The Part & Parcel Principle, III: Old Cases and New Tools Vying in Applying Attorney-Client Privilege to Email Attachments

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ABSTRACT

Attorney-client privilege is a perpetually vexing creature of the law. This is perhaps most so in its intricacies, because the value of the privilege lies in its predictability, and yet the countless postures in which clients consult with attorneys can defy ready regularity. Two previous articles by this author have interrogated how privilege should treat attachments to emails with counsel, after a case about paper enclosures in 1981 laid down a misguided rule that such pre-email attachments ought to be considered independently of the privileged communication. The recommended answer was called the Part & Parcel Principle: attachments that are part and parcel of a privileged exchange are inseparable from the entirety. Two pre-email Supreme Court cases had shed some light on the proper answer, but cannot directly control the question, leaving lower courts to debate the answer irresolutely. Meanwhile, developments in email technology have moved the question even further from archaic paper enclosures, opening new problems to be addressed even as the old remains unsettled. In light of both new technology and fifty years of quarreling cases, further refinements to the Principle suggested by a few astute cases are proposed to align it more closely with Supreme Court precedent, but it remains to be seen whether courts will coalesce over these commonsensical solutions to a very common problem.

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> Courts have taken varying approaches regarding the privilege claims over email attachments. . . . I don't need to get into the weeds on all the ways that attachments might be privileged because, in this case, I only need to decide how to handle emails between privileged persons that attach articles that are clearly not privileged standing alone.
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> Here is how I see it. The emails themselves demonstrate that the client sender (or client recipient) had the non-privileged article in their possession because at one point they sent (or received) it. The client cannot immunize discovery of those articles merely because they were sent to (or received from) their lawyer. Nor can the client conceal the fact that they were and are in possession of those articles. On the other hand, I am sensitive to the possibility that the fact that a client sent (or received) a particular article to (or from) his attorney on a certain date can implicate privilege concerns.
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> In view of the foregoing, this is how the parties should proceed with respect to this group. Plaintiff must either (1) produce the non-privileged attachments or (2) if Plaintiff contends that the act of sending a particular attachment is privileged, confirm that the attachment has already been produced in discovery under circumstances that demonstrate which custodians had possession of it.[1]
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> —*Elm 3DS Innovations, LLC v. Samsung Electronics Co.* (2021)

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1. Elm 3DS Innovations, LLC v. Samsung Elecs. Co., No. CV 14-1430, 2021 WL 4819904, at *5 (D. Del. Oct. 15, 2021).

INTRODUCTION

Over a decade ago, this author published an article making the obvious point that attorney-client communications were privileged from discovery, whatever their format.[2] The Supreme Court had affirmed as much for over a hundred years when asked, and the courts of Britain and indeed the Roman Republic and Empire had said so before.[3] An epochal Supreme Court case of 1981, *Upjohn Co. v United States*,[4] had encapsulated this exceedingly long line of precedent in no uncertain terms: whatever a client says in confidence to his attorney in the course of professional representation is outside the bounds of lawful inquiry, even if the client may be compelled to recite the selfsame facts disclosed to the attorney in a deposition or court.[5] And yet the vagaries of business presented a strangely insoluble question: how would privilege apply (if at all) when the client conveyed a preexisting document to his attorney for a legal purpose? May the document be withheld in discovery as part of an attorney-client communication, or must it be disgorged as an independent record whose privilege depended on its own circumstances rather than that of the transmission to counsel? The original article explained that nothing distinguished the enclosure from the rest of the communication—it was part and parcel of the substance conveyed to counsel—and was thus privileged too, a simple rule denominated as the Part & Parcel Principle.

Once—as far back as the Romans—those appended documents commended to the attorney's attention were pieces of paper accompanying a more ad hoc cover letter or simply handed over to a solicitor (as Britain came to call them).[6] Modern parlance calls them "enclosures" to the communications, as it has since the practice was first noticed by the law.[7] Even more modern parlance calls them "attachments" when they are appended to a communication sent via email, the ubiquitous manner by which clients and counsel correspond contemporarily.[8] If the email is privileged, and the attachment is an integral part of the legal matter

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2. Jared S. Sunshine, *The Part & Parcel Principle: Applying the Attorney-Client Privilege to Email Attachments*, 8 J. MARSHALL L. J. 47 (2014) [hereinafter *Part & Parcel*].

3. *See* Jaffee v. Redmond, 518 U.S. 1, 11 (1996); Swidler & Berlin v. United States, 524 U.S. 399, 409 (1998); Hunt v. Blackburn, 128 U.S. 464, 470 (1888); Jared S. Sunshine, *The Parthenogenesis of Wigmore: A Humble History of How a Confidentiality Requirement Arose Ex Nihilo to Become the Sine Qua Non of Attorney-Client Privilege*, 54 UIC J. MARSHALL L. REV. 429, 435–39 (2021) (discussing privilege in Roman Republic and Empire).

4. Upjohn Co. v. United States, 449 U.S. 383 (1981).

5. *Id.* at 394–95.

6. *See, e.g.*, Elizabeth A. Meyer, *Writing in Roman Legal Contexts*, *in* THE CAMBRIDGE COMPANION TO ROMAN L. 85–96 (2015).

7. *See* THE LEGAL SECY'S ENCYCLOPEDIC DICTIONARY 186–87 (1962) (discussing praxis for enclosures).

8. Jared S. Sunshine, *The Part & Parcel Principle, II: Applying the Attorney-Client Privilege to Attachments over Half a Century*, 38 GEO. J. LEGAL ETHICS 351, 356–59 (2025) [hereinafter *Part & Parcel II*].

on which the client is corresponding with his attorney, so too must be the attachment.[9] Yet some early cases disagreed, at least as to the pieces of paper, and that disagreement was perpetuated into the world of emails without much introspection. The evolution of those cases, led by the 1981 opinion of the Northern District of Illinois in *Sneider v. Kimberly-Clark Corp.*,[10] began the prior installment of this story.[11] In time, other courts came to doubt the artificial separation of emails from their attachments.[12] One case approved by the Seventh Circuit, *Muro v. Target Corp.,* expressly repudiated *Sneider*'s misreading in 2007,[13] and thereafter district courts around the country came into fervent alignment with its rule: email attachments sent to counsel confidentially for legal purposes were as privileged as the email itself.[14] The original Part & Parcel article followed this efflorescence in 2014, seeking to recognize and publicize the felicitous blossoming of accord.[15]

Consensus was not to be so easily reached, however. A year ago, this author published a sequel to the original article, providing a more trenchant rebuttal to the *Sneider* line of thought and endorsing the line of thinking implicitly favored in 2014: the *Part & Parcel Principle II (P&P II)*, published in this same journal. In the intervening decade, no few courts had returned to *Sneider*'s side in the irresolute combat between the Part & Parcel Principle and *Sneider*'s test of privilege for attachments as independent documents untethered to the emails to which they were attached.[16] Indeed, some resurrected an old argument that the 1976 Supreme Court case, *Fisher v. United States*, foreclosed the Principle and the cases that advocated for it.[17] Yet several cases from this period, foremost among them *Willis*, *Elm*, and *Linet*, continued to fly the banner of Part & Parcel concerns with aplomb.[18] *Fisher*'s and *Sneider*'s approach may have made sense for the paper enclosures they were addressing, but decades of practice with email have revealed the philosophical difficulties with exporting precedent on paper memoranda to electronic mail.[19]

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9. Sunshine, *Part & Parcel*, *supra* note 2, at 54–63.

10. Sneider v. Kimberly-Clark Corp., 91 F.R.D. 1, 4 (N.D. Ill. 1980), *abrogated in unrelated part by In re* Queen's Univ. at Kingston, 820 F.3d 1287 (Fed. Cir. 2016).

11. *See generally* Sunshine, *Part & Parcel II*, *supra* note 8.

12. *Id.* at 370–77.

13. Muro v. Target Corp., 250 F.R.D. 350 (N.D. Ill. 2007), *aff'd*, 580 F.3d 485 (7th Cir. 2009).

14. Sunshine, *Part & Parcel II*, *supra* note 8, at 374–77.

15. *See generally id.*

16. *See id.* at 377–85.

17. *See id.* at 365, 378–79; *compare* Lee v. Chi. Youth Ctrs., 304 F.R.D. 242, 248–49 (N.D. Ill. 2014), *objections sustained in part and overruled in part*, No. 12-C-9245 (Aug. 6, 2014), *with* Evergreen Trading, LLC *ex rel.* Nussdorf v. United States, 80 Fed. Cl. 122 (Fed. Cl. 2007).

18. Linet Americas, Inc. v. Hill-Rom Holdings, Inc., 740 F. Supp. 3d 685, 707 & n.17 (N.D. Ill. 2024); Elm 3DS Innovations, LLC v. Samsung Elecs. Co., No. CV 14-1430, 2021 WL 4819904, at *5 (D. Del. Oct. 15, 2021); Willis Elec. Co. v. Polygroup Trading Ltd., No. 15-cv-3443, 2021 WL 568454, at *7 (D. Minn. Feb. 16, 2021); *see* Sunshine, *Part & Parcel II*, *supra* note 8, at 385–94 (discussing cases).

19. *See infra* Part II.B.

This Article completes the thought begun in *P&P II*, but where that article dwelt in the past, this Article looks to the future. First, however, it examines a few modern cases involving email attachments that have issued since *P&P II* as evidence that the debate catalogued a year ago is still going strong. In the service of bringing order to discord, it next offers a thorough reconciliation of the two Supreme Court cases on privilege most often cited as dispositive of the Part & Parcel Principle, even though neither did nor could address the issue of emails. The philosophical harmonization of the two cases in Part II of this Article results in a clear median in which the Part & Parcel Principle can thrive, whereas *Sneider*'s rule founders. Part III introduces and explores the modern practice of attachments to email communications, underlining that technology has not stood still and therefore the questions today are as far distant from those of the traditional MIME email attachments of 1995 as those attachments were from the paper of ancient ages. Happily, however, modern practice conduces rather than challenges concepts of privilege, and it is only to the extent that the law seeks to drag technology into ill-fitting molds of the past that the same problems of privilege arise. The fourth part promulgates a revised version of the Part & Parcel Privilege, defending the rectitude of its basic rule whilst exploring the liminal circumstances in which refinements are expedient, as illustrated by real-world cases. A conclusion expresses again hope for the future—but also a cynical expectation that the Principle will demand further defense and reexamination yet again as technology forges forward still.

I. THE DEBATE CONTINUES UNABATED

Even in the brief time since *P&P II* was prepared in 2024, further cases have emerged to carry the baton. A series of cases from 2024 in the Southern District of New York embodied the nuances faithfully, grappling with the ambivalence in the case law.[20] One case, for example, admitted that if originally nonprivileged papers had been handed over to counsel, they could be recovered from the lawyers—but "[t]o the extent that [p]laintiff seeks to obtain from litigation counsel the same documents he can obtain (or has already obtained) from [the defendant] itself, the request creates an undue burden and implicates attorney-client privilege concerns that are not justified by any articulated need by [p]laintiff for these records."[21]

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20. *See, e.g.*, GLD3, LLC v. Albra, No. 21-CV-11058, 2024 WL 4471672 (S.D.N.Y. Oct. 11, 2024); Ball v. Metro-N. Commuter R.R., No. 21 Civ. 6159, 2024 WL 1118783, at *8–9 (S.D.N.Y. Mar. 13, 2024); Dorce v. City of New York, No. 19 Civ. 2216, 2024 WL 139546, at *4 (S.D.N.Y. Jan. 12, 2024) (Cave, Mag. J.); Bennett v. Cuomo, No. 22 Civ. 7846, 2024 WL 80271, at *4 (S.D.N.Y. Jan. 8, 2024) (Cave, Mag. J.).

21. *Ball*, 2024 WL 1118783, at *8–9 ("Of course, if there are responsive and non-privileged documents which MNR gave to its outside counsel, such documents would have to be produced even if they are no longer in MNR's possession." (citing Renner v. Chase Manhattan Bank, No. 98 Civ. 926, 2001 WL 1356192, at *5 (S.D.N.Y. Nov. 2, 2001)).

Early in the year, *Bennett v. Cuomo* had well collected the vying principles.[22] On the one hand, the "mere fact, however, that a document was transmitted between an attorney and a client does not render the document privileged," but must comprise a confidential communication relating to legal advice.[23] "Conversely," the court added, "the mere fact that a document contains some public or nonconfidential information does not necessarily make the document discoverable."[24] But that means that the facts contained in a communication stand separate from the communication itself, as the court underlined with another quote: "just as facts cannot be invested with privilege merely by communicating them to an attorney, so [too] the confidentiality of the communication is not [necessarily] destroyed by disclosure of the underlying facts."[25] In the case at hand, however, attachments were not at issue, only text messages between client and counsel.[26] Mere days later, the same magistrate judge repeated much the same primer in the foundational logic.[27]

Likewise, *GLD3, LLC v. Albra* from late in the year exhibited discernment in applying those principles to attachments.[28] It first confirmed the truism that privilege attends "only legal advice, not economic, business, or policy advice."[29] But the court readily found privileged not merely the email correspondence providing legal advice and comments to the client, but also the "draft resolutions prepared by the Town Attorney and shared with the Board for review and approval."[30] Nonetheless, the court caveated, "if any of these drafts are the final version of the resolution adopted and made public by the Board, then they should be produced."[31] Moreover, an email with "no legal impressions, analysis, or solicitation of any similar advice from counsel"—in other words, for no evident legal purpose—was not itself privileged, and thus "[i]f the attachments contained therein are free from comments and other redline edits and represent the final resolutions adopted by the Board and made public, then those should also be produced."[32]

By way of contrast to these more measured decisions, a 2024 decision from the District of New Jersey hewed closer to *Sneider*'s approach.[33] For its rule on privilege, *LifeScan, Inc. v. Smith* peered back through the decades, quoting a New Jersey case from 1990, which in turn cited *Sneider*: "Merely attaching something

22. *Bennett*, 2024 WL 80271, at *4.

23. *Id.*

24. *Id.* (quoting Astra Aktiebolag v. Andrx Pharm., Inc., 208 F.R.D. 92, 103 (S.D.N.Y. 2002)).

25. *Id.* (quoting Solomon v. Sci. Am., Inc., 125 F.R.D. 34, 37 (S.D.N.Y. 1988)).

26. *Id.* at *7.

27. Dorce v. City of New York, No. 19 Civ. 2216, 2024 WL 139546, at *4 (S.D.N.Y. Jan. 12, 2024) (Sarah L. Cave, Mag. J.).

28. GLD3, LLC v. Albra, No. 21-CV-11058, 2024 WL 4471672 (S.D.N.Y. Oct. 11, 2024).

29. *Id.* at *2 (quoting Durling v. Papa John's Int'l, Inc., No. 16-CIV-3592, 2018 WL 557915, at *3 (S.D.N.Y. Jan. 24, 2018)).

30. *Id.* at *4.

31. *Id.* n.8.

32. *Id.* at *4.

33. LifeScan, Inc. v. Smith, No. CV 17-5552, 2024 WL 4913027 (D.N.J. May 16, 2024).

to a privileged document will not, by itself, make the attachment privileged."[34] *Upjohn*, meanwhile, featured only to remind that "applicability of the attorney-client privilege is determined on a case-by-case basis."[35] As for the actual attachments under review by the master,

> while Zions [the defendant] asserts that nearly all (without specifying exactly how many) of those documents already appear in its document productions, Zions nevertheless must demonstrate that each attachment has a separate basis to be privileged. While Zions argues that the "selection" or "compilation" of these documents reflects an attorney's mental impression, to hold that these documents are therefore privileged would expand the work product privilege beyond any conceivable limit. To so hold would allow an attorney to shield any document from production merely by attaching it to an email. The District of New Jersey thus requires attachments to privileged emails to fall under an independent claim of privilege in order to be withheld. To the extent the withheld attachments are not privileged on an independent basis, those attachments must be produced.[36]

Perplexingly, the District of New Jersey precedents to which the *LifeScan* court looked dated back well over a decade and more,[37] even though more recent, numerous, and relevant cases from the district beckoned from only the previous few years.[38] Those uncited cases, however, had approved of the Principle, and thus would not lend credence to the current court's views.

For an even more trenchant view, consider *In re Local TV Advertising Antitrust Litigation* from mid-2024, hailing from the ancestral home of *Sneider*'s atavism in the Northern District of Illinois.[39] On the whole, the magistrate was parsimonious with privilege,[40] but grew downright miserly when it came to attachments:

> All of these documents are designated "Attachments" in Nexstar's privilege log. Even assuming *arguendo* the parent email to these attachments were privileged, that privilege does not apply to the attachments. It is beyond cavil that attachments to emails are judged separately from their primary documents—to be withheld as privileged, each document must individually satisfy the privilege standard. This document-by-document requirement is consistent with the

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34. *Id.* at *8 ("If a privileged document has attachments, each attachment must individually qualify for the privilege.") (quoting Leonen v. Johns-Manville, 135 F.R.D. 94, 98 (D.N.J. 1990) (citing Sneider v. Kimberly-Clarke Corp., 91 F.R.D. 1 (N.D. Ill. 1980))).

35. *Id.*

36. *Id.* at *12 (citation omitted).

37. *Id.* at *8 (citing *Leonen*, 135 F.R.D. at 98); *id.* at *12 (citing Spiniello Cos. v. Hartford Fire Ins. Co., No. CIV A. 07-CV-2689 (DMC), 2008 WL 2775643, at *2 (D.N.J. July 14, 2008)).

38. *E.g.*, United States *ex rel.* Salomon v. Wolff, 2022 WL 17327214, at *2–3 (D.N.J. Mar. 14, 2022); Jorjani v. N.J. Inst. of Tech., No. CV 18-11693, 2021 WL 4237255, at *4 (D.N.J. Sept. 17, 2021); Engage Healthcare Commc'ns, LLC v. Intellisphere, LLC, No. 12CV00787, 2017 WL 10259770, at *3 (D.N.J. Sept. 12, 2017), *report and recommendation adopted*, No. CV 12-787, 2017 WL 10259774 (D.N.J. Nov. 21, 2017).

39. *See In re* Loc. TV Advert. Antitrust Litig., No. 18-C-6785, 2024 WL 1956255 (N.D. Ill. Apr. 16, 2024).

40. *Id.* at *3–6.

