THE POWER TO PRIVILEGE

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Mila Sohoni[*]
University of San Diego School of Law
5998 Alcala Park, San Diego, CA 92110
sohoni@sandiego.edu

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A new and startling development has recently occurred in the law of delegation: Congress has for the first time expressly delegated to an administrative agency the power to write rules of privilege. Privileges abound in federal law, but until now they have been defined either by statute or by judicial opinion. The type of law that Congress has now authorized agencies to create—the regulatory evidentiary privilege—is a true novelty in our system of law.

This article is the first to grapple with the implications of migrating the power to write rules of privilege from Congress and the courts, on the one hand, to the executive branch, on the other. It begins by describing an underappreciated aspect of the administrative state: that the law of privilege is becoming increasingly important to the functioning of administrative agencies. As a result, administrative agencies are actively pursuing control over the law of evidentiary privilege in order to further their substantive mandates.

Granting agencies that sought-after control through a privilege delegation will imperil key federal and state regulatory and governance interests. First, privilege delegations will reduce agency accountability. A delegated authority to write privileges that enables an agency to shield its own communications from disclosure will allow the agency to insulate itself from external review and oversight. Second, privilege delegations will erode state interests in allowing litigants and the public broad access to information. Agencies promulgating regulatory evidentiary privileges are likely to displace state laws that would permit disclosure to a greater extent than would be the case if Congress and the courts retained the privilege pen. Third, privilege delegations threaten to undercut state sovereignty. When Congress authorizes federal agencies to privilege the communications of state officials, it obstructs the capacity of the states to monitor state agents and thereby produces a type of harm akin to prohibited Congressional commandeering of state governance.

After establishing the risks attendant to privilege delegations, the article offers some design considerations that should govern the institutional process responsible for drafting any new set of privileges that may be invoked by executive branch agencies. Finally, the article explains why this innovation in delegation provides a unique opportunity to test prevailing scholarly models of why and to whom Congress chooses to delegate. When it delegates the power to privilege to an agency, Congress is substituting a new delegate—a politically accountable executive agency—for an old delegate—the politically unaccountable federal courts. Accounts of delegation grounded in party competition have greater explanatory power for this swapping of delegates than alternative accounts.

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INTRODUCTION

In 2010, Congress enacted sweeping reform of the health insurance market, cutting through decades of deadlock with a mammoth piece of legislation on a policy question of pressing national importance. Embedded within the Patient Protection and Affordable Care Act (the "ACA")[1] was a historically unprecedented provision. This provision augmented federal authority in novel ways. It threatened to encroach upon long-recognized state prerogatives. It placed federal agencies in an unfamiliar and intrusive regulatory role. And it entirely escaped scholarly and public attention.

The provision is not the "individual mandate" targeted by the Commerce Clause challenges to the ACA.[2] Rather, it is an amendment to the Employee Retirement Income Security Act ("ERISA") made by Section 6607 of the act. The new provision authorizes the Secretary of Labor to promulgate regulations that "provide[] an evidentiary privilege for, and provide[] for the confidentiality of communications between or among" a host of federal and state entities, including the Treasury Department, the Department of Justice, state attorneys general, and an association of state insurance regulators with no official governmental status whatsoever.[3] Labor is also authorized to privilege communications between "[a]ny other federal or state authority," as long as—in the Secretary's determination—that extension of the privilege is "appropriate" for the purposes of enforcing the employee benefit provisions of ERISA.[4] The power to privilege entrusted to Labor is simple and startling: it is a wholesale delegation of the authority to craft regulatory evidentiary privileges covering communications between dozens of federal, state, and private entities.

In the ongoing cacophony of debate surrounding the ACA, Section 6607 has been overlooked.[5] Yet this provision could (eventually[6]) prove

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[1] *See* Pub. L. No. 111-148, 124 Stat. 119, Section 6607, Permitting Evidentiary Privilege and Confidential Communications, codified at 29 U.S.C. § 1134(d)-(e). *See infra*, Appendix A, for the full text of this provision.

[2] *See* NFIB v. Sebelius, 132 S. Ct. 2566 (2012).

[3] The organization is the National Association of Insurance Commissioners, an interest group made up of elected or appointed insurance commissioners from the states and the District of Columbia. Timothy S. Jost, *Reflections on the National Association of Insurance Commissioners and the Implementation of the Patient Protection and Affordable Care Act*, 159 U. PA. L. REV. 2043, 2044 (2011) (describing NAIC as "a private, nonprofit organization").

[4] 29 U.S.C. § 1134(d)-(e).

[5] As of this writing, WestLaw's news and scholarship reference databases show nearly 10,000 newspaper and scholarly articles containing the terms "ObamaCare" or

to have a more sustained impact on public law than the individual mandate—which, when all was said and done, turned out to be merely a poorly phrased tax provision.[7] The type of law contemplated by Section 6607—the regulatory evidentiary privilege—is a true novelty. Privileges abound in federal law, but they are defined either by statute or by judicial opinion. Section 6607 bestows on regulators a power that they have never before held: the power to write rules of privilege from the ground up.

Many within the federal bureaucracy will no doubt welcome this innovation in delegation as long overdue. Equipped with the power to privilege communications between it and regulated entities, an agency could more easily induce regulated parties to cooperate with its investigations. An agency could also much more comfortably coordinate its activities with other agencies, with state entities, or with private parties, if it could shield from disclosure its communications with these other entities through promulgating regulatory evidentiary privileges. In these and other contexts, a delegated power to write privileges could come in very handy indeed.

Given the influence that federal agencies wield over the shape of federal legislation, it was perhaps only a matter of time before Congress enacted an express delegation of the power to promulgate privileges. Section 6607 is the first such delegation, but it probably will not be the last. Now is the time—before more such delegations are enacted—to think through the implications of migrating the power to write rules of evidentiary privilege from Congress and the courts, on the one hand, to the executive branch, on the other.

This article fills that gap. This contribution is valuable because no scholarly literature probes the intersection of the law of delegation and the law of privilege. Scholarship on delegation ignores privilege law, despite the fact that privilege law rests on a sweeping delegation of interpretive authority to courts.[8] And scholarship on privilege law starts

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"Affordable Care Act." There are no substantive references to Section 6607 in this corpus other than in a series of Congressional Research Service bill summaries that contain the same one-line description of this provision—a description that is partial and rather misleading. *See*, *e.g.*, *CRS Bill Digest for Patient Protection and Affordable Care Act*, CONGRESSIONAL QUARTERLY, March 23, 2010, *available at* 2010 WLNR 6035121 (describing Section 6607 as "[a]uthorizing the Secretary of Labor to promulgate a regulation providing an evidentiary privilege that allows confidential communication among specified federal and state officials relating to investigation of fraud and abuse"). No legislative history exists regarding this provision.

[6] As of this writing, no regulations have been promulgated pursuant to Section 6607.

[7] *See NFIB*, 132 S. Ct. at 2598.

[8] *See* Fed. R. Evid. 501 ("The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege"); *infra* text

from the widely shared initial premise that Congress and the courts, as opposed to executive agencies, will control the substance of federal evidentiary privileges.[9] As Section 6607 shows, this premise is faulty. This law opens up the prospect of federal administrative agencies crafting new evidentiary privileges through the rulemaking process. This article is the first to grapple with the ramifications of that scenario—a scenario that is no longer theoretical.

Delegating the power to write rules of privilege to an executive agency poses three risks. The primary threat is to agency accountability. Authorizing an agency to write rules to protect its own communications from disclosure is a sure invitation to mischief. Executive agencies resist compliance with open government laws and they over-utilize the mechanisms already available to them for shielding their own information. If an agency can write regulations to shield its own information and communications from exposure to the public or to adversaries in litigation, the transparency and accountability of government will decrease.

Authorizing agencies to write evidentiary privileges will cause trouble even if the resulting regulations apply only to the communications of parties outside the agency, such as private parties or state entities. The chief concern here arises from the likelihood that agencies will want to give their new regulatory privileges broad preemptive effect. Many substantive state laws are designed to ensure either public access to government information (i.e., open government laws) or litigant access to private information (i.e., rules of discovery). As the literature on administrative federalism suggests, federal agencies will likely prioritize achieving their substantive mandates over the federalism harms of preempting such state rules. The result is likely to be a greater volume of privileges with a concomitantly greater degree of displacement of state law than would be the case if Congress and the courts retained the privilege pen.

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accompanying notes 15-18 (describing adoption of Fed. R. Evid. 501); *infra* note 244 (describing scholarship on courts as delegates).

[9] One scholar has argued for federalization of the law of attorney-client privilege, but he argued that it should be federalized by statute and did not broach the possibility of a regulatory privilege with preemptive effect. *See* Timothy P. Glynn, *Federalizing Privilege*, 52 AMER. U. L. REV. 59 (2002) ("Congress, therefore, should federalize the law of privilege preemptively, creating uniform protection for client confidences that will apply in every proceeding in federal and state court, as well as in arbitration proceedings, administrative hearings, and legislative proceedings."); *see also id*. at 63 n.10 (collecting sources similarly assuming statutory, not regulatory, control of privilege law). Similarly, in considering the question "which branch of government can legitimately control the creation of privileges?", Professor Graham considers only two options: courts and Congress. Kenneth W. Graham, Jr., *Government Privilege: A Cautionary Tale for Codifiers*, 38 LOY. L.A. L. REV. 861, 864-65 (2004).

A distinct harm to federalism—and one that may be more disturbing—is the prospect that a federal regulatory evidentiary privilege might shield the communications of state agents, such as state attorneys general or state insurance regulators, from disclosure to the public or to their state-level principals, such as governors or state legislatures. By obstructing the ability of the states to monitor their agents, privilege delegations could imperil not just state regulatory interests but also state governance interests.

After canvassing some necessary background, the discussion below elaborates on these problems with delegations of the power to privilege. It then leverages this critique to generate some institutional design principles that should govern the body charged with creating any new set of privileges that might be necessary to satisfy the administrative imperatives of administrative agencies. The article next turns to the broader puzzle of what can be learned from Congress's decision to undertake such a dramatic innovation in delegation. Section 6607 offers a unique opportunity to test the prevailing scholarly models that seek to explain why and to whom Congress chooses to delegate. That is because in Section 6607 Congress did not merely select a delegate; it swapped in a *new* delegate—a politically accountable executive agency—for an *old* delegate—politically unaccountable federal courts. This delegation swap, I suggest, is best understood by accounts of delegation that emphasize partisanship as a causal factor in the structuring of the administrative state rather than by alternative accounts of Congressional choice of delegate.

The article proceeds in five parts. Part I demonstrates the novelty of delegations of the power to privilege to the executive branch and walks through the legal mechanics of how such delegations would apply in federal or state cases raising federal or state claims. Part II describes how privilege law plays a central role in shaping the capacity of agencies to enforce the law and to coordinate their activities with other governmental and private actors. Part III explains why delegating the power to privilege to executive agencies will undercut agency accountability and erode important state regulatory and governance interests. Part IV develops design principles that should govern the institutional process responsible for creating any new evidentiary privileges applicable to administrative agencies. Part V examines Section 6607 in light of various competing accounts of why and to whom Congress chooses to delegate. A brief conclusion follows.

I. THE SOURCES OF PRIVILEGE LAW

Where do privileges come from?[10] Answering this question requires a brief overview of the general statutory structure governing the federal rules of judicial procedure and of how this structure treats rules of evidentiary privilege.

The Rules Enabling Act gives the Supreme Court the power to write rules of procedure and evidence that will govern in federal courts.[11] Ordinarily, rules written by the Court take effect if Congress does not veto them within a certain period.[12] The rules of evidentiary privilege are, however, carved out from this process.[13] Rules of evidentiary privilege take effect only if enacted by Congress; they do not become law by virtue of Congressional silence like other rules of procedure and evidence.[14]

By keeping privilege law in this special category, Congress appeared to intend to retain more control over privilege law than it chose to retain over other procedural and evidentiary rules.[15] But in fact Congress

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[10] "[P]rivileges are the evidentiary rules that allow a person [or legal entity] who communicated in confidence or who possesses confidential information to shield the communication or information from compelled disclosure during litigation." NEW WIGMORE, § 1.1.

[11] *See* 28 U.S.C. § 2072(a) ("The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.").

[12] 28 U.S.C. § 2074(a) ("The Supreme Court shall transmit to the Congress not later than May 1 of the year in which a rule prescribed under section 2072 is to become effective a copy of the proposed rule. Such rule shall take effect no earlier than December 1 of the year in which such rule is so transmitted unless otherwise provided by law.").

[13] 28 U.S.C. § 2074(b) ("Any such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress.").

[14] *Id.*

[15] For some light on why Congress felt strongly about retaining control over privileges, see Representative Holtzman's statement explaining that "[e]videntiary privileges are not simple legal technicalities, they involve extraordinarily important social objectives. They are truly legislative in nature. ... I think it is very important that we do not let the Supreme Court legislate in such areas. Instead, I think it is important for Congress to legislate in such areas, and it is wholly appropriate that we do so. The tradition in this country has been for evidentiary privileges to grow on a case-by-case basis upon the experience of centuries. What we are permitting the Supreme Court to do in the enabling act in the form proposed by the House Judiciary Committee is to depart from tradition and enact rules of privileges instead of deciding questions of privileges in the crucible of the adversary process. That is a radical step and contrary to our traditions. It is also inconsistent with congressional prerogatives." 2 FEDERAL EVIDENCE § 5:1.

delegated substantial power over this body of law to the federal courts.[16] In Federal Rule of Evidence 501, Congress provided that "[t]he common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege," unless otherwise provided by the Constitution, a federal statute, or rules prescribed by the Supreme Court.[17] By thus letting common-law decision-making by federal courts set the content of federal privilege law, Congress was able to avoid the task of drafting a set of statutory privilege rules that would manage to please the many powerful interest groups with a stake in the shape of federal privilege law.[18]

The upshot of Rule 501 is that today evidentiary privileges in federal law have two basic sources: the common law as expounded by the federal courts; and the single material exception to Rule 501—federal statutory law. The other exceptions—for constitutional privileges and for privileges prescribed by rule—effectively collapse into these two categories. Constitutional evidentiary privileges are developed through common law decision-making by federal courts.[19] And because 28 U.S.C. § 2074 makes Supreme Court rules concerning evidentiary privilege ineffective unless approved by statute, the "rules prescribed by

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[16] Kenneth S. Broun & Daniel J. Capra, *Getting Control of Waiver of Privilege in the Federal Courts: A Proposal for A Federal Rule of Evidence 502*, 58 S.C. L. REV. 211, 218 (2006) (noting that ultimately "Congress returned the primary evidence rulemaking function to the judiciary with regard to future additions, deletions and amendments, except as to rules governing privilege."); Stephen P. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 700 (1988). For more on the significance of the choice of courts as delegate, *see* sources cited *infra* note 244.

[17] The rule further provides that in civil cases, state privilege law should apply to claims or defenses governed by state law. Fed. R. Evid. 501.

[18] For a detailed account of the rejection of the draft Article V on privileges, see Edward J. Imwinkelried, *Draft Article V of the Federal Rules of Evidence on Privileges, One of the Most Influential Pieces of Legislation Never Enacted: The Strength of the Ingroup Loyalty of the Federal Judiciary*, 58 ALA. L. REV. 41, 42-44 (2006). As Professor Imwinkelried explains, "in the early 1970s the federal judiciary proposed a draft of the Federal Rules of Evidence to Congress. ... In the past, when the judiciary recommended the draft Federal Rules of Civil and Criminal Procedure, Congress allowed the judiciary to promulgate the draft rules without amendment. However, the reaction to the draft of the Federal Rules of Evidence, particularly to Article V devoted to privileges, was so strong and negative that Congress blocked the promulgation of the draft. ... In the course of its deliberation over the draft Rules of Evidence, Congress ultimately decided to jettison draft Article V. However, during the deliberations, it became crystal clear to Congress that if it attempted to legislate specific privilege rules, it would run a huge political risk, namely, offending a large number of influential special interest groups. Consequently, Congress enacted the current Rule 501 as a substitute." *Id*.

[19] Constitutional privileges include the testimonial privileges against self-incrimination, the exclusionary rule, and (according to some) the state secrets doctrine. The contours of constitutional privileges are developed by common law decision-making by courts. *See* Nixon v. United States, 418 U.S. 683 (1974).

the Supreme Court" proviso in Rule 501 means, in effect, a privilege enacted by federal statute. Thus, evidentiary privileges are either *statutory*—i.e., created directly by Congress by positive law—or *common law*—i.e., developed by federal courts through precedential decision-making.

Notably absent is a corpus of privilege law created directly by the executive. Though the executive may *claim* privilege, it has historically not held any power to *proclaim* privilege. And, as explained in further detail below, where the executive has attempted to assert that it has been delegated the power to proclaim rules of evidentiary privilege, the courts and Congress have rebuffed those efforts.

A. COMMON LAW PRIVILEGES

Working under the auspices of Rule 501, the federal judiciary has developed a robust body of privileges.[20] These include several privileges that are specifically or exclusively available to the executive branch,[21] as well as many privileges that are available to all litigants, including to the executive branch. Either way, federal case law sets the metes and bounds of the privilege.

Consider the deliberative process privilege. Through common-law decision-making, federal courts have defined this privilege to contain certain elements. The privilege covers "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated,"[22] as long as the communications are pre-decisional.[23] Communications between an agency and certain sorts of extra-agency parties may be privileged,[24] while others may not.[25] The privilege is qualified in the

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[20] *See* Imwinkelried, *supra* note 18, at 42-44.

[21] *See* Gerald Wetlaufer, *Justifying Secrecy: An Objection to the General Deliberative Privilege*, 65 IND. L.J. 845, 849 (1990) (enumerating state secrets, presidential communications, law enforcement, and informant's privilege as among those privileges available to the executive but unavailable to private litigants). *See also* MUELLER & KIRKPATRICK, 2 FED. EVID. § 5:53 (describing privileges for state secrets, deliberative process, law enforcement, Presidential communications, and informer's identity).

[22] Dep't of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8-9 (2001) (quoting *Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975)).

[23] *In re* Sealed Case, 121 F.3d 729, 737 (D.C. Cir. 1997) ("Two requirements are essential to the deliberative process privilege: the material must be predecisional and it must be deliberative.").

[24] *See Klamath*, 532 U.S. at 10-11 (describing the "consultant's corollary" to the deliberative process privilege).

