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## ARTICLE

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### THE POWER TO PRIVILEGE

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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 judicial opinion. The type of law that Congress has now authorized agencies to create—the regulatory evidentiary privilege—is a true novelty in our legal system.*

*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: 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 to further their substantive mandates.*

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*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, this Article offers some design principles that should govern the institution chosen to draft any new set of privileges that may be invoked by executive branch agencies and explains that the existing judicial rulemaking system fits well with these principles. Finally, this 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. Embedded within the Patient Protection and Affordable Care Act (ACA)<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> The Department of Labor is also authorized to privilege communications between “[a]ny other Federal or State authority,” as long as—in the Secretary’s determination—the extension of the privilege is “appropriate” for the purposes of enforcing ERISA’s employee benefit provisions.<sup>4</sup> The power to

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<sup>1</sup> See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 6607, 124 Stat. 119, 781-82 (2010) (codified at 29 U.S.C. § 1134(d)-(e) (2012)) (“Permitting Evidentiary Privilege and Confidential Communications”); see also *infra* Appendix for the full text of this provision.

<sup>2</sup> See generally *Nat’l Fed’n of Indep. Bus. v. Sebelius (NFIB)*, 132 S. Ct. 2566 (2012) (addressing the constitutionality of the individual mandate).

<sup>3</sup> 29 U.S.C. § 1134(d)-(e). The insurance regulators’ organization is the National Association of Insurance Commissioners, an interest group comprised of elected or appointed insurance commissioners from the states, the District of Columbia, and some U.S. territories. See Timothy Stoltzfus 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”); see also *About the NAIC*, NAT’L ASS’N OF INS. COMMISSIONERS & CENTER FOR INS. POL’Y RES., [http://www.naic.org/index\\_about.htm](http://www.naic.org/index_about.htm) (last visited Nov. 7, 2014), archived at <http://perma.cc/STU7-QG9L> (describing NAIC as “the U.S. standard-setting and regulatory support organization created and governed by the chief insurance regulators” from across the United States).

<sup>4</sup> 29 U.S.C. § 1134(d)-(e).

privilege entrusted to the Department of 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.<sup>5</sup> Yet this provision could (eventually<sup>6</sup>) prove 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.<sup>7</sup> 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 judicial opinion. Section 6607 bestows on federal 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 an agency and regulated entities, an agency could more easily induce regulated parties to cooperate with its investigations. An agency could also more comfortably coordinate its activities with other agencies, state entities, or 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 be valuable 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

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<sup>5</sup> As of this writing, Westlaw's news and scholarship reference databases show nearly 10,000 newspaper and scholarly articles containing the terms "ObamaCare" or "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*, CONG. Q, Mar. 23, 2010, 2010 WLNR 6035121 (describing section 6607 as "[a]uthoriz[ing] 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.

<sup>6</sup> As of this writing, no regulations have been promulgated or proposed pursuant to section 6607.

<sup>7</sup> *See NFIB*, 132 S. Ct. at 2598 (holding that the individual mandate "need not be read to do more than impose a tax").

from Congress and the courts, on the one hand, to the executive branch, on the other.

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.<sup>8</sup> And scholarship on privilege law starts from the widely shared initial premise that Congress and the courts, as opposed to executive agencies, will control the substance of federal evidentiary privileges.<sup>9</sup> 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 an invitation to mischief. Executive agencies resist compliance with open government laws, and they overutilize 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

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<sup>8</sup> 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 accompanying notes 16-19 (describing the adoption of Federal Rule of Evidence 501); *infra* note 264 and accompanying text (describing scholarship on courts as delegates).

<sup>9</sup> One scholar has argued for federalization of the law of attorney–client privilege but contended that it should be federalized by statute without broaching the possibility of a preemptive regulatory privilege. See Timothy P. Glynn, *Federalizing Privilege*, 52 AM. U. L. REV. 59, 133 (2002) (“The only way to achieve reasonable certainty in privilege law is to enact federal legislation providing clear, national protections for attorney–client communications that will apply regardless of the fortuity of the forum—state, federal, or nonjudicial—in which the privilege is asserted.”); see also *id.* at 63 n.10 (collecting sources assuming statutory, rather than 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: the courts and Congress. Kenneth W. Graham, Jr., *Government Privilege: A Cautionary Tale for Codifiers*, 38 LOY. L.A. L. REV. 861, 864-65 (2004).