> foundational principle that the "privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney."[41]

The oft-used quotation is from *Upjohn*, though the *Local TV* court also invoked *Fisher* by footnote as supporting its holding.[42] Beyond this pair, the court ignored the dozens of cases that very much did "cavil" with the idea that an attachment should be considered, counterfactually, independently of the email it is actually part of,[43] and instead relied on three Illinois cases that had perpetuated *Sneider*'s mistaken conflation of attachments with "facts," including the magistrate decision overruled in *Muro*![44] True, the Northern District could pick from any number of local cases that had rejected the Principle.[45] But others had expressed considerable ambivalence,[46] and neither did the district lack for decisions approving of the Principle, notwithstanding *Sneider*.[47] Indeed, only months earlier, the same judge had quoted one of those latter decisions in an earlier order in the *Local TV* case, for the principle that "the privileged nature of a communication may be established by the document itself and the circumstances relating to the communication."[48]

Manifestly, the profuse lower court opinions have not sufficed to decide the issue cleanly, even within a single district court, and if anything are muddying the waters in their multifarity. Thus, if there is to be some harmony achieved, it bears returning to that often-cited pair of aging cases from the Supreme Court, *Upjohn* and *Fisher*.

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41. *Id*. at *6 (citations omitted).

42. *Id*. at n.36 (quoting Upjohn Co. v. United States, 449 U.S. 383, 395 (1981)).

43. *See* Sunshine, *Part & Parcel II*, *supra* note 8, at 394–98, figure 1 (listing 42 cases).

44. *Loc. TV*, 2024 WL 1956255, at *6 n.35 (citing Towne Place Condo. Ass'n v. Philadelphia Indem. Ins. Co., 284 F. Supp. 3d 889, 895 (N.D. Ill. 2018); Muro v. Target Corp., 2006 WL 3422181, at *5 (N.D. Ill. Nov. 28, 2006) ("Attachments which do not, by their content, fall within the realm of the privilege cannot become privileged by merely attaching them to a privileged communication with the attorney."); and Allendale Mut. Ins. Co. v. Bull Data Sys., Inc., 145 F.R.D. 84, 88 (N.D. Ill. 1992)).

45. *E.g*., RTC Indus., Inc. v. Fasteners for Retail, Inc., No. 17-C-3595, 2019 WL 5003681, at *12 (N.D. Ill. Oct. 8, 2019); *Towne Place*, 284 F. Supp. 3d at 895; Slaven v. Great Am. Ins. Co., 83 F. Supp. 3d 789, 795 (N.D. Ill. 2015); Lee v. Chi. Youth Ctrs., 304 F.R.D. 242, 248–49 (N.D. Ill. 2014), *objections sustained in part and overruled in part*, No. 12-C-9245 (Aug. 6, 2014); McCullough v. Frat. Order of Police, Chi. Lodge 7, 304 F.R.D. 232, 237 (N.D. Ill. 2014); RBS Citizens, N.A. v. Husain, 291 F.R.D. 209 (N.D. Ill. 2013); Mold-Masters Ltd. v. Husky Injection Molding Syss. Ltd., No. 01 C 1576, 2001 WL 1558303, at *3 (N.D. Ill. 2001); McCook Metals, LLC v. Alcoa, Inc., 192 F.R.D. 242, 254 (N.D. Ill. 2000).

46. *E.g*., Diamond Servs. Mgmt. Co. v. C&C Jewelry Mfg., Inc., No. 19 C 7675, 2021 WL 5834004, at *3 (N.D. Ill. Dec. 9, 2021) (discussed in Sunshine, *Part & Parcel II*, *supra* note 8, at 389–90); Med. Waste Techs. L.L.C. v. Alexian Bros. Med. Ctr., Inc., No. 97 C 3805, 1998 WL 387706, at *3 (N.D. Ill. June 24, 1998) (discussed in Sunshine, *Part & Parcel II*, *supra* note 8, at 363, 366–67 n.55).

47. *See* Sunshine, *Part & Parcel II*, *supra* note 8, at 394–98, figure 1; *e.g*., Belcastro v. United Airlines, Inc., 2021 WL 1531601, at *6, n.2 (N.D. Ill. Apr. 19, 2021); United States Sec. & Exch. Comm'n v. Hollnagel, No. 07 CV 4538, 2010 WL 11586980, at *6–7 (N.D. Ill. Jan. 22, 2010); Rainey v. Plainfield Cmty. Consol. Sch. Dist. No. 202, No. 07 C 3566, 2009 WL 1033654, at *2 (N.D. Ill. Apr. 16, 2009); Muro v. Target Corp., 250 F.R.D. 350 (N.D. Ill. 2007), *aff'd*, 580 F.3d 485 (7th Cir. 2009).

48. *In re* Loc. TV Advert. Antitrust Litig., No. 18-C-6785, 2024 WL 165207, at *2 (N.D. Ill. Jan. 16, 2024) (quoting *Hollnagel*, 2010 WL 11586980, at *9).

II. CASES IN CONFLICT: *FISHER*'S FAILURE OF FORESIGHT AND *UPJOHN*'S UPSHOT

The original *Part & Parcel* article spent much time on the lessons of *Upjohn Co. v. United States*, the seminal modern decision on communicational privilege.[49] An earlier ruling, *Fisher v. United States*, was relegated to a footnote in that article, albeit one that took up most of two pages.[50] This reflected the author's misguided instinct that attorneys would readily recognize that *Fisher* derived from another era, addressed a concern distinct from emails—the singularity of a physical file, rather than infinitely replicable electronic information—and in any case predated *Upjohn*.[51] History has not vindicated that happy assumption, though parties desirous of penetrating privilege may be forgiven for interpreting *Fisher* effusively and urging extrapolation of its ruling beyond the case decided.[52] It is telling that both *Willis* and *Linet* cited to the original Part & Parcel article's lengthy footnote for the proposition that *Fisher* did not contradict *Upjohn* and the two were reconcilable; they deserved more attention than a footnote.[53] But to understand why *Upjohn* and *Fisher* illuminate compatible facets of privilege, they must be considered in their respective contexts, not as isolated phrases excerpted in a later case.[54]

A. WHAT THE SUPREME COURT REALLY SAID

Start in 1976 with *Fisher*.[55] The Court granted certiorari to resolve the conflict posed by decisions of the Third and Fifth Circuits anent IRS enforcement actions

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49. Sunshine, *Part & Parcel*, *supra* note 2, at 51–54 (introducing *Upjohn* to be "as seminal a case as the discipline enjoys"); *see* Hof *ex. rel.* FoodServiceWarehouse.com v. LaPorte, No. CV 19-10696, 2020 WL 5594126, at *5 (E.D. La. Sept. 18, 2020) ("seminal decision"); Edwards v. Scripps Media, Inc., No. 18-10735, 2019 WL 2448654, at *1 (E.D. Mich. June 10, 2019) ("[T]he seminal Supreme Court decision on attorney-client privilege and work product doctrine[.]").

50. Sunshine, *Part & Parcel*, *supra* note 2, at 66–67 n.73.

51. *Id.*

52. *See* Doe v. Intermountain HealthCare, Inc., No. 2:18-CV-807, 2021 WL 425117, at *3 (D. Utah Feb. 8, 2021); Lee v. Chi. Youth Ctrs., 304 F.R.D. 242, 249 (N.D. Ill. 2014) (quoting Fisher v. United States, 425 U.S. 391 (1976)), *objections sustained in part and overruled in part*, No. 12-C-9245 (Aug. 6, 2014). *See also* Sneider v. Kimberly-Clark Corp., 91 F.R.D. 1 (N.D. Ill. 1980) (quoting *Fisher*, 425 U.S. at 403), *abrogated in unrelated part by In re* Queen's Univ. at Kingston, 820 F.3d 1287 (Fed. Cir. 2016); *see generally* Evergreen Trading, LLC *ex rel.* Nussdorf v. United States, 80 Fed. Cl. 122 (Fed. Cl. 2007).

53. Linet Americas, Inc. v. Hill-Rom Holdings, Inc., No. 1:21-cv-6890, 2024 WL 3425795, at *16 n.17 (N.D. Ill. 2024) (quoting Sunshine, *Part & Parcel*, *supra* note 2, at 66–67 n.73); Willis Elec. Co. v. Polygroup Trading Ltd., No. 15-cv-3443, 2021 WL 568454, at *7 (D. Minn. Feb. 16, 2021) (citing Sunshine, *Part & Parcel*, *supra* note 2, at 66 n.73).

54. As metasyntactic parallel, properly understood, both cases prescribe that attachments be considered in the complete context of the email communication in which they are embedded rather than in isolation. And, of course, the Supreme Court has often remonstrated that cases are properly understood in their entirety, not merely mined for cherry-picked quotations. *Compare* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 419 (2024) (Gorsuch, J., concurring) (quoting Sir Francis Bacon as warning against overreliance on particular phrases in opinions), *with* Bowe v. United States, 2026 WL 70342, at *26 (Jan. 9, 2026) (Gorsuch, J., dissenting) ("But the majority's quote mining of that decision only winds up highlighting just how unprecedented its course today really is. . . . If anything, and as we have seen, Castro does more to hurt than help the majority's cause.").

55. Fisher v. United States, 425 U.S. 391 (1976).

to compel the production of accountants' papers from the files of the taxpayer's counsel, which the Third Circuit allowed in one case, whilst the Fifth Circuit quashed in another.[56] In both cases, however, the operative privilege asserted was the Fifth Amendment privilege against self-incrimination: that the papers' production could not have been compelled from the taxpayer himself, only invoking the attorney-client relationship to argue that their privity made production from the lawyer tantamount to production from the client.[57] Although all parties and courts had proceeded on the premise that if the papers were immune in the client's hands under the Fifth Amendment, the lawyer too should be thus immune, the Court agreed only in part, noting it was not the Fifth Amendment underlying the lawyer's immunity.[58] Relying upon its recent decision in *Couch v. United States*, the "physical or moral compulsion" against the person of the accused that the Fifth Amendment protected was lacking where third parties were the subpoena's subject, whatever their connection to the accused:[59] "[w]e adhere to the view that the Fifth Amendment protects against 'compelled self-incrimination, not (the disclosure of) private information.'"[60]

No one had expressly urged the application of attorney-client privilege, but given its holding that the Fifth Amendment was inextensible to the attorney, the Court *sua sponte* felt "obliged to inquire whether the attorney-client privilege applies to documents in the hands of an attorney which would have been privileged in the hands of the client by reason of the Fifth Amendment."[61] It did. Privilege conduced intercourse with counsel by assuring the client that his secrets could not be extracted from the lawyer once divulged.[62] As a general principle, the client's (otherwise nonprivileged) documents are equally susceptible to collection from the client or attorney, so there is no need for protection.[63] But if the

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56. *Id*. at 393–96.

57. *Id*. at 395–96.

58. *Id*. at 396.

59. *Id*. at 396–98 (quoting Couch v. United States, 409 U.S. 322, 328 (1973)). The Court was clear: "Agent or no, the lawyer is not the taxpayer. The taxpayer is the 'accused,' and nothing is being extorted from him." *Id*. at 398.

60. *Fisher*, 425 U.S. at 401 (quoting United States v. Nobles, 422 U.S. 225, 233 n.7 (1975)). The Supreme Court had ample precedent for this, noting also: "The protection of the Fifth Amendment is therefore not available. 'A party is privileged from producing evidence but not from its production.'" *Id*. at 399 (quoting Johnson v. United States, 228 U.S. 457, 458 (1913)).

61. *Id*. at 402 ("The taxpayers in these cases, however, have from the outset consistently urged that they should not be forced to expose otherwise protected documents to summons simply because they have sought legal advice and turned the papers over to their attorneys. The Government appears to agree unqualifiedly. The difficulty is that the taxpayers have erroneously relied on the Fifth Amendment without urging the attorney-client privilege in so many words. They have nevertheless invoked the relevant body of law and policies that govern the attorney-client privilege.").

62. *Id*. at 403–04.

63. *Id*. at 404 ("Pre-existing documents obtainable from the client are not appreciably easier to obtain from the attorney after transfer to him. Thus, even absent the attorney-client privilege, clients will not be discouraged from disclosing the documents to the attorney, and their ability to obtain informed legal advice will remain unfettered.").

documents are immune from production in the client's hands (say, because of the Fifth Amendment), then failure to recognize like immunity in the lawyer would deter legal consultation, and therefore abridge the attorney-client privilege,[64] when "the transfer to the attorney is for the purpose of obtaining legal advice."[65]

The Court granted that the transfer at issue qualified, and thus the papers "if unobtainable by summons from the client, are unobtainable by summons directed to the attorney by reason of the *attorney-client privilege*," not the Fifth Amendment.[66] But what of the premise? Were the tax papers actually immune from production in the client's hands as self-incriminatory?[67] The Court recounted that the notion of immunity in one's papers under the Fifth Amendment sprang from *Boyd v. United States* in 1886.[68] Even as many of *Boyd*'s pronouncements were eroded and discarded, however, the rule as to private papers persevered in later opinions.[69] Finding that "the foundations for the rule have been washed away," *Fisher* at last clarified that only *testimonial* compulsion is forbidden, and that a "taxpayer cannot avoid compliance with the subpoena merely by asserting that the item of evidence which he is required to produce contains incriminating writing, whether his own or that of someone else."[70]

In the end, therefore, *Fisher* said rather little about attorney-client privilege. True, it offered a version of the banality that privilege extends only so far as necessary, as an impediment to truth-seeking.[71] But what it said first and foremost was that disclosures to one's attorney for a legal purpose were privileged.[72] As for materials enclosed, the situation it envisioned was the one at bar, where the physical objects had been transported from the client to the attorney: "This Court and the lower courts have thus uniformly held that pre-existing documents which could have been obtained by court process from the client *when he was in possession* may also be obtained from the attorney by similar process *following transfer*

64. *Id.* ("'It follows, then, that *when the client himself would be privileged* from production of the document, either as a party at common law . . . or as exempt from self-incrimination, the attorney having possession of the document is not bound to produce.' Lower courts have so held.") (quoting 8 WIGMORE § 2307, p. 592).

65. *Id.* at 404–05.

66. *Id.* at 405 (emphasis added).

67. *Id.*

68. *Id.* at 405–07 ("Among its several pronouncements, *Boyd* was understood to declare that the seizure, under warrant or otherwise, of any purely evidentiary materials violated the Fourth Amendment and that the Fifth Amendment rendered these seized materials inadmissible. . . . Private papers taken from the taxpayer, like other 'mere evidence,' could not be used against the accused over his Fourth and Fifth Amendment objections.") (citing Gouled v. United States, 255 U.S. 298 (1921); Agnello v. United States, 269 U.S. 20 (1925); and United States v. Lefkowitz, 285 U.S. 452 (1932)).

69. *Id.* at 407–09.

70. *Id.* at 409–10.

71. *Id.* at 403 ("However, since the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose. Accordingly it protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege.").

72. *Id.* ("Confidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged.").

by the client in order to obtain more informed legal advice."[73] The past tense in the first italicized phrase is key: the reason such documents had to (and could) be obtained from the attorney was that the client no longer possessed them. The mere fact that an attorney now had custody of the physical objects of the subpoena could not conjure a privilege had not existed in the first place. But the sole precept *Fisher* adduced on the *act of communicating* was that it was privileged[74]—the papers could be obtained from the attorney only "following transfer."[75]

Upjohn was issued only five years later in 1981, and unlike *Fisher*, was squarely aimed at attorney-client privilege.[76] After learning of potentially illegal expenditures in its branches abroad, Upjohn's general counsel distributed a letter (under the chairman's signature) and questionnaire to overseas managers describing the background and legal regime and soliciting information about payments to foreign officials.[77] Both in-house and outside counsel reviewed the responses and conducted interviews with three dozen employees.[78] Once Upjohn submitted a preliminary report of possible infractions to the SEC and IRS, the latter issued a summons demanding the questionnaires returned to counsel and memoranda of the ensuing interviews, but the company demurred, citing the attorney-client and work product privileges.[79] After the district court ordered compliance, Upjohn appealed, and the Sixth Circuit affirmed in the main but remanded to determine which interviewees were senior enough to qualify under the prevailing "control group test" for corporate privilege.[80] Upjohn appealed again.

After reciting the traditional rationale and rule for common-law privilege, incorporated via Federal Rule of Evidence 501, the Supreme Court turned to corporate privilege.[81] The theory of the "control group test" adopted by the Sixth Circuit and many other lower courts before held that only "senior management" who guide and direct the corporation could invoke its privilege with counsel.[82] The Court disagreed, because this blinkered test "overlooks the fact that the

73. *Id*. at 403–04 (emphases added) (citing Falsone v. United States, 205 F.2d 734 (5th Cir. 1953); Sovereign Camp, W.O.W. v. Reed, 94 So. 910 (Ala. 1922); Andrews v. Mississippi R. Co., 98 N.E. 49 (Ind. 1860); Palatini v. Sarian, 83 A.2d 24 (N.J. 1951); Pearson v. Yoder, 134 P. 421 (Okla. 1913); and State *ex rel*. Sowers v. Olwell, 394 P.2d 681 (Wash. 1964)).

74. *Id*. at 403–05.

75. *Id*. at 404.

76. Upjohn Co. v. United States, 449 U.S. 383, 386 (1981) ("With respect to the privilege question the parties and various amici have described our task as one of choosing between two 'tests' which have gained adherents in the courts of appeals. We are acutely aware, however, that we sit to decide concrete cases and not abstract propositions of law. We decline to lay down a broad rule or series of rules to govern all conceivable future questions in this area, even were we able to do so. We can and do, however, conclude that the attorney–client privilege protects the communications involved in this case from compelled disclosure and that the work–product doctrine does apply in tax summons enforcement proceedings.").

77. *Id*. at 386–87.

78. *Id*. at 387.

79. *Id*. at 387–88.

80. *Id*. at 388–89.

81. *Id*. at 389–90.

82. *Id*. at 390.

privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice."[83] Executives may be the principal actors upon legal advice, but rank-and-file employees must provide the vital information needed.[84] No corporation could enjoy sound advice unless *all* its relevant employees were afforded its privilege.[85] Worse still, the control group test rendered privilege inherently unsure, discouraging clients from relying on it.[86] The Court thus held the employee responses to and interviews with counsel were uniformly privileged from discovery.[87]

In doing so, the Court noted and dismissed the pronounced alarm in courts below that endorsing a broad privilege would drape an all-encompassing "zone of silence" over corporate intercourse.[88] To the contrary, the Court insisted that "application of the attorney–client privilege to communications such as those involved here, however, puts the adversary in no worse position than if the communications had never taken place," because the privilege protected communications rather than the underlying facts, which could be discovered by other means—just not by seizing the actual communiqués with counsel.[89] The Court elaborated:

> Here the Government was free to question the employees who communicated with Thomas and outside counsel. Upjohn has provided the IRS with a list of such employees, and the IRS has already interviewed some 25 of them. While it would probably be more convenient for the Government to secure the results of petitioner's internal investigation by simply subpoenaing the questionnaires and notes taken by petitioner's attorneys, such considerations of convenience do not overcome the policies served by the attorney-client privilege. As Justice Jackson noted in his concurring opinion in *Hickman v. Taylor*:

83. *Id.*

84. *Id.* at 391–92.