[25] *Klamath*, 532 U.S. at 12-13 (refusing to apply "consultant's corollary" to communications between government and Indian tribes that were "necessarily communicat[ing] with the [government] with their own, albeit entirely legitimate, interests in mind").

sense that a court may disregard it on the basis of a showing of strong need by the government's litigation adversary,[26] and it is limited in the sense that "if the government can segregate and disclose non-privileged factual information within a document, it must."[27] In all events, the government bears the burden of establishing the elements of the privilege.[28]

Other privileges have generated similar lines of cases. The goal here is not to provide an exhaustive catalog of these doctrines. Rather, the point is a simple one: federal decisional case law supplies the structure of many (probably nearly all) of the evidentiary privileges recognized by federal law.

B. STATUTORY PRIVILEGES

Statutes affecting confidentiality, secrecy and privilege crop up in random contexts scattered throughout the U.S. Code.[29] For example, federal statutes provide protection for national security, defense, and diplomatic secrets, for the confidentiality of "required reports" submitted to federal agencies, and for the protection of governmental files on private individuals, such as tax returns.[30] But most of these statutes merely require confidentiality and do not create true evidentiary privileges.[31] For example, in *Jicarilla Apache Nation v. United*

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[26] *In re* Sealed Case, 121 F.3d 729, 737 (D.C. Cir. 1997) ("The deliberative process privilege is a qualified privilege and can be overcome by a sufficient showing of need. This need determination is to be made flexibly on a case-by-case, ad hoc basis."). In FOIA litigation, however, the privilege is absolute as a formal matter. *See* EPA v. Mink, 410 U.S. 73 (1973).

[27] Loving v. Dep't of Def., 550 F.3d 32, 38 (D.C. Cir. 2008).

[28] Chevron v. United States, 80 Fed. Cl. 340 (2008); EPA v. Mink, 410 U.S. 73 (1973).

[29] *See* MUELLER & KIRKPATRICK, 2 FED. EVID. § 5:5 (3d ed.); John A. Fraser III, *Sixty Years of* Touhy, FED. LAWYER, March 2013, at 74, 79 (collecting numerous examples of statutes that render information secret, including statutes concerning "questions of information classification, contracts for espionage, military strategy, patent applications, scientific secrecy, foreign relations and diplomacy, atomic weapons safeguards, qualifications for the military draft, tax return confidentiality, census record privacy, and legislative privilege under the Speech and Debate Clause").

[30] *See* Bourdeau *et al*., 12 FED. PROC. L. ED. § 33.270 (collecting examples).

[31] As an influential treatise explains, a statute rendering material confidential may be relevant to whether the material is shielded by privilege, but the statute requiring confidentiality does not itself create privilege. The distinction between confidentiality and privilege "is analogous to the distinction between the attorney-client privilege and the ethical rules of confidentiality in that the privilege rules describe what the government can and cannot refuse to disclose in court while confidentiality statutes and official secrets legislation is concerned with out-of-court disclosures of official information. As is the case with attorney-client confidentiality, the rules governing government confidentiality are not congruent with the government privileges but are important for the light they shed on the policy and application of the government privileges." *See* WRIGHT & MILLER, FED. PRAC. & PROC. EVID. § 5662; *see also id*. at § 5437

States,[32] the Court of Federal Claims held that a provision of the Indian Mineral Development Act that required the Department of Interior to hold mineral development information as "privileged proprietary information" of the affected Indian tribe did not create a discovery or evidentiary privilege, but rather a requirement of confidentiality, and on that basis ordered Interior to produce the information to its adversary in litigation.[33]

Statutes that actually create privileges are very rare: "only a handful of statutes ... can be said to clearly fall within the exception in Rule 501."[34] These stand-alone privileges were enacted by Congress to further specific policy purposes. A rare example of a statutory privilege was addressed in *Baldridge v. Shapiro*,[35] a case that concerned statutory provisions that exempted from disclosure certain information collected by the Bureau of the Census.[36] "No discretion [was] provided to the Bureau on whether or not to disclose the information referred to in [those statutes]."[37] In evaluating whether these provisions created a privilege, the Court reasoned that the statutes "embody explicit congressional intent to preclude all disclosure of raw census data

("Regulations requiring that certain matter be kept confidential may, of course, be relevant in determining whether such matter falls within one of the governmental privileges, but this does not mean that the regulation creates the privilege.").

[32] 60 Fed. Cl. 611 (Fed. Cl. 2004).

[33] *Id*. at 612.

[34] *See* WRIGHT & MILLER, FED. PRAC. & PROC. EVID. § 5437. What turns on the label "privilege"? Privileged materials are not discoverable, and material deemed privileged by Congressional statute cannot be divested of privilege except by another Congressional statute. *See* WRIGHT & MILLER, FED. PRAC. & PROC. EVID. § 5437 ("First, if the court decides that the statute is one dealing with 'privilege' under the present exception, the court cannot compel disclosure of matters falling within the statute when adjudicating preliminary questions of fact. Second, if the statute is one of 'privilege', it applies at all stages of the proceedings and to such proceedings as grand jury hearings. Third, matter that is 'privileged' within the exception to Rule 501 is not only inadmissible, but also not discoverable. Finally, if the statutory rule is one of 'privilege', it cannot be displaced by another rule adopted by the Supreme Court unless that rule has been affirmatively approved by Congress. Thus, one cannot simply assume that every federal statute bearing on the admissibility of evidence falls within the exception in Rule 501.").

[35] 455 U.S. 345 (1982).

[36] The information at issue in *Baldridge* was the "master address list," a "listing of such information as addresses, householders' names, number of housing units, type of census inquiry, and, where applicable, the vacancy status of the unit. The list was compiled initially from commercial mailing address lists and census postal checks, and was updated further through direct responses to census questionnaires, pre- and post-enumeration canvassing by census personnel, and in some instances by a cross-check with the 1970 census data. The Bureau resisted disclosure of the master address list, arguing that 13 U.S.C. §§ 8(b) and 9(a) prohibit disclosure of all raw census data pertaining to particular individuals, including addresses." *Id*. at 349.

[37] *Id*. at 355.

reported by or on behalf of individuals,"[38] and concluded that "[t]his strong policy of non-disclosure indicates that Congress intended the confidentiality provisions to constitute a 'privilege' within the meaning of the Federal Rules."[39] Congress had, in other words, created a true privilege in the *Baldridge* statute.

The Court considered another stand-alone federal statutory privilege in *Pierce County v. Guillen*.[40] In that case, a federal statute shielded from discovery or admission into evidence materials collected by state public works departments or agencies regarding accident sites or hazardous road conditions.[41] The Court held that the statute fell within the scope of Congress's Commerce Clause power and that the plaintiff was precluded from obtaining the materials they sought in their state court action.[42]

Other examples of statutory privileges address similarly diverse circumstances.[43] As the original Advisory Committee that drafted Rule 501 put it, "privileges created by act of Congress ... do not assume the form of broad principles; they are the product of resolving particular problems in particular terms."[44] The point here is not to catalog these privileges; it is only to show that Congress does on occasion involve itself in expressly articulating rules of privilege, and that these privileges supplement the privileges developed by federal courts under Rule 501.

C. THE EXECUTIVE REBUFFED

In contrast to the courts and to Congress, the executive branch's power to privilege has never been on firm footing. For decades, some took the position that the Housekeeping Act authorized executive agencies to promulgate regulations limiting access to information in court.[45] Enacted in 1789, this prosaically titled statute gave executive officers of the federal government the authority to set up offices and maintain government files.[46] In 1900, however, the Housekeeping Act assumed a new importance with the Court's decision in *Boske v.*

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[38] *Id*. at 361.
[39] *Id*.
[40] 537 U.S. 129 (2003).
[41] *Id*. at 131.
[42] *Id*. at 145-46.
[43] For a collection, see 23 FED. PRAC. & PROC. EVID. § 5437.
[44] Advisory Committee's Note, Proposed Fed. R. Evid. 501, 1969, 46 F.R.D. 161, 243 to 248.
[45] 5 U.S.C. § 301 (2006).
[46] H.R. Rep. No. 85–1461, reprinted at 1958 U.S.C.C.A.N. 3352 (1958). The Housekeeping Act provides that "[t]he head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property....." 5 U.S.C. § 301.

Commingore.[47] In *Boske*, a state tax collector sought to obtain federal tax records from a federal tax collector to use against an alcohol distillery. Treasury regulations forbade the federal tax collector from producing those records to a state court. On appeal from a contempt citation issued by the state court, the Supreme Court held that the federal tax collector could not be held in contempt because he had merely complied with valid Treasury regulations.[48] The Court held that the secretary of the Treasury could require that all decisions about the use of department papers be reserved for his own determination; the opinion did not address whether the secretary himself was authorized to resist subpoena.[49] Nonetheless, many executive branch officials construed *Boske* as authority to issue regulations that "privileged" information.[50] By the mid-twentieth century, agencies were routinely using regulations promulgated pursuant to the Housekeeping Act to decline to produce information in response to subpoena or court order.[51]

The Supreme Court's 1951 decision in *United States ex rel. Touhy v. Ragen*[52] offered oblique support for the executive's position. The facts of *Touhy* were quite similar to *Boske*. In *Touhy*, an executive branch official—an FBI agent—had refused to comply with a subpoena seeking records in his control because a Department of Justice regulation restricted the production of the government records sought by the subpoena.[53] The agent was held in contempt by the trial court.[54] On appeal, the circuit court reversed, holding that the regulation was authorized by the Housekeeping Act and that the regulation "confers upon the Department of Justice the privilege of refusing to produce unless there has been a waiver of such privilege," which there had not been.[55] The Court affirmed, holding that that the trial court could not

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[47] 177 U.S. 459 (1900).

[48] *Id*. at 469.

[49] *Id*. at 470 ("[T]he Secretary, under the regulations as to the custody, use, and preservation of the records, papers, and property appertaining to the business of his department, may take from a subordinate, such as a collector, all discretion as to permitting the records in his custody to be used for any other purpose than the collection of the revenue, and reserve for his own determination all matters of that character.").

[50] Graham, *supra* note 9, at 891 (describing *Boske*'s interpretation by "government lawyers ... as giving bureaucrats the power to create evidentiary privileges by regulations issued under the Housekeeping Act.").

[51] John T. Richmond, Jr., *Forty-Five Years Since* United States ex rel. Touhy v. Ragen*: The Time Is Ripe for A Change to A More Functional Approach*, 40 ST. LOUIS U. L.J. 173, 178 (1996) (noting that in the first half of the twentieth century, privileges promulgated pursuant to *Boske* were "frequently utilized to deny information which private litigants requested from non-party federal agencies").

[52] 340 U.S. 462 (1951).

[53] *Id*. at 464.

[54] *Id*. at 465.

[55] *Id*.

cite a subordinate executive department official for contempt when he had no discretion but to comply.[56] The Court refused to address whether a department *head* possessed the authority to refuse a court's order to produce government papers in his possession.[57]

Following *Touhy*, executive agencies wrote scores of regulations limiting disclosure of government information in response to subpoena. These regulations, usually described as "*Touhy* regulations," were routinely relied upon by federal agencies to avoid complying with federal discovery requests.[58]

From its inception, this practice faced sharp criticism. Federal Rules of Civil Procedure, adopted in 1934, had made the government subject to ordinary discovery procedures.[59] Courts began to insist more frequently that "the judiciary, not the executive branch, possessed the ultimate authority to evaluate privilege claims,"[60] and to refuse to permit *Touhy* regulations to block government responses to discovery requests.

Congress, too, was far from indifferent. In 1958, the House of Representatives determined that the Housekeeping Act had become a "convenient blanket to hide anything Congress may have neglected or refused to include under specific secrecy laws."[61] To address this problem, Congress amended the Housekeeping Act to state specifically that the act did not authorize "withholding information from the public or limiting the availability of records to the public."[62] Notwithstanding this express curtailment of executive authority, *Touhy* regulations limiting disclosure of government records continued to proliferate after 1958—with the difference that agencies promulgated those regulations in reliance on other statutory sources of authority. Ironically, the other

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[56] *Id*. at 468.

[57] *Id*. at 467 ("We find it unnecessary, however, to consider the ultimate reach of the authority of the Attorney General to refuse to produce at a court's order the government papers in his possession, for the case as we understand it raises no question as to the power of the Attorney General himself to make such a refusal.").

[58] *See* Richmond, *supra* n.51, at 181 (noting that *Touhy* was read to allow "agency heads to promulgate blanket non-disclosure regulations which forbid subordinates from complying with discovery requests while avoiding review of their own actions. This practice has persisted, with relatively little change or development, for nearly forty-five years.").

[59] *See* WRIGHT & MILLER, FED. PRAC. & PROC. EVID. § 5682 (1st ed.) ("The Housekeeping Act regulations became more valuable to federal agencies after the Federal Rules of Civil Procedure made the government subject to discovery by its litigation adversaries.").

[60] Note, *Discovery of Government Documents and The Official Information Privilege*, 76 COLUM. L. REV. 142, 146 (1976); *id*. at n. 23 (collecting cases from the 1940s and 1950s).

[61] *Id*. at 3558.

[62] 5 U.S.C. § 301. *See* WRIGHT & MILLER, FED. PRAC. & PROC. EVID. § 5682 (1st ed.) ("The executive branch fought the amendment tooth and nail, but when it passed both houses of Congress without a dissenting vote, a veto was politically impossible.").

statutes relied upon by the executive were often those enacted specifically in order to augment, not contract, government openness.[63] Courts and commentators have given these repackaged *Touhy* claims short shrift.[64] After the 1958 amendment, "[w]ith near unanimity,... those courts considering the issue have concluded that, when the United States is a party to the litigation, the reach of disclosure-limiting *Touhy* regulations ends at the courthouse doors."[65] The consensus view became that the "housekeeping privilege," if it ever existed, was defunct.[66]

In the modern era, sporadic claims have surfaced that one statute or another confers on an agency the authority to privilege materials through promulgating regulations. These claims have not met with much success.[67] Courts have insisted that absent some clear indication

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[63] *See, e.g.*, Dean v. Veterans Admin. Reg'l Office, 151 F.R.D. 83 (N.D. Ohio 1993) (*Touhy* regulation promulgated pursuant to Ethics in Government Act). Other agencies relied on the Freedom of Information Act. *See, e.g.*, Res. Investments, Inc. v. United States, 93 Fed. Cl. 373, 381 (Fed. Cl. 2010) (discussing *Touhy* regulation limiting disclosure purportedly promulgated pursuant to the Freedom of Information Act, the "dominant objective" of which is "disclosure, not secrecy").

[64] *See, e.g.*, Res. Investments, Inc. v. United States, 93 Fed. Cl. 373, 380 (Fed. Cl. 2010) (rejecting government claim that *Touhy* regulations or regulations promulgated pursuant to the Ethics in Government Act constituted an evidentiary privilege); *id*. at 380 (collecting cases); Houston Bus. Journal, Inc. v. Office of Comptroller of Currency, U.S. Dep't of Treasury, 86 F.3d 1208, 1212 (D.C. Cir. 1996) ("[N]either the Federal Housekeeping Statute nor the *Touhy* decision authorizes a federal agency to withhold documents from a federal court. To the extent that the Comptroller's regulation ... may be to the contrary, it conflicts with Federal Rule of Civil Procedure 45 and exceeds the Comptroller's authority under the Housekeeping Statute"). *See also Exxon Shipping*, 34 F.3d at 777-78 (holding that neither *Touhy* nor the Housekeeping Statute permits a federal agency to forbid an agency employee from complying with a court's subpoena); Watts v. Securities & Exchange Comm'n, 482 F.3d 501, 508 n.40 (D.C. Cir. 2007).

[65] *Res. Investments*, 93 Fed. Cl. at 380.

[66] *See* WRIGHT & MILLER, FED. PRAC. & PROC. EVID. § 5682 (1st ed.) ("The writers and the better reasoned cases now agree that the housekeeping privilege is defunct. However, some writers and an occasional case still take the indefensible view that the de facto privilege lives on.").

[67] *See, e.g.*, Nw. Mem'l Hosp. v. Ashcroft, 362 F.3d 923, 926 (7th Cir. 2004) (holding that regulation promulgated pursuant to HIPAA was "purely procedural" and did not create a federal physician-patient or hospital-patient privilege); *In re* Bankers Trust Co., 61 F.3d 465, 470 (6th Cir. 1995) (holding that Federal Reserve regulation forbidding a party from complying with "subpoena, order, or other judicial process ... exceeds the congressional delegation of authority and cannot be recognized by this court"). There are two district court opinions that have found a statute to authorize an agency to privilege information by regulation. The first case concerned 49 U.S.C. § 114(s), which orders the Transportation Security Administration to adopt regulations prohibiting disclosure of "sensitive security information." A California district court held this statute authorizes the TSA to privilege such information from discovery. *See* Chowdhury v. Northwest Airlines Corporation, 226 F.R.D. 608, 610 (N.D. Ca. 2004) (concluding that "[t]he plain language of [49 U.S.C.A. § 114(s)] creates an evidentiary privilege for information the TSA determines would be detrimental to air safety if

of Congressional intent, courts, and not agencies, must retain control over discovery, because the power to determine what information the executive branch can withhold must remain subject to external checks.[68]

But although courts have rebuffed agency efforts to claim the power to write rules of privilege, one must take care to be precise about the nature of the rebuff. The rare court that has considered the question has not ruled out the possibility that agencies *can* hold the power to privilege by regulation. Instead, the judicial stance appears to have been more modest: it is that courts will not find that Congress has delegated the power to without a crystal-clear Congressional statement.[69]

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disclosed"); *see also* In re Sept. 11 Litig., 236 F.R.D. 164, 169 (S.D.N.Y. 2006) (describing genesis of TSA regulations). The second case concerns 31 U.S.C. § 5318(g), which "give[s] the Secretary of the Treasury power to require banks and other financial institutions to report various suspicious transactions to the appropriate authorities" and prohibits financial institutions filing such reports from notifying "any person involved in the transaction" that the report has been filed. Weil v. Long Island Sav. Bank, 195 F. Supp. 2d 383, 386 (E.D.N.Y. 2001). A Treasury regulation promulgated pursuant to this statute, 12 C.F.R. § 563.180(d)(12), provided that suspicious activity reports are confidential and prohibited their disclosure in civil discovery. In *Weil*, the district court held that this regulation could validly bar discovery of such "suspicious activity reports" in civil litigation because it was functionally a privilege. *See also In re* Mezvinsky, 2000 Bankr. LEXIS 1067 (Bankr. E.D. Pa. Sept. 7, 2000) (addressing predecessor regulation to 12 C.F.R. § 563.180(d)(12)). These statutes are obviously narrow in scope and authorize agencies to restrict access to only a limited type of information that Congress has explicitly specified: "sensitive security information" or suspicious activity reports. Section 6607, in contrast, is a broadly worded delegation expressly authorizing an agency to write rules of privilege covering communications among a host of parties—the first law of this kind.

