged: “The essential element of the psychotherapist-patient privilege is its assurance to the patient that his innermost thoughts may be revealed without fear of disclosure. Mere disclosure of the patient’s identity does not negate this element.”

V. Conclusion

Privileges should be afforded in cases where the interests of the party claiming the privilege outweigh the value of the information to the judicial system. The interests of psychotherapists, their patients, and society are substantial enough that the psychotherapist-patient

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96 In re Zuniga, 714 F.2d at 639 (emphasis added). As the Zuniga court recognized, questions of privilege do raise two issues. First, did the communication for which the privilege is sought occur in a relationship which merits protection? If so, then second, is recognition of a privilege appropriate? In other words, a court must first determine whether a privilege exists and then whether the privilege’s scope is sufficiently broad to cover the particular case.

97 The court declined to apply the privilege under the factual circumstances of Zuniga since the information subpoenaed by the grand juries was limited to the identity of the patients, the dates of treatment, and the length of treatment on each date. 714 F.2d at 640. Other courts have also declined to recognize a psychotherapist-patient privilege to protect information about the fact and dates of treatment. E.g., In re Doe, 711 F.2d 1187 (2d Cir. 1983); In re Pelsworth, 705 F.2d 261 (7th Cir. 1983); Flora v. Hamilton, 81 F.R.D. 576 (M.D.N.C. 1978); Lora v. Board of Educ., 74 F.R.D. 565 (E.D.N.Y 1977). One reason commonly cited for this is that the patient has no reasonable expectation of privacy in such information. Cf. Slovenko, supra note 14, at 187-88.

98 In re Zuniga, 714 F.2d at 640.
relationship merits protection. The only way to adequately protect this relationship is through recognition of an evidentiary privilege.

The legislative history of the enactment of Rule 501 indicates that the courts are to continue the evolution of privilege law. The intended province of the courts includes judicial recognition of privileges so long as they are not radical departures from current privilege law. The psychotherapist-patient privilege is relatively uncontroversial and, at the very least, ought to be recognized by the federal courts on a case-by-case basis. An even better approach, however, would be the enactment of a specific psychotherapist-patient privilege rule.99

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LABOR LAW—SECTION 7 OF THE NATIONAL LABOR RELATIONS ACT AND NEW JERSEY'S CASINO CONTROL ACT: WHO WILL CONTROL ORGANIZED CRIME IN ATLANTIC CITY?

In an effort to prevent the infiltration of organized crime into its casino industry, the New Jersey legislature passed the Casino Control Act ("Act"), which authorized the licensing of Atlantic City hotels for casino gambling. The Act established the Casino Control Commission ("Commission") and entrusted it with broad regulatory authority over casinos and related industries. Section 93 of the Act requires annual registration with the Commission of every labor organization seeking to represent casino employees. Hotel and Restaurant Employees International Union Local 54 registered pursuant to this provision, but its chief officers were disqualified for failing to meet the Act's qualification criteria under section 86. Accordingly, the union was prevented from collecting dues from its members, thus vitiating its ability to function.

In Hotel and Restaurant Employees International Union Local 54 v. Danziger, Local 54 sued the Commission, claiming that section 7 of the National Labor Relations Act, which guarantees employees the right to bargain collectively through representation of their own choosing, preempted sections 86 and 93. The Court of Appeals for the Third Circuit reversed the decision of the New Jersey District Court and held that this case fell squarely within the ruling

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1 New Jersey Casino Control Act, N.J. STAT. ANN. §§ 5:12-1 to -152 (West Supp. 1982) [hereinafter referred to as the Act].
2 The Act contains comprehensive licensing requirements, and provides for civil and criminal penalties for its violation or for violation of regulations promulgated under it. N.J. STAT. ANN. §§ 5:12-76 to -95 (West Supp. 1982). For a discussion of the spirit and policies of the Act, see text accompanying notes 98-112 infra.
5 Hotel & Restaurant Employees Int'l Union Local 54 v. Danziger, 709 F.2d 815, 819 (3d Cir.), cert. granted, 104 S. Ct. 479 (1983). For a discussion of § 86 and its qualification criteria, see note 19 infra and accompanying text.
6 N.J. STAT. ANN. §§ 5:12-86 to -93(b) (West Supp. 1982); See note 20 infra.
8 Hotel & Restaurant Employees Int'l Union Local 54 v. Danziger, 536 F. Supp. 317 (D.N.J. 1982); see notes 25-30 infra and accompanying text.
9 709 F.2d at 833; see notes 31-34 infra and accompanying text.
of *Hill v. Florida*. In *Hill*, the United States Supreme Court stated that no conditions may be imposed on employees' choice of bargaining representatives. Judge Becker vehemently dissented saying that the New Jersey statute in question fell within an exception delineated by the Court since *Hill*: that of a deeply-seeded local interest. The Supreme Court granted certiorari to consider whether section 7 of the NLRA preempts state regulations such as sections 86 and 93, in the area of union representation.

Part I of this comment relates the relevant facts of the *Danziger* controversy. Part II examines section 7 of the NLRA and relevant Supreme Court preemption decisions from *Hill* to the present. Part III applies preemption analysis to the facts of *Danziger*, and argues that the Casino Control Act does not unconstitutionally interfere with federal labor legislation.

### I. The Challenge to the Casino Control Act

In 1977, the New Jersey legislature enacted the Casino Control Act, legalizing casino gambling in Atlantic City. The Act requires the licensing of casino employees, including those who perform custodial or service-related duties not directly related to casino operations. Section 86 of the Act lists criteria for the disqualification of casino licensees, while section 93 requires registration of labor orga-

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11 325 U.S. at 543; see notes 46-50 infra and accompanying text.
12 709 F.2d at 846-51; see notes 65-86 infra and accompanying text (setting forth the Supreme Court decisions since *Hill* which allow for limited flexibility in construing § 7 of the NLRA).
13 Hotel & Restaurant Employees Int'l Union Local 54 v. Danziger, 709 F.2d 815 (3d Cir.), cert. granted, 104 S. Ct. 479 (1983).
14 See notes 17-35 infra and accompanying text.
15 See notes 36-86 infra and accompanying text.
16 See notes 87-145 infra and accompanying text.
18 N.J. STAT. ANN. §§ 5:12-89 to -91 (West Supp. 1982). Through the licensing mechanism the various state agencies govern union qualification and thus guard against organized crime.
19 N.J. STAT. ANN. § 5:12-86 (West Supp. 1982). Section 86 disqualifications include 1) intentional failures to disclose material information; 2) enumerated criminal convictions; 3) other criminal convictions which are inimical to casino operations; 4) current or pending prosecutions for enumerated crimes; 5) engaging in crime for occupational purposes; 6) career offenders and certain of their associates; 7) conduct which, whether prosecuted or not, would constitute an enumerated offense; and 8) defiance of any official investigatory body concerned with crimes relating to gaming, official corruption, or organized crime activity. Although § 86 criteria are broad, each is concerned solely with corruption and organized crime as these relate to the casino industry.
nizations seeking to represent casino employees, and prohibits dues collection by any union whose officers, agents, or principal employees are disqualified under section 86. The Commission is, however, given the discretion to waive disqualification criteria if such waiver is required by the interests of justice and furthers the policy of the Act.