(e.g., open government laws) or litigant access to private information (e.g., rules of discovery). As much literature on administrative federalism suggests, federal agencies will likely prioritize achieving their substantive mandates over the federalism harms of preempting such state rules.<sup>10</sup> The result is likely to be a greater volume of privileges with a concomitantly greater degree of displacement of state law than if Congress and the courts retained the privilege pen.

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 only 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 needs of federal administrative agencies. The existing judicial rulemaking process fits well with these principles, and it could easily be charged with drafting new proposed privileges for Congress's consideration.

Of course, that is not the option that Congress chose when it enacted section 6607. 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 Congress did not merely select a delegate in section 6607; 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

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<sup>10</sup> See *infra* notes 207-209 and accompanying text.

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 lays out design principles that should govern the institutional process responsible for creating any new evidentiary privileges applicable to administrative agencies. Finally, Part V examines section 6607 in light of various competing accounts of why and to whom Congress chooses to delegate.

### I. THE SOURCES OF PRIVILEGE LAW

Where do privileges come from?<sup>11</sup> 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 govern in the federal courts.<sup>12</sup> Ordinarily, rules written by the Court take effect if Congress does not veto them within a certain time period.<sup>13</sup> The rules of evidentiary privilege are, however, carved out from this process.<sup>14</sup> Rules of evidentiary privilege take effect only if enacted by Congress; they do not become law by virtue of congressional inaction.<sup>15</sup>

At first blush, Congress's decision to place privilege law in this special category might seem to reflect a choice by Congress to retain more control over privilege law than it was choosing to retain over other procedural and

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<sup>11</sup> See 1 EDWARD J. IMWINKELRIED, *THE NEW WIGMORE: A TREATISE ON EVIDENCE: EVIDENTIARY PRIVILEGES* § 1.1 (2002) (“[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.” (footnote omitted)).

<sup>12</sup> See 28 U.S.C. § 2072(a) (2012) (“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.”).

<sup>13</sup> *Id.* § 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.”).

<sup>14</sup> See *id.* § 2074(b) (“Any such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress.”).

<sup>15</sup> *Id.*

evidentiary rules.<sup>16</sup> In fact, however, Congress delegated substantial power over this body of law to the federal courts.<sup>17</sup> 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 rule prescribed by the Supreme Court.<sup>18</sup> By thus letting common law decisionmaking by federal courts set the content of federal privilege law, Congress was able to avoid the difficult task of drafting a set of statutory privilege rules that would please the many powerful interest groups with a stake in the shape of federal privilege law.<sup>19</sup>

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<sup>16</sup> For some background 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 is to depart from tradition and enact rules on 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.

120 CONG. REC. 2391 (1974) (statement of Rep. Elizabeth Holtzman).

<sup>17</sup> 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” (footnote omitted)); Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 700 (1988) (“[T]he major purpose of those who wrote and defended the bill that became the Enabling Act was to allocate power to make federal law prospectively between the Supreme Court as rulemaker and Congress . . .”). For more on the significance of the choice of courts as delegate, see sources cited *infra* note 264.

<sup>18</sup> FED. R. EVID. 501. The rule further provides that in civil cases, state privilege law should apply to claims or defenses governed by state law. *Id.*

<sup>19</sup> 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

The upshot of Rule 501 is that evidentiary privileges in federal law today have two basic sources: (1) the common law as expounded by the federal courts and (2) 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 decisionmaking by federal courts.<sup>20</sup> And because 28 U.S.C. § 2074 makes Supreme Court rules concerning evidentiary privilege ineffective unless approved by statute, the “rules prescribed by 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 decisionmaking.

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.<sup>21</sup> These include several privileges that are specifically or exclusively available to the executive branch,<sup>22</sup> as well as many

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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.* (footnotes and citations omitted).

<sup>20</sup> 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 decisionmaking. *See, e.g.*, *United States v. Nixon*, 418 U.S. 683, 711-13 (1974) (developing the presidential communications privilege by holding that the President’s general assertion of privilege must yield to the specific need for criminal evidence).

<sup>21</sup> *See* Imwinkelried, *supra* note 19, at 51-56 (describing how the judiciary construed Rule 501 to include a robust set of privileges that Congress balked at specifying for political reasons).

<sup>22</sup> *See* Gerald Wetlaufer, *Justifying Secrecy: An Objection to the General Deliberative Privilege*, 65 IND. L.J. 845, 845 n.3 (1990) (enumerating state secrets, presidential communications, ongoing investigations, and informant’s privilege as among those privileges available to the executive but unavailable to private litigants); *see also* 2 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE §§ 5:53-5:64 (3d ed. Supp. 2012) (describing privileges for state secrets, deliberative process, law enforcement, presidential communications, and informer’s identity).

privileges that are available to all litigants, including the executive branch. Either way, federal case law sets the metes and bounds of the privilege.

