

DRAFT ARTICLE V OF THE FEDERAL RULES OF EVIDENCE ON
PRIVILEGES, ONE OF THE MOST INFLUENTIAL PIECES OF
LEGISLATION NEVER ENACTED: THE STRENGTH OF THE
INGROUP LOYALTY OF THE FEDERAL JUDICIARY

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“The stone that the builders rejected has become the cornerstone.”¹

One of the best settled bromides in legisprudence is that, in construing statutes, the courts should generally attach little weight to legislative inaction. Over the years, the courts have stated the bromide with such colorful expressions as the declarations that “legislative inaction is a thin reed from which to divine” intention² and unenacted bills are ““legislative tea leaves,” inherently incapable of shedding light on the meaning” of enacted legislation.³ The courts have cautioned that it is treacherous to infer any intent from legislative silence.⁴

Different courts sound this cautionary note to varying degrees. Some courts state flatly that they will not rely at all on a legislature’s failure to act.⁵ Other courts take the position that legislative inaction is entitled to little,⁶ limited,⁷ or weak⁸ weight. Still others assert only that legislative ac-

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1. *Psalms* 118:22 (English Standard).
2. *Tomlinson v. Qualcomm, Inc.*, 118 Cal. Rptr. 2d 822, 828 (Cal. Ct. App. 2002).
3. *San Rafael Elementary Sch. Dist. v. State Bd. of Educ.*, 87 Cal. Rptr. 2d 67, 73 n.12 (Cal. Ct. App. 1999) (citation omitted) (quoting *Baldwin v. County of Tehama*, 36 Cal. Rptr. 2d 886, 895 (Cal. Ct. App. 1994)).
4. *Castro v. Chi. Hous. Auth.*, 360 F.3d 721, 729 (7th Cir. 2004).
5. *Nat’l Rifle Ass’n of Am., Inc. v. Reno*, 216 F.3d 122, 129 (D.C. Cir. 2000); *State ex rel Cal. State Lands Comm’n v. City of Long Beach*, 23 Cal. Rptr. 3d 126, 136 (Cal. Ct. App. 2005) (“No inference may be drawn from a bill upon which the Legislature took no action.”).
6. *Atkinson v. Inter-Am. Dev. Bank*, 156 F.3d 1335, 1342 (D.C. Cir. 1998); *Am. Fin. Serv. Ass’n v. City of Oakland*, 104 P.3d 813, 827 (Cal. 2005); *Graham v. DaimlerChrysler Corp.*, 101 P.3d 140, 152 n.5 (Cal. 2004), *modified*, No. S112862, 2005 Cal. LEXIS 16 (Cal. Jan. 12, 2005); *People v. Barker*, 96 P.3d 507, 514 (Cal. 2004); *Lolley v. Campbell*, 48 P.3d 1128, 1135 (Cal. 2002); *People v. Mendoza*, 4 P.3d 265, 283 (Cal. 2000); *S. Cal. Edison Co. v. Pub. Utils. Comm’n*, 12 Cal. Rptr. 3d 441, 450 (Cal. Ct. App. 2004); *Med. Bd. of Cal. v. Superior Court*, 4 Cal. Rptr. 3d 403, 415 (Cal. Ct. App. 2003); *People v. Baniqued*, 101 Cal. Rptr. 2d 835, 845 (Cal. Ct. App. 2000).
7. *Martin v. Szeto*, 84 P.3d 374, 378 (Cal. 2004); *Warmington Old Town Assocs. v. Tustin Unified*

tion is not conclusive.⁹ The common denominator among these courts is that they regard legislative inaction with skepticism. The legislature conventionally expresses its intent by action, that is, the formal enactment of bills. Moreover, there can be a myriad¹⁰ of reasons for a legislature's failure to enact a bill or a particular provision in a proposed bill.¹¹

Despite the treacherous nature of drawing any inference from legislative inaction, on occasion, courts have ascribed significance to inaction and treated it as a legitimate factor in construing enacted bills.¹² In the words of one court, the legislature "sometimes can speak as clearly by opting not to enact proffered language as by enacting it."¹³ In most cases in which the courts attach weight to legislative inaction, they do so for a negative purpose. If in the process of deliberating over a bill that is ultimately enacted the legislature rejects certain language, the surrounding circumstances sometimes support the inference that the legislature disapproved of the outcome represented by the rejected language.¹⁴ The United States Supreme Court itself has declared that "[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language."¹⁵

However, it is truly exceptional for the courts to put legislative inaction to affirmative use and, after the rejection of a proposed provision, to construe the enacted legislation as if it included the rejected provision. Yet that is precisely what has happened with draft Article V of the Federal Rules of Evidence on privileges. As Part I of this Article explains, in the early 1970s the federal judiciary proposed a draft of the Federal Rules of Evidence to Congress. Draft Article V on privileges contained thirteen provisions, four devoted to general matters such as waiver and nine to specific privileges such as attorney-client and psychotherapist-patient.¹⁶ In the past, when the judiciary recommended the draft Federal Rules of Civil and Criminal Procedure, Congress allowed the judiciary to promulgate the draft rules without amendment.¹⁷ However, the reaction to the draft of the Federal Rules of

Sch. Dist., 124 Cal. Rptr. 2d 744, 755 (Cal. Ct. App. 2002).

8. *Butterbaugh v. Dep't of Justice*, 336 F.3d 1332, 1342 (Fed. Cir. 2003); *People v. Anderson*, 50 P.3d 368, 376 (Cal. 2002).

9. *Maranian v. Workers' Comp. Appeals Bd.*, 97 Cal. Rptr. 2d 418, 428 (Cal. Ct. App. 2000).

10. *Broad Music, Inc. v. Roger Miller Music, Inc.*, 396 F.3d 762, 774 (6th Cir. 2005), *cert. denied*, 126 S. Ct. 374 (2005).

11. *Castro v. Chi. Housing Auth.*, 360 F.3d 721, 729 (7th Cir. 2004) (explaining even a deliberate omission of a provision is "'often subject to alternative interpretations'") (quoting *Alto Dairy v. Vene-man*, 336 F.3d 560, 566 (7th Cir. 2003)).

12. *Planning & Conservation League v. Dep't of Fish and Game*, 67 Cal. Rptr. 2d 650, 657 (Cal. Ct. App. 1997), *depublished by*, 939 P.2d 746 (Cal. 1997).

13. *Mass. Ass'n of Health Maint. Orgs. v. Ruthardt*, 194 F.3d 176, 185 (1st Cir. 1999).

14. *See European Cmty. v. RJR Nabisco, Inc.*, 355 F.3d 123, 133-34 (2d Cir. 2004), *vacated*, 544 U.S. 1012 (2005), *reinstated*, 424 F.3d 175 (2d Cir. 2005).

15. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (quoting *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 392-93 (1980) (Stewart, J., dissenting)).

16. FED. R. EVID. 501 advisory committee notes to 1974 enactment.

17. *See* Jack H. Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*,

Evidence, particularly to Article V devoted to privileges, was so strong and negative that Congress blocked the promulgation of the draft.¹⁸ Congress decided that if the Rules of Evidence were to take effect, they would do so only as statutes.¹⁹ In the course of its deliberation over the draft Rules of Evidence, Congress ultimately decided to jettison draft Article V.²⁰ However, during the deliberations, it became crystal clear to Congress that if it attempted to legislate specific privilege rules, it would run a huge political risk, namely, offending a large number of influential special interest groups.²¹ Consequently, Congress enacted the current Rule 501 as a substitute:

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.²²

The Federal Rules of Evidence eventually took effect in 1975.²³ Remarkably, in the intervening thirty years, although Congress appeared to repudiate draft Article V, the federal courts have generally construed Rule 501 as both including all the privileges proposed in the draft²⁴ and excluding privileges omitted from the draft. Thus, for the most part, the federal courts have reached the very same outcomes that would have been mandated by draft Article V.

This is an extraordinary result. Again, while courts sometimes ascribe weight to legislative intent, they almost always do so for negative purposes

27 STAN. L. REV. 673, 675 (1975).

18. 1 EDWARD J. IMWINKELRIED, *THE NEW WIGMORE: EVIDENTIARY PRIVILEGES* § 4.2.2.a, at 173 (2002).

19. Friedenthal, *supra* note 17, at 675.

20. 1 IMWINKELRIED, *supra* note 18, § 4.2.2.a, at 173-74.

21. *Id.* § 4.2.2.b-e, at 177-89.

22. FED. R. EVID. 501.

23. RONALD L. CARLSON, EDWARD J. IMWINKELRIED, EDWARD J. KIONKA & KRISTINE STRACHAN, *EVIDENCE: TEACHING MATERIALS FOR AN AGE OF SCIENCE AND STATUTES* 16 (5th ed. 2001).

24. See Raymond F. Miller, Comment, *Creating Evidentiary Privileges: An Argument for the Judicial Approach*, 31 CONN. L. REV. 771, 775 (1999) ("Over the last 25 years, the federal courts have . . . confirm[ed] the eight privileges which existed in the common law prior to 1973 and . . . introduce[d] one new privilege. The recognition of a psychotherapist-patient privilege in *Jaffee v. Redmond* completed a process started a quarter century ago. The federal judiciary now recognizes all of the privileges originally proposed in 1973 [in the Supreme Court's draft of Article V of the Federal Rules of Evidence] . . ." (footnotes omitted)).

as the basis for an inference that the legislature did not want the courts to interpret legislation as if it incorporated language the legislature rejected during the deliberative process. Here, in contrast, as a general proposition, the courts have embraced the draft which Congress refused to enact.

The first part of this Article chronicles the history of draft Article V. This part traces the judiciary's development of the draft, Congress's treatment of draft Article V, and the courts' later interpretations of Rule 501. This part establishes the degree to which the courts have embraced the draft rejected by Congress. The second part of the Article attempts to explain this phenomenon. The second part explores three different types of explanations: those related to evidentiary policy, others resting on politics, and finally, another hypothesis related to the psychological concepts of ingroup loyalty and outgroup prejudice. This part of the Article demonstrates that the psychological theory is the hypothesis with the greatest explanatory power. Congress's repudiation of draft Article V presented the federal judiciary with an exceptional fact situation. While Congress had rejected draft Article V, in a sense the draft was the judiciary's own work product, and the subject-matter related to the bailiwick of the courts' own work. Moreover, it was evident to the judiciary that the same political fears that prevented Congress from adopting specific privilege statutes would likely preclude Congress from generating the consensus needed to override judicial "enactment" of Article V. The Article concludes that in this unique fact situation, the power of the subconscious ingroup loyalty of the federal judiciary can play a major role in explaining why the courts have largely adopted the very rules that Congress rejected.

I. A HISTORY OF DRAFT ARTICLE V OF THE FEDERAL RULES OF EVIDENCE

This part of the Article presents an overview of the history of draft Article V.²⁵

The Generation of the Draft of Article V by the Federal Judiciary

The drafting process began in 1958.²⁶ In that year, the American Bar Association adopted a resolution urging the United States Judicial Conference to consider adopting a uniform set of evidentiary rules for federal courts.²⁷ The Conference referred the request to its Standing Committee on Rules of Practice and Procedure.²⁸ The committee recommended appointing a special committee to explore that possibility.²⁹

25. For a comprehensive history, see 1 IMWINKELRIED, *supra* note 18, § 4.2. This part of the Article is based in part on section 4.2. Reprinted with the kind permission of Aspen Law & Business Publishers.

26. *Id.* § 4.2.1.a, at 150.

27. Comm. on Fed. Courts, *Revisiting the Codification of Privileges under the Federal Rules of Evidence*, 55 THE REC. ASS'N BAR OF CITY OF N.Y., 149, 151 (2000).