Local 54, a National Labor Relations Board ("NLRB") certified labor organization representing upwards of 12,000 hotel and restaurant employees, registered in accordance with the Act. Thereafter, the Division of Gaming Enforcement ("Division") investigated the union and its chief officers, and reported to the Casino Control Commission regarding the qualifications of Local 54's chief officers. The Division reported that in its view Frank Gerace, President, Robert Sumino, Secretary-Treasurer, and Frank Materio, Grievance Manager, were disqualified under section 86 of the Act because of criminal convictions and associations.

20 N.J. STAT. ANN. § 5:12-93 (West Supp. 1982). Section 93 provides in pertinent part:

a. Each labor organization, union or affiliate seeking to represent employees licensed or registered under this act and employed by a casino hotel or a casino licensee shall register with the commission annually, and shall disclose such information to the commission as the commission may require, including the names of all affiliated organizations, pension and welfare systems and all officers and agents of such organizations and systems. The commission may in its discretion exempt any labor organization, union, or affiliate from the registration requirements of this subsection where the commission finds that such organization, union or affiliation is not the certified bargaining representative of any employee.

b. No labor organization, union or affiliate registered or required to be registered pursuant to this section and representing or seeking to represent employees licensed or registered under this act may receive any dues from any employee licensed or registered under this act and employed by a casino licensee or its agent, or administer any pension or welfare funds, if any officer, agent, or principal employee of the labor organization, union or affiliate is disqualified in accordance with the criteria, contained in section 86 of this Act. The commission may for the purposes of this subsection waive any disqualification criterion consistent with the public policy of this act and upon a finding that the interests of justice so require.

c. Neither a labor organization, union or affiliate nor its officers and agents not otherwise individually licensed or registered under this act and employed by a casino licensee may hold any financial interest whatsoever in the casino hotel or casino licensee whose employees they represent.

21 Id. Section 93(b) of the Act confers upon the Commissioner discretionary authority to "waive any disqualification criteria [of § 86] consistent with the public policy of this act and upon a finding that the interests of justice so require." See note 20 supra. Moreover, the Commission may fashion a sanction which is of lesser magnitude than those explicitly provided for in § 93. N.J. STAT. ANN. § 5:12-75.

22 709 F.2d at 817.

23 Id. at 819.

24 Id. Section 76 of the Act entitles the Division to investigate all applicants and provide the Commission with all information necessary for a proceeding involving enforcement of any
The Commission scheduled a hearing to discuss the Division’s allegations for September 9, 1981.25 Prior to this date, however, Local 54 filed a complaint and motion for a preliminary injunction in the United States District Court for the District of New Jersey. Local 54 claimed that section 93 of the Casino Control Act was preempted by federal legislation and that the union would suffer irreparable harm if the matter proceeded to a hearing on the merits.26 The district court denied the union’s motion for a preliminary injunction.27 While appeals and cross-appeals were pending, the Commission commenced its hearings and issued a final decision, disqualifying three officers: Gerace and Materio because of their associations with organized crime, and business agent Karlos LaSane because of his criminal record.28 The Commission ordered the officers removed from their union offices by October 12, 1982; otherwise, Local 54 would thereafter be prohibited from collecting membership dues.29

On October 12, 1982, Judge Brotman, for the district court, enjoined the Commission from taking any steps to enforce its order against Local 54 and its officers.30 From Judge Brotman’s original decision, the parties then filed a joint appeal with the court of appeals.31 The majority found the union’s claims meritorious and reversed the district court’s denial of preliminary injunctive relief, remanding the matter for entry of an order enjoining enforcement of section 93.32 Judge Becker dissented, saying that section 7 of the regulations of the Act. N.J. STAT. ANN. § 5:12-76 (West Supp. 1982); see note 28 infra and accompanying text.


26 Denziger, 536 F. Supp. 317, 321, 332 (D.N.J. 1982). The union instituted the action for declaratory, injunctive, and monetary relief against prohibitions in the Act. The district court denied relief, stating that the union was not likely to succeed on the merits of the claim that the Act was invalidated by the supremacy clause. Furthermore, the union was not likely to succeed on merits of vagueness and overbreadth claims under the first and fourteenth amendments.

27 Id. at 338.

28 709 F.2d at 820, 821. Frank Gerace and Frank Materio were disqualified pursuant to § 86(f) of the Act for their association with a career offender cartel, which created a reasonable belief that the association was inimical to the policy of the Act. Karlos LaSane was disqualified under § 86(c) of the Act because of his criminal conviction on extortion charges while he was City Commissioner in 1973.

29 709 F.2d at 821. The Commission is given the power to make such a removal pursuant to § 93(b) of the Act, N.J. STAT. ANN. § 5:12-93(b) (West Supp. 1982). See note 20 supra for the text of § 93(b).

30 Judge Brotman’s injunction against the enforcement of the dues collection prohibition is discussed at 709 F.2d at 821.

31 Id.

32 Id. at 833; see text accompanying notes 87-89 infra.
NLRA did not preclude New Jersey from statutorily restricting union representation of employees in the casino industry. Judge Becker found that the state’s interest in prohibiting the infiltration of organized crime into Atlantic City outweighed any preemptive considerations. The Third Circuit en banc denied a petition for rehearing, stating that the issue of whether the NLRA preempted sections 86 and 93 of the Casino Control Act was worthy of full exploration by the Supreme Court. On November 28, 1983, the Supreme Court granted certiorari.

II. The Scope of Section 7

A key concern of the states is whether section 7 of the NLRA occupies the entire field in the area of qualification of union officials, or whether certain limited state regulations, such as sections 86 and 93 of the Casino Control Act, can coexist with the federal law. An analysis of this issue must begin with Congress’ enactment of section 7.