[68] As the Sixth Circuit put it, "[t]o allow a federal regulation issued by an agency to effectively override the application of the Federal Rules of Civil Procedure and, in essence, divest a court of jurisdiction over discovery, the enabling statute must be more specific than a general grant of authority." *In re* Bankers Trust Co., 61 F.3d 465, 470 (6th Cir. 1995); *id*. at 470 ("We likewise conclude that Congress did not empower the Federal Reserve to prescribe regulations that direct a party to deliberately disobey a court order, subpoena, or other judicial mechanism requiring the production of information."). *See also* N.L.R.B. v. Heath TEC Div./San Francisco, 566 F.2d 1367, 1371 (9th Cir. 1978) (holding that "mere existence" of 29 C.F.R. 102.118 "by itself was not enough to create any recognized evidentiary privilege").

[69] *See, e.g.*, AgriVest P'ship v. Cent. Iowa Prod. Credit Ass'n, 373 N.W.2d 479, 483 (Iowa 1985) ("Federal decisions generally hold that privileges should not be called into play merely because an agency, acting on only general authority, issues regulations declaring certain information privileged. ... To do so would be to strip courts of the authority to determine the scope of discovery."). Some decisions have entertained in passing the possibility that privileges can be set by federal regulation. *See In re* Subpoenas Duces Tecum, 738 F.2d at 1375 (refusing to find selective waiver but stating that "[i]f a change is to be made because it is thought that such voluntary disclosure programs are so important that they deserve special treatment, that is a policy matter for the Congress, or perhaps through the SEC (through a regulation)").

With Section 6607, we have language that passes any threshold of clarity that a court might reasonably apply. As a delegation, it is technically perfect; it grants, *in haec verba*, the power to promulgate evidentiary privileges to an administrative agency.[70] Before studying this innovation through a normative lens,[71] it is first necessary to cover some mechanics regarding the applicability of a regulatory evidentiary privilege in federal or state proceedings raising federal or state claims. The next section tackles that task.

D. A WORD ON SOME MECHANICS

Section 6607 in clear terms authorizes an agency to promulgate regulatory evidentiary privileges. What legal effect would such privileges have in federal and state court?

It is useful to begin by examining the situation that will surely make up the lion's share of potential applications of a federal regulatory evidentiary privilege: the case in which a litigant seeks to invoke a federal regulatory evidentiary privilege in federal court with respect to a federal claim. An example would be a FOIA lawsuit seeking disclosure of intra-agency materials. In such a suit, the federal common law of privilege incorporated via Exemption 5 of FOIA would normally control govern whether a document was exempt from FOIA.[72] If a newly coined federal regulatory evidentiary privilege applied to the materials *not* protected by the federal common law of privilege, the agency might seek to use the regulatory evidentiary privilege to fend off disclosure, on the grounds that the federal regulatory evidentiary privilege and not federal common law controlled the privileged status of the sought-after records. For instance, the Secretary of Labor might promulgate a regulatory evidentiary privilege that shielded inter-agency communications that occurred *after* a policy decision was reached, rather than *before* a policy decision was reached, which is the time period spanned by the extant deliberative process privilege.[73]

How would a court assess such a claim? The starting point for the analysis is Federal Rule of Evidence 501. In federal civil cases on federal claims, Federal Rule of Evidence 501 provides that the common law "as

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[70] *See infra* Appendix A.

[71] *See infra* Part III.

[72] *See* 5 U.S.C. § 552(b)(5) (protecting "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency"); NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975); FTC v. Grolier Inc., 462 U.S. 19, 26 (1983).

[73] *In re* Sealed Case, 121 F.3d 729, 737 (D.C. Cir. 1997) ("Two requirements are essential to the deliberative process privilege: the material must be pre-decisional and it must be deliberative."); *see also* Dep't of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8-9 (2001) (quoting *Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975)).

interpreted by United States courts in the light of reason and experience" governs a claim of privilege "unless ... provide[d] otherwise" by "a federal statute."[74] A statute explicitly authorizing a federal agency to promulgate an evidentiary privilege (such as Section 6607) would likely qualify for this exception. As an influential treatise explains, "[w]here Congress creates a statutory privilege, then explicitly authorizes making of regulations governing scope and procedural incidents of privilege," the exception in Rule 501 for privileges provided by "Acts of Congress" should include "administrative regulations purporting to create a privilege."[75] An evidentiary privilege regulation would, in other words, supersede the otherwise applicable federal common law of privilege where a statute "expressly authorizes" such a regulation to be made.

The next question is how a federal regulatory evidentiary privilege would apply in state court proceedings on state law claims. A state FOIA or sunshine act lawsuit could easily pose this question; so could a state-court fraud lawsuit that sought discovery of communications between a regulated entity and its federal regulator. In the event that a federal regulatory evidentiary privilege more generously shielded materials than applicable state law, what law would a federal court apply?

The starting point for analyzing this issue is the Supremacy Clause. Because of the supremacy of federal law, federal regulations can preempt state law.[76] And federal statutes regarding privileges can preempt contrary state law even in state court proceedings.[77] Taken together, these propositions mean that a federal regulatory evidentiary privilege could in principle be written to govern claims of privilege in a state court proceeding on a state law cause of action.[78] Indeed, for

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[74] Fed. R. Evid. 501.

[75] WRIGHT & MILLER, FED. PRAC. & PROC. EVID. § 5437, text accompanying note 44 & n.44.

[76] "Federal regulations have no less pre-emptive effect than federal statutes." Fed. Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 153 (1982).

[77] Pierce County v. Guillen, 537 U.S. 129 (2003) (federal statute regulating the admission of evidence in state court actions involving state law causes of action).

[78] Professor Noyes has argued that Congress cannot preempt state privilege law of attorney-client relations or state law on attorney conduct, on the grounds that privilege law is not purely procedural. Henry S. Noyes, *Federal Rule of Evidence 502: Stirring the State Law of Privilege and Professional Responsibility with A Federal Stick*, 66 WASH. & LEE L. REV. 673, 675 (2009). But to the extent the argument is based on *Erie*'s substance/procedure dichotomy, it is not an objection of constitutional stature and can be overridden by Congress by statute. If, instead, the argument is based on the Rules Enabling Act, it again has no relevance when the entity promulgating the privilege rule is not the Supreme Court but an agency pursuant to Congressional statutory authorization. *See* Broun & Capra, *supra* note 16, at 243 ("Although one may question whether rules governing evidentiary privileges are procedural or substantive, even writers who objected to the enactment of the proposed Federal Rules of Evidence

reasons described in more detail below, if a federal regulatory evidentiary privilege did not have force in state court proceedings with respect to state law claims, it would be pretty worthless; a parallel state suit could force disclosure of the information purportedly "shielded" by the federal regulatory evidentiary privilege.[79]

The next question is how a federal regulatory evidentiary privilege would apply in federal court to a state law claim. The starting point for analysis of this question will be how the language of the regulatory evidentiary privilege treats the state-law proviso of Federal Rule of Evidence 501. That rule provides that in a federal civil case, the state law of privilege will govern "regarding a claim or defense for which state law supplies the rule of decision." But this proviso can be superseded by subsequent clear language. So, for example, the recently adopted Federal Rule of Evidence 502, which addresses waiver of attorney-client privilege, stipulates that it applies "notwithstanding Rule 501, ... even if state law provides the rule of decision."[80] A federal regulatory evidentiary privilege could likewise be drafted in a way that would supersede Rule 501's state law proviso. Of course, it is true that the Federal Rules of Evidence are a statute like any other statute enacted by Congress, and they therefore cannot be repealed or superseded by administrative regulation.[81] But when Congress enacts an express delegation of the authority to write rules of privilege to an agency, as it has here, it has effectively authorized that agency to write regulations that would amend the rules of evidence. Any other reading of the delegation would fatally weaken it: if a federal regulatory evidentiary privilege did *not* govern the privilege applicable to state-law claims in federal court, then parties could force the disclosure of information shielded by the federal regulatory evidentiary privilege in routine diversity suits by relying on the (less protective) state privilege law. So long as it is drafted with sufficient clarity to achieve this result, there is no reason why a federal regulatory evidentiary privilege could not govern in federal suits where state law supplies the rule of decision.

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governing privilege assumed the power of Congress to enact such rules and argued against their adoption on policy grounds. The ability of the Rules to dictate state court action has been clearly established. For example, a federal court determination of the preclusive effect of a judgment controls state action with regard to that judgment. Furthermore, the federal supremacy principle has been applied to state procedural rules where federal substantive law is preemptive."); *The Development of Evidentiary Privileges in American Law*, 98 HARV. L. REV. 1454, 1467 (1985).

[79] *See infra* Part II.A (describing SEC campaign to obtain privilege with preemptive power over state rules concerning discovery).

[80] Fed. R. Evid. 502.

[81] Complaint of Nautilus Motor Tanker Co., Ltd., 85 F.3d 105, 111 (3d Cir. 1996) ("[I]t is axiomatic that federal regulations can not 'trump' or repeal Acts of Congress."); WRIGHT & MILLER, FED. PRAC. & PROC. EVID. § 5013 ("[T]he Rules of Evidence were enacted by Congress....").

The final scenario—and one that is likely least probable to arise because of the likelihood of removal—is how a federal regulatory evidentiary privilege would apply in a state court suit raising a federal claim. If the federal regulatory evidentiary privilege is expressly made applicable in state proceedings, the governing law will be federal because of the Supremacy Clause.[82] Indeed, in this context it is likely that a state court would apply the federal regulatory evidentiary privilege even if the language of that privilege left some ambiguity about its scope. This is because of the so-called reverse-*Erie* doctrine,[83] which governs the extent to which federal law is applicable in state courts. In this framework, a state court will "apply federal law on clearly substantive questions."[84] Rules of privilege are generally regarded as substantive for conflicts-of-law purposes,[85] in the sense that the law of the forum with the most significant relationship to a privileged communication determines the existence and scope of the privilege. Even if this categorization were contestable, however, it is reasonable to expect that a state court would apply the federal law of privilege because in cases of doubt states operating under the reverse-*Erie* doctrine tend to defer to federal law.[86]

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[82] Clermont, *supra* note 83, at 20 ("The reverse-*Erie* question is a relatively simple one if the Constitution or Congress (or its authorized administrative delegate) actually chose to displace state law in state court. If the lawmaker expressly or impliedly made federal law applicable in state court, that choice to preempt is binding on the state courts under the Supremacy Clause, provided that any such choice was valid under the rest of the Constitution.").

[83] *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), of course, is the watershed opinion addressing the question of what law federal courts must apply—state or federal—when adjudicating a state claim. *See* Joseph P. Bauer, *The* Erie *Doctrine Revisited: How a Conflicts Perspective Can Aid the Analysis*, 74 NOTRE DAME L. REV. 1235, 1244 (1999). "Reverse-*Erie*" refers to the other side of the coin: the question of what law state courts must apply when adjudicating a federal claim. As Professor Clermont notes, this doctrine is also called converse-*Erie* or inverse-*Erie*. *See* Clermont, *supra* note 83, at 2.

[84] *See* Clermont, *supra* note 83, at 29 ("Thus, in adjudicating federal-law claims, state courts apply federal law on clearly substantive questions, and generally state courts apply state law on clearly procedural questions. On the classic problems in between, such as statutes of limitations, the state courts come out the same way on reverse-*Erie* that federal courts do in the *Erie* setting, with each deferring to the other sovereign.").

[85] *See* RESTATEMENT (SECOND) CONFLICTS OF LAWS § 138 ("The local law of the forum determines the admissibility of evidence, except as stated in §§ 139- 141."); *id*. § 139(2) (the law of the state with the most significant relationship to a privileged communication determines the existence and scope of the privilege); *id*. at § 139(2) cmt. 2 (noting that "where the contacts are few and insignificant" ... "the forum may feel that the interest of the state of most significant relationship in having the evidence excluded should prevail").

[86] *See* Clermont, *supra* note 83, at 29 ("Thus, in adjudicating federal-law claims, state courts apply federal law on clearly substantive questions, and generally state courts apply state law on clearly procedural questions. On the classic problems in between, such as statutes of limitations, the state courts come out the same way on

To fans of the two-by-two matrix, the foregoing discussion can be summarized in the following table:

A FEDERAL REGULATORY EVIDENTIARY PRIVILEGE ("FREP") WOULD APPLY ...		
	IN FEDERAL COURT ...	IN STATE COURT ...
... TO FEDERAL CLAIMS	If the FREP meets FRE 501's exception for "Acts of Congress."	Under the Supremacy Clause and reverse-*Erie* doctrine.
... TO STATE CLAIMS	If the FREP is drafted to trump FRE 501's state law proviso.	Under the Supremacy Clause.

Due to the novelty of privilege delegations, these questions have never been squarely presented in precisely the form they will now be. And, as noted throughout, much will turn on the precise wording of a given regulatory evidentiary privilege and of a given delegation of the power to privilege. But the point is that there is no obstacle in principle to the results just summarized. Assuming it and its authorizing delegation are drafted with sufficient clarity, a regulatory evidentiary privilege could govern claims of privilege in both state and federal court and on both state and federal claims. Before exploring the pathologies of such a delegation, the next part elaborates why obtaining such a delegation would be important to an executive agency.

II. ADMINISTERING PRIVILEGE

Information is the "life blood" of modern government.[87] One of the fonts of legitimacy of the administrative state is its claim to expertise, which is to say *informed* decision-making.[88] For that reason, doctrines or practices that regulate the administrative state's ability to gather and disseminate information affect not only its functioning as a practical

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reverse-*Erie* that federal courts do in the *Erie* setting, with each deferring to the other sovereign.").

[87] *See* Matthew Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422, 1423 (2011) ("Good information is the lifeblood of effective governance.").

[88] Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L.J. 1490, 1517 (2006) (describing the "neo-Weberian conception" that prizes "bureaucratic governance processes that delegate some policy choices to experts whose knowledge, focus, neutrality, and insulation from politics promise systematically superior decision-making outcomes" and noting that "[t]he modern American administrative state arising out of the New Deal largely reflects this expertise- and results-based orientation to policymaking legitimacy").

matter but also, at a deeper level, its capacity to claim legitimacy for the fruits of its decision-making processes.

This context begins to suggest the first of two reasons why an agency would seek to gain control over the substantive law of evidentiary privileges. Fourth Amendment doctrine forms only a soft check on administrative information gathering from regulated entities.[89] It thus falls to privilege law to set hard limits on what information agencies may or may not procure from regulated entities. Conversely, open government laws such as FOIA and the Federal Rules of Civil Procedure create a presumption that government information ought to be accessible to the public and at the very least to litigation adversaries. It therefore also falls to privilege law to set the hard limits on what information the agency can be compelled to disclose to the public or to its litigation adversaries. The landscape of privilege law thus has a powerful effect on the functioning of administrative agencies.

Once the lens is broadened to take into account inter-agency interactions, another reason for the importance of privilege law comes into view. Privilege law determines how easily an agency can communicate with other state and federal agencies and with private parties. Absent a privilege shielding it, extramural communications by an agency will result in the potential disclosure of the communicated information, whether via discovery in litigation or through the operation of state or federal open government laws. The landscape of privilege law thus affects the capacity of agencies to communicate and coordinate with each other and with private parties.

Enforcement and coordination are both powerful administrative imperatives. Agencies thus are amply incentivized to influence aspects of privilege law. As the discussion below explains, obtaining a delegation of the power to privilege is a natural next item on the agency agenda.

A. AGENCY ENFORCEMENT

For an agency charged with enforcing federal law, one aspect of privilege law—whether and how privilege is waived—is critically important.[90] Like prosecutors, agencies frequently compel (or induce[91])

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[89] Marshall v. Barlow's, Inc., 436 U.S. 307, 320 (1978) (agency's entitlement to inspect "will not depend on [its] demonstrating probable cause ... in the criminal law sense"); United States v. Morton Salt Co., 338 U.S. 632, 642-43, 652 (1950) (noting that an administrative subpoena will be enforced if "the inquiry is within the authority of the agency, the demand is not too indefinite, and the information sought is reasonably relevant"); Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 509 (1943).

[90] Practitioners have voiced support for altering aspects of privilege law so as to accommodate agencies' needs to investigate and enforce law against regulated parties. *See, e.g.*, Alex C. Lakatos & Lili Kazemi, *Keeping Half the Cat in the Bag: Selective Waiver of*

production of attorney-client privileged material from regulated parties under investigation. Agencies want to be able to control the consequences of that production—that is, they want regulated parties to be able to "selectively waive" privilege as to the agency without waiving the privilege as to third parties.

Why? As Professors Broun and Capra have explained, the answer is simple: selective waiver has the potential to "encourage targets of [an agency] investigation to cooperate more fully with the agency. The same encouragement would exist with regard to any agency investigation. Not only would selective waiver benefit the agency, it would relieve the target companies, which could comply fully with agency requests without the fear that their privileged documents would be used in private litigation."[92] In short, a selective waiver power would facilitate an agency's efforts to enforce the law by encouraging regulated parties to cooperate fully with agency investigations.[93]

The difficulty is that most courts do not allow selective waiver as to government agencies.[94] As one court reasoned, permitting selective

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Privileged Materials Pursuant to 1828(x), 129 BANKING L. J. 242 (2012) (criticizing existing regime governing selective waiver and the pooling of privileged information between various state and federal regulators).

[91] The extent to which waiver is "voluntary" or "induced" as opposed to "compelled" is a matter of heated dispute. Some commentators have come refer to corporate waiver as "compelled-voluntary" to emphasize the difficulty of classifying the decision to waive privilege as definitely one or the other. *See* Lonnie T. Brown, Jr., *Reconsidering the Corporate Attorney-Client Privilege: A Response to the Compelled-Voluntary Waiver Paradox*, 34 HOFSTRA L. REV. 897, 899-900 (2006) ("[C]orporations and their counsel understandably feel great pressure to abandon the time-honored sanctuary of the attorney-client privilege and work product doctrine when confronted with a government investigation. Although prosecutors and other agency officials maintain that waiver is never required or compelled..., there is a growing body of evidence to the contrary.... [I]t is impossible to dispute that the potential for what amounts to compelled-voluntary waiver represents a legitimate fear.").

[92] Broun & Capra, *supra* note 16, at 239.

