State of Confusion: The HIPPA Privacy Rule and State Physician-Patient Privilege Laws in Federal Question Cases

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STATE OF CONFUSION: THE HIPAA PRIVACY RULE AND STATE PHYSICIAN-PATIENT PRIVILEGE LAWS IN FEDERAL QUESTION CASES

I. INTRODUCTION

People expect that when they visit a doctor the information that is revealed in the visit and recorded in their medical records will be kept from the eyes of others. This may be a reasonable expectation in most situations, but not necessarily if the medical records are sought for use in court. No federal physician-patient privilege exists, and the existence and scope of such a privilege varies across states. The passage of the Health Insurance Portability and Accountability Act (HIPAA) has led to confusion over the appropriate effect of state privileges in federal question cases.

HIPAA required the Department of Health and Human Services (HHS) to promulgate rules relating to privacy of protected health information. The resulting set of regulations, known as the HIPAA Privacy Rule, contains a section discussing the use of protected health information, such as medical records, in judicial proceedings. Federal courts generally use federal evidentiary rules where federal law supplies the rule of decision.


4 45 C.F.R. § 164.512(e) (2005).

5 Fed. R. Evid. 501; see also In re Sealed Case (Medical Records), 381 F.3d 1205,
Additionally, federal laws typically preempt contrary state laws. HIPAA, however, contains a preemption clause stating that it will not "supercede [sic] a contrary provision of State law, if the provision of State law imposes requirements, standards, or implementation specifications that are more stringent than the requirements, standards, or implementation specifications imposed under the regulation." Courts have differed in their interpretation of HIPAA's preemption clause in cases whose subject matter jurisdiction is based on a federal question. Some courts have held that HIPAA should always control in federal question cases. Conversely, others have held that state privilege laws should apply if they are more stringent. Still others have found middle ground, analyzing whether the particular state privilege law in question is more stringent than HIPAA without generalizing as to HIPAA's effect in all federal question cases. This Note will argue that HIPAA should control in federal question cases, regardless of whether state privilege laws are more stringent. Future courts should acknowledge that Congress did not intend for HIPAA to incorporate state privileges. Courts should not compare the stringency of state privilege laws with HIPAA in federal question cases because this confuses the proper analysis and could lead to inappropriate control by state privilege laws in these cases.

Part II will provide an overview of relevant sections of HIPAA, along with Congress and HHS's intent. This section will also review the general doctrine of evidentiary privileges, various physician-patient and medical records privileges in states, and the theory of preemption. Part III will discuss various approaches taken by courts regarding the interpretation of HIPAA's preemption provision and the consequences that this has on which privilege law will apply in federal question cases. Part IV will analyze these approaches, and argue that HIPAA should preempt state privilege laws in federal question cases, regardless of the stringency of state law.

1212 (D.C. Cir. 2004) (recognizing preference for applying federal privilege law in cases with both federal and state claims).

6 See infra notes 36-39 and accompanying text.


8 See infra notes 57-71 and accompanying text.

9 See infra notes 72-80 and accompanying text.

10 See infra notes 81-90 and accompanying text.
II. HIPAA, PRIVILEGES, PREEMPTION, AND CONGRESSIONAL INTENT

A. Overview of HIPAA and the Privacy Rule

Congress enacted HIPAA on August 21, 1996. The purposes of HIPAA were to ensure more consistent health insurance coverage, reduce insurance fraud, and increase efficiency in insurance administration. Many provisions, particularly those in the Administrative Simplification section, would implicate privacy issues because they would result in increased sharing of individuals' health information. Congress therefore directed the Secretary of HHS to provide them with recommendations regarding appropriate standards to protect individuals' information privacy. If Congress failed to enact legislation encompassing the recommended standards, then HHS was to issue regulations regarding privacy of protected health information. The task fell to HHS when Congress did not enact such legislation.

In 2002, HHS promulgated the regulations known as the HIPAA Privacy Rule, which detail the measures that must be taken to properly handle protected health information. Protected health information (PHI) is individually identifiable health information, meaning someone could potentially identify the individual by examining the health and demographic information contained in the PHI. All health plans, health care clearinghouses, and health care providers who transmit health information electronically are considered covered entities and must abide by the regulations.

One section of the Privacy Rule pertains to the use of protected health information in judicial and administrative proceedings, allowing disclosure of such information after certain detailed procedures are fol-
If the presiding court issues a subpoena, the covered entity may disclose medical records without providing notice to the patient. If the subpoena or discovery request is not court-ordered, the covered entity may disclose the records after either providing notice to the affected individual or obtaining a qualified protective order.

