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Federalizing Privilege

Timothy P. Glynn

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Federalizing Privilege

FEDERALIZING PRIVILEGE

TIMOTHY P. GLYNN*

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INTRODUCTION

The attorney-client privilege is a mess. One might expect a few unresolved issues because there is no national law governing the privilege, no codification of the privilege in the federal courts, and little leadership from the Supreme Court on the subject. Yet the conflict and confusion runs deeper and is more widespread than many observers realize. Unlike most other areas of the law of evidence, there is a lack of convergence in key aspects of the attorney-client privilege.¹ The law of privilege varies greatly from state to state, federal circuit to federal circuit, and context to context, and its application often is unclear within particular jurisdictions and even within particular cases. Most strikingly, the conflicts and ambiguities are not relegated to the margins. Fundamental issues, such as the requirements of confidentiality, the parameters of the corporate attorney-client privilege, and the scope of the crime-fraud exemption are disputed or largely unresolved. Moreover, choice-of-law principles governing the choice between conflicting privilege doctrines of interested jurisdictions simply exacerbate the unpredictability because these principles vary widely and often default to application of the law of the forum.

The disarray reflects our love-hate attitude toward the privilege. Attorneys and clients assessing their own relationships believe the privilege promotes candor, communication, and sound legal advice, and serves other important interests, such as protecting privacy and ensuring loyalty. Indeed, the mere suggestion that attorney-client

1. See Kenneth S. Broun, *Giving Codification a Second Chance—Testimonial Privileges and the Federal Rules of Evidence*, 53 HASTINGS L.J. 769, 786 (2002) (noting that, in the federal system, many important, unresolved issues relating to testimonial privileges involve the attorney-client privilege); see also Margaret A. Berger, *The Federal Rules of Evidence: Defining and Refining the Goals of Codification*, 12 HOFSTRA L. REV. 255, 256 (1984) (discussing the trend toward codification by states, Puerto Rico, and the military of evidence codes following adoption of, and based on, the Federal Rules of Evidence); Note, *Making Sense of Rules of Privilege Under the Structural (IL) Logic of the Federal Rules of Evidence*, 105 HARV. L. REV. 1339, 1339 (1992) (stating that the attorney-client privilege has long been the most controversial area of federal evidence law).

confidences may be disclosed or used against the client evokes outrage in many members of the legal profession. The recent uproar over the Justice Department's post-September 11 decision to allow government officials to monitor prisoners' telephone conversations with their attorneys is an obvious example.²

Yet, when the focus shifts outward, specifically to an adversary's use of the privilege as a shield in discovery or at trial, attitudes toward the privilege turn decisively sour. From this perspective, attorneys and their clients view the privilege as a formidable barrier to ascertaining truth, and the plaintiffs' bar in particular sees claims of privilege as largely overstated and obstructionist.³ Likewise, the public takes a dim view of assertions of the attorney-client and other privileges by those under scrutiny in well-publicized disputes or scandals, such as the tobacco litigation and the recent Enron debacle.⁴

These strong feelings and competing interests ensure that controversy over the privilege will not go away. Skeptics will remain, among them commentators who question the basic assumption that the privilege produces social benefits, particularly in the corporate context.⁵ Yet, given its long history and solid foothold in every jurisdiction, the privilege—including the corporate privilege—is here to stay, in one form or another. The question then, is not whether to keep or abandon the attorney-client privilege, but rather, how to

2. On October 31, 2001, the Justice Department announced that it had the authority to monitor conversations between detainees and their attorneys whenever the government has "substantial reason" to believe that the conversations could facilitate violence or terrorism by passing on information or instructions. Prevention of Acts of Violence and Terrorism, 28 C.F.R. § 501.3(d) (2002). Some criminal defense attorneys and civil libertarians have called the rule "horrifying" and have expressed concerns that the rule will make it impossible for attorneys to prepare defenses. Tom Brune, *Rule Would Bypass Attorney Privilege*, NEWSDAY, Nov. 6, 2001, available at <http://www.newsday.com/news/nationworld/nation/nyusrule06245043Inov06.story>. The American Bar Association also opposed the rule. Review Wire Services, *ABA Opposes Monitoring of Client-Lawyer Talks, But Supports Use of Tribunals*, 76 MIAMI DAILY BUS. REV., Jan. 11, 2002, at 13.

3. See Robert W. Gordon, *The Ethical Worlds of Large-Firm Litigators: Preliminary Observations*, 67 FORDHAM L. REV. 709, 722-25 (1998) (discussing attitudes of plaintiffs' attorneys toward the defense and corporate bars and finding most plaintiffs' attorneys believe the other side is obstructionist and evasive in discovery). While there may be good reasons for drawing sharp distinctions between different contexts, shifting attitudes with respect to the circumstances in which the privilege should apply also often reflect differing experiences and sympathies.

4. See, e.g., Jonathon D. Glater, *Round Up the Usual Suspects. Lawyers Too?*, N.Y. TIMES, Aug. 4, 2002, at C4 (noting public criticism of efforts by lawyers and other corporate executives to conceal malfeasance through the attorney-client privilege); Stuart Taylor, Jr., *Tobacco Lawyers and The Case For Cover-Up Reform*, NAT'L J., Feb. 10, 2001, at 388 (criticizing lawyers who use the attorney-client privilege to shield evidence of the harmful effects of tobacco).

5. See *infra* notes 53-57, 70-73 and accompanying text (articulating specific criticisms of the privilege).

maximize its potential benefits while limiting its costs.

Some are content to let parties and courts continue to hash out privilege doctrine on a case-by-case, jurisdiction-by-jurisdiction basis. That is what Congress did in 1975, when it chose to leave the development of privilege doctrine to the courts.⁶ Continuing on this course makes no sense, however. First, re-litigating the parameters of privilege doctrine over and over again creates enormous transaction costs.⁷ More importantly, the uncertainty that this approach has produced defies the principal justification for the modern privilege. By shielding attorney-client confidences from discovery, the privilege is supposed to promote communication and candor between the attorney and client, which, in turn, is supposed to foster compliance with the law, facilitate the effective administration of justice, and produce other social benefits. Sufficient certainty or predictability that these confidences will be protected from disclosure is *essential* to promote, and avoid chilling, client candor. Indeed, an uncertain privilege offers nothing but harm: it inhibits access to the truth and creates enormous transaction costs while failing to enhance attorney-client communication and candor. Thus, today's highly uncertain privilege is intolerable.

In the quest for greater certainty, many commentators have called for reform. Some have advocated specific changes to the substance of privilege doctrine or called on specific jurisdictions to change the way in which they approach or apply the privilege.⁸ Others have taken a more holistic approach. One commentator, for example, has called for adoption of new choice-of-law principles that enhance predictability by ensuring that the law of the jurisdiction in which the attorney practices governs the privilege determination, rather than the privilege law of the forum state.⁹ In addition, there is a revitalized movement to abandon the common-law approach to privilege in the

6. See *infra* notes 109-17, 126, 129 and accompanying text (describing Article V of the Proposed Federal Rules of Evidence, which was proposed to codify the law of privilege).

7. See Paul R. Rice, *The Evidence Project: Proposed Revisions to the Federal Rules of Evidence With Supporting Commentary*, 171 F.R.D. 330, 346 n.16 (1997) [hereinafter Rice, *Evidence Project*] (noting that both federal and state bodies of case law on the attorney-client privilege include more than five thousand cases). This case law, however, has not established clear standards nor prevented re-litigation of privilege issues.

8. See *infra* notes 68, 327 and accompanying text (explaining arguments used to advocate reform of privilege law, such as the need for greater predictability and certainty).

9. Steven Bradford, *Conflict of Laws and the Attorney-Client Privilege: A Territorial Solution*, 52 U. PITT. L. REV. 909, 912-13 (1991).

federal courts and codify a set of testimonial privileges.¹⁰

These proposed reforms, however, cannot solve the uncertainty problem. Obviously, clarification of particular aspects of privilege law, a well-crafted set of new privilege rules for the federal courts, and a more sensible choice-of-law regime would be welcome. Yet, given the competing policies at stake, enormous differences between and within jurisdictions inevitably will remain. A better choice-of-law regime will not address the uncertainties resulting from “vertical” inconsistencies—that is, federal versus state law—or, even more fundamentally, uncertainties within jurisdictions. This is true because the law of privilege is largely or exclusively a product of the common law, which has not, and in my view cannot, produce governing principles that foster certainty and predictability in privilege protections. Likewise, although a new set of privilege rules for the federal courts may foster greater certainty in federal criminal and federal question cases, these rules will not result in sufficient inter-jurisdictional agreement and corresponding predictability, given that many states have been reluctant to follow the federal common-law lead on attorney-client privilege law. Moreover, none of these approaches to reform addresses the troublesome question of the application of privilege protections in arbitral, administrative, legislative, and other nonjudicial fora, which oversee a growing mass of adversarial disputes, and in which decision makers may feel less constrained by the privilege rules applicable in state and federal courts.

The time has come for a more radical solution. A quarter century after the last serious congressional consideration of, and ultimate inaction on, the attorney-client privilege, this area of the law is now in serious need of renewed congressional attention. Yet enhancing certainty demands more than changes in choice-of-law principles or

10. See, e.g., Broun, *supra* note 1, at 769-72, 789-815 (arguing that Congress should codify a set of rules governing testimonial privileges, including the attorney-client privilege, applicable in federal criminal and federal question cases); Rice, *Evidence Project*, *supra* note 7, at 346 (same); Kenneth R. Tucker, Note, *Did Congress Err in Failing to Set Forth Codified Rules Governing Privileged Relationships and Resulting Communications?*, 72 U. DET. MERCY L. REV. 181, 184 (1994) (advocating congressional codification in all federal cases). Indeed, the Advisory Committee on the Federal Rules of Evidence has begun to consider codification of various testimonial privileges. Broun, *supra* note 1, at 814 n.292. Others, however, believe that the federal decision makers should not attempt to codify the law of privilege. See, e.g., *The Committee on Federal Courts, Association of the Bar of the City of New York: Revisiting the Codification of Privileges Under the Federal Rules of Evidence*, 55 THE REC. 148, 152-53 (2000) [hereinafter *Committee on Federal Courts*]; Raymond F. Miller, Comment, *Creating Evidentiary Privileges: An Argument for the Judicial Approach*, 31 CONN. L. REV. 771, 772 (1999).

the codification of a set of privilege rules for the federal courts. Rather, to resolve both lingering conflicts between jurisdictions and confusion within jurisdictions, we need a single, codified solution. Congress, therefore, should federalize the law of privilege preemptively, creating uniform protection for client confidences that will apply in *every* proceeding in federal and state court, as well as in arbitration proceedings, administrative hearings, and legislative proceedings. Federal privilege legislation providing clear, unqualified,¹¹ and generally applicable privilege protections will produce a level of certainty sufficient to reap the potential benefits of the privilege while ultimately lowering its transaction costs. Congress has both the capacity and the constitutional power to enact this needed reform.

Part I of this Article discusses the need for reasonable certainty in attorney-client privilege protections. It begins by tracing the history of the privilege, outlining the doctrine's basic elements, and reviewing various justifications for the privilege. It then discusses the predominant utilitarian or instrumental rationale, which is premised on the assumption that the privilege promotes client candor and full communication between attorneys and clients, and thereby produces social benefits that outweigh its social costs. Next, Part I outlines why, to achieve any social benefits, privilege protections must be sufficiently certain to assure that attorneys and their clients can fairly predict whether their communications will be subject to later disclosure. Finally, Part I concludes that, because absolute certainty is not attainable, policy makers should seek to ensure that the privilege doctrine provides at least reasonably certain protections, thereby allowing attorneys and clients to assess accurately whether various communications will be protected.

Part II details why the protections that the modern privilege affords are often uncertain. It begins by tracing why Congress chose not to codify the attorney-client privilege in the early 1970s and the effects of that choice. Part II then shows how the Supreme Court has since provided little leadership on privilege doctrine. Next, it outlines the significant tangle of inter-jurisdictional conflicts and the lingering intra-jurisdictional confusion on privilege doctrine. Similarly, Part II

11. By "unqualified," I do not mean without exceptions. A qualified privilege, as I use the term, means a privilege that is subject to a judge's discretionary or post hoc balancing of interests on a case-by-case basis. Any privilege regime will contain exceptions and waiver doctrines; thus, an unqualified or absolute privilege is one that contains exceptions and recognizes waiver doctrines, but these exceptions and doctrines are both *categorical* and *defined in advance*, giving attorneys and clients notice of the limits of the protection.

discusses the varied and flawed choice-of-law approaches that states apply in choosing among the conflicting privilege laws and the largely unexplored question of application of privilege protections in nonjudicial fora, such as arbitral, administrative, and legislative proceedings. Given all of this, and the fact that communications may lose their privileged status once a single decision maker compels disclosure, this Part concludes that privilege protections are highly uncertain.

Part III offers a new approach to reform. Other proposed reforms cannot resolve the existing problems either because they are limited in reach or because they do not address the systemic problems with a court-centered, common-law approach to developing privilege doctrine. For these reasons, the solution to the problem of uncertainty must be both legislative and national in scope. This Part therefore proposes that Congress federalize the law of privilege, adopting a clear, unqualified, and generally applicable privilege statute that preempts contrary state law. Such a law would provide the client with a federal privilege right applicable in all proceedings in federal and state court, and in all nonjudicial proceedings. Although Congress refused to act a quarter century ago, today it has greater history and resources to draw upon in crafting such particularized legislation and avoiding political derailment. Finally, Congress has the power to enact this preemptive legislation under the Commerce and Supremacy Clauses, and the exercise of this power will not offend the Tenth Amendment or the values of federalism it serves.

I. THE NEED FOR REASONABLE CERTAINTY

A. *The Privilege's History, Elements, and Purposes*

The attorney-client privilege is the oldest of the evidentiary privileges, predating the Constitution.¹² The Anglo-American

12. See, e.g., *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (noting that the attorney-client privilege is the oldest of the common-law privileges for confidential communications) (citing 8 J. WIGMORE, EVIDENCE § 2290 (McNaughton 1961)); 2 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 181, at 302 (2d ed. 1994 & Supp. 2001) (noting that privilege originates in Roman and canon law); 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 503.03 (2002) (explaining the rationale and nature of attorney-client privilege); see also Note, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226, 1227-28 (1962) [hereinafter *Functional Overlap*] (noting that recognition of the attorney-client privilege by British and American courts predates the recognition of all other professional privileges by nearly 300 years). Indeed, the privilege originates in Roman and canon law. JOHN

privilege developed contemporaneously with the right of compulsory process,¹³ and the availability of the doctrine is unquestioned in every jurisdiction in this country.¹⁴ Indeed, some form of the privilege is probably guaranteed in the criminal context by the Sixth Amendment to the Constitution¹⁵ and parallel state constitutional provisions.¹⁶ In the civil context, the protections that the privilege provides do not rise to the constitutional level, but such protections are recognized by the federal courts and all fifty states.¹⁷

Despite the privilege's long history and the enormous amount of litigation it has spawned,¹⁸ the basic elements of the privilege have remained largely the same for over a century. Unless it is waived, the attorney-client privilege protects confidential communications between the client and attorney made for the purpose of obtaining or providing legal advice.¹⁹ Of course, questions regarding each of these

WILLIAM GERGACZ, ATTORNEY-CORPORATE CLIENT PRIVILEGE § 1.04 (3d ed. 2001).

13. MUELLER & KIRKPATRICK, *supra* note 12, § 181, at 302.

14. See generally PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE: STATE LAW § 1 (1996) (discussing the history of the attorney-client privilege in each state and the District of Columbia).

15. "In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense." U.S. CONST. amend. VI.

16. See *Weatherford v. Bursey*, 429 U.S. 545, 554 n.4 (1977) (assuming, tacitly, that government intrusion on confidences between criminal defendants and their counsel would violate the Sixth Amendment); MUELLER & KIRKPATRICK, *supra* note 12, § 181, at 305 (stating that attorney-client privilege also has been viewed as an adjunct to the privilege against self-incrimination, at least to the extent that incriminating admissions of a defendant could otherwise be extracted from the defendant's attorney).

17. See generally RICE, *supra* note 14, § 1 (examining the attorney-client privilege in all states and the District of Columbia).

18. Rice, *Evidence Project*, *supra* note 7, at 346 n.16.

19. *Genentech, Inc. v. United States Int'l Trade Comm'n*, 122 F.3d 1409, 1415 (Fed. Cir. 1997) (citing PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 2:1, at 2-45 (1993)). The Third Restatement of the Law Governing Lawyers offers a substantially similar definition. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 (2000) (protecting a communication made between privileged persons, in confidence, for the purpose of obtaining or providing legal assistance for the client). Another often accepted statement of the scope of the privilege is embodied in the Revised Uniform Rule of Evidence 502(b):

General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client (i) between the client or a representative of the client and the client's lawyer or a representative of the lawyer, (ii) between the lawyer and a representative of the lawyer, (iii) by the client or a representative of the client or the client's lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein, (iv) between representatives of the client or between the client and a representative of the client, or (v) among lawyers and their representatives representing the same client.

REV. UNIF. R. EVID. 502(b) (1999); see also 1 MCCORMICK ON EVIDENCE § 87, at 347-48 n.19 (John W. Strong et al. eds., 5th ed. 1999) [hereinafter MCCORMICK ON

elements generate controversy—i.e., who is the client, when is a communication made in confidence, when are attorney communications to the client privileged, and when is confidentiality waived.

The protection afforded by the attorney-client privilege and other unqualified evidentiary privileges is distinguishable from the protections afforded by other evidence rules that operate to exclude—e.g., hearsay, opinion evidence, and character evidence restrictions—in two respects. First, privileges not only prevent the use of protected communications at trial but also prohibit adverse parties from gaining access to such communications, even if they contain otherwise relevant information. Privileges protect communications by both parties and non-parties from discovery and other forms of compulsory disclosure. Thus, unlike other legal doctrines classified as evidentiary rules, privileges protect against *discovery* of relevant information.²⁰ Of course, the attorney-client privilege does not protect underlying facts or information, which can be discovered through means other than disclosure of the attorney-client communication.²¹

Second, the testimonial privileges, including the attorney-client privilege, are unlike other exclusionary rules because they are not designed to assist in finding the truth by excluding evidence which is unreliable or likely to be unfairly prejudicial or misleading.²² To the contrary, privileges have the effect of inhibiting, rather than facilitating, the illumination of the truth.²³ Privileges serve to protect other interests that are regarded as sufficiently important to warrant limiting access to relevant evidence.²⁴

Throughout the attorney-client privilege's long history, a number of justifications have been offered to support the protection it affords.²⁵ For example, in 1768, Blackstone suggested that the

EVIDENCE] (relying on and excerpting Rule 502(b)).

20. See MUELLER & KIRKPATRICK, *supra* note 12, § 170, at 220-21 (noting the distinct rationale and broader sweep of privilege rules in relation to other evidence law, specifically referring to privileges' unique ability to exclude probative evidence, hinder the discovery of truth, and produce inefficiency in the litigation process).

21. *Upjohn Co. v. United States*, 449 U.S. 383, 395-96 (1981). Indeed, since the underlying information contained in the attorney-client communication is otherwise obtainable, some have argued that the costs of the privilege to truth-seeking are limited. See *infra* note 49 and accompanying text.

22. See MCCORMICK ON EVIDENCE, *supra* note 19, § 72, at 298-99 (contrasting exclusionary rules with rules of privilege, noting that the former seek to exclude prejudicial, misleading, or unreliable evidence, while the latter seek to inhibit the truth).

23. *Id.* at 299.

24. *Id.*

25. Indeed, the prevailing justifications have evolved over time. See, e.g.,

privilege is an extension of the right of individuals to avoid self-incrimination.²⁶ Modern commentators have contended that the privilege is necessary to preserve a criminal defendant's Fifth Amendment²⁷ privilege against self-incrimination and Sixth Amendment²⁸ right to counsel.²⁹ Others have argued that the privilege is necessary to uphold the professional relationship between the attorney and client: without it, there could be no confidentiality and corresponding trust and loyalty.³⁰ Similarly, some commentators suggest that the attorney's traditional role as an advocate in our adversarial system would be seriously undermined if attorneys could be utilized routinely as a source of information about the client.³¹ Still others have contended that the attorney-client privilege is necessary to protect the client's privacy or dignitary interest in preventing interference with the client's relationship with a close advisor.³²

Bradford, *supra* note 9, at 913-14 (describing the various policy justifications from Roman times to the present); GERGACZ, *supra* note 12, § 1.04 (same).

26. 3 W. BLACKSTONE, COMMENTARIES 370 (1768); *see also* Note, *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1501, 1502 (1985) [hereinafter *Privileged Communications*] (discussing Blackstone's self-incrimination theory).

27. "No person . . . shall be compelled in any criminal case to be a witness against himself . . ." U.S. CONST. amend. V.

28. "In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense." *Id.* amend. VI.

29. *See* Note, *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, 91 HARV. L. REV. 464, 485-86 (1977) [hereinafter *Attorney-Client Privilege*] (explaining that, although the Fifth and Sixth Amendments, when viewed together, seemingly do not provide for the attorney-client privilege protection, the absence of such a privilege would preclude enjoyment of rights enumerated in either amendment).

30. *E.g.*, *Trammel v. United States*, 445 U.S. 40, 51 (1980); MODEL CODE OF PROF'L RESPONSIBILITY EC 4-1 (1980) (stating that both the attorney-client fiduciary relationship and the proper functioning of the legal system require the preservation of confidences); Broun, *supra* note 1, at 796-97 (discussing loyalty concerns as one of the considerations supporting the maintenance of the attorney-client privilege); Note, *Developments in the Law—Privileged Communication: Modes of Analysis: The Theories and Justifications of Privileged Communications*, 98 HARV. L. REV. 1471, 1498 (1985) [hereinafter *Theories and Justifications*] (attributing the attorney-client privilege to the importance society places on both the attorney-client relationship and the codes of ethics governing the relationship); *Privileged Communications*, *supra* note 26, at 1502 (noting that the original justification for the privilege was based on an individual's right to avoid self-incrimination and, alternatively, the attorney's oath of loyalty to the client).

31. *E.g.*, MCCORMICK ON EVIDENCE, *supra* note 19, § 87, at 346 (noting that the strong tradition of advocacy would be outraged by examination of attorneys aimed at uncovering client confidences).

32. *E.g.*, *Attorney-Client Privilege*, *supra* note 29, at 483; *Theories and Justifications*, *supra* note 30, at 1481-82; *see also* MCCORMICK ON EVIDENCE, *supra* note 19, § 87, at 345-46 (noting that, although contemporary arguments suggest that privacy defines and supports the attorney-client privilege, courts remain hesitant to adopt the privacy rationale); Broun, *supra* note 1, at 790-96 (discussing how modern writers frequently justify the existence of privilege protections based on privacy and endorsing such a

Each of these justifications is consistent with the protections afforded by the modern privilege, and each continues to receive scholarly recognition and support.³³ Indeed, each justification highlights an important interest—protecting against self-incrimination, facilitating maintenance of the trust relationship, guarding the integrity of the adversarial system, and respecting legitimate expectations of privacy and human dignity—that the privilege ought to continue to serve. Thus, any discussion of the adequacy of current privilege doctrine or reforms must include consideration of these interests. Yet none of these justifications can fully explain the modern privilege, which applies in criminal and civil contexts, protects attorney-client communications made in and outside of litigation, is generally unqualified, and affords protection for both natural and corporate persons.³⁴

Rather, the widely accepted, overarching purpose for the modern attorney-client privilege is utilitarian or instrumental.³⁵ The predominant modern rationale for the privilege is that it fosters client candor and full communication between attorneys and clients, which produce social benefits that outweigh the privilege's social costs.³⁶ The Supreme Court has unambiguously endorsed this view:

[The privilege's] purpose is to encourage full and frank

view).

33. See, e.g., Broun, *supra* note 1, at 796 (discussing how commentators continue to endorse privilege protections based on privacy and professionalism interests, and indicating that the best arguments for the maintenance of privileges are those that take into account instrumental as well as privacy, dignity, and loyalty considerations).

34. See John W. Gergacz, *Attorney-Corporate Client Privilege: Cases Applying Upjohn, Waiver, Crime-Fraud Exception, and Related Issues*, 38 BUS. LAW. 1653, 1659 (1983) (discussing why the attorney-client privilege cannot be based on notions of individual privacy alone). For example, the privilege applies even in those civil matters in which the right against self-incrimination is not implicated. Likewise, the privacy rationale—at least one which views individual privacy as an end in itself—may not extend to organizations, such as corporations. See *Theories and Justifications*, *supra* note 30, at 1482 (discussing the uncomfortable fit between the privacy rationale and privileges that extend to organizational clients).

35. See, e.g., MCCORMICK ON EVIDENCE, *supra* note 19, § 87, at 344 (stating that the utilitarian purpose became the primary rationale for the privilege in the eighteenth century and continues to be the principal justification today); Bradford, *supra* note 9, at 915 (stating that the desire to promote effective legal representation remains the best explanation for the attorney-client privilege); *Theories and Justifications*, *supra* note 30, at 1486-87 (characterizing the privilege's utilitarian purpose as predominant). As suggested above, however, the utilitarian and non-utilitarian justifications are not irreconcilable. Indeed, recent commentary has suggested that non-utilitarian concerns—including privacy and dignitary interests—can be incorporated within a broad utilitarian framework by factoring these concerns into any balancing of social benefits and costs. *Privileged Communications*, *supra* note 26, at 1504-07.

36. See *Attorney-Client Privilege*, *supra* note 29, at 466 (stating that the goal of fostering legal communication has remained the unchallenged justification for attorney-client privilege since the mid-nineteenth century).

communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.³⁷

Correspondingly, without the attorney-client privilege, the argument goes, clients would be deterred from making open and candid disclosures to their attorneys.³⁸ Absent reasonable assurance that such disclosures could not be used against them later—via their attorney's testimony or otherwise—clients would be unwilling to disclose embarrassing, unpleasant, or otherwise harmful facts.³⁹

In addition to serving the independent interests described above, full client disclosure and the corresponding interchange between attorney and client purportedly produce several social benefits. First, full and frank communication is necessary for the provision of effective legal representation.⁴⁰ In the litigation context, for example, attorneys otherwise would be deprived of information necessary for the preparation and anticipation of claims and defenses, which would harm both the client's interests and the adversarial process.⁴¹ The vindication of rights in, and overall efficacy of, our justice system often depends on sound and adequate legal advice and assistance. Outside the litigation context, candid interchange between attorney and client is necessary to assess legal risks and consequences, and to allow counseling in avoidance of risks, adverse consequences, and litigation in our modern, complex regulatory regime.⁴²

37. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *see also Privileged Communications*, *supra* note 26, at 1502-03 (discussing the utilitarian justification for the privilege and distinguishing it from right-based theories).

38. *See Privileged Communications*, *supra* note 26, at 1502-03 (stating that sound legal advice both serves public ends and depends on full disclosure of information to the attorney); *see also Theories and Justifications*, *supra* note 30, at 1475 (noting that the absence of the privilege may deter communications between an attorney and a client).

39. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 cmt. c (1998).

40. MCCORMICK ON EVIDENCE, *supra* note 19, § 87, at 344.

41. *See* Geoffrey Hazard, *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061, 1061 (1978) (stating that the attorney-client privilege is viewed as indispensable to an attorney's ability to prepare a case and effectively advocate); *Privileged Communications*, *supra* note 26, at 1506 (discussing the importance of the privilege in the litigation process, particularly given the complex and imposing array of formalities and procedures).

42. *See* Hazard, *supra* note 41, at 1061 (arguing that the privilege is necessary to the attorney's function as confidential counselor in law on the theory that proper advice only can be given if the client is free to make full disclosure); *see also* MODEL CODE OF EVIDENCE R. 210 cmt. a (1942) (same); MCCORMICK ON EVIDENCE, *supra* note 19, § 87, at 344 (stating that expert legal advice is essential in structurally complicated and detailed society).

In addition, greater client candor and communication facilitates ongoing compliance with the law.⁴³ Legal rules are complex and fact-specific in application; attorneys are better situated to appreciate the meaning and effect of such rules and to determine whether or not actions conform to these rules.⁴⁴ Moreover, legal compliance enhances social welfare by furthering the underlying aims of the law.⁴⁵

Yet, given the privilege's potential social costs, even ardent supporters of the utilitarian rationale—including the Supreme Court—advocate construing the privilege narrowly.⁴⁶ Doctrinal limitations, such as the crime-fraud exception, which seek to address abuse of the privilege, are designed to reduce potential social harm.⁴⁷ Despite such limitations, because the privilege inhibits discovery of relevant communications, it can create obstacles to ascertaining the truth.⁴⁸ The significance of this adverse consequence is indeterminate because the privilege protects only attorney-client communications that arguably would not otherwise exist and does not shield underlying information or facts from discovery.⁴⁹ Still, the

43. See, e.g., GERGACZ, *supra* note 12, § 1.12 (stating that the privilege promotes law-abiding behavior); *Privileged Communications*, *supra* note 26, at 1506-07 (stating that the privilege promotes behavior that conforms to the law, because the law is so complex, "people need the assistance of counsel to understand its dictates"). The Supreme Court agrees with this view. See *Upjohn Co.*, 449 U.S. at 392 (rejecting as too narrow the "control group" test in part because the test threatens to hinder efforts of corporate counsel to ensure their client's compliance with the law).

44. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 cmt. c (1998).

45. *Privileged Communications*, *supra* note 26, at 1507 (stating that the attorney-client privilege furthers social good because, without the aid of an attorney's advice, laypeople may unknowingly break laws that they would have been willing to follow) (footnote omitted).

46. See, e.g., *Fisher v. United States*, 425 U.S. 391, 403 (1976) (stating that the attorney-client privilege applies only where necessary to achieve its purpose because the privilege has the effect of withholding relevant information from the fact-finder); *Privileged Communications*, *supra* note 26, at 1504 (noting that utilitarian supporters of the privilege generally argue for a narrow application by balancing easily observed social costs with less concrete benefits).

47. E.g., *Attorney-Client Privilege*, *supra* note 29, at 467 (stating that the existence of the crime-fraud exception demonstrates a recognition that some values outweigh the values advanced by protecting confidential relations).

48. See Bradford, *supra* note 9, at 914 (stating that the privilege represents a tradeoff between effective legal representation and full discovery of relevant facts).

49. *Theories and Justifications*, *supra* note 30, at 1477-78. In *Upjohn*, the Supreme Court adopts the view that the privilege has little impact on ascertaining the truth. 449 U.S. at 395 ("Application of the attorney-client privilege to communications such as those involved here, however, puts the adversary in no worse position than if the communications had never taken place."). The Court reasons that because the privilege protects only communications, and not underlying facts or information, it causes inconvenience for an adverse party but does not prevent discovery of the truth. *Id.* at 395-96. See also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 cmt. c (1998) (stating that the evidentiary consequences of the privilege are indeterminate because, if the behavioral assumptions supporting the privilege are

privilege unquestionably imposes barriers to confrontation and ascertaining facts by shielding attorneys from testifying and otherwise disclosing relevant communications and, at times, shielding clients from full examination.⁵⁰ Indeed, the sheer volume of litigation over privilege issues strongly suggests that adverse parties view access to these communications as both useful and important.⁵¹

Moreover, the litigation over the privilege itself constitutes a significant transaction cost. Privilege disputes—particularly in large and complex civil cases—can take months and even years to resolve, and can consume enormous private and public resources. While I have found no study estimating the actual cost of privilege disputes in litigation, the aggregate cost of these battles is undoubtedly enormous.⁵²

Although almost no one advocates abolishing the attorney-client privilege in its entirety—indeed, it is too late in the game for that—the utilitarian justification has its critics.⁵³ Some argue that the costs of the privilege outweigh the purported benefits in certain contexts,⁵⁴ and others question whether the benefits are in fact real.⁵⁵ For example, scholars have questioned whether the corporate attorney-

well-founded, the evidence excluded by the privilege would not have come into existence if not for the privilege); GERGACZ, *supra* note 12, § 1.15 (suggesting that the costs of the privilege may be as speculative as its benefits); *Functional Overlap*, *supra* note 12, at 1238 (discussing the results of Yale Law Journal survey, which found that more attorneys believe that the evidence was otherwise available from another source than those who believe that the privilege usually kept out otherwise unobtainable evidence); *Privileged Communications*, *supra* note 26, at 1507-08 (stating that the privilege keeps from the court only sources of information that would not exist but for the inducement to communicate with attorneys that the privilege provides).

50. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 cmt. c (1998) (discussing evidentiary consequences of the privilege). For example, in some circumstances, utilizing attorney-client communications to impeach may be the only realistic way an adversary can demonstrate that the client is not being truthful.

51. Cf. *Theories and Justifications*, *supra* note 30, at 1476 (noting that, if testimony were an adequate substitute for privileged information, courts would have little reason to compel disclosure).

52. This must be true, given the complexity of the privilege and the sheer volume of litigation over both its doctrinal limitations and application. See, e.g., Rice, *Evidence Project*, *supra* note 7, at 346 & n.16 (describing the privilege as complex and stating that it has generated a body of federal case law that exceeds five thousand cases and a similar body of state case law).

53. See, e.g., MCCORMICK ON EVIDENCE, *supra* note 19, § 87, at 344-45 (discussing the history of the controversy surrounding the privilege, including Jeremy Bentham's famous criticisms).

54. See, e.g., *Attorney-Client Privilege*, *supra* note 29, at 470 (arguing for a qualified privilege in certain circumstances because the interests served by the privilege are outweighed by other interests).

55. *Id.* (questioning whether the privilege actually promotes attorney-client communications); *Theories and Justifications*, *supra* note 30, at 1472 (noting belief among some evidence experts that privileges serve no important societal purpose).

client privilege is necessary and whether it enhances social welfare.⁵⁶ Others may contend that the benefits of the privilege are too speculative to justify the costs.⁵⁷ In addition, judges and litigants, faced with privilege-created obstacles in a particular piece of litigation, may find the privilege's harsh consequences unbearably difficult to accept.⁵⁸

The fact that the benefits of the privilege are extrinsic and speculative while the costs are intrinsic to the particular dispute in which the privilege is asserted, combined with the sheer frequency of privilege claims, assures that the privilege will remain controversial and difficult to apply. Most judges, law makers, attorneys, and scholars tend to agree that the privilege is useful and important, but should be narrowly construed.⁵⁹ There is far less agreement, however, as to what exactly this means, either generally or in particular cases.

B. *The Utilitarian Justification and Reasonable Certainty*

The utilitarian justification for the attorney-client privilege is premised on the assumption that providing protection for attorney-client confidences will enhance client candor or, at a minimum, foster greater attorney-client communication.⁶⁰ Although most courts, practitioners, and commentators accept this assumption outright, it is both disputed and empirically unverified.⁶¹ Skeptics

56. See, e.g., Paul R. Rice, *The Corporate Attorney-Client Privilege: Loss of Predictability Does Not Justify Crying Wolf*, 55 BUS. LAW. 735, 741 (2000) [hereinafter Rice, *Loss of Predictability*] (questioning the utility of the privilege in the corporate context); *Attorney-Client Privilege*, *supra* note 29, at 473-76 (calling into question the efficacy and necessity of the privilege in the corporate context). Others believe the corporate privilege is justifiable. See GERGACZ, *supra* note 12, § 1.21 (noting that the privilege is justifiable particularly in the corporate context because of the corporation's need for access to legal advice to ensure compliance with the law).

57. Cf. 8 WIGMORE ON EVIDENCE § 2291, at 554 (McNaughton rev. 1961 & Supp. 1990) (supporting the privilege, but conceding that its benefits are all indirect and speculative, while its obstruction is plain and concrete).

58. See, e.g., Broun, *supra* note 1, at 780-81 (stating that courts' distaste for the exclusionary consequences of the privilege lead to rejection of new privileges and, more often, narrow constructions of existing privileges).

59. See, e.g., Vincent C. Alexander, *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 ST. JOHN'S L. REV. 191, 197 (1989) (conducting a survey and finding that attorneys, judges, and corporate officials generally responded favorably to the privilege); *Functional Overlap*, *supra* note 12, at 1232 (discussing survey results that indicate attorneys strongly support the privilege).

60. It is this candor or communication that produces, in turn, the social benefits—better legal advice, more effective administration of justice, greater compliance with the law, and other interests—that outweigh the social costs the privilege inflicts.

61. See *Attorney-Client Privilege*, *supra* note 29, at 470 (noting the existence of continued academic debate); *Theories and Justifications*, *supra* note 30, at 1474 (noting lack of empirical data to support existence of either the privilege's putative benefits or costs).

therefore remain, even though most aspects of the modern privilege—including the corporate privilege—are almost certainly here to stay. Despite the lingering controversy, the privilege cannot enhance candor or communication if the protection it affords is uncertain. Thus, for society to reap benefits from the privilege, it must afford sufficiently certain protection for attorney-client communications.

To promote greater candor and communication, privilege protection must remove the disincentives for clients to speak freely with their attorneys. Adherents to the utilitarian justification of the attorney-client privilege rely on the “common sense” notion that clients would be unwilling, or at least far more hesitant, to discuss embarrassing, unpleasant, and otherwise harmful matters in detail with their attorneys if such discussions could be used against the client in a pending or later proceeding.⁶² Moreover, attorneys would be reluctant to seek or allow full disclosure from clients if such disclosures ultimately could harm the clients’ interests.

This greater willingness on the part of clients and attorneys to engage in full and frank communications depends upon their belief that the communications will be protected.⁶³ If either client or attorney has significant doubts about the communication’s protected status, each person will be less willing to engage in the interchange.⁶⁴ Thus, in order to enhance communications, the privilege must provide protection that is sufficiently certain to allay client and attorney concerns regarding future disclosure.

Courts and commentators adhering to the view that the privilege promotes attorney-client candor and communication are virtually unanimous in agreement on the need for a concrete privilege.⁶⁵

62. See, e.g., MCCORMICK ON EVIDENCE, *supra* note 19, § 87, at 344 (stating that utilitarian theory depends in part on the client’s belief that the attorney cannot be compelled subsequently to divulge confidential information); GERGACZ, *supra* note 12, § 1.10 (stating that encouraging client candor is a valid purpose for the rule although there are no “numbers” to prove that the privilege enhances candor); see also *Theories and Justifications*, *supra* note 30, at 1476 (indicating available data suggests that most people would not communicate as freely and completely without a privilege).

63. See *Theories and Justifications*, *supra* note 30, at 1476-77 (arguing that, while knowledge of the privilege may not necessarily encourage candor between attorney and client, knowledge of the privilege’s absence may deter such candor).

64. See Broun, *supra* note 1, at 793 (postulating that the absence of a privilege would make an attorney much less aggressive in seeking information, and that such inhibition would adversely affect the quality of representation).

65. See, e.g., Eric P. Slotter & Anita M. Sorensen, *Corporate Ethics—An Empirical Study: The Model Rules, The Code of Professional Responsibility, and Counsel’s Continuing Struggle Between Theory and Practice*, 8 J. CORP. L. 601, 607 (1983) (arguing that the attorney-client privilege is an effective legal tool only when the client and the attorney are able to predict with reasonable certainty whether a communication is

Indeed, the Supreme Court premised its decision in *Upjohn* largely on the need for a predictable and certain privilege:

[I]f the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.⁶⁶

Although some state courts have not accepted the Supreme Court's ultimate holding in *Upjohn*,⁶⁷ state courts do not question the basic premise that the privilege must be predictable in order to serve its purposes. Many members of the legal community who seek reforms in privilege law base their proposals on the need for greater predictability and certainty.⁶⁸

likely to be privileged if later sought through discovery); Glen Weissenberger, *Toward Precision in the Application of the Attorney-Client Privilege for Corporations*, 65 IOWA L. REV. 899, 918 (1979) (arguing that because a client's view is prospective, the attorney-client privilege must be reasonably predictable at the time of attachment, or else the privilege fails to serve its intended purpose); *Theories and Justifications*, *supra* note 30, at 1487 (noting that utilitarians commonly assert that the privileges must be easily predictable in application to achieve the certainty necessary to modify the behavior of communicators and thereby secure the supposed benefits of privilege law).