Consider the deliberative process privilege. Through common law decisionmaking, 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,”<sup>23</sup> as long as the communications are predecisional.<sup>24</sup> Communications between an agency and certain sorts of extra-agency parties may be privileged,<sup>25</sup> while other communications may not be.<sup>26</sup> The privilege is qualified in the sense that a court may disregard it if the government’s litigation adversary shows a strong need,<sup>27</sup> and it is limited in the sense that “if the government can segregate and disclose non-privileged factual information within a document, it must.”<sup>28</sup> In all events, the government bears the burden of establishing the elements of the privilege.<sup>29</sup>

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 of the evidentiary privileges recognized by federal law.

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<sup>23</sup> *Dep’t of the Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8 (2001) (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975)) (internal quotation marks omitted).

<sup>24</sup> See *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.”).

<sup>25</sup> See *Klamath Water Users*, 532 U.S. at 10-11 (describing the “consultant corollary” to the deliberative process privilege, which extends the privilege to cover communications between agencies and their outside consultants).

<sup>26</sup> *Id.* at 12 (refusing to apply “consultant corollary” to communications between the government and Indian tribes that were “necessarily communicat[ing] with the [government] with their own, albeit entirely legitimate, interests in mind”).

<sup>27</sup> See *In re Sealed Case*, 121 F.3d at 737 (“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.” (footnote omitted)). In Freedom of Information Act (FOIA) litigation, however, the privilege is absolute as a formal matter. See *EPA v. Mink*, 410 U.S. 73, 84 (1973) (holding that documents requested under FOIA did not have to be disclosed pursuant to the “national defense or foreign policy” exception when those documents had been classified by executive order), *superseded by statute*, Freedom of Information Act, Pub. L. No. 93-502, 88 Stat. 1561 (1974), as recognized in *CIA v. Sims*, 471 U.S. 159 (1985).

<sup>28</sup> *Loving v. Dep’t of Def.*, 550 F.3d 32, 38 (D.C. Cir. 2008) (citation omitted).

<sup>29</sup> See *Mink*, 410 U.S. at 93 (“The burden is, of course, on the agency resisting disclosure . . .”).

B. *Statutory Privileges*

Statutes affecting confidentiality, secrecy, and privilege crop up in random contexts scattered throughout the U.S. Code.<sup>30</sup> 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 government files on private individuals, such as tax returns.<sup>31</sup> But most of these statutes merely require confidentiality and do not create true evidentiary privileges.<sup>32</sup> For example, in *Jicarilla Apache Nation v. United States*, the Court of Federal Claims held that a provision of the Indian Mineral Development Act requiring 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.<sup>33</sup> On that basis, the court ordered the Department of the Interior to produce the information to its litigation adversaries.<sup>34</sup>

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<sup>30</sup> See MUELLER & KIRKPATRICK, *supra* note 22, § 5:5 (3d ed. 2007) (discussing privileges created by the Constitution, statutes, or court rules); John A. Fraser III, *Sixty Years of Touhy*, FED. LAW., Mar. 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” (footnotes omitted)).

<sup>31</sup> See 12 JOHN BOURDEAU ET AL., FEDERAL PROCEDURE: EVIDENCE § 33.270 (2010) (collecting examples of statutes creating federal privileges).

<sup>32</sup> As one influential treatise explains, a statute rendering material confidential may be relevant to whether the material is shielded by privilege, but a statute requiring confidentiality does not itself create privilege. 26 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5662 (1992). 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.

*Id.* (footnote omitted); see 23 *id.* § 5437 (1980) (“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.”).

<sup>33</sup> 60 Fed. Cl. 611, 612, 614 (2004).

<sup>34</sup> *Id.*

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.”<sup>35</sup> These stand-alone privileges were enacted by Congress to further specific policy purposes. A rare example of a statutory privilege was discussed in *Baldrige v. Shapiro*, a case that concerned statutory provisions that exempted from disclosure certain information collected by the Bureau of the Census.<sup>36</sup> The Supreme Court held that “[n]o discretion [was] provided to the Census Bureau on whether or not to disclose the information referred to in [those provisions].”<sup>37</sup> In evaluating whether these sections of the statute created a privilege, the Court reasoned that they “embody explicit congressional intent to preclude *all* disclosure of raw census data reported by or on behalf of individuals” and concluded that “[t]his strong policy of nondisclosure indicates that Congress intended the confidentiality provisions to constitute a ‘privilege’ within the meaning of the Federal Rules.”<sup>38</sup> In other words, Congress had created a true privilege in the *Baldrige* statute.