B. Privileges

A privilege gives a witness the right to withhold certain information from a judicial proceeding. Privileges are exceptions to the maxim that “the public . . . has a right to every man’s evidence.” The policy underlying privileges is to encourage the free flow of information in certain relationships in which society highly values privacy. Many states provide for such a privilege between patient and physician, usually via statute. These statutes vary in scope but generally protect against requiring admission of medical records into evidence.

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21 45 C.F.R. § 164.512(e)(1)(i) (2005). This Note uses the phrase “medical records” interchangeably with PHI because this is the more common term, but technically PHI can also include information such as records of payment for health care. See 45 C.F.R. § 160.103 (2005).
22 45 C.F.R. § 164.512(e)(1)(vi) (2005). The covered entity may also disclose the information if the party seeking the records provides satisfactory assurance of reasonable efforts to either provide notice or obtain a qualified protective order. 45 C.F.R. § 164.512(e)(1)(ii) (2005). The standards for adequate notice and for a qualified protective order are found at 45 C.F.R. §§ 164.512(e)(1)(iii)-(v) (2005).
24 Trammel, 445 U.S. at 50 (quoting United States v. Bryan, 339 U.S. 323, 331 (1950)) (narrowing privilege against spousal testimony). The Court reasoned that privileges should be construed narrowly to protect the policy of admitting probative evidence. Id.
25 See Ruebner & Reis, supra note 14, at 532-40 (reviewing the Jaffee court’s reasoning).
26 Ruebner & Reis, supra note 14, at 563-64.
27 See, e.g., HAW. REV. STAT. ANN. § 504 (LexisNexis 2006); MICH. COMP. LAWS ANN. § 600.2157 (West 2006); see also Ruebner & Reis, supra note 14, at 564-65 (surveying similar state statutes). The Hawaii privilege provides:

A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of the patient's physical, mental, or emotional condition, including alcohol or drug addiction, among oneself, the patient's physician, and persons who are participating in the diagnosis or treatment under the direction of the physician, including members of the patient's family.

HAW. REV. STAT. ANN. § 504 (LexisNexis 2006). The Michigan statute is drafted more narrowly:
Federal Rule of Evidence 501 governs privileges in federal courts. As a result of this rule, federal privileges control in federal courts unless state law provides the rule of decision—in which case, state privileges apply. The rule reflects the theory that where a particular state's law provides the rule of decision in a case, that state has an interest in the privilege policies that the court applies.

If federal law applies, Rule 501 dictates the procedure to determine which privileges, if any, pertain to the case. First, the court determines whether an Act of Congress has created a privilege; if not, the court then assesses whether federal courts have developed a common-law privilege "in the light of reason and experience." While federal courts currently recognize a psychologist-patient privilege, no such federal privilege exists to protect the physician-patient relationship or the resulting medical records.

HIPAA fits into this framework in a rather complex way. Some commentators argue that HIPAA was, in fact, an "Act of Congress" that created a physician-patient privilege. Others contend that while HIPAA did not create a federal statutory privilege, federal courts should now rec-

Except as otherwise provided by law, a person duly authorized to practice medicine or surgery shall not disclose any information that the person has acquired in attending a patient in a professional character, if the information was necessary to enable the person to prescribe for the patient as a physician, or to do any act for the patient as a surgeon.

MICH. COMP. LAWS ANN. § 600.2157 (West 2006)

FED. R. EVID. 501. The text of the Rule is as follows:

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.

See id.; see also In re Sealed Case (Medical Records), 381 F.3d 1205, 1212 (D.C. Cir. 2004) (leaving issue unresolved in cases containing both federal and state claims).

FED. R. EVID. 501 advisory committee's note.


See Ruebner & Reis, supra note 14, at 532-40 (arguing that HHS responded to Congress' broad grant of authority by creating a physician-patient privilege).
of the United States Constitution commands that the Constitution and federal laws enacted pursuant to its authority "shall be the supreme Law of the Land." The doctrine of preemption originating in this clause establishes that federal law trumps state law in particular areas if Congress so intends—expressly or impliedly—or if state law conflicts with federal law. Express and conflict preemption are the types most pertinent to this discussion. Express preemption occurs when Congress enacts a statute explicitly stating that it will preempt state law in the relevant field. Conflict preemption exists in scenarios in which one cannot simultaneously comply with both state and federal law because they are in conflict. In enacting HIPAA, Congress expressly preempted some state laws relating to medical record-keeping.

As mentioned earlier, however, Congress saved from preemption conflicting state laws if they provide more stringent protections for health infor-

34 See Broun, supra note 1, at 659 (proposing that physician-patient privilege should be narrow in scope and modeled after existing psychotherapist-patient privilege); Ruebner & Reis, supra note 14, at 540-74 (contending that even if HIPAA did not create new privilege, it provided foundation for common-law privilege through "reason and experience"); Molly Silfeti, Note and Comment, I Want My Information Back: Evidentiary Privilege Following the Partial Birth Abortion Cases, 38 J. HEALTH L. 121, 132-34 (2005) (arguing that courts should create federal physician-patient privilege that is "somewhat weaker" than the psychiatrist-patient privilege). Professor Broun also provides a useful survey of legal scholars' arguments for and against such a privilege. See Broun, supra note 1, at 683-91.