28. *Rules of Evidence: Hearings Before the Spec. Subcomm. on Reform of Fed. Crim. Laws of the*

In 1961, the Judicial Conference authorized the appointment of the committee. Acting on that authorization, Chief Justice Earl Warren appointed an ad hoc committee³⁰ that included both judges and practitioners.³¹ Professor Thomas Green of the University of Georgia School of Law served as the committee's reporter.³²

In 1962, the special committee submitted its report.³³ The committee concluded that it was both feasible and advisable to promulgate a set of uniform rules.³⁴ The committee acknowledged that, in the past, the courts had deemed certain evidentiary doctrines, such as the parol evidence rule, to be substantive in character.³⁵ However, the consensus of the committee members was that evidentiary rules should be classified as procedural in nature.³⁶ If so, the Rules Enabling Act³⁷ empowered the Supreme Court to promulgate evidentiary rules.³⁸ Further, the committee believed that a set of uniform rules would be preferable to the status quo.³⁹ The committee asserted that in several respects, federal evidence law needed "clarification."⁴⁰ The committee believed that the common-law process was too slow to yield the necessary reforms. According to the committee, the appellate courts "make only infrequent sallies into the field" with the result that the needed clarification would require "many, many years."⁴¹

In 1963, the Judicial Conference approved the ad hoc committee's report.⁴² In 1965, Chief Justice Warren announced the formation of a second committee, an advisory committee tasked with drafting the new rules.⁴³ The committee included judges, practitioners, and academics.⁴⁴ The academics included Judge Jack Weinstein, who had long taught evidence at Columbia University, and Professor Green, who had earlier served as the reporter for the ad hoc committee.⁴⁵ Professor Edward Cleary was named reporter.⁴⁶

Comm. on the Judiciary, 93d Cong. 74 (1973) [hereinafter *Hearings 1*] (statement of Judge Albert B. Maris, Chairman, Standing Comm. on Rules of Practice and Procedure, Judicial Conf. of the United States).

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. COMMITTEE ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, RULES OF EVIDENCE: A PRELIMINARY REPORT ON THE ADVISABILITY AND FEASIBILITY OF DEVELOPING UNIFORM RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS, 30 F.R.D. 73 (1962) (hereinafter PRELIMINARY REPORT).

34. 1 IMWINKELRIED, *supra* note 18, § 4.2.1.a, at 151.

35. *Id.*

36. *Id.*

37. 28 U.S.C. § 2072 (2000).

38. *Id.*

39. 1 IMWINKELRIED, *supra* note 18, § 4.2.1.a, at 151.

40. PRELIMINARY REPORT, *supra* note 33, at 98, 108.

41. *Id.* at 99.

42. *Hearings 1*, *supra* note 28, at 75 (statement of Judge Albert B. Maris).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

According to Judge Weinstein, the consensus of the committee was that privileges are “‘hindrances’ which should be curtailed.”⁴⁷ Most committee members believed that any “‘privileges contained in the rules of evidence [ought to] be narrow.’”⁴⁸ That was certainly the view of the reporter, Professor Cleary. In later testimony before the House Subcommittee, Professor Cleary cited Dean Wigmore’s view that many statutory privileges are the product of effective lobbying by special interest groups which simply want the prestige of a privilege.⁴⁹ As Professor Cleary noted, privileges often operate as “‘blockades” to the quest for truth.”⁵⁰

Later, in 1965, the committee set about its work. It held fourteen sessions spread out between 1965 and 1968.⁵¹ The committee produced its first of many drafts in March 1969.⁵² The process of revising the various drafts continued until 1972.⁵³ During this period, the committee struggled with two questions.

One question was the extent to which federal courts ought to apply state privilege law.⁵⁴ The committee agreed with its predecessor, the ad hoc committee, that evidentiary rules should be characterized as procedural.⁵⁵ On that assumption, the committee reasoned that it would be permissible for the federal courts to completely ignore state privilege law and apply an exclusively federal body of privilege doctrine.⁵⁶ The committee’s draft would have applied federal privilege law across the board in criminal cases, federal question civil cases, and even federal diversity civil cases.⁵⁷

The other question was the content or tenor of federal privilege law. Given the committee members’ bias against privileges, the content of their draft rules was perhaps predictable. To begin with, they wanted to freeze federal privilege law: a federal judge would be permitted to recognize only the privileges set out in the draft Federal Rules.⁵⁸ The judge could not enforce any uncodified privileges.⁵⁹ To be enforceable, the privilege had to be set out in a specific rule.

The specific rules omitted several privileges that many jurisdictions recognized either by statute or as a matter of common law. Thus, there was

47. 23 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5422, at 685 (1980) (quoting 2 JACK WEINSTEIN & MARGARET BERGER, WEINSTEIN’S EVIDENCE ¶ 501[01], at 501-12 (1975)).

48. 23 WRIGHT & GRAHAM, *supra* note 47, § 5422, at 685 (quoting 2 WEINSTEIN & BERGER, *supra* note 47, ¶ 501[01], at 501-12).

49. *Hearings I*, *supra* note 28, at 555-56 (reply statement of Edward W. Cleary).

50. *Id.* at 558.

51. *Id.* at 14-15 (testimony of Judge Albert B. Maris).

52. COMM. ON THE RULES OF PRACTICE AND PROCEDURES OF THE JUDICIAL CONF. OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS AND MAGISTRATES, 46 F.R.D. 161 (1969).

53. 1 IMWINKELRIED, *supra* note 18, § 4.2.1.h, at 169.

54. *Id.* § 4.2.1.c, at 155.

55. *Id.* at 156.

56. *Id.*

57. *Id.* at 155-57.

58. *See* 23 WRIGHT & GRAHAM, *supra* note 47, § 5421, at 647-48.

59. *See id.* at 648.

no provision for either a general medical privilege⁶⁰ or any privilege for confidential communications between spouses.⁶¹ Both omissions represented “major” departures from state practice.⁶² As finally approved by the Supreme Court, the draft contained several general provisions. Draft Rule 501 mandated that federal courts apply only the specified federal privileges, draft Rule 511 addressed waiver, draft Rule 512 dealt with privileged information previously disclosed under compulsion, and draft Rule 513 governed the propriety of adverse comment on the invocation of a privilege.⁶³ Draft Article V also included nine specific provisions for required reports to governmental agencies (draft Rule 502), lawyer-client privilege (draft Rule 503), psychotherapist-patient privilege (draft Rule 504), penitent-clergy privilege (draft Rule 506), political vote (draft Rule 507), trade secrets (draft Rule 508), state secrets and other confidential government information (draft Rule 509), and identity of an informer (draft Rule 510).⁶⁴

On February 5, 1973, the Chief Justice officially transmitted the approved draft to Congress.⁶⁵ However, the Court did so over Justice Douglas’s vigorous dissent. He singled out draft Article V on privileges for special criticism.⁶⁶ He contended that, unlike most evidentiary doctrines, privileges relate to substantive policy.⁶⁷ They are not purely procedural matters. Although the Rules Enabling Act authorized the Court to promulgate “rules of practice and procedure,”⁶⁸ in Justice Douglas’s view that authority did not extend to prescribing rules for evidentiary privileges.⁶⁹ The Justice’s criticism of draft Article V set the stage for the attacks that would be launched against the draft when the Court’s transmittal reached the Hill.

*The Congressional Response: The Rejection of the Judiciary’s
Draft of Article V*

In 1934, Congress delegated procedural rulemaking authority to the federal judiciary.⁷⁰ For forty years, Congress passively acquiesced while the

60. 1 IMWINKELRIED, *supra* note 18, § 4.2.1.c, at 158.

61. *Id.*

62. 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S EVIDENCE ¶ 501[06], at 501-83 to -84 (Joseph M. McLaughlin ed., 1996).

63. RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES, 56 F.R.D. 183, 230-60 (1972). Draft Rule 505 was entitled “Husband-Wife Privilege.” *Id.* at 244-45. However, the title was misleading. Although the rule would have recognized an accused spouse’s right to altogether bar his or her spouse from testifying against him or her, the provision did not provide any further protection for confidential communications between spouses. *Id.*

64. *Id.* at 230-60.

65. C.J. WARREN BURGER, COMMUNICATION FROM THE CHIEF JUSTICE OF THE UNITED STATES TRANSMITTING THE PROPOSED RULES OF EVIDENCE TO THE UNITED STATES COURTS AND MAGISTRATES, H.R. DOC. NO. 93-46, at III (1st Sess. 1973).

66. *Id.* at VI.

67. *Id.*

68. 28 U.S.C. § 2072 (2000).

69. H.R. DOC. NO. 93-46, at VI (Douglas, J., dissenting).

70. 28 U.S.C. §§ 2071-77 (2000); *Rules of Evidence: Hearings Before the Comm. on the Judiciary*, 93d Cong. 31 (1974) (hereinafter *Hearings 2*) (testimony of Judge Roszel C. Thomsen).

Supreme Court promulgated court rules without any legislative intervention.⁷¹ The Federal Rules of Civil and Criminal Procedure were issued in that manner. However, that tradition was shattered when the Supreme Court transmitted the draft Federal Rules of Evidence to Congress.⁷² The Court's submission of the draft evidence rules to Congress triggered a veritable "crisis"⁷³ in the rulemaking process, straining relations between the federal judiciary and Congress.

Congress's reaction to the draft was both swift and violent.⁷⁴ The submission of the draft created a furor⁷⁵ that prompted Congress to take immediate action to delay the effective date of the rules.⁷⁶ In particular, the privilege provisions of the draft proved to be controversial and "emotionally provocative."⁷⁷ Within two days of the submission of the draft in February 1973, the Senate had approved Resolution 583 blocking implementation of the draft.⁷⁸ In March 1973, the House of Representatives passed a similar suspension bill.⁷⁹ In the House, the bill was supported by Representative (later Judge) William Hungate, the chair of the House's Special Subcommittee on Reform of Federal Criminal Laws.⁸⁰ His committee prepared a report on the bill.⁸¹ The report stated that the purpose of the bill was "to promote the separation of constitutional powers."⁸² The report pointed out that the House's Special Committee on Reform of Federal Criminal Laws had opened hearings on the draft rules in February.⁸³ The report asserted that although the hearings lasted for only four days, "the magnitude of the questions [about the draft] . . . has become clear."⁸⁴ The report then identified a number of specific questions of "magnitude," including:

Are there constitutional impediments to the promulgation of Rules of Evidence by the Supreme Court, rules which may impinge on state-created substantive rights and infringe on the constitutional separation of powers?

. . . .

71. *Hearings 2*, *supra* note 70, at 31 (testimony of Judge Roszel C. Thomsen).

72. *Comm. on Fed. Courts*, *supra* note 27, at 149-50; *see* Friedenthal, *supra* note 17, at 675, 682-85.

73. Friedenthal, *supra* note 17, at 676.

74. 2 WEINSTEIN & BERGER, *supra* note 62, ¶ 509[02], at 509-14.

75. *See* 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 501 App. 101[1][a], at 501 App.-22 (Joseph M. McLaughlin ed., Matthew Bender 2d ed. 1997).

76. *See id.*

77. *Comm. on Fed. Courts*, *supra* note 27, at 151.

78. *Hearings 2*, *supra* note 70, at 129 (prepared statement of Richard H. Keatinge & John T. Blanchard); *id.* at 82 (prepared statement of James F. Schaeffer & Joe A. Moore).

79. *Id.* at 129 (prepared statement of James F. Schaeffer & Joe A. Moore).

80. *Id.* at 82 (prepared statement of James F. Schaeffer & Joe A. Moore).

81. COMM. ON THE JUDICIARY, FEDERAL RULES OF EVIDENCE, H.R. REP. NO. 93-52 (1973).

82. *Id.* at 1.

83. *Id.* at 3.