[93] Lakatos & Kazemi, *supra* note 90, at 245 ("Advocates of the selective waiver doctrine...have lauded the doctrine for enhancing transparency, facilitating law enforcement objectives, and minimizing the exposure that privilege holders would otherwise suffer upon choosing to share privileged information with the government.").

[94] The bulk of decisional authority prohibits selective waiver. All but one of the federal appellate courts to have considered the issue held that producing documents to a government agency waives the privilege as to third parties. *Compare In re* Pacific Pictures Corp., 679 F.3d 1121 (9th Cir. 2012) (rejecting selective waiver); *In re* Qwest Communications Int'l, 450 F.3d 1179 (10th Cir. 2006) (same); *In re* Columbia/HCA Healthcare Corp., 293 F.3d 289 (6th Cir. 2000) (same); Genentech, Inc. v. United States Int'l Trade Comm'n, 122 F.3d 1409, 1417 (Fed. Cir. 1997) (same); United States v. MIT, 129 F.3d 681, 685-86 (1st Cir. 1997); In re Steinhardt Partners, L.P., 9 F.3d 230, 235 (2d Cir. 1993) (same); Westinghouse Elec. Corp. v. Rep. of Philippines, 951 F.2d 1414. 1424-26 (3d Cir. 1991) (same); *In re* Martin Marietta Corp., 856 F.2d 619, 623 (4th Cir. 1988) (same); Permian Corp. v. United States, 665 F.2d 1214, 1220 (D.C. Cir. 1981); *with* Diversified

waiver would transform the oldest of common-law privileges—the attorney-client privilege—into "merely another brush on an attorney's palette, utilized and manipulated to gain tactical or strategic advantage."[95] As a result, to assert that they have selective waiver power, agencies need to be able to point to a statute or a regulation that would authorize regulated parties to selectively waive privilege as to them. But currently only two statutes—12 U.S.C. § 1828(x) and 12 U.S.C. § 1785(j)— provide for selective waiver,[96] and these statutes apply to a very limited and specialized context: the submission of information by banks or credit unions to their regulators.[97] Outside these contexts, "a muddled patchwork of common law rules [applies to] documents produced to other regulators," even those regulators cooperating with bank regulators.[98]

Other agencies that believe they would benefit from having selective waiver power have been actively seeking it. The most aggressive in its pursuit has been the SEC.[99] It is worthwhile to narrate in some detail the SEC's efforts to obtain selective waiver power because this story reflects both how important the power over privilege is to administrative agencies and also how valued a straightforward delegation of that power would be.

The SEC's campaign to secure selective waiver power dates back at least to the 1980s.[100] In 1984, the Commission supported enactment of a

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Industries, Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1977) (allowing selective waiver). Still, it is a complicated question; district court opinions are more varied. In addition, the circuits disagree with respect to what effect they will give confidentiality agreements between the government and the entity. *See* Lakatos & Kazemi, *supra* note 90, at 250.

[95] *In re* Columbia/HCA Healthcare Corp., 293 F.3d 289, 303 (6th Cir. 2000).

[96] *See* Lakatos & Kazemi, *supra* note 90, at 245 ("Section 1828(x), and its companion, 12 U.S.C. § 1785(j), which applies the same rule to credit unions, are groundbreaking because they are the first and only federal statutes that provide for selective waiver.").

[97] 12 U.S.C. § 1828(x) (banks); 12 U.S.C. § 1785(j) (credit unions).

[98] Lakatos & Kazemi, *supra* note 90, at 261.

[99] Also active in this arena has been the CFPB. It recently asserted that it had implicitly been delegated the power to compel regulated entities to supply it with attorney-client privileged information in response to its subpoenas and that production of privileged information to it would not constitute waiver. *See* Confidential Treatment of Privileged Information, 77 Fed. Reg. 39,617 (July 5, 2012) (to be codified at 12 C.F.R. pt. 1070). The CFPB based this claim on the fact that it was authorized to prescribe rules regarding confidentiality of information, on its general rulemaking authority, on its authority to make rules to facilitate its supervision of consumer financial institutions, amd on the fact that it is the successor to prudential bank regulators that had been given that power by statute. *Id*. at 39,619. *See also infra* note 150 (noting subsequent amendment to 12 U.S.C. § 1828(x) to add a reference to the CFPB).

[100] Final Rule, Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. 6296, 6312 (Feb. 6, 2003), *available at* http://www.sec.gov/rules/final/33-8185.htm#P397_133248 ("[P]roposed legislation before

proposed amendment to the Securities and Exchange Act of 1934 that would have established selective waiver for any documents produced to the agency.[101] The amendment was referred to a House committee, which took no action on it.[102]

In 2002, the Commission proposed a regulation in which it simply gave itself selective waiver authority.[103] The regulation would have permitted selective waiver as to SEC when the SEC and an issuer had entered into a confidentiality agreement.[104] In the initial airing of the rule for public comment, the Commission took the position that Congress's general delegation of rulemaking power to the SEC authorized the agency to adopt a selective waiver rule.[105] In its final rule, however, the agency dropped the selective waiver provision. The reason it gave for this reversal was that courts were unlikely to accept the notion that Congress had implicitly delegated the power to write a selective waiver rule to the SEC.[106]

Congress in 1974 [sic], supported by the Commission, that would have enacted a provision permitting issuers to selectively waive privileges in disclosures to the Commission was ultimately not passed by Congress.").

[101] *See* Westinghouse Elec. Corp. v. Republic of Philippines, 951 F.2d 1414, 1425 (3d Cir. 1991) (citing *SEC Statement in Support of Proposed § 24(d) of the Securities and Exchange Act of 1934,* in 16 Sec. Reg. & L. Rep. at 461 (March 2, 1984)).

[102] *See* Final Rule, Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. 6296, 6312 n.116 (Feb. 6, 2003), *available at* http://www.sec.gov/rules/final/33-8185.htm#P397_133248 ("Congress did not reject the Commission's proposal; rather, the House Committee to which the proposal was submitted took no action.") (citing SEC Oversight and Technical Amendments: Hearing Before the Subcommittee on Telecommunications, Consumer Protection, and Finance of the House Committee on Energy and Commerce, 98th Cong., 2d Sess 341 at 34, 51 (1984)).

[103] *See* Proposed Rule, Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. 71,670 (Dec. 2, 2002), *available at* http://www.sec.gov/rules/proposed/33-8150.htm.

[104] *See* Proposed Rule, Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. 71,670, 71,693-94 (Dec. 2, 2002), *available at* http://www.sec.gov/rules/proposed/33-8150.htm (discussing proposed 17 C.F.R. 205.3(e)(3)). The agency's proposed rule explained that allowing regulated parties to submit information "without waiving otherwise applicable privilege or protection serves the public interest because it significantly enhances the Commission's ability to conduct expeditious investigations and obtain prompt relief, where appropriate, for defrauded investors." *Id*. at 71,693.

[105] *Id*. (claiming that selective waiver rule was authorized by statute directing the Commission to 'promulgate such rules and regulations, as may be necessary or appropriate in the public interest or for the protection of investors, and in furtherance of this Act'").

[106] *See* Final Rule, Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. 6,296, 6,312 (Feb. 6, 2003), *available at* http://www.sec.gov/rules/final/33-8185.htm#P397_133248 ("The Commission has determined not to adopt the proposed rule on this 'selective waiver' provision. The Commission is mindful of the concern that some courts might not adopt the

The agency's next move was to return to Congress, to ask it to enact legislation that would give the SEC selective waiver power.[107] The bill, the Securities Fraud Deterrence and Investor Restitution Act of 2004,[108] would have amended the Securities Exchange Act of 1934 to authorize regulated parties to share information with "the Commission or an appropriate regulatory agency" without waiving work product or attorney-client privilege over that material as to any third party.[109] As the SEC's director of enforcement testified to Congress, that provision would "help the Commission gather evidence in a more efficient manner by eliminating a strong disincentive to parties under investigation to voluntarily produce to the Commission important information." [110] He further explained that "[m]ore expeditious investigations could lead to more prompt enforcement actions, with a greater likelihood of recovery of assets to return to investors."[111] Despite the SEC's urgings, however, Congress again failed to enact a selective waiver law.

The SEC next tried to enlist an unusual ally: state courts. This was an uphill fight because virtually no state recognized selective waiver.[112] Nonetheless, "[i]n an attempt to influence the jurisprudence over selective waiver, the SEC has appeared as *amicus curiae* in a number of state court cases urging that defendants who produced materials to the

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Commission's analysis of this issue, and that this could lead to adverse consequences for the attorneys and issuers who disclose information to the Commission pursuant to a confidentiality agreement, believing that the evidentiary protections accorded that information remain preserved.").

[107] *See* Jeremy Burns, *Selective Waiver in the Era of Privilege Uncertainty*, 5 U.C. DAVIS BUS. L. J. 14 (2005) (discussing 2004 legislation).

[108] H.R. 2179, 108th Cong. § 4 (2004).

[109] The relevant provision stated: "Notwithstanding any other provision of law, whenever the Commission or an appropriate regulatory agency and any person agree in writing to terms pursuant to which such person will produce or disclose to the Commission or the appropriate regulatory agency any document or information that is subject to any Federal or State law privilege, or to the protection provided by the work product doctrine, such production or disclosure shall not constitute a waiver of the privilege or protection as to any person other than the Commission or the appropriate regulatory agency to which the document or information is provided."

[110] *See* Stephen M. Cutler, Director of Enforcement, U.S. Securities & Exchange Commission, Testimony Concerning the Securities Fraud Deterrence and Investor Restitution Act, H.R. 2179, *available at* http://www.sec.gov/news/testimony/060503tssmc.htm.

[111] *Id*.

[112] *See* Memorandum to Advisory Committee on Evidence Rules from Professor Daniel J. Capra, Re: Proposed Rule 502, March 15, 2007, at 7-8, available at http://www.klgates.com/files/upload/eDAT_ER502_Draft_Cover.pdf (noting that a federal rule of selective waiver would "change the law of privilege in virtually every state, because most of the states do not recognize selective waiver").

SEC did not waive work product privilege."[113] State courts were not, however, particularly receptive to the SEC's litigation campaign.[114] Moreover, even the agency's sporadic successes in court were of little use because they have left the law nationwide in an unsatisfying state of non-uniformity. This patchwork privilege regime does not accomplish the agency's goal, which is to provide peace of mind to cooperating regulated entities.[115]

Finally, the SEC has also tried its hand at lobbying the federal judicial rulemaking process. In 2006 and 2007, Advisory Committee on Evidence Rules met to discuss a new proposed rule of evidence, Rule 502, which would address waiver of attorney-client privilege. An early draft of the proposed Rule 502 included a broad selective waiver provision that preserved privilege over any disclosure in a federal or state proceeding made to "a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority."[116] The SEC,[117] as well as the CFTC, [118] urged the Advisory Committee to

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[113] *See* Burns, *supra* note 107; Letter from Brian G. Cartwright, General Counsel, Securities and Exchange Commission, to Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure, Judicial Conference of the United States (Feb. 16, 2007), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/EV%20Comments%202006/06-EV-062.pdf [hereinafter SEC Rule 502 Letter], at 1 n.1.

[114] *See* Burns, *supra* note 107 (citing occasions on which state courts rejected SEC's selective waiver arguments).

[115] *See* Nolan Mitchell, *Preserving the Privilege: Codification of Selective Waiver and the Limits of Federal Power over State Courts*, 86 B.U. L. REV. 691, 717 (2006) (positing that because of varying state jurisprudence on selective waiver, "for selective waiver to have uniform application in all courts, Congress would have to enact a rule that preempts federal and state decisions on corporate privilege waiver"). Like most commentators, Mitchell does not consider the possibility of achieving the same uniformity with a federal regulation with preemptive effect.

[116] The proposed rule on selective waiver to government agencies read as follows: "502(c) Selective Waiver—In a federal or state proceeding, a disclosure of a communication covered by the attorney-client privilege or work-product protection—when made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority—does not operate as a waiver of the privilege or protection in favor of non-governmental persons or entities. The effect of disclosure to state or local government agency, with respect to non-governmental persons or entities, is governed by applicable state law. Nothing in this rule limits or expands the authority of a government agency to disclose communications or information to other government agencies or as otherwise authorized or required by law." *See* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/EV05-2006.pdf. *See generally* Broun & Capra, *supra* note 16, at 239; Patrick Emery, *Comment, The Death of Selective Waiver: How New Federal Rule of Evidence 502 Ends the Nationalization Debate*, 27 J. L. & COM. 231 (2009); Noyes, *supra* note 78.

[117] *See* SEC Rule 502 Letter, *supra* note 113.

[118] *See* Letter from Eileen Donovan, Acting Secretary to the Commission, Commodities Futures Trading Commission to Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure, Judicial Conference of the United States (Feb. 15,

include this "vital" government selective waiver provision in the final rule, but to amend the rule so that it would have preemptive effect over contrary state law.[119] The Advisory Committee was less confident of the provision's merits; it sent the government selective waiver provision to Congress in brackets to indicate that the Committee had no position on whether the provision ought to be adopted.[120] Ultimately, the government selective waiver provision was dropped entirely from the final rule enacted by Congress.[121]

This sequence of efforts by the SEC suggests that at least some agencies can take an ongoing, active interest in influencing the development of privilege law in a direction that will aid their enforcement missions. It also suggests that agencies may encounter significant resistance when they pursue this goal using ordinary methods. Despite years of effort in lobbying Congress, judicial rule-makers, and state courts, the SEC has yet to achieve its ultimate objective of procuring a selective waiver power, let alone one that has preemptive effect on contrary state law.[122]

One can readily see how eagerly the Commission would welcome a delegation of the power to write rules of privilege via regulation. With such a delegation in hand, the SEC could cut directly to its endpoint and promulgate a regulatory evidentiary privilege shielding from disclosure any materials produced by regulated entities to the agency. Indeed, perhaps the most surprising thing about Section 6607 is not that Congress ultimately delegated the power to privilege to an agency, but that the delegate Congress selected was Labor and not the Commission.

2007), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/EV%20Comments%202006/06-EV-064.pdf

[119] *See* SEC Rule 502 Letter, *supra* note 113, at 7 ("A final issue of importance to the Commission is that, to be effective, the Rule must provide protection in state proceedings as well as in federal proceedings. … We urge the [Advisory Committee] to add to the Notes that [language on the Rule's applicability in a federal or state proceeding] is intended to preempt any contrary state law. To ensure this result and make the Rule effective and likely to be used, Congressional action to enact the Rule is vital.").

[120] *See id*. ("The Committee unanimously agreed on the following basic principles, as embodied in the proposed Rule 502: … A provision on selective waiver should be included in any proposed rule released for public comment, but should be placed in brackets to indicate that the Committee has not yet determined whether a provision on selective waiver should be sent to Congress.").

[121] *See* Fed. R. Evid. 502(c).

[122] *See* SEC Rule 502 Letter, *supra* note 113, at 1 & n.1 (noting that starting in 2002 the SEC has pressed the case for selective waiver power in amicus briefs filed in state and federal courts; in findings accompanying proposed rules; in recommendations to Congress; and in congressional testimony by agency officials on proposed legislation).

B. AGENCY COORDINATION

A second reason that privilege law is increasingly important to agency enforcement is the steady rise of regulatory overlap, or of situations where multiple state and/or federal regulators are tending the same pot.[123] These are areas that Professors Freeman and Rossi have dubbed "shared regulatory spaces."[124] In such contexts, various government agencies at both the state and federal levels must coordinate their enforcement roles and their regulatory agendas.[125]

It is not easy to maneuver in a shared regulatory space. "With the accretion of federal regulatory authority, the potential for conflicts between agencies, separately empowered by distinct statutory regimes, necessarily grows."[126] It is no longer adequate for one federal agency—say, the EPA—to resolve unilaterally to make some goal—say, controlling the greenhouse gases emitted by automobiles—a regulatory priority.[127] Rather, the EPA must consult other federal agencies with power in the relevant space—such as the National Highway Traffic Safety Administration—to ensure that its efforts do not run afoul of theirs.[128] State agencies may need or want a say as well.[129] "Once one peels back the skin of administrative decision-making, one finds not lone agencies making isolated decisions in a cocoon of bureaucratic insularity, but collections of agencies intervening in each other's

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[123] J.R. DeShazo & Jody Freeman, *Public Agencies As Lobbyists*, 105 COLUM. L. REV. 2217, 2303-04 (2005) (noting the "complicated new world of inter-agency process"); *id*. at 2304 (noting that the dynamic of inter-agency interaction has "implications not only for theories of legislative control, which we have emphasized here, but for our thinking about interest group theory, the separation of powers, and statutory interpretation as well"); David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, at 302 ("The concern about regulatory overlap, and the best means of managing it, has become increasingly important to the operation of the modern administrative state as it advances in age.").

[124] *See, e.g.*, Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1173-81, 1209-10 (2012); Jason Marisam, *Duplicative Delegations*, 63 ADMIN. L. REV. 181 (2011).

[125] *See* Freeman & Rossi, *supra* note 124, at 1173-81.

[126] Rakoff & Barron, *supra* note 123, at 302.

[127] *See* Jody Freeman, *The Obama Administration's National Auto Policy: Lessons from the 'Car Deal'*, 35 HARV. ENVTL. L. REV. 343 (2011) (noting the overlapping jurisdiction of the EPA and the NHTSA over fuel emissions).

[128] *Id*. at 353 (explaining that "as the Obama Administration came into office, the auto industry was facing at least two regulators, and probably three. And because of considerable potential for inconsistency in their respective approaches, the prospect of confusion and conflict was significant").

[129] *Id*. at 358 ("Beyond the two federal agencies, of course, lay California and the so-called section 177 states that had adopted its [greenhouse gas] standards.").

decision-making processes, sometimes quite formally and sometimes less so."[130]

Inter-agency coordination at the federal tier is but one piece of a larger mosaic—a mosaic that reveals the *hybridization of the administrative form*. In the core agency functions of rulemaking, enforcement, and information gathering, new collaborative forms of regulation and governance seem to be constantly developing. Sometimes Congress directs the creation of these hybrid forms through statute;[131] at other times, the hybrid forms come into being at the direction of the President.[132] Some hybrid regulatory forms involve private organizations (or "marketized bureaucracy"),[133] while others involve organizations of public actors that are not quite private.[134] Others involve state governments acting as surrogates or agents of federal government.[135] Still others involve foreign governmental entities working in concert with federal entities.[136]

This world of hybrid administrative forms poses many new and exciting questions. One critical but underappreciated aspect of this world is the way that it is shaped by privilege law.[137] Consider the

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[130] DeShazo & Freeman, *supra* note 123, at 2303-04.