36 U.S. Const. art. VI, cl. 2.


38 Id. at 299 ("Of course, Congress explicitly may define the extent to which its enactments pre-empt state law").

39 Id. at 300 ("Such a conflict will be found 'when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress'" (quoting Cal. Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 581 (1987))). The third type, implied preemption, occurs when Congress effectively occupies a field. Id.

HHS included similar sections on preemption in the Privacy Rule regulations, which state that the regulations as a whole preempt contrary state law.\textsuperscript{42} A notable exception to this general rule is the "anti-preemption" clause, providing that HIPAA and its regulations will not preempt a conflicting state provision that "relates to the privacy of individually identifiable health information and is more stringent than a standard, requirement, or implementation specification adopted under [the privacy provisions] of this subchapter."\textsuperscript{43} It is this preemption provision that has proven so troublesome in federal question cases. Some commentators and courts believe that the anti-preemption clause contained in HIPAA gives state privileges that are more stringent the force of federal law in federal question cases.\textsuperscript{44}

\textit{D. Intent of Congress and HHS}

In drafting and enacting HIPAA, Congress did not explicitly address the issue of whether HIPAA would give more stringent state privilege laws the force of law in federal question cases. Congressional records reveal, however, that several legislators expressed concern during debate that HIPAA did not provide more substantial privacy protections.\textsuperscript{45} Representative Jim McDermott from Washington was especially disturbed that the bill required increased ease of transferring health information without mandating "one single shred of protection of your privacy."\textsuperscript{46} Other testimony indicates that the anti-preemption provision may have been included in response to fears that HIPAA would override state health care and insurance reform efforts.\textsuperscript{47}

In HHS' recommendations to Congress and in its final regulations, the Secretary of HHS expressed an urgent need for privacy protections at

\textsuperscript{41} 42 U.S.C. § 1320d-7(a)(2) (2000); HIPAA § 264(c)(2).
\textsuperscript{42} 45 C.F.R. § 160.203 (2005).
\textsuperscript{43} 45 C.F.R. § 160.203(b) (2005). This provision in the regulation complements the similar statement in the statute. See supra note 7 (quoting relevant language from HIPAA).
\textsuperscript{44} See Ruebner & Reis, supra note 14, at 533-34 (construing HHS' commentary to support this position); see also United States v. Diabetes Treatment Ctrs. of Am., No. Civ. 99-3298, 2004 WL 2009416, at *3-*4 (D.D.C. May 17, 2004) (holding Florida medical privacy law to be more stringent than HIPAA).
the federal level. The Secretary explained that many factors, including the rising use of electronic medical records and the attendant ease of information transfer, have increased the potential for misuse of private health data. The Secretary believed that a federal floor of regulation in this area would provide a minimum level of protection while reflecting HHS' policy of guarding individuals' privacy surrounding their medical information.

Although HHS recognized the importance of protecting medical privacy, the agency did not intend for the Privacy Rule to affect existing evidentiary privileges. The Secretary explained that Congress and HHS had balanced privacy considerations against competing policies in allowing disclosure for certain purposes, such as for judicial proceedings. In construing the interaction of the Privacy Rule with more protective state laws, the Secretary emphasized that such state laws would continue to apply where they "operate in the same area as the federal standards."

III. FEDERAL COURTS' VARYING APPROACHES

The question of whether state privilege laws, if more stringent than HIPAA, should be used in federal question cases emerged in several courts in 2004 when then-Attorney General John Ashcroft subpoenaed medical records from various hospitals across the country. This issue arose out of a case filed in New York in which the National Abortion Federation and seven physicians challenged the constitutionality of the Partial-Birth Abortion Ban Act of 2003 (PBABA).

During discovery the Attorney General


See id. at 82,466 (explaining that state privacy rules are inconsistent and that health information transfer is becoming increasingly national); see also id. at 82,471 (describing Privacy Rule as federal floor above which states and regulated entities are free to provide more privacy protections).

See id. at 82,596 (refusing to incorporate previously existing federal psychotherapist-patient privilege into regulations). The Secretary explicitly stated that creating any new privileges would be beyond the scope of the authority that Congress delegated to HHS. Id.

See id. at 82,471 (recognizing that information privacy is not absolute and must be balanced against other public expectations).