84. *Id.*

Should various of the individual rules be adopted in their present form? For example, the Special Subcommittee on Reform of Federal Criminal Laws has received adverse testimony with respect to the formulation of the rules relating to doctor-patient and husband-wife privileges . . . [and] secrets of state and official information . . . among others.⁸⁵

Representative Bertram Podell of New York was particularly critical of draft Article V. Of his six specific complaints about the draft, four related to Article V.⁸⁶ For example, he faulted the draft for omitting a general medical privilege⁸⁷ and a spousal communications privilege.⁸⁸

After blocking the Supreme Court's attempt to promulgate the draft Rules, both houses convened hearings on the draft. The House conducted its hearing first. On the question of federalizing privilege law, Judge Maris appeared to defend the Advisory Committee's view that federal courts should apply exclusively federal doctrine, even in diversity cases.⁸⁹ However, it is fair to say that most witnesses at the House hearings felt otherwise.⁹⁰ The primary thrust of their testimony was that even if it was legally permissible for federal courts to disregard state privilege law, it was unwise to do so.⁹¹ A large number of witnesses argued that at least in some cases, notably diversity suits, federal courts ought to apply state privileges, since privileges affect substantive social policy.⁹²

On the question of the tenor of federal privilege law, many witnesses objected to the draft for the stated reason that it curtailed some existing privileges,⁹³ specifically the general medical privilege and the spousal communications privilege.⁹⁴ In its eventual report, the House Judiciary Committee underscored the "adverse testimony with respect to the formulation of the rules relating to doctor-patient and husband-wife privileges."⁹⁵ At the same time, several witnesses decried what they regarded as the Advisory Committee's attempt to expand government privileges. "Government privilege was a special target, perhaps because the witnesses realized that [the Watergate] Congress battling President Nixon over claims of executive privilege would be sympathetic to that criticism."⁹⁶

85. *Id.* at 3-4.

86. *See Hearings 1, supra* note 28, at 5-8 (testimony of Hon. Bertram L. Podell).

87. *Id.* at 7.

88. *Id.*

89. *Id.* at 16 (testimony of Judge Albert B. Maris).

90. 1 IMWINKELRIED, *supra* note 18, § 4.2.2.b, at 178.

91. *See* 3 WEINSTEIN & BERGER, *supra* note 75, § 501 App. 101[1][b], at 501 App.-23.

92. *Hearings 1, supra* note 28, at 109 (testimony of Alvin K. Hellerstein, Francis E. Koch & Joseph T. McLaughlin, appearing on behalf of the Association of the Bar of the City of New York); *id.* at 171-73 (statement of Charles R. Halpern & George T. Frampton Jr., appearing on behalf of the Washington Council of Lawyers); *id.* at 215, 219 (statement of a committee of New York trial lawyers).

93. 1 IMWINKELRIED, *supra* note 18, § 4.2.2.b, at 179.

94. *See, e.g., Hearings 1, supra* note 28, at 241-42 (letter to Rep. Hungate from Charles L. Black).

95. COMM. ON THE JUDICIARY, FEDERAL RULES OF EVIDENCE, H.R. REP. NO. 93-52, at 4 (1973).

96. 1 IMWINKELRIED, *supra* note 18, § 4.2.2.b, at 179 (footnote omitted).

Given this testimony, it was relatively easy for the House drafters to reach two conclusions. First, they decided that at least in diversity cases in which state substantive law supplies the rule of decision, federal courts should follow state privilege doctrine.⁹⁷ Second, they concluded that the specific privilege rules proposed by the judiciary were unacceptable.⁹⁸ However, it soon became apparent that drafting substitute privilege statutes would be terribly difficult and run the risk of offending many influential special interest groups.⁹⁹ Simply stated, privilege doctrine was “a hot potato”:¹⁰⁰

While the attacks on the Advisory Committee’s attempts to abolish and restrict privileges may have accounted for the majority of the complaints, the testimony was quite conflicting. Many witnesses simultaneously called for the expansion of some privileges and the narrowing of others. In addition, with the exception of proposed Rule 507 protecting the secrecy of votes, there was some testimony complaining about the excessive breadth of every proposed privilege. . . . To further complicate matters, some witnesses complained that at once, a particular privilege was too narrow in some respects while overly broad in others.¹⁰¹

Rather than proposing substitute privilege statutes, the House drafters recommended enacting a single statute providing only that when federal privilege doctrine governed, the federal courts would follow “the principles of the common law [as they may be governed] in the light of reason and experience.”¹⁰²

The drafters were so fearful of venturing into the thicket of special interest group politics that they sent their draft, H.R. 5463, to the House floor under an unusual rule precluding any amendments to the draft.¹⁰³ To justify the peculiar rule, Representative Bolling stated that draft Rule 501 was frankly a compromise “that could easily blow up all over the place if amended.”¹⁰⁴ As it turned out, though, even that announced rule did not preclude the amendment of the bill. During the floor debate, Representative Holtzman proposed adding a section providing that in the future, the Su-

97. *Id.* § 4.2.2.b, at 181.

98. *Id.*

99. See Eileen A. Scallen, *Analyzing “The Politics of [Evidence] Rulemaking,”* 53 HASTINGS L.J. 843, 867-68 (2002).

100. Panel Transcript, *The Politics of [Evidence] Rulemaking*, 53 HASTINGS L.J. 733, 759 (2002).

101. Edward J. Imwinkelried, *An Hegelian Approach to Privileges Under Federal Rule of Evidence 501: The Restrictive Thesis, the Expansive Antithesis, and the Contextual Synthesis*, 73 NEB. L. REV. 511, 532-33 (1994) (footnotes omitted).

102. H. COMM. ON THE JUDICIARY, 93D CONG., RULES OF EVIDENCE SUPPLEMENT: HEARINGS BEFORE THE SUBCOMM. ON CRIMINAL JUSTICE 156 (Comm. Print 1973) (hereinafter Comm. Print).

103. See 23 WRIGHT & GRAHAM, *supra* note 47, § 5421, at 657 (citing 120 CONG. REC. 1408 (1974)).

104. *Id.* § 5421, at 657-58 (quoting 120 CONG. REC. 1408, 1408 (1974) (remarks of Mr. Bolling)).

preme Court could not promulgate court rules governing privilege doctrine without Congress's affirmative approval.¹⁰⁵ In the past, Congress has reserved to itself only the negative power to intervene to block the Court's promulgation of proposed rules. The amendment went even farther in restricting the judiciary's power to formulate privilege law. Tellingly, the House adopted the amendment when it voted to approve the bill.¹⁰⁶

The scene now shifted to the Senate hearings. Those hearings convened in June 1974.¹⁰⁷ The very first witness in the Senate hearings was Representative Hungate.¹⁰⁸ On the one hand, he informed the Senate Committee that "50 percent of the complaints in our committee related to the section on privileges."¹⁰⁹ On the other hand, he stressed how hard it would be to reach consensus on specific privilege provisions such as those proposed by the Advisory Committee. He bluntly cautioned the Senators that if they "open[ed] this [issue] up," it would be "very difficult" to decide which groups deserved the protection of a privilege.¹¹⁰ In effect, Hungate warned the Senators that any attempt to draft specific privilege statutes would turn into a political Pandora's box.¹¹¹ In his words, "the social workers and the piano tuners [will] want a privilege."¹¹²

Near the end of the Senate hearings, the committee received its staff memorandum on the draft Federal Rules.¹¹³ The memorandum essentially echoed Representative Hungate's warning. It stated that determining the contours of particular privileges would be "extremely controversial."¹¹⁴ The staff predicted that "no agreement was likely to be possible as to the content of specific privilege rules."¹¹⁵

A number of witnesses appeared after Representative Hungate and before the submission of the staff memorandum. However, after Hungate's testimony, most astute observers could "read the handwriting on the wall":¹¹⁶

Most of those intervening witnesses appeared to sense that it was a waste of time to advocate particular policy positions on specific

105. 120 CONG. REC. 2391 (1974).

106. 1 IMWINKELRIED, *supra* note 18, § 4.2.2.c, at 184.

107. *Hearings 2*, *supra* note 70.

108. *Id.* at 3 (testimony of Hon. William L. Hungate).

109. *Id.* at 6; see also Kenneth S. Broun, *Giving Codification a Second Chance—Testimonial Privileges and the Federal Rules of Evidence*, 53 HASTINGS L.J. 769, 769 (2002) ("The testimonial privilege rules in the Proposed Rules of Evidence . . . almost doomed the total project. The presence of those rules became a rallying point for general opposition to the entire proposal . . .").

110. *Hearings 2*, *supra* note 70, at 6 (testimony of Hon. William Hungate).

111. 1 IMWINKELRIED, *supra* note 18, § 4.2.2.d, at 184.

112. *Hearings 2*, *supra* note 70, at 6 (testimony of Hon. William Hungate). Representative Hungate's sarcastic reference to "social workers" was ironic in light of the Supreme Court's eventual decision to extend a privilege to licensed clinical social workers. See *Jaffee v. Redmond*, 518 U.S. 1 (1996).

113. *Hearings 2*, *supra* note 70, at 355 (S. Judiciary Comm. staff memorandum).

114. *Id.* at 356.

115. *Id.*

116. 1 IMWINKELRIED, *supra* note 18, § 4.2.2.d, at 185.

privileges. The witnesses evidently . . . believed that it was a foregone conclusion that Congress would not enact detailed privilege statutes. Rather, the witnesses largely confined their remarks to the question of the role of state privileges in federal court.¹¹⁷

The Senate tinkered with the House's language on that question,¹¹⁸ and in late 1974, a Conference Committee ironed out the differences between the House and Senate language on the topic.¹¹⁹ In December of that year, both houses voted to adopt the Conference Committee Report.¹²⁰ Public Law 93-595, establishing the Federal Rules of Evidence, was approved by the two houses on January 2, 1975.¹²¹ On January 3, 1975, President Nixon's successor, President Ford, signed the legislation.¹²² As enacted, the statute included the version of Rule 501 set out in the Introduction and omitted all the specific privileges rules proposed by the judiciary in draft Article V. However, as in the case of the premature report of Mark Twain's death, any proclamation of the demise of draft Article V would prove to be "greatly exaggerated."¹²³

The Judiciary's Counter-Response: The Resurrection of Draft Article V

As of 1975, when the Federal Rules took effect, draft Article V was formally dead, but it was hardly forgotten. One student author urged that since the Supreme Court had approved the specific privilege provisions and Congress had not legislated to the contrary on specific privileges, the courts should apply the provisions of draft Article V as if they had been enacted.¹²⁴ The federal courts were unwilling to go to the length of embracing that bold view, but they nevertheless attached significant weight to draft Article V. Rule 501 directed the courts to develop privilege doctrine "in the light of reason and experience."¹²⁵ Almost immediately, courts and commentators began referring to the provisions of the draft. They often stated that the draft was "useful,"¹²⁶ a "reference point,"¹²⁷ a "starting point,"¹²⁸ or a "guide."¹²⁹

117. *Id.*

118. *Id.* at 186-88.

119. *Id.* § 4.2.2.e, at 188-89.

120. H.R. REP. NO. 93-1597, at 1 (1974) (Conf. Rep.).

121. Bill Establishing Rules of Evidence for United States Courts and Magistrates, 11 WEEKLY COMP. PRES. DOC. 12 (Jan. 6, 1975).

122. *Id.*

123. Cable from Europe to the Associated Press, *quoted in* THE SHORTER BARTLETT'S FAMILIAR QUOTATIONS 407 (Christopher Morely & Louella D. Everett eds., 1959). *See also* JOHN BARTLETT, FAMILIAR QUOTATIONS 528 (Justin Kaplan ed., 16th ed. 1992).