66. *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981). Recently, the Court reiterated the necessity of certainty in adopting an *unqualified* psychotherapist-patient privilege. See *Jaffee v. Redmond*, 518 U.S. 1, 17 (1996) (stating that the psychotherapist-patient privilege would be eviscerated if the promise of confidentiality were contingent upon a trial judge's post hoc balancing of the relative importance of a patient's interest in privacy and the evidentiary need for disclosure).

67. See *infra* notes 218-21 and accompanying text (explaining that some states reject *Upjohn's* subject matter test and use a control group test to determine the extent of attorney-employee corporate privileges).

68. See, e.g., Bradford, *supra* note 9, at 944 (noting that the need for certainty and predictability have never been the focus of attorney-client privilege cases predicated on choice-of-law); Jack P. Friedman, *Is the Garner Qualification of the Corporate Attorney-Client Privilege Viable After Jaffee v. Redmond?*, 55 BUS. LAW. 243, 281 (1999) (advocating abandonment of the balancing test for determining shareholder access to privileged communications by corporate personnel); Amy Weiss, *In-House Counsel Beware: Wearing the Business Hat Could Mean Losing the Privilege*, 11 GEO. J. LEGAL ETHICS 393, 394 (1998) (advocating for reform in the corporate context based on greater certainty of privilege protections). Professor Bradford, for example, calls for a territorial approach to conflicts determinations in the privilege setting because of the unique need for predictability and certainty in this context. Bradford, *supra* note 9, at 943-44. He states that the attorney-client privilege encourages communications between attorney and client only if both parties know at the time of their communications whether the privilege will apply. *Id.* at 943. If the protection is uncertain, attorney-client "communications will be chilled, and the purpose of the privilege will be entirely defeated." *Id.* He contends that choice-of-law questions in the privilege area ought to be resolved differently than those in other areas because of the "special need for uniformity, predictability and certainty." *Id.* at 945.

Almost all of the commentators who question the emphasis on certainty are skeptics of the corporate privilege. Some commentators within this group recognize the need for predictable privilege protections outside the corporate context, but advocate a qualified corporate privilege.⁶⁹

Skeptics of the corporate privilege offer a number of related arguments for why the privilege does not or cannot enhance communication and candor in the corporate setting, thereby making privilege protections unnecessary. For example, some commentators contend that the privilege is unnecessary because rational corporate decision makers, faced with ongoing compliance obligations and legal risks, have adequate incentives to seek legal advice and maximize legal counsel's effectiveness without the protection of the privilege.⁷⁰ Others contend that, even if the privilege fosters greater interchange, it creates no incentive for corporate employees to be more truthful with counsel.⁷¹ Critics further argue that the privilege cannot enhance candor and communication within the corporate structure because it belongs to the corporation, not the individuals communicating with corporate counsel.⁷² Since employees have no

69. See Alexander, *supra* note 59, at 385-89 (noting that the existing limits to the corporate privilege, the corporate privilege's definitional uncertainty, and the need for a qualified corporate privilege facilitate an adversary's discovery); *Attorney-Client Privilege*, *supra* note 29, at 470-87 (arguing that the distinctions between the "legal" and "business" privileges justify the abandonment of any fixed privilege and the creation of a qualified privilege in the corporate context).

70. See Alexander, *supra* note 59, at 273 (arguing that the very existence of numerous corporate laws and regulations and the omnipresence of attorneys in corporate affairs suggests that corporations will encourage open communications with counsel in order to comply with the laws regardless of privilege); Rice, *Loss of Predictability*, *supra* note 56, at 741 (arguing that corporate officers will not disregard the corporation's welfare and their own interests if the privilege is not maintained); Elizabeth G. Thornburg, *Sanctifying Secrecy: The Mythology of the Corporate Attorney-Client Privilege*, 69 NOTRE DAME L. REV. 157, 175 (1993) (concluding that the rational corporation will risk candor to secure the needed legal advice); *Attorney-Client Privilege*, *supra* note 29, at 473-74 (asserting that corporations will continue to seek legal advice regardless of clear certainty or absolute rules of corporate privilege because of their frequent, ongoing, legal needs); *cf.*, e.g., *Theories and Justifications*, *supra* note 30, at 1474 (discussing frequent attacks on the notion that existing privileges actually encourage communications). In addition, some legal scholars contend that intelligent attorneys would not place themselves in a situation of weakness, whereby they could be surprised by information that would open their clients up to unexpected liability. See Thornburg, *supra*, at 179-80 (discussing the elimination of the corporate attorney-client privilege and the improbability that attorneys would probe less thoroughly for information).

71. *Cf.* Rice, *Loss of Predictability*, *supra* note 56, at 741 (questioning whether corporate employees are candid with attorneys about their own misdeeds).

72. As the client, the corporate entity owns the privilege. The privilege therefore is controlled by the corporation's decision makers, under the assumption that they will fulfill their duty to act in the best interests of the corporation. Corporate employees and other agents do not enjoy the benefits associated with the privilege. See GERGACZ, *supra* note 12, § 1.20 (noting that, because the privilege belongs to the

assurance that the corporation will not later waive the protection or otherwise utilize the communications for its own purpose, the protection that the privilege affords cannot induce employees to communicate with counsel, even if otherwise reasonably certain.⁷³

Although I agree there are important distinctions between corporate and individual clients, the skeptics understate both the potential impact of the privilege on corporate decision makers and the need for predictable privilege protections in the corporate context. Corporate decision makers have strong incentives to seek legal advice, but they would face strong, countervailing disincentives in many circumstances if adversaries readily could gain access to attorney-client communications. The specter of adverse parties using such communications against corporate interests is more than enough to make corporate decision makers and counsel forego communications that otherwise may be beneficial in corporate compliance and risk assessments. Indeed, faced with no privilege, or a highly uncertain one, both decision makers and counsel would discourage all but the most essential communications between attorneys and corporate employees.⁷⁴ Frankly, this conclusion seems intuitive enough that I wonder if at least some of the skeptics accept

corporation, corporate employee communications cannot be encouraged by the existence or lack of a privilege, but, more likely, by directives from a corporate superior or senses of duty to the organization); Brian E. Hamilton, *Conflict, Disparity, and Indecision: The Unsettled Corporate Attorney-Client Privilege*, 1997 ANN. SURV. AM. L. 629, 646-47 (1997) (stating that, because the corporation and not the employee retains the privilege, it is arguable whether application of the privilege in corporate environments actually encourages employee candor and disclosure); Rice, *Loss of Predictability*, *supra* note 56, at 740-42 (arguing that corporate employees are not necessarily candid when properly informed that they are personally liable for their misdeeds); Thornburg, *supra* note 70, at 173-74 (suggesting that the corporate employee's incentive for candor is limited by the fact that the privilege protects the corporation and not the employee).

73. See, e.g., Rice, *Loss of Predictability*, *supra* note 56, at 741 (noting the possibility that subsequent circumstances might lead a corporation to waive its privilege and thereby destroy the protection that would otherwise inure to the benefit of the employee). Furthermore, corporate counsel is free to disclose the information to the employees' superiors. Thus, corporate employees can never be certain that their communications will remain confidential, and subject themselves to both internal and external risks each time they communicate with corporate counsel. *Id.*; Thornburg, *supra* note 70, at 174.

74. See GERGACZ, *supra* note 12, § 1.20 (contending that an uncertain corporate privilege creates the specter of corporate attorneys being used by opponents to prepare their cases, which will, in turn, create strong disincentives for management to require corporate agents to communicate with counsel); cf. Alexander, *supra* note 59, at 271 (discussing how attorney-client privilege stimulates a business entity to encourage employees to communicate openly with the company's attorneys); *Theories and Justifications*, *supra* note 29, at 1475 (stating that actual knowledge of the lack of a privilege arguably would be a strong deterrent to communicating). Indeed, in the absence of the privilege, attorneys would be viewed as a threat to the corporate clients they serve. GERGACZ, *supra* note 12, § 1.20.

the notion that some minimum level of certainty is necessary, but just disagree as to the amount.⁷⁵

The skeptics are correct that the privilege is inherently less predictable in the corporate context because an employee ultimately has no assurance that the entity will protect the employee's communications, and corporate decision makers have no guarantee that they will have the authority to control the privilege in future proceedings.⁷⁶ Yet an otherwise sufficiently certain privilege still can enhance candor and communication within the corporate structure. First, while the entity owns the privilege, in many circumstances the entity, its decision makers, and its employees will have mutual interests.⁷⁷ In addition, even if the privilege does not create an incentive for lower-level employees to communicate with corporate attorneys, decision makers will have incentives to promote such communications and can compel employee cooperation.⁷⁸ Also, while corporate decision makers always face the risk that they will not control the entity's privilege in the future, that risk alone does not defeat the potential effectiveness of the privilege. As long as decision makers can assess the risk that future decision makers will use corporate-attorney communications against them, the assessed risk is low, and the privilege's protections otherwise are sufficiently certain,

75. For example, two of the commentators who argue that greater certainty is unnecessary and, therefore, the corporate privilege could be qualified, seem to acknowledge, at least implicitly, that some degree of predictability is needed. See Alexander, *supra* note 59, at 385-89 (disputing the contention that the corporate privilege depends on a high degree of certainty and arguing for a qualified approach, but defending the qualified approach on the grounds that it may enhance certainty and that the privilege rarely will be pierced); *Attorney-Client Privilege*, *supra* note 29, at 470-87 (questioning the need for total certainty in privilege protections and advocating a post hoc balancing approach to apply the privilege, although implicitly recognizing that some level of certainty should be preserved).

76. For example, by the time of the litigation, the entity's interests may have changed, or the business may be under new management or the authority of a bankruptcy trustee. Moreover, as discussed more fully in Part II.B, *infra*, in some circumstances, shareholders may attain the right to access and use the communications.

77. See, e.g., MUELLER & KIRKPATRICK, *supra* note 12, § 189, at 343 (explaining that the effects of corporate ownership of the privilege do not automatically result in divergent interests between the corporation and the employee); Alexander, *supra* note 59, at 262 (noting that most corporate executive employees assume that their individual interests and the interests of the corporation are the same).

78. See GERGACZ, *supra* note 12, § 1.20 (stating that a policy of corporate candor relates to and encourages a corporation's use of its attorneys, and does not pertain to an individual's decision to communicate with an attorney). Cooperation does not ensure candor, but, in addition to perceived mutual interests, employees may be truthful to avoid discipline or because they believe it is the right thing to do. Moreover, in many circumstances, employees will see no reason to avoid the truth, because they will not know the legal implications of the information they communicate to counsel.

decision makers are likely to continue to encourage communications with counsel.⁷⁹

Of course, the debate over the privilege's effect on candor and communication cannot be resolved definitively because the actual impact of the privilege on participant behavior is unverifiable.⁸⁰ There have been a few attempts to seek empirical verification of the effects of the privilege.⁸¹ Although most of these studies suggest that attorneys and laypeople tend to believe the privilege helps to enhance client candor or at least attorney-client communication in both the corporate and individual contexts,⁸² this research ultimately is inconclusive as to the privilege's actual impact.⁸³ Furthermore, the

79. At least one empirical study suggests that executives who are aware that the entity owns the privilege still believe fairly strongly that the privilege promotes candor. Alexander, *supra* note 59, at 251, 262.

80. Cf. GERGACZ, *supra* note 12, § 1.06 (asserting that inconclusive empirical results do not diminish the long-held view that a person with assured confidentiality will be less likely to hide certain facts).

81. See, e.g., Alexander, *supra* note 59, at 193 (reporting the results of a survey of corporate and legal professionals concerning the privilege); Slotter & Sorensen, *supra* note 65, at 625 n.139 (noting responses of corporate managers to a bar query regarding the correlation between certainty of confidentiality and the extent of organizational cooperation with investigations); Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 373-95 (1989) (discussing privilege studies); *Functional Overlap*, *supra* note 12, at 1232 (discussing the results of a survey conducted in 1961 by the Yale Law Journal); Paul R. Rice, *Corporate Attorney-Client Privilege: Study Reveals Corporate Agents Are Uninformed; What They Don't Know Can Destroy the Privilege*, ACCA DOCKET (1998), at <http://www.acprivilege.com/articles/accorpstudy.htm>.

82. See Alexander, *supra* note 59, at 232-33, 241-46 (discussing previous studies and own survey results that indicate the privilege plays a role in enhancing candor and communication in the corporate context); Slotter & Sorensen, *supra* note 65, at 625 n.139 (indicating that twelve out of fifteen high-level business executives stated that "an assurance of confidentiality" by counsel would increase their willingness to comply with an investigation); Zacharias, *supra* note 81, at 396 (admitting confidentiality encourages client use of attorneys and client forthrightness, but conceding the proposition may be overstated by proponents); *Functional Overlap*, *supra* note 12, at 1232 n.38 (stating that 55 of 108 laypersons indicated that they would be less likely to make full disclosure to an attorney in the absence of privilege, and 90 out of 125 attorneys said that their clients' awareness of the privilege enhanced communications). Professor Alexander's survey found that several other factors besides the privilege promote candor and that trust and confidence in an individual attorney was the most influential single factor. Alexander, *supra* note 59, at 248. However, he noted that many respondents qualified their answers by noting that the attorney-client privilege creates the environment in which this trust and confidence exists. *Id.* at 248, 265-66.

83. See, e.g., Alexander, *supra* note 59, at 260-70 (concluding that the survey's results ultimately were mixed on whether the privilege enhances candor in the corporate context); Broun, *supra* note 1, at 793 (noting the paucity of empirical data on the effect of the privilege in promoting the free flow of information within protected relationships); Rice, *Loss of Predictability*, *supra* note 56, at 741 (noting that his survey showed that thirty percent of corporate employees indicated they are not candid with corporate counsel); Zacharias, *supra* note 81, at 352, 295-96 (analyzing the Tompkins County study, in which seventy-two percent of the lawyers presented with a specific hypothetical responded that they would disclose particular information even though the relevant statute requires silence, cautioning against

value of such studies is inherently limited. Generic questions to attorneys, executives, and employees provide some useful insights, but the extent to which the answers mirror real-world, context-specific behavior is unknown. And, because attorney-client communications must remain confidential to preserve the privilege, researchers cannot participate in, or gather information about, actual attorney-client discussions.⁸⁴

Still, some skeptics argue that, given the current climate of uncertainty, particularly in the corporate context, the fact that significant attorney consultation and communication with clients continues demonstrates either that the privilege is not needed or that more certain privilege protections are unnecessary.⁸⁵ I agree that the privilege is highly uncertain, as I argue in Part II, but I disagree that the current state of affairs proves that greater certainty is not needed. First, we simply do not know the extent to which existing uncertainties deter attorney-client communications.⁸⁶ Moreover, this argument presumes that corporate decision makers and attorneys are aware of the extent of existing uncertainties. Yet one of the consistent findings in the aforementioned surveys is how little corporate executives, other laypeople, and attorneys understand the scope and, more importantly, limitations of the privilege.⁸⁷ Indeed, some of the misunderstandings in particular support the conclusion that executives, employees, and attorneys speak freely because they

over-reliance on the study, and conceding its limitations); *Functional Overlap*, *supra* note 12, at 1236 (indicating on the one hand, that most laypeople were misinformed or uninformed about the privilege, but on the other hand, that most believe that without the privilege, full disclosure would be deterred); *Theories and Justifications*, *supra* note 30, at 1474 (stating that although the benefits of privileges have not been verified, there is no reason to assume that they are small).

84. See MCCORMICK ON EVIDENCE, *supra* note 19, § 87, at 345 (admitting the difficulty of empirical study of the privilege).

85. See, e.g., Rice, *Loss of Predictability*, *supra* note 56, at 741 (noting that the increased unpredictability of the corporate privilege has not led to a reduction in legal advice); *Attorney-Client Privilege*, *supra* note 29, at 473-76 (critiquing “the certainty argument” and questioning the need for the privilege in the corporate context).

86. Again, this cannot be quantified. Some attorneys with whom I have spoken, including in-house counsel, suggest that they avoid certain communications with corporate personnel out of concern that such communications ultimately will not be privileged.

87. See, e.g., Alexander, *supra* note 59, at 249 (summarizing survey results that demonstrate few in corporate hierarchy know that privilege belongs only to corporations); Rice, *Loss of Predictability*, *supra* note 56, at 741-42 (finding that corporate personnel know little about the limits of privilege protection); Zacharias, *supra* note 81, at 394 (noting pervasive client misunderstanding of confidentiality); *Functional Overlap*, *supra* note 12, at 1236 (finding that most laypeople are misinformed about the privilege).

believe the communications will remain confidential.⁸⁸ If these misunderstandings are as widespread as the studies suggest, then the prevailing uncertainty does not refute the widely held assumption that significant uncertainties in privilege protections, *if known* to decision makers and attorneys, would deter communications.⁸⁹

All of this makes a fairly straightforward point: while there are lingering doubts about the impact of the privilege, particularly in the corporate context, the privilege is of little use unless the protection it provides is predictable enough to convince clients, corporate decision makers, and their attorneys that their communications will not be disclosed in the future. An uncertain privilege, if known to attorneys and clients, cannot promote client communication and candor or any of the resulting benefits. Moreover, such uncertainty, which either deters attorney-client communication or allows unforeseen disclosure of such communications, also harms the other interests—avoiding self-incrimination, respect for privacy and dignity, facilitating professionalism and loyalty—that the privilege serves.

Because the privilege—including the corporate privilege—is here to stay in one form or another,⁹⁰ ensuring that the protection it affords is predictable must be a priority for courts and policy makers. This true particularly in light of the privilege's extraordinary costs; we may never be able to verify whether the social benefits of the privilege outweigh its social and transaction costs, but we know that we cannot achieve such benefits without sufficiently certain protections.

88. See, e.g., Rice, *Loss of Predictability*, *supra* note 56, at 741-42 (concluding that one of the most significant reasons why corporate employees continue to speak with corporate attorneys is their mistaken belief that the privilege will protect them); Zacharias, *supra* note 81, at 396 (attributing clients' reliance on confidentiality to attorneys who overstate the scope of confidentiality or who close their eyes to client misperception of confidentiality's limits).

89. Skeptics may counter that the corporate privilege depends on such ignorance because employees would not communicate with corporate attorneys if they knew that the corporation owned the privilege. Professor Rice states that one of the most significant reasons why corporate employees continue to speak with corporate attorneys is their mistaken belief that the privilege will protect them and their communications. Rice, *Loss of Predictability*, *supra* note 56, at 741-42. As discussed previously, however, this may not always be the case, and, even if lower level employees resist, corporate decision makers can compel cooperation. See *supra* note 87 and accompanying text. The ignorance of corporate decision makers and attorneys is more important than that of lower level employees. If those who control the entity knew how uncertain the privilege is, they would be discouraged from facilitating or allowing communications with counsel.

90. See Alexander, *supra* note 59, at 275 (noting that suggestions of abolishing the corporate privilege would be "heresy"). Even Professor Rice, who is among the most persuasive critics of the corporate privilege, has not advocated that it be abandoned. See Rice, *Evidence Project*, *supra* note 7, at 346-47 (including the corporate privilege within a proposed privilege rule).

Given that sufficient certainty is necessary, the more vexing issue is how much certainty is sufficient. There is no general agreement on the level of certainty that is required to ensure the privilege is effective.⁹¹ Indeed, many practitioners and judges assume or believe that current privilege protections are sufficiently certain,⁹² while many commentators—including myself—contend that they are not.

Also, assuming that the privilege can promote attorney-client candor and communication, the level of certainty required most likely varies by client and circumstance. Some clients may be unwilling to engage in full and frank communications with their attorneys unless they are absolutely certain the communications will not be subject to disclosure later. No privilege regime will satisfy this group, since—given the inherent complexity of aspects of privilege doctrine and the corresponding possibility of erroneous applications—absolute certainty is unachievable. Other clients may be willing to communicate openly with their attorneys with minimal assurance that their communications will be protected. Most clients probably fall between these two extremes; for them, sufficient certainty exists when the benefits of communication outweigh the risk of future disclosure multiplied by the resulting harm of such disclosure.⁹³ This calculation will depend on the circumstances—the perceived benefit of a particular communication and how embarrassing or harmful the communication is likely to be if disclosed.

Thus, the level of certainty that is sufficient to promote client candor and communication cannot be delineated with precision, nor can it be generalized for all clients and all circumstances. But, more certainty is better than less, as long as other competing values—such as preventing the use of the privilege to facilitate crimes—are not sacrificed.⁹⁴ Policy makers therefore should strive to ensure the

91. See *supra* notes 69 and 75 (discussing how some commentators believe that the existing privilege or even a qualified corporate privilege may be certain enough to enhance candor and communication).

92. See *supra* note 85 (calling into question the need for attorney-client privilege in the corporate context).

93. See, e.g., Alexander, *supra* note 59, at 247-48 (suggesting clients engage in a cost-benefit analysis in determining whether and how to communicate information to attorneys).

94. By advocating greater certainty, I am not suggesting that the scope of the privilege should be expanded or given its broadest interpretation. Indeed, I agree with some commentators that the protection may be too broad in some contexts. There are strong social policies in favor of various limitations and exceptions, which always must be considered in fashioning privilege doctrine. See *Clark v. United States*, 289 U.S. 1, 13 (1933) (recognizing the need for conditions or exceptions in

highest level of certainty achievable, while recognizing that the competing interests at stake will require some doctrinal complexity, and that no legal doctrine, including privilege law, is entirely predictable or without nuances in application. This level of certainty would maximize the potential benefits of the privilege.

Moreover, while seeking the highest level of certainty achievable, policy makers should be unsatisfied with any regime that does not at least provide what I call “reasonable certainty.” As a general matter, reasonable certainty is lacking if a competent attorney well-versed in privilege law cannot predict with substantial accuracy,⁹⁵ at the time of an attorney-client communication, whether the communication will be immune from future disclosure, assuming the communication is kept confidential and the client does not knowingly and voluntarily waive the protection. Although the goal of the privilege is to promote client communication, we should evaluate the certainty of privilege protections from the perspective of a competent attorney well-versed in privilege law, not the client. Attorneys are responsible for, and capable of, assessing how likely it is that particular communications will be protected, given the existing legal landscape, and then relating this assessment to the client.⁹⁶ Reasonable certainty will allow the attorney to counsel the client as to the benefits and risks of the communication, and potentially foster fuller and franker communication when the attorney determines that the communication is safe from disclosure.

Similarly, privilege protections ought to be *actually* reasonably certain to the competent, well-versed attorney, not merely *apparently* reasonably certain. The appearance of certainty in privilege protections may be sufficient to induce some clients and attorneys to engage in full and frank communication, even if the protections are uncertain.⁹⁷ Indeed, as discussed previously,⁹⁸ if the privilege is as

the privilege where the policies supporting it run afoul of other social policies). Nevertheless, legal policy makers must determine the appropriate scope of the privilege and then ensure that the protection it affords is certain.

95. I cannot delineate “substantial accuracy” with precision, but it is fair to say that fifty percent accuracy falls far below this standard while ninety percent accuracy probably satisfies it.

96. *Cf. Theories and Justifications, supra* note 30, at 1477 (stating that the behavior of professionals, including attorneys, is more significantly affected by the privilege than the behavior of nonprofessionals because the professional is more likely to know about and act upon applicable privilege law). Of course, attorneys may fail to educate their clients adequately. *See Zacharias, supra* note 81, at 396 (finding that client reliance on confidentiality may be attributable to an attorney’s exaggeration of the scope of confidentiality or the attorney’s choice to ignore client misperception of confidentiality’s limits).

97. *See Theories and Justifications, supra* note 30, at 1489 (suggesting that the appearance of certainty may be enough to encourage communication).

uncertain as other commentators and I argue, the extent to which the privilege enhances candor and communication today often may be attributable to the fact that many attorneys and their clients believe that privilege protections are more certain than they actually are.⁹⁹ In fact, a regime that provides only apparently certain privilege protections may be superficially appealing: it encourages attorney-client communications while allowing judicial and other decision makers to provide access to such communications once the privilege is challenged.¹⁰⁰

Yet policy makers should not be satisfied with apparent certainty. Although apparent certainty promotes some candor and communication, it is both unseemly and counterproductive. By promoting ultimately unprotected communications, such a regime actually facilitates adversaries' use of attorney-client communications, and hence, the attorney-client relationship, against the client. Apparent certainty therefore renders legal assistance *less* effective, defeating one of the primary social benefits greater client candor and communication are supposed to produce.¹⁰¹ Similarly, the mere appearance of certainty will promote attorney-client communications that, if ultimately unprotected, will harm the other social interests that the privilege serves: criminal defendants may unknowingly incriminate themselves, an adversary's use of the attorney against client may irreparably damage their relationship of trust and confidence, and disclosure of the communications may defeat the client's legitimate expectation of privacy.¹⁰² Apparent certainty also leads to a troublesome dichotomy: unwitting or poorly advised clients will communicate more—and more than they should—with their attorneys, while the privilege will not promote candor and communication between well-advised clients and their attorneys.

98. See *supra* note 68 and accompanying text; see also *infra* Part II.

99. See Rice, *Loss of Predictability*, *supra* note 56, at 741-42 (arguing that whatever success the corporate privilege may have had is attributable at least in substantial part to the mistaken beliefs of corporate officers and employees); see also *supra* notes 87-88 and accompanying text (same).

100. See *Attorney-Client Privilege*, *supra* note 29, at 469-73 (suggesting that allowing a reasonable balancing of interests post hoc is better than providing absolutely certain privilege protections); *Theories and Justifications*, *supra* note 30, at 1489 (accepting as sufficient the mere appearance of certainty to encourage communication).

101. See Alexander, *supra* note 59, at 214 (arguing that an attorney who is called on to testify to a client's damaging admission is disqualified from serving as trial advocate, and such disqualification both interferes with the client's freedom to choose counsel and delays the progress and efficacy of litigation).

102. Cf. *Theories and Justifications*, *supra* note 30, at 1488 (suggesting that apparent certainty, on the one hand, will not encourage those who recognize the uncertainty to communicate, while on the other hand, will allow judges to manipulate the uncertainty to reach arbitrary results).

Thus, despite its initial appeal, apparent certainty actually harms the interests the privilege is supposed to serve and produces unsavory results that policy makers should not tolerate.

In addition, apparent certainty increases transaction costs. Misperceptions about the privilege will lead to unwarranted assertions of the privilege and, hence, more litigation. Likewise, when privilege doctrine is unclear or undefined, both sides have a strong incentive to litigate the privilege, further increasing expenses.

Finally, the appearance of certainty cannot last forever when protections are, in fact, uncertain. Eventually, courts, commentators, and practitioners will become aware of the actual level of uncertainty, a phenomenon that has been building over the last two decades.¹⁰³ And, because appearances can cut both ways, attorneys and clients who become aware of various uncertainties in privilege doctrine may view privilege law as a whole, as uncertain, and be deterred from communicating, even if some protections are in fact fairly certain.

In conclusion, the ultimate benefits of the privilege are in dispute, but the essential precondition for realization of any such benefits is clear. To promote candor and communication, privilege protections must be sufficiently certain to assure that clients and attorneys can fairly predict whether their communications will be subject to later disclosure. Since absolute certainty is not attainable, policy makers should seek to ensure that privilege doctrine provides at least reasonably certain protections, thereby allowing well-versed, competent attorneys, and hence their clients, to assess accurately whether various communications will be protected.

II. THE LACK OF REASONABLE CERTAINTY

In order for privilege protections to be reasonably certain to a competent attorney looking forward from the time of the communication, the protections must satisfy at least three conditions. First, the scope of the protection that the privilege affords must be clear: confusing, ambiguous, or flexible privilege standards do not offer predictable protection. Second, reasonably certain protections must be generally—or at least predictably—applicable. The attorney must have confidence that protections will apply regardless of the forum—state, federal, or nonjudicial—and the nature of the proceeding or substantive claims that ultimately give rise to assertion of the protections. Finally, privilege protections remain wholly uncertain if they are qualified or otherwise subject to post hoc

103. See generally MCCORMICK ON EVIDENCE, *supra* note 19, § 87.

abandonment or revocation.¹⁰⁴

The current privilege regime fails to satisfy each of these conditions in many circumstances. There is a substantial amount of confusion over a number of fundamental aspects of the attorney-client privilege.¹⁰⁵ Indeed, there are numerous, lingering ambiguities and unresolved doctrinal issues within particular jurisdictions.¹⁰⁶ In addition, there is no guarantee that the privilege protections afforded in one jurisdiction, forum, or type of proceeding will apply in another.¹⁰⁷ To the contrary, there is no generally applicable set of privilege rules and, perhaps surprisingly, limited convergence on key aspects of attorney-client privilege doctrine. These significant inter-jurisdictional conflicts in the law, combined with varying and often unpredictable governing choice-of-law principles, result in uncertain protections. Moreover, modern business, litigation, and conflict resolution practices make it increasingly difficult for an attorney to predict, at the time of a communication, whether the allegedly privileged status of the communication will be challenged in a particular state or federal court, in a proceeding governed by state or federal privilege law, or in a nonjudicial forum, such as arbitral, regulatory, or congressional proceedings. Finally, in many circumstances, privilege protections are tentative or qualified: substantive privilege doctrine sometimes allows decision makers to override, abrogate, or ignore privilege protections, while at other times, attorneys or their clients waive the privilege permanently by involuntary disclosure or by stumbling into one of the traps for the

104. See Berger, *supra* note 1, at 275 (finding troublesome lower federal courts' endorsement of a qualified privilege, which permitted the court to find, on balance, that disclosure should be ordered). The Supreme Court has emphasized the need for absolute privilege protections that are not subject to a post hoc balancing of interests or values. See *Jaffee v. Redmond*, 518 U.S. 1, 17 (1996) (holding that the psychotherapist-patient privilege would be eviscerated if made contingent upon a judge, after the fact, weighing the relative importance of a patient's interest in privacy and the evidentiary need for disclosure). Indeed, to the extent privilege doctrine allows individual judges or decision makers to ignore protections in given circumstances, those protections become wholly unreliable and, hence, uncertain. See *Functional Overlap*, *supra* note 12, at 1245 (recognizing that discretionary privilege protections would cause uncertainty and that the full disclosure objective therefore would be "deeply undercut"). I therefore disagree with those commentators and courts that suggest that a qualified privilege that allows judges to balance competing interests post hoc can be reconciled with the purposes of the modern privilege. See *supra* note 69 and accompanying text (discussing commentators who have advocated for a qualified corporate privilege).

105. See Broun, *supra* note 1, at 786 (stating that most unresolved issues relating to testimonial privileges invoked in federal courts surround the attorney-client privilege rather than other privileges).

106. See discussion *infra* Part II.B.2.

107. See discussion *infra* Part II.B.2.

unwary lurking below the surface of apparent protection.¹⁰⁸

Thus, the protections that the modern privilege affords often are uncertain. The story of the uncertainty in today's privilege most appropriately begins in the early 1970s, when Congress had a real opportunity to provide national leadership on privilege doctrine but chose not to act.¹⁰⁹ Congress had its reasons for not taking the lead a quarter century ago, but, in hindsight, its inaction ultimately was a major cause for the current, intolerable state of privilege doctrine. Since then, continuing disagreements among state and federal jurisdictions, judicial inattention, flawed judicial policy making, and changing economic, litigation, and dispute resolution practices have contributed to the problem.¹¹⁰

A. *How We Got Here:*

The Federal Rules of Evidence and State Privilege Law

Prior to the adoption of the Federal Rules of Evidence in 1975, the federal courts had no single set of evidence rules. Evidentiary privileges, including the attorney-client privilege, were creatures of state and federal common law. In 1972, after years of discussion, the Supreme Court promulgated the Federal Rules of Evidence pursuant to the Court's authority under the Rules Enabling Act.¹¹¹ These rules were then submitted to Congress for tacit approval or explicit rejection.¹¹²

As originally proposed, Article V of these rules would have codified the law of privileges.¹¹³ These rules would have provided for nine specific privileges including the attorney-client privilege, waiver of privilege by voluntary disclosure, protection of privileged matters disclosed under compulsion, and prohibition of negative inferences drawn from a party's assertion of privilege.¹¹⁴ Proposed Federal Rule

108. See discussion *infra* Part II.B.2.c.

109. See MUELLER & KIRKPATRICK, *supra* note 12, § 169, at 216-20 (describing congressional refusal to codify a federal privilege law, preferring instead that the privilege be guided by the common law and applicable state law); see also discussion *infra* Part II.A.

110. See discussion *infra* Part II.A-C.

111. 28 U.S.C. § 2072 (1970) ("The Supreme Court shall have the power to prescribe general rules of practice and procedure, and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals."), *repealed by* Judicial Improvements and Access to Justice Act of 1988, 28 U.S.C. § 2072(a) (1994) (retaining the original language of the Rules Enabling Act); see also Broun, *supra* note 1, at 772-79 (discussing the history of the Proposed Federal Rules of Evidence).

112. Broun, *supra* note 1, at 772.

113. FED. R. EVID. art. V (Proposed Draft 1972).

114. *Id.* at 502-13.

of Evidence 501 would have provided that only those privileges set forth in Article V could be recognized by federal courts, thereby explicitly superseding contrary state and federal common law.¹¹⁵

Congress, however, displaying rare interest in the proposed rules and the rule-making process, rejected Article V in its entirety.¹¹⁶ The proposed privilege rules proved too controversial for a number of reasons. In the wake of the Watergate scandal, Congress did not look fondly upon proposed Rule 509, which redefined—and arguably expanded—the scope of the secrets of state and official information privileges.¹¹⁷ In addition, Article V narrowed some common-law privileges and omitted others, such as the physician-patient, spousal communications, and journalistic privileges.¹¹⁸

Perhaps most importantly, however, various commentators, members of Congress, and a former Supreme Court Justice expressed concern that the proposed privilege rules—and the governing state and federal standards that they were designed to replace—were substantive in nature.¹¹⁹ Indeed, despite the Advisory Committee's

115. *Id.* at 501.

116. Indeed, the proposed testimonial privileges contained in Article V almost doomed the entire set of evidence rules. *See* Broun, *supra* note 1, at 772-77 (describing the opposition to the draft rules from various judicial, academic, and civic commentators, who particularly criticized the proposed rules on privilege). This was the first time Congress exercised its retained power to revise evidentiary and procedural rules proposed by the Supreme Court. *Committee on Federal Courts, supra* note 10, at 148-49.

117. FED. R. EVID. 509 (Proposed Draft 1972); MUELLER & KIRKPATRICK, *supra* note 12, § 169, at 214; Broun, *supra* note 1, at 776-77; *see also* S. REP. NO. 93-1277, at 6 (1974) (stating that the focus of congressional disagreement regarding Rule 509 was whether the rule was or was not merely codifying existing law with respect to state and official information privileges).

118. MUELLER & KIRKPATRICK, *supra* note 12, § 169, at 214; Broun, *supra* note 1, at 776. A related criticism offered by some commentators was that Article V would eliminate the ability of courts to formulate new privileges if the circumstances warranted. *See* Broun, *supra* note 1, at 776 (noting the opposition from the academic community to the proposed elimination of the judiciary's ability to create new privileges).

119. *See, e.g.*, Broun, *supra* note 1, at 774 (discussing such criticisms of Article V, including Former Justice Goldberg's criticism that the privilege rules were rule-making incursions into substantive matters); *Committee on Federal Courts, supra* note 10, at 150-52 (discussing the pervasive effect of privilege rules on the substantive behavior of citizens); Arthur J. Goldberg, *The Supreme Court, Congress, and Rules of Evidence*, 5 SETON HALL L. REV. 667, 681-84 (1974) (arguing against Article V because of its implications for substantive rights); *see also* Paul Carrington, *Learning from the Rule 26 Brouhaha: Our Courts Need Real Friends*, 156 F.R.D. 295, 299-300 (1994) (stating that, at the time Congress considered the proposed rules, there were concerns about the displacement of state privilege rules, which were "too substantive" in nature); Jack B. Weinstein, *The Uniformity-Conformity Dilemma Facing Draftsmen of the Federal Rules of Evidence*, 69 COLUM. L. REV. 353, 370-73 (1969) (discussing the independent substantive impact of privilege rules and arguing that state privilege rules therefore should apply in cases predicated on state substantive law).

and the Supreme Court's contrary view,¹²⁰ Article V's critics contended that evidentiary privileges reflected substantive policy judgments regarding and regulating certain relationships.¹²¹ Therefore, the argument continued, unlike other types of evidentiary rules designed merely to facilitate reliability in the fact-finding process, the proposed Article V rules could not be viewed as procedural in nature.¹²² Thus, according to the critics, evidentiary privileges were not appropriate subjects for judicial rule making under the Rules Enabling Act because judicially-crafted rules may not "abridge, enlarge, or modify any substantive right."¹²³ Moreover, contrary to the views of the Advisory Committee,¹²⁴ the rules' critics believed that because the proposed privileges would have applied even in diversity cases and other cases in which state law supplied the rules of decision in federal court, they would offend the principles

120. See *Hanna v. Plumer*, 380 U.S. 460, 471-74 (1965) (holding that *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) and its progeny do not preclude application of a federal rule that was promulgated by Congress in accordance with its constitutional mandate to create rules governing the practice of federal courts); see also Goldberg, *supra* note 119, at 678-84 (describing the viewpoint of the Supreme Court and the Advisory Committee).

121. See sources cited *supra* note 119.

122. See, e.g., S. REP. NO. 93-1277, at 6-7 (noting the controversy surrounding the codification of privilege as superceding substantive state law); MUELLER & KIRKPATRICK, *supra* note 12, § 175, at 263 (stating that privilege law seeks to implement policies which are wholly extrinsic both to the litigation and the fact-ascertaining policy underlying most evidence law). Former Supreme Court Justice Goldberg opposed Article V because of the substantive nature of privilege rules, stating that the rules of privilege represent "real changes in the substantive rights and duties of persons throughout the country." Goldberg, *supra* note 119, at 669.

123. 28 U.S.C. § 2072 (1970), *repealed by* Judicial Improvements and Access to Justice Act of 1988, 28 U.S.C. § 2072(a) (1994); *Committee on Federal Courts*, *supra* note 10, at 151-52; see also S. REP. NO. 93-1277, at 8 (describing concerns about the substantive nature of privilege protections and indicating that some commentators believed that the law of privilege should be a subject for the legislative rather than rule-making process). Former Justice Goldberg best summarized these reasons for opposition to the privilege rules:

The reason rules of privilege are substantive for both the Rules Enabling Act and the *Erie* doctrine is that they are designed to protect independent substantive interests that the state has regarded as more significant than the free flow of information. Thus, their intrinsic objective is to protect communications that the state deems inviolate.

The substantive nature of rules of privilege can be more clearly seen when contrasted with other rules of evidence. Most evidentiary rules, including the admission and exclusion of evidence, examination of witnesses, judicial notice, competency of witnesses and relevance, are designed to facilitate the fact-finding process. Rules of privilege, however, do not help elicit the truth. Rather, they impede the truth-seeking process in order to serve extrinsic social policies.

Goldberg, *supra* note 119, at 682-84.