See id. at 82,583 (emphasis added) ("state laws that are more protective of privacy than contrary federal standards should remain").


subpoenaed medical records of abortions performed by the plaintiff physicians. These included records at Northwestern Hospital in Illinois and at New York and Presbyterian Hospital in New York—two hospitals that challenged the subpoenas in their respective district courts. The resulting decisions, along with other recent cases, illustrate the various ways that courts have reconciled HIPAA with state privilege laws.

A. Stating that HIPAA Should Always Control in Federal Question Cases

Some courts have held that HIPAA, rather than any state privilege law, should always control in cases in which courts have jurisdiction based on a federal question. So far the only federal circuit Court of Appeals to reach this conclusion has been the Seventh Circuit in *Northwestern Memorial Hospital v. Ashcroft*. Although the court ultimately affirmed the quashing of the subpoena, it did so on different grounds from those of the lower court. The court of appeals explained that state privilege laws do not control in federal question cases because the federal courts have exclusive jurisdiction over the claims. See *Nat'l Abortion Fed'n v. Ashcroft*, 362 F.3d 923, 926 (7th Cir. 2004); see also *Northwestern*, 362 F.3d at 923; *NAF Illinois*, 2004 WL 292079, at *2*. Both hospitals claimed that the applicable state privilege law protected the records from disclosure. *NAF Illinois*, 2004 WL 292079, at *2*. The court of appeals held that the government's motion to compel the records was properly denied because the government had failed to demonstrate that the records were relevant and necessary to the case. See *Northwestern*, 362 F.3d at 923; *NAF Illinois*, 2004 WL 292079, at *2*.
not apply in cases based on federal question jurisdiction. The court did not explicitly discuss HIPAA’s anti-preemption provision but reasoned that it was not HHS’s intent for the regulations to incorporate state law. Rather, HIPAA and the Privacy Rule are purely procedural in nature—merely establishing the requisite procedures for medical records to be brought into court.

In the Southern District of New York, a judge faced the same facts as those in Northwestern and came to a similar conclusion regarding HIPAA and the use of state privileges. This court was more explicit in its analysis of HIPAA’s anti-preemption provision than was the Seventh Circuit. The district court distinguished a federal law that does not by its terms preempt state law from a federal law that incorporates state law. The former permits the state law to continue operating where it otherwise would have if the federal law in question had not been in effect; in contrast, the latter actively adopts state law as federal law.

The district court interpreted HIPAA’s language as being more similar to the former non-preemption situation. Thus, the anti-preemption clause simply allows state privileges to have continued effect in state court, and also in federal court when state law provides the rule of deci-

45(c)(3)(A)(iv)). The court considered, as one factor in its balancing, that Illinois’ medical records privilege would have dictated quashing the subpoena. Id. at 932-33. The court also overruled the lower court’s alternate holding that would have established a federal common-law privilege for the abortion records. Id. at 926. 59 Id. at 925-26; see also Kalinoski v. Evans, 377 F. Supp. 2d 136, 140-41 (D.D.C. 2005) (citing Northwestern and agreeing that federal privilege law applies when federal claims are brought in federal court); Equal Employment Opportunity Comm’n v. Boston Mkt Corp., No. 2:03-CV-04227, 2004 WL 3327264, at *4 (E.D.N.Y. Dec. 16, 2004) (refusing to decide whether state privilege law was more stringent in a case based on a federal claim).

60 Northwestern, 362 F.3d at 925 (“[W]e think it improbable that HHS intended to open such a can of worms when it set forth a procedure for disclosure of medical records in litigation.”). The court acknowledged at the outset of its analysis, however, that the question regarding the effect of HIPAA on state privileges in federal court is still “not free from doubt.” Id.

61 Id. at 925-26. Further, the court remarked that HIPAA is not an “Act of Congress” that would create a privilege and remove the issue from the purview of federal common-law under Federal Rule of Evidence 501. Id. at 926.

62 Nat’l Abortion Fed’n v. Ashcroft (NAF New York), No. 1:03-CV-08695, 2004 WL 555701, at *4-*6 (S.D.N.Y. Mar. 19, 2004) (refusing to apply New York privilege law). The district court judge allowed the subpoena of the medical records to stand. Id. at *1. The Attorney General, however, withdrew the subpoena after all of these cases were decided.


64 NAF New York, 2004 WL 555701, at *4 (reasoning that courts must look to Congressional intent to interpret which result statute dictates).

65 See id. at *4-*5 (comparing the former to the effect of a shield, and the latter to a sword).
HIPAA IN FEDERAL QUESTION CASES

To support this proposition, the court provided contrasting examples of incorporation-type situations in which Congress makes explicit statements such as "State standards to preempt applicable Federal standards" or "laws of each adjacent State . . . are declared to be the law of the United States." The relevant language in HIPAA instead states only that it will not preempt contrasting, more stringent state privilege laws.