The Supreme Court considered another stand-alone federal statutory privilege in *Pierce County v. Guillen*.<sup>39</sup> In that case, a federal statute, 23

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<sup>35</sup> 23 WRIGHT & GRAHAM, *supra* note 32, § 5437 (1980). What turns on the label “privilege”? This characterization has significant effects:

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.

*Id.* (footnotes omitted).

<sup>36</sup> 455 U.S. 345, 347 (1982). The information at issue in *Baldrige* was the “master address register,” described as

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.

<sup>37</sup> *Id.* at 355.

<sup>38</sup> *Id.* at 361.

<sup>39</sup> 537 U.S. 129 (2003).

U.S.C. § 409, shielded materials collected by state public works departments or agencies from discovery or admission into evidence in cases concerning accident sites or hazardous road conditions.<sup>40</sup> The Court held that the statute fell within the scope of Congress's Commerce Clause power, precluding the plaintiff from obtaining the materials he sought in his state court action.<sup>41</sup>

Other examples of statutory privileges address similarly diverse circumstances.<sup>42</sup> 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."<sup>43</sup> 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 such privileges supplement those developed by the 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.<sup>44</sup> Enacted in 1789, this prosaically titled statute gave executive officers of the federal government the authority to set up offices and maintain government files.<sup>45</sup> In 1900, however, the Housekeeping Act assumed a new importance after the Court's decision in *Boske v. Comingore*.<sup>46</sup> In *Boske*, a state tax collector sought to obtain federal tax records from a federal tax collector to use against an alcohol distillery.<sup>47</sup> Treasury regulations forbade the federal tax

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<sup>40</sup> *Id.* at 133-36.

<sup>41</sup> *Id.* at 146-48. The Court also held that the statute was a proper exercise of Congress's Commerce Clause authority. *Id.* at 146-47.

<sup>42</sup> For a collection, see 23 WRIGHT & GRAHAM, *supra* note 32, § 5437 (1980).

<sup>43</sup> Proposed Fed. R. Evid. 501 advisory committee's note, 46 F.R.D. 161, 243-48 (1969).

<sup>44</sup> See 5 U.S.C. § 301 (2012) ("The 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."); see also 26A WRIGHT & GRAHAM, *supra* note 32, § 5682 (noting that it "quickly became a common practice of government attorneys" to rely on the Housekeeping Act and regulations promulgated pursuant to that act as justification for withholding government information from courts).

<sup>45</sup> H.R. REP. NO. 85-1461 (1958), reprinted in 1958 U.S.C.C.A.N. 3352, 3352-53.

<sup>46</sup> 177 U.S. 459 (1900).

<sup>47</sup> *Id.* at 461-62.

collector from producing those records to a state court.<sup>48</sup> 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.<sup>49</sup> The Court held that the Secretary of the Treasury could require that all decisions concerning 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.<sup>50</sup> Nonetheless, many executive branch officials construed *Boske* as authority to issue regulations that “privileged” information.<sup>51</sup> By the mid-twentieth century, agencies were routinely using regulations promulgated pursuant to the Housekeeping Act to decline to produce information in response to a subpoena or court order.<sup>52</sup>

The Supreme Court’s 1951 decision in *United States ex rel. Touhy v. Ragen*<sup>53</sup> offered oblique support for the executive’s position. The facts of *Touhy* were quite similar to those in *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 their production.<sup>54</sup> The district court held the agent in contempt.<sup>55</sup> 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.<sup>56</sup> The Supreme Court affirmed, holding that that the trial court could not cite a subordinate executive department official for contempt when he had no option but to

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<sup>48</sup> *Id.* at 462-63.

<sup>49</sup> *Id.* at 463-65, 469-70.

<sup>50</sup> *See 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.”).

<sup>51</sup> Graham, *supra* note 9, at 891 (describing how government lawyers interpreted *Boske* “as giving bureaucrats the power to create evidentiary privileges by regulations issued under the Housekeeping Act”).

<sup>52</sup> *See* John T. Richmond, Jr., Note, *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”).

<sup>53</sup> 340 U.S. 462 (1951).

<sup>54</sup> *Id.* at 464-65.

<sup>55</sup> *Id.* at 465.