In the Wagner Act of 1935 ("NLRA"), Congress established a permanent foundation for the right of employees to organize and bargain collectively through representation of their choice. The heart of the Wagner Act was section 7, which provided:

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33 Id. at 835; see text accompanying notes 122-25 infra.
34 113 L.R.R.M.(BNA) 3311 (3d Cir. 1983). The court noted that given the magnitude of a state's interest in regulating an industry such as the casino industry, and the contention that such regulation does not inexorably stand as an obstacle to the purposes and objectives of Congress in the labor area, the issue of whether the NLRA preempts a provision such as section 93 of the Casino Control Act would seem a question worthy of full exploration by the Supreme Court.
35 Hotel & Restaurant Employees Int'l Union Local 54 v. Danziger, 709 F.2d 815 (3d Cir.), cert. granted, 104 S. Ct. 479 (1983).
37 See notes 1, 19, and 20 supra and accompanying text.
Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representation of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.  

The rights guaranteed in section 7 are implemented and enforced through section 8 of the NLRA, which makes a section 7 violation an unfair labor practice. The Act explicitly refers to both employers and unions but does not purport to govern the qualifications of those who may become union officials. On its face the NLRA does not disable states from legislating the qualifications for eligibility as a bargaining representative. Moreover, because there was little discussion of section 7's preemptive effect, the legislative history of the NLRA offers little insight into congressional intent on this issue.  

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41 29 U.S.C. § 158 (1976). Section 8(a) contains the provision enforcing an employee's rights as follows:

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it. . . ;
(3) by discrimination in regard to hire or any term or condition of employment to encourage or discourage membership in any labor organization. . . ;
(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;
(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

42 Id.
43 Unfair labor practices committed by employers are governed by § 8(a), 29 U.S.C. § 158(a) (1976), as set forth in note 41 supra. Unfair labor practices committed by unions are governed by § 8(b), 29 U.S.C. § 158(b) (1976). Section 8(b) prohibits labor organizations from restraining or coercing employees in the exercise of their § 7 rights; from causing an employer to discriminate against an employee; from refusing to bargain with an employer; from engaging in illegal strikes; from charging excessive dues; from extorting payment from an employer; and from engaging in illegal picketing.

44 The NLRA is silent as to qualifications of union officials. Congress has, however, addressed this problem. See notes 58-64 infra, and accompanying text for a discussion of § 504(a) of the Labor Management Reporting and Disclosure Act of 1959.

45 During the congressional debate over the Wagner Act, the only mention of a conflict between federal and state regulations was an objection that the Act would violate the tenth amendment. Hearings Before the Senate Comm. on Education and Labor, 74th Cong., 1st Sess. 243-44, 840 (1935) (statement of James A. Emery, General Counsel, National Association of Manufacturers). In order to violate the tenth amendment, the federal legislation would have to enter an area reserved solely for the states. Therefore, the rejection of the tenth amendment objection sheds little light on whether state legislation can coexist with the Act. In addition, several objections to the Act's failure to deal with the influence of racketeering on the labor movement were made. Hearings on S. 2926 Before the Senate Comm. on Education and Labor, 73d Cong., 2d Sess. 606-07, 645-46, 745-52, 979 (1934) (statements of Wallace B. Donham, Dean,
The United States Supreme Court faced the task of ascertaining the breadth of section 7 in *Hill v. Florida*. The Florida legislature had enacted a statute providing that no person who has not been a citizen of the United States for more than ten years, who has been convicted of a felony, or who is not a person of good moral character shall be licensed as a business agent of a labor union. A union with an unlicensed business agent was prevented from collecting dues. The Court, speaking expansively, stated that employees were to have "full freedom" to choose their own representatives, and held that section 7 of the NLRA preempted the Florida enactment.

In 1947, Congress, through the Taft-Hartley Act ("LMRA"), substantially revised the NLRA. Section 7 was reenacted in basi-
ally the same form as it had been in the Wagner Act, but additionally allowed employees the rights to refrain from organizing, bargaining collectively, and engaging in concerted activities, except to the extent that these rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized under section 8(a)(3).\(^{53}\) Section 7, as reenacted, still contained no explicit language either precluding or inviting state regulation of the qualification of union officials.\(^{54}\) Two sections of the 1947 amendments to the NLRA, however, explicitly allowed for state action in particular areas,\(^{55}\) while another section explicitly prohibited it.\(^{56}\) Because the Taft-Hartley Act contains sec-

\(^{53}\) 29 U.S.C. § 157 (1976). Section 8(a)(3) allows an employer to agree with a union that new employees, as a condition of employment, become members of the union, subject to certain limitations. 29 U.S.C. § 158(a)(3) (1976); see also note 55 infra.

\(^{54}\) Neither § 7 nor the rest of the NLRA as amended by the Taft-Hartley Act addressed state or federal legislation of union qualifications. But see notes 58-64 infra and accompanying text.

\(^{55}\) Section 10(a) gave the NLRB restricted power to cede jurisdiction to state agencies, thus eliminating the NLRB’s exclusive jurisdiction over labor disputes. 29 U.S.C. § 160(a) (1976). Section 14(b) granted the states the right to prohibit mandatory membership in a union as a condition of employment. 29 U.S.C. § 164(b) (1976).

In pertinent part, section 10(a) reads:

The Board is empowered . . . to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith. (emphasis added)

Moreover, section 14(b) reads:

Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

\(^{56}\) Section 14(a) allows supervisors to become members of unions, but does not compel
tions explicitly granting the states the power to regulate in some areas and sections denying them the right in other areas, the absence of any preemptive language in section 7 is not dispositive of the issue in either direction. 57

Congress again turned its attention to labor legislation with the enactment of the Labor Management Reporting and Disclosure Act of 1959 (LMRDA). 58 Congress drafted section 504 of the LMRDA to combat the infiltration of criminal elements into labor unions. 59 Section 504(a) prohibits individuals convicted of certain felonies from holding a union office for five years following the conviction, 60 thus limiting the employee's "free choice" of a bargaining representative. 61 Section 504 does not indicate whether it is the sole qualification statute or whether states also have the right to regulate in this

employers to deem their supervisors as employees for the purposes of any law relating to collective bargaining. 29 U.S.C. § 164(a) (1976).

57 See notes 55 and 56 supra. If the Taft-Hartley Act contained only provisions which expressly precluded state action, one could possibly infer that if a section did not mention state action, that it was permitted. Likewise if the Act contained only provisions which allowed state action, then when a section was silent one could possibly infer that state action was precluded. When, however, as happens in the Taft-Hartley Act, both types are present, no clear inference can be drawn from a section's silence.