The court also quoted HHS, who authored the Privacy Rule regulations, as interpreting HIPAA to not "give an effect to State law that it would not otherwise have in the absence of section 264(c)(2)." This supports the court's conclusion that HIPAA was not intended to incorporate state law into federal law.

B. Stating that More Stringent State Privilege Laws Should Apply

A minority of courts have held that even in federal question cases, state privilege laws should apply if they are more stringent than the protections afforded by HIPAA. The first of these cases was National Abortion Federation v. Ashcroft (NAF Illinois)—a case from the Northern District of Illinois, which on appeal became Northwestern Memorial, discussed above.

NAF Illinois involved a subpoena for medical records for certain patients of a physician-plaintiff in the original case in New York, challenging PBABA's constitutionality.

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66 See id. at *4-*5 ("The negative language in section 264(c)(2) does not equate to the positive power to create binding law in the federal domain.").

67 Id. at *4 (quoting 29 U.S.C. § 667(b)) (distinguishing HIPAA from law in which Congress intended for state law to preempt federal law).

68 Id. at *4 (quoting 43 U.S.C. § 1333(a)(2)(A)) (distinguishing HIPAA from law that Congress intended to incorporate state standards).

69 Id. at *5.

70 Id. at *5 (quoting 64 Fed. Reg. 59,918, 60,000 (Nov. 3, 1999)). The court emphasized HHS' construction, saying that courts should look to the relevant administrative agency's reasonable interpretation if a statute is silent on a particular issue. Id. (citing Chevron USA, Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843-44 (1984)).

71 Id. at *6. The court also asserted that although HIPAA does not create a privilege, it counts as an Act of Congress for the purposes of Fed. R. Evid. 501. Id. If other courts were to adopt this view it would preclude development of a federal common-law privilege. Id. at *6.

72 Nat'l Abortion Fed'n v. Ashcroft (NAF Illinois), No. 1:04-CV-00055, 2004 WL 292079, at *5 (N.D. Ill. Feb. 6, 2004), aff'd sub nom. Northwestern Mem'l Hosp. v. Ashcroft, 362 F.3d 923 (7th Cir. 2004). Although the court of appeals affirmed the ultimate result regarding the subpoena in NAF Illinois, it disagreed with the district court's interpretation of HIPAA and how it relates to the Illinois medical-records privilege. See supra notes 57-61 and accompanying text (discussing court of appeals' decision). The district court's reasoning remains useful for study as the law in this subject area is unsettled, and it is unclear what approach future courts will take.

The district court in *NAF Illinois* quashed the subpoena on the basis of Illinois' medical privacy law, which prevents physicians from disclosing patients' medical information without their consent. The court compared the scope of the Illinois statutory privilege with HIPAA's protections and found that the Illinois provisions were contrary to and more stringent than HIPAA. In determining which provisions to apply, the court interpreted HIPAA's anti-preemption clause to mean that HIPAA "activated" Illinois's provisions, describing this as "a case of one federal law displacing another." The court reasoned that it must have been Congress' intent in enacting HIPAA to give federal effect to more stringent state privilege laws because the Privacy Rule would otherwise be meaningless under Federal Rule of Evidence 501. Similarly, in *United States v. Diabetes Treatment Centers of America*, the District Court for the District of Columbia found that Florida's state privilege law was in conflict with and more stringent than the HIPAA provisions. The court reasoned

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F.3d 278 (2d Cir. 2006); *NAF Illinois*, 2004 WL 292079, at *1 (explaining that Northwestern had control over records because plaintiff-physician practiced there); see supra notes 53-56 and accompanying text (providing circumstances leading to these cases).

*NAF Illinois*, 2004 WL 292079, at *3, *5 (citing 735 ILCS 5/8-802). Illinois law prevented disclosure in this situation even though the records would have been redacted of certain patient-identifying information. *Id.* at *3.

*Id.* at *3-*4 (citing 45 C.F.R. § 160.202 for definition of "more stringent"). The court determined that Illinois's provision does not allow a physician to disclose protected information even in response to a subpoena, while "HIPAA regulations clearly allow a hospital to disclose patient medical records, when ordered in judicial proceedings, subject to... limitations." *Id.* at *3. This Note does not focus on the specifics of how to perform a HIPAA preemption analysis because it is argued here that such analyses should not be performed in federal question cases. Interested readers are referred to other commentators for further elaboration on the mechanics of HIPAA preemption analyses. See Guthrie, supra note 35, at 152-53 (arguing that covered health care entities should not be forced to perform such difficult legal analyses). See generally Beverly Cohen, *Reconciling the HIPAA Privacy Rule with State Laws Regulating Ex Parte Interviews of Plaintiffs' Treating Physicians: a Guide to Performing HIPAA Preemption Analysis*, 43 Hous. L. Rev. 1091 (2006) (noting that courts have been inconsistent in analysis).