124. Note, *The Proposed Federal Rules of Evidence: Of Privileges and the Division of Rule-Making Power*, 76 MICH. L. REV. 1177, 1196 (1978). *See* 23 WRIGHT & GRAHAM *supra* note 47, § 5425, at 705.

125. FED. R. EVID. 501.

126. 3 WEINSTEIN & BERGER, *supra* note 75, § 501.2[1][ii], at 501-9.

127. *In re* Grand Jury Investigation, 918 F.2d 374, 380 (3d Cir. 1990).

128. *Id.* at 379; *In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 915 (8th Cir. 1997) ("starting place").

129. *Suburban Sew 'N Sweep, Inc. v. Swiss-Bernina, Inc.*, 91 F.R.D. 254, 259 (N.D. Ill. 1981); *In re*

in construing Rule 501. Many courts treated the draft as “persuasive” of the governing reason and experience.¹³⁰ Judge Weinstein’s treatise in particular contributed to the trend. As previously stated, Judge Weinstein had been a member of the Advisory Committee which drafted the Federal Rules, including Article V. He was and is a highly respected judicial authority on federal evidence, and his treatise on the subject is one of the most highly regarded and widely used texts on the subject. He made it a practice to refer to the provisions of draft Article V as “Supreme Court Standards.”¹³¹ Given Judge Weinstein’s stature in the field and his role in drafting the Federal Rules, his view carried significant weight, and his terminology became relatively popular.

The impact of draft Article V, though, extended well beyond the terminology which the federal courts used to describe the draft’s provisions. Much more importantly, the draft has affected the substance of the privilege decisions made by the federal courts.

That effect can be seen at the highest level in the decisions of the United States Supreme Court. Two of the Court’s privilege decisions under Rule 501, *United States v. Gillock*¹³² in 1980 and *Jaffee v. Redmond*¹³³ in 1996, are illustrative.

In *Jaffee*, the Court considered whether, under Rule 501, it should recognize a psychotherapist-patient privilege.¹³⁴ Prior to both the enactment of the Federal Rules and the Court’s decision, only a distinct minority of lower federal courts had recognized such a privilege.¹³⁵ Indeed, in Part I of his opinion for the majority, Justice Stevens acknowledged the continuing split of authority over the question.¹³⁶ In Part II of his opinion, the Justice posed the question of whether the Court should announce the existence of a federal psychotherapy privilege.¹³⁷ In the very first paragraph of Part II, Justice Stevens did several things. At the outset of the paragraph, he stated that the issue was reducible to the interpretation of Federal Rule 501.¹³⁸ In a footnote to the paragraph, he quickly pointed out that draft Article V had included Rule 504 creating a testimonial privilege for the psychotherapist-patient relationship.¹³⁹ In Part III, he reached the merits of the question. Part III was relatively short, consuming only six pages in the official United States Reports. Yet, in that short span, Justice Stevens found occasion to

Franklin Nat’l Bank Sec. Litig., 478 F. Supp. 577, 580 (E.D.N.Y. 1979); see also *Flora v. Hamilton*, 81 F.R.D. 576, 578 (M.D.N.C. 1978) (“strong guidance”).

130. See 23 WRIGHT & GRAHAM, *supra* note 47, § 5422, at 691 (some “scholars of the Progressive ideology” attempted to “equate[]” the content of the draft with “reason and experience”).

131. See *id.* at 692 (quoting 2 WEINSTEIN & BERGER, *supra* note 47, at 501-20.5).

132. 445 U.S. 360 (1980).

133. 518 U.S. 1 (1996).

134. *Id.* at 4.

135. See *id.* at 7.

136. *Id.* at 7.

137. *Id.* at 9-10.

138. *Id.* at 8.

139. *Id.* at 8 n.7.

cite the Advisory Committee Note to Rule 504 no fewer than four times.¹⁴⁰ He directly quoted the Note twice.¹⁴¹ Suffice it to say that he relied more heavily on the Advisory Committee Note than on any other authority, primary or secondary. It should come as no surprise that after drawing so extensively on the Note, Justice Stevens decided to endorse draft Rule 504's position that there should be a federal psychotherapist-patient privilege.¹⁴²

While the *Jaffee* Court invoked draft Article V to justify its decision to adopt a federal psychotherapy privilege, the *Gillock* Court also appealed to the draft but as part of the basis for its decision not to recognize a privilege. In that case, the accused was a Tennessee state legislator.¹⁴³ The indictment alleged that he had corruptly abused his public position; the charge was that he had accepted bribes to block a defendant's extradition and to introduce legislation enabling four persons to obtain master electricians' licenses to which they were not entitled.¹⁴⁴ To block the introduction of some inculpatory evidence, the accused analogized to the speech and debate clause¹⁴⁵ of the federal Constitution. The clause prevents federal prosecutors from using as evidence certain types of legislative acts against Members of Congress.¹⁴⁶ The accused contended that by parity of reasoning, he was entitled to a privilege to prevent the introduction of evidence of comparable conduct in his capacity as a state legislator.¹⁴⁷ The district court sustained the accused's contention,¹⁴⁸ but on certiorari, the Court rejected the contention in an opinion authored by then Chief Justice Burger.¹⁴⁹

As in *Jaffee*, the *Gillock* majority opinion stated that the disposition of the case turned on the interpretation of Federal Rule 501.¹⁵⁰ The majority advanced several arguments to support its conclusion. One of the arguments rested squarely on draft Article V. In response to the accused's contention that the proposed privilege had obvious policy merit, the majority commented that "[n]either the Advisory Committee, the Judicial Conference, nor this Court saw fit . . . to provide the privilege sought by *Gillock*" in any

140. *Id.* at 10-15.

141. *Id.* at 10-11, 14.

142. The text accompanying notes 131-36 arguably understates the weight that Justice Stevens attached to the draft Rule. At first blush, in one respect Justice Stevens seemed to depart from the rule. Although the draft Rule applied the privilege to communications only with psychiatrists and psychologists, the majority held that the privilege extended to communications with licensed clinical social workers. *Id.* at 15. However, in explaining that holding, Justice Stevens did not assert that the provision in the draft Rule was unsound. Rather, he endeavored to reconcile his holding with the Rule by arguing that "[i]n the quarter century since the Committee adopted its recommendations, much has changed in the domains of social work and psychotherapy." *Id.* at 16 n.16. See also Diane Marie Amann & Edward J. Imwinkelried, *The Supreme Court's Decision to Recognize a Psychotherapist Privilege in Jaffee v. Redmond*, 116 S. Ct. 1923 (1996): *The Meaning of "Experience" and the Role of "Reason" Under Federal Rule of Evidence 501*, 65 U. CIN. L. REV. 1019, 1045-47 (1997).

143. *United States v. Gillock*, 445 U.S. 360, 362 (1980).

144. *Id.*

145. U.S. CONST. art I., § 6, cl. 1.

146. *Gillock*, 445 U.S. at 370-73.

147. *Id.* at 362-63.

148. *Id.* at 362.

149. *Id.* at 374.

150. *See id.* at 366-68.

of its draft versions of Article V.¹⁵¹ In short, just as the inclusion of a psychotherapy privilege in draft Article V cut in favor of recognizing that privilege, the omission of a state legislative privilege in the draft counseled against recognizing that privilege.

After reading decisions such as *Gillock* and *Jaffee*, the lower federal courts have evidently gleaned the message that the Supreme Court attaches a good deal of weight to draft Article V.¹⁵² The results have been predictable. To begin with, even without the benefit of binding Supreme Court precedents such as *Jaffee* on some privileges, the lower federal courts have recognized every privilege that was set out in draft Article V.¹⁵³ Further, the courts have generally balked at recognizing the existence of any privilege that was omitted from draft Article V.¹⁵⁴ Despite the passage of over three decades since the enactment of the Federal Rules, no privilege omitted from draft Article V has come even close to garnering majority support among the lower federal courts.¹⁵⁵ The upshot is that the state of federal privilege law in 2006 looks amazingly like what it would have been if Congress had formally approved Article V in 1975.¹⁵⁶

To be sure, it would be a mistake to overstate the degree of congruence between current federal privilege law and the contents of draft Article V.

151. *Id.* at 367.

152. See Daniel J. Capra, *Advisory Committee Notes to the Federal Rules of Evidence That May Require Clarification*, 182 F.R.D. 268, 274 (1998) (“[I]n *Jaffee v. Redmond*, 116 S. Ct. 812 (1996), the Court, in adopting a psychotherapist-patient privilege, relied heavily on the fact that it was one of the nine specific privileges originally recommended by the Advisory Committee. The Court also stressed the reverse proposition—that if a privilege was not one of those proposed by the Advisory Committee, this would cut against its recognition under federal common law.”).

153. The following citations collect cases recognizing the privileges specified in the following draft Rules:

—Draft Rule 502 on required reports. 2 IMWINKELRIED, *supra* note 18, § 7.2; 24 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE: EVIDENCE* §§ 5451-61 (1986).

—Draft Rule 503 on the attorney-client privilege. 1 IMWINKELRIED, *supra* note 18, § 6.2.4; 24 WRIGHT & GRAHAM, *supra* note 153, §§ 5471-5507.

—Draft Rule 504 on the psychotherapy-patient privilege. 1 IMWINKELRIED, *supra* note 18, § 6.2.7; 25 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE: EVIDENCE* §§ 5521-52 (1989).

—Draft Rule 505 on the spousal privilege. 1 IMWINKELRIED, *supra* note 18, § 1.3.6; 25 WRIGHT & GRAHAM, *supra* note 153, §§ 5571-5602.

—Draft Rule 506 on the penitent-clergy privilege. 1 IMWINKELRIED, *supra* note 18, § 6.2.3; 26 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE: EVIDENCE* §§ 5611-26 (1992).

—Draft Rule 507 on political vote. 2 IMWINKELRIED, *supra* note 18, § 9.3; 26 WRIGHT & GRAHAM, *supra* note 153 §§ 5631-38.

—Draft Rule 508 on trade secrets. 2 IMWINKELRIED, *supra* note 18, § 9.2; 26 WRIGHT & GRAHAM, *supra* note 153, §§ 5641-52.

—Draft Rule 509 on state secrets and other official information. 2 IMWINKELRIED, *supra* note 18, § 7.4 & Ch. 8; 26A WRIGHT & GRAHAM, JR., *supra*, §§ 5673-93 (1992); 26 WRIGHT & GRAHAM, *supra* note 153, §§ 5661-72.

—Draft Rule 510 on the identity of an informant. 2 IMWINKELRIED, *supra* note 18, § 7.3; 26A WRIGHT & GRAHAM, *supra* note 153, §§ 5701-17.

154. 3 WEINSTEIN & BERGER, *supra* note 75, § 501.04[5], at 501-38.3; 23 WRIGHT & GRAHAM, *supra* note 47, § 5431, at 823-45.

155. Miller, *supra* note 24, at 775-76.

156. *Id.*

There are differences, some important.¹⁵⁷ However, as a general proposition, in the vast majority of cases, the courts have reached the same result that would have been dictated by the provisions of draft Article V. Moreover, in many cases, in the course of justifying the result, the courts have expressly appealed to the draft and the accompanying Advisory Committee Notes as authority. In effect, the federal judiciary has resurrected draft Article V. That resurrection is remarkable given Congress's seemingly resounding rejection of the draft in its entirety. The question that naturally arises is what can account for this outcome.

II. THE POSSIBLE EXPLANATIONS FOR THE FEDERAL COURTS' GENERAL RESURRECTION OF DRAFT ARTICLE V

What are the potential explanations for the outcome that "[t]he stone which the builders rejected [has] become the head of the corner"?¹⁵⁸ This part of the Article identifies several possible hypotheses and evaluates their validity.

Random chance accounts the outcome.