124. See MUELLER & KIRKPATRICK, *supra* note 12, § 169, at 216 (summarizing the Advisory Committee's view that privileges were appropriate subjects of rule making by the Supreme Court, and that the *Erie* doctrine did not prevent such rule making).

embodied in *Erie Railroad Co. v. Tompkins*¹²⁵ and federalist values.¹²⁶

Congress ultimately decided that, if codified privilege rules were to be adopted for the federal courts, it, rather than the judiciary, should adopt them.¹²⁷ Nevertheless, Congress chose not to replace the proposed privilege rules. Rather, Congress opted to enact new Federal Rule of Evidence 501, which provides 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.¹²⁸

The legislative history of Rule 501 makes clear that Congress's rejection of Article V did not constitute a disapproval of specific privileges.¹²⁹ Rather, Congress left federal privilege law where it had found it.

125. 304 U.S. 64 (1938).

126. See, e.g., S. REP. NO. 93-1277, at 6 (noting congressional dissatisfaction with the policy of the Court's rule because it contravened the result many legal scholars deemed mandated by *Erie* in which the Court required application of state procedural law in civil actions where the underlying issues were governed by substantive state law); Broun, *supra* note 1, at 775 (expressing displeasure at the proposed codification of federal privilege law that would ignore state privilege law, particularly in diversity cases); *Committee on Federal Courts*, *supra* note 10, at 151 (noting critics' contention that federalist principles underlying the *Erie* doctrine supported the continued application of state privilege rules); Note, *Development in the Law—Privileged Communication: I. Introduction: The Development of Evidentiary Privileges in American Law*, 98 HARV. L. REV. 1450, 1467 (1985) (discussing how *Erie* objections and federalist values supported application of state privilege law in diversity cases). See generally MUELLER & KIRKPATRICK, *supra* note 12, §§ 169, 175 (explaining in detail why privilege law implicates the *Erie* doctrine and discussing Congress's concerns with regard to *Erie*). In 1969, Judge Weinstein wrote that Congress should consider limiting privilege rules to federal question cases precisely for this reason. Weinstein, *supra* note 119, at 373-74. He discussed different treatment for privileges because privilege rules are designed to make an "independent substantive impact." *Id.* at 370.

127. See MUELLER & KIRKPATRICK, *supra* note 12, § 169, at 213-20 (discussing the legislative history of the privilege rules). Indeed, the original Federal Rules of Evidence were statutory. See S. REP. NO. 93-1277, at 5 (stating that Congress delayed the effective date of the evidence rules so that it had time to review them in detail).

128. FED. R. EVID. 501.

129. MUELLER & KIRKPATRICK, *supra* note 12, § 169, at 215; see also S. REP. NO. 93-1277, at 6-10 (continuing to recognize the existence of privileges despite controversy as to their scope).

Rule 501 embodies two congressional choices that have significantly affected the application and development of the law of privilege in federal courts. First, Congress decided that state law governing privileges should continue to apply in civil cases in federal court in which state law supplies the rules of decision.¹³⁰ Thus, there is not a single law of privilege that governs civil cases in federal court: federal privilege law governs federal question cases and, as later clarified by the courts, cases with federal and state claims, while state privilege law governs in diversity cases.¹³¹ Second, Congress left formulation of federal privilege rules in the hands of the courts, stating that privileges shall continue to be governed by the common law.¹³² Unlike virtually all other areas of federal evidence law, privileges—their recognition, limitations, and application—would continue to evolve through the common-law process. How much freedom federal courts should exercise in recognizing new and modifying established privileges remains unresolved.¹³³

Arguably, Congress's decision to enact Rule 501 rather than specific privilege rules also has had a profound effect on the development of privilege law in the states. Since Congress enacted the Federal Rules of Evidence, state evidentiary law has become far more uniform, as many states have followed the federal lead.¹³⁴ Yet, because Congress chose not to codify rules governing the attorney-client and other privileges, there has been no clear federal model for the states to follow. Some states have adopted the original or revised versions of Uniform Rule of Evidence 502,¹³⁵ which governs the attorney-client privilege.¹³⁶ However, few of these jurisdictions have

130. FED. R. EVID. 501.

131. See MUELLER & KIRKPATRICK, *supra* note 12, § 177, at 280-81 (discussing post-Rule 501 authority asserting that federal privilege doctrine governs when there are federal and state claims in a single action).

132. FED. R. EVID. 501.

133. Indeed, the Supreme Court has expressed its reluctance to recognize new privileges. *Univ. of Pa. v. EEOC*, 493 U.S. 182, 189 (1990) (stating that although it has the authority to develop new rules of privilege, it is not inclined to exercise this authority expansively). *But see Jaffee v. Redmond*, 518 U.S. 1, 17 (1996) (recognizing the psychotherapist-patient privilege).

134. See Broun, *supra* note 1, at 789-90 (stating that, since the Federal Rules of Evidence were enacted, thirty-nine states have adopted evidence rules based on them); Berger, *supra* note 1, at 256 (discussing the trend toward codification following adoption of the Federal Rules of Evidence).

135. UNIF. R. EVID. 502; see *supra* note 19 (setting forth Rule 502).

136. Uniform Rule 502 was originally based on the attorney-client privilege rule proposed to Congress, but was subsequently amended in 1986 and 1999. UNIF. R. EVID. 502 (amended 1986 & 1999), 13A U.L.A. 150-59 (2000 & Supp. 2002); MCCORMICK ON EVIDENCE, *supra* note 19, § 75, at 313; Broun, *supra* note 1, at 799 n.191. Sixteen states and Puerto Rico have adopted all or part of Original Uniform Rule 502, UNIF. R. EVID. 502 (1974), and seven states have adopted all or part of

adopted either version of Uniform Rule 502 in its entirety.¹³⁷ Many others have maintained their own statutory or common-law privilege regimes.¹³⁸ While various jurisdictions have borrowed from the federal common law in interpreting their privilege rules, there is less uniformity in the attorney-client privilege area than in most other areas of evidence law.¹³⁹ Thus, Congress's decision not to act affirmatively in the privilege area has affected the development of privilege law across jurisdictions.¹⁴⁰

After the original Federal Rules of Evidence were enacted, Congress amended the Rules Enabling Act to provide for future changes to these rules through the rule-making process.¹⁴¹ Interestingly, however, Congress expressly exempted privileges, stating that any rule "creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by

Revised Uniform Rule 502, REV. UNIF. R. EVID. 502 (amended 1986).

137. For example, only six states that have adopted Original Uniform Rule 502, UNIF. R. EVID. 502 (1974), also have adopted the rule's definition of "representative of the client." Action in Adopting Jurisdiction, 13A U.L.A. 150-59 (2000) (identifying Alaska, Arkansas, Maine, New Hampshire, North Dakota, and Oklahoma). Other states either omit the definition or have modified it. *Id.* (reporting Arizona, Colorado, Delaware, Iowa, Michigan, Minnesota, Nebraska, North Carolina, Ohio, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming omit the definition, while Idaho, Mississippi, and Oregon have modified the definition). Similarly, among the states that have adopted Revised Uniform Rule 502, REV. UNIF. R. EVID. 502 (amended 1986), only Texas has adopted verbatim the rule's definition of "representative of the client." *Id.*

138. MCCORMICK ON EVIDENCE, *supra* note 19, § 75, at 313. New York, for example, has resisted adopting a general code of evidence for more than 100 years. Broun, *supra* note 1, at 801. Instead, New York has a statute that recognizes the privilege, but the statute provides no details on elements, limitations, or application. N.Y. C.P.L.R. 4503 (Consol. 2002). Also following its own path, the New Mexico Supreme Court, which has promulgated a modified version of Original Uniform Rule 502, UNIF. R. EVID. 502 (1974), has declared that legislatively-enacted privileges are invalid under the New Mexico Constitution. *Ammerman v. Hubbard Broad., Inc.*, 551 P.2d 1354, 1357 (N.M. 1976).

139. See *supra* notes 1, 134 and accompanying text.

140. See MCCORMICK ON EVIDENCE, *supra* note 19, § 76, at 313-14.

[T]he failure of Congress to enact specific rules of privilege for the federal courts effectively precluded any immediate prospect of substantial national uniformity in this area. It is arguable that, in light of the strength and contrariety of views which the subject generates, hope for such consensus was never realistic. In any event, the present form of Federal Rule of Evidence 501 perpetuates a fluid situation in the federal law of privilege and affords the states little inducement to adopt identical or similar schemes of privilege. The variegated pattern of privilege in both federal and state courts, described below, thus seems likely to remain the case for the foreseeable future.

Id.

141. See Judicial Improvements and Access to Justice Act of 1988, 28 U.S.C. § 2072(a) (1994) (providing a procedure for delivering proposed rules for congressional consideration).

Act of Congress.”¹⁴² This exception for privileges reflects Congress’s continuing view that any codification of evidentiary privileges is Congress’s own prerogative rather than that of the Supreme Court. Ironically, as a result, the actual development of federal privilege doctrine is left to the common law, which resides in the hands of the Supreme Court and lower federal courts.¹⁴³

B. Conflicts and Confusion in Attorney-Client Privilege Law

In the quarter century since Rule 501 was enacted, Congress has addressed or referenced the attorney-client privilege—or privileges more generally—only in a few specific contexts.¹⁴⁴ Congress has made no attempt to codify a law of attorney-client privilege, either preemptively or for the federal courts. A lack of attention on the part of both Congress and the Supreme Court has left unaddressed widely diverging applications of the law of privilege and resultant substantial uncertainty. At the most general, doctrinal level, there is much consensus among federal and state courts with regard to the attorney-client privilege.¹⁴⁵ For example, all jurisdictions—whether they have adopted one of the versions of Uniform Rule of Evidence 502 or not—cling to the same basic elements, recognize the crime-fraud exception, require the person asserting privilege to demonstrate its application, and adhere to some form of the subject matter waiver doctrine.¹⁴⁶ Not far below this superficial level of agreement,

142. *Id.* § 2074(b).

143. *Cf. Berger, supra* note 1, at 276.

If the limitation on rule-making rests on a separation of power rationale as well as the perception that privileges affect primary conduct and should be subjected to empirical fact-finding and legislative accountability, then Congress’ action in passing [this limitation] and approving the formulation in Rule 501 is tantamount to locking the barn after first having arranged to turn over the key to a horse thief.

Id.

144. *See, e.g.,* Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1806(a) (2001 & Supp. 2002) (stating that the communications otherwise privileged do not lose their privileged character simply because they are subject to electronic surveillance pursuant to or in violation of the restrictions on such surveillance contained in the act); I.R.C. § 7525(a)(1) (2002) (extending attorney-client privilege protections to communications between taxpayers and federally authorized tax practitioners); Electronic Communications Privacy Act of 1986, 18 U.S.C. § 2517(4) (2000) (ensuring protection of intercepted but otherwise privileged wire, oral, or electronic communications).

145. According to one leading treatise, the statement of the scope of the privilege contained in Revised Uniform Rule of Evidence 502 (1986), *see supra* note 19, is now generally accepted. MCCORMICK ON EVIDENCE, *supra* note 19, § 87, at 347.

146. *See* MCCORMICK ON EVIDENCE, *supra* note 19, § 87, at 368-69, 380-81 (stating that it is well-settled both that the privilege belongs to the client and that the privilege does not protect communications made in furtherance of a crime or fraud); GERGACZ, *supra* note 12, § 5.16 (noting wide acceptance of subject matter waiver rules).

however, looms an extraordinary amount of inter-jurisdictional conflict and intra-jurisdictional confusion. Indeed, given the current state of privilege law, application of the privilege in any given case is likely to be ad hoc. An examination of developments in the federal and state courts since 1975 reveals this stark reality.

1. *The lack of Supreme Court leadership*

As the final and only national arbiter of federal common law, the Supreme Court holds the potential for clarifying the law of privilege in federal criminal cases and civil cases involving federal questions. Yet the Supreme Court has shown little interest in the attorney-client or other privileges. Prior to 1975, the Court rarely addressed the privilege: in a smattering of decisions, the Court recognized the existence of the privilege, its purpose, and occasionally addressed some more specific aspects of its contours.¹⁴⁷ Since 1975, when Congress expressly directed the courts to continue to develop the common law of privilege, the Supreme Court has confronted testimonial privilege questions only a few times, and the attorney-client privilege even fewer; indeed, the Court has directly addressed attorney-client privilege issues only five times in the last quarter century.¹⁴⁸

In *Fisher v. United States*,¹⁴⁹ the Court's first post-Rule 501 decision discussing the attorney-client privilege, the Court addressed only the narrow issue of when papers in the possession of the client's attorney are obtainable by a summons directed to the attorney.¹⁵⁰ The Court held that the summons was enforceable against the attorney only if the papers in question were obtainable by summons from the client.¹⁵¹ Given that the papers were not otherwise privileged,¹⁵² the Court did not address other aspects of attorney-client privilege doctrine.

The Court's most important and controversial discussion of the attorney-client privilege followed *Fisher*. In *Upjohn Co. v. United States*,¹⁵³ the Court held that the attorney-client privilege protects confidential communications between a corporation and its counsel, although it recognized that the artificial nature of the corporate

147. See generally Brian Sheppard, Jr., Annotation, *Views of United States Supreme Court as to Attorney-Client Privilege*, 159 A.L.R. FED. 243 (2000) (discussing the Court's less than comprehensive treatment of the attorney-client privilege).

148. See *infra* notes 149-86 and accompanying text.

149. 425 U.S. 391 (1976).

150. *Id.* at 404-05.

151. *Id.* at 405.

152. *Id.* at 414.

153. 449 U.S. 383 (1981).

entity creates complications.¹⁵⁴ Specifically, the Court addressed whether communications to Upjohn's corporate counsel by corporate employees outside the corporation's "control group" may be privileged.¹⁵⁵ The Court held in the affirmative, rejecting the position taken by the court below that the privilege applies only to communications to counsel by employees in a position to control, or take a substantial part in, a decision that the corporation may make on the advice of counsel.¹⁵⁶ Thus, the Court found that the privilege applies to communications from mid-level and even lower-level employees to counsel.¹⁵⁷

In rejecting the "control group" approach, the Court reasoned that the test overlooks the fact that lower level employees can, by their actions within the scope of their employment, embroil the corporation in serious legal difficulties.¹⁵⁸ The Court also noted that the control group test frustrates the purpose of the attorney-client privilege by discouraging the communication of relevant information by employees to corporate counsel seeking to render legal advice to the corporate client.¹⁵⁹ Moreover, the Court stated that the narrow approach threatens to limit the valuable efforts of corporate counsel to ensure the client's compliance with the law.¹⁶⁰ Finally, the Court rejected the control group test as difficult to apply in practice.¹⁶¹ Indeed, the Court emphasized the need for a test that provides some level of predictability, declaring that an uncertain privilege "is little better than no privilege at all."¹⁶²

Based on this reasoning, the Court held that the employee communications at issue were privileged because they were made to corporate counsel at the direction of the employees' superiors in order to secure legal advice, the communications concerned matters within the scope of the employees' corporate duties, and the employees were aware that they were being questioned so that the corporation could obtain legal advice.¹⁶³ Nevertheless, despite emphasizing the need for certainty, the Court refused to articulate a general rule for determining which employee communications to

154. *Id.* at 389-90.

155. *Id.* at 390.

156. *Id.*

157. *Id.* at 391.

158. *Id.*

159. *Id.* at 392.

160. *Id.*

161. *Id.* at 393.

162. *Id.*

163. *Id.* at 394.

corporate counsel are privileged.¹⁶⁴ Thus, although the Court clearly indicated that the control group test is too narrow, it did not offer an alternative analytical approach. As discussed in more detail below, *Upjohn* has failed to end the confusion regarding the application of the attorney-client privilege in the corporate context, nor has the decision gained universal adherence in state courts.¹⁶⁵

Five years later, in *Commodity Futures Trading Comm'n v. Weintraub*,¹⁶⁶ the Court again confronted the privilege in the corporate setting, this time in the context of a bankrupt corporation.¹⁶⁷ Rather than address the scope of protection, the Court tackled the issue of who is entitled to assert and then waive the privilege on behalf of the corporation.¹⁶⁸ For solvent corporations, the power to waive the privilege on behalf of the entity rests with the corporation's management, usually its officers and directors.¹⁶⁹ When control of the corporation passes to new management, this authority to waive the privilege passes along with it.¹⁷⁰ The Court held that this principle applies when a corporation enters bankruptcy: the bankruptcy trustee assumes the powers of the previous management and therefore gains the authority to waive the entity's privilege.¹⁷¹ *Weintraub*, however, provided no additional guidance on when the corporate privilege attaches in the first place, or who has the authority to assert or waive the privilege in other contexts.

In its 1989 decision in *United States v. Zolin*,¹⁷² the Supreme Court discussed the evidentiary and procedural requirements for establishing the applicability of the crime-fraud exception to the attorney-client privilege.¹⁷³ The crime-fraud exception prevents clients from using the privilege to shield from disclosure otherwise privileged communications when those communications are made for the purpose of furthering or facilitating the commission of a fraud or crime.¹⁷⁴ The Court first stated that trial courts may test a proponent's claims of privilege through an in camera review of the

164. See *id.* at 396 (declining to comment on a broader rule because the Court only decides issues before it and because the attorney-client privilege is best left to a case-by-case review).

165. See *infra* notes 217-23 and accompanying text.

166. 471 U.S. 343 (1985).

167. *Id.* at 345.

168. *Id.* at 348.

169. *Id.* at 348-49.

170. *Id.* at 349.

171. *Id.* at 353.

172. 491 U.S. 554 (1989).

173. *Id.* at 565-72.

174. *Id.* at 562-63. The Court had first recognized the crime-fraud exception in *Clark v. United States*, 289 U.S. 1, 15 (1933).

allegedly privileged documents.¹⁷⁵ Turning to the crime-fraud exception specifically, the Court held that a court should engage in an in camera review of the allegedly privileged communications only if the party opposing the privilege on the crime-fraud ground demonstrates a factual basis adequate to support a good faith belief by a reasonable person that an in camera review may reveal evidence that the exception applies.¹⁷⁶ Finally, the Court held that the threshold showing to obtain an in camera review may be satisfied by using any relevant evidence that a court has not adjudicated to be privileged.¹⁷⁷

The Court's discussion in *Zolin* provides some guidance to lower federal courts confronting opposition to claims of privilege based on the crime-fraud exception. Like *Upjohn*, however, *Zolin* left many questions unanswered. For example, the Court specifically stated that it would not decide questions relating to the quantum of proof necessary to establish applicability of the crime-fraud exception.¹⁷⁸ Moreover, as discussed below,¹⁷⁹ *Zolin* offered no guidance on what constitutes a communication made for the purpose of furthering a fraud.¹⁸⁰

Finally, in *Swidler & Berlin v. United States*,¹⁸¹ the Court recently resolved the narrow but ongoing dispute over whether the privilege survives the death of the client.¹⁸² The Court held that the privilege does survive the client's death, concluding that survival is the better rule after surveying various authorities and emphasizing, as it did in *Upjohn*, the need for certainty in privilege protections.¹⁸³

Thus, since Rule 501 was enacted, the Court has rarely addressed the privilege. When it has, it either has addressed a relatively narrow question¹⁸⁴ or has taken on larger doctrinal issues¹⁸⁵ with little in the

175. *Zolin*, 491 U.S. at 556-57.

176. *Id.* at 572.

177. *Id.* at 575.

178. *Id.* at 563 & n.7 (noting that the question presented for review was narrow, and thus, the case was "not the proper occasion to visit" the question of evidentiary threshold).

179. *Infra* Part I.B.2.b.

180. *See Zolin*, 491 U.S. at 563-64 (focusing instead on the type of evidence that can be used to prove such an accusation).

181. 524 U.S. 399 (1998).

182. *See id.* at 402 (applying the privilege to communications between White House Counsel Vincent Foster and his attorney nine days before Foster committed suicide).

183. *See id.* at 407-09 (noting that a client might fear posthumous disclosure just as much as disclosure during the client's lifetime). Most notably, the Court rejected the invitation to allow federal courts to balance ex post the purposes against the need for access to the communications in criminal matters. *See id.* at 409 (noting that such balancing would introduce substantial uncertainty into the privilege's application).

184. *See supra* text accompanying notes 178-80 (discussing the Court's decision in

way of detail or guidance for lower federal courts. The Supreme Court's inattention to the privilege doctrine is particularly ironic, since, as previously discussed, the Court has reiterated several times—in *Upjohn*, *Jaffee*, and *Swidler & Berlin*—that certainty is necessary to foster the aims of the privilege.¹⁸⁶

2. *Intra- and inter-jurisdictional conflicts and confusion*

Intra- and inter-jurisdictional conflicts and confusion in the law of the attorney-client privilege are rampant. Indeed, it would be impossible to discuss all of the ways in which privilege law is unresolved or disputed in the courts. However, by focusing on a few areas of ambiguity and disagreement, I hope to demonstrate the depth and scope of the problem. The areas of confusion and dispute fall into three general categories: (1) the basic elements of the privilege;¹⁸⁷ (2) the crime-fraud exception;¹⁸⁸ and (3) the ways in which the privilege protections may be waived, abandoned, or ignored.¹⁸⁹

Although most of the discussion focuses on inter-jurisdictional conflicts, many jurisdictions have not resolved these issues internally.¹⁹⁰ Indeed, the foregoing review of the Supreme Court's privilege decisions shows how few issues have been resolved definitively in the federal system.¹⁹¹ More generally, these issues receive limited appellate attention because privilege determinations usually occur at the discovery stage of litigation, and hence are interlocutory.¹⁹² Thus, in most federal circuits and most state court

Zolin).

185. See *supra* text accompanying notes 181-83 (discussing the Court's decision in *Swidler*).

186. See *supra* notes 66, 183 and accompanying text.

187. See *infra* Part II.B.2.a.

188. See *infra* Part II.B.2.b.

189. See *infra* Part II.B.2.c.

190. See *infra* Part II.B.2.a-c. In addition, although many of the cases cited are federal cases (because federal district court opinions are more likely to be published than decisions from lower state courts), those in which jurisdiction is based solely on diversity jurisdiction apply state privilege law. 19 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, ET AL., FEDERAL PRACTICE AND PROCEDURE § 4512 (2d ed. 1987).

191. See *supra* Part II.B.1. Many jurisdictions, moreover, have not resolved definitively the scope of the corporate privilege. See *infra* notes 217-23 and accompanying text. A brief review of the various and conflicting approaches of Pennsylvania state and federal courts cited below provides some indication of how unclear the privilege is within specific jurisdictions. See *infra* notes 199-200 and accompanying text.

192. Indeed, given that privilege is a defense to discovery and not just admissibility, privilege determinations often occur even earlier in the litigation than many other evidence determinations. The major exception is the subpoena enforcement action, in which the entire controversy involves whether to compel disclosure. See generally 9 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 45.04

systems, privilege determinations are rarely subject to immediate appeal.¹⁹³ In addition, unless privilege decisions are appealed immediately, they are likely to evade appellate review because most cases are resolved before final judgment, and if not, some privilege issues may be mooted once “the cat is out of the bag.”¹⁹⁴ Definitive appellate resolution of lingering controversies, therefore, is often elusive.¹⁹⁵

a. The elements of the privilege

As most commonly articulated, the attorney-client privilege protects confidential communications between the client and attorney made for the purpose of obtaining or providing legal advice.¹⁹⁶ Although this statement appears straightforward, each

(3d ed. 1999) (discussing procedures and standards for receiving and complying with subpoenas).

193. In the federal courts and most state court systems, an order or other action of the trial court is not appealable unless it satisfies the “final judgment rule,” or one of its narrow exceptions. *See generally* Timothy P. Glynn, *Discontent and Indiscretion: Discretionary Review of Interlocutory Orders*, 77 NOTRE DAME L. REV. 175, 182-202 (2001) (discussing the final judgment rule and its various, narrow exceptions). Virtually all of the federal system privilege determinations made during discovery are appealable only in extremely rare circumstances: (1) when the district court certifies the question for immediate review pursuant to 28 U.S.C. § 1292(b) and the circuit court accepts such review; (2) when the circuit court grants a writ of mandamus; or (3) pursuant to the doctrine in *Perlman v. United States*, 247 U.S. 7 (1918), when the party seeking to prevent discovery is a third-party intervener. *See* Glynn, *supra*, at 192-202 (discussing the various exceptions to the final judgment rule). The Third Circuit has held that orders denying protection for allegedly privileged communications are appealable as a matter of right under the collateral order doctrine. *See* *Bacher v. Allstate Ins. Co.*, 211 F.3d 52, 53-55 (3d Cir. 2000) (reaffirming *In re Ford Motor Co.*, 110 F.3d 954, 957-64 (3d Cir. 1997)). However, other circuits have expressly rejected this extension of the doctrine, and the remaining circuits and the Supreme Court are not likely to adopt the Third Circuit’s view. *See* Glynn, *supra*, at 215-16 & n.154 (citing cases and discussing the Third Circuit view). The only other avenue to immediate appeal as a matter of right is for the person (party or nonparty) resisting discovery to refuse to abide by an order to compel and subject himself or herself to contempt. *Id.* at 190 n.55. As a practical matter, however, few persons are willing to subject themselves to contempt and its corresponding risks.

194. *See, e.g., In re Ford Motor Co.*, 110 F.3d at 963 (stating that, even if an appellate court decides to “send the case back for re-trial without use of the protected materials,” that would not be enough to remedy a breach of confidentiality); *Chase Manhattan Bank, N.A. v. Turner & Newall, P.L.C.*, 964 F.2d 159, 164-65 (2d Cir. 1992) (granting mandamus review to address concerns about application of the privilege by lower courts in part because few privilege decisions are reversed on appeal and, in the particular case, the benefit of confidentiality would be lost but for an immediate appeal); *see also In re Grand Jury Subpoena*, 825 F.2d 231, 234 (9th Cir. 1987) (finding privilege issues were moot after disclosure of those materials to a grand jury because “the cat has been out of the bag” and there was no effective relief the appellate court could grant).

195. *See, e.g., Hamilton, supra* note 72, at 633-40, 645-46 (discussing jurisdictions in which the scope of the corporate privilege has not been definitively resolved).

196. *E.g., CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE: PRACTICE UNDER THE RULES* § 5.13 (2d ed. 1999); *see also supra* notes 134-39 and accompanying

element continues to produce controversy.

The modern trend is toward a privilege covering all confidential communications *between* the attorney and client.¹⁹⁷ Some courts, however, continue to insist that the privilege does not apply to communications *from* the attorney *to* the client, except to the extent that those communications would reveal confidences of the client.¹⁹⁸ For example, seeking to apply Pennsylvania privilege law, a federal district court in the Third Circuit recently adopted the narrower view, rejecting a contrary view contained in dicta from the Third Circuit.¹⁹⁹ The Pennsylvania Supreme Court, like many others, has yet to resolve this issue.²⁰⁰ Other courts have limited the privilege to attorney

text (noting variety among states of versions of the privilege).

197. See, e.g., *Byrd v. State*, 929 S.W.2d 151, 154 (Ark. 1996) (stating that the attorney-client privilege extends to statements made by the attorney *and* the client, and includes “self-initiated attorney communications intended to keep the client posted on legal developments and implications”) (quoting *Jack Winter, Inc. v. Koratron Co.*, 54 F.R.D. 44, 46 (N.D. Cal. 1971)); *Titmas v. Superior Court*, 104 Cal. Rptr. 2d 803, 808 (Cal. Ct. App. 2001) (“The attorney-client privilege covers all forms of communication, including transactional advice and advice in anticipation of threatened litigation”); *Spectrum Sys. Int’l Corp. v. Chem. Bank*, 581 N.E.2d 1055, 1060 (N.Y. 1991) (stating that “the privilege is not narrowly confined to the repetition of confidences that were supplied to the lawyer by the client.”); *Harris v. State*, 56 S.W.3d 52, 60 (Tex. App. 2001) (explaining that the statements and advice that an attorney gives to the client are just as protected as the statements that the client makes to the attorney); *State ex rel. United States Fid. & Guar. Co. v. Canady*, 460 S.E.2d 677, 687 n.13 (W. Va. 1995) (stating that it is irrelevant whether the attorney or client made the communication, or whether the communication was written or oral); MUELLER & KIRKPATRICK, *supra* note 12, § 185, at 323-24 (stating that some courts extend the privilege to legal advice given by the attorney, regardless of whether it would reveal a confidential client communication, and noting the trend among courts to recognize that the privilege is “a two-way privilege covering all confidential communications between the attorney and the client in the course of legal representation”); see also Paul R. Rice, *Attorney-Client Privilege: Continuing Confusion About Attorney Communications, Drafts, Pre-Existing Documents, and the Source of the Facts Communicated*, 48 AM. U. L. REV. 967, 973-79 (1999) [hereinafter Rice, *Continuing Confusion*] (discussing the trend more generally, and criticizing courts for extending the privilege beyond its traditional boundaries).

198. See, e.g., *Avery Dennison Corp. v. UCB Films P.L.C.*, No. 95C 6351, 1998 WL 703647, at *3 (N.D. Ill. Sept. 30, 1998) (holding that communications from an attorney to a client are privileged if the statements would reveal the essence of confidential communications by the client); *Fed. Elec. Comm’n v. Christian Coalition*, 178 F.R.D. 61, 66 (E.D. Va. 1998) (stating that the privilege extends to attorney communications to the client if those communications reveal client confidences); MUELLER & KIRKPATRICK, *supra* note 12, § 185, at 323 (discussing similar cases); Rice, *Continuing Confusion*, *supra* note 197, at 973-79 (discussing additional similar cases).

199. See *Coregis Ins. Co. v. Law Offices of Carole F. Kafrissen, P.C.*, 186 F. Supp. 2d 567, 574 (E.D. Pa. 2002) (rejecting the more lenient approach adopted in dicta by the Third Circuit in *In re Ford Motor Co.*, 110 F.3d 954, 965 n.9 (3d Cir. 1997)); see also *Garvey v. Nat’l Grange Mut. Ins. Co.*, 167 F.R.D. 391, 395 (E.D. Pa. 1996) (finding that a communication from an attorney must be based on confidential information received from the client in order to be privileged).

200. Compare, e.g., *Nelson v. Himes*, 62 Pa. D. & C.2d 748, 749 (Pa. Ct. Com. Pl. 1973) (stating that the privilege only attaches to a client’s communications to an

communications that reveal client confidences or responsive legal advice.²⁰¹ Thus, there are lingering doubts over the fundamental question of whether and when communications from an attorney to a client that do not reveal client confidences are privileged. This is no small matter, particularly in ongoing attorney-client relationships in which attorneys often give legal advice that cannot be traced to specific client requests or communications.

In addition, there is an enormous amount of confusion over when communications satisfy the *confidentiality* requirement.²⁰² Generally speaking, courts require privilege claimants to demonstrate that confidentiality was anticipated, accomplished, and preserved.²⁰³ The significant uncertainties surrounding preservation of confidentiality are addressed below in the discussion of various waiver doctrines.²⁰⁴ Whether the privilege initially attaches, however, depends on whether the client intended to keep the communication confidential and took steps to maintain such confidentiality.²⁰⁵ There is much

attorney), *with* Northampton Borough Mun. Auth. v. Remsco Ass'n, 22 Pa. D. & C.3d 541, 550 (Pa. Ct. Com. Pl. 1981) (privilege attaches to an attorney's communications only "where the very purpose of the privilege would be contravened by disclosure"), *and* City of Shamokin v. W. End Nat'l Bank, 22 Pa. D. & C.3d 232, 234 (Pa. Ct. Com. Pl. 1982) (stating that it has always been assumed that the privilege attaches to attorneys' communications, to the extent they are based on confidential facts provided by the client). Pennsylvania's Superior and Supreme Courts have provided no recent guidance to resolve this disparity. *See also* S. Bell Tel. & Tel. Co. v. Deason, 632 So. 2d 1377, 1382 (Fla. 1994) (noting an unresolved divergence of views between the "narrow view" and the "broad view" of attorney-client privilege).

201. *See, e.g., In re* Grand Jury Proceeding, 68 F.3d 193, 197 (7th Cir. 1995) (holding that the privilege applies only to legal advice and does not apply more generally to attorney communications with the client that do not reveal client confidences); *Mead Data Cent., Inc. v. United States Dep't of the Air Force*, 566 F.2d 242, 254 (D.C. Cir. 1977) (noting that the federal courts do not extend the attorney-client privilege to attorney communications except when based on confidential information of the client); *Olson v. Accessory Controls & Equip. Corp.*, 757 A.2d 14, 18-19 (Conn. 2000) (holding that a communication from an attorney to a client on a matter of fact is not privileged "unless it were shown to be inextricably linked to the giving of legal advice") (quoting *Ullmann v. State*, 647 A.2d 324, 332 (Conn. 1994)); *see also* Rice, *Continuing Confusion*, *supra* note 197, at 975-76 & n.30 (discussing additional cases with similar holdings).

202. *See infra* notes 207-12 and accompanying text.

203. *See* Paul R. Rice, *Attorney-Client Privilege: The Indirect Recognition of Limited Waiver*, ACCA DOCKET (Apr. 2000), at <http://www.acprivilege.com/articles/docket7.html> (arguing that the requirement of confidentiality imposes heavy costs on the litigation process). In another article, Professor Rice argues that there is little logic in the courts' requirement that attorney-client communications remain secret in order to preserve the privilege. Paul R. Rice, *Attorney-Client Privilege: The Eroding Concept of Confidentiality Should Be Abolished*, 47 DUKE L. REV. 853, 856-57 (1998) [hereinafter Rice, *Eroding Confidentiality*].

204. *See infra* Part II.B.2.c.

205. *See, e.g.,* Sherry L. Talton, *Mapping the Information Superhighway: Electronic Mail and the Inadvertent Disclosure of Confidential Information*, 20 REV. LITIG. 271, 288-89 (2000) (noting the courts typically focus on such efforts, as well as the parties' reasonable expectations of privacy).

disagreement over what this actually means.

For example, courts have not agreed on the privileged status of drafts of documents that the client submits to an attorney for legal advice but ultimately intends to disclose to the public or third parties.²⁰⁶ Some courts have suggested that the client's intent to disclose some version of the content of the draft means that the privilege never attaches.²⁰⁷ Other courts have held that those portions of the draft that do not appear in the final, published version are privileged.²⁰⁸ Still other courts disagree, treating the entire draft—including portions that ultimately appear in the final version—as a confidential communication between an attorney and client that was never intended to be published.²⁰⁹ The implications of this

206. Compare, e.g., *In re Grand Jury Proceedings*, 33 F.3d 342, 354-55 (4th Cir. 1994) (holding that, where a client retains an attorney for the purpose of advice on publication, drafts are not privileged), with *State ex rel. Benesch, Friedlander, Coplan & Arnoff, L.L.P. v. City of Rossford*, 746 N.E.2d 1139, 1144-45 (Ohio Ct. App. 2000) (holding information appearing in draft bond documents privileged, except that information which was later released to the public).

207. See, e.g., *In re Grand Jury Proceedings*, 727 F.2d 1352, 1358 (4th Cir. 1984) (finding irrelevant the fact that no prospectus was ever actually issued, because the information given to the attorney was to assist in preparing the prospectus for public circulation); *Heidelberg Harris, Inc. v. Mitsubishi Heavy Indus.*, No. 95-C-0673, 1996 WL 732522, at *3 (N.D. Ill. Dec. 9, 1996) (holding that the privilege does not protect the draft of a contract where no attorneys were involved in the communication); *Burroughs Wellcome Co. v. Barr Labs., Inc.*, 143 F.R.D. 611, 618 (E.D.N.C. 1992) (holding that draft patent applications are not privileged); see also *Abramian v. President & Fellows of Harvard Coll.*, No. 93-5968-C, 2001 Mass. Super. LEXIS 598, at *9 (Mass. Super. Ct. Nov. 29, 2001) (holding attorney-client privilege inapplicable to draft versions of a report that Harvard intended to release to the public); *Gordon v. Newspaper Ass'n of Am.*, No. LF-768-3, 2000 WL 14693, at *7 (Va. Cir. Ct. Jan. 5, 2000) (ordering the production of all preliminary drafts and communications "necessary to the preparation" of a non-privileged letter), *vacated in part on other grounds*, No. LF-768-3, 2000 WL 140602, at *2 (Va. Cir. Ct. Feb. 4, 2000); *Rice, Continuing Confusion*, *supra* note 197, at 999-1000 (citing additional cases).

208. See, e.g., *In re von Bulow*, 828 F.2d 94, 102 (2d Cir. 1987) (concluding that the privilege is not waived for communications not disclosed in the final draft); *Brossard v. Univ. of Mass.*, No. 961036, 1998 WL 1184124, at *8 (Mass. Super. Ct. Sept. 29, 1998) (finding drafts privileged, but ordering the production of "segregable portions of drafts which are identical to the final versions of the same documents" that were previously released); *State ex rel. Benesch*, 746 N.E.2d at 1144-45 (holding information appearing in draft bond documents privileged, except that information which was later released to the public). Several courts have followed the approach taken in *von Bulow*. See *Rice, Continuing Confusion*, *supra* note 197, at 1003-05 (discussing *von Bulow* and its progeny).

209. See, e.g., *In re Grand Jury Subpoena Duces Tecum*, 731 F.2d 1032, 1037 (2d Cir. 1984) (reasoning that the confidentiality of drafts is not waived when the client sends the final document to another party because the client intended to maintain confidentiality of drafts in sharing them with attorneys); *In re Kidder Peabody Sec. Litig.*, 168 F.R.D. 459, 474 (S.D.N.Y. 1996) (holding that a client may intend to permit the release of the final version of a document without waiving the right to keep confidential all communications with the attorney prior to the finalization of the document); *In re Brand Name Prescription Drugs Antitrust Litig.*, No. 94-C-897, 1995 WL 557412, at *2 (N.D. Ill. Sept. 19, 1995) (concluding that an attorney's drafts of documents are privileged if they are created as part of confidential

disagreement are enormous given the number and variety of documents—prospectuses, press releases, contracts, product instructions, warnings, and advertisements—clients have attorneys review prior to disclosure.²¹⁰

Similarly, some courts have held that oral or written communications from an attorney or client are not privileged if the underlying information communicated is not confidential.²¹¹ Other courts have disagreed, adopting the traditional and better view that the privilege protects confidential communications, even if the public or third parties know some of the underlying information conveyed in those communications.²¹² Like the confusion over drafts, this

communications concerning legal advice); *Olson v. Accessory Controls & Equip. Corp.*, 757 A.2d 14, 26 (Conn. 2000) (finding a preliminary draft of environmental report to be submitted to state was protected by the attorney-client privilege because consultant's engagement letter contemplated strict confidentiality); *Tompkins Indus. v. Warren Tech., Inc.*, 768 So. 2d 1125, 1125-26 (Fla. Dist. Ct. App. 2000) (finding that a draft letter that the plaintiff sent to counsel for advice before sending it to the defendant was covered by the attorney-client privilege); *Kobluk v. Univ. of Minn.*, 574 N.W.2d 436, 443 (Minn. 1998) (holding that certain communications can remain confidential even if the facts communicated are later disclosed); *Va. Elec. & Power Co. v. Westmoreland-LG & E Partners*, 526 S.E.2d 750, 755 (Va. 2000) (concluding privilege attached to a draft letter sent to counsel for legal advice on whether it should be mailed); see also *Rice, Continuing Confusion, supra* note 197, at 1003-04 (arguing that written drafts should be afforded the same protections as the oral communications in *von Bulow*).

210. See, e.g., *Rice, Continuing Confusion, supra* note 197, at 1001 ("To conclude that the disclosure of an attorney's final written product, after a series of exchanges with the client, results in the loss of all privilege claims for all prior exchanges would destroy the privilege protection in a large percentage of instances where legal assistance is rendered.")