*Id.* at *5. The Illinois court reasoned that the lack of a federal common-law physician-patient privilege was not dispositive because HIPAA was an Act of Congress for the purposes of Federal Rule of Evidence 501. See *id.* As an alternate means of quashing the subpoena, the court also declared there to be a federal physician-patient privilege protecting abortion records. See *id.* at *6 (holding that reason and experience dictate a privilege under Federal Rule of Evidence 501 for such sensitive information as abortion records).


*Id.* at *1. The case involved medical records from twenty-seven states and the District of Columbia; however, only those from Florida were at issue here because only Florida's privilege law was in conflict with and more stringent than HIPAA's protections. *Id.* at *2 (reviewing state-by-state analysis taken by Diabetes Treatment Centers of America). The Florida law required that notice be provided to non-party patients whose medical records would be brought into the action, while HIPAA would not require notice if the dis-
HIPAA did not preempt the state law because of HIPAA's anti-preemption language.

C. Performing Comparison of HIPAA with State Privilege Laws

Some courts exercising federal question jurisdiction have performed comparisons to determine whether HIPAA or the relevant state privilege law offers greater privacy protections. For example, in Creely v. Genesis Health Ventures, the District Court for the Eastern District of Pennsylvania exercised federal question jurisdiction and addressed whether the defendant would be required to produce certain medical records during discovery. The court determined that HIPAA did not prevent the court-ordered production of the records. Significantly, the court also evaluated whether Pennsylvania's medical records confidentiality statute allowed the records to be withheld. While the Creely court did not formally analyze whether the state statute should apply in a federal question case, it referenced HIPAA's anti-preemption language and implied that if Pennsylvania's law had prevented disclosure it would have controlled in the case.

The District Court for the Eastern District of Louisiana performed a similar analysis in United States ex rel. Stewart v. Louisiana Clinic, in which the court addressed whether HIPAA or Louisiana privilege law prevented nonparty medical records from disclosure. The Stewart court ex-
licitly noted that federal—not state—confidentiality law typically controls in federal question cases. The court reasoned, however, that if the Louisiana law met the requirements of the HIPAA anti-preemption language, the state law would apply to the case. Ultimately, the *Stewart* court held that HIPAA preempted the Louisiana law because it did not satisfy the required elements to be exempt from preemption.

IV. ANALYSIS

A. HIPAA Was Not an Act of Congress Creating a Privilege

Congress did not intend to create a federal physician-patient privilege in enacting HIPAA. Congress has used much more direct language when creating other privileges by statute. For example, one such statute creating a privilege for certain highway safety reports dictates that such reports “shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding.” Another statute creating a privilege for patient safety work product clearly states that “patient safety work product shall be privileged and shall not be subject to... subpoena... order... subject to discovery... admitted as evidence in any Federal, State, or local governmental civil proceeding, criminal proceeding, administrative rulemaking proceeding, or administrative adjudicatory proceeding... or admitted in a professional disciplinary proceeding.” Congress did not

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88 Id. at *2.
89 See id. at *4-*5 (electing to perform HIPAA analysis despite HIPAA not yet being in effect); see also Bayne v. Provost, 359 F. Supp. 2d 234 (N.D.N.Y. 2005) (case brought under 42 U.S.C. § 1983). The Bayne court similarly stated that state privileges do not apply in federal question cases, but then proceeded to analyze whether the New York law was more stringent than the protections provided by HIPAA. Id. at 238-41. Although the court ultimately held that New York law did not offer more protections and was thus preempted by HIPAA, this implied that the court would have applied New York confidentiality law to the federal question case if it had found the reverse. See id. at 239-41.
90 *Stewart*, 2002 WL 31819130, at *5 (holding that the Louisiana statute was not more stringent than HIPAA in that it did not address “the form, substance, or the need for express legal permission from an individual” (citing 45 C.F.R. § 160.202)).
91 23 U.S.C. § 409. Courts have held that the policy underlying this provision is to “[f]oster the free flow of safety-related information by precluding the possibility that such information later would be admissible in civil suits.” Perkins v. Ohio Dept. of Transp., 584 N.E.2d 794, 802 (Ohio Ct. App. 1989).
92 42 U.S.C. § 299b-22. Patient safety work product includes reports “developed by a provider for reporting to a patient safety organization... or developed by a patient safety...
intend for HIPAA to directly create a physician-patient privilege because it did not use similar explicit language as in these other statutes.