It is possible that it just so happens that the privilege decisions the federal courts have reached largely coincide with the provisions of draft Article V. Albeit conceivable, this hypothesis seems implausible. After all, these decisions are deliberate choices rather than accidental events. Moreover, as we have seen, in defending these choices, the federal courts have often cited either the provisions of draft Article V or the accompanying Advisory Committee Notes. The frequent citations strongly suggest that, at least to some degree, draft Article V has influenced the judicial choices on privilege issues.

157. 3 WEINSTEIN & BERGER, *supra* note 75, § 501.02[1][ii], at 501-9 (footnotes omitted) lists the following differences:

–Psychotherapist-patient privilege. The Supreme Court has extended the privilege, beyond the scope established in Standard 504, to cover statements to social workers.

–Marital communications privilege. Standard 505 does not protect confidential marital communications, whereas the common law does.

–Privilege against adverse spousal testimony. Standard 505 gives the criminal defendant the right to bar a spouse's testimony, whereas the Supreme Court has since held that the testifying spouse has the sole right to claim the spousal immunity privilege.

–Erroneous ruling and waiver. Standard 512 provides that the acceptance of an erroneous privilege ruling in one forum is not a waiver in another forum. This departs from the usual principles of *res judicata*, collateral estoppel, and the law of the case.

–Inference on assertion of privilege. Standard 513, which prohibits a comment or inference on an assertion of a privilege, has had a mixed reception in the courts, particularly in civil cases.

158. *Psalms* 118:22 (English Standard).

The basic pattern of the judicial decisions is simply to uphold the status quo of federal privilege doctrine as of 1975.

There is certainly a measure of truth in this hypothesis. In general, the draft Federal Rules of Evidence were much more of a status quo document than preceding draft comprehensive evidence codes such as the Model Code of Evidence.¹⁵⁹ That code was the work product of the American Law Institute.¹⁶⁰ The Reporter was Professor Edmund Morgan.¹⁶¹ “[H]e pondered the fate of the attorney-client privilege in terms that suggested its ultimate abolition. Arguments in support of the other privileges were dismissed as ‘mere sentiment’ and ‘rhetoric’”¹⁶² No jurisdictions adopted the Model Code.¹⁶³ Moreover, many of the specific privilege rules in draft Article V merely confirmed the existence of common-law privileges then recognized at common law. Draft Rules 503 on attorney-client privilege and 510 on the privilege for an informer’s identity fit that mold.

However, in material respects that pattern breaks down. Affirmatively, as the *Jaffee* Court acknowledged, draft Rule 504 recognized the existence of a psychotherapy privilege which was hardly a fixture in federal common-law privilege doctrine.¹⁶⁴ Negatively, the draft omitted the spousal communications privilege which was well settled in the federal common law of privileges. As Part I pointed out, the omission of that established privilege generated some of the most vociferous opposition to the draft voiced during the Congressional deliberations on the Federal Rules.

The tendency in the federal decisions is to conform federal privilege doctrine to the prevailing state practice.

Part I also noted that one of the sentiments expressed during the Congressional hearings was that privileges relate to substantive policy rather than merely procedure and that consequently, the federal courts should generally defer to state privilege choices. As finally worded, Rule 501 formally requires the federal courts to apply state privilege law “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.”¹⁶⁵ Thus, state privilege law can govern in federal civil cases based on diversity jurisdiction.

However, that formal effect is not the full extent of the impact of state privilege law on federal privilege doctrine; the impact also extends to federal criminal proceedings and civil actions based on federal question juris-

159. See Scallen, *supra* note 99, at 848-50.

160. *Id.* at 849.

161. *Id.*

162. *Id.* at 850 (quoting 21 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5005, at 86-87 (1977 & Supp. 2001)).

163. *Id.*

164. *Jaffee v. Redmond*, 518 U.S. 1, 13-14 (1996).

165. FED. R. EVID. 501.

diction. The Supreme Court has indicated that state privileges, including statutory privileges, may be used as part of the “experience” considered under Rule 501 to determine the content of federal privilege doctrine.¹⁶⁶ For instance, in *Trammel v. United States*,¹⁶⁷ when the Court had to decide whether an accused may bar his or her spouse from testifying against him or her, the Court considered state privilege doctrine, including statutory provisions.¹⁶⁸ The Court chose to give the privilege to the witness spouse rather than the accused spouse in part because the Court discerned a “trend in state law toward divesting the accused of the privilege.”¹⁶⁹ *Jaffee*¹⁷⁰ is a further example. *Jaffee* was a civil federal question case arising under the civil rights statute, 42 U.S.C. § 1983.¹⁷¹ Again, that case posed the question of whether the Court should recognize a psychotherapy privilege.¹⁷² In its decision deciding to confer the privilege, the Court attached very significant weight to state practice. In a footnote, the Court collected all the state statutes recognizing a psychotherapist-patient privilege.¹⁷³ Writing for the Court, Justice Stevens elaborated:

That it is appropriate for the federal courts to recognize a psychotherapist privilege under Rule 501 is confirmed by the fact that all 50 States and the District of Columbia have enacted into law some form of psychotherapist privilege. We have previously observed that the policy decisions of the States bear on the question whether federal courts should recognize a new privilege or amend the coverage of an existing one. See *Trammel*, 445 U.S., at 48-50 [T]he existence of a consensus among the States indicates that “reason and experience” support recognition of the privilege.¹⁷⁴

In another passage, the Court emphasized “[t]he uniform judgment of the States.”¹⁷⁵ In still another passage, the Court described the states’ view as “unanimous.”¹⁷⁶ Again, in *Gillock*, the Court stated it “has taken note of state privilege laws in determining whether to retain [privileges] in the federal system.”¹⁷⁷

166. 3 WEINSTEIN & BERGER, *supra* note 75, § 501.03[5][a], at 501-24 to -25; Amann & Imwinkelreid, *supra* note 142, at 1034. See also *In re Lindsey*, 158 F.3d 1263, 1268 (D.C. Cir. 1998) (“considerable weight”); *United States v. Schwensow*, 942 F. Supp. 402, 406 (E.D. Wis. 1996), *aff’d*, 151 F.3d 650 (7th Cir. 1998) (“state law analogies”); Timothy P. Glynn, *Federalizing Privilege*, 52 AM. U. L. REV. 59, 94 (2002) (arguing that the Supreme Court has not provided leadership in evolving privilege law).

167. 445 U.S. 40 (1980).

168. *Id.* at 48-50.

169. *Id.* at 49-50.

170. *Jaffee v. Redmond*, 518 U.S. 1 (1996).

171. *Id.* at 5.

172. *Id.* at 4.

173. *Id.* at 13 n.11.

174. *Id.* at 12-13 (footnote omitted).

175. *Id.* at 14.

176. *Id.*

177. *United States v. Gillock*, 445 U.S. 360, 368 n.8 (1980).

The weight the Court ascribes to state practice becomes all the more important because most states adopting codes based on the Federal Rules of Evidence “have patterned their privilege rules after [draft] Article V as proposed by the Advisory Committee.”¹⁷⁸ As of early 2001, forty-one states had adopted evidence codes patterned after the Federal Rules,¹⁷⁹ and in a majority of states a version of draft Article V is in force.¹⁸⁰ Perhaps the federal courts have not reached outcomes consistent with draft Article V because they attach so much significance to the draft itself. Rather, the explanation may be that the federal courts attach great weight to predominant state practice and coincidentally most states have chosen to adopt the specific privilege rules proposed in the draft.

This explanatory hypothesis has a good deal of power. However, like the status quo hypothesis, this explanation does not fully account for the current state of federal privilege law. As previously stated in Part I, one of the roots of the opposition to draft Article V was its failure to include a general medical privilege. Although draft Rule 504 included a psychotherapist privilege, the drafters indicated both that there was no general federal medical privilege and that they opposed framing a broader privilege.¹⁸¹ In *Jaffee*, although the Court created a federal psychotherapy privilege, the Court made it clear that it was unwilling to recognize a general medical privilege.¹⁸² In part, the opposition to draft Article V was so intense because a general medical privilege is entrenched in state evidence law. Statutes recognizing the privilege exist in forty-two states.¹⁸³ If the evolution of federal privilege law was driven solely by the federal courts’ desire to follow prevailing state practice, there would be a federal medical privilege. However, even today there is none in federal practice.¹⁸⁴

*The provisions of draft Article V happen to embody the most
“reason[able]” position in a Wigmorean sense on the overwhelming
majority of privilege issues.*

The preceding two explanations focus primarily on the “experience” factor mentioned in Rule 501. One explanation suggested that, in their deci-

178. 23 WRIGHT & GRAHAM, *supra* note 47, § 5421, at 664.

179. CARLSON ET AL., *supra* note 23, at 16.

180. 2 IMWINKELRIED, *supra* note 18, § 10.2.1, at 1201; 1 IMWINKELRIED, *supra* note 18, § 4.3.1, at 242.

181. See discussion *supra* Part I.

182. *Jaffee*, 518 U.S. at 10 (“Treatment by a physician for physical ailments can often proceed successfully on the basis of a physical examination, objective information supplied by the patient, and the results of diagnostic tests. Effective psychotherapy, by contrast, depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears.”).

183. Kit Kinports, *The “Privilege” in the Privilege Doctrine: A Feminist Analysis of the Evidentiary Privileges for Confidential Communications*, in FEMINIST PERSPECTIVES ON EVIDENCE 79, 91 n.75 (2000).

184. *Whalen v. Roe*, 429 U.S. 589, 602 n.28 (1977); 1 IMWINKELRIED, *supra* note 18, § 6.2.6, at 491 n.351 (collecting cases).

sions under Rule 501, the federal courts are following primarily the federal judicial experience underlying the status quo as of 1975. The second hypothesized that the primary thrust of federal privilege decisions is to conform federal law to the prevailing state practice. As we have seen, neither explanation is completely satisfactory.

The next potential explanation shifts to the “reason” factor mentioned in Rule 501. Perhaps the corpus of post-1975 federal privilege decisions has coincided with the content of draft Article V to such a remarkable degree because, as a generalization, both rest on the same type of reasoning or rationale. There is a good deal of truth in that generalization. Both draft Article V and modern federal privilege law appear to rest largely on Dean Wigmore’s classic instrumental theory of privileges.

Like the British utilitarian philosopher Jeremy Bentham,¹⁸⁵ Dean Wigmore firmly believed that the primary objective of the judicial system is rectitude of decision, that is, the accurate application of substantive law.¹⁸⁶ The question was how to reconcile that priority with the recognition of at least some privileges. For his part, Bentham vehemently opposed most privileges.¹⁸⁷ Bentham attacked even the attorney-client privilege.¹⁸⁸ However, for the most part Bentham’s attacks were unsuccessful. Although his proposals were well received by legal reformers, the courts and legislatures in both England and the United States rejected his radical proposal to repeal most privileges.¹⁸⁹

As previously stated, Wigmore generally concurred with Bentham that privileges hinder the search for truth. He wrote: “The investigation of truth and the enforcement of testimonial duty demand the restriction, not the expansion, of these privileges. They should be recognized only within the narrowest limits Every step beyond these limits helps to provide . . . an obstacle to the administration of justice.”¹⁹⁰ Precisely to confine privileges to those limits, Wigmore proposed a strict set of criteria for recognizing a communications privilege.¹⁹¹ The criteria rested on a key behavioral assumption, that is, that the typical layperson, such as a prospective client, would neither consult with nor divulge to a confidant, such as an attorney, but for the assurance of confidentiality furnished by a formal evidentiary privilege. In Wigmore’s words, the recognition of the privilege must be truly “essential” to the “satisfactory maintenance of the [protected relationship].”¹⁹² The assumption is that the average layperson is so concerned about subsequent evidentiary protection of his or her revelations that the

185. 1 IMWINKELRIED, *supra* note 18, § 2.5.