211. See, e.g., *Tax Analysts v. IRS*, 117 F.3d 607, 618-19 (D.C. Cir. 1997) (denying attorney-client protection to portions of letters from the IRS Office of Chief Counsel to field personnel because the letters contained legal conclusions based on information gathered from taxpayers); *United States v. Billmyer*, 57 F.3d 31, 37-38 (1st Cir. 1995) (holding that the privilege does not attach to facts communicated from an attorney to a client where the client—a criminal defendant—chose to make this same information available to the government prosecutor); *Burke v. Tenn. Walking Horse Breeders' & Exhibitors Assoc.*, App. No. 01A01-9611-CH-00511, 1997 Tenn. App. LEXIS 378, at *29 (Tenn. Ct. App. May 28, 1997) ("The privilege applies only to the extent that the attorney's communications to a client were specifically based upon a client's confidential communication or would otherwise, if disclosed, directly or indirectly reveal the substance or tenor of a confidential communication."); see also *Rice, Continuing Confusion, supra* note 197, at 979-82 (discussing decisions in which courts have (erroneously) found that communications are not privileged because of the public nature of the facts contained within the communications).

212. See, e.g., *Montgomery County v. Microvote Corp.*, 175 F.3d 296, 303-04 (3d Cir. 1999) (holding that documents containing attorney-client communications are privileged even though attorney and client thought processes and findings were known to third parties); *Ippoliti v. Town of Ridgefield*, No. CV 990337600S, 2000 Conn. Super. LEXIS 2020, at *13-14 (Conn. Super. Ct. Aug. 7, 2000) (stating that a communication from attorney to client solely regarding a matter of fact may be privileged only if it is "inextricably linked" to rendering legal advice); *A.W. Chesterton Co. v. Allstate Ins. Co.*, No. 96-4871, 2001 Mass. Super. LEXIS 16, at *4-5

dispute has implications for an enormous number of attorney-client communications.

It is often unclear how far the circle of confidentiality extends and how guarded the attorney and client must be with their communications. For example, some courts have held that attorney-client communications are not confidential if persons other than the attorney and client—including agents, close advisors, or relatives—are present, unless these persons are indispensable or otherwise necessary to facilitate the communications.²¹³ Other courts have been less restrictive.²¹⁴ Moreover, largely because the scope of the corporate privilege remains unresolved, as discussed below, it is

(Mass. Super. Ct. Jan. 18, 2001) (declaring that factual portions of a privileged communication are themselves privileged); *Stout v. Christie, Manson & Woods Int'l, Inc.*, 681 N.Y.S.2d 19, 20 (N.Y. App. Div. 1998) (finding that legal consultations regarding the estate of Andy Warhol that included "incidental, not otherwise privileged matters," were covered by attorney-client privilege); *Spectrum Sys. Int'l Corp. v. Chem. Bank*, 581 N.E.2d 1055, 1060 (N.Y. 1991) (stating that the presence of non-privileged information in an otherwise privileged communication does not destroy attorney-client privilege for the entire document); *see also Rice, Continuing Confusion*, *supra* note 197, at 982-83 (criticizing courts for failing to recognize that the privilege focuses on the communication, and is not affected by the facts). Professor Rice summarizes why courts that have found otherwise have failed to recognize the distinction between communications and information:

The privilege focuses on the communication. It is not concerned with, and does not affect, the facts within the communication, as the facts exist outside the box. The privilege does not bestow an independent protection on such information, and the information's nature (factual or technical) or status (public or private) does not affect the privilege. The information does not have to be confidential for the communication in which it is incorporated to be confidential, and therefore, privileged.

Id. at 982-83. Professor Rice likewise states that the source of the information contained within the communication is irrelevant. *Id.* at 985.

213. *See, e.g., Nat'l Educ. Training Group, Inc. v. Skillsoft Corp.*, 1999 U.S. Dist. LEXIS 8680, at *14 (S.D.N.Y. June 10, 1999) (finding no confidentiality in the notes of an associate at a board meeting in which the board discussed legal advice of its counsel because the associate's presence at the meeting was not necessary and thus, New York's narrow agency exception did not apply); *In re Himmel*, 533 N.E.2d 790, 794 (Ill. 1988) (finding no confidentiality because communications were made in the presence of the client's mother and fiancé); *State v. Rhodes*, 627 N.W.2d 74, 85 (Minn. 2001) (privilege does not attach when a client makes statements to an attorney in the presence of a spouse); *People v. Osorio*, 549 N.E.2d 1183, 1186 (N.Y. 1989) (holding that presence of co-defendant as translator for defendant's communications with attorney destroyed the privilege because codefendant was not present for the purpose of building a joint defense with defendant).

214. *See, e.g., Kevlik v. Goldstein*, 724 F.2d 844, 849 (1st Cir. 1984) (holding that the presence of client's father did not destroy the privilege); *State v. Blacknall*, 760 A.2d 1151, 1153 (N.J. Super. Ct. Law Div. 2000) (holding that the privilege extends to any agent of either the attorney or the client, including necessary intermediaries); *Rosati v. Kuzman*, 660 A.2d 263, 266-67 (R.I. 1995) (finding that the presence of adult client's parents at meeting with attorney did not waive attorney-client privilege); *Hoffman v. Conder*, 712 P.2d 216, 216-17 (Utah 1985) (holding that the appropriate standard is whether the presence of a third party is "reasonably necessary," and, therefore, finding that the presence of a nurse did not destroy privilege).

unclear when communications widely dispersed within an organization or revealed to agents or consultants are privileged.²¹⁵ Indeed, courts have differed significantly on what steps a client must take to preserve the confidentiality of the privilege—and prevent eavesdropping—to satisfy the intent and maintenance requirements.²¹⁶

In addition, two decades after *Upjohn*, there continues to be enormous confusion and disagreement regarding the identity of the *client* in the corporate or organizational setting.²¹⁷ Some states have declined to follow the Supreme Court's lead in *Upjohn*, and continue to adhere to the control group or modified control group test for determining who within the corporate structure constitutes the

215. See *infra* notes 217-22 and accompanying text (discussing disagreement regarding the identity of the client in the corporate context); see also Edward C. Brewer, III, *The Ethics of Internal Investigations in Kentucky and Ohio*, 27 N. KY. L. REV. 721, 763-64 (2000) (discussing how the *Upjohn* principle may extend to non-employee agents in certain situations, but cautioning that this view is not universally shared).

216. See, e.g., *In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989) (stating that clients seeking to preserve the privilege must treat the communications “like jewels” and that, short of court-compelled disclosure or other extraordinary circumstances, the court will not engage in an analysis of degrees of voluntariness); *Suburban Sew 'N Sweep, Inc. v. Swiss Bernina, Inc.*, 91 F.R.D. 254, 260 (N.D. Ill. 1981) (finding a failure to maintain confidentiality after adverse party found otherwise privileged documents in trash dumpster); *Floyd v. Coors Brewing Co.*, 952 P.2d 797, 808-09 (Colo. Ct. App. 1997) (adopting an ad hoc approach that considers several factors when determining whether an alleged inadvertent disclosure constitutes a waiver of privilege), *overruled on other grounds*, 978 P.2d 663 (Colo. 1999); *Blumenthal v. Kimber Mfg., Inc.*, 795 A.2d 1288, 1291 (Conn. Super. Ct. 2001) (finding that the attorney-client privilege is sacrosanct and cannot be waived unless a party knowingly and intentionally waived it); *In re Reorganization of Elec. Mut. Liab. Ins. Co.*, 681 N.E.2d 838, 841 (Mass. 1997) (requiring reasonable precautions to prevent eavesdropping); *Commonwealth v. Petty*, No. SUCR 95-10524, 1995 Mass. Super. LEXIS 42, at *3-4 (Mass. Super. Ct. Nov. 1995) (finding that the burden of demonstrating a socially recognized expectation of privacy in the location where the communication took place rests with a defendant); *Trilogy Communications, Inc. v. Excom Realty, Inc.*, 652 A.2d 1273, 1275-76 (N.J. Super. Ct. Law Div. 1994) (adopting the liberal approach, whereby privilege cannot be waived through inadvertence); *Goldsborough v. Eagle Crest Partners, Ltd.*, 838 P.2d 1069, 1073 (Or. 1992) (adopting a strict approach under which intent to waive privilege may be inferred by disclosure, even if inadvertent); see also *infra* notes 251-54 and accompanying text (discussing inadvertent disclosure doctrine). At least one state supreme court has held that the mandatory presence of a deputy at the trial preparations of a defendant in police custody waives the attorney-client privilege as to communications between the defendant and defendant's counsel. *Haworth v. State*, 840 P.2d 912, 918 (Wyo. 1992), *habeas corpus granted sub nom.* *Haworth v. Shillinger*, 852 F. Supp. 961 (D. Wyo. 1994), *aff'd*, 70 F.3d 1132 (10th Cir. 1995).

217. See, e.g., *Hamilton*, *supra* note 72, at 654 (concluding, after surveying disparate state approaches prevailing after *Upjohn*, that there is tremendous uncertainty and inconsistent application); *Thornburg*, *supra* note 70, at 166 (discussing the uncertainty in whether a communication to corporate counsel will be privileged).

client.²¹⁸ Other states have affirmatively adopted *Upjohn* or what appears to be a similar “subject matter” approach.²¹⁹ Still others have adopted subject matter approaches more narrow than that suggested in *Upjohn*.²²⁰ Most states have yet to resolve this issue definitively—by statute, rule, or supreme court opinion—although lower court opinions within these jurisdictions tend to apply some form of the subject matter test.²²¹ Moreover, because *Upjohn* held that the privilege must extend beyond the control group to lower level employees, but did not articulate a test for determining which communications by such employees would be protected, there is a substantial amount of inconsistency in how federal and state courts interpret and apply *Upjohn* and the subject matter approach to analyzing communications between employees and corporate counsel.²²² Also, the debate continues to rage over whether and when

218. See, e.g., *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 432 N.E.2d 250, 254-58 (Ill. 1982) (adhering to the control group test and rejecting *Upjohn*). Besides Illinois, a number of states—including Alaska, Arkansas, Hawaii, Maine, Nevada, New Hampshire, Oklahoma, and South Dakota—have adopted statutory or rule-based formulations of the control-group test based on Uniform Rule 502. See REV. UNIF. R. EVID. § 502 (amended 1986), 13 U.L.A 150-59 (Supp. 2002); see also Hamilton, *supra* note 72, at 633-40, 644-45 (discussing states’ statutory and common-law treatment of the privilege when dealing with corporate clients).

219. Some states—including Alabama, Arizona, Colorado, Kentucky, North Dakota, Oregon, Texas, and Vermont—have adopted *Upjohn* or a subject matter test that appears to conform to its teachings. A compilation of these states’ statutes, rules, and case law is on file with the author. See also Hamilton, *supra* note 72, at 633-41 (discussing states’ statutory and common-law treatment of the privilege in the corporate setting). As of 2001, only Texas has expressly adopted the Revised Rule 502(a)(2) (1986) and its broad subject matter test, which defines “representative of the client” as one who has the authority to obtain legal services; act on the legal advice rendered; or, “for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client.” UNIF. R. EVID. 502; see also *id.* & cmt. 150-59 (describing treatment of the rule and variations in jurisdictions that have adopted the Uniform Rules of Evidence).

220. See, e.g., *S. Bell Tel. & Tel. Co. v. Deason*, 632 So. 2d 1377, 1383 (Fla. 1994) (adopting a subject matter test but requiring that the communications of lower-level employees with attorneys be at the direction of a corporate supervisor); *Chadbourne, Inc. v. Superior Court*, 388 P.2d 700, 709-10 (Cal. 1964) (applying a subject matter test that covers only communications within an employee’s duties and requires an intent on a part of the initial communicator); see also Hamilton, *supra* note 72, at 641-44 (discussing the California, Florida, and Utah modified subject matter approaches).

221. See Hamilton, *supra* note 72, at 633-40, 645-46 (reporting that fourteen states had adopted the subject matter test).

222. Although an exhaustive discussion of the subtle and not so subtle distinctions between approaches in different state and federal jurisdictions is beyond the scope of this article, others already have provided detailed accounts of these disparate views. See generally Alexander C. Black, Annotation, *Determination of Whether a Communication is from a Corporate Client for Purposes of the Attorney-Client Privilege—Modern Cases*, 26 A.L.R.5TH 628 (1995) (summarizing disparate approaches to the attorney-client privilege in federal and state courts); RICE, *supra* note 14, § 4.11 (providing specific state examples of attorney-client privilege law); MUELLER & KIRKPATRICK, *supra* note

former employees may reveal or discuss corporate confidences with outsiders.²²³

Similarly, there is much conflict over who is entitled to control—and, hence, choose to preserve or waive—the privilege on behalf of the corporate client. For example, courts disagree over whether and when corporate decision makers can assert the privilege with regard to communications with corporate counsel in an action brought against the decision makers or on the corporation's behalf by

12, § 189, at 344 (discussing the split in authority in the wake of *Upjohn*); Michael L. Waldman, *Beyond Upjohn: The Attorney-Client Privilege in the Corporate Context*, 28 WM. & MARY L. REV. 473 (1987) (discussing the long history of the corporate attorney-client privilege and exploring why the proper scope of the privilege has been so problematic); Thornburg, *supra* note 70, at 166 (discussing the uncertainty in whether a communication to corporate counsel will be privileged). By way of example, Alexander Black, in addition to summarizing the various state court approaches, discussed the disparate approaches in federal courts in the wake of *Upjohn*:

The courts in many pre-*Upjohn* cases, including the leading subject matter test cases, took the view that a communication is the corporate client's if it concerns matters within the scope of the communicator's employment and is made at the direction of a corporate supervisor, and some post-*Upjohn* cases have continued to apply that test. Other courts require only that the communication concern matters within the scope of the communicator's employment. One court has held that a privileged communication must concern matters within the scope of either the communicator's duties or the duties of the communicator's subordinate. Another court has held that a communication is the corporate client's if it is made at the direction of the communicator's corporate superior. A court has held that a privileged communication must concern matters within the scope of the communicating employee's employment and must concern information necessary for legal decision making. According to another court, a privileged communication must concern matters within the scope of the communicator's employment and the employee must be aware that information is provided for the purpose of obtaining legal advice for the corporation. Another court has held that a privileged communication must relate to the communicating employee's duties and must be at the corporation's behest, and that the employee must know that the communication was made for purposes of obtaining legal advice. One court has held that a communication is the corporate client's if it advises corporate personnel who can act on the advice or provides necessary information to corporate counsel. Other or unspecified criteria were used in a few cases to find communications privileged or not privileged.

See Black, *supra*, at 628 (cross-references and corresponding citations omitted).

223. See, e.g., Charles A. Weiss, *Lawyers Bypassing Lawyers*, 2 LITIG. 42, 43-44 (2002) (identifying the controversy and examining the arguments asserted on each side); Paul R. Rice, *Attorney-Client Privilege: Does the Corporation's Privilege Protect Communications Between Corporate Counsel and Former Employees?*, ACCA DOCKET (June 2000) (same), at <http://www.acprivilege.com/articles/docket9.htm>; Mark A. Buchanan, *Ex Parte Contacts with Former Employees: An Update on Rule 4.2 of the Model Rules of Professional Conduct*, 28 THE BRIEF 48, 49 (Winter 1999) (same).

shareholders.²²⁴ In the leading case, *Garner v. Wolfenbarger*,²²⁵ the Fifth Circuit set out various criteria for abrogation of the privilege in a derivative action.²²⁶ Yet some state courts and federal district courts in other circuits have rejected or questioned *Garner's* approach, and commentators also have criticized the decision.²²⁷ To add to the confusion, federal courts disagree as to whether the *Garner* approach or "fiduciary duty exception" should apply in individual shareholder actions.²²⁸ Similarly, courts have differed on how to treat privilege

224. See *infra* notes 225-27 and accompanying text.

225. 430 F.2d 1093 (5th Cir. 1970).

226. See *id.* at 1104 (holding that shareholders can gain access to the communications by demonstrating "good cause" for the information, which includes demonstrating the bona fides of their claim, the percentage of shareholders represented, and their need for the information).

227. See, e.g., *Milroy v. Hanson*, 875 F. Supp. 646, 651 (D. Neb. 1995) (declining to follow *Garner* because it had not been adopted by the Eighth Circuit); *Lefkowitz v. Duquesne Light Co.*, Civ. A. Nos. 86-1046, and 86-2085, 1988 WL 169273, at *6 (W.D. Pa. June 14, 1988) (rejecting *Garner* because "a hasty resort to *Garner* concepts will confuse who corporate counsel's clients realistically are, and ignore the genuine need of management in the ordinary course [of] confidential communication and advice") (quoting *Shirvani v. Capital Investing Corp.*, 112 F.R.D. 389, 391 (D. Conn. 1986)); *Nat'l Football League Props., Inc. v. Superior Court*, 75 Cal. Rptr. 2d 893, 897 (Cal. Ct. App. 1998) (stating that California courts have refused to carve out a shareholder exception to the statutory attorney-client privilege applicable to corporations); *Hoiles v. Superior Court*, 204 Cal. Rptr. 111, 114-15 (Cal. Ct. App. 1984) (refusing to pierce the privilege based on *Garner* in the closely held corporate context because the exception is not statutory); *Agster v. Barmada*, 43 Pa. D. & C.4th 353, 363 (Pa. Ct. Com. Pl. 1999) (stating that *Garner's* approach to shareholder litigation, in which the attorney-client privilege may be pierced for good cause shown, is inconsistent with Pennsylvania case law's application of the privilege); *Broun*, *supra* note 1, at 786-87 (citing federal cases and commentators); *Fredrick R. Ball*, *The Attorney-Client Privilege in Director and Shareholder Litigation*, 89 ILL. B.J. 537, 537 (2001) (stating that the scope of the privilege varies dramatically from jurisdiction to jurisdiction depending on whether state or federal law applies, and how willing the court is to pierce the privilege); *Paul J. Sigwarth*, *It's My Privilege and I'll Assert It if I Want To: The Attorney-Client Privilege in Closely-Held Corporations*, 23 J. CORP. L. 345, 352-55 (1998) (discussing *Garner* and its progeny, the confusion that followed, and critical commentary); *Brewer*, *supra* note 215, at 770-72 (discussing state and federal courts' differing views on *Garner*). See generally *Friedman*, *supra* note 68, at 281 (criticizing *Garner* and questioning its viability after *Jaffee*).

228. Compare *Ward v. Succession of Freeman*, 854 F.2d 780, 786 (5th Cir. 1988) (applying *Garner* to non-derivative shareholder actions but stating that in such actions a showing of good cause is subject to a more "careful scrutiny"), and *Picard Chem. Inc. Profit Sharing Plan v. Perrigo Co.*, 951 F. Supp. 679, 687 (W.D. Mich. 1996) (agreeing with the Sixth Circuit that *Garner* does not only apply to shareholder derivative actions, and stating that "[t]he fact that shareholder-plaintiffs seek recovery for themselves may only render their motives more suspect than if they bring a derivative action.") (citing *Fausek v. White*, 965 F.2d 126, 131 (6th Cir. 1992)), and *In re Int'l Bus. Machs. Corp. Sec. Litig.*, No. 92 Civ. 9076 (GLG), 1993 WL 760214, at *3 (S.D.N.Y. Nov. 30, 1993) (following the approach of the Fifth and Sixth Circuits), with *Cox v. Adm'r, United States Steel & Carnegie*, 17 F.3d 1386, 1416 (11th Cir. 1994) (declining to follow *Garner* because the plaintiffs sought damages for their personal benefit, at the expense of the Union rather than on behalf of the Union), and *Weil v. Inv./Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 23 (9th Cir. 1981) (limiting *Garner* to shareholder derivative suits because "[t]he

claims in disputes between directors of closely held corporations.²²⁹ Moreover, some jurisdictions now extend the fiduciary duty exception to other contexts in which the person seeking to prevent disclosure owes a fiduciary duty to the person seeking access to the communications,²³⁰ while other jurisdictions have resisted this

Garner plaintiffs sought damages from other defendants [on] behalf of the corporation, whereas Weil [sought] to recover damages from the corporation for herself and the members of her proposed class.”), and *Milroy v. Hanson*, 875 F. Supp. 646, 651 (D. Neb. 1995) (stating that *Garner* “has no applicability where the plaintiff stockholder asserts claims primarily to benefit himself, particularly where such claims will undoubtedly harm all other stockholders if successful.”); see also Rice, *Loss of Predictability*, *supra* note 56, at 736 (citing cases that disagree on the use of the privilege in the corporate context); Friedman, *supra* note 68, at 281 (citing cases that support the abandonment of the balancing test on the corporate context); Sigwarth, *supra* note 227, at 355, 366-67 (discussing the various contexts in which *Garner* has been applied).

229. Compare *Carnegie Hill Fin., Inc. v. Krieger*, No. 99-CV-2592, 2000 WL 10446, at *2 (E.D. Pa. Jan. 5, 2000) (holding that a corporation may not assert the attorney-client privilege against former officers and directors), and *Gottlieb v. Wiles*, 143 F.R.D. 241, 247 (D. Colo. 1992) (stating that present board of directors could not assert privilege against a former director because the situation is analogous to one where parties with a common interest retain the same attorney, but when they later become adverse, neither is allowed to claim privilege), and *Harris v. Wells*, No. B-89-391 (WWE) & B-89-482 (WWE), 1990 WL 150445, at *4 (D. Conn. Sept. 5, 1990) (defendant-director could not claim privilege against other plaintiff-directors), and *Moore Bus. Forms, Inc. v. Cordant Holdings Corp.*, Nos. 13911 & 14595, 1996 WL 307444, at *4 (Del. Ch. June 4, 1996) (holding under Delaware law that “a corporation may not assert the attorney-client privilege against its own directors to deprive them of access to information discussed at board meetings, including legal advice furnished to the board,” during the directors’ tenures), and *Kirby v. Kirby*, Civ. A. No. 8604, 1987 Del. Ch. LEXIS 463, at *18 (Del. Ch. July 29, 1987) (stating that privilege cannot be invoked against a corporation’s own directors because directors should be “treated as the “joint client”” when they receive legal advice for the corporation), with *Milroy*, 875 F. Supp. at 649-50 (finding that a dissident director is not management and, therefore, cannot pierce the attorney-client privilege if it would conflict with the will of management), and *Lane v. Sharp Packaging Sys., Inc.*, 640 N.W.2d 788, 813 (Wis. 2002) (concluding that, based on the reasoning in *Milroy* and the entity rule, the plaintiff’s status as a former director does not allow him to waive the privilege, or preclude the defendant’s board of directors from asserting the privilege against him); see also Sigwarth, *supra* note 227, at 357-64 (discussing cases in which courts have treated such privilege claims differently).

230. See, e.g., *Fortson v. Winstead, McGuire, Sechrest & Minick*, 961 F.2d 469, 475 n.5 (4th Cir. 1992) (holding that general partners owed appellants a fiduciary duty and, therefore, cannot assert the privilege against the appellants); *Lawrence v. Cohn*, No. 90 Civ. 2396 (CSHMHD), 2002 WL 109530, at *46 (S.D.N.Y. Jan. 25, 2002) (applying the fiduciary exception in the trustee-beneficiary context without recourse to the *Garner* “good cause” test); *Wessel v. City of Albuquerque*, 48 Fed. R. Serv.3d 349, 351 (D.D.C. 2000) (applying fiduciary exception in suit brought by nonunion employees against a union); *Nellis v. Air Line Pilots Ass’n*, 144 F.R.D. 68, 71 (E.D. Va. 1992) (applying fiduciary exception in suit by union members against union for breach of fair representation duty); *Ferguson v. Lurie*, 139 F.R.D. 362, 365 (N.D. Ill. 1991) (considering the “good cause” factors of *Garner* after finding that general partners have a fiduciary obligation to the limited partners in limited partnerships); *Martin v. Valley Nat’l Bank of Ariz.*, 140 F.R.D. 291, 326 (S.D.N.Y. 1991) (applying the fiduciary exception in the trustee-beneficiary context without recourse to the *Garner* “good cause” test); *Dome Petroleum Ltd. v. Employers Mut. Liab. Ins. Co.* of Wis., 131 F.R.D. 63, 68-69 (D.N.J. 1990) (applying the *Garner* exception to an insured

expansion.²³¹

Yet another substantial disagreement exists over when communications are made for the purpose of obtaining or providing legal advice, particularly when the client may be seeking business or other nonlegal advice in addition to legal advice.²³² This

and an excess insurer subrogee); *Wash.-Balt. Newspaper Guild v. Wash. Star Co.*, 543 F. Supp. 906, 909 (D.D.C. 1982) (applying the fiduciary exception in the trustee-beneficiary context without recourse to the *Garner* “good cause” test); *Donovan v. Fitzsimmons*, 90 F.R.D. 583, 586 (N.D. Ill. 1981) (finding that corporate shareholders, as well as pensioners and potential recipients of fund assets, need access to information to determine whether a fiduciary is exercising authority as contemplated); *Metro. Bank & Trust Co. v. Dovenmuehle Mortgage, Inc.*, No. Civ.A.18023-NC, 2001 WL 1671445, at *2 (Del. Ch. Dec. 20, 2001) (explaining that the *Garner* doctrine has been extended so that limited partners can access the corporation’s privileged communications); *Cont’l Ins. Co. v. Rutledge & Co.*, No. Civ.A.15539, 1999 WL 66528, at *2 (Del. Ch. Jan. 26, 1999) (extending fiduciary exception to limited partnership as long as there is “mutuality of interest” between limited and general partners and showing of “good cause”); see also *Rice, Loss of Predictability*, *supra* note 56, at 736-37 (discussing *Garner* and various “fiduciary duty exception” cases, including partnership, trust, union, and shareholder divorce cases).

231. See, e.g., *Wells Fargo Bank v. Superior Court*, 990 P.2d 591, 596 (Cal. 2000) (holding that a trustee may assert the attorney-client privilege against trust beneficiaries); *Smith v. Laguna Sur Villas Cmty. Ass’n*, 94 Cal. Rptr. 2d 321, 324 (Cal. Ct. App. 2000) (refusing to carve out a fiduciary exception because “courts ‘do not enjoy the freedom to restrict California’s statutory attorney-client privilege based on notions of policy or ad hoc justification.’”) (quoting *Wells Fargo Bank*, 990 P.2d at 596); *First Union Nat’l Bank v. Turney*, No. 1D00-2803, 2001 WL 1485659, at *11 (Fla. Dist. Ct. App. Nov. 26, 2001) (refusing to decide whether Florida has a fiduciary exception to the attorney-client privilege); *Huie v. DeShazo*, 922 S.W.2d 920, 924-25 (Tex. 1996) (declining to adopt fiduciary exception approach).

232. For example, some courts require that the particular communication be “primarily” or “predominately” of a legal character. See, e.g., *Stephenson Equity Co. v. Credit Bancorp, Ltd.*, No. 99 CIV 113951RWS, 2002 WL 59418, at *3 (S.D.N.Y. Jan. 16, 2002) (stating that the privilege does not attach because, although reports investigating insurance claims on behalf of insurance company were prepared by attorneys, such reports were prepared “as part of the regular business of the company” and therefore were not of a primarily or predominately legal character); *Burton v. R.J. Reynolds Tobacco Co.*, 170 F.R.D. 481, 484 (D. Kan. 1997) (holding that a communication must be predominated by legal advice to be protected); *Sackman v. Liggett Group, Inc.*, 920 F. Supp. 357, 364 (E.D.N.Y. 1996) (citing *Spectrum Sys. Int’l Corp. v. Chem. Bank*, 581 N.E.2d 1055, 1060 (N.Y. 1991)); *Aetna Cas. & Sur. Co. v. Certain Underwriters at Lloyd’s*, 692 N.Y.S.2d 384, 385 (App. Div. 1999) (holding that defendants are not protected by the attorney-client privilege because the communications pertained mainly to commercial concerns, and were not primarily of a legal character), *leave to appeal dismissed*, 726 N.E.2d 483 (N.Y. 2000); cf. *Olson v. Accessory Controls & Equip. Corp.*, 757 A.2d 14, 25 (Conn. 2000) (adopting an approach that resonates with the “primarily” or “predominately” legal approach by applying the privilege where the communications at issue are “inextricably linked” or “necessary” to the giving or obtaining of legal advice). Other courts apply a “but for” test: the claimant must demonstrate that the communication with counsel would not have been made but for the client’s need for legal services. See, e.g., *Reich v. Hercules, Inc.*, 857 F. Supp. 367, 373 (D.N.J. 1994) (finding that the claimant failed to show that the materials in question were prepared in a manner other than the ordinary course of business, and that the communication would not have occurred but for the client’s need for legal advice) (quoting *First Chicago Int’l v. United Exch. Co.*, 125 F.R.D. 55, 57 (S.D.N.Y. 1989)); *Doe v. Archdiocese of the*

disagreement is most pronounced in the in-house counsel context, since in-house attorneys often serve multiple roles within the business and the potential for abuse of the privilege may be greater in this context because businesses often funnel many communications and proposals through in-house attorneys.²³³ Although the American Bar Association and some courts have taken the position that in-house counsel should not be subjected to stricter privilege standards than outside counsel,²³⁴ other state and federal jurisdictions have

Catholic Church of Miami, 721 So. 2d 428, 429 (Fla. Dist. Ct. App. 1998) (listing the “but for” requirement as one of five criteria that needs to be established in order to be entitled to privilege) (citing *S. Bell Tel. & Tel. Co. v. Deason*, 632 So. 2d 1377, 1383 (Fla. 1994)). *But see In re Ford Motor Co.*, 110 F.3d 954, 966 (3d Cir. 1997) (applying the “for the purpose of securing legal advice” test broadly by allowing the assertion of the attorney-client privilege over communications at a Policy and Strategy Committee meeting that included both legal and business decisions, so long as the business decisions were reached after the committee examined the legal implications of doing so). One federal circuit court has taken the view that, once a matter is committed to an attorney, it is presumptively for the purpose of obtaining legal advice and, therefore, within the privilege absent a clear showing to the contrary. *In re Bieter Co.*, 16 F.3d 929, 938 (8th Cir. 1994); *see also United States v. Chen*, 99 F.3d 1495, 1501 (9th Cir. 1996) (holding that when a person hires an attorney for advice, regardless of the subject of the advice, there is a rebuttable presumption that the attorney is hired to give legal advice, but the presumption is rebutted when the attorney was hired without reference to his knowledge and discretion in the law) (citations omitted); *Weeks v. Samsung Heavy Indus., Ltd.*, No. 93.C.4899, 1996 WL 288511, at *2 (N.D. Ill. May 30, 1996) (holding that a communication between a corporation and its attorney concerning whether and how the corporation should make a variety of employment and legal decisions was privileged); *In re Federated Dep’t Stores, Inc.*, 170 B.R. 331, 354 (S.D. Ohio 1994) (holding that there is a prima facie assumption that a communication committed to an attorney was sought for the sake of legal advice). In many circumstances, courts have been vague about when mixed legal and business advice is protected. *See, e.g., Leonen v. Johns-Manville*, 135 F.R.D. 94, 98-99 (D.N.J. 1990) (appearing to apply a “but for” test, while at the same time asserting that “the court’s inquiry is focused on whether ‘the communication is designed to meet problems which can fairly be characterized as predominately legal.’”) (quoting *Cuno, Inc. v. Pall Corp.*, 121 F.R.D. 198, 204 (E.D.N.Y. 1988)); Mark C. Van Deusen, Note, *The Attorney-Client Privilege for In-House Counsel When Negotiating Contracts: A Response to Georgia-Pacific Corp. v. GAF Manufacturing Corp.*, 39 WM. & MARY L. REV. 1397, 1398 (1998) (stating that courts have failed to articulate clearly when the privilege protects communications containing mixed legal and business advice).

233. *See, e.g., Weiss*, *supra* note 68, at 394, 398-400 (discussing the role of in-house counsel and the potential for abuse that have led some courts to take a dim view of the privilege in the in-house context); Van Deusen, *supra* note 232, at 1398 (discussing the precarious status of communications with in-house counsel). This is no small matter, since, according to an American Bar Association publication, over ten percent of attorneys serve as in-house counsel. Barry F. McNeil, *Internal Corporate Investigations: Conducting Them, Protecting Them*, 1997 A.B.A. SEC. OF LITIG. REP. 120.

234. *See Weiss*, *supra* note 68, at 394 (stressing the importance of in-house attorneys being able to communicate freely with their clients); *see also Weeks*, 1996 WL 288511, at *2 (asserting that the attorney-client privilege is not vitiated when an attorney weighs business considerations in rendering legal advice); Note *Funding Corp. v. Bobian Inv. Co.*, No. 93 Civ. 7427 (DAB), 1995 WL 662402, at *2-3 (S.D.N.Y. Nov. 9, 1995) (holding that, because it is common for commercial entities to use attorneys who have training and experience in analyzing “alternative business

scrutinized in-house communications more strictly.²³⁵ Moreover, those courts that apply a stricter standard to communications between clients and in-house counsel apply varying standards, some of which provide little meaningful guidance.²³⁶

strategies," a corporation can assert attorney-client privilege over communications to an attorney that encompass both legal and commercial considerations); *In re Federated Dep't Stores, Inc.*, 170 B.R. at 354-55 (holding that an attorney's tax planning advice was legal advice and, therefore, communications relating to this advice were covered by the attorney-client privilege, regardless of whether the attorney also weighed business considerations in giving the advice).

235. See generally *United States v. Chevron Corp.*, No. C-94-1885 SBA, 1996 WL 264769, at *4 (N.D. Cal. Mar. 13, 1996) (refusing to assume that all communications to in-house counsel are primarily related to legal advice because in-house counsel usually are involved in a company's business decisions); *S. Bell Tel. & Tel. Co. v. Deason*, 632 So. 2d 1377, 1383 (Fla. 1994) (subjecting a corporation's attorney-client privilege claims to a heightened level of scrutiny to hinder the corporation's attempts to cloak information with the privilege and avoid discovery).

236. For example, some courts require that the party seeking protection of communications between in-house counsel and the party demonstrate that the communications are primarily legal or made for the primary purpose of seeking or providing legal advice. *E.g.*, *Andritz Sprout-Bauer, Inc. v. Beazer E., Inc.*, 174 F.R.D. 609, 633 (M.D. Pa. 1997); *Harmony Gold U.S.A., Inc. v. FASA Corp.*, 169 F.R.D. 113, 115 (N.D. Ill. 1996); *Chevron Corp.*, 1996 WL 264769, at *3; *Kramer v. Raymond Corp.*, Civ. No. 90-5026, 1992 WL 122856, at *1 (E.D. Pa. May 26, 1992); *N.C. Elec. Membership Corp. v. Carolina Power & Light Co.*, 110 F.R.D. 511, 514 (M.D.N.C. 1986); *Sicpa Holdings S.A. v. Optical Coating Lab., Inc.*, Civil Action No. 15129, 1996 WL 636161, at *9 (Del. Ch. Oct. 10, 1996); *Rossi v. Blue Cross & Blue Shield*, 540 N.E.2d 703, 706 (N.Y. 1989); *Certain Underwriters at Lloyd's*, 692 N.Y.S.2d at 385. Of course, these standards are vague; it is difficult to discern when communications involve primarily legal advice, and how to determine the primary purpose of the communications. See, *e.g.*, *Weiss*, *supra* note 68, at 398-400 (discussing and criticizing these standards in part because they fail to explain when communications will be sufficiently legal in nature). Other courts have limited the in-house counsel privilege more severely to circumstances in which in-house attorneys are acting solely in a "professional legal capacity." See, *e.g.*, *Amway Corp. v. Procter & Gamble Co.*, No. 1:98-CV-726, 2001 WL 1818698, at *5 (W.D. Mich. Apr. 3, 2001).

Where . . . in-house counsel appears as one of many recipients of an otherwise business-related memo, the federal courts place a heavy burden on the proponent to make a clear showing that counsel is acting in a professional legal capacity and that the document reflects legal, as opposed to business, advice.

Id.; *Andritz Sprout-Bauer, Inc.*, 174 F.R.D. at 633 (stating that the privilege only applies when an attorney is acting in the role of legal advisor, not business advisor or corporate administrator); *Ga.-Pac. Corp. v. G.A.F. Roofing Mfg. Corp.*, No. 93 CIV 5125 (RPP), 1996 WL 29392, at *3 (S.D.N.Y. Jan. 25, 1996) (explaining that the communications from in-house counsel to management involve difficult fact specific questions); *Chevron Corp.*, 1996 WL 264769, at *4 (holding that there must be a clear showing that in-house counsel was giving advice in a professional legal capacity); *Lee v. Engle*, Nos. Civ.A.13323 & Civ.A.13284, 1995 WL 761222, at *1 (Del. Ch. Dec. 15, 1995) (stating that the privilege only applies to advice given by an attorney in a professional legal capacity); *Evans v. United Servs. Auto. Ass'n*, 541 S.E.2d 782, 791 (N.C. Ct. App. 2001) (holding that in-house counsel for an insurance company is not protected by the privilege unless acting as a legal advisor at the time of the communication). Still others have adopted modified subject matter tests, allowing privilege claims where communications are made in the course of seeking legal services and, indeed, would not have been made but for contemplation of such services, as long as other aspects of the subject matter test is satisfied. See, *e.g.*, *Deason*,

There are countless other differences among jurisdictions regarding the scope of the attorney-client privilege and lingering unresolved issues within jurisdictions.²³⁷ Thus, while the basic elements of the privilege are largely undisputed, there is enormous conflict over what the basic elements actually require.

b. The crime-fraud exception

The crime-fraud exception is the most significant exception to the attorney-client privilege.²³⁸ This exception, like the privilege itself, is usually justified in utilitarian terms: society would incur harm if the privilege protected attorney-client communications that assist clients in furthering a crime or perpetrating a fraud.²³⁹ Like the privilege itself, the scope of the exception is unresolved.

The Supreme Court recognized the crime-fraud exception in *Clark v. United States*,²⁴⁰ stating that the law will not help any client who asks an attorney for advice that will serve him in the commission of a fraud.²⁴¹ Under *Clark's* articulation of the exception, a party seeking

632 So. 2d at 1382-83 (explaining that the subject matter test, which potentially extends to communications of all employees and not just officers, adds a condition to corporate privilege that more completely addresses the problems in corporate cases); see also *Leonen v. Johns-Manville*, 135 F.R.D. 94, 98-99 (D.N.J. 1990) (appearing to apply a "but for" test); cf. *Williams v. Gen. Motors Corp.*, 147 F.R.D. 270, 272 (S.D. Ga. 1993) (adopting the modified subject matter test, articulated in *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977), which allows protection by the attorney-client privilege over a corporation's communications that were made for the purpose of securing legal advice, so long as other prongs of the test are also met); *Marriott Corp. v. Am. Acad. of Psychotherapists, Inc.*, 277 S.E.2d 785, 792 (Ga. Ct. App. 1981) (concluding that *Diversified's* modified subject-matter test "best strikes an appropriate balance").

237. For example, there is continuing confusion over the application of the privilege when the client discloses non-privileged, pre-existing documents to the attorney during the course of a communication. See Rice, *Continuing Confusion*, *supra* note 197, at 989-95 (reviewing cases and suggesting an (appropriate) analysis). In addition, there is much debate over the proper scope of the "joint defense" or "common interest" doctrines, addressing protection of communications shared among a group of parties with common interests. E.g., John J. Faley, Jr. & Valerie K. Frias, *The Corporate Joint-Defense Privilege: For Defense Lawyers, a Shield or a Sieve?*, 1 BUS. CRIMES BULL. 3 (Feb. 2002). There is also continuing controversy over whether and when the identity of the client is privileged. MCCORMICK ON EVIDENCE, *supra* note 19, § 90, at 360-63.