[131] *See* DeShazo and Freeman, *supra* note 123; Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201 (2006).

[132] Jason Marisam, *The President's Agency Selection Power*, __ ADMIN. L. REV. (2013) (forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm? abstract_id=2235088; Daphna Renan, *Pooling Powers*, __ COLUM. L. REV. __ (forthcoming) (eds.- need to obtain permission to cite).

[133] Jon D. Michaels, *Privatization's Progeny*, 101 GEO. L.J. 1023 (2013); *see also* Jon D. Michaels, *Privatization's Pretensions*, 77 U. CHI. L. REV. 717 (2010).

[134] See Timothy S. Jost, *Reflections on the National Association of Insurance Commissioners and the Implementation of the Patient Protection and Affordable Care Act*, 159 U. PA. L. REV. 2043, 2044 (2011) (describing role played by NAIC in the ACA implementation scheme).

[135] *See* Abbe Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L. J. 534 (2011); Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698 (2011).

[136] Dodd-Frank, for example, requires close coordination between the Board of Governors of the Federal Reserve System and foreign bank supervisors. *See* 77 Fed. Reg. 594, 597-98 (Jan. 5, 2012); Dodd-Frank § 113(f)(3) (requiring Financial Stability Oversight Council to consult with foreign regulators regarding application of heightened prudential standards to foreign nonbank financial companies).

[137] Mark Fenster has addressed one aspect of the flip side—how open government laws should apply to the private-public hybrid form. *See* Mark Fenster, *Seeing the State: Transparency As Metaphor*, 62 ADMIN. L. REV. 617, 668 (2010) ("Government delegation of some degree of regulatory authority to private or hybrid public-private entities may increase the state's organizational complexity and may thereby decrease the state's visibility to the public. Some degree of privacy may be essential to the process, however. If private entities that collaborate with the government would thereby become subject to open government laws, they may be less willing to engage directly with the government. Their reluctance would in turn undermine the collaborative approach that new governance seeks to promote. At the same time, to the extent that

situation faced by the enforcement agencies that want selective waiver authority over information produced to them. As outlined above, enforcement agencies want to be able to receive information without forcing waiver of the regulated party's privilege.[138] But they also want to be able transmit or share information without waiving the regulated party's privilege shielding that information.

This poses a problem once one considers how many regulators potentially have an interest in privileged material produced to one regulator. Consider, for example, the sphere of banking regulation. A conservative list of agencies involved with enforcing banking law would include the FRB, the OCC, the FDIC, the SEC, the CFTC, OFAC, FinCEN, the IRS, and state and foreign bank supervisors.[139] "All of these regulators routinely cooperate ... in the investigation of, and imposition of penalty and remedial provisions upon, financial institutions that have committed or are suspected of committing infractions."[140]

There are a scant handful of statutory provisions that expressly authorize agencies to share information without potentially losing privilege over the communicated information, but these statutes are far from comprehensive. For example, "federal banking agencies and a few related federal agencies, such as the Farm Credit Administration and the Federal Housing Finance Agency, may share privileged information without waiving privilege. This provision does not, however, extend to state bank supervisors, federal or state prosecutors, the IRS, the SEC, the CFTC and many others."[141] Another recently enacted statute authorizes sharing of information between federal and state agencies with mortgage oversight authority without the loss of privilege.[142] A

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current law limits the FOIA's applicability to new governance efforts, then the new governance approach appears significantly less than perfectly transparent.")

[138] *See supra* Part II.A.

[139] Lakatos & Kazemi, *supra* note 90, at 260.

[140] Lakatos & Kazemi, *supra* note 90, at 260 ("[T]hese agencies should be able freely to share Section 1828(x) information amongst one another, without undermining the goal of Section 1828(x). Doing so not only will promote efficient and coordinated law enforcement and regulatory efforts, but moreover will help to ensure fair and consistent treatment of regulated and supervised entities.").*Id*.

[141] Lakatos & Kazemi, *supra* note 90, at 274 n.73 (citing 12 U.S.C. § 1821(t)). The operative language was added to the Federal Deposit Insurance Act in 1992. See Housing & Community Development Act of 1992, Sec. 1544, Interagency Information Sharing (amending 12 U.S.C.11821(t) to add section (t) ("Agencies May Share Information Without Waiving Privilege")).

[142] Housing and Economic Recovery Act of 2008, P.L. 110-289, Tit. V., § 1512, 122 Stat. 2654, 2820, codified at 12 U.S.C. § 5111 (protecting the confidentiality of information exchanged by state and federal agencies through the National Mortgage Licensing System and providing that such information "may be shared with all State and Federal regulatory officials with mortgage industry oversight authority without the loss of privilege or the loss of confidentiality protections provided by Federal or State laws"); 12 C.F.R. 1008.3 (implementing regulation).

third statutory provision, enacted in 2010 as part of Dodd-Frank,[143] permits the SEC to share information without loss of privilege with, inter alia, "any agency," "any self-regulatory organization," and "any State securities or law enforcement authority."[144] This provision further permits "[f]ederal agencies, State securities and law enforcement authorities, [and] self-regulatory organizations" to transfer privileged information to the SEC without loss of privilege.[145] Dodd-Frank similarly authorized the Public Company Accounting Oversight Board (PCAOB) to share information without loss of privilege with foreign regulators charged with inspecting or overseeing public accounting firms.[146] A final example is 12 USC § 1828b, which authorizes sharing of data pertaining to antitrust review of transactions without loss of federal or state privilege among the OCC, OTS, FDIC, the Federal Reserve, the Attorney General, and the FTC.[147]

Beyond these limited safe harbors, however, agencies pool information at peril of exposing the materials they share to the public gaze—or at least to the gaze of an adversary in litigation. Positive enactments, such as open government laws or rules of discovery, may make documents produced to a regulator vulnerable to exposure once they are shared with another regulator.[148] If a single cloak of privilege securely covered all of these entities—all for one and one for all—then regulated parties could cooperate with requests for privileged information with any of them without running the risk that subsequent sharing of that information among the cooperating pool of regulators would strip away the privilege.[149]

Regulated parties may be less than thrilled at this prospect. When, for example, the CFPB announced the (quite dubious) position that it could share privileged information provided to it by regulated parties with state agencies—including state prosecutors—without waiving the

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[143] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Sec. 929I(a)(3), Pub. Law 111-203, 124 Stat. 1376, 1860 (adding Section 24(e) of the Securities Exchange Act of 1934), codified at 15 U.S.C. § 78x(f).

[144] *Id*.

[145] *Id*.

[146] *See* 15 U.S.C. § 7215(b)(5).

[147] *See* 12 U.S.C. § 1828b(a) (requiring sharing of "any data in the possession of any such banking agency that the antitrust agency deems necessary for antitrust review of any transaction requiring notice to any such antitrust agency or the approval of such agency"); 12 U.S.C. § 1828b(b)(3) ("Other privileges not waived by disclosure under this section: The provision by any Federal agency of any information or material pursuant to subsection (a) of this section to another agency shall not constitute a waiver, or otherwise affect, any privilege any agency or person may claim with respect to such information under Federal or State law.").

[148] Lakatos & Kazemi, *supra* note 90, at 259.

[149] Lakatos & Kazemi, *supra* note 90, at 260-61.

attorney-client privilege shielding the material,[150] it set off alarm bells in some quarters.[151] Viewed from the perspective of the regulated party, it is clearly less than ideal for one's immediate regulator to have an unfettered ability to share privileged information demanded by that regulator with potentially adverse parties such as federal or state prosecutors, [152] or with other entities who might disclose that information to private plaintiffs.[153]

To an agency charged with enforcing federal law, however, there is only value in having broad leeway over the sharing of privileged information produced to it. An agency's ideal position would be to have not only the threshold authority to share privileged information that has been produced to it, but also the further authority to determine with whom it may share that information in a privileged way without loss of privilege. A delegation of the power to write privileges would give an

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[150] *See* 77 Fed. Reg. at 39,621. *See also* CFPB Statement of Intent for Sharing Information with State Banking and Financial Services Regulators, Dec. 6., 2012, *available at* http://files.consumerfinance.gov/f/201212_cfpb_statement_of_Intent_for_sharing_information_with_sbfsr.pdf. As authority, the CFPB cited the federal selective waiver statute, 12 U.S.C. § 1828(x), which at the time did not mention the CFPB and which said nothing regarding the consequences of disclosure to state law enforcement officials anyway. *After* the CFPB issued its final rule, Congress amended 12 U.S.C. § 1828(x) to refer to the CFPB. *See* An Act to Amend the Federal Deposit Insurance Act with Respect to Information Provided to the Bureau of Consumer Financial Protection, Pub. L. No. 112-215, 126 Stat. 1589 (2012) (codified at 12 U.S.C. §§ 1821, 1828). State law enforcement agencies still make no appearance. *Id*.

[151] *See* Bruce Green, *The Attorney-Client Privilege—Selective Compulsion, Selective Waiver, and Selective Disclosure: Is Bank Regulation Exceptional?*, 2013 JOURNAL OF THE PROFESSIONAL LAWYER 85, at 105 ("[T]he CFPB has made no effort to explain how it can, on one hand, claim to value a bank's attorney-client privilege, and on the other hand, assert the right to compel banks to submit privileged information during the examination process and then turn that material over to its own enforcement lawyers, to prosecutors, or to other federal or state law enforcement officials who would have the power to indict or bring enforcement actions against the bank or its employees.").

[152] Lakatos & Kazemi, *supra* note 90, at 259 ("[B]ank regulators may well argue that they should be permitted broader access to privileged materials to help fulfill their mandate of ensuring the safety and soundness of the banking system. But once the regulator steps into a prosecutorial role by bringing an enforcement action, those arguments should yield to the policies favoring the attorney-client privilege and work product protections as a means to ensure systemic fairness.").

[153] *See, e.g.*, Sharon Nelles & Paul Saltzmann, *Preserving the Bank Examination Privilege in the Wake of Public Disclosures by the Financial Crisis Inquiry Commission*, 4 BLOOMBERG LAW REPORTS—BANKING AND FINANCE Vol. 4, No. 7, *available at* https://www.sullcrom.com/files/Publication/866afaba-d0f0-4b56-8f21-4e3683829f3c/Presentation/PublicationAttachment/8d73bf5d-6c1b-481a87ee4fb5aaaa8607/Nelles-Saltzman-Bloomberg-Jul-2011.pdf (describing how bank examination materials publicly released by the Financial Crisis Inquiry Commission have subsequently been used by private plaintiffs in litigation against banks). For one example of a plaintiff using such documents, see Mem. ISO Def.'s Mot. to Dismiss First Am. Consol. Verified Shareholder Derivative Complaint, In re *Citigroup Inc. Shareholder Derivatives Litig*., 11-CV-02693, Dkt. 23, 18 n. 12.

agency the broadest degree of latitude on this question, particularly if it specifies—as does Section 6607—that any communications that are covered by a new regulatory evidentiary privilege "shall not waive any privilege otherwise available to … any person who provided the information that is communicated."[154]

The imperative of agency coordination also points to a separate and perhaps more fundamental reason why a privilege delegation would be a valuable tool for an administrative agency. Entities, including agencies, must converse if they are going to coordinate. If the nature of this crosstalk matters—as some scholars have argued that it should[155]—than should agencies have discretion over whether to cloak these communications from external scrutiny? Delegations of the power to privilege will play a critical role in determining whether such crosstalk will be accessible to the public and to litigants.

The Affordable Care Act demonstrates the importance of this question. The ACA fundamentally overhauled the American system of health insurance by placing new regulations on the pricing, benefits, coverage, and issuance of insurance plans.[156] The ACA enlists states and state officials to create state-run exchanges and to enforce the ACA's restrictions against insurance plans.[157] In addition, the Act assigns to the National Association of Insurance Commissioners ("NAIC") the responsibility to determine whether the amount that health insurers are spending on health care is adequate or whether they must issue rebates to their policyholders.[158] Finally, the ACA requires consultation between federal agencies, the NAIC, and state officials "on a variety of issues central to the ACA's implementation."[159] In essence, the ACA links together federal agencies, state officials, and the NAIC into a hybrid superenforcement structure charged with implementing and enforcing the provisions at the heart of the act.

The agencies and entities that constitute this hybrid superenforcement structure will naturally value being able to

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[154] *See* Appendix A.

[155] J.R. DeShazo & Jody Freeman, *Public Agencies As Lobbyists*, 105 COLUM. L. REV. 2217, 2303-04 (2005) ("Courts should be more inclined to defer when the lead agency has negotiated with other affected agencies and there is consensus among them. Alternatively, in cases of interagency conflict over statutory meaning, courts should defer to the agency that Congress has chosen as the expert—for purposes of that decision-making process—even if it is a lateral agency and not the lead agency implementing the relevant statute.").

[156] Gillian E. Metzger, *Federalism Under Obama*, 53 WM. & MARY L. REV. 567, 572 (2011) ("The ACA undertakes a major overhaul of health insurance, imposing substantial new federal requirements and expanding health insurance to to 32 million of the nation's 55 million uninsured.").

[157] *Id*. at 578.

[158] *Id*.

[159] *Id*.

communicate regarding their future course of action without risk of disclosure of their crosstalk. The discussion below will explore further whether or not allowing privilege over such communications is desirable.[160] For now, however, the point is a simple one. The incentive of an agency within the hybrid structure is to obtain the maximum amount of slack over what is privileged—that is, the broadest possible authority to communicate with public or private entities of the agency's choosing, as well as the ability to exercise discretion within that zone as circumstances warrant. Put differently, an agency's ideal position is to have not only the threshold authority to communicate within a privileged channel, but also the further authority to determine to whom it will open privileged channels of communication.

The most direct way for an agency to obtain that leeway is to secure a broad delegation of the right to promulgate rules of evidentiary privilege governing communications between or among a permissively specified list of entities. This is a delegation that sounds awfully like the actual language of Section 6607.[161] This provision is proof positive not only that agencies want a broad power to specify the parameters of privilege, but that agency efforts to obtain such a power can eventually succeed.

III. DELEGATING PRIVILEGE

Traditionally, the process for creating federal privileges has moved at a glacial pace. Courts are notably reluctant to expand privilege law.[162] And the creation of new privileges by legislation is constrained both by Congressional reluctance to make new privileges and by the fact that courts have essentially imposed a clear-statement rule on legislation that purports to create new privileges.[163]

Once it is handed off to federal administrative agencies, federal privilege law is likely to grow at a much more rapid clip. As a threshold matter, agencies are more able to write rules than Congress is to write

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[160] *See infra*, Part III.B.2.

[161] *See* Appendix A.

[162] *See, e.g.*, Pierce County v. Guillen, 537 U.S. 129, 144 (2003) ("[S]tatutes establishing evidentiary privileges must be construed narrowly because privileges impede the search for the truth."); University of Pennsylvania v. EEOC, 493 U.S. 182 (1990) ("[A]lthough Rule 501 manifests a congressional desire 'not to freeze the law of privilege' but rather to provide the courts with flexibility to develop rules of privilege on a case-by-case basis, we are disinclined to exercise this authority expansively."); United States v. Nixon, 418 U.S. 683, 709-10 (1974) (noting that privileges are "exceptions to the demand for every man's evidence" and that they "are not lightly created nor expansively construed, for they are in derogation of the search for truth").

[163] *See* sources cited supra note 162.

and re-write statutes.[164] In addition, agencies are likely to be prolific authors of new privilege rules because of the administrative imperatives discussed above.[165] The power to write privilege rules will prove just too tempting not to be used.

An increase in the number and availability of evidentiary privileges will have complicated effects on the system of American law. At least three consequences are fairly predictable, though, and they are all undesirable. First, agencies are likely to use regulatory privileges to insulate themselves from accountability in courts and to the public. Second, agencies are likely to craft regulatory privileges that will preempt state laws that further important state policy interests. Third, agencies that promulgate regulatory evidentiary privileges covering the communications of state agents from disclosure will create the expressive and accountability harms that anti-commandeering doctrine seeks to prevent.

A. ACCOUNTABILITY

Establishing adequate oversight of the administrative state is a besetting problem of modern administrative law. "One of administrative law's anxieties is the problem of authority delegated from more politically accountable actors to the unelected ones within administrative agencies."[166] The problem of government gave rise to the solution of delegation; but the solution of delegation gave rise to the problem of the unchecked delegate.

To mitigate the problem of the unchecked delegate, Congress in the late 1960s and 1970s hard-wired mechanisms for making agencies transparent and accountable into the basic structure of the administrative state. It is not for nothing that the Freedom of Information Act was codified in the sections of the U.S. Code

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[164] *See* Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 1985 (2008) ("We could not seriously contend that it is more difficult to enact regulations than to enact clear legislation."); Richard J. Pierce, Jr., *Political Accountability and Delegated Power: A Response to Pro- fessor Lowi*, 36 AM. U. L. REV. 391, 404 (1987) ("Given the nature and level of government intervention that Congress now authorizes, it could not possibly make the hundreds, or perhaps thousands, of important policy decisions that agencies make annually."). The enactment costs of federal legislation are greater than the enactment costs of regulation because legislation requires ratification by both houses of Congress and by the President. *See* Mila Sohoni, *Notice and the New Deal*, 62 DUKE L.J. 1169, 1215 (2013) (describing how bicameralism and presentment slow the mechanics of federal lawmaking).

[165] *See supra* Part II.

[166] Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1764 (2013).

immediately preceding the Administrative Procedure Act.[167] In exchange for the ongoing privilege of wielding broad delegated power, agencies were required to be accountable—to the courts and to the public.[168]

Privilege delegations will unsettle this bargain. It is a simple matter of foxes and henhouses.[169] An agency delegated the power to promulgate rules of privilege has every incentive to specify that the regulatory evidentiary privilege be applicable to communications that might expose the agency to criticism or second-guessing if disclosed. It lies in the interests of agencies to have generous evidentiary privileges protective of government information and of government officials.[170]

Of course, the risk of regulatory self-dealing is omnipresent in the administrative state. Environmental Protection Agency officials drive cars. Consumer Products Safety Commission officials buy cribs. Social Security Administration officials will one day retire. They all write rules that, to some extent, will affect their own lives. As a rule, we do not place limits on agency power out of fear that agencies will craft special self-serving rules that selectively benefit their own officials and employees. Why should any special concern attach to the prospect of agencies writing the rules of privilege that will apply to agency officials and agency communications?

The short answer is that experience should make us cautious about letting executive branch agencies wield too much authority over the power to protect their own information.[171] The most obvious examples come from the sphere of national security. Consider executive use of classification power. The number of classified documents continues its

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[167] *See* 5 U.S.C. §§ 551-559.