186. *Id.* § 3.2.2, at 126.

187. *See* 7 THE WORKS OF JEREMY BENTHAM 472 (John Bowring ed. 1962) (1843).

188. *Id.* at 473-75, 477-79; 5 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 304 (1827).

189. 1 IMWINKELRIED, *supra* note 18, § 3.1, at 120-21.

190. 8 JOHN HENRY WIGMORE, EVIDENCE § 2192, at 73 (McNaughton rev. 1961).

191. *See id.* § 2285, at 527-28.

192. *Id.* § 2285, at 527.

privilege is a “but-for cause” of the revelations.¹⁹³ Absent an attorney-client privilege, clients would be deterred from consulting attorneys. Similarly, without the protection of a privilege, patients’ communications with psychotherapists would be chilled. Again, to use Wigmore’s words, the courts should fashion a privilege only when the recognition of the privilege is an essential instrument or means of promoting social relationships “which in the opinion of the community ought to be sedulously fostered.”¹⁹⁴ The paradox was that the privileges which passed muster had to be absolute in character;¹⁹⁵ although they could be subject to special exceptions announced beforehand, they could not be qualified in the sense that they can be defeated by a case-specific showing of compelling need for the privileged information. If the layperson was as reluctant to confide as Wigmore supposed, at the very time of communication, the layperson must be able to predict with relative confidence that the courts will protect the communication in the future.¹⁹⁶ If the privilege were qualified, the layperson could not make that prediction; and if he or she could not make that forecast, they well might refrain from consulting or confiding.

Dean Wigmore’s theory is comforting. If one posits his behavioral assumption, the recognition of privileges comes relatively cost free to the judicial system.¹⁹⁷ It is true that in the microcosm, when a judge enforces a privilege, the judge is excluding relevant evidence that could assist the trier of fact. However, according to Wigmore’s instrumental theory, the excluded evidence would not have come into existence without the privilege.¹⁹⁸ As one commentator has observed, “In a perfect [Wigmorean] world, . . . the privilege would shield no evidence. . . . Eliminate the privilege, and the communication disappears”¹⁹⁹

There are grave questions about the validity of Wigmore’s behavioral assumption.²⁰⁰ However, it is clear that the members of the Advisory Committee that drafted Article V were sympathetic to Wigmore’s views. As Part I noted, the majority of the committee members viewed privileges as obstructions to the search for truth.²⁰¹ Like Wigmore, they believed that any

193. Melanie B. Leslie, *The Costs of Confidentiality and the Purpose of Privilege*, 2000 WIS. L. REV. 31, 31 (2000). See also 23 WRIGHT & GRAHAM, *supra* note 47, § 5422, at 673 (“causal relationship”).

194. WIGMORE, *supra* note 190, § 2285, at 527.

195. 1 IMWINKELRIED, *supra* note 18, § 3.2.4, at 139.

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

197. 3 WEINSTEIN & BERGER, *supra* note 75, § 504.03[4][a], at 504-10-11 (“The recognition of the privilege has little cost to the judicial system, because . . . if a privilege were not recognized, many of the confidential disclosures would never be made.”).

198. *Folb v. Motion Picture Indus. Pension & Health Plans*, 16 F. Supp. 2d 1164, 1178 (C.D. Cal. 1998), *aff’d*, 216 F.3d 1082 (9th Cir. 2000) (noting that the recognition of a privilege satisfying Wigmore’s criteria would “result[] in little evidentiary detriment where the evidence lost would simply never come into being if the privilege did not exist”).

199. Leslie, *supra* note 193, at 31.

200. See generally 1 IMWINKELRIED, *supra* note 18, § 5.2.

201. See also Thomas G. Krattenmaker, *Testimonial Privileges in Federal Courts: An Alternative to the Proposed Federal Rules of Evidence*, 62 GEO. L.J. 61, 85 (1973).

privileges set out in the rules ought to be “narrow.”²⁰² They produced a set of Notes which both frequently cited Wigmore and relied primarily on his instrumental theory.

There were some explicit attacks on the instrumental theory during the Congressional deliberations over the draft Federal Rules.²⁰³ However, once the Rules took effect in 1975, most federal courts brought a Wigmorean mindset to the task of interpreting Rule 501. The Supreme Court itself has repeatedly endorsed Wigmore’s theory. In 1976, in *Fisher v. United States*, the Court stated that the attorney-client privilege is intended to “protect[] only those disclosures . . . which might not have been made absent the privilege.”²⁰⁴ In the *Jaffee* opinion, Justice Stevens declared:

[T]he likely evidentiary benefit that would result from the denial of the [psychotherapy] privilege is modest. If the privilege were rejected, confidential conversations between psychotherapists and their patients would surely be chilled Without a privilege, much of the desirable evidence to which litigants such as [plaintiff] seek access—for example, admissions . . . —is unlikely to come into being. This unspoken “evidence” will therefore serve no greater truth-seeking function than if it had been spoken and privileged.²⁰⁵

Even more recently in 1998, in *Swidler & Berlin v. United States*²⁰⁶ dealing with the attorney-client privilege, Chief Justice Rehnquist wrote that “without the privilege, the client may not have made such communications in the first place.”²⁰⁷ The Chief Justice continued that “the loss of evidence is [therefore] more apparent than real.”²⁰⁸

In several cases, the Court has relied on classically Wigmorean reasoning to come down on the side of the result proposed in draft Article V. For example, both draft Rule 503 on attorney-client privilege and draft Rule 504 on the psychotherapy privilege provided for absolute privileges; while the draft rules set out exceptions to the scope of the privilege, the draft rules did not empower courts to later override a privilege merely because a litigant had a desperate need for the privileged information. In *Jaffee*, dealing with the psychotherapy privilege, while the Court of Appeals for the Seventh Circuit recognized the privilege, that court treated the privilege as qualified.²⁰⁹ The court held that a showing of compelling necessity could sur-

202. 2 WEINSTEIN & BERGER, *supra* note 62, ¶ 501[01], at 501-15.

203. 2 IMWINKELRIED, *supra* note 18, § 10.4.2, at 1246-47.

204. 425 U.S. 391, 403 (1976).

205. *Jaffee v. Redmond*, 518 U.S. 1, 11-12 (1996).

206. 524 U.S. 399 (1998)

207. *Id.* at 408.

208. *Id.*

209. *Jaffee v. Redmond*, 51 F.3d 1346, 1357-58 (7th Cir. 1995), *aff’d*, 518 U.S. 1 (1996).

mount the privilege.²¹⁰ When the case reached the Supreme Court, though, the Court was in only partial agreement with the Seventh Circuit. The Court approved the Seventh Circuit's decision to recognize a privilege; but, consistent with both draft Rule 504 and Wigmorean theory, the Supreme Court insisted that the privilege had to be categorized as absolute.²¹¹

The history of the litigation in *Swidler & Berlin*²¹² was strikingly similar. The lower court, the Court of Appeals for the District of Columbia, ruled that although the attorney-client privilege survived the client's death, upon death it could be treated as qualified.²¹³ When the Supreme Court addressed the merits of the case, the Court affirmed the ruling that the privilege survives death.²¹⁴ However, true to draft Rule 503 and Wigmore, the Court forcefully held that even after death, the privilege remains absolute.²¹⁵ The Court explained that classifying the privilege as qualified would "introduce[] substantial uncertainty into the privilege's application"²¹⁶—uncertainty that might chill socially desirable communications.

Most post-1975 federal privilege decisions reaching the outcome prescribed by draft Article V can be rationalized under Wigmore's instrumental theory.²¹⁷ However, there are limits to the validity of even this explanatory hypothesis. Modern federal privilege law recognizes two privileges that are difficult to justify under Wigmore's theory: the privileges for communications between spouses²¹⁸ and penitent and clergy.²¹⁹ Neither privilege seems consistent with the instrumental theory. Dean Wigmore himself questioned whether the spousal privilege satisfied his criteria.²²⁰ As laypersons, the spouses may be unaware of the existence *vel non* of any evidentiary privilege. Further, their intimacy is so great and their need for communication is often so compelling that it is hard to believe that the absence of a formal evidentiary rule would significantly deter spousal communications. Likewise, it is strained to make a case for the penitent-clergy privilege under Wigmore's theory:

If the penitent is a sincere fideist, he or she would probably make the confession even absent the assurance of confidentiality fur-

210. *Id.*

211. *Jaffee v. Redmond*, 518 U.S. 1, 17-18 (1996).

212. *Swidler & Berlin*, 524 U.S. 399.

213. *In re Sealed Case*, 124 F.3d 230, 231 (D.C. Cir. 1997), *rev'd*, 524 U.S. 399 (1998).

214. *See Swidler & Berlin*, 524 U.S. at 401-02.

215. *Id.* at 409.

216. *Id.*

217. The lower courts have also repeatedly invoked Wigmore's criteria. *E.g.*, *In re Hampers*, 651 F.2d 19, 23 (1st Cir. 1981); 3 WEINSTEIN & BERGER, *supra* note 75, § 501.03[8][c], at 501-30. *See also* *Beth Israel Hosp. & Geriatric Ctr. v. Dist. Court*, 683 P.2d 343, 345 (Colo. 1984); *Berst v. Chipman*, 653 P.2d 107, 114-15 (Kan. 1982); *Senear v. Daily Journal-Am.*, 641 P.2d 1180, 1182 (Wash. 1982); *In re Pittsburgh Action Against Rape*, 428 A.2d 126, 131 (Pa. 1981), *superseded by statute*, 42 PA. CONS. STAT. § 5945.1 (2001), *as recognized in* *Commonwealth v. Wilson*, 602 A.2d 1290, 1292 (Pa. 1992).

218. 1 IMWINKELRIED, *supra* note 18, § 6.2.1, at 447.

219. *Id.* § 6.2.3, at 465.

220. WIGMORE, *supra* note 190, § 2228, at 216-17.

nished by an evidentiary privilege. Assume that the religion in question treats confession as a full-fledged moral duty. On that assumption, a fideist would believe that the breach of the duty will result in severe sanctions. For instance, a member of the Catholic faith might believe that the failure to confess a mortal sin could cause eternal damnation. . . . It is an insult to the sincerity of a fideist's belief to argue that he or she will make a doctrinally required confession only if the legal system confers an evidentiary privilege on the confession.²²¹

In short, while this hypothesis appears to have greater explanatory power than the others considered to date, even it falls short of providing a complete explanation for the current tenor of federal privilege law.

The federal courts have generally embraced the positions set out in draft Article V because both the courts and the drafters favored the political agenda of the wealthy and government.

If evidentiary policy cannot provide a fully satisfactory answer, perhaps realism demands acknowledging that the best explanation lies in politics.²²² Some commentators have charged that under draft Article V:

[W]ith surprising consistency, those testimonial privileges generally employed to protect individual, interpersonal relationships are eviscerated, if not wholly omitted. However, privileges typically asserted by corporate groups generally are given carefully widened latitude, and the federal government is provided an almost limitless privilege to keep out of federal courts information it possesses but does not want utilized at trial.²²³

Although the Advisory Committee did not include any practitioners engaged in poverty law or avowedly public interest practice, the Committee included representatives of government and corporate interests, and the critics complain that the draft "tilt[ed] the balance of power in favor of those interests that were represented on the Advisory Committee."²²⁴ The critics

221. 1 IMWINKELRIED, *supra* note 18, § 6.2.3, at 468 (footnote omitted). Dean Wigmore approvingly noted that even Bentham favored recognizing this privilege. WIGMORE, *supra* note 190, § 2396, at 877. However, Bentham took that position out of a spirit of religious "toleration." See 4 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 586-92 (1st ed. 1827); WILLIAM TWINING, THEORIES OF EVIDENCE: BENTHAM AND WIGMORE 42 (1985). Neither Bentham nor Wigmore attempted to justify the privilege on instrumental grounds.