<sup>56</sup> *Id.* at 465-66 (internal quotation marks omitted).

comply with the Department of Justice regulation.<sup>57</sup> 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.<sup>58</sup>

Following *Touhy*, executive agencies wrote scores of regulations limiting disclosure of government information in response to subpoenas. Federal agencies routinely relied upon these regulations, usually described as "*Touhy* regulations," to avoid complying with federal discovery requests.<sup>59</sup> Challenging the invocation of *Touhy* regulations was an arduous enough endeavor that "*Touhy* temporarily created a privilege-in-effect."<sup>60</sup>

From its inception, this practice faced sharp criticism. The Federal Rules of Civil Procedure, adopted in 1934, had made the government subject to ordinary discovery procedures.<sup>61</sup> Courts began to insist more frequently that "the judiciary, and not the executive branch, possessed the ultimate authority to evaluate privilege claims"<sup>62</sup> and began to reject *Touhy* regulations that would otherwise block discovery requests aimed at the government.

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."<sup>63</sup> To address this problem, Congress amended the Housekeeping Act in 1958 to state specifically that the act "does not authorize withholding information from the public or limiting the

<sup>57</sup> *Id.* at 468-70.

<sup>58</sup> *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.")

<sup>59</sup> See Richmond, *supra* note 52, at 181 (noting that most lower court interpretations of *Touhy* have allowed "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.")

<sup>60</sup> Edward J. Imwinkelried, *The Government's Increasing Reliance on—and Abuse of—the Deliberative Process Evidentiary Privilege: "[T]he Last Will Be First,"* 83 MISS. L.J. 509, 515 (2014); see also Wetlaufer, *supra* note 22, at 863 ("Thus, at least until its amendment in 1958, the Housekeeping Act was read, in effect, to empower the federal executive to create, through its own internal regulations, an absolute privilege-in-effect that permitted the executive to keep documents secret from the courts when, in its judgment, disclosure would be contrary to the public interest.")

<sup>61</sup> See 26A WRIGHT & GRAHAM, *supra* note 32, § 5682 ("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.")

<sup>62</sup> Mark S. Wallace, Note, *Discovery of Government Documents and the Official Information Privilege*, 76 COLUM. L. REV. 142, 146 (1976); see *id.* at 146 n.23 (collecting cases from the 1940s and 1950s).

<sup>63</sup> H.R. REP. NO. 85-1461 (1958), reprinted in 1958 U.S.C.A.N. 3352, 3353.

availability of records to the public.”<sup>64</sup> 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 statutes that the executive relied upon were often enacted specifically in order to augment, not contract, government openness.<sup>65</sup> Courts and commentators have given these repackaged *Touhy* claims short shrift.<sup>66</sup> 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.”<sup>67</sup> The consensus view became that the “housekeeping privilege,” if it ever existed, was defunct.<sup>68</sup>

In the modern era, sporadic claims have surfaced that one statute or another confers upon an agency the authority to privilege materials by promulgating regulations. These claims have not met with much success.<sup>69</sup>

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<sup>64</sup> 5 U.S.C. § 301 (2012); see 26A WRIGHT & GRAHAM, *supra* note 32, § 5682 (“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.” (footnotes omitted)).

<sup>65</sup> See, e.g., *Dean v. Veterans Admin. Reg'l Office*, 151 F.R.D. 83, 84 (N.D. Ohio 1993) (discussing a *Touhy* regulation promulgated pursuant to the Ethics in Government Act); *Res. Invs., Inc. v. United States*, 93 Fed. Cl. 373, 381 (2010) (discussing a *Touhy* regulation limiting disclosure purportedly promulgated pursuant to “the Freedom of Information Act, the dominant objective of which is disclosure, not secrecy” (citation and internal quotation marks omitted)).

<sup>66</sup> See, e.g., *Hous. 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.” (citations omitted)); *Res. Invs.*, 93 Fed. Cl. at 380-82 (rejecting the government’s claim that *Touhy* regulations or regulations promulgated pursuant to the Ethics in Government Act constituted an evidentiary privilege); see also *Watts v. SEC*, 482 F.3d 501, 508 & n.\* (D.C. Cir. 2007) (explaining that Federal Rule of Civil Procedure 45’s “undue burden” standard, rather than the APA’s “arbitrary and capricious” standard, applies when a court reviews an agency’s decision not to comply with a federal court subpoena); *Exxon Shipping Co. v. U.S. Dep't of Interior*, 34 F.3d 774, 777-78 (9th Cir. 1994) (holding that neither *Touhy* nor the Housekeeping Statute permits a federal agency to forbid an agency employee from complying with a court’s subpoena).