59 29 U.S.C. § 504 (1976). In relevant part, § 504 provides:

(a) No person who is or has been a member of the Communist Party or who has been convicted of, or served any part of a prison term resulting from his conviction of robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury, or a violation of title II or III of this Act, or conspiracy to commit any such crimes, shall serve—

(1) as an officer, director, trustee, member of any executive board or similar governing body, business agent, manager, organizer, or other employee (other than as an employee performing exclusively clerical or custodial duties) of any group or association of employers dealing with any labor organization, or

(2) as a labor relations consultant to a person engaged in an industry or activity affecting commerce, or as an officer, director, agent, or employee (other than as an employee performing exclusively clerical or custodial duties) of any group or association of employers dealing with any labor organization, or

(b) Any person who willfully violates this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

(c) For the purposes of this section, any person shall be deemed to have been "convicted" and under the disability of "conviction" from the date of the judgment of the trial court or the date of the final sustaining of such judgment on appeal, whichever is the later event, regardless of whether such conviction occurred before or after the date of enactment of this Act.

60 Id. Section 504 applies even when the conviction occurred before the date of the enactment. 29 U.S.C. § 504(c) (1976).

61 Id. Thus, even though employees have the "right . . . to representation of their own
Like the Taft-Hartley Act, the LMRDA contains a section expressly precluding certain state action and sections expressly allowing certain state action. Therefore, Congress' silence in section 504 is also not dispositive of its preemptive effect.

In 1960, the Supreme Court considered a conflict between section 7 and a state regulation targeted toward a single industry. In DeVeau v. Braisted, section 8 of the New York Waterfront Commission Act was challenged as an unconstitutional usurpation of congressional power. The New York statute disqualified persons convicted of certain crimes from eligibility for office in any waterfront union. DeVeau presented the Court with a unique factual sit-

choosing," see text accompanying note 40 supra, they may not choose a representative disqualified under the § 504(a) criteria.

62 See note 59 supra for the text of § 504.

63 Sections 603(a), 29 U.S.C. § 523(a) (1976), and 604, 29 U.S.C. § 524 (1976), expressly grant the states regulatory freedom. Section 603(a) permits states to regulate in the areas of labor organization responsibilities, rights, and liabilities. Section 604 recognizes the rights of states to enact and enforce criminal laws.

Conversely, § 483 expressly restricts state action, providing:

No labor organization shall be required by law to conduct elections of officers with greater frequency or in a different form or manner than is required by its own constitution or bylaws, except as otherwise provided by this subchapter. Existing rights and remedies to enforce the constitution and bylaws of a labor organization with respect to elections prior to the conduct thereof shall not be affected by the provisions of this subchapter. The remedy provided by this subchapter for challenging an election already conducted shall be exclusive.


64 The dissent in Danziger espoused this position. See notes 122-25 infra and accompanying text.


66 N.Y. UNCONSOL. LAWS § 9933 (McKinney 1974). Section 8 provides:

No person shall solicit, collect or receive any dues, assessments, levies, fines or contributions, or other charges within the state for or on behalf of any labor organization which represents employees registered or licensed pursuant to the provisions of this act . . . if any officer, agent or employee of such labor organization . . . has been convicted by a court of the United States, or any state or territory thereof, of a felony [or] any misdemeanor involving moral turpitude . . . unless he has been subsequently pardoned therefor by the governor or other appropriate authority of the state or jurisdiction in which such conviction was had or has received a certificate of good conduct from the board of parole pursuant to the provisions of the executive law to remove the disability.

67 The appellant in DeVeau had served as Secretary-Treasurer of Local 1346, International Longshoreman's Association. In 1920 he pled guilty to grand larceny and received a suspended sentence. Three years after the enactment of the Waterfront Commission Act,
vation because section 8 was enacted pursuant to a congressionally approved interstate compact between New York and New Jersey.\textsuperscript{68} Although the compact received congressional support, section 8, administered solely by New York, was not itself specifically approved.\textsuperscript{69} Justice Brennan, who provided the fifth vote in a plurality opinion, stated that Congress had demonstrated its intent that section 8 of the New York Waterfront Commission Act should stand, and found no preemption.\textsuperscript{70} He further added that the LMRDA,\textsuperscript{71} containing language barring convicted felons from holding union office,\textsuperscript{72} did not displace additional legislation by the states.\textsuperscript{73} Thus, this Court recognized a limited exception to \textit{Hill} in the unique factual setting of \textit{DeVeau}.

In addition to the limited exception to \textit{Hill} carved out in \textit{DeVeau}, the Supreme Court has, through a series of cases, delineated a general exception to the normal rules of preemption in the labor area. In \textit{San Diego Building Trades Council, Millmen's Union, Local 202 v. Garmon},\textsuperscript{74} the Court enunciated what has become the recognized rule

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\textsuperscript{68} Congress had approved this compact pursuant to article I, section 10 of the U.S. Constitution in the Waterfront Commission Compact, Pub. L. No. 83-252, 67 Stat. 541 (1953).

\textsuperscript{69} Section 8 is part of New York's code. It was enacted by New York and is administered solely by New York, thus it lacks the bi-state character which would require congressional approval pursuant to article I, section 10, of the U.S. Constitution and, accordingly, was not formally included in the compact which Congress approved. \textit{DeVeau}, 363 U.S. at 150-51.

\textsuperscript{70} Justice Brennan opined that Congress has demonstrated its intent that § 8 of the New York Waterfront Commission Act should stand, despite the provisions of the NLRA. He additionally believed that the LMRDA explicitly provides that it shall not displace state legislation. New York's disqualification of ex-felons from waterfront union offices, on all the circumstances, and as applied to this specific area, is a reasonable means for achieving a legitimate state aim, and does not deny due process or otherwise violate the U.S. Constitution. Accordingly, he held that the judgment should be affirmed. 363 U.S. at 160 (Brennan, J., concurring).

\textsuperscript{71} 29 U.S.C. § 401 (1976); \textit{see} text accompanying notes 58-61 supra.

\textsuperscript{72} \textit{See} note 59 supra.

\textsuperscript{73} \textit{See} note 70 supra. However, the dissenting Justices believed that Congress' failure to overrule \textit{Hill} indicated congressional approval of \textit{Hill} and that federal law alone should determine the qualifications for union officials. 363 U.S. at 165. (Douglas, J., dissenting).

\textsuperscript{74} 359 U.S. 236 (1959). \textit{Garmon} involved an action in state court by an employer against a union for an injunction to restrain picketing and for damages. In an opinion by Justice Frankfurter, the Court held that §§ 7 and 8 of the NLRA preempted the state action, and that the NLRB had exclusive jurisdiction over the matter, reversing the decision of the California Supreme Court that the action was not under the exclusive jurisdiction of the NLRB. \textit{Garmon v. San Diego Bldg. Trades Council}, 49 Cal. 2d 595, 320 P.2d 473 (1958). Justice
in the area of preemption and labor legislation:

[Due regard for the presuppositions of our embracing federal system . . . has required us not to find withdrawal from the states of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act. Or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the states of the power to act.]