238. There are other exceptions, including the "common interest," breach of duty (by attorney or client), and attestation exceptions. See generally MUELLER & KIRKPATRICK, *supra* note 12, §§ 196-1 98, at 374-79 (reviewing breach of duty, claim through decedent client, and attorney as attesting witness exception). Although these exceptions arise less frequently than the crime-fraud exception, they are not free from controversy. *Id.*

239. See, e.g., *Privileged Communications*, *supra* note 26, at 1508-10 (discussing why, from a utilitarian perspective, attorney-client communications intended to further a crime or fraud should not be privileged).

240. 289 U.S. 1 (1933).

241. *Id.* at 15.

otherwise privileged communications must make a prima facie showing that the client sought the attorney's advice or representation for the purpose of furthering wrongful conduct.²⁴² Thus, the Supreme Court's test requires a showing of wrongful intent, or knowingly wrongful behavior, on the part of the client.²⁴³ As discussed above, the Court then provided in *Zolin* that trial courts should engage in an in camera review of the allegedly privileged communications if those opposing the privilege on the crime-fraud ground demonstrate a factual basis adequate to support a good faith belief by a reasonable person that an in camera review may reveal evidence to establish the claim that the exception applies.²⁴⁴

Although all jurisdictions recognize this exception, they differ on both its application and scope. For example, *Zolin* never clarified the quantum of proof required to vitiate the privilege, and since then, courts have articulated disparate standards.²⁴⁵ Moreover, some lower federal courts and courts in other jurisdictions have abandoned *Clark's* requirement that the party seeking discovery make such a showing of client intent—namely, that the client consulted an attorney for the purpose of committing or furthering a crime or fraud.²⁴⁶ These courts have simply required a showing of a crime or

242. *Id.*

243. *Id.*; see also *Privileged Communications*, *supra* note 26, at 1512 (discussing how many courts have "scrupulously follow[ed]" the *Clark* requirement of a prima facie showing that the client intentionally sought the advice to perpetuate a crime).

244. See sources cited *supra* notes 174-77 and accompanying text.

245. See, e.g., *Olson v. Accessory Controls & Equip. Corp.*, 757 A.2d 14, 31 (Conn. 2000) (finding that a court may abrogate the privilege under the crime-fraud exception only when the court finds there was probable cause to believe that the privileged communications were made with the intent to perpetrate and further a civil fraud); *Am. Tobacco Co. v. State*, 697 So. 2d 1249, 1256 (Fla. Dist. Ct. App. 1997) (holding that the party opposing the privilege based on the crime-fraud exception must produce evidence of fraud beyond a preponderance of the evidence, and the party asserting the privilege must then give the court a reasonable explanation for the communications or conduct in order to keep the privilege); *Stidham v. Clark*, 74 S.W.3d 719, 726-27 (Ky. 2002) (stating that *Zolin's* disclaimer regarding the requisite quantum of proof "can only mean that lower federal courts are free to fashion other and better tests than the 'prima facie case' standard to overcome a claim of privilege," a preponderance of evidence test); *Purcell v. Dist. Attorney for Suffolk Dist.*, 676 N.E.2d 436, 439 (Mass. 1997) (applying the preponderance of the evidence standard, but stating that the court retains discretion to conduct an in camera review if the facts support a reasonable belief that the review would establish that the exception applies). Compare *United States v. Chen*, 99 F.3d 1495, 1503 (9th Cir. 1996) (stating that government must submit evidence that, if reasonably believed, would establish elements of an ongoing violation), and *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 95-96 (3d Cir. 1992) (holding that a party seeking discovery under the exception must present evidence that, if believed, would be sufficient to support a finding in its favor on each element of the privilege), with *United States v. Davis*, 1 F.3d 606, 610 (7th Cir. 1993) (stating that a party seeking discovery need only demonstrate something "giv[ing] color" to the crime or fraud).

246. See, e.g., *In re Sealed Case*, 676 F.2d 793, 814 (D.C. Cir. 1982) (adding that

fraud and a nexus or relationship between the crime or fraud and the potentially privileged matters.²⁴⁷ By removing the intent requirement, this approach, which has received some criticism,²⁴⁸ vastly expands the potential scope of the exception. In addition, courts are in conflict over whether the crime-fraud exception applies to statements made in furtherance of intentional torts other than fraud. In the federal system, for example, two circuit courts have held that the exception should not extend beyond criminal or fraudulent activities, while a number of other courts have reached contrary conclusions.²⁴⁹

requiring a greater showing creates administrability concerns); *X-Corp v. Doe*, 805 F. Supp. 1298, 1307 (E.D. Va. 1992) (expressing hope that the approach would prevent use of privilege to shield information learned collaterally during representation).

247. See, e.g., *Sealed Case*, 676 F.2d at 814-15 (stating a court must find only some relationship between the privileged communication and the prima facie violation to defeat the privilege); *X-Corp*, 805 F. Supp. at 1307 (holding a communication falls within the crime-fraud exception if it merely “reflects” an ongoing or future illegal scheme); *People v. Superior Court (Bauman & Rose)*, 44 Cal. Rptr. 2d 734, 741 (Cal. Ct. App. 1995) (stating that, in order for the crime-fraud exception to apply, the party opposing privilege must establish a prima facie case of fraud and a “reasonable relationship” between the fraud and the communication between attorney and client) (citing *Cunningham v. Conn. Mut. Life Ins.*, 845 F. Supp. 1403, 1412-16 (S.D. Cal. 1994) (crime-fraud exception applied to allegedly privileged letter because insurance company established a prima facie case for finding that the letter was reasonably related to a future or on-going fraud)); *Privileged Communications*, *supra* note 26, at 1512 & n.64 (citing cases in which courts have applied the crime-fraud exception to work-product doctrine).

248. See John J. Mulderig et al., *Tobacco Cases May Be Only the Tip of the Iceberg for Assaults on Privilege*, 67 DEF. COUNS. J. 16, 26-27 (2000) (noting potential for application of exception to privileged and work product documents unrelated to crime or fraud); *Privileged Communications*, *supra* note 26, at 1513 (describing application of a reduced standard as particularly troubling where clients face ambiguous or complex laws, which are more readily violated despite good-faith attempts to comply).

249. Compare *Motley v. Marathon Oil Co.*, 71 F.3d 1547, 1551 (10th Cir. 1995) (holding that crime-fraud exception is limited to legal advice in furtherance of a crime or fraud and, under Oklahoma and federal law, the exception does not extend to tortious conduct generally), and *Hyde Constr. Co. v. Koehring Co.*, 455 F.2d 337, 342 (5th Cir. 1972) (declining to take the further step of also excepting the commission of a tort from the privilege), and *Ferrara & DiMercurio, Inc. v. St. Paul Mercury Ins. Co.*, 173 F.R.D. 7, 13 (D. Mass. 1997) (refusing to extend the exception to unfair and deceptive trade practice claims), with *In re Sealed Case*, 124 F.3d 230, 234 (D.C. Cir. 1997) (applying the exception to other intentional torts, in addition to crimes and fraud), *rev'd on other grounds sub nom. Swidler & Berlin v. United States*, 524 U.S. 399 (1998), and *Sprague v. Thorn Am., Inc.*, 129 F.3d 1355, 1372 (10th Cir. 1997) (holding that the privilege does not extend to communications where there is sufficient evidence that the communication was made to enable or aid in a crime or tort), and *Sackman v. Liggett Group, Inc.*, 920 F. Supp. 357, 367 (E.D.N.Y. 1996) (recognizing that the crime-fraud exception applies to intentional torts “moored in fraud” and does not require actual fraud), and *In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1985) (finding that attorney-client communications are made in furtherance of a “crime, fraud, or other misconduct” when the evidence shows a pervasive and systematic plan to destroy evidence), and *Coleman v. Am. Broad. Cos.*, 106 F.R.D. 201, 209 (D.D.C. 1985) (indicating willingness to expand the scope of crime-fraud exception but finding extension not warranted in this case because the party alleging the misconduct failed to make a prima facie showing that such

c. *Waiver and post hoc qualification*

At the time of the attorney-client communication, attorneys and their clients obviously do not intend to waive the privilege. However, the likelihood that the client may waive or mistakenly waive the privilege, or might otherwise be denied protection for initially privileged communications must be part of an attorney's assessment of how safe attorney-client communications will be from compelled disclosure.²⁵⁰ Thus, even if the elements of the privilege and the parameters of its exceptions were clear, which they are not, the protection that the privilege affords would still be highly uncertain if there exist unpredictable or unforgiving waiver rules or other doctrines that make application uncertain and which might strip otherwise protected communications of their privileged status. Unfortunately, the current regime is riddled with such unpredictable doctrines.

First, although some courts are forgiving with regard to inadvertent disclosures of attorney-client communications, other courts are not. Indeed, there is lingering disagreement over whether and when an inadvertent disclosure of privileged communications to an adversary or third party constitutes a waiver of the privilege.²⁵¹ A few courts have suggested that waiver occurs regardless of the circumstances of the disclosure, including situations in which no blame can be attached to either the attorney or the client.²⁵² Most have looked at

misconduct occurred), *and* *Diamond v. Stratton*, 95 F.R.D. 503, 505 (S.D.N.Y. 1982) (holding that there is an exception to the attorney-client privilege for communications made in furtherance of intentional torts other than fraud, namely, in this case, intentional infliction of emotional distress).

250. *But see* *Zacharias*, *supra* note 81, at 365-66 (suggesting that flexible exceptions in fact may not affect client decisions whether or not to communicate with counsel).

251. *See* *Gray v. Bicknell*, 86 F.3d 1472, 1483 (8th Cir. 1996) (discussing the federal courts' disparate approaches to inadvertent waiver); *see also* MCCORMICK ON EVIDENCE, *supra* note 19, § 93, at 372 (stating that opinions in the area have been divergent); MUELLER & KIRKPATRICK, *supra* note 12, § 202, at 401 (same); Talton, *supra* note 205, at 290-95 (discussing the disparate views of inadvertent waiver doctrine); Ken M. Zeidner, Note, *Inadvertent Disclosure and the Attorney-Client Privilege: Looking to the Work Product Doctrine for Guidance*, 22 CARDOZO L. REV. 1315, 1318-19 (2001) (outlining the divergent approaches to inadvertent disclosures in the federal courts).

252. *See In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989) (stating that clients seeking to preserve the privilege must treat the communications "like jewels" and that, short of court-compelled disclosure or other extraordinary circumstances, the court will not engage in an analysis of degrees of voluntariness); *FDIC v. Singh*, 140 F.R.D. 252, 253 (D. Me. 1992) (applying a strict rule); *see also* *United States v. Ryans*, 903 F.2d 731, 741 n.13 (10th Cir. 1990) (appearing to adopt the strict view); *New York v. Microsoft Corp.*, No. CIV.A.98-1233 (CKK), 2002 U.S. Dist. LEXIS 7684, at *9 (D.D.C. Apr. 8, 2002) (holding that disclosure of otherwise-privileged materials waives the privilege, regardless of whether the disclosure was unintentional); *Int'l Digital Sys. Corp. v. Digital Equip. Corp.*, 120 F.R.D. 445, 449-50 (D. Mass. 1988) (holding that, even after inadvertent disclosure, information is no longer

the circumstances of the disclosure or have applied multi-factor tests in determining whether inadvertent production was careless or unreasonable enough to constitute waiver.²⁵³ Still others have been far more forgiving, concluding that waiver occurs only when attorneys or clients have voluntarily disclosed confidential communications, or have been reckless or extremely careless in guarding against disclosure.²⁵⁴

In addition, the state and federal courts are split over whether a client's voluntary sharing of privileged communications with

confidential regardless of the disclosing party's intention and that the adequacy of the precautions taken to avoid such disclosure is immaterial). *Compare* Ares-Serono, Inc. v. Organon Int'l B.V., 160 F.R.D. 1, 10 (D. Mass. 1994) (explaining that the strict rule ensures that attorneys will "more diligently" protect the secrecy of patent applications), *with* Amgen Inc. v. Hoechst Marion Roussel, Inc., 190 F.R.D. 287, 292 (D. Mass. 2000) (declining to adopt the strict rule, which effects a waiver of the privilege regardless of the disclosing party's inadvertence or intent, and instead adhering to a "middle test," which takes into consideration the totality of the circumstances surrounding the inadvertent disclosure of privileged communications, such as whether adequate steps were taken to ensure a document's confidentiality).

253. *See, e.g., In re Grand Jury Proceedings*, 219 F.3d 175, 186 (2d Cir. 2000) (adopting a case-by-case fairness approach); *Gray*, 86 F.3d at 1484 (adopting—purportedly under Missouri law—the "middle of the road approach," which takes into account a number of factors to determine whether unintentional disclosures constitute waiver); *Alldread v. Grenada*, 988 F.2d 1425, 1434 (5th Cir. 1993) (stating that waiver must be determined on a case-by-case basis); *Parkway Gallery v. Kittinger*, 116 F.R.D. 46, 50 (M.D.N.C. 1987) (applying a five-factor test including consideration of the reasonableness of precautions taken to prevent disclosure, the number of inadvertent disclosures, the extent of the disclosure, delays in rectifying disclosures, and the overriding interests of justice); *Lois Sportswear U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y. 1985) (applying a four-factor test which includes consideration of reasonable precautions taken, the scope of discovery, the amount of time to correct the error, and the extent of disclosure); *see also* *Broun*, *supra* note 1, at 787-88 (adding that federal courts also are divided on whether privilege applies to communications from an attorney to a client).

254. *See, e.g., Desai v. Am. Int'l Underwriters, No. 91 Civ. 7735*, 1992 WL 110731, at *1 (S.D.N.Y. May 12, 1992) (holding that there is no inadvertent waiver in the absence of extreme carelessness); *Georgetown Manor, Inc. v. Ethan Allen, Inc.*, 753 F. Supp. 936, 938 (S.D. Fla. 1991) (holding that the privilege is not waived unless disclosure was intentional and knowing); *Helman v. Murry's Steaks, Inc.*, 728 F. Supp. 1099, 1104 (D. Del. 1990) (finding no waiver where counsel's actions did not constitute more than simple negligence); *Blumenthal v. Kimber Mfg., Inc.*, 47 Conn. Supp. 378, 381-82 (Conn. Super. Ct. 2001) (stating that the privilege is "sacrosanct" and a party cannot waive it without a knowing and intentional act); *Chrysler Corp. v. Sheridan*, No. 227511, 2001 WL 773099, at *2 (Mich. Ct. App. July 10, 2001) (holding inadvertent disclosure does not waive the privilege); *State v. Blacknall*, 760 A.2d 1151, 1155 (N.J. Super. Ct. Law Div. 2000) (concluding that inadvertent statements by independent investigator, characterized as the result of "mere negligence or misfortune," did not waive defendant's privilege because investigator was not aware that statements were privileged) (quoting *Trilogy Communications, Inc. v. Excom Realty, Inc.*, 652 A.2d 1273, 1273 (N.J. Super. Ct. Law Div. 1994)); *Doe v. Maret*, 984 P.2d 980, 986 (Utah 1999) (stating that Utah courts will not find a waiver of the privilege if the disclosure was voluntary or excusably inadvertent); *see also* *KL Group v. Case, Kay & Lynch*, 829 F.2d 909, 919 (9th Cir. 1987) (assuming that, under both California and Hawaii law, an inadvertently disclosed document was still privileged because disclosure was not voluntary).

government agencies or independent auditors waives the privilege absolutely, or only as to the agency or auditor with which the information was shared.²⁵⁵ This “limited waiver” doctrine is unresolved in most jurisdictions, since few appellate courts have addressed the issue.²⁵⁶

Courts also have disparate views on the scope of the “at-issue,” “issue injection,” or “implied waiver” doctrine. In essence, this doctrine removes otherwise privileged communications from the scope of the protection when a party proffers a claim or defense in litigation that puts such communications at issue.²⁵⁷ Yet courts have adopted various approaches to determining when communications are implicitly waived by issue injection.²⁵⁸ An increasing number of courts have adopted a narrow view of “at issue” waiver, finding that the exception applies only where the attorney’s advice is directly placed at issue as an essential element of the claim.²⁵⁹ A majority of jurisdictions adhere to a somewhat broader approach to the exception, requiring the party asserting the privilege to undertake

255. Compare *United States v. Mass. Inst. of Tech.*, 129 F.3d 681, 686 (1st Cir. 1997) (rejecting limited waiver), and *Permian Corp. v. United States*, 665 F.2d 1214, 1220-21 (D.C. Cir. 1981) (finding absolute waiver), and *In re Martin Marietta Corp.*, 856 F.2d 619, 625 (4th Cir. 1988) (rejecting limited waiver), and *Fid. & Cas. Co. of N.Y. v. Mobay Chem. Corp.*, 625 N.E.2d 151, 157 (Ill. App. Ct. 1992) (rejecting limited waiver for documents previously turned over to the United States Attorney), and *People v. Calandra*, 467 N.Y.S.2d 141, 143 (N.Y. Sup. Ct. 1983) (rejecting limited waiver except when the right to assert the attorney-client privilege in subsequent proceedings is specifically reserved at the time of the disclosure), with *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1977) (adopting limited waiver approach), and *Danielson v. Superior Court*, 754 P.2d 1145, 1147 & n.1 (Ariz. Ct. App. 1987) (following *Diversified Industries* in adopting limited waiver of physician-patient privilege, and noting that Arizona analyzes physician-patient privilege and attorney-client privilege similarly). See also Paul R. Rice, *Attorney-Client Privilege: Does Sharing Privileged Communications With Government Agencies Waive the Privilege Protection?*, J. AM. CORP. COUNS. ASS’N (Mar. 2000) (discussing the split in authority on the limited waiver doctrine).

256. RICE, *supra* note 14, § 9:87.

257. See T. Maxfield Bahner & Michael L. Gallion, *Waiver of Attorney-Client Privilege Via Issue Injection: A Call for Uniformity*, 65 DEF. COUNS. J. 199, 200 (1998) (describing issue injection as one of two subcategories of implied waiver).

258. See *Pub. Serv. Co. of N.M. v. Lyons*, 10 P.3d 166, 171 (N.M. Ct. App. 2000) (discussing the conflicting approaches to at-issue waiver in federal and state courts); Bahner & Gallion, *supra* note 257, at 201-06 (tracing the various ways in which courts have applied the at-issue exception). See also cases cited *infra* note 259.

259. E.g., *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 864 (3d Cir. 1994); *Remington Arms Co. v. Liberty Mut. Ins. Co.*, 142 F.R.D. 408, 415-16 (D. Del. 1992); *Ex parte State Farm Fire & Cas. Co.*, 794 So. 2d 368, 374-75 (Ala. 2001); *State Farm Mut. Auto. Ins. Co. v. Lee*, 13 P.3d 1169, 1179 (Ariz. 2000); *Smith v. Kavanaugh, Pierson & Talley*, 513 So. 2d 1138, 1145-46 (La. 1987); *Aranson v. Schroeder*, 671 A.2d 1023, 1030 (N.H. 1995); *Lyons*, 10 P.3d at 173; *Mueller v. Nationwide Mut. Ins. Co.*, 31 Pa. D. & C.4th 23, 35-36 (Pa. Ct. Com. Pl. 1996); see also Bahner & Gallion, *supra* note 257, at 204-05 (referring to this approach as the “anticipatory waiver test” and citing cases).

some affirmative action making the privileged information relevant to the dispute *and* vital to the opposing party's defense.²⁶⁰ In a third, related approach, some courts balance the necessity of discovering protected information against the importance of the interests served by maintaining the attorney-client privilege.²⁶¹ Still other courts have applied the doctrine in a more draconian fashion, finding an automatic waiver of the privilege when a party's assertion of a claim, counterclaim, or affirmative defense raises an issue to which a privileged communication is merely relevant.²⁶²

Likewise, courts have not reached agreement on the scope of "subject matter waiver." Subject matter waiver is a form of implied waiver that allows the party attacking the privilege to seek all privileged communications on a particular topic once one privileged communication on the subject matter has been disclosed.²⁶³ Some courts limit the doctrine to circumstances in which a party uses privileged communications strategically in litigation as a "sword,"

260. *E.g.*, *Pyramid Controls, Inc. v. Siemens Indus. Automations, Inc.*, 176 F.R.D. 269, 272 (N.D. Ill. 1997); *Hearn v. Rhay*, 68 F.R.D. 574, 581 (E.D. Wash. 1975); *State ex rel. Stovall v. Meneley*, 22 P.3d 124, 142 (Kan. 2001); *State v. Roeder*, 636 N.W.2d 870, 876 (Neb. 2001); *Ward v. Graydon, Head & Ritchey*, No. CA2001-03-038, 2001 Ohio App. LEXIS 5340, at *9 (Ohio Ct. App. Dec. 3, 2001); *S. Cal. Gas Co. v. Pub. Util. Comm'n.*, 784 P.2d 1373, 1378-79 (Cal. 1990); *Pappas v. Holloway*, 787 P.2d 30, 36 (Wash. 1990); *see also* *Paramount Comm., Inc. v. Donaghy*, 858 F. Supp. 391, 395 (S.D.N.Y. 1994) (finding no waiver but suggesting that waiver will occur if privileged information is used to "bolster" an essential claim); *Bahner & Gallion*, *supra* note 257, at 202-04 (1998) (stating that this view is favored by a clear majority of courts and citing numerous cases).

261. *E.g.*, *Greater Newbury Clamshell Alliance v. Pub. Serv. Co. of N.H.*, 838 F.2d 13, 19-20 (1st Cir. 1988); *Afro-Lecon, Inc. v. United States*, 820 F.2d 1198, 1205 (Fed. Cir. 1987); *Sedco Int'l, S.A. v. Cory*, 683 F.2d 1201, 1206 (8th Cir. 1982) (citing *Hearn*, 68 F.R.D. at 581); *Black Panther Party v. Smith*, 661 F.2d 1243, 1268 (D.C. Cir. 1981), *vacated on other grounds sub nom. Moore v. Black Panther Party*, 458 U.S. 1118 (1982); *Darius v. City of Boston*, 741 N.E.2d 52, 59 (Mass. 2001); *see also* *Zenith Radio Corp. v. United States*, 764 F.2d 1577, 1580 (Fed. Cir. 1985) (declining to decide between applying the *Hearn* test and the balancing test, but noting that a substantial showing of need is required to overcome privilege under either test); *Bahner & Gallion*, *supra* note 257, at 202 (referring to this approach as the "balancing test" and citing cases).

262. *E.g.*, *Fed. Deposit Ins. Corp. v. St. Paul Fire & Marine Ins. Co.*, 53 F.R.D. 260, 262 (W.D. Okla. 1979); *Ghana Supply Comm'n v. New Eng. Power Co.*, 83 F.R.D. 586, 593-94 (D. Mass. 1979); *Indep. Prods. Corp. v. Loew's Inc.*, 22 F.R.D. 266, 277-79 (S.D.N.Y. 1958); *see also* *People v. Ullery*, 984 P.2d 586, 589 (Colo. 1999) (finding Colorado's statutory waiver of physician-patient privilege for pleas of not guilty by reason of insanity extends to waiver of attorney-client privilege as well); *People v. Edney*, 350 N.E.2d 400, 403 (N.Y. 1976) (automatic waiver of attorney-client privilege when defendant asserts an insanity defense); *State v. Bonds*, 653 P.2d 1024, 1036 (Wash. 1982) (defense team's mental health expert not covered by attorney-client privilege when defendant raises an insanity defense); *Bahner & Gallion*, *supra* note 257, at 201 (referring to this approach as the "automatic waiver rule" and citing cases).

263. *In re von Bulow*, 828 F.2d 94, 102-03 (2d Cir. 1987).

while seeking to utilize the privilege as a “shield” to prevent access to other communications regarding the same subject matter.²⁶⁴ Other courts, however, construe the doctrine more broadly, finding waiver in circumstances in which a party has revealed some but not all privileged communications on a particular subject matter, even if the party revealed those communications outside the litigation context or gained no strategic advantage from disclosure.²⁶⁵ Indeed, some courts have stated that careless but inadvertent disclosure of privileged communications waives the privilege for all communications on the same subject.²⁶⁶

Moreover, courts disagree on the fundamental question of whether the attorney-client privilege provides absolute or qualified protection. The privilege provides absolute and unqualified protection if, assuming communications fall within its scope and are otherwise not waived, a court or other decision maker cannot disregard the protection based on a post hoc balancing of policies, interests, or harms.²⁶⁷ In *Swidler & Berlin*,²⁶⁸ the Supreme Court made clear that the federal attorney-client privilege is absolute, rejecting the government’s argument that, in the criminal context, a court ought to balance the policies supporting the privilege against the need for the information.²⁶⁹ Other courts that have addressed the issue tend to agree,²⁷⁰ but there are significant exceptions. Courts in some

264. See, e.g., *id.* (refusing to extend subject matter waiver to circumstances in which the initial disclosure was made extrajudicially and without prejudice to the opposing party); *In re Subpoena Duces Tecum*, No. M8-85, 1997 U.S. Dist. LEXIS 2927, at *9 (S.D.N.Y. Mar. 14, 1997) (stating that a complete subject matter waiver applies when a party seeks to use the privilege selectively, as both a sword and a shield in litigation).

265. See *Browne of N.Y. City, Inc. v. AmBase Corp.*, 150 F.R.D. 465, 485 (S.D.N.Y. 1993) (stating that, where a party has voluntarily disclosed some but not all privileged communications on a subject, the privilege is waived as to that entire subject, and the opposing party need not demonstrate prejudice or that the privileged communications were put at issue in the litigation).

266. See, e.g., *Texaco P.R., Inc. v. Dep’t of Consumer Affairs*, 60 F.3d 867, 883-84 (1st Cir. 1995) (finding that waiver premised on inadvertent disclosure is deemed to encompass all other communications on the same subject) (citing *Weil v. Inv./Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 24-25 & n.13 (9th Cir. 1981)).

267. See cases cited *infra* note 271.

268. 524 U.S. 399 (1998).

269. *Swidler & Berlin v. United States*, 524 U.S. 399, 407-09 (1998). In *Jaffee v. Redmond*, 518 U.S. 1 (1996), the Court rejected similar calls for a qualified psychotherapist-patient privilege. See *id.* at 17-18 (noting the importance of privacy to effective psychotherapy and stating that allowing for post-communication balancing of patient’s need for confidentiality with the need for disclosure would render the privilege useless).

270. See, e.g., *Wells Fargo Bank v. Superior Court*, 990 P.2d 591, 594-96 (Cal. 2000) (stating that California courts are bound by statutes delineating the attorney-client privilege and may not abrogate the privilege for policy or other reasons); *Pub. Serv. Co. v. Lyons*, 10 P.3d 166, 170-71 (N.M. Ct. App. 2000) (refusing to engage in ad hoc

jurisdictions—including Connecticut, New York, and New Jersey—expressly reserve the authority to balance interests at the time the privilege is asserted, and have, in certain circumstances, allowed discovery of otherwise privileged materials based on the need for the materials in the particular litigation or based on other policy interests.²⁷¹

C. *Choice of Law and Privilege*

Because there is no single law of privilege, and because there are significant doctrinal differences between jurisdictions, potential for conflicts in governing standards exists whenever more than one jurisdiction may have an interest in the claimed privilege. The most prominent example is the circumstance in which the attorney-client communications sought to be protected occurred in one state, while the suit in which the protection is sought proceeds in another state, and the two jurisdictions treat the privilege differently in some relevant respect.²⁷²

A coherent choice-of-law regime would have no effect on the uncertainty created by either intra-jurisdictional confusion regarding

waiver analysis or rule making); *Mueller v. Nationwide Mut. Ins. Co.*, 31 Pa. D. & C.4th 23, 31 (Pa. Ct. Com. Pl. 1996) (rejecting need-based arguments and stating that, in Pennsylvania, the attorney-client privilege is absolute).

271. See, e.g., *Sackman v. Liggett Group, Inc.*, 920 F. Supp. 357, 365 (E.D.N.Y. 1996) (recognizing that, under New York law, the privilege is not absolute, and ordering disclosure in part because of the “compelling public policy interest” in protecting public health); *Leonen v. Johns-Manville*, 135 F.R.D. 94, 100 (D.N.J. 1990) (noting that the party seeking to pierce the privilege must show, under New Jersey law, the relevance and materiality of the communications, a legitimate need to obtain the communications, and that the substance of the communications is not available through other means) (citing *In re Kozlov*, 398 A.2d 882, 887 (N.J. 1979)); *Cloutier v. Liberty Mut. Ins. Co.*, No. CV 900278184S, 1998 Conn. Super. LEXIS 593 at *5-6 (Conn. Super. Ct. Mar. 6, 1998) (discussing previous Connecticut decisions allowing a balancing of interests in the criminal context and extending this approach to the context of a bad faith claim against an insurer); see also *McGranahan v. Dahar*, 408 A.2d 121, 125-39 (N.H. 1979) (stating that the attorney-client privilege may not be absolute where there is a compelling need for the information but finding no compelling need under the instant circumstances); *Henderson v. State*, 962 S.W.2d 544, 555-57 (Tex. Crim. App. 1997) (holding that a third party can compel disclosure of privileged information by showing a reasonable possibility of the occurrence of a continuing or future crime likely to result in serious bodily injury or death). Some states allow or require attorneys to disclose client confidences in certain circumstances, such as to prevent a future crime that is likely to result in serious injury or death. See *Henderson*, 962 S.W.2d at 557.

272. Professor Bradford indicates that there may be other jurisdictions with an interest in applying their privilege law, including, for example, the interest of the state where the underlying cause of action arose, the state in which the client is domiciled, and the state in which the attorney practices. See Bradford, *supra* note 9, at 913. There are added complexities when subpoenas for documents or deposition testimony are issued in jurisdictions outside the forum.

the privilege or vertical conflicts between state and federal law.²⁷³ Nevertheless, a uniform approach to choice-of-law doctrine that produces predictable outcomes at least would address the corrosive effect that inter-jurisdictional conflicts have on reasonable certainty. Yet, like the underlying substantive law governing privilege, jurisdictions take divergent approaches to selecting which privilege rules apply. The regime as a whole affords little, if any, predictability to attorneys and their clients, attempting to determine—at the time of a potential communication—whether the communication will be protected.

In his 1991 article, Professor Bradford discusses six methods that courts have employed or commentators have suggested for making horizontal, that is, state to state, choice-of-law determinations where potentially interested jurisdictions have conflicting privilege rules.²⁷⁴ Two of these approaches almost always result in application of the forum's privilege law.²⁷⁵ Courts adhering to choice-of-law principles set forth in the First Restatement of Conflict of Laws tend to apply the privilege law of the forum state because they view privilege as a question of evidence or procedure to be resolved by forum law.²⁷⁶ In addition, the few courts that have applied a public policy analysis to conflicts in privilege law have decided that public policy favors forum law.²⁷⁷

273. As discussed previously, Federal Rule of Evidence 501 and interpretive case law essentially supply vertical choice-of-law rules for privileges in federal court. See MUELLER & KIRKPATRICK, *supra* note 12, § 177, at 280-81 (discussing post-Rule 501 authority that has taken the position that, when there are federal and state claims in a single action, federal privilege doctrine governs). Federal privilege law applies in federal question cases, federal criminal cases, and cases in which both state and federal law supply the rules of decision. *Id.* State privilege law applies in diversity cases. *Id.* However, there is no corresponding, consistently-applied, vertical choice-of-law regime in state courts. One commentator has suggested that state courts ought to apply federal privilege law in cases in which the underlying claims concern areas of strong federal interest. See Earl C. Dudley, Jr., *Federalism and Federal Rule of Evidence 501: Privilege and Vertical Choice of Law*, 82 GEO. L.J. 1781, 1832-36 (1994) (discussing the growing federal interest in regulating the attorney-client privilege because of the growth of federal litigation and federal regulation in various fields and suggesting that the implication is that federal privileges should apply preemptively even in state court when the dispute involves federally regulated activity).

274. Bradford, *supra* note 9, at 915-16. In determining the applicable state law of privilege in diversity cases, federal courts look to the forum state's choice-of-law rules pursuant to *Klaxon Co. v. Stentor Elec. Man. Co.*, 313 U.S. 487, 496-97 (1941).

275. Bradford, *supra* note 9, at 916-18.

276. See *id.* at 916-17 (noting that procedure is always determined by the forum law under the Second Restatement test, where "procedure" and "evidence" are defined broadly) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 596, 597 (1934)).

277. See *id.* at 917-18 (noting that, because courts using the public policy approach have not set guidelines, policy interests are always strong enough to justify

Other courts apply multi-factored interest or relationship tests. Some of these courts apply an interest analysis, focusing on the policy interests underlying the laws of each case.²⁷⁸ Under this approach, courts usually apply the law of the state in which the communications occurred, although their reasoning is often far from clear. Other courts apply the “most significant relationship” test set forth in section six of the Second Restatement of Conflict of Laws.²⁷⁹ Section six does not define “most significant relationship,” but rather lists a number of factors that a court should consider in determining which law to apply.²⁸⁰ Still other courts apply Professor Leflar’s five choice-of-law considerations.²⁸¹ These considerations are (1) predictability of results, (2) maintenance of the interstate and international order, (3) simplification of the judicial task, (4) advancement of the forum’s governmental interests, and (5) application of the better rule of law.²⁸² Although the first four of Leflar’s considerations are similar to factors listed in section six, courts following this approach often emphasize the last consideration—the “better rule of law.”²⁸³

Finally, section 139 of the Second Restatement of Conflict of Laws contains a section specifically addressing choice of privilege law, although this approach had not been widely adopted at the time Professor Bradford published his article.²⁸⁴ Section 139 provides as follows:

application of the forum law).

^{278.} *Id.* at 919-32.

^{279.} *Id.* at 932-39.

^{280.} RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) (1969). The factors courts consider in making the determination are (a) the needs of the interstate and international systems; (b) the relevant policies of the forum; (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue; (d) the protection of justified expectations; (e) the basic policies underlying the particular field of law; (f) certainty, predictability, and uniformity of result; and (g) ease in the determination and application of the law to be applied. *Id.*

^{281.} Bradford, *supra* note 9, at 941-42 (citing generally Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966); Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CAL. L. REV. 1584 (1966)).

^{282.} *Id.*

^{283.} *See id.* at 942 (noting that Leflar, unfortunately, provided no guidance for determining which rule of law is the better rule, and, accordingly, courts have simply chosen the rule of law originating within the court’s own jurisdiction).

^{284.} Some courts had utilized this approach prior to 1991. *See, e.g.,* *Anas v. Blecker*, 141 F.R.D. 530, 531-32 (D. Fla. 1992) (noting that other courts had utilized section 139 to resolve choice-of-law questions regarding privileges); *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 432 N.E.2d 250, 252 (Ill. 1982) (discussing how the lower court had applied section 139 and applied forum privilege law rather than the law of Wisconsin). Section 139 has received more attention since then, although courts often refer to it and then apply a standard “most significant relationship” analysis.

(1) Evidence that is not privileged under the local law of the state which has the most significant relationship with the communication will be admitted, even though it would be privileged under the local law of the forum, unless the admission of such evidence would be contrary to the strong public policy of the forum.

(2) Evidence that is privileged under the local law of the state which has the most significant relationship with the communication but which is not privileged under the local law of the forum will be admitted unless there is some special reason why the forum policy favoring admission should not be given effect.²⁸⁵

Application of section 139, absent one of the exceptions, results in the selection of the law that *favours* disclosure.²⁸⁶ The exceptions contained in the two subparts of section 139 provide little guidance on when a court should otherwise opt for the stronger privilege law. Indeed, Professor Bradford suggests that these exceptions are sufficiently subject to manipulation that courts may simply revert to a forum preference rule.²⁸⁷ Moreover, these exceptions are supposed to be applied only in “rare” circumstances.²⁸⁸

Professor Bradford details, persuasively, the flaws in all of these approaches.²⁸⁹ Choice-of-law rules that always result in the choice of the forum’s privilege law fail to foster certainty because attorneys and clients often cannot predict, at the time of the communication, the forum in which the privilege may need to be asserted.²⁹⁰ The multi-factored interest and relationship approaches likewise do not produce predictable outcomes, provide little concrete guidance to

285. RESTATEMENT (SECOND) CONFLICT OF LAWS § 139 (1969).

286. See Bradford, *supra* note 9, at 939 (noting that, under each of the subparts of the test, evidence is admitted unless admission violates “strong” forum policy).

287. *Id.* at 941 (noting that, if forum policy considerations are deemed broad enough, a state court can always apply its own law).

288. See Christopher F. Dugan, *Foreign Privileges in U.S. Litigation*, 5 DETROIT C. L.J. INT’L L. & PRAC. 33, 38 (1996) (stating that, absent some strong public policy or special reason, section 139 favors a policy of wide admissibility).

289. Professor Bradford explains why the existing approaches to privilege conflicts foster uncertainty:

Forum law rules are inherently unpredictable; attorney and client usually do not know when they communicate what the forum will be. Interest analysis, the most significant relationship test, section 139 of the Second Restatement, and the better law approach all require post hoc judgments concerning the weight of state policy interests. Such tests are inherently uncertain, more than one alternative is often logically justifiable, and attorney and client cannot reasonably predict which law any given court will choose. Thus, a flexible approach like interest analysis might achieve better results in particular cases, but only at the expense of the policies the attorney-client privilege was meant to serve.

Bradford, *supra* note 9, at 945-46.

290. *Id.* at 945.

courts, and are easily manipulated.²⁹¹ Similarly, section 139 fosters uncertainty because, not only is the forum fortuitous, but the approach is subject both to the least protective doctrine and to exceptions, which, if applied, are as unwieldy as the other balancing approaches.²⁹²

In response, Professor Bradford proposes a territorial rule: where there is a conflict between attorney-client privilege doctrines, the court should apply the law of the jurisdiction in which the attorney involved in the communication practices.²⁹³ He contends that this approach is the best way to enhance certainty and predictability in application of privilege law in the context of conflicts.²⁹⁴ Professor Bradford's approach also is superior to approaches that default to the rule of the forum because it recognizes the true nature of the privilege: it provides substantive protection of extra-judicial communications designed to serve extrinsic interests.²⁹⁵

Despite its potential appeal, no court has explicitly adopted Professor Bradford's proposal.²⁹⁶ To the contrary, since 1991, courts have continued to apply the foregoing, troublesome approaches to choosing among conflicting privilege doctrines.²⁹⁷

291. *Id.* at 945-46.

292. *Id.*; see also Russell J. Weintraub, *The Silver Anniversary of the Second Conflicts Restatement: "At Least, To Do No Harm": Does the Second Restatement of Conflicts Meet the Hippocratic Standard?*, 56 MD. L. REV. 1284, 1305 (1997) (criticizing section 139).

293. See Bradford, *supra* note 9, at 948-49 (noting that the forum in which the communication takes place, the state in which the attorney practices, and the state of the client's domicile are all options, but that these options could conflict in any given case).

294. *Id.*

295. See *id.* at 948 (noting that the privilege is intended to foster open communication between attorneys and clients).

296. Two courts have mentioned Professor Bradford's territorial approach but have not adopted it. *VLT Corp. v. Unitrode Corp.*, 194 F.R.D. 8, 16 n.4 (D. Mass. 2000); *Rivera v. Periodicos Todo Bayamon*, Nos. 108 & 113, 1997 WL 43202, at *3 (D.P.R. June 23, 1997).