<sup>67</sup> *Res. Invs.*, 93 Fed. Cl. at 380.

<sup>68</sup> See 26A WRIGHT & GRAHAM, *supra* note 32, § 5682 (“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.” (footnotes omitted) (internal quotation marks omitted)).

<sup>69</sup> See, e.g., *Nw. Mem'l Hosp. v. Ashcroft*, 362 F.3d 923, 926 (7th Cir. 2004) (holding that a regulation promulgated pursuant to Health Insurance Portability and Accountability Act (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 a Federal

Courts have insisted that absent some clear indication 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.<sup>70</sup>

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 agencies without a crystal-clear congressional statement.<sup>71</sup>

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Reserve regulation forbidding a party from complying with a “subpoena, order, or other judicial process . . . exceeds the congressional delegation of authority and cannot be recognized by this court”).

Two district court opinions have found a statute to authorize an agency to privilege information by regulation. The first case concerned 49 U.S.C. § 114(s) (Supp. IV 2002), which ordered the Transportation Security Administration (TSA) to adopt regulations prohibiting disclosure of “sensitive security information.” A California district court held that this statute authorized the TSA to privilege such information from discovery. *See Chowdhury v. Nw. Airlines Corp.*, 226 F.R.D. 608, 615 (N.D. Cal. 2004) (“The plain language of [49 U.S.C. § 114(s)] creates an evidentiary privilege for information the TSA determines would be detrimental to air safety if disclosed.”); *see also In re Sept. 11 Litig.*, 236 F.R.D. 164, 169-70 (S.D.N.Y. 2006) (describing the genesis of TSA regulations). The second case concerns 31 U.S.C. § 5318(g) (2000), 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) (2001), 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. 195 F. Supp. 2d at 389. These statutes are 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 its kind.

<sup>70</sup> 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 at 470 (citation omitted); *see id.* (“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.”); *NLRB v. Heath Tec Div./S.F.*, 566 F.2d 1367, 1371 (9th Cir. 1978) (noting that the “mere existence” of 29 C.F.R. § 102.118 “by itself was not enough to create any recognized evidentiary privilege” (citing *NLRB v. Seine & Line Fisherman’s Union of San Pedro*, 374 F.2d 974, 980 (9th Cir. 1967))).

<sup>71</sup> *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

The language of section 6607 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.<sup>72</sup> Before studying this innovation through a normative lens,<sup>73</sup> 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?<sup>74</sup>

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 Freedom of Information Act (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 govern whether a document was exempt from the Act.<sup>75</sup> If a newly coined federal

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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." (citations omitted). 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 1367, 1372, 1375 (D.C. Cir. 1984) (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 for the SEC (through a regulation)").

<sup>72</sup> 29 U.S.C. § 1134(d)-(e) (2012).

<sup>73</sup> See *infra* Part III.

<sup>74</sup> This discussion brackets the possibility that a regulatory evidentiary privilege might be drafted in a way so that it is substantively unconstitutional due to due process or Article III constraints on privilege law. Certain constitutional constraints limit all privileges, whether common law, statutory, or regulatory in form. See *United States v. Nixon*, 418 U.S. 683, 712 (1974) (rejecting assertion of executive privilege because "the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts"). Drafting a regulatory evidentiary privilege in compliance with these capacious constitutional limits should not be difficult, as the existing corpus of statutory and common-law privileges demonstrates.

<sup>75</sup> See 5 U.S.C. § 552(b)(5) (2012) (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"); *FTC v. Grolier Inc.*, 462 U.S. 19, 26 (1983) ("Exemption 5 requires reference to whether discovery would normally be required during litigation *with the agency*"). See generally *NLRB v.*

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.<sup>76</sup>

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, the rule provides that “[t]he common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege” unless a federal statute or other enumerated authority provides otherwise.<sup>77</sup> 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.”<sup>78</sup> A regulatory evidentiary privilege 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, as could a tort lawsuit in state court that sought discovery of communications between a regulated entity and its federal regulator. In the event that a federal regulatory

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Sears, Roebuck & Co., 421 U.S. 132 (1975) (discussing when Exemption 5 would apply to advice and appeals memoranda explaining decisions by the general counsel of the NLRB).

<sup>76</sup> See *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.”); see also *Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8-9 (2001) (explaining that the purpose of Exemption 5 is to protect and encourage candid deliberations among government officials).

<sup>77</sup> FED. R. EVID. 501.