Congress also did not intend for HIPAA to incorporate state privileges and thereby implement a de facto federal privilege. Had this been the case, it surely would have been an issue of debate, not only among those in Congress but also among academic and legal commentators, during the drafting and passage of HIPAA. Rather, Congress intended to increase efficiency and reduce fraud in the administration of health insurance. The privacy provisions, relegated to formation by regulation, were primarily added to ensure that the increasing transfer of electronic health information would not lead to information misuse, to give patients the right to consent to various uses of their personal data, and to provide individuals access to their own medical records. The Secretary of HHS remarked in the preamble to the Privacy Standards that the regulations were not intended to create a new privilege, as this would be beyond the scope of authority that Congress had delegated to the agency.

If Congress did not intend to create a privilege, then HIPAA was not an Act of Congress for the purposes of Federal Rule of Evidence 501. On the contrary, HIPAA is purely procedural in nature and allows the use of protected medical information in court when litigants comply with the procedures in the Privacy Rule. Courts apply HIPAA in determining what procedures are required, but this does not equate to a privilege. Instead, a true privilege results from society valuing the privacy of a particular relationship to such a degree that it is willing to forgo in-court use of any relevant information arising from that relationship.

organization for the conduct of patient safety activities.” 42 U.S.C. § 299b-21(7)(A); see also 42 U.S.C. 3614-1(a)(2) (using phrase “shall be privileged” to create privilege for reports of certain self-tests).

93 See supra notes 13-17 and accompanying text (describing purpose of HIPAA and Privacy Rule).

94 Instead, during the debates on HIPAA, legislators commented on the lack of accompanying privacy protections. See supra note 45-46 and accompanying text (providing examples of legislators’ fears about HIPAA’s lack of attendant privacy protections).

95 See supra note 13 and accompanying text (summarizing HIPAA’s purposes).

96 See supra notes 14-17 and accompanying text.

97 See supra note 50 and accompanying text (providing Secretary’s caution that HIPAA regulations did not create any new privilege).

98 See supra notes 20-22 and accompanying text (summarizing HIPAA’s requirements for use of medical records in judicial proceedings); supra note 61 and accompanying text (discussing Northwestern’s reasoning that HIPAA was purely procedural). The court in NAF Illinois explained that “HIPAA’s regulations clearly allow a hospital to disclose patient medical records, when ordered in judicial proceedings, subject to . . . limitations.” Nat’l Abortion Fed’n v. Ashcroft (NAF Illinois), No. 1:04-CV-00055, 2004 WL 292079, at *3 (N.D. Ill. Feb. 6, 2004), aff’d sub nom. Northwestern Mem’l Hosp. v. Ashcroft, 362 F.3d 923 (7th Cir. 2004).

99 See supra notes 24-25 and accompanying text (discussing policy reasons behind
does not reach the same policy conclusion; although Congress and HHS recognized the importance of privacy of medical information, they chose to allow the use of this information in courts.\textsuperscript{100}

Rule 501 dictates that courts then look to federal common-law privileges in situations such as this where Congress has not so acted.\textsuperscript{101} Congress did not intend for HIPAA to preempt state law in the area of medical information privacy, and the Privacy Rule would presumably not conflict with any privilege that courts may establish in the future.\textsuperscript{102} HIPAA merely provides the minimum procedures necessary to bring private medical information into court; a privilege that would disallow the use entirely would go beyond the present floor of protection.\textsuperscript{103} This leaves courts the freedom to develop a federal common-law physician-patient privilege if they so choose.\textsuperscript{104}

\textbf{B. HIPAA Does Not Direct Courts to Apply More Stringent State Privilege Laws in Federal Question Cases}

The plain language of HIPAA does not direct federal law to incorporate state privilege laws.\textsuperscript{105} HIPAA's anti-preemption section states that its provisions do not supersede contrary state laws that "[impose] requirements, standards, or implementation specifications that are more stringent than [those] imposed under the regulation."\textsuperscript{106} State privilege laws do not impose any requirements in cases where courts exercise federal question jurisdiction, as federal privilege law controls in these cases.\textsuperscript{107} Thus, the anti-preemption language could have no effect on state law in these cases providing a privilege); see also supra note 27 (providing examples of state physician-patient privileges).

\textsuperscript{100} See supra notes 50-52 and accompanying text (explaining HHS's policy valuing privacy while balancing against other competing policies).
\textsuperscript{101} See supra note 31 and accompanying text (setting out analysis under FED. R. EVID. 501).
\textsuperscript{102} See supra notes 36-43 and accompanying text (providing overview of preemption doctrine and HIPAA's preemption language). Federal law preempts state law in a particular area if Congress so intends or if federal and state laws are in conflict with one another. \textit{Id.} See supra note 49 and accompanying text (characterizing Privacy Rule as a federal floor of regulations).
\textsuperscript{104} See supra note 49 and accompanying text. The Secretary of HHS explained that states and regulated agencies are free to provide more protections than does HIPAA. \textit{Id.} By inference, the federal courts or Congress are also free to provide increased protections in the future. See id.
\textsuperscript{105} See supra notes 64-71 and accompanying text (summarizing reasoning of \textit{Nat'l Abortion Fed'n v. Ashcroft} in distinguishing simple non-preemption language from that of incorporation).
\textsuperscript{107} See supra notes 28-30 and accompanying text (explaining that federal courts only apply state privilege laws where state law provides rule of decision).
because state law never would have applied in the absence of HIPAA. The anti-preemption provision applies only in state courts and in federal court cases in which state law provides the rules of decision—i.e., diversity jurisdiction.