85. *Id.* at 392 ("The control group test adopted by the court below thus frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation. The attorney's advice will also frequently be more significant to noncontrol group members than to those who officially sanction the advice, and the control group test makes it more difficult to convey full and frank legal advice to the employees who will put into effect the client corporation's policy. The narrow scope given the attorney–client privilege by the court below not only makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law.") (citations omitted).

86. *Id.* at 393 ("An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all. The very terms of the test adopted by the court below suggest the unpredictability of its application. The test restricts the availability of the privilege to those officers who play a 'substantial role' in deciding and directing a corporation's legal response. Disparate decisions in cases applying this test illustrate its unpredictability.").

87. *Id.* at 394–95.

88. *Id.* at 395 ("The Court of Appeals declined to extend the attorney–client privilege beyond the limits of the control group test for fear that doing so would entail severe burdens on discovery and create a broad 'zone of silence' over corporate affairs.").

89. *Id.* (initial majuscule reduced to minuscule).

> "Discovery was hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from the adversary."[90]

The Court, indeed, went on to examine and apply the work product privilege under *Hickman* as well,[91] but that is a story for another article.

B. READING *FISHER* AND *UPJOHN* TOGETHER

The original *Part & Parcel* article opined that *Fisher* and *Upjohn* could be harmonized, and that remains true.[92] *Upjohn* taught that attorney-client privilege turns on communications, not the *facts* therein,[93] and thus other objects of discovery may yield the same factual content as a privileged exchange. *Fisher*, meanwhile, taught that the privilege turns on communications, not *possession*,[94] and thus a document that was unprivileged in the client's hands is not transmuted to privileged status once in the attorney's hands,[95] even if the act of transmission was protected. Functionally, *Fisher* established that discovery could not be evaded by fraudulent artifices, including those misusing the attorney-client privilege. In its day, were a critical (paper) document to be pretextually secreted with obliging counsel as a means to evade disclosure, it would be absent from the materials available in discovery—and privilege was never intended to allow such an inequitable result.[96] *Fisher* facially

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90. *Id.* at 396 (citation omitted) (*quoting* Hickman v. Taylor, 329 U.S. 495, 516 (1947) (Jackson, J., concurring).

91. *Id.* at 397–402.

92. *See* Gould, Inc. v. Mitsui Mining & Smelting Co., 825 F.2d 676, 679–80 (2d Cir. 1987) (citing both *Upjohn* and *Fisher* together for a truism: "We recognize, of course, that communications between WMW and its clients for the purpose of obtaining or rendering legal advice, conducting the negotiation of the Miyakoshi-Danvers settlement, or defending the Gould lawsuit are privileged.").

93. Upjohn Co. v. United States, 449 U.S. 383, 395–96 (1981) (quoting Philadelphia v. Westinghouse Elec. Corp., 205 F. Supp. 830, 831 (E.D. Pa. 1962)).

94. Fisher v. United States, 425 U.S. 391, 404–05 (1976); *see infra* note 111 (discussing how self-incrimination privilege implicates possession differently than the attorney-client privilege).

95. United States v. Walker, 243 F. App'x. 621, 623 (2d Cir. 2007) ("For this reason, putting otherwise non-privileged business records (like the contract summaries here) in the hands of an attorney—or printing out such records for an attorney to review—does not render the documents privileged or work product. *See* Ratliff v. Davis Polk & Wardwell, 354 F.3d 165, 170–71 (2d Cir. 2003) ('Documents obtain no special protection because they are housed in a law firm; "[a]ny other rule would permit a person to prevent disclosure of any of his papers by the simple expedient of keeping them in the possession of his attorney."').); *Gould*, 825 F.2d at 679–80 ("However, other documents received by WMW from its clients, which would not be privileged if they remained in the clients' hands, would not acquire protection merely because they were transferred to WMW."); *see also* Sunshine, *Part & Parcel*, *supra* note 2, at 67 ("It goes almost without saying that documents lacking privilege may be subject to discovery regardless of an attorney's possession of the documents.").

96. *See Gould*, 825 F.2d at 679–80 ("Furthermore, the equities might not favor the application of the *Sporck* exception ['that the selection and compilation of documents by counsel for litigation purposes is protected opinion work product'] if the files from which documents had been culled by WMW were not otherwise available to Gould (the Miyakoshi documents) or were beyond reasonable access to Gould (the Mitsui files in Japan)."); United States v. Davis, 636 F.2d 1028, 1041 (5th Cir. 1981) ("[D]ocuments created outside the attorney-client relationship should not be held privileged in the hands of the attorney unless otherwise privileged in the hands of the client, lest the client immunize . . . evidence merely by depositing it with his attorney."), *cert. denied*, 454 U.S. 862 (1981); Bouschor v. United States, 316 F.2d 451, 457 (8th Cir. 1963) ("The delivery of the papers to the attorney does not create the privilege when it did not theretofore exist."); Evergreen Trading, LLC *ex rel.* Nussdorf, 80 Fed. Cl. 122, 139 n.25 (2007).

represents the overarching principle that attorney-client privilege depends upon the sincere legal intercourse of an attorney with his *bona fide* client, as that Court stressed repeatedly in requiring that the communication be "for the purpose of legal advice."[97] Intrinsic in that qualification is that secretion of files purely or primarily to evade discovery is *not* for that purpose.

Both cases agree, therefore, that *merely* attaching something to an otherwise privileged communication cannot automatically cloak it in privilege, as all thereafter understood well.[98] On that rule, *Sneider* and its ilk were right: one cannot "funnel" documents to counsel without a *bona fide* legal purpose, purely as an artifice to generate privilege, and expect courts to defer to a fiction based on form alone.[99] Indeed, even a *bona fide* transmission lacking demonstrable legal intent (like an "FYI" or blank forward) may not suffice to protect either email or attachment.[100] For the Part & Parcel Principle to apply, the attachment must be an

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97. *Fisher*, 425 U.S. at 404–05; *see* Dorce v. City of New York, No. 19 Civ. 2216, 2024 WL 139546, at *4 (S.D.N.Y. Jan. 12, 2024) ("The mere fact, however, that a document was transmitted between an attorney and a client does not render the document privileged."). *See* Dep't of Econ. Dev. v. Arthur Anderson & Co. (U.S.A.), 139 F.R.D. 295, 300 (S.D.N.Y. 1991). Rather, it 'must contain confidential communication relating to legal advice.' *Id.*; *see* Renner v. Chase Manhattan Bank, No. 98 Civ. 926, 2001 WL 1356192, at *1 (S.D.N.Y. Nov. 2, 2001); (rejecting argument that "any reference to any communication between [a client] and one of his attorneys on any document shields that entire document from disclosure, whether or not the document reveals communications made by [the client] to his attorneys in confidence and for the purpose of obtaining legal advice."); Bennett v. Cuomo, No. 22 Civ. 7846, 2024 WL 80271, at *4 (S.D.N.Y. Jan. 8, 2024) (same); Monterey Bay Mil. Hous., LLC v. Ambac Assurance Corp., No. 19 Civ. 9193, 2023 WL 315072, at *6 (S.D.N.Y. Jan. 19, 2023) (same); Bellridge Cap., LP v. EVmo, Inc., No. 21 Civ. 7091, 2022 WL 17490961, at *3 (S.D.N.Y. Dec. 6, 2022) (same); Coventry Capital US LLC v. EEA Life Settlements Inc., No. 17 Civ. 7417, 2021 WL 4312026, at *3 (S.D.N.Y. Sep. 22, 2021) (same); Flynn v. Cable News Network, Inc., No. 21 Civ. 2587, 2022 WL 17820854, at *3 (S.D.N.Y. Dec. 5, 2022) (similar).

98. Miller UK Ltd. v. Caterpillar, Inc., No. 10 C 3770, 2015 WL 13652752, at *1 (N.D. Ill. Feb. 11, 2015) ("It cannot be too strongly emphasized that the lawyer-client relationship, itself, 'does not create "a cloak of protection which is draped around all occurrences and conversations which have any bearing, direct or indirect, upon the relationship of the attorney with his client."'"). *In re* Walsh, 623 F.2d 489, 494 (7th Cir. 1980)."), *objections sustained*, No. 10-CV-03770, 2015 WL 14069754 (N.D. Ill. Sep. 24, 2015); *Renner,* 2001 WL 1356192, at *1; Sunshine, *Part & Parcel*, *supra* note 2, at 67 ("Similarly fundamental is that sending a document to counsel does not *ipse dixit* immunize even that attachment from discovery; the document must be part and parcel of a *genuine* solicitation of *legal* advice.").

99. Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314, 324 (7th Cir. 1963) ("Certainly, the privilege would never be available to allow a corporation to funnel its papers and documents into the hands of its lawyers for custodial purposes and thereby avoid disclosure."); Baxter Travenol Labs., Inc. v. Abbott Labs., No. 84 C 5103, 1987 WL 12919, at *5 (N.D. Ill. June 19, 1987) ("The attorney-client privilege protects only communications related to the giving or seeking of legal advice; funneling other communications past an attorney will not make them privileged."). *Compare* Lee v. Chi. Youth Ctrs., 304 F.R.D. 242, 249 (N.D. Ill. 2014), *objections sustained in part and overruled in part*, No. 12-C-9245 (Aug. 6, 2014), *and* Sneider v. Kimberly-Clark Corp., 91 F.R.D. 1, 4 (N.D. Ill. 1980), *with* Barton v. Zimmer Inc., No. 1:06-CV-208, 2008 WL 80647, at *4 (N.D. Ind. Jan. 7, 2008) (citing *Sneider*), and N. Valley Commc'ns, LLC v. Qwest Commc'ns Corp., 2010 WL 3672233, at *4 (D.S.D. Sep. 10, 2010) ("The courts will not permit the corporation to merely funnel papers through the attorney in order to assert the privilege."). *See also* Sunshine, *Part & Parcel*, *supra* note 2, at 67–68 (discussing "attorney-funneling").

100. *See* Dale v. Deutsche Telekom AG, No. 22 C 3189, 2024 WL 4416761, at *3 n.5 (N.D. Ill. Oct. 4, 2024) (cataloguing examples of non-legal communications with counsel, including a photograph of a toilet as the "GOAT"); Sokol v. Wyeth, Inc., No. 07 Civ. 8442, 2008 WL 3166662, at *9 (S.D.N.Y. Aug. 4, 2008) (ordering

integral part of a genuine communication with counsel requesting or rendering legal advice.[101] The reason why attachments do not automatically gain privilege by their inclusion with any email with counsel is because *not every communication involving counsel is privileged*, not because attachments are a second-class form of communication requiring special justification.[102] No more or less than an email or letter, the attachments or enclosures communicated to counsel must serve a cognizable legal purpose to enjoy privilege: both parts of the parcel are subject to the same standard.[103]

Nevertheless, some judges have still fulminated at the insubstantial specter of abuse, insisting that if the easy expedient of attachment could shield an otherwise nonprivileged document, clients would outsource archiving to counsel, claim the law office an impenetrable citadel, and refuse to honor discovery requests *en masse*.[104] Given precious few miscreants have ever attempted such a ludicrous

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production of "any communication consisting of the text 'FYI,' or a similar announcement"); *Renner*, 2001 WL 1356192, at *5; Window World of Baton Rouge, LLC v. Window World, Inc., No. 15 CVS 1, 2019 WL 3995941, at *26–28 (N.C. Super. Aug. 16, 2019), *aff'd*, No. 2021-NCSC-70, 857 S.E.2d 850 (N.C.).

101. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) ("'The lawyer–client privilege rests on the need for the advocate and counselor to know all *that relates to the client's reasons for seeking representation* if the professional mission is to be carried out.'" (quoting Trammel v. United States, 445 U.S. 40, 51 (1980) (emphasis added))); *id*. at 394 ("communications at issue were made . . . in order to secure legal advice from counsel"); *Fisher*, 425 U.S. at 404–05 (1976) (communications "for the purpose of obtaining legal advice"); *see* Sunshine, *Part & Parcel*, *supra* note 2, at 55 (defining the Principle to be that "where attachments comprise an integral part of a confidential communication with counsel for the purpose of obtaining legal advice, both the email and its factual attachments are privileged in their entirety, regardless of the attachments' origin in the public domain, or their later dissemination").

102. *See* United States ex rel. Gill v. CVS Health Corp., No. 18 C 6494, 2024 WL 406510, at *6 n.10 (N.D. Ill. Feb. 2, 2024) ("Too often, the court has dealt with privilege claims that, essentially, seem to be based on attorneys being magic, with even the hint of their involvement drawing a conjurer's circle around even the most innocuous of communications."). Consider a client attempting to abuse privilege by the sophistic expedient of randomly attaching an arbitrary (but important) preexisting document every time he emailed his attorney for genuine reasons. The portion of the communication presenting the bona fide solicitation of legal advice—the email—would remain privileged, even as the randomly included attachment, sent for no legal purpose but only in a desire to fraudulently obtain privilege, would not. All the more so, a blank email merely forwarding the document for no reason other than such fraud would yield no privilege for either the contrived email or the attachment. And in any case, the original document would remain on the client's computer, available for discovery, unless it was deliberately deleted, an unvarnished misdeed that the stern penalties for spoliation of evidence target and deter. *See* FED R. CIV. PRO. 37(e); Thomas Y. Allman, *Amended Rule 37(e): What's New and Next for Spoliation*, 101 JUDICATURE 46 (2017). Not so for tangible documents, where transfer of the physical papers intrinsically removed them from its original site, making the applicability of spoliation law far less clear. *See infra* notes 109–114 and accompanying text.

103. Durling v. Papa John's Int'l, Inc., No. 16CIV3592, 2018 WL 557915, at *8 (S.D.N.Y. Jan. 24, 2018); *see* Washtenaw Cnty. Employees' Ret. Sys. v. Walgreen Co., No. 15 C 3187, 2020 WL 3977944, at *6 (N.D. Ill. July 14, 2020) ("Attachments need to have their own privileged bases in order for them to be properly withheld under a claim of privilege.").

104. *E.g*., PepsiCo, Inc. v. Baird, Kurtz & Dobson, LLP, 305 F.3d 813, 816 (8th Cir. 2002) ("legal departments are not citadels where information may be placed to defeat discovery" (citing Simon v. G.D. Searle & Co., 816 F.2d 397, 403 (8th Cir. 1987))); Towne Place Condo. Ass'n v. Philadelphia Indem. Ins. Co., 284 F. Supp. 3d 889, 896 n.4 (N.D. Ill. 2018) ("If the result were otherwise, clients and lawyers could have all relevant documents sent to their counsel initially or as attachments to emails and then refuse to honor a single Rule 34 request.") (declining to cite *Lee*); Lee v. Chi. Youth Ctrs., 304 F.R.D. 242, 249 (N.D. Ill. 2014) ("If the result

gambit, these fears are catastrophizing at best, and if documents are really funneled to counsel in bad faith, courts are ready and willing to deny privilege.[105] Indeed, *Upjohn* acknowledged the prevailing paranoia about conducing a corporate "zone of silence" in 1981, but rejected it as hysteria.[106] It has grown no more plausible with time: the improbability of success when courts are clearly sensitive to so obvious a sham—compounded by the logistical inefficiencies incurred in orchestrating such a plan—are powerful deterrents to any rational enterprise. And both *Upjohn* and *Fisher* indeed foreclose such flagrantly fraudulent maneuvers from accomplishing their goal of obtaining privilege.[107] Paul R. Rice has argued that *Fisher* "erroneously" allowed discovery of documents lodged with an attorney in good faith, but this Article takes *Fisher* at its word, misguided though it may be.[108]

And it may not be. *Fisher* addressed a more subtle and foundational (dare it be said, *actual*) problem: with a paper document, there is only one physical object, and if it is conveyed to the attorney, it is no longer in the possession of the client. Thus, attorney-client communications involving paper enclosures concomitantly removed the underlying document from the universe of party discovery the underlying document, even if it had been originally prepared in the ordinary course of business without any semblance of privilege.[109] And this autonomic removal ensues even when a client makes a legal request in good faith, legitimately implicating the enclosure as part and parcel of the inquiry.[110] *That* was the knotty problem that *Fisher* confronted.[111] Even a client who honestly transferred such a

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were otherwise, unscrupulous clients and lawyers could have all relevant documents sent to their counsel initially or as attachments to emails and then refuse to honor a single Rule 34 request. The privilege is not so easily perverted."); *Renner*, 2001 WL 1356192, at *5 (quoting SCM Corp. v. Xerox Corp., 70 F.R.D. 508, 515 (D. Conn. 1976) ("Legal departments are not citadels in which public, business or technical information may be placed to defeat discovery and thereby ensure confidentiality.")).

105. *E.g.*, Bell Microproducts, Inc. v. Relational Funding Corp., 2002 WL 31133195 (N.D. Ill. Sep. 25, 2002); *In re* Asousa P'ship, No. 01-12295DWS, 2005 WL 3299823 (Bankr. E.D. Pa. Nov. 17, 2005). *See* N. Valley Commc'ns, LLC v. Qwest Commc'ns Corp., 2010 WL 3672233, at *4 (D.S.D. Sep. 10, 2010) ("The courts will not permit the corporation to merely funnel papers through the attorney in order to assert the privilege.").

106. *Upjohn*, 449 U.S. at 395 (quoted *supra* notes 88–89).

107. *See Upjohn*, 449 U.S. 383.

108. Paul R. Rice, *Attorney-Client Privilege: Continuing Confusion about Attorney Communications, Drafts, Pre-existing Documents, and the Source of the Facts Communicated*, 48 AM. U. L. REV. 967, 990–92 (1999) ("It not infrequently happens that deeds, contracts, or other written instruments may be delivered by a client to an attorney under such circumstances that the attorney cannot be compelled or permitted to produce the same in evidence against his client at the demand of an adversary party. In this class of cases the deed or other written instrument is not itself privileged. It is merely the possession of the attorney that is protected. As he received the instrument by reason of the confidential relation of client and attorney, he cannot be compelled to yield up such possession at the demand of another, nor to reveal the contents of the paper." (quoting *Liggett v. Glenn*, 51 F. 381, 395–96 (8th Cir. 1892))).

109. *Id.* at 992–94, n.101.