297. See, e.g., *Abbott Labs. v. Alpha Therapeutic Corp.*, 200 F.R.D. 401, 405 (N.D. Ill. 2001) (holding that local Illinois law governs the attorney-client privilege); *Sackman v. Liggett Group, Inc.*, 920 F. Supp. 357, 363 (E.D.N.Y. 1996) (purporting to apply New York choice-of-law rules to hold that New York's "greater interest" requires application of New York privilege law because the plaintiffs were from New York and the defendant sold, marketed, and advertised its products in New York); *In re Best Lock Corp. S'holder Litig.*, C.A. No. 16281, 2000 Del. Ch. LEXIS 175, at *20-22 (Del. Ch. Dec. 18, 2000) (holding, pursuant to the "most significant relationship" test, that Delaware law on the accountant-client privilege applies largely because the party seeking privilege protection chose to incorporate in Delaware); *Lee v. Engle*, C.A. No. 13323, 1995 Del. Ch. LEXIS 149, at *17 (Del. Ch. Dec. 15, 1995) (choosing Delaware rather than Illinois law on the accountant-client privilege after finding that Delaware had the most significant relationship to the communications despite the fact that accountants practiced in Illinois); *Barnes v. Confidential Party*, 638 So. 2d 283, 289 (Miss. 1993) (applying the "center of gravity" approach and finding that Georgia law of privilege applied based on greater contacts with the underlying dispute, even though the privilege issues surfaced in a dispute over depositions taken

D. Extrajudicial Proceedings

Although controversy swirls around the attorney-client privilege, the discussion tends to focus only on state and federal courts' treatment of the privilege doctrine and privilege claims.²⁹⁸ A few scholars, however, have criticized members of Congress for failing to respect privilege claims by persons appearing before them,²⁹⁹ and after some earlier controversy, there also seems to be consensus that the privilege generally applies in federal agency proceedings.³⁰⁰ Yet, beyond these particular settings, there has been little in-depth discussion of the application of privileges in most nonjudicial settings, including arbitral, administrative, and legislative proceedings. Until now, no one has discussed the overall impact of the availability of these nonjudicial fora on the certainty of the attorney-client privilege. This question, however, is becoming evermore important because an increasing number of adversarial proceedings are occurring outside of the traditional courtroom setting.³⁰¹

from a Mississippi resident in Mississippi); *Ford Motor Co. v. Leggat*, 904 S.W.2d 643, 647 (Tex. 1995) (holding that the most significant relationship test applies in determining which state's privilege law applies); *cf. Tartaglia v. Paul Revere Life Ins. Co.*, 948 F. Supp. 325, 326 (S.D.N.Y. 1996) (applying, in a subpoena enforcement action, New York privilege law after undertaking a relationship or contacts analysis, but limiting that analysis, appropriately, to the subpoenaed party and its confidential communications).

298. *Cf. Glenn A. Beard, Congress v. the Attorney-Client Privilege: A "Full and Frank" Discussion*, 35 AM. CRIM. L. REV. 119, 121-36 (1997) (describing as "sporadic" debates over the application of the privilege to the congressional context).

299. *See, e.g., Jonathan P. Rich, Note, The Attorney-Client Privilege in Congressional Investigations*, 88 COLUM. L. REV. 145, 145-46, 170-72 (1988) (discussing Congress's refusal to recognize the privilege and arguing that Congress should be bound by the privilege and should enact legislation accordingly); James Hamilton, *The Attorney-Client Privilege and Congress*, ABA J. SEC. LITIG., Winter 1986, at 3 (criticizing the view in Congress that the attorney-client privilege is applicable in congressional investigations at the discretion of the investigating sub-committee and discussing examples of when Congress has refused to recognize the privilege); *see also* Beard, *supra* note 298, at 121-36 (recognizing that Congress has the authority to exercise its discretion in determining whether to respect the privilege, but advocating that it adopt procedural rules to govern that discretion).

300. *See, e.g., United States v. Louisville & Nashville R.R. Co.*, 236 U.S. 318, 336 (1915) (holding that the Interstate Commerce Commission could not examine confidential communications between the railroad and its attorneys); *Civil Aeronautics Bd. v. Air Trans. Ass'n*, 201 F. Supp. 318, 319 (D.D.C. 1961) (holding that, when an agency has the power to compel testimony, the privilege nevertheless is applicable, unless there is a statutory directive to the contrary); Gene A. Petersen, *Attorney-Client Privilege in Internal Revenue Service Investigations*, 54 MINN. L. REV. 67, 68-70 (1969) (concluding that the privilege remains available in federal agency proceedings); Rich, *supra* note 299, at 168 (noting that the privilege is generally respected in federal agency proceedings).

301. *See Allen Hoberg, Administrative Hearings: State Central Panels in the 1990s*, 46 ADMIN. L. REV. 75, 75 (1994) (discussing the growing number of administrative law judges and stating that there are well over a million administrative matters or cases a

The first issue is whether the privilege even applies in these nonjudicial settings. Again, the legal community seemingly agrees that federal agencies must respect the privilege,³⁰² and many federal agencies must resort, in any event, to subpoena enforcement actions in federal court to compel disclosure.³⁰³ In addition, some state statutes and courts have made clear that privilege protections apply in state administrative and agency proceedings.³⁰⁴ Similarly, some leading arbitral organizations, including the American Arbitration Association (“AAA”), the National Association of Securities Dealers (“NASD”), and the Center for Public Resources (“CPR”) Institute for Dispute Resolution have adopted rules providing that the privilege applies in their proceedings.³⁰⁵

Yet, in other settings, the status of the privilege is far from clear. Members of Congress, for example, have refused to honor attorney-

year); Jack M. Sabatino, *ADR as “Litigation Lite”: Procedural and Evidentiary Norms Embedded Within Alternative Dispute Resolution*, 47 EMORY L.J. 1289, 1290-1303 (1998) (tracing the recent, dramatic growth of litigation alternatives and forms of ADR, including binding arbitration).

302. See sources cited *supra* note 300.

303. See *Mobil Exploration & Producing United States, Inc. v. Dep’t of Interior*, 180 F.3d 1192, 1200 (10th Cir. 1999) (stating that administrative subpoenas are not self-executing, and, therefore, require an order of the federal district court compelling disclosure); see also *In re Ramirez*, 905 F.2d 97, 98 (5th Cir. 1990) (citing cases suggesting that a party wishing to challenge the enforceability of an administrative subpoena should refuse to comply with the subpoena and await an enforcement action by the issuing agency in federal district court).

304. See, e.g., N.Y. C.P.L.R. 4503(a) (Consol. 2002) (making clear that the privilege applies in administrative and legislative proceedings); *Squealer Feeds v. Pickering*, 530 N.W.2d 678, 683-84 (Iowa 1995) (assuming that the attorney-client privilege applies in agency proceedings); *S. Cal. Gas Co. v. Pub. Util. Comm’n*, 784 P.2d 1373, 1376-77 (Cal. 1990) (holding that, absent a statutory provision to the contrary, the privilege applies against state agencies); *Davis v. Sarasota County Pub. Hosp. Bd.*, 480 So. 2d 203, 205 (Fla. App. 1985) (concluding that the privilege applies in agency proceedings). The Model State Administrative Procedure Act provides that privileges relating to evidence apply equally to agencies. MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 4-212(a) (1981).

305. See COMMERCIAL ARBITRATION R. 33(c) (1999) (Am. Arbitration Ass’n) (providing that principles of privilege apply to arbitration conducted under association rules); National Association of Securities Dealers, *NASD Notice to Members 99-90*, para. II.B (Nov. 1999) (recognizing objections to production of documents based on “an established privilege”); INST. ARBITRATION R. 11.2 (1997) (Ctr. for Pub. Res.) (calling for application of attorney-client privilege and the work-product protections); see also James H. Carter, *The Attorney-Client Privilege and Arbitration*, CURRENTS, Winter 1996/1997, at 15 (discussing the formal recognition of the application of privileges in some arbitration proceedings and how the few courts that have reached the issue have suggested that it should be honored). Moreover, parties can include a provision in the arbitration agreement making clear that the privilege will apply. See COMMERCIAL ARBITRATION R. 1 (noting that parties may amend the rules applicable to them under rules by agreement); UNIF. MEDIATION ACT § 3(a), (c) (2001) (providing for liberal application of privilege principles in arbitrations and mediations conducted under the Act, but allowing for parties to agree otherwise).

client privilege claims.³⁰⁶ In other jurisdictions, it is uncertain whether privilege doctrine applies in some administrative and legislative proceedings.³⁰⁷ Indeed, although rarely discussed by courts and commentators, some state agencies and administrators insist that the privilege cannot be asserted against them.³⁰⁸ The reluctance of state agencies and administrators also is evident in state court decisions requiring compliance with state privilege law.³⁰⁹ Federal agencies have shown similar reluctance to respect the confidentiality of privileged communications,³¹⁰ as have arbitral tribunals, which are not governed by arbitration rules recognizing the privilege.³¹¹

Even when privilege protections extend to these proceedings as a formal matter, the scope of the protection is left undefined. For example, various state statutes and arbitration rules simply provide that the privilege applies, without articulating what the privilege *is*.³¹² Thus, nonjudicial decision makers, like judges, must decide which privilege doctrine to apply before determining whether the privilege protects the particular communications at issue. These decision makers are left to choose among conflicting approaches between jurisdictions and courts, and to decide for themselves, when the law is unclear, how to balance properly the competing interests in defining the scope of protection, and whether to accept various arguments for

306. *See* *Falise v. Am. Tobacco Co.*, 193 F.R.D. 73, 77-79 (E.D.N.Y. 2000) (describing how a member of Congress released to the public documents that the tobacco defendants maintained were privileged, while the litigation over the status of the documents continued).

307. *Cf. Iowa Prot. & Advocacy Servs., Inc. v. Rasmussen*, 206 F.R.D. 630, 642 (S.D. Iowa 2001) (advising that courts should carefully scrutinize assertions of privilege that would reduce the effectiveness of legislatively-mandated administrative investigations); *United States v. Brown*, 349 F. Supp. 420, 430 (N.D. Ill. 1972) (similarly suggesting privilege may be relaxed or waived where administrative agencies pursue investigations under legislative authority).

308. I have been unable to locate commentary precisely on this point. Nevertheless, anecdotally I am aware of at least one circumstance in which a party encountered such a refusal by a state agency.

309. *See* cases cited *supra* note 304.

310. *See, e.g., Brune, supra* note 2 (noting the Justice Department's recently promulgated rule allowing government agents to monitor conversations between post-September 11 detainees and their attorneys); Petersen, *supra* note 300, at 69 (discussing the Civil Aeronautics Board's reluctance to recognize the privilege in proceedings before it).

311. *E.g.,* Evan J. Spelfogel, *New Trends in the Arbitration of Employment Disputes*, *ARB. J.*, Mar. 1993, at 6, 13 (stating that the attorney-client and work-product privileges are not always viewed as binding in arbitral fora); Carter, *supra* note 305, at 15 (noting that, before the American Arbitration Association's adoption of a privilege rule, the association had found that some arbitrators had ruled that the privilege does not apply in arbitral proceedings).

312. *E.g.,* COMMERCIAL ARBITRATION R. 33(c) (1999) (Am. Arbitration Ass'n) (providing for the application of principles of privilege, but only referring loosely to "confidential communications"); MODEL STATE ADMIN. PROC. ACT § 4-212(a) (1981) (lacking a privilege definition).

waiver or qualification.³¹³

This situation creates an enormous amount of uncertainty. Attorneys and clients often cannot predict at the time of the communication the forum—judicial or nonjudicial—in which they may have to assert the privilege. Even if they recognize the possibility of having to assert the privilege in a nonjudicial forum, it is often unclear whether the decision maker will recognize the privilege.³¹⁴ If governing rules or law mandate recognition of the privilege, the decision maker is left to decide the scope of protection. Many of these decision makers must make such determinations without the benefit of legal training, legal assistance, or extensive briefing. And, in many circumstances, judicial review of privilege decisions is unavailable or severely limited, such as in the arbitration context.³¹⁵ In other contexts, resort to the courts may be impossible as a practical matter.

Thus, as nonjudicial forms of dispute resolution grow in importance, the unpredictability of privilege protections grows with them. In many jurisdictions, this reality has largely eluded privilege policy makers or is simply outside their control.³¹⁶

E. Today's Uncertain and Unpredictable Privilege

Once the three previous subsections are considered together, the largely uncertain and unpredictable nature of the attorney-client privilege emerges. There is little Supreme Court leadership on privilege doctrine, significant inter- and intra-jurisdictional uncertainties and confusion in substantive privilege doctrine, and differing and unreliable choice-of-privilege-law principles. The conflicts and confusion in privilege doctrine are not relegated to the outer edges; rather, many of the disputes address issues lying at the heart of the protection. In addition, it is becoming harder for attorneys and clients to predict at the time of the communication the

313. See Spelfogel, *supra* note 311, at 13 (characterizing arbitrators as “piercing with respect to privileges,” and willing to forgo the deference to privilege protections that might otherwise be accorded in judicial fora).

314. See, e.g., *id.*; Symposium, *New York Stock Exchange, Inc. Symposium on Arbitration in the Securities Industry (November 21, 1994)*, 63 *FORDHAM L. REV.* 1505, 1563-64 (1995) (statement of John Peloso) (questioning whether arbitrators recognize and correctly evaluate privileges and suggesting a tendency on the part of arbitrators to err on the side of allowing discovery).

315. See Laurie A. Kamaiko, *Reinsurance Arbitrations*, 557 *PRAC. L. INST. LITIG.* 201, 281 (1997) (discussing how the availability of a judicial remedy for parties in arbitration is unclear).

316. See *Southland Corp. v. Keating*, 465 U.S. 1, 15-16 (1984) (determining that, despite a state’s desire to provide judicial review of discovery decisions in arbitration, states are preempted from doing so by the Federal Arbitration Act).

fora—judicial or otherwise—in which clients ultimately may seek privilege protection.

And it gets worse. The uncertainty is magnified by the fact that, once allegedly privileged communications are revealed, they may lose the benefit of the privilege, even if the court's decision to compel disclosure in the first proceeding was erroneous or the protection afforded by the original forum is weaker than protections available in other fora.³¹⁷ To illustrate, when a party asserts the privilege unsuccessfully, the asserting party must disclose those communications to the adverse party.³¹⁸ At that point, the communications are no longer confidential.³¹⁹ As a formal matter, this occurrence calls into question whether the party may assert in later proceedings that the communications are confidential, particularly if the content is available to the public.³²⁰ Some courts have held that parties can no longer claim privilege if, as a practical matter, third parties or the public know of the allegedly privileged communications.³²¹ Moreover, even if a party's legal right to claim

317. See, e.g., *FDIC v. Singh*, 140 F.R.D. 252, 253 (D. Me. 1992) (finding no privilege with respect to document disclosed to opposing counsel); *Duplan Corp. v. Deering Milliken Inc.*, 397 F. Supp. 1146, 1162 (D.S.C. 1974) (rejecting the contention that waiver of the attorney-client privilege requires intentional relinquishment); *Underwater Storage, Inc. v. U.S. Rubber Co.*, 314 F. Supp. 546, 549 (D.D.C. 1970) (finding that an inadvertently disclosed document loses privilege protection when "[i]t's confidentiality was breached thereby destroying the basis for the continued existence of the privilege"); *Clark v. State*, 261 S.W.2d 339, 342-43 (Tex. Crim. App.) (stating that telephone operator may testify to the contents of an otherwise privileged telephone conversation heard by eavesdropping), *cert. denied*, 346 U.S. 855 (1953). Again, in many circumstances, there will be no opportunity to appeal the decision prior to the disclosure. See *supra* note 193 and accompanying text.

318. See generally 8 JOHN HENRY WIGMORE, EVIDENCE § 2292, at 550-54 (McNaughton rev. 1961) (discussing disclosure and attorney-client privilege).

319. See, e.g., sources cited *supra* note 317.

320. See, e.g., *In re von Bulow*, 828 F.2d 94, 103 (2d Cir. 1987) (stating that matters disclosed in public are not confidential and thus lose their privileged status); see also *Genentech, Inc. v. United States Int'l Trade Comm'n*, 122 F.3d 1409, 1416-18 (Fed. Cir. 1997) (holding that, where a party has been found to have waived the privilege inadvertently through careless procedures, the privilege is gone and cannot be asserted in another forum). But see *Leonen v. Johns-Manville*, 135 F.R.D. 94, 99-100 (D.N.J. 1990) (refusing to recognize waiver where opposing side actually had possession of privileged documents that had been produced previously pursuant to a court order). And, of course, nonmutual issue preclusion may bar the party from further litigating the issue of privilege, if the first privilege decision has merged into a final judgment. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 324-29 (1979) (permitting the use of nonmutual issue preclusion by allowing stockholders to preclude a corporation and its officers and directors from relitigating issues previously decided in an action by the Securities and Exchange Commission).

321. Cf. *In re Grand Jury Subpoena*, 825 F.2d 231, 234 (9th Cir. 1987) (finding privilege issues were moot after disclosure of those materials to a grand jury because "the cat has been out of the bag" and there was no effective relief the appellate court could grant); see also *Falise v. Am. Tobacco Co.*, 193 F.R.D. 73, 74-75 (E.D.N.Y. 2000)

privilege is not lost upon compelled disclosure, the cat is out of the bag: the confidences are no longer secret, and, in complex litigation, adversaries in later proceedings may have gained the benefit of knowing such confidences whether or not those communications will be admissible at trial.³²² Thus, a single judge, administrative law judge, arbitrator, commissioner, or legislator may destroy privilege protections permanently. This is particularly troubling given that erroneous privilege decisions are more likely while privilege law remains unclear.

I am not suggesting that privilege protections are *never* certain enough to promote client candor and communication. Again, many attorneys and their clients probably believe, mistakenly, that their communications are absolutely safe from disclosure,³²³ and some clients may be willing to speak freely with attorneys even in the face of substantial uncertainty. Also, in some circumstances, parties can take steps to reduce the uncertainty. For example, one can reduce the uncertainty arising from inter-jurisdictional conflicts by including forum selection clauses in agreements that may someday be the subject of litigation.³²⁴ In addition, other doctrines, including the work product doctrine, may provide additional layers of protection for some communications.³²⁵

(affirming and incorporating the magistrate judge's order denying defendant's motion to suppress). Prior to the New York decision, a Minnesota court ordered disclosure of 37,000 documents that the defendants claimed to be privileged. *Id.* at 74. While the Minnesota decision was stayed, members of Congress who subpoenaed the documents released them onto the Internet, over defendants' objection. *Id.* at 77. The magistrate judge overseeing discovery in the New York case denied the defendants' motion to suppress discovery, stating that "to the extent th[e] disclosure might inhibit candid attorney-client communications, that inhibition already has occurred." *Id.* at 82. The district judge then affirmed, noting that a court "should not blind itself in the investigative stage of an important litigation to critical facts known to the world." *Id.* at 74. While the court left until trial the unresolved questions of admissibility, the court suggested that it would look to other factors—probative force, necessity, and cumulativeness—in making admissibility determinations. *Id.* at 75.

322. *Cf. In re Ford Motor Co.*, 110 F.3d 954, 964 (3d Cir. 1997) (noting that the court could send the case back for re-trial without use of the protected materials, but, practically speaking, the information was now known).

323. *See supra* notes 88-89 and accompanying text (discussing survey results suggesting that individual clients and corporate employees may speak freely with attorneys because they believe their communications are in fact safe from disclosure).

324. *See generally* Young Lee, *Forum Selection Clauses: Problems of Enforcement in Diversity Cases and State Courts*, 35 COLUM. J. TRANSNAT'L L. 663, 665-75 (discussing the factors and application of well drafted forum selection clauses).

325. *See* Ken M. Zeider, *Inadvertent Disclosure and the Attorney-Client Privilege: Looking to the Work-Product Doctrine for Guidance*, 22 CARDOZO L. REV. 1315, 1358-64 (2001) (discussing work-product protection for disclosed communications).

Even given all of the problems discussed above, there is probably a kernel of fairly certain protection. For example, a natural—rather than corporate—person who orally communicates with an attorney alone, for the purpose of receiving purely legal advice, and intends to keep the entire conversation confidential, can be confident that the communications will be privileged in a subsequent judicial proceeding, provided that the circumstances of the communication in no way implicate even a broadly construed crime-fraud or at-issue exception, and the client and the attorney are informed and careful enough not to involuntarily waive the privilege.³²⁶ Yet, once one moves slightly away from this core—to include, *inter alia*, communications from a corporate agent to in-house counsel, from an attorney to a client, embodied in drafts of documents, circulated to representatives or consultants, or which may be “at-issue” in later litigation—this confidence should quickly erode.

Thus, in many contexts, attorneys and their clients have little assurance, looking forward from the time of a communication, that the communication will be protected. We have not, therefore, achieved reasonable certainty.³²⁷ To the extent attorneys and clients think their communications are safe from disclosure, the foregoing analysis ought to make them think again. The law governing the attorney-client privilege within particular jurisdictions and across the country is so conflicted, confused, and underdeveloped, I suggest that trial judges and other decision makers are free to make *ad hoc* privilege determinations in many circumstances. This regime makes no sense: an uncertain privilege creates significant transactional and social costs—often inhibiting access to the truth—while failing to provide the assurance of protection necessary to enhance attorney-client communication and candor.

III. THE SOLUTION: FEDERALIZING PRIVILEGE

Part I discusses the need for reasonably certain attorney-client privilege protections. Part II demonstrates that, despite this need, the privilege affords surprisingly and intolerably uncertain protection. Now, more than a quarter century after Congress passed

326. *Cf. Theories and Justifications*, *supra* note 30, at 1488 (stating that, even uncertain rules generally possess at least a core of certainty, surrounded by a “penumbra of uncertainty”).

327. After discussing the amount of confusion and conflict in the law of privilege, a leading treatise reached the following conclusion: “The foregoing state of affairs is clearly less than optimum from the standpoint that predictability in the application of the privilege, logically indispensable for any utilitarian effect, is largely lacking in many areas.” MCCORMICK ON EVIDENCE, *supra* note 19, § 87, at 347.

on its last opportunity to fashion privilege doctrine, significant reform is both justified and needed. Although the call for greater certainty in the privilege area is not new, no existing proposal addresses the entire problem. Indeed, even the best, most ambitious proposed reforms—for example, adopting a sensible choice-of-law regime or codifying a new set of privilege rules for federal criminal and federal question cases—offer only partial solutions that do not address key root causes of the existing disarray.

The only way to achieve reasonable certainty in privilege law is to enact federal legislation providing clear, national protections for attorney-client communications that will apply regardless of the fortuity of the forum—state, federal, or nonjudicial—in which the privilege is asserted. Only a codified, preemptive, and unqualified federal privilege can resolve current privilege woes.

Perhaps contrary to prevailing thought, Congress is the most appropriate policy-making body to address the existing problems with privilege doctrine. First, the common-law method has failed to develop predictable privilege protections.³²⁸ Second, under the Rules Enabling Act, only Congress can codify federal privilege protections;³²⁹ hence, even the more limited proposed reforms—such as codifying a set of privilege rules for federal courts—would require congressional action. Although enacting sufficiently detailed legislation would require Congress to resolve a number of difficult, lingering issues, these issues deserve vigorous debate and resolution. Congress is now well-equipped for such policy making: it has far more commentary, history, and experience to draw upon than it did a quarter century ago,³³⁰ as well as established vehicles for receiving judicial, scholarly, and other input.³³¹

Moreover, although privilege protections often are mischaracterized as procedural or evidentiary “rules,”³³² they embody substantive protections or rights promoting extra-judicial interests.³³³ Thus, Congress—which already has recognized the substantive nature of privilege protections³³⁴—has the power under the Commerce Clause to enact legislation guaranteeing these protections in all

328. See discussion *infra* Part III.A.2.

329. 28 U.S.C. § 2074(b) (2000); see also Zeider, *supra* note 325, at 1316-38 (discussing the common-law background, application, and possible codification of revised privilege doctrine).

330. See discussion *infra* Part III.B.1.

331. See discussion *infra* Part III.B.1.

332. See, e.g., *United States v. Rogers*, 751 F.2d 1074, 1077 (9th Cir. 1985) (defining the attorney-client privilege as an evidentiary rule regulating disclosure).

333. See *infra* notes 395-401 and accompanying text.

334. See *infra* notes 404, 406 and accompanying text.

courts and nonjudicial fora, and this exercise of power does not offend the Tenth Amendment.

A. *The Need For a Codified, Preemptive, Federal Privilege*

1. *The limitations of other proposed reforms*

Since 1975, and particularly since *Upjohn*, there has been a steady stream of critical commentary and proposed reforms. Many of these proposals have sought to increase certainty by altering or resolving disputes regarding various aspects of privilege doctrine.³³⁵ While some calls for change or greater clarity have gained widespread adherence,³³⁶ others have received only sparse attention,³³⁷ and still others have been largely ignored.³³⁸ Although I support some of these proposed changes in privilege doctrine, even widespread adoption of any particular proposal would have only a limited impact. Despite plenty of attention, uncertainty and confusion in many areas of privilege law remain pervasive rather than isolated, and are both inter- and intra-jurisdictional. Thus, the problems with privilege, given their pervasiveness and magnitude, cannot be addressed on an issue-by-issue basis.

Recognizing the need for more holistic reforms, other commentators have sought to address systemic problems in the creation and application of privilege doctrine. For example, Professor Broun and others are seeking to revitalize the movement to convince Congress to codify a set of testimonial privileges—including the attorney-client privilege—applicable in federal criminal and federal question cases.³³⁹ Such a codification offers a number of potential benefits, including increasing certainty by providing a uniform set of privilege rules for federal disputes and promoting the convergence of privilege law by providing national leadership on privilege doctrine.³⁴⁰ Other reformers have sought to create greater certainty not by clarifying or enhancing convergence of substantive

335. See, e.g., Friedman, *supra* note 68, at 281 (advocating abandonment of the *Garner* approach because its balancing test fosters uncertainty); Talton, *supra* note 205, at 301-06 (proposing a single, more predictable standard for determining whether inadvertent disclosure constitutes waiver); Weiss, *supra* note 68, at 394 (arguing that, to promote certainty, courts should use specified criteria to determine which communications between in-house attorneys and their clients are privileged).

336. See Zeider, *supra* note 325, at 1320-33 (outlining popular proposals).

337. See *id.* (discussing such theories as the “subjective intent approach” and the “circumstances approach”).

338. See *id.* (alluding to other derivative theories).

339. See sources cited *supra* note 10.

340. Broun, *supra* note 1, at 784-85.

privilege rules, but rather by advocating adoption of new choice-of-law principles that would give attorneys and clients assurance that a particular state's privilege law would apply, regardless of the court in which the litigation occurs. Professor Bradford's approach, which calls for federal legislation providing that, when there is a conflict, the privilege law of the jurisdiction in which the attorney practices governs the privilege determination, is perhaps the most convincing of these proposals.³⁴¹

Undoubtedly, implementation of such broad reforms would be steps in the right direction.³⁴² Nevertheless, the reforms thus far proposed cannot address all of the causes of uncertainty, nor all of the inadequacies within the current regime. Professor Bradford concedes that his proposal will not address the uncertainty created by the vertical differences between federal and state law.³⁴³ He also acknowledges that his choice-of-law proposal would not address the uncertainties and confusion in privilege law within particular jurisdictions.³⁴⁴ Moreover, while he suggests intra-jurisdictional uncertainties are "around the edges," the discussion in Part II, *supra*, demonstrates that many unresolved questions are in fact both central and common. Thus, a sensible choice-of-law regime is not a complete solution because federal versus state conflicts and significant intra-jurisdictional confusion will remain.

While Professor Broun's proposal will assist in providing much needed clarity in federal privilege law, it alone cannot produce sufficient certainty. His proposed rules for testimonial privileges would apply only in federal court, and more particularly, only in

341. See Bradford, *supra* note 9, at 945-46 (arguing that, if the attorney-client privilege is to serve its purpose to produce certain and predictable results, only a territorial rule will allow an attorney and client to know in advance whether their communications will be protected). Professor Bradford offers several reasons why a rule centered on the state of practice is superior to other territorial rules—such as one based on the state of the communication or the client's domicile. See *id.* at 946-50 (listing attorney expertise in local privilege law, and the relative ease and cost-effectiveness of limiting privilege research to the attorney's local forum). Because his proposal can only enhance predictability if it is widely adopted, he suggests that it should be imposed on the states by federal legislation. *Id.* at 951.

342. For example, even though Professor Bradford's territorial rule would not create uniformity, it would aid the attorney and client in predicting—at the time of the communication—whether the communication is privileged. It would also reduce the "cat out of the bag" problem—at least for privilege decisions that are not erroneous—because every court would apply the privilege law of the attorney's state of practice.

343. See Bradford, *supra* note 9, at 950 (conceding proposal permits some chilling of attorney-client communications because the attorney and client often will not know at the time of the communication whether the claim will be state or federal or both).

344. *Id.* at 950-51.

federal criminal and federal question cases.³⁴⁵ Thus, privilege protections will continue to be subject to the fortuity of the forum and nature of the underlying claims, unless federal codification were to promote significant convergence and clarity in state privilege law. However, such convergence would take years and may not be forthcoming. Although I agree with Professor Broun and others that an absence of national leadership on the law of privilege—from Congress and the Supreme Court—has contributed to the lack of uniformity in privilege law, such leadership alone cannot solve the problem. Even in the rare circumstance in which the Supreme Court has provided some leadership, such as in *Upjohn* and decisions stressing the need for unqualified protections, states have been slow or resistant to follow the federal lead.³⁴⁶ Similarly, state courts and legislatures have resisted adopting the original and revised versions of Uniform Rule of Evidence 502, despite a general willingness to adopt other parts of the Revised Uniform Rules of Evidence.³⁴⁷ Thus, federal codification, even if finely crafted, offers an incomplete solution unless it extends well beyond federal question and federal criminal cases.

2. *Systemic problems with a common-law approach to privilege*

The problems that render these other reforms incomplete—continuing inter-jurisdictional conflict, lingering intra-jurisdictional confusion, and the unlikelihood of convergence—are largely attributable to a single source, namely, the common law. Indeed, satisfactory reform requires acknowledging, as few have, that the traditional common-law approach to developing privilege doctrine has failed and must be abandoned in its entirety.

Professor Broun, although recognizing the virtues of the common-law approach,³⁴⁸ accepts the premise that codification will bring about

345. In deference to objections raised when Congress rejected codification in the early 1970s, Professor Broun's proposal would maintain the current rule that, in federal court, state privilege law will govern where state law supplies the rule of decision. Broun, *supra* note 1, at 934-36, 953-57.

346. See *supra* notes 217-22, 266-70 and accompanying text. Professor Broun suggests that the careful scrutiny state courts have given *Upjohn* suggests the force of federal precedent in the states. Broun, *supra* note 1, at 947-49. However, state jurisdictions' direct or indirect resistance to the *Upjohn* approach suggests that its impact is more limited.

347. See *supra* notes 134-38 (summarizing judicial and legislative treatment of Rule 502).

348. See Broun, *supra* note 1, at 934 (stating that the common-law approach avoids some risks of a legislative approach, including the freezing of privilege at the drafting stage and the influence of various special interests).

greater certainty, at least as it applies to federal privilege law.³⁴⁹ Codifying a set of clear privilege rules applicable in federal cases is not enough, however, because court-made privilege doctrine predominates elsewhere. In many states, as in federal court, privilege law is expressly left to the common law.³⁵⁰ In other jurisdictions, the privilege has been codified, but at a level of generality that leaves much of the law governing the details of privilege to judicial creation and modification.³⁵¹ Thus, throughout the country, privilege is largely a creature of common law.

The common-law approach cannot foster the needed certainty and predictability in the law of privilege for a number of reasons. First, there is the problem of “too many cooks in the kitchen.” Forging privilege doctrine with specificity is an enormously difficult task. Indeed, many disagreements within and between jurisdictions can be attributed in part to the fact that striking the right balance between promoting client candor and protecting the truth-seeking function is exceptionally challenging. Courts simply disagree on how this balance should be struck and how to fashion privilege doctrine accordingly. In addition, courts do not make policy in a vacuum. They make these determinations in specific contexts—that is, confronting differing types of communications, parties, and conflicts before them—which, added to the competing interests courts must consider, naturally lead to disparate conclusions.

Second, it is axiomatic that the common-law method is ill-equipped for developing clearly defined rules. The flexibility of the case method is one of the common law’s enduring strengths. But, in the attorney-client privilege context, in which substantial certainty regarding future legal treatment and consequences is not merely efficient or preferable, but also essential, the common-law method is inadequate.

Ironically, this problem is made plain in *Upjohn*, despite the Supreme Court’s emphasis on the need for certainty. After stating that a privilege uncertain in doctrine or application “is little better

349. *See id.* at 935 (arguing that a more satisfactory set of rules could be promulgated governing privilege in cases involving federal law than that developed by courts on “a circuit-by-circuit, district-by-district, and case-by-case basis”); *id.* at 141-42 (discussing how codification would make privilege doctrine simpler and more certain).

350. *See supra* notes 138, 221 and accompanying text.

351. Some jurisdictions have adopted all or part of the original or revised versions of Uniform Rule of Evidence 502 or similar codifications. These codifications, however, do not provide detailed or clear guidance in many contexts, including the general parameters of the privilege, the crime-fraud exception, and waiver doctrine. *See, e.g.*, N.Y. C.P.L.R. 4503 (Consol. 2002); REV. UNIF. R. EVID. 502(a)-(c) (1999).

than no privilege at all,³⁵² the Court went on to state as follows:

Needless to say, we decide only the case before us, and do not undertake to draft a set of rules which should govern challenges to investigatory subpoenas. Any such approach would violate the spirit of Federal Rule of Evidence 501 . . . While such a “case-by-case” basis may to some slight extent undermine desirable certainty in the boundaries of the attorney-client privilege, it obeys the spirit of the Rules.³⁵³

The *Upjohn* Court correctly observed that the limits of its holding would undermine certainty, but, for the reasons previously discussed, the Court wrongly predicted that the effect on certainty would be “slight.”³⁵⁴ Likewise, the Court correctly concluded that it was unable to provide greater certainty, but the Court was wrong to suggest that Congress imposed the operative constraints. Although I contend that Congress mistakenly left the development of the attorney-client privilege to the courts, Congress’s view that the privilege would be developed on a case-by-case basis was simply descriptive of the common-law method. Indeed, at the very outset of the *Upjohn* opinion, the Court all but concedes that it is constrained by its *own* adherence to the strictures of the case method, rather than any constraints imposed by Congress:

We are acutely aware, however, that we sit to decide concrete cases and not abstract propositions of law. We decline to lay down a broad rule or series of rules to govern all conceivable future questions in this area, even were we able to do so.³⁵⁵

352. *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981).

353. *Id.* at 396-97. The Court did virtually the same thing fifteen years later, when it recognized the existence of a psychotherapist-patient privilege under federal law in *Jaffee v. Redmond*, 518 U.S. 1, 17 (1996). In recognizing the need for an absolute—rather than qualified—privilege, the Court declared that “[m]aking the promise of confidentiality contingent upon a trial judge’s later evaluation of the relative importance of the patient’s interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege” because the participants in the confidential conversation “must be able to predict with some degree of certainty whether particular discussions will be privileged.” *Id.* Yet, despite its emphasis on the need for certainty and predictability, the Court refused to provide guidance on the parameters of the privilege, stating that “it is neither necessary nor feasible to delineate its full contours in a way that would govern all conceivable future questions,” and later conceding that there may be situations in which the privilege may give way to other concerns. *Id.* See generally Daniel J. Capra, *Communications with Psychotherapists and Social Workers*, 216 N.Y. L.J. 3 (1996) (critiquing *Jaffee* and the common-law method).

354. See *supra* notes 217-23 and accompanying text.

355. *Upjohn Co.*, 449 U.S. at 386. In another ironic moment almost a decade after *Upjohn*, the Supreme Court suggested that, despite Rule 501 and the courts’ historic role in declaring and defining privilege rules, developing privilege law is best viewed as a legislative prerogative. *Univ. of Pa. v. EEOC*, 493 U.S. 182, 189 (1990). While

This case-by-case process and the judicial restraint accompanying it have not and cannot produce generally applicable, particularized privilege rules that provide certainty.³⁵⁶

Third, the limited efficacy of the common law in developing clear governing rules and principles is even more pronounced in the privilege area because privilege determinations usually are interlocutory.³⁵⁷ As discussed previously, trial courts' privilege rulings therefore are rarely subject to review.³⁵⁸ Also, unless appealed immediately, privilege decisions generally evade review because most cases are resolved before final judgment, and if not, the particular privilege decisions may be mooted, as a legal or practical matter, once disclosure has occurred.³⁵⁹ Indeed, once privileged communications are available to adversaries, third parties, or the public, much of the benefit of the privilege is lost.³⁶⁰

Thus, the attorney-client privilege receives limited appellate attention.³⁶¹ This leaves trial courts confronting difficult privilege questions with few clear and binding precedents to apply, little guidance, and almost no oversight. Clear rules and predictable outcomes are unlikely to result in such circumstances; to the contrary, a hodge-podge of approaches and quotable "sound bites" of doctrine are more likely to emerge, creating a pervasive atmosphere of uncertainty.

refusing to create a new privilege against the disclosure of peer review materials, the Court observed:

[A]lthough Rule 501 manifests a congressional desire "not to freeze the law of privilege" but rather to provide the courts with flexibility to develop rules of privilege on a case-by-case basis, we are disinclined to exercise this authority expansively. We are especially reluctant to recognize a privilege in an area where it appears that Congress has considered the relevant competing concerns but has not provided the privilege itself. *The balancing of conflicting interests of this type is particularly a legislative function.*

Id. (emphasis added). The Court went on to discuss how Congress must have considered and approved of access to such materials in passing portions of Title VII. *Id.* at 190-92.

356. In addition, if a court does decide to announce a broad, generally applicable rule on privilege, and that broad pronouncement is not necessary to the disposition of the case, even lower courts can choose to ignore it later. *See, e.g.,* *Coregis Ins. Co. v. Law Offices of Carole F. Kafrissen, P.C.*, 186 F. Supp. 2d 567, 573 (E.D. Pa. 2002) (discussing the limits of stare decisis and refusing to follow dicta in an earlier Third Circuit opinion that had suggested that the privilege covers all communications from an attorney to a client).

357. *See supra* note 192 and accompanying text.

358. *See supra* notes 192-93 and accompanying text.

359. *See supra* note 194 and accompanying text.

360. *See supra* notes 317-22 and accompanying text.

361. For example, circuit courts rarely grant mandamus review of privilege determinations. Glynn, *supra* note 193, at 218.

Trial judges and magistrates will do their best, but, when largely left alone to determine the governing rules of privilege, they face a particularly daunting task. Determining whether a particular communication is privileged—in an in camera review, for example—is surprisingly difficult and extraordinarily time consuming even if the governing privilege rules are clear. Yet trial judges not only must apply privilege doctrine, but often also must make it in the first place. This burden may lead judges to adopt governing rules or procedures that are problematic, insufficient, and unlikely to promote certainty.³⁶²

Fourth, trial judges—and perhaps courts in general—may be particularly ill-suited to make policy judgments regarding generally applicable privilege rules. Judges are asked to formulate privilege rules in the context of the individual cases proceeding before them. This requires a careful balancing of the extrinsic values that the privilege serves—that is, the aggregate benefits that accrue from having privilege protections—against the intrinsic costs of the truth-seeking process, along with an assessment of how such rules are likely to operate in practice.³⁶³ Yet, when a court confronts these policy issues, the particular communications at issue already exist, while the stark, potential costs of recognizing the privilege—namely, shielding relevant evidence from discovery—do not. Realistically, judges seeking to do justice in the particular case before them will find it difficult to engage in an appropriate balancing of interests and analysis of whether various approaches will foster sufficient certainty. Faced with the stark costs of the privilege in the case before them, judges may discount or ignore the extrinsic values that the privilege is

362. For example, the sheer volume of allegedly privileged documents can create an enormous burden. Realistically, this burden, in turn, can lead judges to adopt questionable procedures for determining whether documents are privileged. Defense counsel argues this occurred in the Minnesota tobacco litigation. See Mulderig et al., *supra* note 248, at 18-23 (criticizing the court for reviewing only randomly selected documents among disputed thousands). Although the Minnesota court ultimately may have reached the right decision on many of the disputed documents, the sampling procedures it employed, *id.*, were less than ideal. My concern, however, is the significant danger that judges, magistrates, and special masters in similarly large cases will allow the overwhelming size of the task—and the difficult choice of procedures to employ—to influence their views on what privilege doctrine ought to be, rather than focusing on the competing interests and costs of the privilege, and the practical effect of a selected doctrine on attorney-client candor and communication.