<sup>78</sup> 23 WRIGHT & GRAHAM, *supra* note 32, § 5437 & n.44 (explaining that, while the exception in Federal Rule of Evidence 501 generally does not include administrative regulations purporting to create a privilege, the exception *would* include administrative regulations governing privilege where Congress explicitly authorizes the making of such regulations).

evidentiary privilege more generously shielded materials than applicable state law, what law would a state court apply?

The starting point for analyzing this issue is the Supremacy Clause.<sup>79</sup> Because of the supremacy of federal law, federal regulations can preempt state law.<sup>80</sup> In addition, federal statutes regarding privileges can preempt contrary state law even in state court proceedings.<sup>81</sup> Taken together, these propositions suggest 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.<sup>82</sup> Indeed, for 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 much worthless; a parallel state suit could force disclosure of the information purportedly “shielded” by the federal regulatory evidentiary privilege.<sup>83</sup>

The next question is how a federal regulatory evidentiary privilege would apply to a state law claim in federal court. The starting point for

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<sup>79</sup> U.S. CONST. art. VI, § 2.

<sup>80</sup> See *Fid. Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982) (“Federal regulations have no less pre-emptive effect than federal statutes.”).

<sup>81</sup> See *Pierce Cnty. v. Guillen*, 537 U.S. 129, 145-47 (2003) (holding that a federal statute regulating the admission of evidence in state court actions involving state law causes of action was a constitutional exercise of the Commerce Clause).

<sup>82</sup> Professor Noyes has argued that Congress cannot preempt state privilege law of attorney-client relationships or state law on attorney conduct, on the grounds that privilege law is not purely procedural. See 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, 730 (2009) (“There is ample support for the position that Rule 502(d) is a law governing substance because the law of privileges affects substantive state policy.”). But to the extent that the argument is based on *Erie R.R. Co. v. Tompkins*'s substance-procedure dichotomy, 304 U.S. 64, 78-79 (1938), 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, then it still has no relevance when the entity promulgating the privilege rule is not the Supreme Court but rather an agency pursuant to congressional statutory authorization:

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 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.

Broun & Capra, *supra* note 17, at 243 (footnotes omitted).

<sup>83</sup> See *infra* Section II.A (describing the SEC's campaign to obtain privilege with preemptive power over state rules concerning discovery).

analyzing 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 “a claim or defense for which state law supplies the rule of decision.”<sup>84</sup> 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.”<sup>85</sup> 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 enacted by Congress and therefore cannot be repealed or superseded by administrative regulation.<sup>86</sup> 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 a federal regulatory evidentiary privilege is drafted with sufficient clarity to achieve this result, there is no reason why it could not govern in federal suits where state law supplies the rule of decision.

The final scenario—and the one that is least likely to arise due to the likelihood of removal—is a federal regulatory evidentiary privilege’s application 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.<sup>87</sup> 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

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<sup>84</sup> FED. R. EVID. 501.

<sup>85</sup> FED. R. EVID. 502(f).

<sup>86</sup> See *In re Complaint of Nautilus Motor Tanker Co.*, 85 F.3d 105, 111 (3d Cir. 1996) (“[I]t is axiomatic that federal regulations can not ‘trump’ or repeal Acts of Congress.”).

<sup>87</sup> Kevin M. Clermont, *Reverse-Erie*, 82 NOTRE DAME L. REV. 1, 20 (2006) (“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.”).

some ambiguity as to its scope. This is because of the so-called reverse-*Erie* doctrine,<sup>88</sup> which governs the extent to which federal law is applicable in state courts. In this framework, a state court will apply federal substantive law.<sup>89</sup> Rules of privilege are generally regarded as substantive for conflict of laws purposes<sup>90</sup>—therefore, in jurisdictions that apply the law of the state with the “most significant relationship” to the dispute, 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.<sup>91</sup>

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

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<sup>88</sup> *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) (describing the Supreme Court’s approach in analyzing whether there is a conflict between federal and state law). “Reverse-*Erie*” refers to the opposite question of what law state courts must apply when adjudicating a federal claim. As Professor Clermont notes, this doctrine is also sometimes called converse-*Erie* or inverse-*Erie*. See Clermont, *supra* note 87, at 2.

<sup>89</sup> See *id.* at 29-30 (“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.” (footnotes omitted)).

<sup>90</sup> See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 138 (1971) (“The local law of the forum determines the admissibility of evidence, except as stated in §§ 139-141.”); *id.* § 139(2) (stating that the law of the state with the most significant relationship to a privileged communication determines the existence and scope of the privilege); *id.* § 139(2) cmt. d (“[W]here 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.”).

<sup>91</sup> See *supra* note 89 and accompanying text.