110. *Id.*

111. A later case applying *Fisher* makes clear why the issue was nonobvious: other privileges, *e.g.*, the Fifth Amendment privilege against self-incrimination, are not implicated by who possesses the document. *See In re*

business file to counsel for review ought not thereby be able to sequester it from the purview of plaintiffs, despite the legitimacy of the legal request.[112] *Fisher*'s simple solution, long accepted,[113] dictated that the unique, nonprivileged papers could be retrieved in discovery from the attorney, *notwithstanding* the privileged communication, not that the instrumentality of the communication itself was nonprivileged and could be discovered.[114]

The age of electronic documents, however, has eliminated that troublesome concomitant: lawyers today are routinely sent only duplicative electronic instances of virtual files, encoded in bytes appended to the email, even as the originals remain safely stored on client networks and computers, awaiting discovery. *Fisher*'s allowance of the invasion of counsel's files is no longer justified or even relevant when an identical copy is readily available on the client's systems.[115] Of course, even in *Fisher*'s day, clients *might* have photocopied paper documents destined for counsel as well, leaving a discoverable copy behind. So too today, an electronic original *might* be deleted after transmission to counsel. But the evil that *Fisher* envisioned was patently that of depriving the opposing party of the one and only copy by lodging it with counsel.[116] The decisive difference is in the default: singularity with paper and multiplicity with bytes.[117]

Grand Jury (Att'y-Client Privilege), 527 F.3d 200, 201 (D.C. Cir. 2008) (observing that "[a]ttorney-client privilege applies to a document a client *transfers* to his attorney 'for the purpose of obtaining legal advice,'" quoting Fisher v. United States, 425 U.S. 393, 404–05 (1976), but "[w]hen the client himself would be privileged from production of the document . . . as exempt from self-incrimination, the attorney having possession of the document is not bound to produce," quoting *Fisher*, 425 U.S. at 405 again as relying on Wigmore) (emphasis added). *Fisher* itself sought to disentangle the privileges at issue after the parties and lower courts had muddied them. *See Fisher*, 425 U.S. at 402.

112. *Contra* Rice, *supra* note 108, at 990–92.

113. *Fisher*, 425 U.S. at 404 (1976); *see* cases cited *supra* note 73 (dating back to 1860).

114. *Compare Fisher*, 425 U.S. at 404, *with* Rice, *supra* note 108, at 989-95.

115. *See* Ball v. Metro-N. Commuter R.R., No. 21 Civ. 6159, 2024 WL 1118783, at *8–9 (S.D.N.Y. Mar. 13, 2024) ("Request No. 68 seeks all non-privileged records 'received by' MNR's outside counsel regarding Plaintiff from its client, MNR, prior to Plaintiff's retention of his current counsel. (Dkt. 47-2 at 13; Chart at 30). The purpose of this request, and what relevant and proportionate information it is designed to yield, are unclear. Of course, if there are responsive and non-privileged documents which MNR gave to its outside counsel, such documents would have to be produced even if they are no longer in MNR's possession. *See, e.g.,* Renner v. Chase Manhattan Bank, No. 98 Civ. 926 (CSH), 2001 WL 1356192, at *5 (S.D.N.Y. Nov. 2, 2001) (nonprivileged documents do not 'become cloaked with privilege solely because [the client] sent them to his attorney'). But Plaintiff does not contend that is the case or limit Request No. 68 to such documents. To the extent that Plaintiff seeks to obtain from litigation counsel the same documents he can obtain (or has already obtained) from MNR itself, the request creates an undue burden and implicates attorney-client privilege concerns that are not justified by any articulated need by Plaintiff for these records."); *see also* Rice, *supra* note 108, at 990–93.

116. *See supra* text accompanying notes 73–75.

117. The conclusion of this article returns to the question of how *Fisher* might apply when the default presumption is defeated. As previewed above, no small number of cases upholding the Principle have come to ask for the producing party to account for the production of the underlying, nonprivileged document that was attached, as a concomitant of asserting privilege on the transmission to counsel. *See, e.g.*, SEC v. Hollnagel, No. 07 CV 4538, 2010 WL 11586980, at *6–7 (N.D. Ill. Jan. 22, 2010); SEC v. Wyly, No. 10 Civ. 5760 SAS, 2011 WL 3055396, at *4 (S.D.N.Y. July 19, 2011) ("Nevertheless, the unprivileged material will have to be produced in some form, as it is the transmission that is protected, not the underlying information. So even if the

At base, much of the subsequent misunderstanding and misapplication of *Fisher* derives from the handy nomenclature developed for electronic records mirroring that of the traditional physical office.[118] By denominating as an "attachment" the series of bytes included in an email that can be decoded into something that looks on a computer screen like a tangible letter or spreadsheet, the framers of the modern internet laid the foundation for precedent about letter enclosures to be translated to email attachments with little thought about whether anything was lost in translation.[119] In many cases, this nomenclatorial equivalency is a useful mnemonic of analogous function, but where the intrinsic singularity of tangible objects is relevant, paper attachments are manifestly not equivalent to electronic ones. By its own terms, *Fisher* has nothing to say about emails and their attachments in this regard: it did not foresee or account for such a technological development. But the *Part & Parcel* article was too glib in dismissing *Fisher* as a "pre-email" case without further explaining *why* the isomorphism[120] of letters with email, and of enclosures with attachments, breaks down when extended to the realm of privilege.[121]

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email were protected as within the common interest, the attachment (Document 3.1) will have to be produced."); Treat v. Tom Kelley Buick Pontiac GMC, Inc., No. 1:08-CV-173, 2009 WL 1543651, at *12 (N.D. Ind. June 2, 2009) ("As Kelley concedes (Defs.' Br. 10), the documents attached to most of the faxes and emails (KEL000002, 6–8, 10–14, 16–23, 25–27, 191–203, 205–10) do not appear to be either confidential attorney-client communications or work product, as they consist of documents from personnel files and materials from the EEOC. However, because Kelley asserts that it has already produced these materials during discovery, the Court will not order Kelley to produce duplicative material."); Rhoads Indus., Inc. v. Bldg. Materials Corp. of Am., 254 F.R.D. 238, 240 (E.D. Pa. 2008).

118. *See* Lea Malani Bays & Stuart A. Davidson, *The Missing Links: Why Hyperlinks Must Be Treated as Attachments in Electronic Discovery*, 92 U. CIN. L. REV. 979, 980 (2024) ("The history of electronically stored information ('ESI') in civil litigation in America took a different path regarding technology. When letters became emails, typewriters became word-processing software, and chalkboards became Microsoft PowerPoint presentations, many stakeholders in the American justice system were not excited about the new technologies.").

119. *See, e.g.*, *id.* at 983 ("Since the transformation of electronic discovery in the early 2000s, courts have routinely held that emails, for example, must be produced with their attachments, just like any 'stapled' or 'enclosed' document.").

That was, indeed, the point: to allow computer users familiar with legacy systems to maintain their trained assumptions and practices without a second thought. *See* L. P. MICHELSON, R. FIELD, D. J. NIGHTINGALE, S. SONE, M. FEUERMAN, R. L. CORSON, INVENTION OF EMAIL IN NEWARK, NJ (1978): THE FIRST EMAIL SYSTEM 8 (2015) ("Email is actually a system—a system of interlocking parts (§2.0) intended to emulate the interoffice, inter-organizational mail system consisting of the Inbox, Outbox, Folders, Memo, Attachment, Address Book, etc., the now-familiar components of every email system."); *id.* at 20-26 (detailing analogues); *see also* E. Parker Lowe, *Emailer Beware: The Fourth Amendment and Electronic Mail*, 2 OKLA. J. L. & TECH art. 15 (2005), https://digitalcommons.law.ou.edu/okjolt/vol2/iss1/15, at 2 ("Because there are many similarities between email and letters, it can be argued that email should receive the same privacy protection as first class mail. . . . However, the question presented here is whether an email and a first class letter are so similar as to receive the same protection.").

120. *Cf.* Jared S. Sunshine, *The Secrets of Corporate Courtship and Marriage: Evaluating Common Interest Privilege When Companies Combine in Mergers*, 69 S.C. L. REV. 301, 305 n.19 (2017) (discussing another isomorphism and scholarly attention to such instructive correspondences).

121. *See* Sunshine, *Part & Parcel*, *supra* note 2, at 66 n.73 ("But *Fisher* was a pre-email case whose holding was essentially that non-privileged documents could not be sheltered from discovery merely by physically lodging them with an attorney.").

These incompatibilities are not trivial. Setting aside its lesson on the fact-communication dichotomy, *Upjohn*'s most compelling *bon mot* is its most quoted: that "if the purpose of the attorney–client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected," for an "uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."[122] This edict—that attorney-client privilege must be well-defined *a priori* even in its intricacies—is especially puissant because the Supreme Court has been reiterating it for a century, long before and after *Upjohn*.[123] The contrary mantra that privilege must be "narrowly construed" as an impediment to truth-seeking, implying that fastidious distinctions should be drawn, is more precariously supported by Supreme Court guidance,[124] however often lower courts gaily quote one another.[125] That principles of privilege in

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

123. *See* Jaffee v. Redmond, 518 U.S. 1, 11 (1996) ("Making the promise of confidentiality contingent upon a trial judge's later evaluation . . . would eviscerate the effectiveness of the privilege."); *id.* at 392 ("An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."); *see* Swidler & Berlin v. United States, 524 U.S. 399, 409 (1998) ("Balancing *ex post* the importance of the information against client interests, even limited to criminal cases, introduces substantial uncertainty into the privilege's application. For just that reason, we have rejected use of a balancing test in defining the contours of the privilege."); Hunt v. Blackburn, 128 U.S. 464, 470 (1888) ("The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.").

124. *Compare* Pierce Cnty., Wash. v. Guillen, 537 U.S. 129, 144 (2003) ("We have often recognized that statutes establishing evidentiary privileges must be construed narrowly because privileges impede the search for the truth." (citing Baldrige v. Shapiro, 455 U.S. 345, 360 (1982)), *with Jaffee*, 518 U.S. at 1, 28 (Scalia, J., dissenting) ("So much for the rule that privileges are to be narrowly construed."); *see also* United States v. Alpers, 338 U.S. 680, 683, (1950) ("'[W]hile penal statutes are narrowly construed, this does not require rejection of that sense of the words which best harmonizes with the context and the end in view'" (quoting Gooch v. United States, 297 U.S. 124, 128 (1936)); *cf.* Seattle Times Co. v. Rhinehart, 467 U.S. 20, 30, 104 S. Ct. 2199, 2206, 81 L. Ed. 2d 17 (1984) ("Under the Rules, the only express limitations [to discovery] are that the information sought is not privileged, and is relevant to the subject matter of the pending action.").

125. *See, e.g.*, *In re* Subpoenas 2019R00561-A0001 Through 2019R00561-A0036, No. 1:20MC00013, 2022 WL 1693712, at *1 (W.D. Va. May 26, 2022) ("While the attorney-client privilege is the oldest of the privileges for confidential communications known to the common law, *see Upjohn Co.*, 449 U.S. at 389 (1981), the Fourth Circuit has held that it is to be narrowly construed and recognized only to the limited extent that excluding relevant evidence has a superior public good because it '"impedes the full and free discovery of the truth."'*In re* Grand Jury Subpoena, 341 F.3d 331, 335 (4th Cir. 2003) (quoting Hawkins v. Stables, 148 F.3d 379, 383 (4th Cir. 1998)).''). The Virginia district court relegated relevant Supreme Court precedent to a nugatory prefatory clause before turning to ramified circuit quotations of the incompatible truism, but courts of appeals themselves cite strings of their own cases as to the beloved mantra in lieu of the Supreme Court's more nuanced guidance favoring privilege, thereby disregarding the controlling rule all the same. *See, e.g.*, *In re* Columbia/HCA Healthcare Corp. Billing Pracs. Litig., 293 F.3d 289, 294 (6th Cir. 2002) ("Claims of attorney-client privilege are 'narrowly construed because [the privilege] reduces the amount of information discoverable during the course of a lawsuit.'") (quoting United States v. Collis, 128 F.3d 313, 320 (6th Cir. 1997) (citing *In re* Grand Jury Proceedings October 12, 1995, 78 F.3d 251, 254 (6th Cir. 1996)) (alteration original)). This predilection may have been influenced by many state courts' historical affinity for a narrowly construed privilege. *E.g.*, Southgate Shopping Ctr., Inc. v. Cincinnati Cas. Co., No. CV 21-5042, 2021 WL 6752264, at *2 (W.D.

attachments—a ubiquitous feature of modern correspondence[126]—has remained unsettled for fifty years is anathema to the Supreme Court's enduring exaltation of certitude. If *Upjohn* commands anything unambiguously, it is that the lower courts coalesce around an answer to privilege consistent with *Upjohn* itself.

The bench has striven mightily to achieve this goal, but strident dissidents persist. Worse, some dissidents have insisted that an inapt Supreme Court precedent forbids the majority view of email attachments.[127] But *Fisher* says no such thing, as other courts have recognized[128]—indeed, it could not, as emails did not exist for practical purposes when that Court rendered the opinion.[129] In fairness, for the same reason, *Upjohn* cannot cleanly dispose of the question either.[130] But suppose that, as applied to later-evolved emails and attachments, *Upjohn*'s reasoning were arguably at odds with *Fisher*'s: what then should the lower courts do?

C. THE TICKLISH BUSINESS OF RECONCILING SUPREME COURT DECISIONS

Harmony is all well and good, but the original *Part & Parcel* article also stated that if *Fisher* and *Upjohn* could not be reconciled, then *Upjohn* would control, as the later case decided. This too was an overly glib assessment fit only for a footnote. As authority, this author looked to *Asher v. Texas*, an 1888 case which had written that "a later decision in conflict with prior ones had the effect to overrule them, whether mentioned and commented or not."[131] *Asher* was brief, spanning only three pages, but has been cited over a hundred times since. It reversed a

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Ark. Sept. 7, 2021) ("The attorney-client privilege 'is the oldest of the privileges for confidential communications known to the common law,' *Upjohn Co*., 449 U.S. at 383, 389 (1981), and has been narrowly construed in Arkansas. Vittitow v. Burnett, 112 Ark. 277 (1914).").

126. *See* Sunshine, *Part & Parcel II*, *supra* note 8, at 356–59.

127. *See* Doe v. Intermountain HealthCare, Inc., No. 2:18-CV-807, 2021 WL 425117, at *2–3 (D. Utah Feb. 8, 2021). Commendably, those favoring the Part & Parcel Principle (which reached the issue) have not advocated that *Upjohn* outright forbids applying the *Sneider* rule to email, but rather than the Principle represents the best interpretation, accepting that multiple interpretations are possible. *Compare* Linet Americas, Inc. v. Hill-Rom Holdings, Inc., 740 F.Supp.3d 685, 703–04 (N.D. Ill. 2024) (noting differential applications of *Upjohn*); and Rhoads Indus., Inc. v. Bldg. Materials Corp. of Am., 254 F.R.D. 238, 240 (E.D. Pa. 2008) (calling *Muro* "a sound interpretation of *Upjohn*"), *with* Doe v. Intermountain HealthCare, Inc., No. 2:18-CV- 807, 2021 WL 425117, at *3 (D. Utah Feb. 8, 2021) (finding that *Muro* "ignore[d] *Fisher*" and should thus be disregarded).

In resting on the inapposite authority of *Fisher*, a decision rendered by a Court entirely unaware of email, *Intermountain* fell prey to the ancient logical fallacy of *argumentum ad verecundiam*, the appeal to authority, where "we accept as expert opinion the dictum of some one [sic], however great in some other direction, who is not an expert on the matter in question." HERBERT AUSTIN AIKINS, THE PRINCIPLES OF LOGIC 367–68 (Harvard Univ. Press 1902).

128. *See Linet*, 740 F.Supp.3d at 707–09; Willis Elec. Co. v. Polygroup Trading Ltd., No. 15-cv-3443, 2021 WL 568454, at *7 (D. Minn. Feb. 16, 2021).

129. *See supra* Part II.A.

130. *See* Linet Americas, Inc. v. Hill-Rom Holdings, Inc., No. 1:21-cv-6890, 2024 WL 3425795, at *703 (quoted and discussed in Sunshine, *Part & Parcel II*, *supra* note 8, at 391–92).

131. *See* Sunshine, *Part & Parcel*, *supra* note 2, at 67 n.73 (quoting Asher v. Texas, 128 U.S. 129, 132 (1888)).

Texas court, which had enforced its local laws in an interstate commerce context despite being foreclosed by the most recent case on point from the Supreme Court.[132] In its defense, Texas "strenuously contended . . . that the decision of this court in *Robbins v. Shelby Taxing Dist.* is contrary to sound principles of constitutional construction, and in conflict with well-adjudicated cases formerly decided by this court, and not overruled."[133] The Supreme Court rebuked Texas, as quoted above: to whatever extent *Robbins* was inconsistent with those formerly decided cases that Texas favored, *Robbins* effectually overruled them.[134] Texas could not persist in following rulings it preferred, ignoring the more recent.

But a century later, the Court abruptly announced a *volte-face* in philosophy. Whereas Texas was scolded for failing to respect that the earlier cases had been overruled by implication, the Court now proclaimed in *Rodriguez de Quijas v. Shearson/American Express, Inc.*: "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower court] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."[135] In its sequelae, the lower courts were forbidden in uncommonly explicit terms from inferring the overthrow of an earlier precedent by a subsequent case *sub silentio*, as the Supreme Court repeated *ad nauseum* throughout the 1990s and beyond.[136] A paradox ensues, for *Asher* has never been expressly overruled, and so *Rodriguez de Quijas* dictates it continues to bind lower courts, which must by its rule treat a more modern applicable Supreme Court case as overruling by implication prior inconsistent precedents—which *Rodriguez de Quijas* and its progeny in turn forbid.[137]

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132. Asher v. Texas, 128 U.S. 129, 129–131 (1888) (citing Robbins v. Taxing Dist. of Shelby Cnty., Tenn., 120 U.S. 489 (1887)).

133. *Id.* at 131.

134. *Id.* at 131–32.

135. Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989); *accord* Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 136 (2023) ("In the proceedings below, the Pennsylvania Supreme Court seemed to recognize that *Pennsylvania Fire* dictated an answer in Mr. Mallory's favor. Still, it ruled for Norfolk Southern anyway. It did so because, in its view, intervening decisions from this Court had 'implicitly overruled' *Pennsylvania Fire*. See 266 A.3d at 559, 567. But in following that course, the Pennsylvania Supreme Court clearly erred. . . . This is true even if the lower court thinks the precedent is in tension with 'some other line of decisions.'").