363. See, e.g., Capra, *supra* note 353, at 3 (stating that the determination of whether a privilege should exist is based on a necessarily political balance of interests); cf. *Privileged Communications*, *supra* note 26, at 1505 (noting that utilitarians focus on the systemic benefits of the privilege, but suggesting that there are additional, litigant-specific benefits, such as protecting rights, that also should be considered).

supposed to serve or the level of certainty needed to serve those values.³⁶⁴

Finally, the inadequacy of the common-law approach to privilege is made more acute by the fact that more and more disputes are now resolved in extra-judicial fora, including arbitration, administrative, and legislative proceedings.³⁶⁵ In order for privilege protections to be reasonably certain—whether creatures of common law or otherwise—they must be generally applicable.³⁶⁶ Yet court-made privilege law may not be binding in these other types of proceedings.³⁶⁷ In addition, even if common-law privilege protections apply—either formally, or because nonjudicial decision makers choose to defer to them—in some of these proceedings, the decision makers may be free to decide among the conflicting privilege rules, to proceed where the law is confusing, or to fashion their own rules, exceptions, or qualifications. Again, this is particularly problematic given that these decision makers often are not attorneys and, as a legal or practical matter, will not have their decisions subjected to appellate or outside scrutiny. Thus, the common-law method is not only internally problematic, but it also embodies a court-centered approach to privilege protection that fails to address the growing mass of extra-judicial dispute resolution mechanisms.

This critique of the common-law method faces a number of counter-arguments. For example, skeptics may contend that my

364. See, e.g., Broun, *supra* note 1, at 938-40 (suggesting that Congress likes privileges better than courts in part because courts recognize that privileges will deprive them of relevant and sometimes crucial evidence); Berger, *supra* note 1, at 275 (noting the “traditional hostility of the judiciary” toward rules that keep relevant information from the courts and the trend toward recognition of qualified privileges in the wake of Rule 501). Also, case-by-case assessments of privilege protections are bound to lead some judges to interpret the doctrine as allowing qualifications or other post hoc modifications of existing protections that defeat certainty. Moreover, we cannot expect judges to ignore how legal rules will affect the work they must perform in a given case. They will be tempted to fashion rules that fit the particularized needs of the case—making the in camera inspection easier or otherwise advancing the litigation—rather than adopting rules that seek to strike the right balance of interests and foster certainty. Thus, I disagree with those scholars who have suggested that privilege doctrine should be made by judges, retrospectively, rather than by policy makers with a prospective viewpoint. Cf. Miller, *supra* note 10, at 803 (discussing judicial approach to creating an evidentiary privilege).

365. See sources cited *supra* note 301.

366. I therefore disagree with those scholars who believe that privileges ought to be viewed as either procedural in nature or court-centered. See, e.g., Miller, *supra* note 10, at 795-97 (arguing that privileges are more procedural than substantive in nature, and therefore privilege policy making belongs to the judiciary).

367. For example, the Federal Arbitration Act does not provide for judicial review of arbitrators’ privilege determinations. See Federal Arbitration Act, 9 U.S.C. § 10 (2002) (setting forth the narrow grounds for vacating an arbitration award).

criticism proves too much: given that the attorney-client privilege always has been a court-created doctrine, and that attorneys and clients always have communicated with one another, I am either wrong that the common law cannot produce sufficiently certain privilege protections to promote attorney-client communications, or I have overstated the level of certainty needed.³⁶⁸

In response, my critique is limited to contemporary circumstances. The common-law method may have provided adequate certainty historically, given that parties generally knew the forum that would resolve their disputes, discovery was limited, and attorney-client communications were less frequent, less varied, and usually occurred in the litigation context.³⁶⁹ Circumstances are far different today: our modern regulatory regime is enormously complex; courts now employ broader discovery rules in civil matters and can extend their compulsory process farther than in the past; there is greater corporate and interstate activity; and litigation and dispute resolution alternatives have grown substantially in both frequency and scope.³⁷⁰ Thus, clients seek legal advice both more regularly and more pervasively than in the past. Attorney-client communications are more likely to fall within the scope of legitimate discovery requests and, hence, are more likely to be disputed. And attorneys and clients are less likely to be able to predict whether and where they will end up litigating or otherwise seeking to resolve disputes. In this modern environment, the common-law approach cannot provide sufficient certainty.

In addition, I do not believe I have overstated the level of certainty that is needed or, at minimum, desirable. Indeed, while my critique of the failings of the common-law approach is more far-reaching, other commentators have offered similar criticisms of various aspects of privilege doctrine and enforcement.³⁷¹ Given this steady stream of

368. See, e.g., *Committee on Federal Courts*, *supra* note 10, at 153 (arguing against codification of privileges in part because there is no evidence suggesting a compelling need to do so).

369. See Michael M. Mustokoff et al., *The Attorney/Client Privilege: A Fond Memory of Things Past; An Analysis of the Privilege Following United States v. Anderson*, 9 ANNALS HEALTH L. 107, 108-20 (2000) (discussing general evolution of the attorney-client privilege).

370. National litigation and national law firms have become far more common. Broun, *supra* note 1, at 961; Michael D. Goldhaber, *Among 2000's Lessons: The Big Get Bigger, the Small Stay Pretty Small*, NAT'L L.J., Dec. 4, 2000, at A1 (discussing how the nation's largest law firms are growing, consolidating, and becoming more national in scope).

371. See, e.g., Capra, *supra* note 353, at 3 (criticizing the common-law method and advocating a legislative approach in part because "a privilege can probably be made more explicit upon legislative enactment than by judicial fiat.").

critical commentary over the last two decades, uncertainty must have deterred attorneys and clients from communicating in various contexts.³⁷² Many other parties may be unaware of how uncertain the protection is and would have been deterred had they known the truth.³⁷³ Moreover, if I am wrong, and many attorneys and clients would engage in full and frank communications even when well-informed of the doctrinal confusion in various contexts and the other risks described in Part II, then one must question—as some privilege skeptics do—whether the privilege is useful at all, much less useful enough to justify its extraordinary costs. Yet, as discussed previously, the privilege probably is here to stay in one form or another, and we will never be able to verify its actual effect on attorney and client behavior.³⁷⁴ Thus, to achieve its purported benefits, the privilege—which will continue to exist and inflict costs—must provide protections sufficiently certain to convince attorneys and clients, who otherwise would curb their communications, to speak freely. The common-law method has not produced such protections.

Other skeptics of my proposal may argue that, even if the common-law method does not result in sufficiently certain privilege protections, a legislative approach would be no better, or perhaps worse. Many critics may fear that Congress will act inappropriately, either by extending privilege protections too far or, conversely, by “gutting” needed protections.³⁷⁵ I address these political process concerns in the next subpart. Yet other observers simply may argue that legislative bodies, including Congress, are unlikely to produce clearer or more predictable governing principles.³⁷⁶ For example, many state legislatures or courts have codified privilege protections, yet even in these jurisdictions, the details are largely left to common-law development.

As an initial matter, legislators are not hamstrung by the aforementioned constraints that prevent judicial policy makers from crafting generally applicable and sufficiently particularized privilege protections. In addition, the fact that state legislatures have been satisfied with less particularized codification models—such as the

372. See, e.g., Weiss, *supra* note 68, at 408 (arguing that, because the attorney-client privilege has not been applied consistently, attorneys are likely to be conservative in predicting which communications will be protected).

373. See *supra* notes 87-88 and accompanying text.

374. See *supra* notes 61, 91, and accompanying text.

375. See, e.g., Miller, *supra* note 10, at 788-89 (arguing that the judiciary can be more objective than the necessarily partisan legislature because the judiciary is “more insulated” from political lobbies).

376. See, e.g., *Committee on Federal Courts*, *supra* note 10, at 153 (stating that an attempt to legislate the boundaries of privileges would be difficult, if not impossible).

Revised Uniform Rules of Evidence—does not mean that legislatures in general or Congress in particular are incapable of codifying clearer rules.³⁷⁷ This is true given that, to the extent Congress would respond to calls for codification, it would act precisely because the law of privilege is in need of greater predictability and clarity. For the reasons discussed in the next subpart, Congress now has the tools—including a wealth of history, commentary, and well-established vehicles for receiving expert guidance³⁷⁸—it needs to draft legislation that will resolve many of the current problems in privilege law and provide far greater certainty.³⁷⁹

Another commonly expressed concern about a legislative approach to fashioning privilege law is that the legislative tack will “freeze” the doctrine, preventing positive or necessary development.³⁸⁰ First, I

377. Indeed, the Uniform Rules of Evidence are conscientiously general and flexible. Similarly, Professor Berger describes the Federal Rules of Evidence as “general rules or ‘standards’ rather than inflexible rules of law.” See Berger, *supra* note 1, at 255 (noting that Congress enacted both the very general Federal Rules of Evidence and more detailed regulatory statutes such as the Bankruptcy and Internal Revenue Codes, thereby implying a conscious decision on the part of Congress to maintain generality and flexibility in the Federal Rules of Evidence).

378. See *infra* note 418 and accompanying text.

379. See, e.g., Broun, *supra* note 1, at 771 (arguing that codification will bring about a more satisfactory set of rules than those created on a case-by-case basis); Anne Bowen Poulin, *The Psychotherapist-Patient Privilege After Jaffee v. Redmond: Where Do We Go from Here?*, 76 WASH. U. L.Q. 1341, 1341 (1998) (insisting that privilege law, in particular, is well suited for statutory treatment because it involves policy questions and other details of application that the legislature, rather than the judiciary, is best equipped to address). In discussing his proposal for codification of various evidentiary privileges in the federal courts, Professor Broun argues that the codification approach can bring about significant improvements: “[I]f drafted with sufficient care and input from the public, the bar and the judiciary, the codification can be a significant improvement over the set of rules that have developed in the federal courts under Rule 501.” Broun, *supra* note 1, at 771. Although Professor Broun concedes that codification cannot resolve every potential problem associated with privilege law, he nevertheless maintains that the law of privilege could be made “much simpler and more certain . . . if there were a federal rule guiding the courts through the more predictable and important issues.” *Id.* at 788-89.

380. See, e.g., *Committee on Federal Courts*, *supra* note 10, at 152-53 (arguing against codification of privilege rules in the federal courts because the common law allows adaptation, flexibility, and gradual delineation of boundaries that is beneficial to development of the law of privilege); Miller, *supra* note 10, at 789-92 (arguing against the legislation of a privilege law because the legislative method is less flexible than the common-law method and judicial decision makers, unlike legislatures or rule makers, have the ability to “fine tune” and modify privilege protections). Some also expressed this concern during the congressional debates over Article V of the Federal Rules of Evidence. See Broun, *supra* note 1, at 769, 773-77 (discussing the criticism raised by scholars, practitioners, judges, and members of Congress, against federal codification of the law of privilege); see also *Univ. of Pa. v. EEOC*, 493 U.S. 182, 189 (1990) (stating that Rule 501, as currently enacted, reflects a congressional desire to maintain flexibility and refrain from freezing the law of privilege). Some of this concern, however, was directed at freezing in or freezing out certain types of privileges, rather than specific aspects or particulars of the individual privileges. See, e.g., Miller, *supra* note 10, at 789-95 (stating a preference for common-law creation

agree with other commentators who have questioned whether codification would have a harmful chilling effect.³⁸¹ I also question whether Congress—once it chooses to enact a privilege law—would be slower to respond to particular problems in privilege doctrine than judicial decision makers. For example, despite all of the controversy and confusion surrounding the corporate privilege since *Upjohn*, the Supreme Court has yet to provide further guidance, some twenty years later. More importantly, however, the last quarter century of limited convergence and doctrinal disarray suggests that the law of attorney-client privilege desperately needs to be clarified and then “frozen,” at least in substantial part. Reasonable certainty demands that attorneys and clients be able to predict—at the time of their communication—the principles that will govern whether the communication will be safe from disclosure. Once Congress codifies the law of privilege, modifications in the doctrine should be rare.

Finally, some critics of my proposal may argue against codification because it will create new transaction costs, particularly in litigation. To the contrary, codification will substantially reduce transaction costs. Without question, new legislation spawns litigation, even if the legislation is carefully drafted. Yet, provided Congress passes appropriate privilege legislation as discussed below, the transaction costs of enforcing privilege will decline substantially over time. Again, in the current regime, parties often must litigate not only how the court should apply privilege doctrine in certain circumstances and to certain communications, but also what doctrine governs.³⁸² Indeed, much of the current privilege litigation—in thousands of state and federal cases³⁸³—concerns doctrine rather than application. Carefully drafted national legislation that resolves many of the current disputes and ambiguities and provides a single set of governing principles will substantially reduce litigation over doctrine, leaving primarily disputes over application.³⁸⁴ In defining privilege

and development of privilege law).

381. See, e.g., Broun, *supra* note 1, at 801-03 (noting that the law of evidence has neither become inflexible nor “frozen,” as its critics predicted when the Federal Rules were enacted in 1975). Instead, Professor Broun argues, the law of evidence “has moved with the times.” *Id.* at 802.

382. See *supra* Part II.B.2 (discussing intra- and inter-jurisdictional conflicts and confusion in the law of privilege).

383. See *supra* note 7 (indicating the volume of privilege litigation in state and federal courts).

384. Cf. Berger, *supra* note 1, at 265 (noting that those subject areas of the Federal Rules of Evidence which have undergone the most comprehensive treatment have, in turn, produced little litigation). Clearer and more predictable protections also will produce savings prior to litigation: attorneys and their clients will need to spend less time and fewer resources on determining how or whether to communicate and what

doctrine, a legislative body like Congress can take into account the aggregate costs of application, and, to the extent possible given other interests, fashion the doctrine to limit such costs.³⁸⁵ Thus, after an initial adjustment period, the legislative approach I propose will produce a substantial cost savings.

For all of the foregoing reasons, the common-law approach should be abandoned. The common law not only has failed to produce reasonably certain privilege protections, but it also is incapable of doing so. Legislation, rather than the common law, ought to be the primary source of privilege doctrine.³⁸⁶ Given that the common-law approach predominates in most jurisdictions, the only way to ensure a legislative approach is to have Congress adopt national privilege legislation that preempts contrary state privilege law.

3. *The essential contents of a national privilege law*

The purpose of this article is not to outline the particulars of a national attorney-client privilege statute, nor to advocate how Congress ought to resolve all disputes and ambiguities in the law of privilege. However, in order to correct the problems in the current, largely common-law regime and achieve reasonable certainty, the legislation must at least satisfy the three conditions discussed in Part II. Namely, privilege legislation must provide protection that is clear, unqualified, and generally applicable.

The first prerequisite for achieving reasonable certainty is to clarify the scope of the protection: confusing, ambiguous, or flexible privilege rules and exceptions do not offer predictable protection. Obviously, no codification can resolve every possible ambiguity, simplify every inquiry or application, or anticipate all interpretive questions. Given the competing interests at stake, some doctrinal complexity must remain.³⁸⁷ Yet carefully drafted legislation can largely resolve many of the lingering ambiguities and important disputes that plague privilege doctrine in the current regime. For

risks they face if they do communicate.

385. For example, Professor Rice argues that the confidentiality/secretcy requirement should be abolished. See Rice, *Eroding Confidentiality*, *supra* note 203, at 888-98. He contends that this requirement is both unnecessary and the cause of a substantial portion of the costs of litigating the privilege. See *id.* Congress should take these kinds of considerations into account when fashioning privilege doctrine.

386. It is worth noting that codification would not harm other interests served by the privilege—such as protection against self-incrimination, fostering professionalism and loyalty, and preserving privacy and dignity. All of these interests likewise are served by a clear and generally applicable privilege. See generally Broun, *supra* note 1, at 789-803 (arguing that other interests served by testimonial privileges benefit from uniform and predictable privilege protections).

387. See *supra* note 94 and accompanying text.

example, the legislation can resolve whether and when communications from the attorney to the client are privileged, clarify the requirements for intending and maintaining confidentiality, provide a uniform and clear framework for determining who is the corporate client, address the status of communications to in-house counsel, and define the limits of the crime-fraud and at-issue exceptions. Carefully drafted legislation also can clarify the scope and applicability of various waiver doctrines, including inadvertent disclosure and subject matter waiver. Such legislation would offer far more guidance and predictability than have the common law and more generalized state-law codifications.³⁸⁸

The second necessary element for achieving reasonable certainty is that the privilege protections be unqualified and not subject to post hoc reconsideration or abandonment. As the Supreme Court emphasized in both *Swidler & Berlin* and *Jaffee*, a qualified privilege—one that is subject to a post hoc balancing of harms or interests—precludes certainty at the time of the communication.³⁸⁹ To root out further lingering doubts about the protection, the legislation should prohibit judicially created exceptions and waiver doctrines. Likewise, legislatively recognized exceptions and waiver doctrines must be clear and provide strict limits to avoid easy manipulation.³⁹⁰ Thus, to the

388. Although conceding that codification of the privilege rules will not resolve every issue existing in the current common-law privilege doctrine, Professor Broun argues that “good, thoughtful drafting can eliminate many of the most troublesome areas and at least suggest a generalized approach for dealing with others.” Broun, *supra* note 1, at 786. In his proposal, Professor Broun discusses a number of unresolved issues involving attorney-client privilege as examples of areas of the doctrine that can be clarified through codification. *See id.* at 786-89 (describing privilege doctrines in areas of corporate attorney-client communications, invocation of the crime-fraud exception, inadvertent disclosure of privileged matter, and other unresolved problems in common-law privilege law).

389. *See Swidler & Berlin v. United States*, 524 U.S. 399, 409 (1988) (admitting that, at the time of a client’s disclosure to counsel, the client has no ability to know whether such disclosure will become relevant, or whether it will hold substantial importance in either a civil or criminal trial at a later juncture). For this reason, the Supreme Court has rejected the use of a “balancing test” to define the contours of the attorney-client privilege, pronouncing that “[b]alancing *ex post* the importance of the information against client interests, even [when] limited to criminal cases, introduces substantial uncertainty into the privilege’s application.” *Id.* (referring to its denial of the balancing test in *Upjohn*). *See also* sources cited *supra* note 353.

390. Again, by “unqualified,” I do not mean without exceptions. The exceptions and other limiting principles simply must be categorical and defined in advance. *See supra* note 11. In addition, an appropriate privilege regime would recognize that the persons entitled to preserve or waive the privilege on behalf of a corporate or other organizational client may change. For example, I am not suggesting that the same set of corporate insiders should always control the entity’s privilege nor that the judicial determination of entitlement to control can always be governed by a strict or bright-line rule. I do believe, however, that the standards for making this determination should be defined in advance and delineated with more clarity than they are in the current regime (*Garner* and its progeny), so that application of such

extent communications fall within the scope of the privilege and outside recognized, categorical exceptions, the protection must be absolute, since protections remain wholly uncertain when subject to qualification or post hoc abandonment.³⁹¹

Finally, and perhaps most controversially, the legislation must be universally applicable. The attorney and client must have confidence at the time of the potential communication that the protections afforded by the statute will apply regardless of the fortuity of the forum—federal, state, or nonjudicial—the civil or criminal nature of the proceeding,³⁹² or the substantive claims giving rise to the dispute in which the client may have to assert the privilege. Universal applicability avoids the uncertainties arising from the existence of conflicting law, the happenstance of the forum, and the decision maker's choice among privilege rules.³⁹³

To achieve universal applicability, the legislation must ensure that privilege doctrine preempts contrary state privilege rules. In other words, the legislation should provide that the client possesses a federal *substantive* right—a “federal privilege right”—to refuse to disclose privileged communications during discovery, by resisting a subpoena, and by refusing to testify or allowing the attorney to testify.³⁹⁴

Viewing the protection afforded by the privilege as a “substantive right” is not as novel as it may seem. As previously discussed,³⁹⁵ much of the criticism of Article V of the Proposed Federal Rules of Evidence was that privilege protections are substantive in nature. Although privileges have been mischaracterized as merely evidentiary, testimonial, or procedural rules in the past,³⁹⁶ they do not merely govern the manner or means by which courts resolve

standards is as predictable as possible to all constituencies and does not simply degenerate into an ad hoc balancing of interests.

391. However, to the extent there are strong, countervailing social policies that ought to override application of the privilege, those social policies must be taken into account in the legislation (by tailoring the limitations and exceptions to the privilege accordingly). Allowing individual decision makers to balance competing policies destroys certainty.

392. In *Swidler & Berlin*, 524 U.S. at 408-09, the Supreme Court observed that no case authority exists to support the proposition that the privilege applies differently depending on whether in the civil or criminal context. *Id.*

393. A single source of law also reduces the appearance of uncertainty by removing the static that inevitably results from multiple, disparate doctrines.

394. This also could be described as a federally recognized immunity to certain forms of compulsory process or disclosure.

395. See *supra* notes 119-23 and accompanying text.

396. See, e.g., *United States v. Rogers*, 751 F.2d 1074, 1077 (9th Cir. 1985) (defining the attorney-client privilege as an evidentiary rule regulating disclosure).

disputes.³⁹⁷ Unlike other rules of evidence and procedure, privileges defeat, rather than serve, the judicial function of elucidating the truth.³⁹⁸ As many commentators have recognized—during the debates over the Proposed Federal Rules of Evidence and thereafter—privilege doctrine is substantive because it serves interests extrinsic to the particular litigation in which the privilege is asserted.³⁹⁹ The attorney-client privilege is concerned with “primary conduct and affairs,” in the words of Justice Harlan,⁴⁰⁰ because its purposes are extrajudicial, promoting and protecting communications between attorneys and clients, and thereby producing various social benefits. Moreover, Congress implicitly recognized the substantive nature of the attorney-client privilege when it amended the Rules Enabling Act after passage of the Federal Rules of Evidence, granting back to the Supreme Court the authority to promulgate rules of evidence, but preserving for itself the exclusive authority to create, abolish, and modify privileges.⁴⁰¹ Thus, my proposal is novel not in recognizing a substantive right of privilege, but rather in federalizing it.

Also, while universality requires creation of this federal substantive right, it does not mean that Congress must recognize a federal cause of action based on that right. Although Congress could make available federal injunctive relief in some circumstances, creating a cause of action premised on an assertion of privilege in another proceeding would create enormous practical and administrative difficulties, incur substantial transaction costs, and raise additional

397. See *supra* notes 22-24 and accompanying text.

398. Goldberg, *supra* note 119, at 683-84 (contrasting evidentiary rules, such as those governing the admission and exclusion of evidence, examination of witnesses, judicial notice, competency of witnesses, and relevance with privilege rules, and finding that, whereas evidentiary rules aid the fact-finding process, privilege rules help to hide the truth).

399. See *supra* notes 119-26 and accompanying text; see also Goldberg, *supra* note 119, at 684 (providing that privilege rules “impede the truth-seeking process in order to serve extrinsic social policies”); Weinstein, *supra* note 119, at 370-73 (discussing the substantive nature of privilege rules, how they serve extrinsic policies, and therefore how privilege rules differ from other rules of evidence); see also MUELLER & KIRKPATRICK, *supra* note 12, §§ 169, 175-176 (discussing why privilege protections are substantive rather than procedural). But see Miller, *supra* note 10, at 796-97 (stating that, although privileges have both substantive and procedural aspects, they should be within the realm of the judiciary because their impact is largely procedural).

400. *Hanna v. Plumer*, 380 U.S. 460, 476 (1965) (Harlan, J., concurring) (discussing *Erie* and noting the difficulties associated with Supreme Court’s choice-of-law doctrine in federal diversity actions).

401. See 28 U.S.C. § 2074(b) (2000) (“Any such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress.”).

constitutional concerns beyond those discussed in the next subpart.⁴⁰² Instead, I simply propose that the legislation recognize the right of a client, without creating an independent cause of action, to resist being compelled to disclose protected attorney-client communications in any proceeding in which such communications are sought.⁴⁰³ The client would retain this federal right, in any forum or proceeding, whether judicial or nonjudicial, unless the client waives its application in that forum.⁴⁰⁴

Universality does not ensure uniform or perfectly predictable application. For example, even if every judicial and nonjudicial decision maker must apply the same privilege law, interpretations and outcomes may not always be the same and errors may occur. The danger of erroneous application or interpretation may be particularly great in nonjudicial fora, in which the decision makers often are not attorneys, and clients may have little or no access to judicial review. And, as discussed previously, trial courts applying the doctrine often may not be subject to appellate oversight.⁴⁰⁵

Perhaps Congress also should consider additional, limited reforms to enhance oversight: for example, providing for interlocutory review for certain privilege issues arising in federal district court cases,⁴⁰⁶ or amending the Federal Arbitration Act to expand judicial review to cover privilege determinations in arbitration.⁴⁰⁷ Yet, even without additional avenues of review, a single, clear set of rules governing the attorney-client privilege should simplify greatly the task for most decision makers and thereby reduce the frequency of error.

402. For example, creating a federal cause of action against state decision makers seeking to compel disclosure may raise Eleventh Amendment concerns. *See* U.S. CONST. amend. XI (“[T]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”).

403. Again, while this appears novel at first blush, Congress has acted similarly in the past. *See, e.g., infra* notes 485-89 and accompanying text (noting the similarities between the proposed legislation and the substantive protections afforded by the Federal Arbitration Act (“FAA”)).

404. Thus, for example, an arbitration panel could not compel the client to produce privileged communications unless the client had agreed to forego the privilege in arbitration or otherwise had waived it.

405. *See supra* notes 192-95 and accompanying text.

406. *See* Glynn, *supra* note 193, at 258-65 (proposing that, to enhance appellate review in problem areas such as privilege, rule makers should consider promulgating rules allowing for mandatory review of discrete categories of interlocutory orders). The provision for interlocutory review need not be permanent: Congress could provide that the provision expires after the amount of time it deems sufficient to resolve most interpretive issues. *Id.*

407. *Cf.* 9 U.S.C. § 10 (2000) (setting forth the narrow reasons for vacating an arbitration award).

Similarly, the clear, unqualified, and universal nature of the protection reduces the risk of manipulation. To the extent ambiguities remain, they may be resolved more quickly than current controversies, because state and federal courts cannot ignore definitive federal interpretations in cases involving state-law claims. Indeed, there will be at least the potential for direct federal oversight of state-court treatment, because the Supreme Court will have the ability to review state-court privilege decisions.

Furthermore, to combat the corrosive effect of potential errors on attorney and client confidence in the privilege, the legislation could reduce the “cat-out-of-the-bag” problem by making clear that compelled disclosure of privileged communications in any forum does not constitute waiver of the protection as against other parties in other proceedings. As a practical matter, clients may lose the full benefit of confidentiality in some circumstances, such as when opposing counsel represents adverse parties in other cases. But, by ensuring that privileged communications are not legally required to remain absolutely secret, such a provision will prevent some of the ripple effects that erroneously compelled disclosures cause.⁴⁰⁸

While the particulars of a national attorney-client privilege should be left to a thorough deliberative process, truly effective legislation must contain several fundamental attributes. No privilege regime can provide completely predictable protection, but the type of national, preemptive legislation I have described comes far closer than any other proposal.

B. Congress’s Capacity and Power to Federalize Privilege

The foregoing analysis demonstrates that the best approach to resolve all of the lingering conflicts and confusion in privilege doctrine, and thereby provide reasonably certain privilege protections, is codification of the law of the attorney-client privilege, providing clear, unqualified, and generally applicable privilege protections. Although no legislative outcome is certain, Congress has

408. A party may still be barred from re-litigating the issue of privilege under the doctrine of issue preclusion. *See generally* Crocker v. Piedmont Aviation, Inc., 49 F.3d 735 (D.C. Cir. 1995) (discussing how the barriers of issue preclusion and waiver doctrine preclude the re-examining of issues except in certain circumstances). However, issue preclusion will attach in the later proceeding only if the privilege determination is merged into a final judgment. *Id.* at 740-41. Also, to the extent that the court in the first proceeding compelled disclosure under an exception or waiver doctrine that is inapplicable in the second proceeding, assertion of the privilege will not be precluded. *Id.* The legislation should make clear that preclusion applies only to judicial proceedings; it should not apply to determinations of nonjudicial decision makers.

both the capacity and constitutional power to enact such legislation.

1. *Congress's ability to craft appropriate legislation*

Many who otherwise agree that a single, clear, and generally applicable set of rules governing the attorney-client privilege is desirable or even necessary might be skeptical of Congress's willingness and capacity to enact the kind of particularized legislation that is needed. For example, Congress had the opportunity to address the attorney-client privilege—and privileges generally—in the early 1970s, and chose to avoid doing so.⁴⁰⁹ Other observers simply may fear that once Congress takes on the attorney-client privilege, it will succumb to political pressures or interests and produce legislation that either inappropriately curtails privilege protections or extends privilege protections too far.⁴¹⁰

One ought to have healthy doubts and concerns about Congress's ability to address these kinds of issues, and, of course, the ultimate outcome of the legislative process is uncertain. Yet, for a number of reasons, both the time and the circumstances are right for Congress to enact the type of legislation I propose and, in so doing, strike an appropriate balance between competing interests.

First, Congress's refusal to codify the proposed privilege rules in 1975 does not mean that it would refuse to codify the attorney-client privilege today. The legislation I propose does not implicate several of the concerns that led Congress to reject Article V. For example, this proposal addresses only the attorney-client privilege, which is recognized in all state and federal jurisdictions. Thus, unlike Article V, this proposal does not ask Congress to recognize or expand controversial privileges such as the secrets of state and official information privileges,⁴¹¹ nor does it seek to narrow or "freeze out" other privileges recognized in some states.⁴¹² My proposal for statutory reform also avoids entirely the concerns about the limits of judicial rule-making authority under the Rules Enabling Act that was the subject of so much critical commentary during congressional hearings in the early 1970s.⁴¹³

409. See *supra* note 116 and accompanying text.

410. See, e.g., Berger, *supra* note 1, at 276 ("Congress is, of course, free to enact privileges, but it would then have to make choices between competing groups clamoring for the privilege of having a privilege—the very choice it obviously sought to avoid by passing rule 501.").

411. See *supra* note 117 and accompanying text.

412. See *supra* note 118 and accompanying text.

413. See *supra* note 123 and accompanying text.

Perhaps more importantly, my proposed legislation avoids the *Erie* concerns that troubled commentators and some members of Congress during the earlier debate.⁴¹⁴ The legislation not only would eliminate the need to decide which privilege “rules” should govern in diversity actions in federal court, it would abandon a court or judicially-centered view of the privilege: its privilege protections would apply in all jurisdictions and all nonjudicial fora. Again, my approach recognizes—and indeed is premised upon—the *substantive* rather than procedural nature of attorney-client privilege protections.⁴¹⁵ As those commentators who were concerned about *Erie* argued during the debates, privilege doctrines are concerned with protecting and promoting primary activity and embody rights serving interests extrinsic to the dispute and possessed to maintain confidentiality.⁴¹⁶ My legislative proposal respects the substantive nature of these rights; it simply federalizes them.

Thus, assuming Congress would have the same kinds of concerns it had when it rejected the proposed privilege rules and enacted Rule 501, my proposal would have to overcome only two of the major objections to codification discussed a quarter century ago. Primarily, Congress would have to be convinced that it was *wrong* in concluding that (1) the development of privilege law is best left to the courts, and (2) state policy choices regarding attorney-client privilege law are entitled to deference, at least in disputes involving state law. That Congress erred in both respects is now apparent, as the foregoing analysis demonstrates. Moreover, the likelihood that attorneys and clients must consider the implications of inter-jurisdictional conflicts has grown because business and communication are more national—and indeed global—in scope than they were in 1975, and the national bar and national litigation have expanded substantially.⁴¹⁷ Today, more than ever, the need for certainty is a national interest, and can be served only by national, legislative reform.

Second, Congress is more capable today than it was in 1975 of resolving lingering ambiguities in attorney-client privilege doctrine and drafting clear and particularized language defining the privilege. There is now a wealth of history, case law, and scholarship on which Congress can draw in making these determinations. The privilege’s most troublesome areas—the confidentiality doctrine, the corporate privilege, the crime-fraud exception, and various ambiguities in the

414. See *supra* notes 124-26 and accompanying text.

415. See *supra* notes 392-94 and accompanying text.

416. See *supra* notes 124-26 and accompanying text.

417. See, e.g., sources cited *supra* note 370.

law of waiver—have received an enormous amount of attention and have been subjected to extensive scholarly scrutiny and debate. This body of commentary is ripe for legislative review. Moreover, Congress now has well-established vehicles for receiving expert guidance on drafting such legislation, including the Judicial Conference of the United States, the American Bar Association and other legal associations, state organizations, and rule-making bodies, and the American Law Institute.⁴¹⁸ Congress could establish a commission—somewhat akin to the Federal Courts Study Commission—to conduct hearings and a thorough study of this area of the law, make findings, and undertake initial drafting responsibilities. Thus, Congress now has the tools to craft sufficiently particularized and effective legislation.

Third, although political pressures will exist in any legislative process, and various interest groups will no doubt seek to influence the content of privilege law, I believe there is a good chance that Congress can enact appropriately balanced legislation. In the attorney-client privilege context, there seems to be a rare balance of highly interested, influential constituencies and, correspondingly, strange bedfellows. For example, well-organized industry groups, various legal organizations, and the criminal defense bar are likely to prefer strong privilege protections, while law enforcement constituencies and the plaintiffs' bar will prefer strict limitations on these protections.⁴¹⁹

In fact, skeptics fearful of subjecting the privilege to the legislative process may offer opposing assessments: one contingent may argue that Congress will simply capitulate to industry groups and expand the privilege inappropriately; the other may contend that Congress will simply gut the privilege because the privilege is used to hide the truth. Given the powerful interests on both sides, both fears are

418. As Professor Broun notes:

[T]here is a ready-made vehicle for providing judicial input into the drafting process. The Judicial Conference of the United States has standing committees set up to consider amendments to rules, including the Federal Rules of Evidence. Those committees are composed not only of federal judges, but of state court judges, practitioners and academics. The committees hold open deliberative sessions as well as public hearings on any proposed amendments to the rules.

Broun, *supra* note 1, at 814.

419. The presence of well-organized and financed interest groups on both sides of the issue reduces the risk, expressed by public choice theorists, that privilege legislation will favor a single, organized interest group to the detriment of social welfare. See generally Susan Block-Lieb, *Congress's Temptation to Defect: A Political and Economic Theory of Legislative Resolutions to Financial Common Pool Problems*, 39 ARIZ. L. REV. 801, 819-24 (1997) (discussing the impact on legislative development of various external political and economic factors).

exaggerated. In particular, capture of privilege legislation by industry groups is unlikely at this moment in history, given the recent Enron debacle and the resulting public and congressional sentiment for greater public disclosure, transparency, and accountability.

Perhaps the remaining critics—particularly advocates for criminal defendants who believe Congress may gut the privilege—have more to be concerned about, especially in the wake of the terrorist activities of September 11. Yet I still believe a congressional approach will be more measured than these critics fear. A substantial curtailing of the privilege would face significant opposition from legal organizations beyond the criminal defense bar. In addition, if my approach is followed, there will be no distinction between the privilege protections that apply in the civil and criminal settings. A uniform privilege will link the destinies of civil and criminal defendants, providing greater leverage against congressional overstepping. Even if Congress is tempted to limit protections too severely in the criminal context, its actions will have Fifth Amendment⁴²⁰ (privilege against self-incrimination) and Sixth Amendment⁴²¹ (right to counsel) implications. If these implications do not deter overreaching, recourse to the courts will remain. Furthermore, I question whether the risks of congressional action are as great as they seem, particularly given the current, problematic state of privilege law.⁴²²

Finally, despite the risks associated with the legislative process, we ought to have a national, public debate on many of the lingering privilege issues that judicial decision makers have been unable to resolve. The difficult balancing of interests, benefits, and costs that must occur in delineating the parameters of the privilege is a uniquely legislative function, and, for all of the foregoing reasons, it is one that cries out for a resolution. Although the process will not necessarily succeed, Congress, our national, politically accountable body, ought to attempt to craft a workable resolution.

420. U.S. CONST. amend. V (“No person . . . shall be compelled in any criminal case to be a witness against himself . . .”).

421. *Id.* amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.”).

422. For example, without a statute addressing the subject, the Justice Department can continue to set its own rules with regard to monitoring detainees’ communications with counsel, unless a federal court were to find such monitoring unconstitutional. Similarly, without a congressional mandate, the Department of Defense, in crafting rules governing military tribunals, need not incorporate privilege protections comparable to those available in civilian courts. Also, given the confusion and ambiguity in privilege law, judges now often can find a justification for denying privilege protection.

All of this being said, the question remains whether Congress would ever be interested enough to take on the challenge of codifying the attorney-client privilege and preempting contrary state law. Indeed, undertaking a serious study of, and then overhauling, the attorney-client privilege probably is not high on Congress's current agenda. My message, however, is addressed not only to members of Congress but to others—scholars, judges, and practitioners—interested in addressing and working to solve the problems in the current privilege regime. Under the Rules Enabling Act, only Congress can codify privilege law for the federal judicial system, and only Congress can implement other holistic changes, such as creating a national choice-of-privilege-law regime.⁴²³ Congressional action, therefore, is needed for *any* significant national reform addressing privilege law. To the extent commentators, practitioners, the Judicial Conference, or others can capture Congress's attention, they should use that rare opportunity to federalize the law of privilege, rather than to seek more limited, less effective reforms.

2. *Congress's power to federalize privilege*

Even if Congress is both willing and capable of crafting clear, unqualified, and generally applicable attorney-client privilege legislation, it must have the power to enact such a far-reaching measure. Although Congress occasionally has enacted legislation addressing privilege issues, these provisions have been narrow in scope, tied to federal agency activities, or, in the case of Rule 501, applicable only to certain matters litigated in federal courts.⁴²⁴ The legislation I propose—which would endow the client with a federal privilege right that supersedes and preempts contrary state privilege law and would apply in all judicial and nonjudicial fora—obviously raises greater concerns about congressional power. This is particularly true given the Supreme Court's "new federalism" jurisprudence.⁴²⁵ Yet I contend that Congress has the authority to act. Congress has the power under the Commerce Clause⁴²⁶ to regulate and protect the provision of legal services, and, under the

423. See 28 U.S.C. § 2072(b) (2000) ("Such rules shall not abridge, enlarge or modify any substantive right.").

424. See *supra* note 144.

425. See generally, e.g., David C. Feola & David R. Fine, *The "New Federalism": Ignore It at Your Peril*, COLO. LAW., (Nov. 2000); Ann Althouse, *On Dignity and Deference: The Supreme Court's New Federalism*, 68 U. CIN. L. REV. 245 (2000); Mark Tushnet, *What Is the Supreme Court's New Federalism?*, 25 OKLA. CITY U. L. REV. 927 (2000).