However, the Garmon Court added that in instances where the activities which a state purports to regulate are protected by section 7 of the NLRA, or constitute an unfair labor practice under section 8, due regard for the federal enactment requires that state jurisdiction yield. This statement created conflict, because a state regulation could touch interests deeply rooted in local feeling while at the same time be "fairly assumed to be protected by Section 7 of the National Labor Relations Act." Later decisions of the Court, most notably Farmer v. Carpenters, have removed this conflict.

In Farmer, the Court stated that regulations which touch interests deeply rooted in local feeling and responsibility are an exception to the general rule stated in Garmon. The Court found that a state's interest in allowing an action for intentional infliction of emotional

Harlan, joined by Justices Clark, Whittaker, and Stewart, filed a concurring opinion emphasizing that "where the challenged conduct is neither protected nor prohibited under the federal Act," state regulation and power is not precluded. 359 U.S. at 254 (Harlan, J., concurring).

[359 U.S. at 243-44 (citations omitted, emphasis added).
3 Id. at 244; see also note 77 infra.
77 Justice Frankfurter stated: "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield." 359 U.S. at 244. See also note 74 supra for a discussion of the concurring opinion of Justice Harlan.
79 See note 80 infra and accompanying text.
80 Writing the unanimous decision, Justice Powell stated:
We have refused to apply the pre-emption doctrine to activity that otherwise would fall within the scope of Garmon if that activity 'was a merely peripheral concern of the Labor Management Relations Act . . . [or] touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act.' 359 U.S. at 243-44. . . . These exceptions 'in no way undermine the vitality of the pre-emption rule.' 386 U.S. at 180. To the contrary, they highlight our responsibility in a case of this kind to determine the scope of the general rule by examining the state interests in regulating the conduct in question and the potential for interference with the federal regulatory scheme.
430 U.S. at 296-97.]
distress against union officials by a union member outweighed any interest the NLRB had in having exclusive control over the same matter, and therefore the state action was not preempted by the NLRA.81 The opinion of Local 926, International Union of Operating Engineers v. Jones,82 augmented the decision in Farmer, identifying the analysis for determining whether a state regulation should stand:

The question of whether regulation should be allowed because of the deeply-rooted nature of the local interest involves a sensitive balancing of any harm to the regulatory scheme established by Congress, either in terms of negating the Board's exclusive jurisdiction or in terms of conflicting substantive rules, and the importance of the asserted cause of action to the state as a protection to its citizens.83

The Supreme Court, in both Farmer and Jones, recognized an exception to the general preemption rule outlined in Garmon. Application of the "local interest" exception can only be determined by balancing a special state interest against the conflicting federal concern of maintaining a uniform regulatory scheme in the area of labor law.84

Neither Jones nor any other relevant Supreme Court decision has overruled Hill. However, later Supreme Court decisions have modified and limited the breadth of its words. DeVeau instructs that not all state regulation concerning qualifications of union officials is preempted under the doctrine of Hill.85 Instead, any challenged state regulation which appears to conflict with section 7 of the

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81 430 U.S. at 302-04. The Court vacated the judgment of the California Court of Appeals which had held that the conduct was arguably subject to the jurisdiction of the NLRB and therefore preempted. Garmon, 49 Cal. App. 3d 614, 122 Cal. Rptr. 722 (1975). The California Court of Appeals reversed a jury verdict in favor of the plaintiff, 49 Cal. App. 3d at 614, 122 Cal. Rptr. at 722, and the California Supreme Court declined to review the case. 430 U.S. at 295.
82 103 S. Ct. 1453 (1983). The Court held that appellee's state cause of action for interference with contractual relations, premised on an allegation that appellant union had coerced the employer into breaching the contract, was preempted by §§ 7 and 8 of the NLRA. Appellee had previously filed a charge with the NLRB, alleging that appellant union had procured his discharge because he was not a member in good standing with the union. When the NLRB rejected this charge, rather than appeal to the NLRB's General Counsel, appellee filed suit in a Georgia state court. The Superior Court, Fulton County, Georgia (unreported opinion), dismissed the complaint on the ground that it was preempted because the subject matter was arguably within the exclusive jurisdiction of the NLRB. See 159 Ga. App. 693, 285 S.E.2d 30 (1981). The Georgia Court of Appeals reversed the dismissal on the grounds that Georgia had a deeply rooted local interest and that the controversy presented in state court was not identical to that which would be presented to the NLRB. 285 S.E.2d at 32-33.
83 103 S. Ct. at 1459. The balancing in this case favored protection of the federal labor scheme.
84 See notes 80-82 supra and accompanying text.
85 See notes 65-73 supra and accompanying text.
NLRA triggers a balancing test: to determine if the state regulation can coexist with section 7, a court must weigh, as outlined in Jones, the special state interest against the harm to the federal regulatory scheme.86

III. The Danziger Analysis

The majority opinion in Danziger, relying heavily on Hill and Congress’ subsequent failure to legislatively overrule Hill, fashioned a preemption doctrine that appears to leave no room for state regulation of qualifications for union officials.87

Choice of bargaining representative is totally protected by section 7, except to the extent that the bargaining representative may be disqualified under Section 504(a) of the LMRDA.88 No Section 504 LMRDA disqualification applies to [Local 54’s] officers. Thus there is neither occasion nor justification for engaging in weighing or balancing.89

The Danziger court, by employing this absolute preemption doctrine and refusing to examine the purposes and policies of the federal scheme in comparison with the state interest in this regulation has, in effect, denied the existence of an exception to the general preemption rule which the Supreme Court has recognized in cases such as Farmer and Jones.90 In Jones, the Court found the union’s conduct arguably prohibited by section 8(b)(1)(B) of the NLRA,91 which forbids a labor union to coerce an employer in the choice of his representative for purposes of collective bargaining or adjustment of grievances.92 Similarly, the Danziger court found that the employee’s free choice of a bargaining representative is arguably protected by section 7.93 In Jones, however, the Supreme Court additionally checked for exceptions, by first ascertaining whether the issue was merely a peripheral concern of the Act,94 and then balancing the state interest against the

86 See notes 80-84 supra and accompanying text.
87 709 F.2d at 835 (Becker, J., dissenting); see also text accompanying note 88 infra.
88 See notes 58-64 supra and accompanying text for discussion of § 504(a).
89 709 F.2d at 828.
90 See notes 80-84 supra and accompanying text.
91 103 S. Ct. at 1460-61.
92 Section 8(b)(1)(B) makes it an unfair labor practice for a labor organization or its agents to restrain or coerce an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances. 29 U.S.C. § 158 (b)(1)(B) (1976).
93 709 F.2d at 828.
94 103 S. Ct. at 1459-60. If the conduct at issue is only a peripheral concern of the Act or touches on interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, it could not be inferred that Congress intended to deprive
harm to the federal regulatory scheme. The Jones Court found an obvious and substantial interference with the NLRB's jurisdiction which outweighed any deeply rooted interest the state had in the matter. Regardless of which way the scale would have tipped, the Danziger majority erred by not using the balancing test at all.