136. Hohn v. United States, 524 U.S. 236, 252–253 (1998) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality."); Agostini v. Felton, 521 U.S. 203, 237 (1997) ("We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent."); State Oil Co. v. Khan, 522 U.S. 3, 20 (1997); *see* Bosse v. Oklahoma, 580 U.S. 1, 3 (2016); Tenet v. Doe, 544 U.S. 1, 10–11 (2005); United States v. Hatter, 532 U.S. 557, 567 (2001) ("[I]t is this Court's prerogative alone to overrule one of its precedents") (quoting *State Oil Co.*, 522 U.S. at 20).

137. These knotty contradictions, not germane to this study, have been examined well by other authors. *See, e.g.*, Bradley Scott Shannon, *Overruled by Implication*, 33 SEA. U. L. REV. 151 (2009).

This paradox is enough to counsel strongly against reading *Fisher* and *Upjohn* to be in conflict, even if that were their most natural reading.[138] It is not. Moreover, under the *Rodriguez de Quijas* rule, neither decision "directly controls" cases involving email, for the inescapable reason that neither *Fisher* nor *Upjohn* was speaking about, ruling upon, or remotely aware of email. There is no definitive answer forthcoming from above to resolve the specific question of the Part & Parcel Principle.[139] As they have so far, lower courts confronting privilege in email attachments can only draw the lessons they think wisest from this pair of aging opinions and chart their own direction until and unless the Supreme Court reaches the subject squarely.

III. THE EMERGING PERPLEXITY OF MODERN ATTACHMENTS

Whilst the lower courts have wrestled irresolutely with privilege in email attachments for decades now, communications technology has not stood still.[140] Even as one age-old legal problem has inched haltingly towards a solution, these more dramatic technical advances have introduced new problems that both inform thinking on the old problem and demand their own solutions.[141] The most salient such technological development is the emergence of so-called "modern attachments," described again by the celebrated Texas practitioner and pundit Craig Ball:[142]

> In the e-discovery bubble, we're embroiled in a debate over "linked attachments." Or should we say "cloud attachments," or "modern attachments" or "hyperlinked files?" The name game aside, a linked or cloud attachment is a file that, instead of being tucked into an email, gets uploaded to the cloud,

138. The Court implied as much in *Asher v. Texas*, demurring from Texas's contention that the prior decisions in fact conflicted with *Robbins.* Asher v. Texas, 128 U.S. 129, 131–32 (1888) ("Even if it were true that the decision referred to was not in harmony with some of the previous decisions . . .").

139. It must be noted that the Supreme Court's granting of certiorari in *In re* Grand Jury, 143 S. Ct. 80 (mem.), No. 21-1397 (Oct. 3, 2022), held out great hope for further clarification of the test for attorney-client privilege. Oral argument in January 2023 posed fecund questions, but hopes were dashed when the Court shortly thereafter dismissed the writ as improvidently granted, providing no further guidance. *In re* Grand Jury, 598 U.S. —, 143 S. Ct. 543 (mem.), No. 21-1397 (Jan. 23, 2023); *see* Stephen Gillers, *A "DIG" on Attorney-Client Privilege: Why the Court Decided Not to Decide* In re Grand Jury, SCOTUSBLOG (Jan. 25, 2023, 9:30 AM), https://www.scotusblog.com/2023/01/a-dig-on-attorney-client-privilege-why-the-court-decided-not-to-decide-in-re-grand-jury/ [https://perma.cc/RRT2-DC5G].

140. *See* Kelly A. Lavelle, *Navigating the Shift: Understanding Modern Attachments in E-Discovery*, LEGAL INTELLIGENCER (June 10, 2024), https://www.law.com/thelegalintelligencer/2024/06/10/navigating-the-shift-understanding-modern-attachments-in-e-discovery/[https://perma.cc/42EV-TLPK] ("The development of new file-sharing techniques creates a dynamic challenge for legal professionals and raises significant questions about electronic discovery."); Bays & Davidson, *supra* note 118, at 980–81.

141. *See* Marta Katarzyna Kolacz & Alberto Quintavalla, *The Conduit between Technological Change and Regulation*, 11 ERASMUS L. REV. 143, 145 (2018) ("Technology is regarded, in other words, as a rationale for regulation. As soon as a technological innovation takes place, it is expected that regulators should intervene to regulate it. Such a view may, however, fail to fully capture the meaning of technological change.").

142. *See* Sunshine, *Part & Parcel II*, *supra* note 8, at 358, Part II (introducing the state of email technology with reference to Mr. Ball).

> leaving a trail in the form of a link shared in the transmitting message. It's the digital equivalent of saying, "It's in an Amazon locker; here's the code" versus handing over a package directly. An "embedded attachment" travels within the email, while a "linked attachment" sits in the cloud, awaiting retrieval using the link.[143]

A. THE ADVENT OF HYPERLINKED MODERN ATTACHMENTS

At their inception, email attachments represented a translation of the binary code of any arbitrary computer file into the ASCII code by which emails were sent, which entailed some bloating of the file's size in order to render it compatible with email protocols.[144] This may have seemed a small price to pay for the utility of freely transmissible attachments at first, but as computers grew more advanced and the miracle of attachments taken for granted, the volume of those attachments inexorably expanded.[145] Soon enough, the volume of these MIME-encoded attachments began to pose challenges to servers processing incoming email.[146] The wastefulness of attaching a duplicative copy of a ballooning file anew with each email could no longer be elided.

Moreover, there were more fundamental problems with duplicative versions of the same document circulating and being edited, as none could be a "master copy."[147] The solution offered was to eschew redundant copies of the enclosure by embedding it into the email transmission itself, and instead to provide only a hyperlink that the addressee could follow to a singular, remotely stored document that the email concerned.[148] This option was facilitated by the emergence of "cloud" storage (like Apple iCloud, Microsoft OneDrive or SharePoint, or Google Drive), which allowed anyone given the appropriate credentials to access a file from anywhere with an internet connection.[149] Indeed, the underlying file,

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143. Craig Ball, *E-Discovery: What's All the Fuss About Linked Attachments?*, 87 TEX. B.J 686, 686 (2024).

144. *See* Patrick Kingsley, *Father of the Email Attachment*, THE GUARDIAN (Mar. 26, 2012), https://www.theguardian.com/technology/2012/mar/26/ather-of-the-email-attachment [https://perma.cc/25AT-XACS] (quoted and discussed in Sunshine, *Part & Parcel II*, *supra* note 8, at 359).

145. Charlie Magliato, *How File Transfers Kill Productivity*, 38 LAW. PRAC. 32 (2012) ("As the volume of e-discovery sources increases, so must the volume of materials shared between counsel and involved parties.").

146. Bays & Davidson, *supra* note 118, at 990–91 ("In fact, there are times that a user is required to use a hyperlink instead of an attachment in order to control the volume of their email (i.e., the attachment's size is too large to send as a traditional email attachment)."); Magliato, *supra* note 145, at 32 (narrating anecdote of attachments blocked by transmission limits).

147. *See* Monica McCarroll & Staci D. Kaliner, *Let's Start by Calling Them What They Are for Discovery: "Pointers" not "Modern Attachments"*, ALM LEGALTECH NEWS (Aug. 11, 2022), https://www.law.com/legaltechnews/2022/08/11/lets-start-by-calling-them-what-they-are-for-discovery-pointers-not-modern-attachments/[https://perma.cc/L5HN-MPWB] ("Storing the document separately from the message allows for ongoing collaboration among multiple users while eliminating the need for continually circulating many duplicate versions of a file.").

148. Bays & Davidson, *supra* note 118, at 982–83; Lavelle, *supra* note 140; McCarroll & Kaliner, *supra* note 147.

149. Bays & Davidson, *supra* note 118, at 983 ("[W]ith the advent of cloud-based storage (e.g., Dropbox, Google Drive, Microsoft OneDrive, and iCloud), companies use hyperlinks, rather than attach files, in emails

which might once have been attached via encoded MIME format, often resided in the first place in such cloud storage systems, and so its inclusion with an email entailed only the provision of the details needed to access it in its pre-existing location.[150]

In effect, the advent of modern attachments decoupled form from substance. In the traditional context, the attachment was technically an encoded portion of the email transmission, as well as semantically a part of the communication conveyed to the recipient.[151] But with modern attachments, an attached file was no longer actually transmitted—only a shorthand instruction for how to access it, *viz*. a hyperlink—and yet, semantically, the document referred to could still be an integral portion of the message conveyed, and often was.[152] Moreover, because what is transmitted to the addressee is only a hyperlink, the file resident at the other end of the link may not be fixed temporally: what is seen when the link is followed might not be the exact same thing extant at the moment of the communication, if it has been updated in the interim.[153] Yet, perplexingly, cloud storage systems can support "version history," where the result of every seriatim edit to a

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and documents with increasing frequency."); McCarroll & Kaliner, *supra* note 147 ("For example, the M365 tenant can be configured such that when users share documents, the files themselves are not transmitted with the message; instead, users are able to send messages that include a link that points to documents stored elsewhere. Users in Outlook or Teams can send messages containing a link that points to content stored in a separate location within the same M365 tenant, often in SharePoint or OneDrive.").

150. McCarroll & Kaliner, *supra* note 147 ("Microsoft generally refers to documents stored in a separate location from the associated message as 'modern attachments' or 'cloud attachments,' but e-discovery practitioners understand that these are not attachments at all; rather, they are links embedded in messages that reference files stored in the organization's M365 cloud.").

151. Ball, *supra* note 143, at 686 ("Traditionally, discovery leaned on indexing the content of email and attachments for quicker search, bypassing the need to sift through each individually. Every service provider employs indexed search. When attachments are *embedded* in messages, those attachments are collected with the messages, then indexed and searched."); McCarroll & Kaliner, *supra* note 147 ("Historically, email attachments have been considered part of an email 'family' in discovery because they are actually part of the .msg email file.").

152. Lavelle, *supra* note 140; Ball, *supra* note 143, at 686 ("Some recoil at calling these digital parcels 'attachments' at all. I stick with the term because it captures the essence of the sender's intent to pass along a file, accessible only to those with the key to retrieve it, versus merely linking to a public webpage. A file I seek to put in the hands of another via email is an 'attachment,' even if it's not an 'embedment.' Oh, and Microsoft calls them 'cloud attachments,' which is good enough for me.").

153. McCarroll & Kaliner, *supra* note 147 ("Unlike traditional email file attachments that are saved within the email .msg container with the associated message body and metadata, the files referenced in Outlook or Teams messages that are stored elsewhere may not be static. This means that the version of the file that is referenced from the sender's message may have been edited or deleted when the recipient returns to the message and accesses the file, or may have been edited or deleted at a later time before the document is identified as subject to discovery."); Lavelle, *supra* note 140 ("Other concerns include broken links and target content that has changed since the time it was linked. The inability to access the original 'attachment' or source document can pose significant challenges, especially if it no longer exists in its original form due to alterations."); *see* Ball, *supra* note 143, at 686 ("But when those attachments are *linked* instead of embedded, collecting them requires an added step of downloading the linked attachments with the transmitting message.").

document is recorded as a discrete version,[154] and thus a link may be (but might not be) configured to point to the precise version extant when the link was created—or such precision may be systemically unavailable, and the link will unavoidably point only to the current, latest version.[155]

The advent of modern attachments—really, hyperlinks to documents resident in cloud storage—thus undermines presumptions in ediscovery about how emails and their ostensible attachments are to be treated.[156] It was traditionally presumed that any attachments embedded in an email must be collected for production along with their email as a single unit[157]—and if the email must be produced as responsive to a discovery request, so too must its attachments, and vice versa (subject, of course, to privilege).[158] Emails and their attachments were routinely

154. *See* Jack Wallen, *How to Use the Google Docs Versioning System to Save You from When Disaster Strikes*, ZDNET (Apr. 20, 2022), https://www.zdnet.com/article/how-to-use-the-google-docs-versioning-system-to-save-you-from-when-disaster-strikes/ [https://perma.cc/58U9-WM88] ("What is versioning? Simple: Versioning is a system that keeps track of changes to a document (or file) and keeps running snapshots of specific moments in time for the document. With those snapshots, you can easily revert to a previous iteration of the file. Let's say, for example, you are collaborating with someone on a document and, for whatever reason, your collaborator makes major changes that either aren't valid or they've completely reformatted the document such that it would take you hours to go back and change it to its original state. All you would have to do is go into the document Version History and revert to a previous snapshot.").

155. Bays & Davidson, *supra* note 118, at 991 ("Indeed, some software manufacturers' cloud-based systems, such as Microsoft OneDrive, also use hyperlinks, but have created ways to collect hyperlinked documents, including a recent change to allow the collection of the version of the document that existed at the time the email was sent so long as certain criteria is met."); *id.* at 998 ("In addition, although not explicitly stated, the hyperlinked document that is exported [by Google Vault] is the document that exists at the time of collection rather than the specific version that existed at the time the email was sent. However, it is possible to identify the version of the hyperlinked document that existed at the time the email was sent, albeit through a more manual process."); McCarroll & Kaliner, *supra* note 147 ("Given the ubiquity of M365 and similar platforms, e-discovery practitioners are grappling with whether the 'as sent' version of the document that is referenced in the associated message can be retained, collected, reviewed, and/or produced for discovery purposes, and perhaps even more importantly, are asking: Does it need to be?"); *see* Lavelle, *supra* note 140 ("Additionally, parties may want to stipulate that any attachment produced must be the same version of the document transmitted at the time of the email—not the latest version stored in the client's cloud storage."); Monica McCarroll & Staci D. Kaliner, *Modern Attachments: Pointers Are Not the Problem When It Comes to Preservation*, ALM LEGALTECH NEWS (Sept. 13, 2022), https://www.law.com/legaltechnews/2022/09/13/modern-attachments-pointers-are-not-the-problem-when-it-comes-to-preservation/[https://perma.cc/U49M-H8RJ] (discussing preservation issues for microversioning in detail) [hereinafter McCarroll & Kaliner, *Not the Problem*].

156. *See generally* Lavelle, *supra* note 140; Ball, *supra* note 143; McCarroll & Kaliner, *supra* note 147.

157. Ball, *supra* note 143, at 687 ("The longstanding practice has been to collect a custodian's messages and ALL embedded attachments, then index and search them.").

158. Virco Mfg. Corp. v. Hertz Furniture Sys., No. 13-cv-2205, 2014 WL 12591482, at *5 (C.D. Cal. Jan. 21, 2014) ("This Court agrees with those courts which have held that emails produced in discovery should be accompanied by their attachments or that the attachments should be produced along with information sufficient to enable a receiving party to identify the emails to which the attachment corresponds."); Pom Wonderful LLC v. Coca-Cola Co., No. 08-cv-6237, 2009 WL 10655335, at *2, n.2 (C.D. Cal. Nov. 30, 2009); Bays & Davidson, *supra* note 118, at 983 n.17 (collecting cases); *see* Ball, *supra* note 143, at 687 ("When using lexical (e.g., keyword) search to identify potentially responsive email 'families,' the customary practice is to treat a message and its attachments as potentially responsive if either the content of the transmitting message or its attachment generates search 'hits' for the keywords and queries run against them. This is sensible because transmittals often say no more than, 'see attached'; it's the attachment that holds the hits. Yet, stripped of its transmittal, you won't know the timing or circulation of the attachment."); *see also* RBS Citizens, N.A.

united "not only because the document is physically [*sic*] attached to the email, but also because its incorporation into a relevant communication creates an inference of relevance for the attachments and each attachment provides context to the parent email and vice versa."[159] Customary ediscovery practice reified this presumption by treating traditional emails and attachments as a unitary "document family."[160] With traditional emails and attachments, this reflects reality: the document family coincides with the bytes constituting the total communication, decoded intelligibly into discrete file types.[161]

But when the bytes comprising the enclosed document are not included in the communication but reside elsewhere, a question arises: must every document referred to via hyperlink in an email be automatically considered with the email, as MIME-encoded attachments always had been?[162] The potential omissions might be highly relevant: emails containing links for which no document is identified leave the receiving party ignorant of context and content intended by the sender to form part of the communication.[163] Yet artificially creating document

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v. Husain, 291 F.R.D. 209, 221 (N.D. Ill. 2013) (considering that emails and their attachments must be produced if either is responsive).

159. Bays & Davidson, *supra* note 118, at 983. That these authors in 2024 still pointedly refer to an attachment as being "physically" attached to an *intangible* email bespeaks just how reflexively entrenched the isomorphism of emails and letters has become in the technologist's mind. *See supra* text accompanying notes 118–121.

160. Lavelle, *supra* note 140 ("Traditionally, email attachments have been regarded as part of an email's 'family' during discovery."); *see* Ball, *supra* note 143, at 686 ("When attachments are embedded in messages, those attachments are collected with the messages, then indexed and searched. But when those attachments are linked instead of embedded, collecting them requires an added step of downloading the linked attachments with the transmitting message. You must do this before you index and search because, if you fail to do so, the linked attachments aren't searched or tied to the transmitting message in a so-called 'family relationship.'"); McCarroll & Kaliner, *supra* note 147.

161. Fams. for Freedom v. U.S. Customs & Border Prot., No. 10-CV-2705, 2011 WL 4599592, at *5 (S.D. N.Y Sept. 30, 2011) ("[Email] attachments can only be fully understood and evaluated when read in the context of the emails to which they are attached. That is the way they were sent and the way they were received. It is also the way in which they should be produced."); *see* Ball, *supra* note 143, at 687 ("When using lexical (e.g., keyword) search to identify potentially responsive email 'families,' the customary practice is to treat a message and its attachments as potentially responsive if either the content of the transmitting message or its attachment generates search 'hits' for the keywords and queries run against them. This is sensible because transmittals often say no more than, 'see attached'; it's the attachment that holds the hits. Yet, stripped of its transmittal, you won't know the timing or circulation of the attachment. So, we preserve and disclose email families."); McCarroll & Kaliner, *supra* note 147.

162. Bays & Davidson, *supra* note 118, at 983–85; Lavelle, *supra* note 140 ("However, with the emergence of modern attachments, these files are not part of the underlying message file—therefore, the traditional notion of a 'family' is absent."); McCarroll & Kaliner, *supra* note 147 ("With 'modern attachments,' however, the 'attached' files are not part of the underlying message file; no 'family' exists in the traditional sense. Litigants and their counsel are weighing any benefits against the risks and burdens associated with treating these documents like traditional email attachments for discovery purposes, where no such 'family' relationship exists in the files as they are maintained in the ordinary course of business.").