426. U.S. CONST. art. I, § 8, cl. 3 (providing Congress with the power "[t]o regulate Commerce . . . among the several States . . .").

Supremacy Clause,⁴²⁷ to preempt contrary state law. While the states have a long tradition of regulating the practice of law, their disparate approaches to the privilege may inhibit and burden the attorney-client relationship, which is a subject of national interest and commerce. Exercising this power will not run afoul of the Tenth Amendment⁴²⁸ or the values of federalism it serves.⁴²⁹

a. The Commerce Clause

Article I, section 8 of the Constitution allocates to Congress the power “to regulate Commerce . . . among the several States.”⁴³⁰ If Congress enacts legislation pursuant to this authority, it may, if it so chooses, preempt state regulation in the field pursuant to the Supremacy Clause.⁴³¹ Congress’s Commerce Clause power extends to three broad categories of activity: “[f]irst, Congress may regulate the use of the channels of interstate commerce;”⁴³² “[s]econd, Congress may regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities;”⁴³³ and, “[f]inally, Congress’ commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, . . . or in other words, those activities that substantially affect interstate commerce.”⁴³⁴ The privilege legislation I propose would fall primarily within the third category.⁴³⁵

427. *Id.* art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

428. *Id.* amend. X (“The powers not delegated to the United States by the Constitution, not prohibited by it to the States, are reserved to the States respectively, or to the people.”).

429. See Anthony J. Bellia, Jr., *Federal Regulation of State Court Procedures*, 110 YALE L.J. 947, 997-1001 (2001) (discussing the Tenth Amendment and the normative values of federalism that the U.S. system of dual sovereignty serves).

430. U.S. CONST. art. I, § 8, cl. 3.

431. *Id.* art. VI, cl. 2.

432. *United States v. Morrison*, 529 U.S. 598, 609 (2000) (quoting *United States v. Lopez*, 514 U.S. 549, 558 (1995)) (citations omitted).

433. *Id.* (quoting *Lopez*, 514 U.S. at 558) (citations omitted).

434. *Id.* (quoting *Lopez*, 514 U.S. at 558-59) (citation omitted).

435. Of course, some of the attorney-client communications that would be subject to the legislation would fall within the other categories. For example, the legislation would protect attorney-client communications made over the telephone or other wire or electronic means. Also, because the Fifth Amendment right against self-incrimination and Sixth Amendment right to counsel have been incorporated against the states under the Fourteenth Amendment, then Section 5 of the Fourteenth Amendment may provide an alternative basis for federalizing the privilege in criminal cases. See *id.* amend. XIV, § 5 (giving Congress the power to enforce the provisions of the Fourteenth Amendment by “appropriate legislation”).

Pursuant to its authority to regulate activities that substantially affect interstate commerce, Congress has enacted an enormous variety of legislation regulating intrastate activities sufficiently related to interstate commerce.⁴³⁶ Recently, however, in *United States v. Morrison*⁴³⁷ and *United States v. Lopez*,⁴³⁸ the Supreme Court, while affirming Congress's power to regulate intrastate activities that substantially affect interstate commerce, has made clear that Congress's authority under the Commerce Clause has limits.⁴³⁹ In *Lopez*, the Court invalidated the Gun-Free School Zones Act,⁴⁴⁰ which made the possession of a gun on or near school premises a crime.⁴⁴¹ In *Morrison*, the Court struck down the portion of the Violence Against Women Act⁴⁴² that provided a federal civil remedy for the victims of gender-motivated violence.⁴⁴³ In both cases, the Court found that the activity Congress sought to regulate was beyond the purview of the Commerce Clause because it was non-economic or noncommercial in nature and had only an attenuated effect on interstate commerce.⁴⁴⁴

Morrison and *Lopez* emphasize that Congress's power under the Commerce Clause has outer boundaries, and each case serves notice that the Supreme Court will not always defer to Congress's judgments on matters of commerce. These cases do not, however, stand in the way of national privilege legislation. Unlike the regulation of gun possession in a school zone or the provision of a civil remedy for victims of gender-motivated violence, a national attorney-client privilege law regulates—indeed fosters and protects—economic and commercial activity, namely, commerce between attorneys and clients. The provision of legal services is usually in exchange for compensation; indeed, the nation's legal industry does a huge

436. See *Morrison*, 529 U.S. at 609-11 (citing Supreme Court decisions where the Court struck down federal legislation on the grounds that Congress had exceeded its power under the Commerce Clause); *United States v. Lopez*, 514 U.S. 549, 559-60 (1995) (listing numerous examples when the Supreme Court has upheld congressional acts regulating interstate economic activity where the Court has considered the activities to substantially affect interstate commerce); Marina Lao, *Federalizing Trade Secrets Law in an Information Economy*, 59 OHIO ST. L.J. 1633, 1687 (1998) (discussing an array of "far-reaching" congressional legislation regulating intrastate economic activities).

437. 529 U.S. 598 (2000).

438. 514 U.S. 549 (1995).

439. See *id.* at 559-64, 567-68 (striking down the Gun-Free School Zones Act); *Morrison*, 529 U.S. at 613-19 (invalidating as unconstitutional certain portions of the Violence Against Women Act).

440. Pub. L. No. 101-647, § 1702, 104 Stat. 4844 (1990).

441. 514 U.S. at 559-64.

442. Pub. L. No. 103-322, 108 Stat. 1902 (1994).

443. *Morrison*, 529 U.S. at 608-16.

444. *Id.* at 617; *Lopez*, 514 U.S. at 551.

amount of business.⁴⁴⁵ The attorney-client privilege protects communications upon which the industry's article of commerce—the provision of legal services—depends. Thus, there is little doubt that legislation providing for such protection would be aimed directly at regulating commercial activity.

In addition, far from having only an attenuated effect on interstate commerce, the regulation of the communications that underlie the provision of legal services would have a direct and substantial effect on interstate commerce. The sheer volume of legal commerce has an enormous effect on interstate commerce, even if the provision of legal services were largely intrastate.⁴⁴⁶ Yet, as discussed previously,⁴⁴⁷ there is a substantial amount of interstate legal activity.⁴⁴⁸ Nationwide legal practices and national litigation continue to grow, and counsel often is retained to assist clients with national or regional business interests.⁴⁴⁹

Moreover, in our modern regulatory regime of varied and complex legal rules, businesses and individuals engaged in interstate commercial activity must resort constantly to attorneys for legal services. Indeed, the smooth functioning of interstate commercial activity depends on attorneys and their continuous and sound advice. It is precisely because of the nexus between attorneys and the

445. In the year 2000, the gross domestic product for the private legal services industry was \$133.5 billion. BUREAU OF ECON. ANALYSIS, U.S. DEP'T OF COMMERCE, TABLE, GROSS DOMESTIC PRODUCT BY INDUSTRY IN CURRENT DOLLARS: 1987-93 AND 1994-2000, <http://www.bea.doc.gov/bea/dn2/gpoc.htm> (Oct. 31, 2001). The Bureau of Labor Statistics estimates that, in the year 2000, 890,910 persons were employed in the legal services industry. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL EMPLOYMENT STATISTICS "LATEST NUMBER," (2000), <http://www.bls.gov/oes/home.htm> (last visited Aug. 31, 2002).

446. See Note, *Developments in the Law—Lawyers' Responsibilities and Lawyers' Responses*, 107 HARV. L. REV. 1547, 1555-56 (1994) [hereinafter *Lawyers' Responses*] (arguing that it is common for attorneys to hold themselves out as specialists in such high impact areas as banking or securities—areas which can have "significant and widespread economic impact on the public"); see also *supra* note 445 and accompanying text.

447. See *supra* note 417 and accompanying text (explaining that businesses have become more national in scope).

448. The interstate nature of legal services distinguishes the attorney-client privilege from most other testimonial privileges. For example, Congress probably could not federalize, pursuant to its Commerce Clause power, the spousal and priest-penitent privileges because the communications these privileges protect do not substantially affect interstate commerce, nor are such communications generally tied to economic activity.

449. See, e.g., Broun, *supra* note 1, at 801 (stating that the national bar has grown exponentially since the enactment of Federal Rule of Evidence 501); Goldhaber, *supra* note 370 (discussing growing nationalization and increased commercial spread of the country's biggest law firms); *Lawyers' Responses*, *supra* note 446, at 1555 (calling multi-jurisdictional law firms and attorneys practicing in more than one jurisdiction "common features of the profession").

interstate activity of their clients that a uniform, national privilege law is needed: attorneys provide legal services to clients engaged in business activities that may subject them to suit in different fora with conflicting privilege rules.⁴⁵⁰ These conflicting rules not only burden interstate commerce by inflicting transaction costs for those engaged in interstate business activities, but these rules also threaten to discourage communications that facilitate the legal services on which these activities depend.

Of course, the provision of legal services is not exclusively commercial.⁴⁵¹ Yet nothing in *Morrison*, *Lopez*, or the Supreme Court's earlier Commerce Clause jurisprudence requires that the activity Congress seeks to regulate be exclusively economic or commercial in nature—provided the activity is not truly noneconomic in nature.⁴⁵² The Court rejected the arguments in both *Morrison* and *Lopez* that the activities regulated had, in the aggregate, a substantial impact on interstate commerce because of the tenuousness of the relationship between the wholly noneconomic activity at issue and interstate commerce.⁴⁵³ Similarly, while both decisions mention the lack of a jurisdictional element in the legislation limiting the reach of the

450. See *supra* note 368 and accompanying text (objecting to the creation of a uniform privilege rule).

451. For example, the attorney-client relationship is fiduciary in nature rather than merely contractual. See RONALD E. MALLIN & JEFFREY M. SMITH, LEGAL MALPRACTICE §§ 14.1-14.2 (4th ed. 1995 & Supp. 1998) (explaining that the basic fiduciary duties of an attorney to a client are acknowledged by every American jurisdiction); see also Gary A. Munneke & Anthony E. Davis, *The Standard of Care in Legal Malpractice: Do the Model Rules of Professional Conduct Define It?*, 22 J. LEGAL PROF. 33, 53 (stating that, even if no contractual engagement has been established, the attorney still owes a fiduciary duty to the client). There are circumstances in which the provision of legal services is not for economic compensation; the Sixth Amendment guarantees the right to counsel—and hence mandates the provision of legal services—in criminal matters, U.S. CONST. amend. VI, and, even while serving their clients, attorneys owe duties to the legal system and serve as officers of the court. See MODEL RULES OF PROF'L CONDUCT, R. 3.3 (2002) (discussing a lawyer's candor toward the tribunal); see generally Eugene R. Gaetke, *Laywers as Officers of the Court*, 42 VAND. L. REV. 39 (1989). Also, in individual instances, legal services may be entirely intrastate in nature.

452. See *Morrison*, 529 U.S. at 613 (stating that gender-motivated violence is not economic activity); *Lopez*, 514 U.S. at 551 (stating that the Gun Free School Zones Act simply does not regulate commerce). Yet, the Court affirmed previous precedents that had established broad congressional authority to regulate classes of activity having a substantial effect on interstate commerce even if such activities were wholly intrastate or had little economic impact. See *id.* at 557-61 (citing the ability to regulate local farming, wages of lumber workers, and local motels because of a substantial effect on interstate commerce).

453. *Morrison*, 529 U.S. at 615-16; *Lopez*, 514 U.S. at 563. In *Morrison* in particular, the Court described how, given the tenuous relationship between gender-motivated violent criminal conduct and its purported effects on the national economy, the same sweeping arguments could be used to justify regulation of anything—including, for example, family law, since the aggregate effect of marriage, divorce, and childrearing on the national economy is significant. *Morrison*, 529 U.S. at 615-16.

regulation to activities tied to interstate commerce, the Court never stated that such an element is required nor that legislation cannot reach purely intrastate activity.⁴⁵⁴ Thus, the Court did not overturn longstanding precedent establishing that legislation under the Commerce Clause can reach instances in which the activity is noncommercial in nature or wholly intrastate as long as the class of activities regulated exerts a substantial effect on interstate commerce or the national economy.⁴⁵⁵ National privilege legislation therefore would be a valid exercise of Commerce Clause power even though it would reach instances of noncommercial and wholly intrastate activity, because it would regulate a class of activities that is largely commercial and exerts both a direct and substantial effect on interstate commerce.⁴⁵⁶

Finally, although both *Morrison* and *Lopez* make reference to areas of traditional state regulation, both opinions do so in the context of striking down congressional acts that regulated *noneconomic* activity with *attenuated* effects on interstate commerce.⁴⁵⁷ As to congressional

454. *Morrison*, 529 U.S. at 613; *Lopez*, 514 U.S. at 561-62.

455. *See Morrison*, 529 U.S. at 610 (favorably referring to substantial effect precedent) (citing *Lopez*, 514 U.S. at 560); *Lopez*, 514 U.S. at 552-61 (discussing and upholding a variety of decisions recognizing the expansive authority of Congress over classes of activity having a substantial effect on interstate commerce, even if entirely intrastate or having little economic effect). *See generally* *Perez v. United States*, 402 U.S. 146, 154-56 (1971) (looking to the class of activities as a whole and determining that, if the collective effect of the class on interstate commerce is substantial, a law governing such activity is constitutional when applied to all within the class); *Maryland v. Wirtz*, 392 U.S. 183, 197 n.27 (1968) (stating that, where statutory scheme substantially relates to commerce, the de minimis character of individual instances arising under the statute is inconsequential); *Wickard v. Filburn*, 317 U.S. 111, 125 (1942) (stating that even local activity not commonly regarded as commerce may be reached by Congress if the activity exerts a substantial economic effect on interstate commerce).

456. Wholly intrastate or pro bono legal services have an impact on the rendering of legal services as a whole and, hence, commerce, just as the consumption of home grown and consumed wheat in *Wickard* had an impact on interstate commerce in wheat. *See Lopez*, 514 U.S. at 559 (characterizing the *Wickard* rationale as a regulation of intrastate activity that resultingly affected interstate commerce) (citing *Wickard*, 317 U.S. at 128).

457. *See Morrison*, 529 U.S. at 617-18 (rejecting the notion that Congress can regulate violent criminal conduct based on the assumption that the conduct's aggregate effect will impact interstate commerce); *Lopez*, 514 U.S. at 568 (concluding that the possession of a gun within a designated school zone is not an economic activity that in the aggregate will affect interstate commerce). In *Morrison*, for example, the Court stated as follows:

[T]he Constitution requires a distinction between what is truly national and what is truly local. In recognizing this fact we preserve one of the few principles that has been consistent since the [Commerce] Clause was adopted. The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.

Morrison, 529 U.S. at 617-18.

regulation of economic activity, the Court was clear: “Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.”⁴⁵⁸ Thus, while the attorney-client privilege—and the legal profession more generally—has been largely, but not exclusively, regulated by the states, congressional legislation regulating the privilege would be valid because it would regulate economic activity that substantially affects interstate commerce.⁴⁵⁹ Indeed, as this Article hopefully demonstrates, the problems with the privilege that the legislation would address are truly national in character.

b. The Tenth Amendment and the values of federalism

This legislation likewise would not offend the Tenth Amendment or the values of federalism it serves.⁴⁶⁰ In several recent cases, the Supreme Court has sought to delineate when congressional enactments, purportedly pursuant to Congress’s enumerated powers, in fact exceed these powers and invade the province of state sovereignty reserved by the Tenth Amendment.⁴⁶¹ For example, in *New York v. United States*,⁴⁶² the Court struck down a portion of the Low-Level Radioactive Waste Policy Amendments Act⁴⁶³ as exceeding Congress’s power because the Act left states in a position where they either were “commandeered” into the service of federal regulatory purposes, or were required to implement legislation enacted by Congress.⁴⁶⁴ Similarly, in *Printz v. United States*,⁴⁶⁵ the Court invalidated

458. *Morrison*, 529 U.S. at 610 (quoting *Lopez*, 514 U.S. at 560).

459. See *New York v. United States*, 505 U.S. 144, 158 (1992) (analyzing the changing nature of the economy and asserting that activities once thought to be purely local now have a substantial effect on the national economy and, therefore, fall under the Commerce Clause); see also Dudley, *supra* note 273, at 1832-36 (discussing the growing federal interest in regulating the attorney-client privilege because of the growth of federal litigation and federal regulation in various fields and suggesting that the implication is that federal privileges should apply preemptively even in state court when the dispute involves federally regulated activity).

460. U.S. CONST. amend X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

461. See *infra* notes 462-71 and accompanying text. See generally Erwin Chemerinsky, *The Federalism Revolution*, 31 N.M.L. REV. 7 (2001) (discussing historical and contemporary trends in the Supreme Court’s Tenth Amendment jurisprudence).

462. 505 U.S. 144 (1992).

463. 42 U.S.C. §§ 2021b-2021j (1994) (originally enacted as Pub. L. No. 99-240, 99 Stat. 1842).

464. *New York*, 505 U.S. at 175 (striking the portion of the Act that gave state governments the choice of either taking title to radioactive waste and assuming liability of generators’ damages, or regulating the disposal of waste according to Congress’s instructions). The Court found this choice unconstitutional, since both

a provision in the Brady Handgun Violence Prevention Act⁴⁶⁶ requiring state officers—namely, “chief law enforcement officer[s]” of local state jurisdictions—to conduct background checks on prospective purchasers of handguns because the legislation compelled states and state executive officials to administer a federal regulatory program.⁴⁶⁷

More recently, however, in *Reno v. Condon*,⁴⁶⁸ the Court upheld the portion of the Driver’s Privacy Protection Act⁴⁶⁹ (“DPPA”) that restricts the states’ ability to disclose a driver’s personal information without the driver’s consent.⁴⁷⁰ Distinguishing *New York* and *Printz*, the *Condon* Court concluded that the regulatory scheme of the DPPA is a valid exercise of Congress’s Commerce Clause power that does not run afoul of the Tenth Amendment because it neither requires states to enact laws or legislation, nor commands state executive officials to assist in the enforcement of federal law regulating private individuals.⁴⁷¹

The *New York* and *Printz* decisions—both internally and now in light of *Condon*—do not call into question the validity of the privilege legislation I propose. To the extent that parties assert the federal privilege right in state court, the limitations on commandeering state officials articulated in *New York* and *Printz* do not apply. Indeed, in both decisions, the Supreme Court recognized that state judicial officers must enforce federal law.⁴⁷² For example, in *New York*, the Court distinguished earlier cases involving enforcement of federal laws in state courts:

These cases involve no more than an application of the Supremacy Clause’s provision that federal law “shall be the supreme Law of the Land,” enforceable in every State. More to the point, all involve congressional regulation of individuals, not congressional requirements that states regulate. Federal statutes enforceable in

options went beyond Congress’s power to regulate, and both options commandeered state officials into serving federal regulatory purposes. *Id.*

465. 521 U.S. 898 (1997).

466. 18 U.S.C. §§ 921-925A (2000) (originally enacted as Pub. L. No. 103-159, 107 Stat. 1536).

467. *Printz*, 521 U.S. at 924-25.

468. 528 U.S. 141 (2000).

469. Pub. L. No. 103-322, § 30, 108 Stat. 2099 (1994).

470. *Condon*, 528 U.S. at 150-51.

471. *See id.* (finding also that drivers’ information, which historically has been sold in commerce, is in fact an article of commerce sufficient to support federal regulation).

472. *See infra* notes 473-76 and accompanying text. *See generally* Bellia, *supra* note 429, at 956-57 (discussing recent trends in federal control over state courts and their enforcement of federal law and procedure).

state courts do, in a sense, direct state judges to enforce them, but this sort of federal “direction” of state judges is mandated by the text of the Supremacy Clause.⁴⁷³

In *Printz*, the Court offered a similar assessment, stating that “the Constitution was originally understood to permit imposition of an obligation on state judges to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for judicial power.”⁴⁷⁴ The Court noted that this notion comes directly from the “Judges Clause” portion of the Supremacy Clause,⁴⁷⁵ which provides that “the Judges in every State shall be bound [by federal law].”⁴⁷⁶

Since *New York* and *Printz*, some scholars have questioned whether Congress has the authority under the Commerce Clause or otherwise to require state judges to conform to federal regulatory mandates in all circumstances.⁴⁷⁷ This is particularly true in the wake of The Y2K Act of 1999,⁴⁷⁸ in which Congress sought to require state courts to change the mode or manner in which they adjudicate state-law claims arising from the “Y2K bug.”⁴⁷⁹ For example, in a recent article, Professor Bellia argues that, while state courts must enforce federal rights of action and defenses, and “procedural” rules that are “part and parcel” of those federal rights, Congress has no authority to prescribe procedural rules for state courts to follow in adjudicating state-law claims.⁴⁸⁰

I agree with Professor Bellia that there may be limits on Congress’s authority to prescribe procedural rules for state courts to follow, unhinged from any federal substantive right or defense. I do not believe, however, that my proposal to federalize privilege runs afoul of any such limitation. Although the privilege has been mislabeled variously in the past as merely procedural, evidentiary, or testimonial,

473. *New York*, 505 U.S. at 178-79.

474. *Printz*, 521 U.S. at 907.

475. *Id.*

476. *Id.* (quoting U.S. CONST. art. VI, cl. 2).

477. See, e.g., Bellia, *supra* note 429, at 964 (explaining the circumstances under which the Commerce Clause permits Congress to regulate state court proceedings); Wendy E. Parmet, *Stealth Preemption: The Proposed Federalization of State Court Procedures*, 44 VILL. L. REV. 1, 3-10 (1999) (discussing a number of proposed federal regulatory regimes that would impose procedural rules on state courts).

478. 15 U.S.C. §§ 6601-6617 (2001).

479. For example, the Y2K Act prescribed notice and pleading requirements for civil actions arising out of computer failures associated with the inability to read dates after December 31, 1999. These notice and pleading requirements would apply not only to federal claims or claims brought in federal court, but also to state-law claims brought in state court. *Id.* § 6601; see also Bellia, *supra* note 429, at 953-55 (discussing the Act’s provisions).

480. See Bellia, *supra* note 429, at 974-85 (analyzing the interpretations of relevant cases regarding conflicts between state and federal laws and their impact on state court proceedings).

for all the reasons discussed earlier, the modern privilege is a doctrine embodying *substantive* protections.⁴⁸¹ Unlike the provisions of the Y2K Act, federal privilege legislation would not simply regulate the mode and manner in which state-law claims are adjudicated. Rather, the privilege regulates, indeed protects and promotes, primary conduct and commercial activity—attorney-client communications and the provision of legal services—and serves interests wholly extrinsic to the litigation in which it is asserted.⁴⁸² The substantive character of privileges is one of the key reasons why Article V of the Proposed Rules of Evidence failed, why Congress adopted Rule 501 instead, and why Congress has exempted privileges from the Supreme Court’s rule-making authority.⁴⁸³ Thus, whether called a “right,” an “immunity,” or a “defense” to compulsory disclosure, the federal privilege protection I propose is substantive in nature.

Congress has the authority to create substantive rights or defenses that preempt contrary state regulations and which are applicable in state courts even in the absence of a corresponding federal cause of

481. See *supra* notes 119-26, 394-401 and accompanying text.

482. See Dudley, *supra* note 273, at 1801-02 (discussing the substantive nature of privilege rules and the substantive ends that they serve); Margaret G. Stewart, *Federalism and Supremacy: Control of State Decision-Making*, 68 CHI.-KENT L. REV. 431, 432 (1992) (“In other words, laws that tell you what promises you must keep, what degree of care you must exercise toward others, and what lies you must not tell, all regulate your daily conduct and are ‘substantive.’”); Weinstein, *supra* note 119, at 373 (discussing the substantive impact of privilege rules and the extrinsic interests they serve).

Similarly, the attorney-client privilege is distinguishable from other rules of evidence that simply regulate the character of proof in judicial proceedings. A leading evidence treatise draws this distinction nicely, first explaining as follows:

Most evidence law is . . . essentially dissociated from substantive policies, for it does not seek to protect any particular social value outside the immediate context of the conduct of litigation, nor even to insure that a particular kind of claim will be made relatively easier or more difficult to pursue or defend.

MUELLER & KIRKPATRICK, *supra* note 12, § 175, at 263. Privileges, however, do not exist primarily to aid in ascertaining the facts or preserving efficiency. See *id.* (discussing the need to reconcile federal law of privileges with *Erie*).

Rather, privilege law seeks to implement policies which in any given instance are likely to be wholly extrinsic both to the litigating process and the fact-ascertaining policy underlying most evidence law, and extrinsic as well to the policies underlying the laws which govern the substantive issues at the heart of the lawsuit.

Id.; Goldberg, *supra* note 119, at 683-84 (distinguishing privileges from other rules of evidence).

483. See *supra* note 482 and accompanying text. Even if the Supreme Court were to accord Congress little deference on the question of what constitutes a substantive right, it would be difficult for the Court to ignore the history and commentary—including the Court’s own—recognizing that the privilege is unlike most procedural rules in that it regulates primary conduct and serves exclusively extra-judicial interests. See *supra* note 400 and accompanying text.

action.⁴⁸⁴ Such federal preemptive rights or defenses need not address the substance or merits of the state-law claim to be fully enforceable in state court; in other words, a right or defense asserted in litigation is not “procedural” in nature simply because it does not address the merits of the claims.⁴⁸⁵ The Federal Arbitration Act⁴⁸⁶ (“FAA”), for example, federalizes the right to enforce arbitration clauses in written contracts and preempts state law less protective of that right.⁴⁸⁷ Among other things, the Act severely limits judicial review of arbitration awards.⁴⁸⁸ In so doing, however, the Act neither creates a corresponding federal right of action nor serves as a defense

484. Professor Bellia and other scholars do not dispute that, pursuant to the Judges Clause, state courts must enforce constitutionally enacted federal defenses to state claims, in addition to enforcing federal claims. *See* Bellia, *supra* note 429, at 974-76 (reviewing the Judges Clause, *New York*, and *Printz*, and concluding that state courts must enforce valid federal claims or a defense to a state claim).

485. After tracing the historical treatment of enforcement of federal law in state courts, Professor Bellia argues that federal regulation of state-court procedures independent of federally recognized substantive rights exceeds Congress’s authority because, under traditional conflict-of-law principles, a forum state, like other sovereigns, may apply its own procedural law to all rights of action that it enforces. *Id.* at 988-89. He therefore concludes that states can exclusively regulate procedure when enforcing a cause of action that arises under the laws of another state. *Id.* at 992. Although he does not define “procedure” in detail, he does state that procedure includes remedies and modes of proceeding, unless such remedies or modes are part and parcel of federally recognized rights. *Id.* at 989.

Although I find most of Professor Bellia’s analysis convincing, he does not address privileges or other similar doctrines, and therefore does not consider the possibility of federal substantive rights and protections that do not form the basis for a federal claim or a federal defense to the substance or merits of a state claim. I simply argue that federal substantive rights are not limited to federal rights of action or federal defenses to the substance or merits of state claims, but also extend to rights addressing primary conduct that can be enforced or protected in other ways, such as through immunity from compulsory disclosure. Yet, to the extent Professor Bellia would distinguish between “substance” and “procedure” along the lines traditionally utilized by courts analyzing conflict-of-law situations, mechanical application of such an approach would not work in the privilege context. Historically, the privilege often has been viewed as a court-centered and, hence, evidentiary or procedural doctrine. *See* discussion *supra* Part I.A. For all of the reasons I have discussed, however, the modern privilege is not a purely procedural doctrine, despite past characterizations. *See supra* notes 119-26, 394-401 and accompanying text. Thus, the fact that most courts have defaulted to the privilege law of the forum when facing a conflict, *see supra* Part II.C, should not inform our analysis of whether federal regulation of privilege infringes upon state sovereignty.

486. 9 U.S.C. §§ 1-307.

487. *See Southland Corp. v. Keating*, 465 U.S. 1, 15-16 (1984) (describing the FAA’s preemptive effects as unintentional by Congress, where limiting the Act to disputes subject only to federal court jurisdiction would frustrate the intent of Congress that arbitration agreements be placed on the same ground as other contracts).

488. *See* 9 U.S.C. § 10 (limiting the grounds for judicial vacation of arbitration awards); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 232 (1987) (stating that the FAA necessarily limits judicial review of arbitration awards); *Southland Corp.*, 465 U.S. at 14-15 (concluding that the FAA’s provisions are applicable in state courts).

to the substance or merits of underlying state-law claims, which may be asserted and prosecuted in the arbitration proceeding.⁴⁸⁹ Yet the Supreme Court has held that the FAA creates substantive protections applicable in state courts and represents a proper exercise of Congress's power.⁴⁹⁰ Similarly, the federal privilege right I propose would be neither the basis for a federal claim nor a defense to the substance or merits of state-law claims, but, like the FAA, a federal privilege would protect federally recognized substantive rights and therefore would not intrude upon a sphere of state court sovereignty over pure procedure, to the extent one exists.⁴⁹¹

To the extent my proposed federal privilege protection applies to administrative and legislative proceedings, it still does not invade the province of state sovereignty as delineated in *New York, Printz*, and *Condon*. From the outset, it is worth noting that *Printz* reaffirms earlier decisions in which the Court upheld congressional mandates requiring state administrative agencies to apply federal law while acting in a judicial capacity.⁴⁹² Thus, to the extent administrators,

489. See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983) (stating that the FAA creates a body of federal substantive law regarding the duty to honor an agreement to arbitrate, but the FAA does not create any independent federal question jurisdiction).

490. *Southland Corp.*, 465 U.S. at 11-12; *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 25 n.32.

491. Indeed, because privilege law is truly independent of the merits of a claim, congressional privilege law does not create the kinds of dangers to the values of federalism that Professor Bellia and others fear. See Bellia, *supra* note 429, at 996-97 (expressing concern that federal regulation of state court procedure might federalize tort law without even allowing public recognition or consideration). One of the concerns commentators have raised about the Y2K Act and other proposed tort reforms is that Congress will covertly or slyly federalize tort law by modifying, for example, pleading standards or burdens of proof. See *id.* (suggesting that federalizing state court procedures in technical and obscure manners is a way for the federal government to preempt state tort law) (quoting Parmet, *supra* note 477, at 65). Because the federal privilege right that I propose is universal and wholly independent of the underlying claims and defenses, it has no such covert effects.

If my proposed legislation required state courts to *order* disclosure or admission of attorney-client communications not protected by the legislation, there would be a better argument that the legislation would require states to adopt certain procedures detached from a federal substantive right. But I only propose that Congress enact *protective* legislation, establishing a single, uniform immunity from disclosure of protected attorney-client communications. If this federal protection is inapplicable in a given instance, state courts obviously are free to refuse to compel disclosure or admit the communications on other grounds, such as, for example, protection of work product, or avoidance of unfair prejudice. Moreover, while I would recommend that states simply adhere to the federally mandated privilege protection, they could provide *more* protection, if they so chose.

492. *Printz v. United States*, 521 U.S. 898, 929 & n.14 (1997) (upholding *Testa v. Katt*, 330 U.S. 386 (1947), and *FERC v. Mississippi*, 456 U.S. 742 (1982)). In fact, the *Printz* Court stated that, when states transfer some adjudicatory functions to administrative agencies, Congress can also, either explicitly or implicitly, prescribe that such adjudication must account for federal law. *Id.*

administrative law judges, commissioners, or other state executives serve in a judicial capacity, Congress can require them to apply federal law in their adjudicative proceedings.

Yet, even in nonadjudicative contexts, the federal privilege right does not run afoul of the Tenth Amendment because the federal privilege neither requires states to enact legislation nor commandeers state executive officials to assist in the enforcement of federal law. Like the DPPA found constitutional in *Condon*, the privilege legislation would be self-executing, requiring no state legislative enactment of laws or regulations. Similarly, the privilege legislation would not require state officials to assist in the enforcement of federal law regulating private individuals.⁴⁹³ My proposed privilege legislation simply *prohibits* state officials from compelling parties to reveal protected attorney-client communications. Although this prohibition may require some effort on the part of state officials to comply with congressional mandates—including determining the scope of the protection—such efforts do not offend the Constitution. As the Court indicated in *Condon*, since regulation demands compliance, action required for compliance is an inevitable and commonplace consequence of regulated state activity.⁴⁹⁴ The legislation therefore validly extends to state administrative and legislative proceedings, whether adjudicative or not.

Finally, while federal privilege legislation survives scrutiny under *New York*, *Printz*, and *Condon* because it commandeers neither state legislatures nor state executive officials, it also does not offend the values of federalism the Court emphasized in these and other “new federalism” cases. The value of federalism cherished most prominently in *New York* and *Printz* is political accountability.⁴⁹⁵ In *New York*, for example, the Court scolded Congress for acting in stealth, which ultimately reduces the accountability of both federal and state officials:

If the citizens of New York, for example, do not consider that making provision for the disposal of radioactive waste is in their best interest, they may elect state officials who share their view.

493. See *Reno v. Condon*, 528 U.S. 141, 151 (2000) (finding that the DPPA regulates states as database owners, and does not require the state legislatures to enact any laws nor require state officials to assist in the enforcement of federal statutes).

494. See *id.* at 150 (finding no constitutional defect when a state, wishing to engage in certain federally regulated activities, takes legislative action to comply with federal standards) (quoting *South Carolina v. Baker*, 485 U.S. 505, 514-15 (1988)).

495. See *infra* notes 496-97 and accompanying text.

That view can always be pre-empted under the Supremacy Clause if it is contrary to the national view, but in such a case it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular. But where the Federal Government directs the States to regulate, it may be state officials who bear the brunt of public disapproval, while federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.⁴⁹⁶

Similarly, in *Printz*, the Court criticized Congress for forcing state officials to bear the costs and blame for implementing a federal regulatory program.⁴⁹⁷

The federal privilege legislation I propose *enhances* rather than diminishes political accountability. As preemptive, generally applicable legislation, my proposal applies equally to state and federal judicial and nonjudicial proceedings, and federal courts ultimately will have the final say on matters of interpretation. Thus, unlike the regulatory regimes that the Court faulted in *New York* and *Printz*, Congress is not delegating the dirty or unpopular work of fashioning and implementing a regulatory scheme to state officials.⁴⁹⁸ Up to this point, both the federal and state governments have left privilege policy making largely in the hands of the judiciary, their least politically accountable branch. My proposal would bring the policy debate out of the shadows of the common law and into the full light of legislative discourse, where, for the reasons discussed earlier, the debate belongs.⁴⁹⁹ There is no stealth here: once Congress enacts this legislation, Congress alone would be accountable for the policy choices contained in the legislation, and would not be able to avoid responsibility for the law's successes or failures.

496. *New York v. United States*, 505 U.S. 144, 168-69 (1992).

497. *Printz*, 521 U.S. at 929-30.

498. Although the difficult task of actually applying privilege doctrine will fall largely on judges, administrative law judges, arbitrators, and other decision makers, this will be the case whether or not Congress enacts the legislation that I have proposed. In fact, if Congress were to enact the proposed legislation, Congress would ease the burden of state decision makers by explicitly supplying the legal doctrine to be applied. Moreover, absent exclusive federal jurisdiction, any federal enactment will impose the burdens of compliance on state officials, and application on state judges. See *Condon*, 528 U.S. at 151 (explaining that federal regulatory statute frees state legislature from need to enact laws and regulations).

499. See *supra* Part III.B.

Similarly, both *New York* and *Printz* make clear that the prerogative of the central government in a system of dual sovereigns is to regulate individuals, not other governments.⁵⁰⁰ Thus, Congress—pursuant to the Commerce Clause and other enumerated powers—is to exercise its legislative authority directly over individuals, not through states.⁵⁰¹ Consistent with this principle, federal privilege legislation regulates, protects, and promotes commerce between attorneys and clients directly by shielding attorney-client communications from compelled disclosure by anyone, including judges and other officials.

A further value inherent in the concepts of “dual sovereignty” and limited central government is that of decentralization and sharing of governmental control.⁵⁰² For example, a balance of power between governments reduces the risk of abuse of power.⁵⁰³ In addition, decentralization allows for greater experimentation and local variations to fit local needs.⁵⁰⁴ Dual sovereignty also recognizes, however, that this value has its limits, and, in fact, that there is also value in centralization.⁵⁰⁵ The Commerce Clause itself was intended to address the failure of the Articles of Confederation to regulate commerce crossing sovereign boundaries.⁵⁰⁶ The balance between these values is not static: the value of local experimentation and variation subsides when it begins to have a harmful or burdensome effect on the nation as a whole.⁵⁰⁷ For this reason, the Court acknowledged in *Lopez*, *Morrison*, and *New York* that the scope of Congress’s authority to regulate has changed appropriately over time to fit changing circumstances.⁵⁰⁸ Indeed, “activities once considered

500. See *Printz*, 521 U.S. at 919-20 (stating that the Framers designed a system in which the federal and state governments would exercise concurrent authority, rather than the federal government acting through the states); *New York*, 505 U.S. at 166 (noting that the Constitution confers upon Congress the power to regulate individuals, not states).

501. *New York*, 505 U.S. at 162 (stating that “the Constitution has never been understood to confer upon Congress the ability to require the states to govern according to Congress’ instructions.”).

502. See *infra* notes 500-06 and accompanying text.

503. *Printz*, 521 U.S. at 921.

504. See, e.g., Bellia, *supra* note 429, at 999-1000 (arguing that federalism “serves the diverse needs of a heterogenous society and promotes experimentation with different programs”).

505. See *infra* notes 506-07.

506. See *New York*, 505 U.S. at 158 (“The defect of power in the existing confederacy to regulate the commerce between its several members [has] been clearly pointed out by experience.”) (quoting THE FEDERALIST NO. 42, at 267 (James Madison) (Clinton Rossiter ed., 1961)).

507. See *id.* at 157 (noting that today’s federal government undertakes activities beyond the imagination of the Framers because our constitutional framework has been sufficiently flexible over the past two centuries to permit enormous changes in the nature of government).

508. *United States v. Morrison*, 529 U.S. 598, 607-08 (2000); *United States v.*

purely local have come to have effects on the national economy, and have accordingly come within the scope of Congress's commercial power.⁵⁰⁹

These lessons apply in the attorney-client privilege context. Earlier in the nation's history, local development of, and variations in, privilege law made sense, particularly given the difficulty in balancing the interests at stake. But that time has now passed. As the nation's economy, regulatory structure, and litigation practices have changed, the role of legal services and, correspondingly, the privilege, also have changed. While perhaps once provincial in character, the privilege now has obvious national implications, and the balance of interests informing privilege doctrine and application is now necessarily a matter of national concern.

CONCLUSION

Two things about the attorney-client privilege are certain: it is here to stay despite lingering controversy, and it will continue to inflict substantial costs. The challenge then, is how to maximize the potential benefits of the privilege while minimizing its costs. The current regime is ill-equipped to meet this challenge. Today's common-law approach to developing privilege doctrine has failed to achieve reasonably certain privilege protections. Indeed, privilege doctrine is in disarray. The conflicts between, and confusion within, jurisdictions around the country not only burden courts, clients, and attorneys with additional transaction costs, but also create sufficient uncertainty to defeat the very purposes that the privilege is supposed to serve. Other proposed reforms seek to address aspects of this uncertainty, but fail to offer an adequately comprehensive solution.

Federalizing privilege is the answer. To achieve reasonable certainty, we must abandon our multi-jurisdictional, common-law approach in favor of a national, codified solution. That leads inevitably to Congress. Congress has the capacity and power to enact legislation that provides clear, unqualified, and generally applicable privilege protections. If and when privilege reformers capture Congress's attention, Congress should craft this type of legislation, rather than settle for lesser reforms.

Lopez, 514 U.S. 549, 556 (1995); *New York*, 505 U.S. at 158.
509. *New York*, 505 U.S. at 158.