[168] *See* NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978) ("The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.").

[169] *Cf*. Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869, 889 (2008) ("[A]llowing agencies to define the scope of their own authority runs headlong into the venerable constitutional principle that 'foxes should not guard henhouses'").

[170] *See* Eric Lane *et. al*., *Too Big A Canon in the President's Arsenal: Another Look at* United States v. Nixon, 17 GEO. MASON L. REV. 737, 739 (2010) (discussing "the motivations for government secrecy, which are only partially related to the exploration of valid policy alternatives[,]" "the dangerous uses to which secrecy is so often put," and "the natural human tendencies that lead government officials to seek the cover of secrecy").

[171] For other examinations of executive branch strategic self-insulation from external review, *see* Nou, *supra* note 166, at 1771 (describing how agencies utilize regulatory forms and strategies to insulate their decisions from review and reversal within the executive branch); Yehonatan Givati, *Strategic Statutory Interpretation by Administrative Agencies*, 12 AM. L. & ECON. REV. 95 (2010); M. Elizabeth Magill, A*gency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1437-42 (2004).

relentless rise.[172] Even many government officials will admit that the apparatus of classification is running amok.[173] The scholarly response to this situation has been notable for its uniformity; it is not much of an exaggeration to say that today there is no literature on classification, but only a literature on *over*classification.

State secrets privilege offers a starker instance. This privilege is not a creature of statute;[174] it derives from Article II.[175] The federal courts control the conditions under which the state secrets privilege can be invoked, but judicial controls on this area are lax.[176] Sometimes the

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[172] Norman C. Bay, *Executive Power and the War on Terror*, 83 DENV. U. L. REV. 335, 386 (2005) ("It has been reported that, by several measures, government secrecy has reached an all-time high, with federal departments classifying documents at the rate of 125 a minute as they create new categories of semi-secrets bearing vague labels like 'sensitive security information.'"); *id*. ("The record number of documents classified in 2004—15.6 million—was nearly double the number in 2001."); Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 133 (2006) ("Since the September 11th attacks on the United States, government secrecy has dramatically increased. Security classification of information, the formal process by which information is marked and protected against disclosure, has multiplied, reaching an all-time high of 15.6 million classification actions in 2004, nearly double the number in 2001. Moreover, the cost of the program has skyrocketed from an estimated $4.7 billion in 2002 to $7.2 billion in 2004.").

[173] *See* Fuchs, *supra* note 172, at 133-34 ("Officials throughout the military and intelligence sectors have admitted that much of this classification activity is unnecessary. Secretary of Defense Donald Rumsfeld acknowledged the problem in a 2005 *Wall Street Journal* op-ed: 'I have long believed that too much material is classified across the federal government as a general rule ....' The extent of over-classification is significant. Under repeated questioning from members of Congress at a 2004 hearing concerning over-classification, Deputy Under Secretary of Defense for Counterintelligence and Security Carol A. Haave eventually conceded that approximately 50 percent of classification decisions are unnecessary over-classifications. These opinions echoed that of the current Director of the Central Intelligence Agency Porter Goss, who told the 9/11 Commission, while then serving as the Chair of the House Permanent Select Committee on Intelligence, '[W]e overclassify very badly. There's a lot of gratuitous classification going on, and there are a variety of reasons for [it].'").

[174] There have been recent efforts to codify the state secrets privilege. *See* Sudha Setty, *Litigating Secrets: Comparative Perspectives on the State Secrets Privilege*, 75 BROOK. L. REV. 201, 202 (2009) (noting reform legislation introduced in 2008 and 2009 following the Obama administration's adoption of Bush administration's stance on "a broad and sweeping invocation and application of the state secrets privilege").

[175] United States v. Reynolds, 345 U.S. 1 (1953) (recognizing Article II basis for state secrets privilege).

[176] Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931, 1950-51 (2007) ("What is undebatable, however, is that the privilege is currently being invoked as grounds for dismissal of entire categories of cases challenging the constitutionality of government action. The executive's concurrent claim that these cases are nonjusticiable ... is further evidence that, as one commentator put it, 'the administration is now well on its way to transforming [the state secrets privilege] from a narrow evidentiary privilege into something that looks like a doctrine of broad government immunity.'").

executive's invocation of the state secrets privilege cannot even be challenged in court—because the executive has invoked the state secrets privilege.[177] When wielding this broad *de facto* authority to resist disclosure, has the executive used this power with prudence and circumspection? The consensus answer is no.[178]

Those who defend executive power to withhold information by classification or state secrets uniformly to do by basing their arguments on the national security interest at stake.[179] But privilege delegations—Section 6607 is a clear example—need not implicate national security at all. As a functional matter, privilege delegations would essentially take the degree of slack concerning disclosure that exists in the national security context and extend it to the sphere of ordinary domestic administrative law.

This is a prospect that ought to give anyone pause. Executive practice with respect to open government laws demonstrates why. Open government laws such as FOIA are mechanisms by which Congress checks the executive branch by requiring executive branch operations to be open to the public. But as a thick literature attests, executive agencies evade the requirements of open-government laws with dismaying frequency. "In the federal and state systems, those who request information under the various freedom of information and 'sunshine' statutes regularly face delays and blanket denials. ... [A]gencies engaged in law enforcement, defense, and national security consider open government laws to be at best a burden and, at worst, a

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[177] *See* Clapper v. Amnesty Int'l, 132 S. Ct. 2431 (2012) (holding that plaintiffs lacked Article III standing to challenge surveillance); *id*. at 1149 n.4 (holding that invocation of state secrets privilege by government could bar plaintiffs from discovery into whether the state secrets privilege was applicable); Al-Haramain Islamic Found. v. Bush, 507 F.3d 1190, 1205 (9th Cir. 2007) (holding that evidence cannot be admitted to establish standing if it is privileged under the state secrets doctrine).

[178] *See*, *e.g.*, D. A. Jeremy Telman, *Intolerable Abuses: Rendition for Torture and the State Secrets Privilege*, 63 ALA. L. REV. 429, 437 (2012) ([T]he very mechanisms for the assertion of the [state secrets privilege] are faulty and require fundamental reconsideration and redress."); Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1267 (2007) (summarizing scholarly criticisms of state secrets doctrine).

[179] This is true notwithstanding the fact that invocation of the state secrets privilege touches on matters far afield from national security—a disconnect that Laura Donohue has most prominently emphasized. *See* Laura K. Donohue, *The Shadow of State Secrets*, 159 U. PA. L. REV. 77, 87 (2010) ("[I]t is not just the executive branch that benefitted from the privilege: in scores of additional cases, private industry claimed that the state secrets doctrine applied, with the expectation that the federal government would later intervene to prevent certain documents from being subject to discovery or to stop the suit from moving forward. Beyond these, there are hundreds of cases on which the shadow of the privilege fell.").

threat to their work."[180] Agencies are more often censoring documents or outright denying access to them.[181]

The executive branch is also becoming increasingly aggressive in its invocation of existing privileges that shield government deliberations. Perhaps the most relevant metric of this tendency is the executive's increasing invocation of the deliberative process privilege.[182] The number of invocations of this privilege has risen to record highs.[183] In recent cases the Justice Department has invoked the privilege to "shield information about officials' deliberations over the manner in which officials should respond to press inquiries about existing government policies."[184] The executive has recently begun to assert deliberative process privilege as protection against Congressional requests for information, not merely judicial subpoenas.[185]

A distinct concern arises from authorizing agencies to resist disclosure of inter-agency communications. Consider an aspect of an issue that has been much in the news lately: "parallel construction." Parallel construction is the term used to refer to one agency "remaking" a case that another agency has already made but using differently sourced information. For example, recent reports have reflected that domestic law enforcement agencies (such as the Drug Enforcement Agency) have used intelligence gathered by the NSA to further their

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[180] Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 891-92 (2006). *See also* Wendy Ginsberg, *The Freedom of Information Act (FOIA): Background and Policy Options for the 113th Congress*, CRS Report R41933, March 8, 2013.

[181] *See U.S. Cites Security More to Censor, Deny Records*, ASSOCIATED PRESS, Mar. 18, 2014 ("The AP analysis showed that the government more than ever censored materials it turned over or fully denied access to them, in 244,675 cases or 36 percent of all requests.").

[182] Imwinkelried, THE NEW WIGMORE: EVIDENTIARY PRIVILEGES § 7.4.2, at 1294 (2d ed. 2010) (describing reluctance of Congress and the lower federal courts to recognize a formal investigatory privilege).

[183] *See U.S. Cites Security More to Censor, Deny Records*, ASSOCIATED PRESS, March 18, 2014 ("And five years after Obama directed agencies to less frequently invoke a 'deliberative process' exception to withhold materials describing decision-making behind the scenes, the government did it anyway, a record 81,752 times.").

[184] *See* Edward J. Imwinkelried, *The Government's Increasing Reliance On—And Abuse Of—The Deliberative Process Evidentiary Privilege: '[T]he Last Will Be First'*, __ MISSISSIPPI L. J. __ (2014) *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2268776 (last visited Dec. 10, 2013).

[185] Todd Garvey & Alissa Dolan, *Congress's Contempt Power and the Enforcement of Judicial Subpoenas: Law, History, Practice, and Procedure*, Congressional Research Service Report 7-5700, Aug. 17, 2012, *available at* http://www.fas.org/sgp/crs/misc/RL34097.pdf (describing invocation of deliberative process privilege with respect to documents "concerning the [DOJ's] response to congressional oversight and related media inquiries"). For criticism of the executive branch's recent invocation of the deliberative process privilege, see Louis Fisher, *Obama's Executive Privilege and Holder's Contempt: "Operation Fast and Furious"*, 43 PRESIDENTIAL STUDIES QUARTERLY 167 (2013), *available at* http://www.loufisher.org/docs/ep/fast2.pdf.

criminal investigations.[186] These revelations are disturbing because it has been generally supposed that legal and practical constraints prevent foreign intelligence and surveillance agencies from conducting or assisting domestic law enforcement efforts.[187] But it is not merely in the spheres of national security or foreign intelligence that such restrictions exist. Within domestic law as well, there are walls that restrict inter-agency cooperation, such as the rules that regulate the joint conduct of criminal and civil investigations.[188]

This is the dark side of agency cooperation—the zone in which coordination between agencies exacts a cost upon other values, values that may be extremely important and even constitutional in stature. It is true that there is substantial disagreement about what precise rules restrict domestic inter-agency coordination and about how stringently courts can and will enforce these rules. But to the extent these restraints have any vigor at all, it is important to recognize how they would be vitiated by a regime in which agencies prohibited from sharing information could create and then evoke a privilege that shields inter-agency communications from disclosure in court.[189] As a functional matter, the already substantial obstacles to external monitoring of prohibited inter-agency coordination would be rendered virtually insurmountable.

Agency accountability should be more than a buzzword; it should be both an attribute and an aspiration of administrative government. But achieving that goal requires the functional operation of a web of rules and structures that render agency action and communications open to disclosure and that restrict the ability of agencies to engage in strategic self-insulation. Delegations of the power to privilege would let executive agencies tear holes in this complex web. As the next sections explain, privilege delegations will also have repercussions on another fundamental aspect of the federal administrative state—its interactions with state laws and state officials.

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[186] *See* John Shiffman & David Ingram, *IRS Manual Detailed DEA's Use of Hidden Intel Evidence*, REUTERS, Aug. 7, 2013.

[187] This is why others, less delicately, have referred to parallel construction as "intelligence laundering." *See* Andrew O'Hehir, *The NSA-DEA Police State Tango*, Aug. 10, 2013, *available at* http://www.salon.com/2013/08/10/the_nsa_dea _police_state_tango/ (quoting attorney Hanni Fakhoury of the Electronic Frontier Foundation, who apparently coined this phrase).

[188] United States v. Posada Carriles, 541 F.3d 344, 354-355 (5th Cir. 2008) (describing "principles" governing the propriety of dual investigations by civil and criminal branches of a government agency or dual investigations by separate agencies); United States v. Scrushy, 366 F. Supp. 2d 1134 (N.D. Ala. 2005) (finding an improper merger of civil and criminal investigations by the SEC and the Department of Justice).

[189] *See* Appendix A (authorizing, *inter alia*, privileging of communications between the Department of Justice and various agencies with civil enforcement authority).

B. PREEMPTION

"Preemption of state regulatory authority by national law is the central federalism issue of our time."[190] The role of agencies in preemption is receiving increasing scholarly attention.[191] Across a wide spectrum of substantive areas—immigration, tort reform, banking regulation, family law, and others—a single issue dominates: the propriety of displacing the laws of the states with federal regulations.[192] Until now, the question of how agency preemption should interact with the law of privilege has not arisen. How would the landscape of American law change if the law of privilege came to be defined by preemptive federal regulations?

A useful place to begin to answer this question is by observing the sensitivity to federalism issues exhibited in the existing judicial rulemaking process. A committee charged with considering federalism concerns monitors the judicial rulemaking process, including the process for generating draft rules of privilege.[193] Organizations such as the Conference of State Chief Justices monitor the work product of the rules committees and offer commentary on federalism concerns.[194] Any

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[190] Ernest Young, *Executive Preemption*, 107 NW. U. L. REV. 869, 869 (2008).

[191] *See* Miriam Seifter, *States as Interest Groups in the Administrative Process*, __ VA. L. REV. __, ___ n.19 (2014) (collecting sources from the growing literature on administrative federalism) (eds.- need to obtain permission to cite).

[192] Jamelle C. Sharpe, *Legislating Preemption*, 53 WM. & MARY L. REV. 163, 218 (2011) ("From immigration to gay marriage, from tort reform to financial reform, the propriety of displacing state law with federal law is quite possibly the most important public law question of the day.").

[193] *See* Noyes, *supra* note 78, at 695-96 n.105 ("The Committee on Federal-State Jurisdiction is charged with analyzing proposed statutory and rule changes that might affect state courts and to '[s]erve as the conduit for communication on matters of mutual concern between the federal judiciary and state courts and their support organizations such as the National Center for State Courts, the Conference of Chief Justices, and the State Justice Institute.'") (quoting Jurisdictional Statements: Jurisdiction of Committees of the Judicial Conference of the United States). Noyes also quotes a former chair of that Committee as explaining that its role is to be "involved in that part of the doctrine of 'federalism' that considers the proper role of the federal courts relative to the states and, particularly, the state courts. Our Committee proceeds from the premise that state courts play an essential role in our justice system ably handling questions of both state and federal law." *Id*. (quoting *Committee Protects Federal Courts, Recognizes Unique Nature of State Courts*, Interview of The Honorable Frederick P. Stamp, Jr., http://www.uscourts.gov/ttb/oct02ttb/interview.html.

[194] *See* Memorandum to Advisory Committee on Evidence Rules from Professor Daniel J. Capra, Re: Proposed Rule 502, March 15, 2007, at 5, *available at* http://www.klgates.com/files/upload/eDAT_ER502_Draft_Cover.pdf ("The first draft of Rule 502 provided for uniform waiver rules in federal and state proceedings, regardless of where the initial disclosure was made. This draft raised the objection of the Conference of State Chief Justices. State judges argued that the Rule as drafted offended principles of federalism and comity, by superseding state law of privilege waiver, even for disclosures that are made initially in state proceedings—and even

proposed rule of privilege is then routed through Congress, where it cannot become law unless it survives the normal political and procedural checks that are protective of federalism.[195]

This process has predictably resulted in rules of evidence that accommodate federalism concerns. Consider the state law proviso of Federal Rule of Evidence 501. During the debates surrounding the adoption of this rule, it was argued that for Congress "to override state privilege law ... would be unwise, because the federalist principles underlying *Erie* supported the application of state privilege law. This appeal to federalist values persisted throughout the debate and carried considerable weight."[196] As a result, Congress decided to preserve the application of state privilege law in federal courts rather than enact a federal law of privilege applicable to state law claims.[197]

More recently, discussions of Rule 502 were similarly shaped by federalism concerns at both the judicial rulemaking committee level and in Congress. This rule addresses when a party's inadvertent disclosure of privileged documents or communications should be treated as a waiver of privilege over those materials.[198] The initial discussion draft of the Rule 502(c) dealt with situations where the inadvertent disclosure of privileged materials was made to a state agency.[199] The Advisory Committee on Evidence Rules ultimately

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where the disclosed material is then offered in state proceeding."); *id*. at 7 (noting, with respect to the proposed selective waiver provision, that "[j]udges of state courts objected that selective waiver raised serious federalism problems, because in order to be effective it would have to bind state courts, and as such would change the law of privilege in virtually every state, because most of the states do not recognize selective waiver.").

[195] *See* 28 U.S.C. § 2074.

[196] *The Development of Evidentiary Privileges in American Law*, 98 HARV. L. REV. 1454, 1467 (1985).

[197] John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693 (1974) (describing Congress's refusal to let the initial draft of the Federal Rules of Evidence go in to effect as stemming from "misgivings" that "went beyond the merits of the proposals" and as a "a qualm sounding in federalism—a feeling that by refusing to recognize in diversity cases the privileges provided by local law, the federal government was making law that should be made by the states"); WEINSTEIN § 501 App. 23; Broun & Capra, *supra* note 16, at 262 ("[A] concern for state prerogatives led Congress to reject the Advisory Committee's original proposals for federal rules of privilege.") (citing SALTZBURG, MARTIN & CAPRA, FEDERAL RULES OF EVIDENCE MANUAL (9th ed. 2006).

[198] *See* Fed. R. Evid. 502.

[199] *See* Advisory Committee Note to Fed. R. Evid. 502 ("The first draft of Rule 502 provided for uniform waiver rules in federal and state proceedings, regardless of where the initial disclosure was made. This draft raised the objections of the Conference of State Chief Justices. State judges argued that the Rule as drafted offended principles of federalism and comity, by superseding state law of privilege waiver, even for disclosures that are made initially in state proceedings—and even

"determined that it would be overreaching to try to control disclosures made at the state level."[200] Ultimately, the Advisory Committee on Evidence Rules "unanimously agreed that the suggested statutory language [in proposed Rule 502(c)] should cover disclosures made to federal agencies only," reasoning "that the federalism issues attendant to controlling disclosures to state agencies are extremely serious."[201] Accordingly, the final rule enacted by Congress does not affect inadvertent disclosures to state agencies—despite the potential for conflicts generated by leaving the law on inadvertent waiver in this patchwork state.[202]

Agencies charged with promulgating regulatory evidentiary privileges are unlikely to be as attuned to state interests. Because "[a]gency action ... evades both the political and the procedural safeguards of federalism,"[203] states cannot count on agencies to give meaningful protection to values of federalism.[204] "The states have no direct role in the 'composition and selection' of federal administrative agencies."[205] Committees of concerned judges do not look over agencies' shoulders as they draft preemptive rules to offer them guidance on how to respect principles of federal-state comity. Even

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when the disclosed material is then offered in a state proceeding (the so-called "state-to-state" problem).").