163. Lavelle, *supra* note 140 ("These family associations are important to understanding the context of the documents. Emails without their attachments often lack significance. The documents exchanged within emails are often more important evidence."); Ball, *supra* note 143, at 686 ("A link in an email is a dead end for anyone but the sender and recipients and reveals nothing of the file's content. These linked attachments could be brimming with relevant keywords yet remain unexplored if not collected with their emails.").

families suitable for production from emails and the documents at the end of the hyperlinks (the "modern attachments") was not a trivial task.[164] Moreover, that artifice defied the usual discovery prescription that items be produced as they are kept, not in a manner contrived for production.[165]

The document family of email and modern attachment might be the semantic unit of communication, but it was no longer an encapsulated technical communicational unit.[166] Contrarians, however, have urged that manufacturing an artificial family or the equivalent is required to faithfully mirror the linkage available in the company's ordinary course of business—if an employee could ordinarily follow a link to see the document, so too should the discovering party be enabled to do so, somehow.[167] Given the robust debate, major technology providers (*viz.* Microsoft and Google) pressed onward in developing tools to harvest emails and modern attachments as artificial "families" notwithstanding their disunity *in situ*.[168] And because courts have often relied on widespread technological

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164. *Compare* Ball, *supra* note 143, at 687 ("Collecting linked attachments isn't as Herculean as some claim, especially with tools from giants like Microsoft and Google easing the process. The challenge, then, isn't in the tools but in the willingness to employ them."), *with id.* ("Do linked attachments pose problems? They absolutely do! I've elided over ancillary issues of versioning and credentials because those concerns reside in the realm between good and perfect solutions. Collection methods must be adapted to them—with clumsy workarounds at first and seamless solutions soon enough.").

165. McCarroll & Kaliner, *supra* note 155 ("We are not suggesting organizations do not have a duty to preserve relevant referenced content *where it is stored* when a duty to preserve attaches. . . . Organizations are not obligated, however, to proactively retain 'as sent' versions of referenced content associated with messages with pointers before the duty to preserve attaches just in case these 'as sent' versions are needed for future discovery (versus whatever versions, if any, are available when the preservation duty arises). . . . eDiscovery practitioners recognize that preserving 'as sent' versions of referenced content using the currently available M365 functionality is a challenge. The problem arises, at least in part, from the fiction that referenced content forms a 'family' with messages with pointers. Organizations and their discovery counsel may conclude that the risks associated with a particular matter, or presented by the organization's litigation profile, justify creating an artificial family relationship for discovery purposes; it is certainly their prerogative to do so.").

166. *See* Lavelle, *supra* note 140 ("However, with the emergence of modern attachments, these files are not part of the underlying message file—therefore, the traditional notion of a 'family' is absent."). *But see* Ball, *supra* note 143, at 687 ("But in acknowledging that there are challenges, we must also acknowledge that these linked attachments have been around *for years*, and *they are evidence*.") (opining that modern attachments should be harvested based on semantic relation to linking emails).

167. In fairness, pundits allowed that extracting material from a corporate ecosystem unavoidably entailed disruption to the established system as used organically but insisted that the Federal Rules demanded that whatever was produced must contrive to approximate the original ease, rather than reflect solely the discoverable content stripped of functional shortcuts. *See* Bays & Davidson, *supra* note 118, at 985 ("Applying these principles to hyperlinked documents would mean that the format of production for emails and their hyperlinked documents could take the same form of production as traditional emails and attachments by producing the document directly following the parent email along with a unique identifier showing a family relationship. Or, although more cumbersome but still arguably 'reasonably usable,' by including a field in the ESI 'load file' that contains a unique identifier for the produced hyperlink file but without an actual family relationship.").

168. Bays & Davidson, *supra* note 118, at 991 ("The ability to use forensic software to collect and produce hyperlinked documents, including the version of the document that existed at the time the email was sent, and to create the correct family relationship with the parent email, exists and is continuing to improve."); Ball, *supra* note 143, at 686–87 ("We see conclusory assertions of burden notwithstanding that the biggest platforms like Microsoft and Google offer 'pretty good' mechanisms to deal with linked attachments. So, if a producing party claims burden, it behooves the court and requesting parties to inquire into the source of the messaging."); McCarroll & Kaliner, *supra* note 155.

feasibility to judge the reasonableness of discovery involving modern attachments, common practice and industry standards are all but dispositive.

B. MODERN ATTACHMENTS IN THE COURTS

Philosophically, technical boffins and legal theorists alike have split sharply on whether modern linked attachments should properly be considered "family" to their emails like traditional attachments.[169] Courts have only recently begun to grapple with even the fundamental precepts of how discovery requests should be construed with regard to such modern attachments.[170] With remarkable regularity, one trendsetting 2021 opinion in *Nichols v. Noom, Inc*.[171] has been singled out for opprobrium or encomium (per the expert's wont) as enunciating a contemporary standard for modern attachments' treatment.[172]

This is perhaps because *Noom* so squarely and lucidly addressed the emerging technology and the issues at play in discovery.[173] The plaintiffs only learned once productions were well underway that Noom employees typically used Google Drive modern attachments in lieu of the traditional sort.[174] They thereupon demanded the court revisit its discovery protocol to compel Noom to extract the linked Google documents using a specified proprietary program to artificially create family relationships rather than standard Google Vault collection, contending that without such accommodation, they would not be able to identify the linked

169. *Compare* Ball, *supra* note 143, at 687 (advocating that modern attachments must be collected and produced along with email), *and* Bays & Davidson, *supra* note 118, at 1000 ("By and large, approaching hyperlinked documents differently than traditional attachments is inconsistent with current technology and contravenes the *Federal Rules of Civil Procedure*'s requirements regarding the production of documents in civil discovery."), *with* McCarroll & Kaliner, *supra* note 155 (advocating that modern attachments are distinct documents that should be treated distinctly from emails linking to them), *and* Lavelle, *supra* note 140 ("However, with the emergence of modern attachments, these files are not part of the underlying message file—therefore, the traditional notion of a 'family' is absent.").

170. Lavelle, *supra* note 140 ("However, courts have begun to distinguish between traditional and modern attachments for discovery purposes.").

171. Nichols v. Noom, Inc., No. 20-CV-3677, 2021 WL 948646 (S.D.N.Y. Mar. 11, 2021).

172. *E.g*., Bays & Davidson, *supra* note 118, at 988–90 ("The Court's Flawed Conclusion About Hyperlinks in *Nichols v. Noom, Inc*."); Michael Berman, *What Hath Noom Wrought?*, EDISCOVERY LLC (Apr. 25, 2023), https://www.ediscoveryllc.com/what-hath-noom-wrought/ [https://perma.cc/M9CZ-WAEZ] ("The 'modern attachments' decision of *Nichols v. Noom, Inc*., 2021 WL 948646 (S.D.N.Y. Mar. 11, 2021), generated a lot of buzz when it was issued. . . . *Noom* has been followed; however, it has also been criticized on procedural, evidentiary, logical, and technological grounds."); *see also* Lavelle, *supra* note 140 (discussing *Noom* without opining).

173. *Noom*, 2021 WL 948646, at *1.

174. *Id*. at *1 ("They argue that without metadata linking the underlying hyperlinked Noom document to the document containing the hyperlink, they will not be able to determine families of documents. They also express concern that some of the hyperlinked documents may not be produced at all. They urge this Court to require Noom to use MetaSpike's Forensic Evidence Collector ('FEC') to recollect Google Drive and Gmail documents so that any hyperlinked documents are also pulled as part of the document 'family' or to create a program using Google's application programming interface to extract links from responsive Google Drive documents, retrieve those linked documents, and produce them as attachments.").

attachment, which might even go unproduced.[175] Noom objected that it was already producing all responsive Google Drive documents after reviewing them independently and that the plaintiffs' desired solution would be redundant, costly, and impractical.[176] Indeed, Noom offered to assist in matching any linked documents that the plaintiff sought specifically.[177]

Firstly, the court confirmed that in its earlier discovery orders, it had never viewed the linked documents as tantamount to attachments; that is, the issue was not resolved by the definition of "attachments."[178] Nor was the court now convinced otherwise on reconsideration.[179] Federal Rule of Civil Procedure 34 gave the general standard that materials must be produced only in "reasonably usable form," subject to factors of proportionality (Rule 26) and a "just, speedy, and inexpensive" process (Rule 1).[180] Noom was thus entitled to use a standard method of nonduplicative collection, and its offer of assistance could address any unusual cases.[181] Noom was not refusing to produce hyperlinked documents; it was simply refusing to collect and produce them redundantly with every email that linked to them.[182] Emphasizing there was no reason to think *all* linkages of *any* kind were material to the case,[183] the court explained why the blithe conflation of modern and traditional attachments was misleading:

> While the Court appreciates that hyperlinked internal documents *could be* akin to attachments, this is not necessarily so. When a person creates a document or email with attachments, the person is providing the attachment as a *necessary part* of the communication. When a person creates a document or email with a hyperlink, the hyperlinked document/information may or may not be

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at *3 ("It is clear to this Court that there was no meeting of the minds on whether hyperlinks were attachments and this Court, when entering the order, did not view hyperlinks to be attachments. . . . In sum, the ESI order does not treat hyperlinked documents as attachments. As noted above, Noom is producing all attachments to emails with the parent email as part of the email 'family.' Relevant hyperlinked documents are being produced separately.").

179. *Id.* at *4 ("With the above principles in mind, the Court denies Plaintiffs' motion for reconsideration. To start, the Court does not agree that a hyperlinked document is an attachment.").

180. *Id.* at *3.

181. *Id.* at *4 ("While it may be true that Noom employees frequently create documents with hyperlinks to other internal Noom documents, it is not at all clear that Plaintiffs cannot identify the underlying hyperlinked documents or the quantity that are even material to this action. The process the Court already ordered is appropriate. It will allow Plaintiffs to evaluate Noom's production and, if Plaintiffs determine there is a need for an additional targeted pull or production or clarifying information about a hyperlinked document's identity or Bates number, Plaintiffs can request it.").

182. *Id.* at *5 ("Noom is searching and producing its Google Drive documents—it is not refusing to search and produce them. What it objects to is collection of them through both a direct collection and a collection through hyperlinks that would dramatically increase redundancies in the collection, increase costs, and delay discovery.").

183. *Id.* ("Moreover, Plaintiffs have not made a showing that the value of obtaining the metadata establishing the linkages for *all* hyperlinked documents is proportional to the needs of the case.").

> necessary to the communication. For example, a legal memorandum might have hyperlinks to cases cited therein. The Court does not consider the hyperlinked cases to be attachments. A document also may contain a hyperlink to another portion of the same document. That also is not an attachment. A document might have a hyperlink shortcut to a SharePoint folder. The whole folder would not be an attachment. These are just examples. An email might have hyperlinks to a phone number, a tracking site for tracking a mailing/shipment, a facebook page, a terms of use document, a legal disclaimer, etc. The list goes on and on. Many of these underlying hyperlinked documents may be unimportant to the communication.[184]

Notwithstanding subsequent criticism,[185] *Noom* is far from alone in its distinction, rejecting the false equivalency and limiting relevant artificial linkages to a bespoke subset identified with specificity.[186] Cases in recent years have rested on averments that collecting and producing linked documents in gross as family-bound attachments would be unwieldy and disruptive to discovery.[187] (An allowance for particularized inquiry as to a limited set of documents can address demonstrably relevant linkages.)[188] In 2024, *In re Insulin Pricing Litigation* declared again that "hyperlinks are not the same as traditional attachments,"

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184. *Id.* at *4 (emphases added).

185. See sources cited in note 172, *supra*.

186. *E.g.*, *In re* Insulin Pricing Litig., No. 23-md-3080, 2024 WL 2808083 at *7 (D.N.J. 2024); *In re* Meta Pixel Healthcare Litig., No. 22-cv-03580, 2023 WL 4361131, at *1 (N.D. Cal. June 2, 2023); Porter v. Equinox Holdings, Inc., No. RG19009052, 2022 WL 887242, at *2 (Super. Ct. Cal. Mar. 17, 2022) ("Given the potential technological challenges with producing linked documents in family relationships, the Court declines to order at this time that Equinox produce all linked documents referenced in relevant communications in family relationships. In addition, the Court finds that such an order would be inappropriate as Plaintiffs have not advanced fact specific good cause to substantiate the production of all linked documents in family relationships. Instead, the Court will follow the procedure from *Nichols v. Noom* to address Plaintiffs' concerns regarding the linked documents.") (distinguishing IQVIA, Inc. v. Veeva Systems, Inc., No. 2:17-CV-00177, 2019 WL 3069203 (D.N.J. July 11, 2019) as inaccurately treating modern attachments as tantamount to traditional); *see, e.g.*, Shenwick v. Twitter, Inc., No. 16-cv-05314, 2018 WL 5735176, at *1 (N.D. Cal. Sept. 17, 2018) (noting that "Plaintiffs have a right to determine if an electronic message refers to a document, then Plaintiffs should be able to access that document," but balancing the parties' needs by limiting discovery to "up to 200 hyperlinks for which they seek the referenced documents").

187. *Meta Pixel*, 2023 WL 4361131, at *1 ("The Court is persuaded that the commercially available tools plaintiffs suggest may be used for automatically collecting links to non-public documents have no or very limited utility in Meta's data environments or systems, and even that limited utility (i.e. using the Microsoft Purview eDiscovery (Premium) tool to collect links to SharePoint and OneDrive cloud attachments in Microsoft Exchange environments) would disrupt Meta's standardized workflow for ESI-related discovery processing across all of its platforms and systems. Accordingly, the ESI protocol should make clear that hyperlinked documents are not treated as conventional attachments for purposes of preserving a 'family' relationship in production."); *Porter*, 2022 WL 887242, at *2; *Shenwick*, 2018 WL 5735176, at *1.

188. *Meta Pixel,* 2023 WL 4361131 at *1 ("However, the Court anticipates that for some documents, it will be important to collect (or attempt to collect) hyperlinked documents and associate them with the underlying ESI in which the links appear. In such circumstances, the parties should consider reasonable requests for production of hyperlinked documents on a case-by-case basis. Such requests should not be made as a matter of routine."); *Porter*, 2022 WL 887242, at *2; *Shenwick*, 2018 WL 5735176, at *1. Indeed, the court itself may intercede with a technical master to identify any particularly relevant linked documents for potential production. *E.g.*, Shumway v. Wright, No. 4:19-cv-00058, 2020 WL 1037773, at *1–2 (D. Utah Jan. 13, 2020).

looking to *Noom* and its progeny.[189] Nevertheless, the court confronted dueling declarations asserting that collecting modern attachments as artificial families was either eminently practical or utterly infeasible, and adopted the defendants' protestations of infeasibility, ordering discovery to proceed without families for modern attachments.[190] The court drew attention to the recent *In re StubHub Refund Litigation*, in which the defendant had agreed preemptively to produce linked documents as attachments without considering feasibility, and later returned with expert declarations (including the same expert as in *Insulin*) that the protocol was, in fact, too onerous to implement—and the court granted relief.[191] More than the theoretical question of what modern attachments really *were* in a theoretical sense, practicability generally decided cases.[192]

Other courts have disagreed, however, by treating traditional and modern attachments as equivalent for purposes of collection and production,[193] or simply ruling that the burden of contriving a family linkage was not excessive.[194] But,

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189. *In re* Insulin Pricing Litig., No. 23-md-3080, 2024 WL 2808083 at *7 (D.N.J. 2024) (citing *Noom*, 2021 WL 948646, at *4; and *Meta Pixel*, 2023 WL 4361131, at *1).

190. *In re Insulin Pricing Litig*., 2024 WL 2808083, at *7–8.

191. *Id.* at *7 n.7 (discussing *In re* StubHub Refund Litigation, No. 20-md-2951, Doc. No. 278 (N.D. Cal. May 20, 2024)).

192. *In re* Uber Technologies, Inc., MDL No. 3084, 2024 WL 3491760 (N.D. Cal. Mar. 15, 2024), again faced dueling declarations of practicability and impracticability, recognized that feasibility was the controlling issue, and directed the parties to supplement the record with a more searching investigation and analysis. *Id.* at *9–11; *see id.* at *1 ("The parties disagree about how to define 'attachment,' at least in part as an outgrowth of a larger dispute about whether documents hyperlinked in electronic communications should be treated as 'attachments.' The resolution of this issue hinges on the outcome of the parties' dispute about the treatment of cloud-based documents. As discussed in greater detail below, the Court will not resolve that issue at this juncture.").

One case illustrated well the potential practical pitfalls, as the producing party inadvertently enabled access to its *entire* cloud storage system when it tendered certain links thereto, access which its adversary partook of overenthusiastically, meriting sanctions. *See* Pursuit Credit Special Opportunity Fund, L.P. v. KrunchCash, LLC, No. 651070/2022, 2023 WL 6465017, at *6 (Sup. Ct. N.Y. Cty. Apr. 19, 2023) (distinguishing *IQVIA*, *Kelly*, *Telxon*, and *Shenwick*).

193. *See, e.g.*, *In re* Acetaminophen – ASD-ADHD Products Liab. Litig., No. 22-md-3043, 2023 WL 196157, at *5 (S.D.N.Y. Jan. 17, 2023) ("Parent-child relationships (association between an attachment and its parent document) shall be preserved. The attachment(s) shall be produced adjacent to the parent document, in terms of Bates numbers, with the first attachment being named with the next sequential number after the parent, and any additional attachment(s) sequentially numbered after that first attachment. Email attachments and embedded files or 'modern attachments' (i.e., hyperlinks pointing to files stored in the cloud or a shared repository such as SharePoint and other types of collaborative data sources, instead of being directly attached to a message as has been historically common with email communications) shall be collected and produced with the parent message."); Stitch Editing Ltd. v. TikTok, Inc., No. 21-06636, 2022 WL 173630, at *1 (C.D. Cal. Aug. 31, 2022) ("Documents referenced in hyperlinks from all productions—existing and future—must be produced together with the source document containing the hyperlinks so that the association between parent document and hyperlinked document is maintained."); Symmetrica Enter., Ltd. v. UMG Recordings, Inc., No. 19-cv-1192, 2020 WL 13311682, at *5 (C.D. Cal. July 17, 2020) ("Thus, well settled authorities from this Circuit and beyond require that, here, where Plaintiff produced responsive emails as required by the April 30 Order, it must also produce any linked attachments, notwithstanding its contentions that those attachments maybe irrelevant.").