222. See 23 WRIGHT & GRAHAM, *supra* note 47, § 5422, at 675-76.

223. Krattenmaker, *supra* note 201, at 66-67 (footnotes omitted).

224. 23 WRIGHT & GRAHAM, *supra* note 47, § 5422, at 687. The treatise writers add:

[I]t is particularly enlightening to learn that the Advisory Committee spent a half a day in meeting with representatives of the American Medical Association to insure that they were satisfied with the privilege provided in Rejected Rule 504 . . . and to follow the wheeling and

contend that, after the enactment of the Federal Rules, the federal courts followed the political lead of the Committee:

[The federal courts] follow the original Advisory Committee in being quite niggardly in providing privileges to ordinary people; e.g., for communications between parents and children. But at the same time, those privileges that are held by powerful people and institutions are expanded and liberally construed. For example, government privileges have grown like crabgrass since the enactment of Rule 501.²²⁵

In the critics' view, both the Advisory Committee and the federal courts have slighted the political interests of "working class people . . . of modest means."²²⁶

As disturbing as this hypothesis may be, it certainly possesses substantial explanatory power. A critic might well point to the Supreme Court's 1981 attorney-client decision in *Upjohn Co. v. United States*²²⁷ as Exhibit A in the case for the political hypothesis. *Upjohn* presented the question of the scope of the corporate attorney-client privilege.²²⁸ As the Court acknowledged, prior to its decision many lower federal courts had used the control group test to define the scope of the corporate privilege.²²⁹ Under that test, the privilege applied only to a narrow range of communications between corporate counsel and high-ranking corporate officials who need to communicate directly with counsel in order to decide how to vote on a corporate legal matter.²³⁰ However, in *Upjohn*, the Court gave the privilege a much broader scope.²³¹ In response to amicus filings by organizations such as the Federal Bar Association, including many members representing corporate interests, the Court endorsed the so-called subject matter test.²³² Under that test, the privilege extends to corporate counsel's communication with lower level employees when the employees are revealing information which they initially gained in the course of their employment.²³³ The *Upjohn* Court seemed quite solicitous of corporate interests.

dealing that took place between the Advisory Committee, the Justice Department, and some powerful Senators on the question of governmental privilege.

Id. § 5422, at 687 n.26 (citation omitted).

225. 23 WRIGHT & GRAHAM, *supra* note 47, § 5425, at 486 (footnotes omitted); *see also id.* § 5431, at 553 ("In remarkable contrast to the niggardly attitude they have shown toward claims of novel privileges for ordinary people, federal courts have generously awarded the bankers a qualified privilege for bank examinations by regulators.").

226. 23 WRIGHT & GRAHAM, *supra* note 47, § 5422, at 676.

227. 449 U.S. 383 (1981).

228. *Id.* at 386.

229. *Id.* at 390.

230. *Id.* at 391-92.

231. *See id.* at 395-96.

232. *See id.* at 395.

233. *Id.* at 394.

Yet, like the hypotheses related to evidentiary policy, this hypothesis provides only a partial explanation for the current tenor of federal privilege law. In particular, the political hypothesis fails to provide an adequate explanation for the Court's ruling in *Jaffee*.²³⁴ The threshold question in *Jaffee* was whether the Court should fashion some sort of federal psychotherapy privilege.²³⁵ However, that was not the only issue posed in *Jaffee*. Draft Federal Rule 504 had essentially limited the reach of the privilege to communications with psychologists and doctors engaged in psychiatry.²³⁶ However, in *Jaffee*, Mary Lu Redmond consulted Karen Beyer, a licensed clinical social worker.²³⁷ The Court decided to go beyond draft 504 and extend the privilege that far.²³⁸ In defending its decision, the Court stressed that such social workers often provide therapy to "the poor and those of modest means who could not afford the assistance of a psychiatrist or psychologist."²³⁹ The Court thus endorsed the circuit court's acknowledgement that social workers, like Ms. Beyer, serve as the "poor [man's] psychiatrist."²⁴⁰ *Jaffee* responded to the needs of the poor, not the political interests of the privileged.²⁴¹ In short, in one of its own celebrated privilege decisions, the Court both deviated from draft Article V and confounded the political hypothesis.

Another contributing factor to the courts' general acceptance of the provisions of draft Article V is the federal judiciary's ingroup loyalty.

As we have seen, neither politics nor policy furnishes a complete explanation for the contemporary state of federal privilege doctrine. Either there is no single explanation, or another factor may be at work. It is submitted that there is a good possibility that a further factor—a psychological one—accounts for the federal courts' almost wholesale endorsement of the provisions of draft Article V.

Psychologists have spent a good deal of time investigating the related phenomena of subconscious ingroup loyalty and negative bias against outgroups.²⁴² The theory is not that members of the ingroup consciously con-

234. *Jaffee v. Redmond*, 518 U.S. 1 (1996).

235. *Id.* at 4.

236. Draft Rule 504(a)(2) reads:

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

56 F.R.D. 183, 240 (U.S. 1973).

237. 518 U.S. at 5.

238. *Id.* at 15.

239. *Id.* at 16.

240. *Jaffee v. Redmond*, 51 F.3d 1346, 1358 n.19 (7th Cir. 1995) (quoting *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1471, 1550 (1985)), *aff'd*, 518 U.S. 1 (1996).

241. Amann & Imwinkelried, *supra* note 142, at 1044-47.

242. See Brian Mullen, Rupert Brown & Colleen Smith, *Ingroup Bias as a Function of Salience, Relevance, and Status: An Integration*, 22 EUR. J. SOC. PSYCHOL. 103 (1992) (a meta-analysis based on 137 tests of the ingroup bias hypothesis); SOCIAL IDENTITY AND INTERGROUP RELATIONS (Henri Tajfel

spire in bad faith to discriminate against the outgroup. Rather, according to the theory, membership in a group can produce a subconscious bias against persons outside the group, and in turn, that bias can influence group members' conduct toward the latter persons.

Ingroup loyalty and outgroup bias are complex phenomena.²⁴³ However, one general finding in the research is that it is extraordinarily easy to trigger these phenomena.²⁴⁴ That finding is relatively well established.²⁴⁵ Even minimal²⁴⁶ conditions can readily²⁴⁷ create these subconscious attitudes and elicit the phenomena. Moreover, research has identified a number of specific determinants or factors which are conducive to the development of such loyalty and bias.²⁴⁸ An analysis of those factors strongly suggests that those phenomena have played a role in the federal courts' general adoption of many of the provisions of draft Article V rejected by Congress.²⁴⁹

One factor shown to produce ingroup loyalty is the degree to which the person has internalized the group membership as part of his or her self-concept.²⁵⁰ How much significance²⁵¹ does the person attach to the membership in the group as an aspect,²⁵² component,²⁵³ or part of the person's concept of self?²⁵⁴ To what extent does the person define himself or herself through membership in the group?²⁵⁵ To what degree does the group membership shape the person's concept of self?²⁵⁶ In the case of members of the federal judiciary, this factor cuts in favor of producing a powerful sense of ingroup loyalty. Whenever a member of the judiciary identifies himself or herself, they are likely to begin the identification by saying "Judge." When-

ed., 1982); Marilyn Brewer, *The Psychology of Prejudice: Ingroup Love or Outgroup Hate?*, 55 J. SOC. ISSUES 429 (1999).

243. Mark Van Vugt & Claire M. Hart, *Social Identity as Social Glue: The Origins of Group Loyalty*, 86 J. PERSONALITY & SOC. PSYCHOL. 585, 586 (2004).

244. Henri Tajfel & John C. Turner, *The Social Identity Theory of Intergroup Behavior*, in PSYCHOLOGY OF INTERGROUP RELATIONS 7, 15 (Stephen Worchel & William G. Austin eds., 2d ed. 1986); Henri Tajfel, *Experiments in Intergroup Discrimination*, SCI. AM., Nov. 1970, at 96, 102.

245. Sabine Otten & Amelie Mummendey, *Valence-Dependent Probability of Ingroup Favoritism Between Minimal Groups: An Integrative View on the Positive-Negative Asymmetry in Social Discrimination*, in SOCIAL IDENTITY PROCESSES 33, 35 (Dora Capozza & Rupert Brown eds., 2000).

246. *Id.* at 34.

247. Sik Hung Ng, *Power and Intergroup Discrimination*, in SOCIAL IDENTITY AND INTERGROUP RELATIONS, *supra* note 242, at 179, 179.

248. Mullen et al., *supra* note 242, at 103-05.

249. 23 WRIGHT & GRAHAM, *supra* note 47, § 5422, at 669 ("Since every expansion of privilege is of necessity a diminution in the power of the judiciary, judges are not completely disinterested participants in controversies over privilege . . .").

250. Jean-Claude Deschamps, *Social Identity and Relations of Power Between Groups*, in SOCIAL IDENTITY AND INTERGROUP RELATIONS, *supra* note 242, at 85, 90; Otten & Mummendey, *supra* note 245, at 34; Henri Tajfel, *Introduction* to SOCIAL IDENTITY AND INTERGROUP RELATIONS, *supra* note 242, at 1, 2; Tajfel & Turner, *supra* note 244, at 16; John C. Turner, *Towards a Cognitive Redefinition of the Social Group*, in SOCIAL IDENTITY AND INTERGROUP RELATIONS, *supra* note 242, at 15, 16, 18, 21, 27, 36; Van Vugt & Hart, *supra* note 243, at 587.

251. Otten & Mummendey, *supra* note 245, at 34; Tajfel, *supra* note 250, at 2.

252. Tajfel, *supra* note 250, at 2-3.

253. Turner, *supra* note 250, at 18.

254. Otten & Mummendey, *supra* note 245, at 34; Tajfel, *supra* note 250, at 2.

255. *See* Deschamps, *supra* note 250, at 90.

256. Van Vugt & Hart, *supra* note 243, at 587.

ever someone describes the judge in public, they are likely to begin the description with "Judge" or "the Honorable." Membership in the federal judiciary is probably an important component of the self-concept of the typical federal judge.²⁵⁷

Another factor is the size of the group. Small groups tend to have a stronger sense of loyalty and cohesiveness.²⁵⁸ The federal judiciary constitutes a small social group. As of September 14, 2006, there were only nine Supreme Court Justices, 165 court of appeals judges, and 646 district court judges.²⁵⁹

A further consideration is the stability of the group. The longer the members remain in the group and the less turnover there is in group membership, the stronger will be the sense of group loyalty.²⁶⁰ Federal judges are not only few in number; they are also permanent appointees to the federal bench. By virtue of Section One of Article III of the United States Constitution, they enjoy life tenure "during good Behaviour."²⁶¹

Another pertinent factor is the salience of the particular issue. The strength of group loyalty varies with the social context.²⁶² When a question touches upon an issue important²⁶³ or central²⁶⁴ to the group's concerns, the context gives group membership greater salience,²⁶⁵ and the group loyalty will become more intense. In this setting, although in a formal sense Congress may have had final plenary power to prescribe evidentiary rules, the rules have special salience for the federal judiciary. After all, the rules relate to and to some extent purport to control the courts' daily professional work. The judge's self-concept is made salient or activated because he or she is asked to resolve the evidentiary issue because he or she is a judge. Moreover, the salience factor is enhanced when there is conflict over the issue.²⁶⁶

Conflict itself is one of the factors that tends to intensify ingroup loyalty. When the ingroup comes into conflict with an outgroup, the conflict strengthens the ingroup's cohesiveness.²⁶⁷ In a very real sense, when Congress blocked the judiciary's attempted promulgation of the draft Federal Rules of Evidence, the two branches came into conflict.²⁶⁸ The members of

257. Professor Shestowsky adds that many factors reinforce the importance of group membership in the typical judge's concept of self. For instance, he or she will attend "judicial" conferences and subscribe to journals specifically addressed to judges. Conversation with Donna Shestowsky, Professor, University of California, Davis Law School.