[200] Broun & Capra, *supra* note 16, at 263.

[201] Lakatos & Kazemi, *supra* note 90, at 254 & n.66 (citing Advisory Committee on Evidence Rules, Minutes of the Meeting of April 12-13, 2007, at 16, *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/EV04-2007-min.pdf (discussing, *inter alia*, application of putative federal selective waiver rule in state court proceedings)).

[202] *See* Advisory Committee Note to Fed. R. Evid. 502 (noting the "many requests from lawyers and lawyer groups to return to the original draft and provide a uniform rule of privilege waiver that would bind both state and federal courts, for disclosures made in either state or federal proceedings" due to concerns that if states were not bound by a uniform federal rule on privilege waiver, ... a state law would find a waiver even though the Federal Rule would not.").

[203] Young, *supra* note 190, at 868-69.

[204] *See* Young, *supra* note 190, at 870; *see also* Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695, 698 (2008) ("[A]gencies lack both institutional expertise on important issues of state autonomy and federalism and adequate statutory guidance regarding preemption questions."). *Cf*. Galle & Seidenfeld, *supra* note 164, at 1985 (arguing that agencies are more institutionally competent than courts to consider federalism). Professors Galle and Seidenfeld argue that agencies are democratic, deliberative, transparent, and better able to assess the policy costs and benefits of federalism. *Id* at 1962-68, 1988. But they acknowledge the importance of considering the "underlying federalism norm" in weighing deference to an agency's preemptive action, *id*. at 1988, and note the need to ensure that agencies do not impose political externalities, *id*. at 2003-04.

[205] Young, *supra* note 190, at 868-69.

when agencies are required to consider federalism concerns by executive order, they often ignore those mandates.[206]

All of these factors are likely to make federal agencies more indifferent to federalism concerns—and more apt to give regulatory evidentiary privileges preemptive effect—when they are performing privilege rulemaking. But perhaps the most important factor militating towards broad regulatory preemption will be this: unless federal regulatory evidentiary privileges preempt state discovery law, there would be in many cases no point in having a federal regulatory evidentiary privilege, because the privileged information could just be obtained in a state proceeding.

Take a concrete example from securities law. The SEC frequently requires parties that it is investigating to produce documents to it. In state court investor lawsuits, investigated parties and the SEC have argued that documents produced to the SEC should be treated as privileged in civil litigation.[207] More than one state court has rejected that claim.[208] The SEC, if authorized to promulgate rules of privilege, will likely draft privileges for documents produced to it that will preempt any state rules that would otherwise make such documents discoverable. If the SEC did not preempt the contrary state rules, then state policy in favor of promoting full discovery in state investor lawsuits would thwart the aims of the federal regulatory evidentiary privilege.[209]

State open government or "sunshine" laws offers another example. State sunshine acts clearly embody an important and widely shared state interest.[210] Consider a lawsuit under a state sunshine act that, say, sought disclosure of state officials' communications at the "weekly phone calls" between HHS and state officials discussing implementation of the Affordable Care Act.[211] Unless a federal regulatory evidentiary

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[206] *See* Catherine M. Sharkey, *Inside Agency Preemption*, 110 MICH. L. REV. 521, 527 (2012) (noting, with regards to provisions of the Federalism Executive Order, that "compliance with these provisions has been inconsistent, and difficulties have persisted across administrations of both political parties. A 1999 Government Accountability Office ("GAO") Report identified only five rules—out of a total of 11,000 issued from April 1996 to December 1998—that included a federalism impact statement. Case studies of particular rulemaking proceedings have revealed failures to comply with E.O. 13132."). Professor Sharkey helpfully suggests several reforms that might improve agency consideration of federalism concerns, *see id*. at 570-94, but these reforms have yet to be embraced.

[207] *See supra*, text accompanying notes 113-115.

[208] *Id*.

[209] *See* Burns, *supra* note 107; sources cited *supra* nn. 106, 110, 113.

[210] Cheryl Cooper, *"Beyond Debatable Limits": A Case for Legislative Clarification of Florida's Sunshine Law*, 41 STETSON L. REV. 305, 332 (2012) ("By 1976, all fifty states and the District of Columbia had open-meetings statutes on the books.").

[211] *See supra*, text accompanying notes 156-159; Metzger, *supra* note 156, at 579 ("HHS is instructed to consult with NAIC and other state stakeholders on a variety of issues

privilege applicable to those communications preempted a state sunshine law that would otherwise require their disclosure, there would be no point in having the federal privilege.

Such examples could be multiplied, but the gist should be clear. One can safely predict that a federal agency will exercise its power to privilege in a manner that will preempt state law that would otherwise authorize access to information. This result—the trumping of state law by federal privileges—would reconfigure the boundaries of long-established zones of federal and state authority. If such an outcome is necessary, an institution in which states have a meaningful voice and meaningful protections should accomplish it. An executive branch agency focused on pursuing its enforcement mandate is not that institution.

C. COMMANDEERING

Delegations of the power to privilege also present a more esoteric variety of federalism problem—the threat of commandeering. This is because of the possibility that a federal regulatory evidentiary privilege would apply to the communications of state agencies and state agents and thereby erode the accountability of those agents to their state principals.

Oversight of state agents is, obviously, a matter of core state concern. A federal privilege that shielded the communications of state officials with federal officials or with private parties would insulate state agents from oversight. Consider the delegation contained in Section 6607. This provision lists state attorneys general and state insurance departments as among the parties whose communications may be privileged by regulation.[212] In fact, Labor is authorized to privilege communications not only between or among these individuals, but also between and among any of their agents, consultants, or employees.[213] Labor could also, pursuant to Section 6607, promulgate a regulatory evidentiary privilege that shielded communications between, say, the California insurance commissioner and consultants for the National Association of Insurance Commissioners—a group with close ties to the insurance industry. Depending on their precise structure, such privileges could cover a thick and important slice of the state personnel responsible for the monitoring of health insurance plans.

No single constitutional doctrine neatly applies to the potential erosion of state sovereignty that a regulatory evidentiary privilege

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central to the ACA's implementation and has undertaken weekly phone calls open to all the states as well as numerous meetings with state officials.").

[212] *See infra* Appendix A.

[213] *Id*.

would cause if it shielded such communications from disclosure. But the doctrine that fits best is anti-commandeering doctrine. Anti-commandeering doctrine formed part of the Supreme Court's broader revival of attentiveness to federalism concerns in the 1990s.[214] The core of anti-commandeering doctrine is narrow, requiring only that the federal government "may not compel the States to enact or administer a federal regulatory program."[215] But where it applies, the jurisprudence of anti-commandeering is unforgiving. "Neither the magnitude of the federal interest nor the degree of interference with state prerogatives is relevant. Rather, the doctrinal boundaries constitute what Justice Kennedy calls 'the etiquette of federalism,' and a federal trespass across those boundaries is per se invalid."[216]

Judges and scholars have offered differing justifications for anti-commandeering doctrine. The most prominent is that grounded in considerations of political economy. On this view, embraced by Justice O'Connor in *New York v. United States*, Congress may not undercut state autonomy by rearranging and tangling the lines of political accountability that constrain public officials.[217] Commandeering by the federal government insulates federal officials from accountability for their actions by allowing them to shift responsibility to state officials.[218] This insulation from accountability may run contrary to the preferences of state legislators and state executives—the true principals of these agents.[219] Alternatively, and more cynically, federal regulatory evidentiary privileges may be desired and actively sought by state officials precisely *because* these privileges reduce their public accountability.[220] A second and related theory justifies anti-

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[214] *See* Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism:* New York, Printz, and Yeskey, 1998 SUP. CT. REV. 71, 72 (1998).

[215] Printz v. United States, 521 U.S. 898, 933 (1997) (quoting New York v. United States, 505 U.S. 144, 188 (1992)).

[216] *See* Adler & Kreimer, *supra* note 214, at 72.

[217] *See New York*, 505 U.S. 144 (1992)

[218] *New York*, 505 U.S. at 169 ("[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulations.").

[219] *Id.*

[220] *See New York*, 505 U.S. at 183 ("[P]owerful incentives might lead both federal and state officials to view departures from the federal structure to be in their personal interests. ... If a state official is faced with ... choosing a location [for disposal of radioactive waste] or having Congress direct the choice of a location—the state official may also prefer the latter, as it may permit the avoidance of personal responsibility. The interests of public officials thus may not coincide with the Constitution's

commandeering doctrine by emphasizing its expressive dimensions.[221] On this view, states cannot act as meaningful political counter-weights to the federal government unless state citizens view interactions with state officials as meaningful, rather than perceiving those officials as "simply remote loudspeakers issuing commands provided by some federal official far away."[222]

Regulatory evidentiary privileges applicable to state agents would run afoul of both conceptions of anti-commandeering. Consider a recent and live controversy involving the states, the federal government, and the public. In the run-up to the enactment of the Affordable Care Act, President Obama frequently promised that "if you like your plan, you can keep it."[223] But many plans issued on the individual market fell short of the Act's minimum coverage regulations and cost caps.[224] Millions of these inadequate plans were cancelled in late 2013. Due to steadily mounting public unease regarding these waves of cancellations, President Obama gave a speech in November 2013 stating that state insurance commissioners could authorize insurance companies to continue to sell plans that had been deemed by the federal government not to comply with the Act.[225] Some commissioners took this option; many others declined.[226] Despite the fact that the President had announced the change in federal policy, the ultimate decision on whether to permit the continued sale of noncompliant plans technically rested—and was publicly perceived to rest—with state insurance commissioners, not with the federal government.[227]

Who and what really drove the decisions on this question? Press reports reflected that state insurance commissioners were receiving guidance from Washington on whether or not to let cancelled plans be reissued.[228] Press reports also indicated that state and federal regulators

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intergovernmental allocation of authority. Where state officials purport to submit to the direction of Congress in this manner, federalism is hardly being advanced.").

[221] Adam B. Cox, *Expressivism in Federalism: A New Defense of The Anti-Commandeering Rule?*, 33 LOY. L.A. L. REV. 1309, 1329 (2000).

[222] *Id.*

[223] *See* PolitiFact.com, *Obama: 'If you like your health care plan, you'll be able to keep your health care plan*, available at http://www.politifact.com/obama-like-health-care-keep/, (enumerating 37 instances "in which President Barack Obama or a top administration official said something close to, "If you like your plan, you can keep your plan," referring to health insurance changes under the Affordable Care Act").

[224] *See* Juliet Eilperin, Amy Goldstein, and Lena H. Sun, *Obama Announces Change to Address Health Insurance Cancellations*, WASHINGTON POST (Nov. 14, 2013).

[225] *Id.*

[226] *See* Caroline Humer & Curtis Skinner, *State Insurance Regulators Hesitate to Embrace Obamacare Fix*, REUTERS (Nov. 15, 2013).

[227] *Id.*

[228] *Id.* ("[Wisconsin Deputy Insurance Commissioner Dan Schwartzer] said he was looking to hear back from administration officials as soon as possible with more information that would help Wisconsin decide how to proceed, though he said that

were participating in joint conference calls concerning how to implement the administration's proposed "fix."[229]

Clearly, state insurance commissioners' decisions on whether to let cancelled plans be reissued mattered to the White House. But information about how these decisions were made would also matter to voters—many of whom clearly have strong views on the Affordable Care Act and its implementation. In particular, voters may care about the extent to which the federal government influenced their state insurance commissioners' choices on this question. Some voters may value resistance by local officials to the federally preferred outcome, while others may value acquiescence. In either event, information about the state-federal conversation could influence how ballots are cast on both the state and the national level.

A regulatory evidentiary privilege shielding from disclosure communications between the federal executive branch and the state insurance commissioners around this issue would prevent the public from ever knowing the full story behind how these choices were made.[230] Such a result would tangle the lines of political accountability by allowing state and federal officials to conceal the extent to which federal influence may have dictated an important state-level public policy decision. If it is *per se* unacceptable for the federal government to "direct[] the states to regulate,"[231] it must at least be undesirable for the federal government to be able to conceal communications with state officials in which it may be directing them to regulate. The concealment of such communications also inflicts an expressive harm to public perception of state institutions. Indeed, the mere existence of a privilege covering state-federal communications creates the impression that state officials may be acting as mere "loudspeakers issuing commands provided by some federal official far away."[232] Why have a privilege concealing state-federal communications unless there was something to conceal in those communications—such as, for example, a forbidden federal directive to regulate or enforce in a particular fashion?

This illustration demonstrates the complicated and important ways in which a regulatory evidentiary privilege might affect the political

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like some other states the department had already encouraged insurers to issue early renewals on expiring policies through most of 2014").

[229] *Id*. ("Regulators have had several conference calls in the last two days, including at least one that included officials from CMS, several state insurance department sources said.").

[230] *See* 29 U.S.C. § 1134 (d)-(e) (authorizing Secretary of Labor to promulgate a privilege applicable to communications between the Department of Health & Human Services and a State Insurance Department relating to any inquiry undertaken by any of the agencies).

[231] *New York*, 505 U.S. at 169.

[232] *See* Cox, *supra* note 221, at 1329.

economy surrounding state officials and state institutions. In order for states to serve effectively as counterweights to the federal government, they must be accountable to the public and the public must perceive them as "credible alternative political institutions."[233] It is hard to think of a better way to undercut the accountability and credibility of states as independent political institutions than to subsume state agents within a federal cloak of privilege.

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Section 6607 brings to the fore a basic and vital question: what institution should we choose to author the law of privilege? In Section 6607, Congress chose a new author—the executive branch. The wisdom of this institutional choice is logically prior to, and separate from, the question whether any particular regulatory evidentiary privilege that Labor ultimately promulgates is well crafted and sensible. Put another way, one can and should evaluate a delegation before a delegate starts to wield its delegated power.[234]

This article's evaluation of this new type of delegation has thus far established three major points. First, privilege delegations are a new and important addition to the roster of powers exercised by administrative agencies. Second, the effective achievement of agency objectives often depends in key respects upon the law of evidentiary privileges. Third, one of the chief mechanisms through which Congress elicits agency action—the delegation—will likely generate substantial undesirable outcomes when it is used in the realm of privilege. Giving agencies the power to privilege risks compromising agency accountability, state regulatory interests, and the principles underpinning the anti-commandeering doctrine.

These intermediate conclusions may be useful to policymakers, as they begin the process of drafting regulatory evidentiary privileges; to regulated parties, state officials, and the public more broadly, as they evaluate and assess proposed rules of evidentiary privilege issued by executive agencies for comment; and to the state and federal courts that will ultimately be called upon to opine on the scope and enforceability of such regulatory evidentiary privileges. These intermediate conclusions also provide the necessary foundation for tackling the

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[233] *Id*. at 1312.

[234] *Cf*. Whitman v. Am. Trucking Ass'n, 531 U.S. 457 (2001) ("We have never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute. ... The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory. The very choice of which portion of the power to exercise—that is to say, the prescription of the standard that Congress had omitted—would itself be an exercise of the forbidden legislative authority.").

fundamental challenge at issue here: what body should author the changes to the law of privilege that might be required to permit the effective functioning of an increasingly complex federal administrative state? The next part addresses this question.

IV. PRIVILEGE AND INSTITUTIONAL DESIGN

Institutions matter in administrative law. "Perhaps the central question in administrative law is how decision-making authority should be allocated among political institutions."[235] Privilege law is novel terrain for those concerned with the architecture of administrative governance. But the foregoing analysis suggests some basic design principles that ought to govern the institution charged with generating any new corpus of privilege law that may be applicable to administrative agencies.

First and foremost, the institution must be able to benefit from agency expertise—that is, it ought to be open to accept substantive input from agencies such as the SEC or the Department of Labor on the reforms they believe are necessary to privilege law. As the discussion above has reflected, the dynamics of information flow between and among agencies, state actors, and regulated parties are complex and important enough that agencies need to have a meaningful voice in the process of developing any new set of privilege laws applicable to agencies. Another kind of expertise also has an obvious role to play: expertise in the drafting of privilege rules. Privilege law is complex, and not only in cases where it poses exotic constitutional issues of federalism and commandeering, but also in its simplest, "plain vanilla" incarnation. It would be foolhardy to entrust the creation of new rules of privilege to an institution or entity that lacked specialized knowledge of how privilege law should work.[236]

The remaining design considerations are no less vital. While the institution should be charged with drawing on agency expertise, it is likewise important that the institution not be beholden to those entities, nor subject to indirect Presidential control; otherwise, the resulting privilege rules would likely lean too far in the direction of reducing executive accountability. In this age of increasingly "Presidential

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[235] Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201 (2006) ("Perhaps the central question in administrative law is how decision-making authority should be allocated among political institutions.").

[236] *Cf*. Green, *supra* note 151, at 97-98 (noting, with respect to the CFPB's alterations to the law of selective waiver that, "it seems doubtful that the [CFPB] is the best-positioned body to decide what assumptions should be made and how to strike the necessary balance. The Bureau's natural tendency will be to favor the tangible interest in obtaining privileged information over the intangible, immeasurable interest in promoting candid attorney-client communications.").

administration,"[237] political considerations are playing an evident role in policymaking, and privilege rulemaking is unlikely be an exception from this trend. In addition, the institution's processes ought to be transparent, in the sense that they ought to be open to the public, in order to avoid capture by the many and powerful interests with a stake in the future evolution of the law of privileges. And because privilege law implicates important state interests, the institution's processes should preserve opportunities for state input.

If one were working from scratch, it would be quite a challenge to create such an institution.[238] Fortunately, an institution already exists that satisfies most if not all of the design constraints outlined: the judicial rulemaking process. A special subcommittee of the Advisory Committee on Evidence Rules could easily have been tasked with proposing rules on selective waiver to state and federal agencies and on the privilege applicable to communications between federal agencies, state agencies, and private parties. The judicial rulemaking procedure is open, transparent, apolitical, and expert at considering constitutional values such as federalism. It is accessible to federal agencies, states, and the public, and it is receptive to input from these parties. As an institution, it is has no stake in reducing executive accountability at either the state or federal level, nor is it beholden to an entity with those incentives. Its ultimate work product—proposed rules of privilege that cannot become law unless enacted by Congress—is subject to the political and procedural checks of federalism. And it has expertise highly relevant here—expertise in the enunciation of a fair and trans-substantive set of privilege rules.