194. *See, e.g.,* IQVIA, Inc. v. Veeva Sys., Inc., No. 2:17-CV-00177, 2019 WL 3069203, at *5 (D.N.J. July 11, 2019) ("While, as Veeva argues, the linked documents are not stored with emails in the ordinary course of

reminiscent of the *Sneider* problem, modern cases inevitably still look to outmoded analogues in such a rapidly evolving milieu.[195] Well before the issues of cloud computing emerged clearly, a court in 2009 ordered production of "documents at the end of the hyperlinks" in webpage "snapshots," without explanation.[196] Even earlier, in 2004, another judge had imposed sanctions after PwC opted not to collect and produce documents linked to the responsive work papers, despite the ease (in the court's view) of doing so: "It simply chose not to," the court declared, and thus "[n]o reasonable person could have believed that PwC's production to the SEC was made in good faith."[197] Even if a bare plurality of modern courts have excused production of modern attachments as families, producing parties omit such contrivances at their potential peril, with the threat of contrary rulings hanging over their heads like the sword of Damocles.[198]

C. A PERFECT MARRIAGE OF FORM AND FUNCTION FOR PRIVILEGE

Felicitously, the analysis of modern attachments synchronizes almost perfectly with the proper assessment of privilege in emails. Because all an email does is convey the hyperlink to the attachment, withholding the actual words (hyperlink and all) of an email with counsel will effectively protect the identity of the modernly attached (*i.e.*, hyperlinked) document under discussion. Meanwhile, the wholly separate document, which might have been linked, can be produced without providing any inkling that the nonprivileged document was elsewhere the subject of a withheld privileged communication. *Upjohn* is vindicated: the communication is inviolate, whilst the facts in the nonprivileged underlying attachment are fully available.[199] And *Fisher* is satisfied: the nonprivileged document is producible, utterly unaffected by the fact that somewhere, sometime, attorneys may have been involved in its discussion and provided access to it via hyperlink.[200]

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business, IQVIA has no way to link the documents, only Veeva is capable of linking the emails to the Google Drive documents. The Special Master is not convinced that relinking these 2,200 documents is unduly burdensome in light of the issues at stake in this matter, the resources of the parties, and the amount in controversy."). *But compare In re* StubHub Refund Litig., No. 20-MD-02951, 2023 WL 3092972, at *1–2 (N.D. Cal. Apr. 25, 2023) (distinguishing as "not a case like *Noom*" because here the party "*did* agree" to "treat linked documents at attachments"), *with Insulin*, 2024 WL 2808083 at *7 n.7 (discussing relief based on impracticability ultimately granted in *Stubhub* after application).

195. *See IQVIA*, 2019 WL 3069203 at *5. (discussing as "instructive" the traditional attachment precedent in *Pom Wonderful LLC v. Coca-Cola Co.*, No. 08-cv-6237, 2009 WL 10655335, at *2, n.2 (C.D. Cal. Nov. 30, 2009)).

196. Kelly v. Provident Life and Accident Ins. Co., No. 04-cv-0807, 2009 WL 10664172, at *5 (S.D. Cal. May 29, 2009).

197. *In re* Telxon Corp. Sec. Litig., No. 5:98-cv-2876, 1:01-cv-1078, 2004 WL 3192729, at *24 (N.D. Ohio July 16, 2004).

198. Frustratingly, again like the *Sneider* problem, the courts seem roughly in equipoise as to whether modern attachments must be treated as families. One may hope future rulings will trend one way or another.

199. *See* Upjohn Co. v. United States, 449 U.S. 383, 386–93 (1981).

200. *See* Fisher v. United States, 425 U.S. 393, 403–05 (1976); *see supra* Part II.B (discussing how *Fisher*'s principles might apply in email cases).

Indeed, one can view modern attachments as the culmination of an evolution away from the paper at issue in *Fisher*. With paper enclosures, the attachment is both embedded with the communication and alienates the original document; traditional email attachments are embedded in the email but do not alienate the original left behind; and finally with modern attachments, the original remains unembedded and unremoved—no different from a client informing his lawyer that a vital item may be found someplace like an Amazon locker.[201] In many ways, the development of modern attachments further clarifies the Principle by stripping away all the extraneous trappings of yesteryear, allowing analysis solely on informational exchange with counsel. Indeed, modern attachments reflect the ultimate response to the *Sneider* rule run amok: to eschew conveying anything other than words and verbal references to one's counsel, not any preexisting file, ensuring the whole of the transmission remains transparently protected. Although modern attachments evolved for different reasons—to facilitate collaboration and avoid burdening email servers[202]—one could scarcely have designed a technological solution more suited to the natural contours of common-law attorney-client privilege.[203]

Modern attachments only begin to pose problems for privilege when efforts are undertaken to contrive artificial family relationships linking an email to the document linked therein, as some of the courts rejecting *Noom*'s reasoning have demanded.[204] Where an artificial family is created, all the same complications of traditional attachments are reintroduced: to safeguard the enclosed subject matter of a discussion with counsel, the attached document itself must be withheld as well. If a hybrid solution is employed—connecting emails with linked documents via a metadata field, rather than by appending a copy of the linked document to each such email[205]—then suppression of that metadata as to privileged emails can

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201. *See* Ball, *supra* note 143, at 686 (quoted *supra* text accompanying note 143).

202. *See supra* notes 144–147 and accompanying text.

203. Thus, the bench may at long last rest assured that the advent of modern attachments negates any elaborate scheme to secure under the guise of privilege all those cloud-stored business documents, since it so felicitously leaves all such documents exposed to suitably-tailored discovery requests. *Cf.* cases cited *supra* note 104.

Even the bleeding-edge development of version history, *see supra* notes 154–155 and accompanying text, can be fit within a privilege rubric, albeit with some added effort. Some might worry that the precise version of a document prepared for provision to counsel (say, with annotations soliciting legal advice) is privileged—and therefore that if such a version is available within the version history, it may be liable to production if considered separately from the communication with counsel. But properly conceived, such a version is inherently privileged to the extent it was prepared solely for transmission to counsel and went no further. The problem is then only that of identifying such a version in discovery review, which can be accomplished by considering each retained version in conjunction with emails linking to it. Thus, the reviewer will be able to readily discern the privileged communication with counsel and observe the link therein proving that the specific version linked was indeed submitted for legal advice—and to pose the appropriate claim of privilege.

204. *See* cases cited *supra* notes 193–197 and accompanying text.

205. *See* Bays & Davidson, *supra* note 118, at 985 (quoted *supra* note 167).

maintain privilege more parsimoniously, allowing the dissociated cloud-stored files to be produced freely. The inescapable truism is that the more ediscovery treats modern attachments like their traditional forebears, the more they will be mired in the same problems of privilege that have persisted for half a century.

Of course, privilege problems do not begin and end with the Part & Parcel Principle. One author explained that "privacy, data security, and privilege considerations add another layer to the management of modern attachments," observing that "[w]hile rules exist for the inadvertent production of privileged content in traditional attachments, similar protocols are lacking for modern attachments."[206] Though the former is undebatable, the latter seems overly blinkered, for Federal Rule of Evidence 502(b) draws no distinction between modern and traditional attachments in the rules prescribed for addressing inadvertent disclosures.[207] If anything, the prevailing confusion and uncertainty as to how privilege applies to attachments, and how discovery implicates *modern* attachments, would militate in favor of demonstrating an excusable oversight.[208] But there is also truth to the observation, in that some courts have not excused situations where mistakes of law lead to the deliberate production of materials wrongly thought nonprivileged.[209] As with traditional attachments, lawyers in an uncertain regime proceed at their peril in deeming a document to enjoy no privilege, encouraging overconservative judgments.

At the risk of repetition, *Upjohn* demands a common law that defines precisely and predictably what is privileged and what is not, both to avoid the vice of overconservatism hampering the truth-seeking function of discovery and to conduce the virtue of clients well-counseled in the law.[210] That the Part & Parcel Principle for traditional attachments remains the subject of vigorous debate is undesirable enough; unnecessarily drawing modern attachments into that vortiginous maw is downright masochistic. Commentators and courts urging that the round peg of

206. Lavelle, *supra* note 140.

207. Fed. R. Evid. 502; *see* Jared S. Sunshine, *Failing to Keep the Cat in the Bag: A Decennial Assessment of Federal Rule of Evidence 502's Impact on Forfeiture of Legal Privilege Under Customary Waiver Doctrine*, 68 CLEV. ST. L. REV. 637, 653–663, 728–733 (2020).

208. *See* Sunshine, *supra* note 207, at 737, n.704 ("Counsel may need time to research the relevant law before making a motion. If the document was produced in the first place based on a mistake arising from nonobvious privilege, it is understandable that counsel may need time to ascertain that it ought to be clawed back even after seeing it again.").

209. Sunshine, *supra* note 207, at 717–20.

210. *See* Upjohn Co. v. United States, 449 U.S. 383, 393 (1981) ("An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all. The very terms of the test adopted by the court below suggest the unpredictability of its application. The test restricts the availability of the privilege to those officers who play a 'substantial role' in deciding and directing a corporation's legal response. Disparate decisions in cases applying this test illustrate its unpredictability.").

newfangled modern attachments be made to fit into not only a square hole but one riven with conflict should reexamine their assumptions.[211]

IV. A MORE NUANCED (NOT NEW) PRINCIPLE FOR A NEW ERA

As Bell said in 1937's *Men of Mathematics*, "time makes fools of us all."[212] The axiom pronounced by *Upjohn* was ultimately more foresighted than that of *Fisher*, perhaps purely by fortuity. That privilege depends on the intent to communicate confidentially with one's counsel on legal matters—and protects the content of such exchanges regardless of the publicity of what is discussed[213]—has proven a more extensible and lasting instruction than *Fisher*'s now-picayune acknowledgement that squirreling away otherwise discoverable papers with counsel is no valid defense.[214] Neither case could anticipate that within a few decades, paper documents would become a negligible portion of business intercourse in favor of communications intermediated first by personal computers and then the cloud storage of the internet. Nor could *Sneider* have anticipated that its muddled assimilation of prior precedents would be so squarely rebutted by *Upjohn* a year later, nor that courts decades later would still nonetheless be applying its logic to a species of legal intercourse unknown and unaddressed in its arguments.[215] Nor could *Muro* imagine that the traditional attachments it considered would soon be supplanted by virtual links that obviated the need to confront actual files freeriding on emails.[216]

The life of the law is in experience, to be sure, and precedents can and should be adapted to meet new circumstances,[217] but the graduated adaptation implicit in such evolution can be disrupted all too easily by seismic or schismatic shifts that vitiate the premises of the original precedent, leaving the rule of law adrift without mooring to a rapidly evolving reality inconceivable to the originating court.[218]

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211. One might argue that the dyssynergy to privilege occasioned by manufacturing such fictions is a powerful argument against the practice in ediscovery more generally. This Article, however, shies from engaging in the bumptious dialogue over the proper treatment of modern attachments in discovery writ large, as narrated above. Privilege is problem enough for one essay to tackle.

212. ERIC TEMPLE BELL, MEN OF MATHEMATICS 481 (Touchstone 2014) (1937). He added: "Our only comfort is that greater shall come after us."

213. *Upjohn Co*., 449 U.S. at 395–96 (1981).

214. *See* Fisher v. United States, 425 U.S. 393, 402–04 (1976).

215. Sneider v. Kimberly-Clark Corp., 91 F.R.D. 1, 4 (N.D. Ill. 1980), *abrogated in unrelated part by In re* Queen's Univ. at Kingston, 820 F.3d 1287 (Fed. Cir. 2016); *see* Sunshine, *Part & Parcel II*, *supra* note 8, at 377–385 (decisions from 2014 to 2024 following *Sneider*).

216. *See* Muro v. Target Corp., 250 F.R.D. 350 (N.D. Ill. 2007), *aff'd*, 580 F.3d 485 (7th Cir. 2009).

217. *See* Brian Hawkins, *The Life of the Law: What Holmes Meant*, 33 WHITTIER L. REV. 323 (2012).

218. *Compare* Jared S. Sunshine, *Secrets Clutched in a Dead Hand: Rethinking Posthumous Psychotherapist-Patient Privilege in the Light of Reason and Experience with Other Evidentiary Privileges*, 37 J.L. & HEALTH 249, 341–45 (2024) (discussing Funk v. United States, 290 U.S. 371, 373 (1933) and its predecessors for the rule of *cessante ratione legis cessat ipsa lex*) *with* Jared S. Sunshine, *A Lazarus Taxon in South Carolina: A Natural History of National Fraternities'* Respondeat Superior *Liability For Hazing*, 5 CHARLOTTE L. REV. 79, 109-113 (discussing how schismatic changes in society can upend an existing corpus of legal precedent).

The survival of *Sneider*'s rule, shorn of its underpinnings, can be attributed to a worthy judicial desire to deter obnoxious subterfuges that an overly permissive regime for privilege might hypothetically conduce.[219] But a yen for practical deterrence is no substitute for principled coherence, and there is simply no principled basis to distinguish amongst particular atomized segments of a genuine communication with counsel.[220] The Supreme Court in *Fisher* itself decisively discarded a much-parroted rule whose reasoned foundations had long since been erased by a million cuts.[221] *Fisher* aside, the sole basis for deeming attachments uniquely resistant to privilege is a contrived sanction divorced from *Upjohn*'s theorem, installed as an unwarranted guardrail against abuse that has hitherto not materialized.[222] The growing adoption of modern attachments offers an earnest that real-world corporate practices (rather than hypothetical malfeasances) are aimed at efficiency rather than exploiting the abstruse legalities of privilege.[223]

Nevertheless, the Part & Parcel Principle as enunciated a decade ago was too simplistic: a simple rule for simple cases.[224] Given all the exceptions to

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219. *See, e.g.*, PepsiCo, Inc. v. Baird, Kurtz & Dobson, LLP, 305 F.3d 813, 816 (8th Cir. 2002); Lee v. Chi. Youth Ctrs., 304 F.R.D. 242, 249 (N.D. Ill. 2014) ("If the result were otherwise, unscrupulous clients and lawyers could have all relevant documents sent to their counsel initially or as attachments to emails and then refuse to honor a single Rule 34 request. The privilege is not so easily perverted."); Renner v. Chase Manhattan Bank, No. 98-CV-926, 2001 WL 1356192, at *5 (S.D.N.Y. Nov. 2, 2001); *see also* Simon v. G.D. Searle & Co., 816 F.2d 397, 403 (8th Cir. 1987).

220. As noted above with regard to the early case *Med. Waste Techs. L.L.C. v. Alexian Bros. Med. Ctr., Inc.* (discussed and quoted in Sunshine, *Part & Parcel II*, *supra* note 8, at 366–67), one may sympathize with courts conceding that words conveying public information and objective facts cannot be shorn from a letter or email but reasoning that an already conveniently partitioned attachment ought to be produced because no such logistical divisibility issue intercedes. *See* Med. Waste Techs. L.L.C. v. Alexian Bros. Med. Ctr., Inc., No. 97 C 3805, 1998 WL 387706, at *5 (N.D. Ill. June 24, 1998). But, again, there is no *principled* way to distinguish between the two: either part-and-parcel attachments are subsumed into the communication and protected *in toto*, or emails and letters must be flyspecked to disclose items like citations to laws, commonly known information, or material intended for eventual dissemination. Aside from the logistical infeasibility of doing so noted by *Medical Waste*, the original Part & Parcel article also contended that divulging such information whilst being permitted only to protect the ultimate legal question to counsel would render privilege a nullity. *See* Sunshine, *Part & Parcel*, *supra* note 2, at 52 ("The privilege would be nugatory if clients could be compelled to divulge the factual premises of their inquiries to counsel, withholding only the ultimate question; mind-reading would be unnecessary to discern that a lengthy email relating corporate practices that could violate the FCPA might conclude with a question to counsel as to whether they do.").

221. *See* Fisher v. United States, 425 U.S. 393, 405–10 (1976) (interrogating and abrogating the rule of Boyd v. United States, 116 U.S. 616 (1886)) (discussed *supra* text accompanying notes 55–75).

222. *See supra* notes 98–108 and accompanying text. Nor would such a resolution solve the problem. Were an arbitrary line in the sand drawn around attachments, cautious clients could simply replace the practice of embedding attachments to their counsel with copying any text relevant to their legal requests into the body of the email—just as a modern attachment is merely a verbally conveyed hyperlink. Before modern attachments, the logistical difficulties of communicating in that manner absent hyperlinks might deter some privileged communications, but now there is little such impediment.

223. *See supra* note 203.

224. The original Part & Parcel article barely probed the edge cases in addressing the situation where the only copy of an attachment is in a privileged email, resorting to speculation: "Setting aside the Principle, a document that was created only for submission to counsel may not be discoverable at all. It is unobjectionable that the Principle has the same result." Sunshine, *Part & Parcel*, *supra* note 2, at 59 (citing Eastman Kodak Co.

privilege,[225] it cannot be quite right that privilege applies categorically in *every* situation where an attorney-client communication serves a genuine legal purpose implicating its attachments.[226] As Rice reminded, one must look to the purpose of *privilege* in evaluating its application to attachments.[227] *Willis* explored the most obvious—if vanishingly rare—counterpoint: what if the only copy of a document that would be concededly nonprivileged standing alone happens to be part and parcel of a genuine communication with counsel?[228] In that extraordinary case, denial based on a hypertechnical application of the Principle would exclude the document from discovery entirely, truly contravening *Fisher*'s lesson.[229] That a privileged communication (no less than a law firm's archive, as *Fisher* taught) is coincidentally the only extant source from which to collect a nonprivileged document does not mean the underlying document cannot rightly be demanded *notwithstanding* a communication's privilege.[230]

Elm 3DS Innovations, LLC v. Samsung Electronics Co. probed a still subtler aspect: although the fact that an attorney was consulted about a particular nonprivileged document is privileged, the fact that a certain (non-attorney) client custodian possessed the document is not.[231] Thus, not only must some copy of an inherently nonprivileged document be disgorged (even, if necessary, from counsel[232]), but also the identity of any non-attorney custodians who sent or received it—without revealing the details or even fact of transmission itself.[233]

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v. Agfa-Gevaert N.V., No. 02-CV-6564 T-F, 2006 WL 1495503, at *3–*4 (W.D.N.Y. Apr. 21, 2006)). It may be true that the inherent privilege of attachments correlates strongly with their being provided only to counsel, *see, e.g.*, Linet Americas, Inc. v. Hill-Rom Holdings, Inc., No. 1:21-cv-6890, 2024 WL 3425795, at *12–*19 (N.D. Ill. Jul. 15, 2024) (discussed in Sunshine, *Part & Parcel II*, *supra* note 8, at 391–94) (proponent advancing such an argument), but a generally applicable principle must take account of edge cases like *Willis* that challenge its assumptions, where sheer happenstance is the conceded reason that a nonprivileged file can be found only in a privileged communication. *See* Willis Elec. Co. v. Polygroup Trading Ltd., No. 15-cv-3443, 2021 WL 568454 (D. Minn. Feb. 16, 2021).