A. New Jersey's State Interest

The balancing must begin with New Jersey's interest in maintaining a comprehensive regulatory scheme to govern casino gambling. In 1974, the New Jersey voters, aware of organized crime's attraction to casino gambling, soundly defeated a state-wide referendum to legalize gambling in Atlantic City. A second referendum passed in 1976, only when the voters were assured that New Jersey

the state of the power to act, the Supreme Court will refuse to invalidate the state regulation or sanction the conduct.

95 See text accompanying note 83 supra for a formulation of the balancing test.
96 103 S. Ct. at 1462.

We thus cannot agree that Jones' efforts to recover damages from the Union for interference with his contractual relationships with his employer was of only a peripheral concern to the federal labor policy. Our [past] decisions . . . refute Jones' submission. They also foreclose any claim that Jones' action against the Union for interference with his job is so deeply rooted in local law that Georgia's interest in enforcing that law overrides the interference with the federal labor law that prosecution of the state action would entail.

Id.

97 709 F.2d at 828. The Danziger Court specifically stated that it did not and need not apply the balancing test. Id. It appears beyond dispute, however, that balancing is required. See text accompanying note 83 supra.
98 See notes 100-06 infra and accompanying text.
99 Sullivan, Jersey Rejects Casino Proposal, N.Y. Times, Nov. 6, 1974, at 1, col. 3. A large turnout led to the defeat of the gambling question by a vote of 1,851,154 to 671,685.
100 The referendum passed read as follows:

It shall be lawful for the Legislature to authorize by law the establishment and operation, under regulation and control by the State, of gambling houses or casinos within the boundaries, as heretofore established, of the city of Atlantic City, county of Atlantic, and to license and tax such operations and equipment used in connection therewith. Any law authorizing the establishment and operation of such gambling establishments shall provide for the State revenues derived therefrom to be applied solely for the purpose of providing reductions in property taxes, rentals, telephone, gas, electric, and municipal utilities charges of eligible senior citizens and disabled residents of the State, in accordance with such formulae as the Legislature shall by law provide. The type and number of such casinos or gambling houses and of the gambling games which may be conducted in any such establishment shall be determined by or pursuant to the laws authorizing the establishment and operation thereof.

would have "the strongest regulations of casinos in the world." To keep its promise to the voters, the state had to prevent organized crime from infiltrating its gambling industry, an industry the FBI labelled "the lifeblood of organized crime." Legalized casino gambling attracts organized crime because casinos contain vast amounts of cash and gaming chips susceptible to misappropriation, and because millions of dollars continually change hands among thousands of people on the casino floor without any record showing where or from whom the money came.

The unique characteristics of the gambling industry, along with its other potential societal evils, compelled the New Jersey legislature and various state agencies to extensively investigate ways to keep Atlantic City's gambling industry clean, aware that only the most stringent of gambling control laws would thwart the infiltration of the casinos and related services by organized crime. The State Commission of Investigation explicitly recognized the necessity of state control over casino-related labor unions, asserting that "there are few better vehicles utilized by organized crime to gain a stranglehold on an entire industry than labor racketeering." The reasons for this assertion are three-fold. First, organized labor sits in an ideal position to extort money from casino owners for labor peace. Be-


102 Hearings Before the Comm'n on the Review of the Nat'l Policy Toward Gambling (May 10, 1976) (testimony of Frederick Fehl, acting Assistant Director, FBI); see also United States v. Garrison, 348 F. Supp. 1112, 1119 (E.D. La. 1972) (commenting on organized crime's use of gambling income to fund other operations).


104 Profitability is . . . not a direct function of the quality of gaming or of the environment in and around the casino. Corporate corruption, cheating, loansharking, overextension of credit, insobriety, prostitution and a honky-tonk atmosphere are not antithetical to a desire for profit, and in the industry are occasionally viewed as legitimate societal overhead so long as they encourage, or at least do not interfere with, the vitality of the gambling market.


105 See, e.g., Comm'n of Investigation, Report & Recommendations, supra note 103; Staff Policy Group, Second Interim Report, supra note 104. The reports were based on studies of gambling industries in other states and around the world.

106 Comm'n of Investigation, Report & Recommendations, supra note 103, at II.

107 See note 110 infra.
cause a casino grosses between $500,000 and $1 million per day, a union could expect large payoffs to prevent a crippling strike. Second, a corrupt union could demand illegal payments from legitimate businessmen to ensure the safe, uninterrupted operation of the lucrative ancillary services. Third, the ready source of cash which union coffers provide could finance all sorts of legitimate or illegitimate activities. If organized crime were able to use these funds to finance the operation of ancillary services and exert pressure through the union to gain the service contracts, it would in effect have the casinos in a stranglehold.

Aware of the peculiar attributes of the gambling industry and its associated potential for entanglement with organized crime, the New Jersey legislature passed the Casino Control Act. This tough, comprehensive regulation fulfilled New Jersey’s promise to its citizens to maintain the integrity of the casino industry. Sections 86 and 93 restrict an employee’s unfettered choice of a bargaining representative, but do not, as the Danziger majority concludes, constitute an impermissible intrusion into federally created or protected rights under section 7.

Section 7 of the NLRA, as originally enacted, did not restrict an employee's choice of representation. But in 1959 Congress recognized a need to curb criminal infiltration into the labor movement and enacted section 504(a) of the LMRDA, which prohibited persons convicted of certain felonies from holding union office for a five year period. "The LMRDA was adopted in part because state and local authorities had failed to adopt effective measures to stamp out crime and corruption [in unions] and guarantee internal union democracy. Consistent with this legislative purpose, Congress could reasonably allow a state to adopt more restrictive eligibility requirements."

Section 504 is silent on the issue of whether a state may impose additional disqualification criteria. The Danziger majority denies the states this right, supporting its position in part by emphasizing that certain sections of the LMRDA contain savings clauses that expressly recognize a state's right to provide additional remedies. Since Congress did not include such a clause in section 504, the majority infers a congressional intent to preclude the states from imposing additional disqualification criteria.