It is true that tasking the judicial rulemaking process with the creation of new privilege rules on agency selective waiver and inter-agency privilege might ultimately have resulted in no significant or new privileges being adopted. As the history recounted above suggests, the judicial rulemaking process has been highly resistant to adopting new privileges that would afford special protection to government information or that would tread on state prerogatives.[239] Even assuming the Advisory Committee determines new privileges are necessary,

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[237] Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

[238] One could imagine creating a specialized stand-alone administrative agency (the Federal Evidentiary Privileges Bureau?) charged with developing a trans-substantive set of privilege rules applicable to the rest of the administrative state. The bureau could be required to make its rulemaking processes transparent, to solicit input from the public and from state lawmakers in particular, and to consider the federalism consequences of its regulatory privileges. This idea has some virtues. But it may not go far enough towards shielding the process of privilege rulemaking from being skewed against transparency, nor may it go far enough towards sensitizing this process to federalism concerns.

[239] *See supra* Part II.A.

Congress may not agree. It would not be the first time that had happened: as in the 1970s, Congress may eventually decide that privileges are best forged through the common-law decision-making rather than through positive lawmaking.[240] But that result would not be a failure, but just as much of a success as if Congress did ultimately enact some new set of new privilege rules applicable to selective waiver and to hybrid regulatory structures. By allocating the development of privilege law to the judicial rulemaking process, Congress would ensure that the decision on adopting new privileges was being channeled through an optimally designed institutional process, rather than ensuring that that process would achieve some preferred substantive result that it is not in a position to determine *ex ante*.

Choosing the judicial rule-making process was a simple and obvious option. It would have provided agencies a forum to which they could have made the case that evidentiary privilege law ought to be reformed in order to better serve administrative needs. It would also have retained tried and true institutional and constitutional safeguards on the adoption of new privileges. And it was an off-the-shelf solution, one readily available to lawmakers in 2009 and 2010, when the Affordable Care Act was being deliberated and enacted.

But that is not the avenue that Congress chose. Like in Frost's famous forest, the road not taken here was the road more traveled by. The puzzle is why this choice was made. Why didn't Congress choose to use the existing judicial rulemaking process when it wanted to alter the privilege rules in this instance? Why, instead, by choosing a privilege delegation, did Congress opt for such a disorienting alteration of the existing relations between federal agencies, federal and state courts, federal and state legislatures, and private litigants? It is hard to say, because of the absence of Congressional deliberation around Section 6607. But one story, which is told in the next Part, seeks to throw some light on this puzzle by drawing upon the theoretical and empirical literature on delegation.

V. DELEGATION SWAPS AND PARTY COMPETITION

Many accounts of delegation, as Margaret Lemos has pointed out, have a sizeable blind spot; they conceive of delegation in basically binary terms.[241] On the binary view, the choice of delegation is on or off:

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[240] *See* Imwinkelried, *supra* note 18, at 42-44.

[241] Margaret H. Lemos, *The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 VAND. L. REV. 363, 365 (2010) ("The literature on delegation tends to view Congress's choice as binary: Congress can either resolve policy issues itself or leave the relevant decisions to an agency. There is a third option, however. Congress can and does delegate policymaking discretion to the federal

either Congress delegates or it retains power for itself.[242] But there is also a third player that the binary view ignores: the courts.[243] The federal courts also serve as Congressional delegates, in the sense that they, too, as an alternative to agencies, may be entrusted by Congress with the primary responsibility for articulating and enforcing a substantive body of law.[244] By training attention on the considerations that might drive Congress's choice to delegate to courts rather than to agencies, work by Professor Lemos and others has emphasized that Congress's "choice *of* delegate" is as significant as Congress's "choice *to* delegate."[245]

The example of delegations of the power to privilege casts some new light on this question. What makes Section 6607 interesting from the perspective of delegation theory is not just that Congress chose to delegate or even which delegate it chose. The interesting feature of Section 6607 is that Congress *switched its choice of delegate* over important aspects of privilege law from the judiciary to the executive branch. If "the choice *of* delegate is every bit as important as the choice *to* delegate,"[246] it is also "every bit as important" to understand why Congress would *remake* that important choice.

Neither the case studies nor the formal models of choice of delegate can give a satisfying explanation of why Congress would swap its choice

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courts. Yet, despite the attention that has been heaped on delegations generally, we lack an account of the value—if any—of delegations to courts").

[242] *Id*.

[243] *Id*.

[244] Professor Lemos treats statutes that contain "substantial gaps or ambiguities [and that] give courts primary interpretive authority to resolve those ambiguities" as equivalent to delegations to courts. *See* Lemos, *supra* note 241, at 365 n.6. This may have some functional truth, but there is a certain unsatisfying inconsistency in an approach that, on the one hand, heralds the significance of Congressional choice of delegate but, on the other hand, counts implicit and probably often inadvertent drafting ambiguities as qualifying as "choices." Oddly, Professor Lemos's work ignores what is surely one of the most lucid expressions of a Congressional decision to delegate primary interpretive authority to the courts: Federal Rule of Evidence 501, which directs the federal courts to articulate privilege law by interpreting the common law "in the light of wisdom and experience." Fed. R. Evid. 501 ("The common law—as interpreted *by United States courts* in the light of reason and experience—governs a claim of privilege"). In an earlier article focused on courts as delegates, Professor Lemos similarly omits discussion of privilege law. Instead, her example of an "explicit," "clear-cut," and self-conscious" delegation to the federal courts is the Sherman Act, which does not even mention courts, because that act is so vaguely written. Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 429 (2008) ("The Sherman Act is a clear-cut and self-conscious delegation of lawmaking power to courts. But, as the Court recognized in *Chevron*, not all delegations are so explicit.").

[245] Lemos, *supra* note 241, at 366.

[246] Lemos, *supra* note 241, at 366.

of delegate in this sudden and dramatic way.[247] The best case study of choice of delegate is Professor Margaret Lemos's study of Title VII, a statute that confers authority both upon courts and upon agencies to interpret and implement.[248] Her conclusions are interesting, but admittedly limited.[249] Most saliently for our purposes, because her case study is essentially diagnostic and evaluative rather than predictive, her analysis does not readily suggest what factors would cause Congress to *switch* its choice of delegate, let alone switch its choice of delegate outside the context of Title VII.

The most prominent formal model of choice of delegate is also of limited help here. Professor Stephenson's model treats Congressional choice of delegate as a function of legislators' time horizons, the number of issues salient to legislators, the cost to legislators of policy instability over time and policy incoherence across issues, variance in policy outcomes as between courts and legislators, and the predicted value of policy outcomes to the legislator.[250] For this model to produce a change in choice of delegate, these variables would have to change dramatically enough that they would drive a change in the ultimate choice of delegate. It is possible in theory to imagine such a change occurring.[251] But it is hard to imagine that such a change did in fact drive the enactment of this privilege delegation. For one thing, if legislator preference or aversion to policy variance or the time horizon of legislators changed sharply, one might expect to see symptoms of those changes manifested in many different legislative contexts, not just with the allocation of authority over privilege law. By the same token, there is no reason to think that the Department of Labor, uniquely among all agencies, would have appeared to Congress to be suddenly preferable to

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[247] Lemos, *supra* note 241; Eli Salzberger, *A Positive Analysis of the Doctrine of Separation of Powers, or: Why Do We Have an Independent Judiciary?*, 13 INT'L REV. L. & ECON. 349 (1993).

[248] Lemos, *supra* note 241, at 380-81.

[249] Lemos, *supra* note 241, at 433-34 (explaining how "the allocative choices embodied in Title VII have played out over the statute's life so far"); *id*. at 381 ("Of course, one must hesitate before drawing general conclusions based on a single statute, and I do not suggest that my findings on Title VII necessarily will hold true for other areas of federal law.").

[250] *See* Matthew Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035, 1049-57 (2006). *See also* Daniel A. Farber, *Modeling Coherence, Stability, and Risk Aversion in Legislative Delegation Decisions*, 119 HARV. L. REV. F. 157 (2006) (offering a table identifying the variables in Stephenson's model).

[251] *See* Jacob E. Gersen & Adrian Vermeule, *Delegating to Enemies*, 112 COLUM. L. REV. 2193, 2227 (2012) (describing the fact that preferences can dramatically change but noting that "[t]he whole subject of preference formation and change is poorly understood").

federal courts in terms of the attributes most relevant to the model.[252] In sum, it is difficult to gain traction on the question of why Congress might have chosen to swap delegates in the way that it did here by referring to this formal model.

How, then, shall we understand this switch in Congress's choice of delegate? Perhaps the most satisfying explanation comes from the literature on party competition. As Professors Levinson and Pildes have pointed out, "the practical distinction between party-divided and party-unified government rivals in significance, and often dominates, the constitutional distinction between the branches in predicting and explaining inter-branch political dynamics."[253] Because the "interests of the branches are not intrinsic or stable but rather contingent on shifting patterns of party control, coming in and out of alignment over time," one must understand party competition in order to understand "the politics that separation-of-powers and administrative law seek to govern."[254]

Where delegation is concerned, the party competition perspective suggests that agencies should become more attractive as delegates relative to courts when the party controlling the legislature is the same as the party controlling the agency.[255] This is because "legislators prefer delegation to an agency rather than a court when the ideological distance between legislator and agency is smaller than that between legislator and court."[256] A convenient proxy for assessing that ideological distance is whether the party that controls the agency—the President—is the same as the party that controls Congress.

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[252] *See* Stephenson, *supra* note 250, at 1038 (noting that the achievement of intertemporal risk diversification and interissue consistency would tend to drive delegations to agencies, while achievement of interissue risk diversification and intertemporal consistency would tend to drive delegations to courts).

[253] Daryl Levinson & Richard Pildes, *Separation of Parties, Not Power*, 119 HARV. L. REV. 2311, 2312 (2006).

[254] *Id*. at 2364.

[255] *Id*. at 2357 (Congress "will be much more willing to delegate policymaking authority to an executive branch actor who shares, or can be kept in line with, its policy preferences. This leads to the prediction that Congress will delegate more authority to the executive branch when government is unified than when it is divided. Empirical studies confirm this prediction."). The converse is also true: "[e]mpirical studies confirm that Congress not only delegates significantly less authority to the executive branch during periods of divided government, but also further limits the discretion of executive agencies by binding them with more restrictive procedural constraints." *Id*. at 2341.

[256] *See* Stephenson, *supra* note 250, at 1043. Professor Stephenson's model also reflects that "the legislative interest in delegating to the agency decreases with the expected distance between the agency's decision and the legislator's most preferred decision and that a similar result holds for courts," though this consideration will not always be paramount. *See* Matthew Stephenson, *The Legislative Choice Between Agencies and Courts: A Response to Farber and Vermeule*, 119 HARV. L. REV. F. 183, 187 (2006).

The delegation swap effectuated by Section 6607 is most easily understood when viewed in this "new and more realistic light"[257] of party competition. Through Section 6607, Congress named as its delegate the Department of Labor, a non-independent executive agency over which Congress and the President could exert control, and thereby replaced a delegate—the federal courts—that is far more insulated from partisan political control. This delegation swap occurred during a brief interval of time where one party controlled both houses and the Presidency. (In sharp contrast, when Congress enacted Federal Rule of Evidence 501 in 1975, Gerald Ford, a Republican, held the Presidency while Democrats controlled Congress—a configuration that would have made delegation to courts, not to executive agencies, more desirable.) As a conception of delegation rooted in party competition would suggest, Congress cared *less* about keeping power away from the executive and *more* about ensuring party control over the ultimately selected delegate. Furthermore, it is also consistent with the party-competition model that this delegation swap occurred in a context where effective Democratic control of Congress was precarious (in the sense that Senate Democrats were on the verge of losing—and in fact lost—their filibuster-proof majority), whereas Democratic control of the executive branch, recently occupied by a charismatic and popular President, correctly appeared more secure. As Professors Levinson and Pildes predicted, that political landscape ought to have produced particularly broad delegations from Congress to the executive as Democrats in Congress sought to reallocate power to the politically safer executive branch.[258] One can extend that observation to predict that in such a scenario one would also see a Democratic Congress shifting power away from federal courts and to the more safely Democratic executive branch—exactly as occurred with Section 6607.

The party-competition account of delegation may also help to answer the puzzle alluded to above: how was it that the recipient of the first-ever delegation of the power to privilege was the Secretary of Labor and not the SEC—an agency that has agitated so long and so hard for changes to the law of privilege?[259] One plausible explanation for this

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[257] Levinson & Pildes, *supra* note 253, at 2315.

[258] Levinson & Pildes, *supra* note 253, at 2362 ("A Democratic Congress delegating to a Democratic executive branch will be reassured by the availability of the legislative veto only to the extent it believes that the Republicans will sooner recapture the presidency than Congress itself. If it is Congress that is under greater threat (say, because partisan control of one chamber is precariously balanced), then we should expect incumbent MCs both to prefer broad delegations to the more safely Democratic executive and to welcome the abrogation of tools of ongoing congressional control as in the *Chadha* and *Bowsher* decisions.")

[259] Levinson & Pildes, *supra* note 253, at 2358 ("[N]either the Court nor the unitarian theorists pause to wonder why Congress does not *always* aggrandize itself by creating or delegating to agencies insulated from presidential control, rather than voluntarily

choice is that the SEC, unlike the Department of Labor, is an independent agency.[260] The party-competition model would predict that a Democratic Congress and Democratic President would choose to delegate a new and important power to an agency that they could more easily control. "When Congress confronts a President who disagrees with its policy objectives, ... it directs its delegations to the executive branch actors most insulated from presidential control, and perhaps also most susceptible to congressional control."[261] The converse should also be true: Congress will prefer to delegate to executive branch actors subject to political control—and not to independent agencies or to federal courts—when the President and Congress are in agreement on policy objectives.

Section 6607 is thus a fresh demonstration of the importance of attending to how party competition might be shaping the fundamental structures of administrative government. Going forward, Section 6607 offers an opportunity to observe the unfolding of a unique experiment in the law of delegation, an experiment that could fill in an important and persistent gap in our understanding of how Congress structures the administrative state through choice of delegate.[262] By observing how these aspects of privilege law develop now that they have been handed over the Secretary of Labor, we have the chance to test whether and to what extent Congress's choice of delegate truly matters. Put differently,

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giving up power to its institutional archrival by delegating to executive agencies. Has Congress lost sight of its own institutional interests?").

[260] "Generally defined as entities whose heads enjoy (or are believed to enjoy) for-cause removal protection, these agencies include the Commodity Futures Trading Commission (CFTC), National Labor Relations Board (NLRB), and Securities and Exchange Commission (SEC)." Kirti Datla & Richard Revesz, *Deconstructing Independent Agencies*, 98 CORNELL L. REV. 769 (2013). Datla & Revesz argue that independence, rather than being a binary trait, in fact is a continuum: "[a]ll agencies are subject to presidential direction in significant aspects of their functioning, and are able to resist presidential direction in others. The continuum ranges from most insulated to least insulated from presidential control. An agency's place along that continuum is based on both structural insulating features as well as functional realities. And that placement need not be static. It can shift depending on statutory amendments or an increased (or decreased) presidential focus on the agency's mission. On this view, an agency gains the ability to resist presidential influence from its enabling statute, rather than from its classification."

[261] Levinson & Pildes, *supra* note 253, at 2358.

[262] Lemos, *supra* note 241, at 272 ("Despite the voluminous literature on delegations, we know strikingly little about the considerations that guide (or ought to guide) Congress's choice of delegate, and even less about the likely consequences of that decision."); Stephenson, *supra* note 250, at 1042 ("Despite the extensive positive literature on legislative delegation and the voluminous normative literature on how courts should allocate interpretive authority between themselves and administrative agencies, there has been relatively little positive analysis of the factors that would influence legislative preferences between delegating to agencies and delegating to courts.").

we will be able to assess how the corpus of privilege law produced by courts compares with the corpus of privilege law that will eventually be produced by agencies. Will temporal consistency diminish while inter-issue consistency increase, as would be suggested by Professor Stephenson's model? Will agencies and courts produce bodies of law that are in important respects similar, as Professor Lemos's case study would suggest? Finally—looking beyond the law of privilege—will other delegation swaps from courts to non-independent agencies occur when one party controls both of the political branches? As noted above, one can hypothesize that decisions to swap in agencies for courts as delegates are likelier to occur when one party controls both Congress and the Presidency, and that they are particularly likely to occur when party control of either chamber of Congress seems fragile. If and when Congress undertakes other delegate swaps, one can test whether this hypothesis proves to be sound.

CONCLUSION

Delegations of the power to privilege could fundamentally transform the flow of information to, from, and about the modern administrative state. Even if a privilege delegation does not technically cross any strict constitutional line, it nonetheless implicates core constitutional concerns—federalism, inter-branch checking, and the bargained-for exchange of agency power for agency accountability that underpins the legitimacy of the modern administrative state. It is not the sort of law that should go unnoticed. Yet in the nearly ten thousand scholarly and popular articles written to date about the Affordable Care Act, there is not one that contains any substantive discussion of either privilege delegations or of Section 6607.[263] This article's goal is to begin that conversation.

[263] *See supra* note 5.

APPENDIX A: SECTION 6607

Section 6607, Permitting evidentiary privilege and confidential communications[264]

Section 504 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1134) is amended by adding at the end the following:

(d) The Secretary may promulgate a regulation that provides an evidentiary privilege for, and provides for the confidentiality of communications between or among, any of the following entities or their agents, consultants, or employees:

(1) A State insurance department.

(2) A State attorney general.

(3) The National Association of Insurance Commissioners.

(4) The Department of Labor.

(5) The Department of the Treasury.

(6) The Department of Justice.

(7) The Department of Health and Human Services.

(8) Any other Federal or State authority that the Secretary determines is appropriate for the purposes of enforcing the provisions of this [subchapter].[265]

(e) The privilege established under subsection (d) shall apply to communications related to any investigation, audit, examination, or inquiry conducted or coordinated by any of the agencies. A communication that is privileged under subsection (d) shall not waive any privilege otherwise available to the communicating agency or to any person who provided the information that is communicated.

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[264] Section 6607, Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, 781-82 (2010).

[265] The statute referred to "this title." *See* 124 Stat. 119, 781-82. As codified at 29 U.S.C. § 1134(d)-(e), it refers to "this subchapter," i.e., Title 29, Ch. 18, Subch. I—Protection of Employee Benefits Rights.