225. *See, e.g.*, Swidler & Berlin v. United States, 524 U.S. 399, 409–410 (1998) (noting the crime-fraud and testamentary exceptions in refusing to sanction a proposed further posthumous exception because the "'no harm in one more exception' rationale could contribute to the general erosion of the privilege, without reference to common-law principles or 'reason and experience'").

226. *Contra* Sunshine, *Part & Parcel*, *supra* note 2, at 55 (quoted *supra* note 101).

227. *See* Rice, *supra* note 108., at 968, 1005; *cf.* United States v. Cerro, 775 F.2d 908, 912 (7th Cir. 1985) ("It is never right to try to answer a legal question, such as (in this case) whether there was one conspiracy or five conspiracies, without considering the purpose of the question.").

228. *See* Willis Elec. Co. v. Polygroup Trading Ltd., No. 15-cv-3443, 2021 WL 568454, at *5 (D. Minn. Feb. 16, 2021).

229. *See id.* at *5–8; *see* Sunshine, *Part & Parcel II*, *supra* note 8, at 387–89 (discussing *Willis*).

230. *See supra* text accompanying notes 55–75 (discussing *Fisher*). *But see* Rice, *supra* note 108., at 992 (quoting Liggett v. Glenn, 51 F. 381 (8th Cir. 1892), for the proposition that documents may indeed be sequestered entirely by provision to counsel); *id.* at 994–95, n.102 (discussing United States v. Hawkins, 631 F.2d 360, 365 (5th Cir. 1980)).

231. Elm 3DS Innovations, LLC v. Samsung Elecs. Co., No. 14-1430, 2021 WL 4819904, at *4–5 (D. Del. Oct. 15, 2021) (discussed in Sunshine, *Part & Parcel II*, *supra* note 8, at 389–90).

232. Fisher v. United States, 425 U.S. 393, 403–04 (citing cases cited *supra* note 73).

233. *Elm*, 2021 WL 4819904, at *4–5 (quoted *supra* text accompanying note 1).

These concerns were aired long before *Willis* or *Elm*—albeit in rudimentary form—via cases immediately responding to *Muro* and declaring that despite the conceded privilege in the transmission (email and attachment both), the underlying document privileged as an attachment in that particular instance must be accounted for somewhere in the party's discovery.[234] Thus *Rhoads* is perhaps the more seminal case, in pioneering a crucial clarification to *Muro*: that the Principle is fully cogent only if another copy of the situationally privileged attachment (dissociated from the privileged communication) can be confirmed to be available in discovery.[235] Numerous cases in the otherwise uncontroversial consensus directly following *Muro* reiterated this prescription,[236] but thereafter it faded from sight in the 2010s—until recently.[237] This lacuna can easily be explained by the sheer infrequency of the fluke confronted in *Willis*: the unlikelihood that the only version of an otherwise nonprivileged attachment in sprawling corporate data systems exists in facially privileged form. Thus, *Rhoads*'s successors soon descended into internecine casuistry on procedural necessities for

234. Because this concept of somehow accounting for nonprivileged attachments, qualifying but not compromising *Muro*'s rule, is so vital to fortifying the underlying logic of the Principle, the many cases advancing its practice both in its early contours (following *Rhoads*) and now contemporarily are noted in the compendium of *Part & Parcel II* (). The pickax icon was chosen because these cases insist that the proponent of privilege, more or less, do the onerous work of locating another produced copy to justify the withholding of attachments as privileged.

235. *See* Diamond Servs. Mgmt. Co., LLC v. C&C Jewelry Mfg., Inc., No. 19 C 7675, 2021 WL 5834004, at *3 (N.D. Ill. Dec. 9, 2021) ("At least one other court, largely following *Muro*, has said that where the component parts of the string were not produced in the litigation, the withholding party must disclose them separately, i.e., not in the same log entry as the withheld communication in which the component parts were forwarded between attorney and client." (citing Rhoads Indus., Inc. v. Bldg. Materials Corp. of Am., 254 F.R.D. 238, 240–41 (E.D. Pa. 2008))); Thompson v. Buhrs Americas, Inc., No. CV 07-2746, 2009 WL 10711526, at *3 (D. Minn. May 19, 2009) ("Even if the privilege attaches to the string as a whole, the privilege does not necessarily attach to constituent messages within the string. If a constituent message remains unprivileged in another context, that message can be separately discovered by other means. *Rhoads Indus., Inc*., 254 F.R.D. at 240; *Banks v. Office of Senate Sergeant-at-Arms*, 236 F.R.D. 16, 21 (D.D.C. 2006). If a string is broken down and only its constituent messages are produced, and an adverse party cannot infer the substance of subsequent legal advice, the privilege is preserved. *Rhoads Indus., Inc*., 254 F.R.D. at 241. These principles are generally consistent with the *Muro* decision."), *objections sustained*, No. CV 07-2746, 2009 WL 10711525 (D. Minn. June 23, 2009).

236. *See, e.g*., United States v. Davita, Inc., 301 F.R.D. 676, 684–85 (N.D. Ga. 2014), *on reconsideration*, No. 1:07-CV-2509, 2014 WL 11531065 (May 21, 2014); Phillips v. C.R. Bard, Inc., 290 F.R.D. 615, 641–42 (D. Nev. 2013); BreathableBaby, LLC v. Crown Crafts, Inc., No. 12-cv-94, 2013 WL 3350594, at *10–*11 (D. Minn. May 31, 2013), *report and recommendation adopted*, No. 12-CV-0094 PJS/TNL, 2013 WL 3349999 (D. Minn. July 1, 2013); SEC v. Wyly, No. 10 Civ. 5760 SAS, 2011 WL 3055396, at *4 (S.D.N.Y. July 19, 2011); SEC v. Hollnagel, No. 07 CV 4538, 2010 WL 11586980, at *6–7 (N.D. Ill. Jan. 22, 2010); Treat v. Tom Kelley Buick Pontiac GMC, Inc., No. 1:08-CV-173, 2009 WL 1543651, at *12 (N.D. Ind. June 2, 2009); *Thompson*, 2009 WL 10711526, at *3.

237. *E.g*., Linet Americas, Inc. v. Hill-Rom Holdings, Inc., 740 F. Supp. 3d 685, 702–11 (N.D. Ill. 2024); *Diamond Servs*., 2021 WL 5834004, at *3; *Elm*, 2021 WL 4819904, at *4–5; Willis Elec. Co. v. Polygroup Trading Ltd., No. 15-cv-3443, 2021 WL 568454, a *5–8 (D. Minn. Feb. 16, 2021); *In re* Zetia (Ezetimibe) Antitrust Litig., No. CV 2:18md2836, 2020 WL 1593544, at *5 (E.D. Va. Feb. 6, 2020).

privilege logs to account for hypotheticals rather than real questions about whether specific attachments were privileged or liable to disclosure.[238]

A decade later, *Willis* reminded that even exceptional cases demand answers. The straightforward Hall Accommodation engineered by Judge Hall in *Elm* (quoted in the epigram) details how a producing party can fulfill its duties to account for the production of inherently nonprivileged material if challenged, without compromising privileged communications.[239] It should thus be standard practice for resolving disputes over attachments whose privilege derives from the Part & Parcel Principle—as *Linet* evinced only a few years later.[240] Rather than a regular privilege log entry, which might reveal information that itself intrudes on the privilege by identifying the attached content given to counsel,[241] inherently nonprivileged attachments to privileged communications necessitate only a "Hall declaration" consisting of either (a) an averment that a copy of any such withheld attachments was produced somewhere, unspecified lest its identity be revealed;[242] or (b) if any was locatable only in privileged communications, then confirming the separate production of that document produced shorn of any privileged trappings, with metadata identifying only the non-attorney custodians who possessed it.[243]

If limited to attachments under actual dispute, implementation of Hall Declarations need not be prohibitively prolix. The declaration need only be done once, in response to a challenge, not for every version of a Part & Parcel attachment, lest the onus become exorbitant.[244] And if the only copy of a document has been lodged with counsel, the client must retrieve it from the attorney and

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238. *Compare* cases cited in Sunshine, *Part & Parcel II*, *supra* note 8, at 373–74 nn.144–46 and accompanying text (intercircuit evolution of *Rhoads*'s progeny in cases implicating Part & Parcel assertions), *with* cases cited in Sunshine, *Part & Parcel II*, *supra* note 8, at 374 n.147 and accompanying text (not addressing any Part & Parcel assertion but still dissecting *Rhoads*).

239. *Elm*, 2021 WL 4819904, at *4–5 (quoted *supra* text accompanying note 1).

240. *See Linet*, 740 F. Supp. 3d at 702–11 (discussed in Sunshine, *Part & Parcel II*, *supra* note 8, at 39–94).

241. *See* Rhoads Indus., Inc. v. Bldg. Materials Corp. of Am., 254 F.R.D. 238, 240–41 (E.D. Pa. 2008) ("As noted by Judge Pallmeyer in overruling the Magistrate Judge, this disclosure could be a breach of attorney-client privilege because the act of itemization might force parties, by disclosing what was sent to the attorney, also to disclose the nature of the privileged information." (citing Muro v. Target Corp., 250 F.R.D. 350, 353 (N.D. Ill. 2007)), *aff'd*, 580 F.3d 485 (7th Cir. 2009)).

242. *See Linet*, 740 F. Supp. 3d at 706–09 (relying on Linet's averments that it had produced copies of attachments to most of the challenged attachments to sustain their withholding).

243. *See* Elm 3DS Innovations, LLC v. Samsung Elec. Co., 2021 WL 4819904, at *4–5 (D. Del. Oct. 15, 2021) (quoted *supra* text accompanying note 1). The length and number of subsidiary clauses of this sentence are stark testament to why Magistrate Judge Hall's plain-language description of how her protocol was to be executed in *Elm* is decidedly superior.

244. *See* United States v. Davita, Inc., 301 F.R.D. 676, 684 (N.D. Ga. 2014) ("However, the Court is concerned with the potential of massive amounts of duplication. A typical email string may exist in multiple different forms as more and more communications are added. The initial email that begins a string may appear 10 or more times in different versions of the same string. The Court does not intend that this email be logged ten separate times, which in this case might turn Defendants' 250 pages of logs into 2,500 pages with little added benefit. Thus, the Court simply requires that Defendants ensure that each withheld email within a string be logged in some fashion *at least once*."), *on reconsideration*, No. 1:07-CV-2509, 2014 WL 11531065 (May 21, 2014).

produce it, dissociated from the privileged intercourse, as if it had never been in the attorney's hands.[245] To be sure, the Hall Accommodation will still face difficulties in some applications, such as tiny production populations where the identity of the unspecified attachment may to be too readily ascertainable from the scarcity of candidates. But it should address most edge cases of privilege in attachments posed by large-scale ediscovery, leaving only the edge cases of edge cases. An accommodation that eliminates yet more of the uncertainty deplored by *Upjohn* from the practice of privilege in discovery is readily justifiable.

The nuances explored here do not question the Part & Parcel Principle but merely clarify what a prudent practitioner might do in order to best assert and preserve the attorney-client privilege guaranteed to email attachments in discourse with counsel in outré circumstances. As discussed above, modern lawyers' duties will be much eased by modern attachments to email, for which there is no need for Hall Declarations because an inherently nonprivileged document will necessarily be produced if responsive to a discovery request.[246] By definition, modern attachments eliminate the possibility that an email's enclosure could exist solely in the instance embedded in the email, because they are not embedded as a separate instance—any nonprivileged cloud-based document must be produced if called for. In short, the Hall Accommodation addresses the latent ambiguities in the interstitial status of traditional attachments, existing somewhere between ancestral paper and the independent virtual existence of documents in "the cloud." Should modern attachments continue to outcompete their traditional predecessors, perhaps one day there will be no need for such accommodations. Realistically, however, just as *Fisher* remains cogent as to residual (albeit today rarely employed) paper enclosures, the Principle's salience will endure as long as users embed duplicative documents into emails despite the inefficiencies that have propelled modern attachments via hyperlinks into prominence.

CONCLUSION

In 1999, the eminent scholar of privilege Paul R. Rice published a spiritual predecessor to this now-trilogy of articles, entitled *Continuing Confusion about Attorney Communications, Drafts, Pre-existing Documents, and the Source of the Facts Communicated*.[247] Early cases were aware of Rice's well-reputed work, even if they failed to heed its admonitions.[248] Rice spoke generally of attorney-client privilege as "one of the most complex and therefore, litigated privileges,"

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245. *See* Rice, *supra* note 108, at 995 ("If the client gave the original document to the attorney and retained no copies, the client would be obligated to retrieve and produce such document, under the discovery rules, as if the writing had never been part of an attorney-client communication.").

246. *See supra* Part II.C.

247. *See* Rice, *supra* note 108.

248. *Compare, e.g.*, Evergreen Trading, LLC *ex rel.* Nussdorf v. United States, 80 Fed. Cl. 122, 137–38 n.25 (Fed. Cl. 2007) (citing Rice but rejecting Principle), *with* Rhoads Indus., Inc. v. Bldg. Materials Corp. of Am., 254 F.R.D. 238, 240 n.3, 241 (E.D. Pa. 2008) (citing Rice and applying Principle).

in large part because of "difficulties created by the concept of confidentiality," reconceived as secrecy by the *fin de siècle* Dean John Henry Wigmore.[249] At base, Rice thought that "opportunities for confusion and misunderstanding have grown" as "judges and lawyers have forgotten the fundamental principles of the attorney-client privilege."[250] Turning to enclosures and attachments specifically, Rice explained:

> Although courts have had little difficulty with the application of this principle when dealing with the distinction between oral and written communication from the client to the attorney, there has been great confusion about the application of the privilege when the client discloses non-privileged, pre-existing documents to the attorney during the course of a communication.[251]

That millennial confusion has since abated somewhat as courts have come to understand better the nature of email attachments, but disputes over the application of law to facts remain. As of 2025, it has been 49 years since *Fisher* wrote about privilege in 1976, and well over forty years since *Sneider* and *Upjohn* in 1980 and 1981. However much *Upjohn* may have exalted predictability, forty years of wandering in a desert of tumultuous precedent have not brought the law to the promised land of a sure and certain privilege, even within the circumscribed niche of email attachments. False idols abound: *Sneider*'s misbegotten conception is a golden calf[252] that has commanded much veneration to this day, as has *Fisher*, despite its jurisprudential feet of clay in an era of email.[253] The last upwelling of consensus after *Muro* dared to refute *Sneider* wholesale guttered within a few years, leading to another decade of desultory dispute. Contrarian courts in *Lee* and *Intermountain* (discussed in *P&P II*) both offered well-argued rebuttals of the Part & Parcel Principle in recent years, even as cases like *Willis* and *Linet* have sought to distinguish and rebut those rebuttals.[254] That cases adopting opposing principles are engaging thoughtfully with one another's

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249. Rice, *supra* note 108, at 968; *see* Jared S. Sunshine, *The Parthenogenesis of Wigmore: A Humble History of How a Confidentiality Requirement Arose Ex Nihilo to Become the Sine Qua Non of Attorney-Client Privilege*, 54 UIC J. MARSHALL L. REV. 429 (2021) (discussing how and why Wigmore committed such an unvarnished act of invention).

250. Rice, *supra* note 108, at 968.

251. *Id*. at 989.

252. *Cf. Exodus* 32:1-8 (King James).

253. *Cf. Daniel* 2:31-35 (King James) ("This great image, whose brightness was excellent, stood before thee; and the form thereof was terrible. This image's head was of fine gold, his breast and his arms of silver, his belly and his thighs of brass, His legs of iron, his feet part of iron and part of clay. Thou sawest till that a stone was cut out without hands, which smote the image upon his feet that were of iron and clay, and brake them to pieces. Then was the iron, the clay, the brass, the silver, and the gold, broken to pieces together, and became like the chaff of the summer threshingfloors; and the wind carried them away, that no place was found for them: and the stone that smote the image became a great mountain, and filled the whole earth.").

254. *See* Sunshine, *Part & Parcel II*, *supra* note 8, at 378–380 (discussing *Lee*), 382–84 (discussing *Intermountain*), 387–89 (discussing *Willis*), and 391–94 (discussing *Linet*).

reasoning, rather than ignoring contrary precedent and forging obdurately ahead, is surely promising.[255]

Only time will tell whether 49 years will be celebrated (in biblical fashion[256]) as a jubilee for the Part & Parcel Principle, heralded by its exceptionally thorough treatment in *Linet*. Alas, if past is prologue, the peregrination of the principles underpinning privilege in emails will muddle on indecisively, as new technological nuances challenge the cogency of proffered rules before they can gain their footing amongst vacillating magistrates and district courts. Even if *Linet* were happily to prove to presage the dispositive resolution (in 2024) for the simple paradigm of legacy email attachment technology dating to the 1990s, modern marvels are already inciting new arguments over ediscovery, and will challenge the application of *Upjohn*, *Fisher*, and the common law of privilege anew.[257] Another installment cataloguing fitful advancements on this subject (Part IV: Revenge of the Part & Parcel Principle?) may well be needed in another decade. In the meantime, trial court judges and magistrates have an unenviable task if they are to live up to *Upjohn*'s demand for definitude, but the record of keenly reasoned decisions by astute jurists heretofore augurs well for the future.

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255. The prequel article underscored the centrality of these few bellwether cases: the vast majority of cases cite to the precedents supporting their view without weighing the arguments on both sides and enunciating the reasons for taking one side or the other. *See* Sunshine, *Part & Parcel II, supra* note 8 at 394–98, figure 1 (annotating the particularly significant cases). In fairness, those discussed here add some nuance or clarification in adding their imprimatur to the tally on either side—but there are, no doubt, far more unreported rulings of masters or magistrates tasked with supervision of discovery disputes that go unmentioned in this Article, which, whether with laudable modesty or unhelpful incuriousness, simply apply one rule or the other to the case at hand, according to their druthers.

256. *See Leviticus* 25:8-10 (King James) ("And thou shalt number seven sabbaths of years unto thee, seven times seven years; and the space of the seven sabbaths of years shall be unto thee forty and nine years. Then shalt thou cause the trumpet of the jubile to sound on the tenth day of the seventh month, in the day of atonement shall ye make the trumpet sound throughout all your land. And ye shall hallow the fiftieth year, and proclaim liberty throughout all the land unto all the inhabitants thereof: it shall be a jubile unto you; and ye shall return every man unto his possession, and ye shall return every man unto his family.").

257. *See supra* Part III.