Congress did not intend for state laws to preempt HIPAA or for HIPAA to incorporate state laws. Congress has been more explicit in giving state law the force and effect of federal law in those instances where it has chosen to do so. No similar explicit language was used in HIPAA's anti-preemption provision, implying that Congress did not intend such a result.

Further, HHS did not believe that the Privacy Rule gave federal effect to state privilege laws. HHS attempted to balance individuals' privacy interests with various competing public interests, such as the use of relevant medical record information in judicial proceedings. The Privacy Rule allows for disclosure in such situations, even without the individual patient's consent, so long as proper procedures are followed. HHS emphasized that the rule dictates the procedures parties must use in obtaining health information; it does not disturb any previously existing state or federal privileges. State privileges never existed in federal question cases, so the Privacy Rule's only effect in these cases is to provide procedures for disclosure.

The Seventh Circuit properly held that the Privacy Rule does not allow for state privileges to apply in federal question cases. While that court recognized that this point was "not free from doubt," the majority of

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108 See supra notes 50-52 and accompanying text (providing HHS's understanding that HIPAA had no effect on existing privileges).
109 See supra note 59 and accompanying text (surveying courts that have so held).
110 See supra note 66 and accompanying text (providing conclusion of Nat'l Abortion Fed'n v. Ashcroft).
111 See supra notes 67-68 and accompanying text (quoting other statutes in which Congress more explicitly intended for federal law to incorporate state law). For example, Congress has used phrases such as "State standards to preempt applicable Federal standards" or "laws of each adjacent State. . . are declared to be the law of the United States." Id.
112 See supra notes 69-71 and accompanying text (distinguishing HIPAA's language from that in incorporation-type statutes).
113 See supra note 70 and accompanying text (quoting HHS's statement made during notice and comment period).
114 See supra note 51 and accompanying text (stating balancing is necessary because privacy interest is not absolute).
115 See supra notes 20-22 and accompanying text (discussing procedures for use of medical records in judicial proceedings).
116 See supra notes 50-52 and accompanying text (summarizing Secretary's statements).
117 See supra notes 59-61 and accompanying text (discussing Northwestern's reasoning).
118 See supra note 59 and accompanying text.
courts analyzing this issue have also reached the same conclusion.\footnote{See supra note 60 and accompanying text (quoting Northwestern). But see supra note 72 and accompanying text (summarizing cases holding that more stringent state privilege law applied in federal question cases).} The problematic cases are those in which courts exercising federal question jurisdiction perform preemption analyses, in which they determine if the relevant state privilege law is more stringent than the protections offered by HIPAA.\footnote{See supra notes 75, 79, 84-90 and accompanying text.} These cases create the potential for state laws to improperly control in federal courts, and also confuse the proper analysis.\footnote{See supra notes 75, 79, 84-90 and accompanying text (summarizing cases in which courts either used or implied that they would use state privileges).} Future courts should follow the Seventh Circuit’s lead and decline to perform these preemption analyses.\footnote{See supra notes 57 and 59 and accompanying text (stating Seventh Circuit was first court of appeals to hold that HIPAA does not direct federal courts to apply state privileges).}

V. CONCLUSION

While many states recognize statutory physician-patient privileges, there is no similar privilege in the federal courts. HIPAA did not have the effect of creating such a privilege—either directly or by federalizing state privileges. HIPAA’s preemption language allows more stringent state privileges to continue their previous effect in state courts, but does not permit courts exercising federal question jurisdiction to apply these state privileges. Federal courts currently performing preemption analyses to determine if the applicable state statute is more stringent than HIPAA are improperly giving federal effect to state law.

Privacy surrounding medical records is certainly an important value; however, it must be balanced against other values, such as free availability of relevant evidence in judicial proceedings. Congress and federal courts have thus far chosen to weigh the balance on the side of admissibility of medical records and have not enacted a federal physician-patient privilege. While HIPAA did not itself create such a privilege, its passage is a public recognition of the need for privacy protections in an environment in which it is increasingly easy to transfer information. Until either Congress or the federal judiciary build upon this recognition and formally recognize a physician-patient privilege, states’ privileges should not control in federal courts.

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