The dissent correctly points out the fallacy of this conclusion. At least one other section of the LMRDA is expressly preemptive and, therefore, an inference equally as plausible as that espoused by the majority can be drawn that Congress intended to preempt only when it did so explicitly. Relying on the absence of a savings

selected officials of a union certified by the Board as exclusive bargaining agent." 709 F.2d at 830. But see notes 131-45 infra and accompanying text.

116 See notes 45 and 54 infra and accompanying text.
117 See notes 58-64 supra and accompanying text for discussion of § 504.
118 International Longshoreman's Assoc. v. Waterfront Comm'n, 495 F. Supp 1101, 1123 (S.D.N.Y. 1980), aff'd in part and rev'd in part on other grounds, 642 F.2d 666 (2d Cir.), cert. denied, 454 U.S. 966 (1981). The Longshoreman's Union brought this action challenging the validity of New York's Waterfront Commission Act § 8, which set forth employment qualifications for waterfront unions. The district court held that the Act could lawfully be enforced against individuals whom it disqualified from service as waterfront union employees, but could not be enforced against persons other than disqualified union employees for collecting and distributing union dues.

119 See notes 58-64 supra and accompanying text.
120 709 F.2d at 827-28. In support of this argument §§ 603(A) and 604 are cited. See note 63 supra and accompanying text.
121 Id.
122 709 F.2d at 842.
123 Section 483, 29 U.S.C. § 483 (1976), is expressly preemptive. Section 483 states, in pertinent part: "the remedy provided by this subchapter for challenging an election already conducted shall be exclusive." See also note 63 supra and accompanying text.
124 709 F.2d at 842; see also notes 62-64 and 120-23 supra and accompanying text.
clause is, realistically, a futile attempt to divine congressional intent. The only reasonable conclusion that can be drawn from the enactment of the LMRDA is that Congress recognized that employees do not have an absolute freedom to choose whomever they desire for union representation. Rather, Congress recognized that the employees' choice is subject to limitations.\footnote{These limitations are seen in § 504(a) of the LMRDA, which specifically addresses the issue of disqualification criteria for union officials. See notes 58-64 \textit{supra} and accompanying text. Additional limitations on employees freedom are: § 302 of the Taft-Hartley Act, 29 U.S.C. § 186 (1976), which addresses the issue of labor-management corruption; § 411(A) of Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1111(a) (1976), which provides protection against corruption in the administration of employee benefit plans by establishing disqualifying criteria for officers and employees of employee benefit plans; and the Hobbs Act, 18 U.S.C. §§ 1951-1955 (1976), and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968 (1976), which both root out corruption in the context of labor-related activities.}

The Supreme Court's decision in \textit{DeVeau}, interpreting congressional intent, further suggests a congressional perception that when a situation exists where crime, corruption, and racketeering threaten the welfare of a state, comprehensive state regulation is needed.\footnote{\textit{DeVeau} v. Braisted, 363 U.S. 144 (1960); see also Hazelton v. Murray, 21 N.J. 115, 123, 121 A.2d 1, 5 (1956) (Justice Brennan wrote the opinion of the New Jersey Supreme Court, which sustained § 8 of New Jersey's Waterfront Commission Act). "If the conviction of crime is a proper consideration related to the public interest for the purposes of licensing and registering waterfront workers, much more so is the provision here under review which would wrest from the vicious criminal combine the means through which the corrupt conspiracy was perpetrated."} Congress approved the New York Waterfront Compact despite the protests from the International Longshoreman's Association that section 8 of the New York Waterfront Commission Act conflicted with federal labor policy.\footnote{See note 68 \textit{supra}; see also \textit{Hearings on H.R. 6296, H.R. 6321, H.R. 6343, and S. 2383 Before Subcomm. No. 3 of the House Comm. on the Judiciary, 83d Cong., 1st Sess. 136 (1953). The Longshoreman's Association was the union most affected by § 8 of the Act.}

The regulations of the Casino Control Act are similar to those in the Waterfront Commission Act. The New Jersey legislature perceived that labor corruption could become as severe and pervasive as that which had existed on the New York waterfront.\footnote{"For years the New York Waterfront presented a notoriously serious situation. Urgent need for drastic reform was generally recognized." 363 U.S. at 147.} To be sure, New York acted only when the situation had reached an appalling state, but "to write into preemptive jurisprudence a distinction between remedial and prophylactic legislation would prevent states from acting until an industry is so rife with corruption that 'criminals, racketeers, and hoodlums [have] acquired a strangle-..."
hold.'”129 Situations where federal interests in section 7 are outweighed by a state’s concern for protecting its welfare are rare, but New Jersey has adequately demonstrated through studies, hearings, and the experience of other jurisdictions, that the casino industry is far more attractive to organized crime than other industries. The dangers of criminal infiltration can only be avoided by the comprehensive regulations put forth in the Casino Control Act. These regulations are not inimical to the federal regulatory scheme, but represent merely a “conscientious and well-reasoned attempt to erect a breakwater against a tide of vice and corruption that could engulf Atlantic City’s casinos.”130

B. The Federal Interest

The application of the balancing test must include an analysis of the impact the state regulation has on the federal regulatory scheme, including a consideration of both substantive conflicts with the NLRA and jurisdictional conflicts with the NLRB.131 The Casino Control Act poses potential problems in both areas; however, the resulting harm to the federal scheme is insignificant.

The NLRA addressed two distinct concerns.132 First, Congress was concerned with the crippling effect industrial unrest had on interstate commerce.133 Second, Congress was bothered by the inequality of bargaining power between an employer and his employees.134 These policy concerns were drafted into section 1 of the NLRA as follows:

> It is hereby declared to be the policy of the United States to elim-

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129 Hotel & Restaurant Employees, Int’l Union Local 54 v. Danziger, 709 F.2d 815, 850 (Becker, J., dissenting), quoting Hazelton v. Murray, 21 N.J. 115, 120, 121 A.2d 1, 4 (1956) (Brennan, J.) (describing the conditions of the New York waterfront prior to the compact, and sustaining the constitutionality of the provision in the New Jersey law which was identical to the provision sustained in DeVeau).

130 709 F.2d at 851 (Becker, J., dissenting).

131 See note 83 supra and accompanying text, which sets out the balancing test of Jones.

132 See notes 133-34 infra and accompanying text.

133 In NLRB v. Pennsylvania Greyhound Lines, 303 U.S. 261 (1938), the Supreme Court said: “The history of the Act and its language show that its ruling purpose was to protect interstate commerce by securing to employees the rights established by § 7 to organize, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for that and other purposes.” Id. at 265-66 (emphasis added); see also C. Bufford, The Wagner Act Employee and Employer Relations 1-8 (1941); 29 U.S.C. § 151 (1976).