258. Brewer, *supra* note 242, at 434; Mullen et al., *supra* note 242, at 105, 109, 117.

259. See United States Courts, Federal Judiciary Vacancy, http://www.uscourts.gov/cfapps/webnovada/CF_FB_301/index.cfm?fuseaction=Reports.ViewSummary (last visited Sept. 14, 2006). Although there are 179 authorized positions on the Courts of Appeal, as of September 14, 2006, there were 14 vacancies; while there are 678 authorized District Court judgeships, there were 32 vacancies. *Id.*

260. Van Vugt & Hart, *supra* note 243, at 585, 587, 595.

261. U.S. CONST., art. III, § 1.

262. Turner, *supra* note 250, at 19.

263. Mullen et al., *supra* note 242, at 107.

264. *Id.* at 105.

265. Turner, *supra* note 250, at 29.

266. *Id.* at 19.

267. Tajfel & Turner, *supra* note 244, at 8, 10.

268. See generally Scallen, *supra* note 99, at 852-53.

Congress not only questioned the wisdom of particular provisions of the draft rules proposed by the judiciary; more fundamentally, Congress indicated that the judiciary had usurped legislative powers. As previously stated, the House Report supporting the suspension bill stated that the purpose of the bill was “to promote the separation of constitutional powers.”²⁶⁹ Further, before finally approving the legislation, Congress went to the length of reducing the judiciary’s rulemaking power with respect to privileges.²⁷⁰ In short, Congress not only rebuffed the judiciary’s attempted exercise of its power; Congress also cut back on the power itself. At the time, a respected commentator wrote that the Congressional actions had strained relations with the judiciary to the degree that the relationship had reached a crisis stage.²⁷¹

Apart from the considerations identified by the psychological literature, common sense suggests that another factor may have come into play. The subconscious temptation to succumb to ingroup loyalty and act out of outgroup bias against Congress would be particularly acute in this case. As Part I demonstrated, as the Federal Rules worked their way through Congress, it became increasingly clear that Congress could not reach the political consensus to legislate specific privilege statutes. In short, the judiciary must have realized that even if it recognized privileges that would offend some members of Congress, it was highly unlikely that Congress could muster the political will to override the judicial decision. On certain issues such as the wisdom of Federal Rules of Evidence 413-15 selectively abolishing the character evidence prohibition in such proceedings as sexual assault and child abuse prosecutions, it would be infeasible for the courts to attempt to undermine the legislation. Congress enacted those statutes over the strong objections of the Judicial Conference,²⁷² and there probably is still enough political consensus on that issue that Congress would react swiftly to any such attempt.²⁷³ However, privilege doctrine is quite different. Congress was afraid of wading into the thicket of special interest group politics. If the members of the judiciary had a subconscious temptation to reassert their power by adopting draft Article V, there would be little countervailing fear of Congressional backlash.

For two reasons, the psychological hypothesis holds special promise as an explanation for the judiciary’s conduct in resurrecting draft Article V.

First, the psychological hypothesis is a better explanatory fit. The common weakness of the other potential hypotheses is that they cannot account for the entirety of the judiciary’s conduct in simultaneously embracing some provisions of draft Article V while rejecting others. The psychological hy-

269. H.R. REP. NO. 93-52, at 1 (1973).

270. 3 WEINSTEIN & BERGER, *supra* note 75, § 501App. 01[3][c], at 501App. -8.

271. Friedenthal, *supra* note 17, at 676.

272. 1 EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 2:23, at 2-141-151 (rev. 2003) (setting out the 1995 Judicial Conference report proposing the legislation favored by Congress).

273. Scallen, *supra* note 99, at 861-62.

pothesis is based on generalizations about group behavior and does not even purport to explain the conduct of every group member. Intragroup variations in loyalty and behavior are to be expected.²⁷⁴ For example, some members may have a weaker sense of ingroup bias because they have multiple, cross-cutting loyalties.²⁷⁵ A judge who is a former legislator²⁷⁶ or entertains a particularly firm belief about separation of powers might be more resistant to the temptation to embrace draft Article V.

Second, the psychological hypothesis is more credible because its premises are loyalties and biases that can operate at a subconscious level. If the federal courts were engaged in a conscious, deliberate attempt to reassert judicial power by resurrecting draft Article V, one would expect greater, if not complete, consistency between the outcomes in the federal privilege decisions and the provisions of draft Article V. However, the hypothesis is a subconscious ingroup bias. When at a conscious level the decision maker perceives the particular question to be highly debatable, the subconscious bias can easily tip the balance in favor of a decision consistent with draft Article V. In contrast, when the decision maker views the choice as clear-cut but the provisions of draft Article V point in the contrary direction, the draft will probably have much less impact. In *Trammel*, the Court denied an accused spouse the power to disqualify a witness spouse who is willing to testify against the accused.²⁷⁷ The Court thought that the choice was clear; if the witness spouse was willing to testify, there was probably little or no marital harmony left to promote.²⁷⁸ In the Court's words, granting the accused spouse a privilege in those circumstances "hardly seems conducive" to promoting the spousal relationship.²⁷⁹ Likewise, in *Jaffee*, the majority saw no sound policy justification to grant a privilege to persons wealthy enough to consult psychiatrists while denying one to poorer persons being treated by clinical social workers.²⁸⁰ The Court professed that it had "no hesitation" in extending the privilege to the latter.²⁸¹ In these two cases, the Court had a strong policy preference, and in both instances, the Court departed from the provisions of draft Article V. When a judge has a marked preference at the conscious level, it is improbable that a subconscious bias will surmount that preference. However, when the choice is a closer one, ingroup loyalty can come into play and lead the courts to reach outcomes consistent with draft Article V.

274. Tajfel & Turner, *supra* note 244, at 11.

275. Brewer, *supra* note 242, at 439, 441.

276. Representative Hungate, who chaired the House hearings on the draft Federal Rules of Evidence, later became Judge Hungate. 1 IMWINKELRIED, *supra* note 18, § 4.2.2.a, at 174.

277. *Trammel v. United States*, 445 U.S. 40, 53 (1980).

278. *Id.* at 52.

279. *Id.* at 53.

280. *See Jaffee v. Redmond*, 518 U.S. 1, 15-17 (1996).

281. *Id.* at 15.

III. CONCLUSION

It would be a mistake to exaggerate either the case for the psychological hypothesis or the importance of the hypothesis. It certainly would be dishonest to claim that the truth of the hypothesis has been established. There are no interviews in which individual federal judges have clearly manifested these subconscious attitudes, and it would be impractical to subject the federal judiciary en masse to a psychological test to verify the existence of the ingroup loyalty or outgroup bias. However, as Part II demonstrated, the hypothesis is plausible and possesses superior explanatory power.

Further, even if one assumes the truth of the hypothesis, it has limited importance. The history of the judicial treatment of draft Article V includes a very unique set of circumstances. First, although technically the draft and accompanying Notes are “legislative” history materials for construing Rule 501, in a very real sense those materials are the judiciary’s work product. The nature of the materials is especially likely to trigger ingroup loyalty. Moreover, the subject-matter of the materials deals directly with the courts’ province. Constitutionally, Congress may have the final authority to prescribe evidentiary rules for the federal courts, but those rules relate to the courts’ daily work conducting trials. That factor would heighten the judiciary’s sense of ingroup loyalty. Finally, this was the rare case in which it was evident that Congress lacked the political consensus to override subsequent decisions by the courts. Even if particular members of Congress were outraged by the decisions, it was patent that Congress as a whole was unwilling to confront the dangers of special interest group politics. A peculiar set of circumstances concurred and will not recur with any regularity.

Yet, as the history of draft Article V demonstrates, such cases arise occasionally. In most instances, such cases will have separation-of-power overtones, more specifically involving tension between the legislative and judicial branches. What broader lessons can be learned for such cases from the experience with draft Article V?

For their part in such cases, legislators must draft with special clarity. They must realize that in a close case, the judiciary’s ingroup bias can come into play and perhaps frustrate the legislative intent. The ambiguity of the statutory text can make the case a close one. When a statute affects the common law crafted by the courts, the courts often invoke the maxim of statutory interpretation that statutes in derogation of the common law are strictly construed.²⁸² More broadly, legislative drafters should appreciate

282. See, e.g., *State Eng’r v. S. Fork Band of Te-Moak*, 339 F.3d 804, 814 (9th Cir. 2003); *Thomas v. McCaughtry*, 201 F.3d 995, 1003 (7th Cir. 2000); *Va. Imports Inc. v. Kirin Brewery of Am., LLC*, 296 F. Supp. 2d 691, 697 (E.D. Va. 2003); *Pastor v. Union Cent. Life Ins. Co.*, 184 F. Supp. 2d 1301, 1307 (S.D. Fla. 2002), *aff’d*, 128 F. App’x 100 (11th Cir. 2005); *Jessen v. Malhotra*, 112 F. Supp. 2d 917, 922 (D. Neb. 2000); *Rygg v. County of Maui*, 98 F. Supp. 2d 1129, 1137 (D. Haw. 1999); *Brown v. Ford Motor Co.*, 67 F. Supp. 2d 581, 585 (E.D. Va. 1999), *aff’d*, 10 F. App’x 39 (4th Cir. 2001); *People v. Valtakis*, 130 Cal. Rptr. 2d 133, 139-40 (Cal. Ct. App. 2003); *People v. Massicot*, 118 Cal. Rptr. 2d 705, 710-11 (Cal. Ct. App. 2002).

that when their statutory text affects the judiciary, the text must be explicit enough to anticipate and counteract any ingroup bias that might otherwise distort the courts' interpretation of the text. If Congress had wanted to ensure that the courts would not in effect resurrect draft Article V, their drafters should have employed language much more expressly manifesting that intent. The very breadth of the text of Rule 501 has allowed the courts to breathe life back into draft Article V.

For their part in such cases, conscientious federal judges must be aware of the risk that even a subconscious sense of ingroup loyalty could influence their decision. Suppose, for example, that Congress had not blocked the promulgation of draft Article V. Assume further that at a later point in time, a litigant challenged a privilege provision in Article V on the ground stated in Justice Douglas's dissent,²⁸³ namely, that privilege provisions relate to substantive policy and hence exceed the scope of the Rules Enabling Act.²⁸⁴ The issue ultimately finds its way to the Supreme Court—the same court which had approved the draft and transmitted the proposed rules to Congress.²⁸⁵ At a subconscious level, even a Justice who is highly respectful of separation of powers could be tempted to resolve any significant doubt in favor of sustaining the validity of a challenged rule because the rule was a judicial product. The resurrection of draft Article V is a testament to the power of the federal judiciary's sense of ingroup loyalty. In these separation of power clashes, scrupulous judges need to be particularly self aware, cognizant of both their conscious policy preferences and the subconscious tugs of ingroup loyalty and outgroup bias.

283. C.J. WARREN BURGER, COMMUNICATION FROM THE CHIEF JUSTICE OF THE UNITED STATES TRANSMITTING THE PROPOSED RULES OF EVIDENCE TO THE UNITED STATES COURTS AND MAGISTRATES, H.R. DOC. NO. 93-46, at VI (1st Sess. 1973).

284. 28 U.S.C. § 2072 (2000).

285. At first blush, the reader might think that having previously approved the challenged rule, the Justices would have to recuse themselves from the decision. However, there is no coordinate tribunal to assign the case to. The rule of necessity would therefore come into play; and despite their obvious stake in the case, the Justices would be permitted to decide the case. *See* 13A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS § 3541, at 550 (2d ed. 1984).