134 “The second major objective of the bill is to encourage, by developing the procedure of collective bargaining, that equality of bargaining power which is prerequisite to equality of opportunity and freedom of contract.” C. Bufford, supra note 133, at 6.
inate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.135

The Casino Control Act must be evaluated against this federal policy background.

Substantively, by imposing disqualification criteria, the New Jersey legislation conflicts with but a portion of section 7 of the NLRA. Section 86 limits only the employees' right to choose bargaining representation, while preserving the rights to organize and bargain collectively.136 Moreover, employees are not completely disabled from choosing their own bargaining representative; rather, employees are prevented only from choosing those representatives that the state of New Jersey reasonably believes pose a threat to the integrity of the casino industry and to the safety of its citizens.137 The casino employees retain the protection and bargaining strength of the unions which Congress intended when it enacted the NLRA.138

Additionally, the problems New Jersey faces in attempting to maintain a crime-free casino industry lack the interstate character with which the NLRA is primarily concerned.139 Because of the lo-

136 See notes 39-44 supra and accompanying text, discussing the several protections of § 7 in addition to the right of representation of choice.
137 Sections 86 and 93, see notes 19-20 supra and accompanying text, do not prevent the unionization of casino employees. They merely implement the policy considerations suggested at notes 100-12 and 128-30 supra and accompanying text.
138 See notes 136-37 supra and accompanying text. The constructive purposes which made the Act acceptable to Congress are nowhere more succinctly set forth than in a statement President Roosevelt issued at the time he signed the Act:

A better relationship between labor and management is the high purpose of this Act. By assuring the employees the right of collective bargaining it fosters the development of the employment contract on a sound and equitable basis. By providing an orderly procedure for determining who is entitled to represent the employees, it aims to remove one of the chief causes of wasteful economic strife. By preventing practices which tend to destroy the independence of labor, it seeks for every worker within its scope freedom of choice and action which is justly his.

79 CONG. REC. 10,720 (1935) (statement of Pres. Roosevelt introduced into record by Sen. Guffey). These purposes themselves are not thwarted by the Casino Control Act. In fact, by preventing the infiltration of organized crime into labor union management, the New Jersey Act helps insure the independence of the labor union and the freedom of the employee. A union and employee controlled by organized crime are no better off than if they were controlled by management.

139 See note 133 supra and accompanying text.
cal nature and the special characteristics of the casino industry, state regulation of its associated unions impacts only slightly on interstate commerce.\(^\text{140}\) Rather, the New Jersey casino industry presents the same type of local problem which Congress felt was best handled by local legislation when it approved the Waterfront Compact to clean up New York Harbor.\(^\text{141}\)

Procedurally, the Casino Control Act impinges on the jurisdiction of the NLRB; it empowers the Commission to disable a union otherwise certified by the NLRB from collecting dues when union officials fail to meet the qualifications of section 86.\(^\text{142}\) State power and NLRB jurisdiction similarly conflicted in the DeVeau situation where the Supreme Court held that Congress acquiesced in the exercise of dual jurisdiction.\(^\text{143}\) Moreover, when Congress enacted the NLRA, it expressly empowered the NLRB to cede jurisdiction to state administrative bodies.\(^\text{144}\) Thus, although the NLRB has not expressly relinquished jurisdiction, exclusive jurisdiction by the NLRB in all labor matters does not seem to be of tantamount importance to Congress. Accordingly, an intrusion into this area by a specially qualified state Commission with limited industry jurisdiction does not seem to place an impermissible burden on the NLRB's

\(^{140}\) This is not to say that regulation of the casino industry and its special problems are beyond the reach of Congress under the powers granted to it under the commerce clause. Nor is it to say that this is regulation of an integral state function and therefore reserved to the states by the tenth amendment. (For an application of the tenth amendment as a means of restricting federal legislation under the commerce clause, see National League of Cities v. Usery, 426 U.S. 833 (1976)). The casino industry surely impacts sufficiently on interstate commerce to allow Congress, if it so desired, to regulate the industry under the power granted it in the commerce clause.

However, there also exists a gray area where Congress could regulate, but has not. Special legislation for unions associated with the gambling industry is just such an area, and the New Jersey regulations fill this void. Congress often defers to the states in those areas which, because of the local nature of the problem, the state's closeness to the situation, and the lack of substantial impact on interstate commerce, Congress finds that the problem is best handled by the state. DeVeau presented such a situation. See notes 126-132 supra and accompanying text; see also Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978), holding that a Washington state law which required tug escorts in Puget Sound for tankers in excess of a certain weight and not satisfying the state's design standards was not preempted, even though the Secretary of Transportation had certified the tankers. The Court stated that the effect of the statute was an additional cost of less than one cent per barrel of oil and had not affected the amount of oil processed at Puget Sound. Id. at 179. It is difficult to imagine that significant effects on interstate commerce will result from New Jersey's enforcement of §§ 86 and 93.

\(^{141}\) See notes 65-73 supra and accompanying text.

\(^{142}\) See note 20 supra for the authority of the Commission to prevent dues collection.

\(^{143}\) See note 65-73 supra and accompanying text.

\(^{144}\) See note 55 supra and accompanying text.
IV. Conclusion

Section 7 rights are not absolute. Congress recognized this fact when it enacted section 504(a) of the LMRDA, which expressly establishes disqualification criteria to halt criminal infiltration into labor unions. The state of New Jersey has also recognized this fact, and passed the Casino Control Act which further restricts criminal infiltration into union representation of casino employees. The federal and state statutes are complimentary; the New Jersey Act merely supplements the federal effort in an area of unique local concern: keeping the gambling industry free of the destructive influences of organized crime.

The issue of whether sections 7 and 504(a) preempt state legislation in the area of representative qualifications is presently under review by the Supreme Court. If the Court holds New Jersey’s statute preempted, the state will become powerless to prevent organized crime from gaining a stranglehold on the casino industry through the instrumentality of the labor unions. The Court is thus urged to balance the interests in Danziger in favor of state action. Additionally, Congress is urged to adopt federal legislation specifically authorizing state regulation of union representation of casino employees. Such a regulatory scheme would maintain the integrity of the casino industry and the safety of the people, while reasonably accommodating the section 7 rights of casino employees. Attempting to stop organized crime from coming in the front door while the back door remains open is futile.

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Louis J. Weber, III

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145 See note 55 supra and accompanying text. Because Congress itself has seen fit to expressly allow the NLRB to cede jurisdiction in § 10(a) of the Taft-Hartley Act and in the same section has excluded certain industries unless predominately local in character, it seems that Congress does not consider it to be of vital importance that the NLRB maintain exclusive jurisdiction over an industry which is not on the excluded list and is local in character.