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- <i>Erie</i> 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 be now.<sup>92</sup> 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 in principle there is no obstacle to the results just summarized. Assuming the privilege 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 "lifeblood" of modern government.<sup>93</sup> One of the fonts of legitimacy of the administrative state is its claim to expertise, which is to say *informed* decisionmaking.<sup>94</sup> For that reason, doctrines or practices that

<sup>92</sup> At the state level, too, the practice has been to develop privileges via legislatures and courts, not via the executive branch. Evidentiary privileges are either enacted or approved by state legislatures or, in some jurisdictions, adopted as court rules. IMWINKELRIED, *supra* note 11, § 4.3. I am unaware of any state law delegations of the power to privilege.

<sup>93</sup> Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422, 1423 (2011) ("Good information is the lifeblood of effective governance.").

<sup>94</sup> See 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 decisionmaking 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").

regulate the administrative state's ability to gather and disseminate information affect not only its functioning as a practical matter but also, at a deeper level, its capacity to claim legitimacy for the fruits of its decisionmaking processes.

This context suggests 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.<sup>95</sup> 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 create a default presumption that government information ought to be accessible to the public, while the Federal Rules of Civil Procedure similarly create a default presumption that relevant government information ought to be accessible to the government's 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 opponents in court. The landscape of privilege law thus has a powerful effect on the functioning of administrative agencies.

Once the lens is broadened to take inter-agency interactions into account, 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 may result in the waiver of any privileges that protect what is communicated and result in the potential disclosure of that information 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 explained below, obtaining a delegation of the power to privilege is a natural next item on the agency agenda.

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<sup>95</sup> See *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320 (1978) (holding that an 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, 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) ("The evidence sought by the subpoena was not plainly incompetent or irrelevant to any lawful purpose . . .").

### 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.<sup>96</sup> Like prosecutors, agencies frequently compel (or induce)<sup>97</sup> 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.<sup>98</sup>

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.<sup>99</sup>

The difficulty is that most courts do not allow selective waiver as to government agencies.<sup>100</sup> As one court reasoned, permitting selective waiver

<sup>96</sup> Practitioners have voiced support for altering aspects of privilege law so as to accommodate agencies’ needs to investigate and enforce the law against regulated parties. *See, e.g.*, Alex C. Lakatos & Golaleh “Lili” Kazemi, *Keeping Half the Cat in the Bag: Selective Waiver of Privileged Materials Pursuant to 1828(x)*, 129 *BANKING L.J.* 242, 257-59 (2012) (criticizing the existing regime governing selective waiver and the pooling of privileged information between the various state and federal regulators).

<sup>97</sup> The extent to which waiver is “voluntary” or “induced” as opposed to “compelled” is a matter of heated dispute. Some commentators refer to corporate waiver as “compelled-voluntary” to emphasize the difficulty of classifying the decision to waive privilege as 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, 936-37 (2006) (explaining that corporate counsel feel compelled to waive privilege because a corporation’s willingness to waive privilege is a very significant factor in analyzing a corporation’s level of cooperation with the prosecution).

<sup>98</sup> Broun & Capra, *supra* note 17, at 239 (footnotes omitted).

<sup>99</sup> Lakatos & Kazemi, *supra* note 96, 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.”).

<sup>100</sup> The bulk of appellate decisional authority prohibits selective waiver. All but one of the federal appellate courts that considered the issue have held that producing documents to a government agency waives the privilege as to third parties. *Compare In re Pac. Pictures Corp.*, 679

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.”<sup>101</sup> 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 the agency. But very few statutes provide for selective waiver,<sup>102</sup> and these statutes apply to very limited and specialized contexts.<sup>103</sup> Outside these contexts, “a muddled patchwork of common law rules [applies to] . . . documents produced to other regulators,” even those regulators cooperating with the regulators designated in these statutes.<sup>104</sup>

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 Securities and Exchange Commission (SEC).<sup>105</sup> It is

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F.3d 1121, 1129 (9th Cir. 2012) (rejecting selective waiver), *In re Qwest Commc’ns Int’l Inc.*, 450 F.3d 1179, 1999-1201 (10th Cir. 2006) (same), *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 302-04 (6th Cir. 2000) (same), *Genentech, Inc. v. ITC*, 122 F.3d 1409, 1417 (Fed. Cir. 1997) (same), *United States v. MIT*, 129 F.3d 681, 684-86 (1st Cir. 1997), *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 235-36 (2d Cir. 1993) (same), *Westinghouse Elec. Corp. v. Republic of Phil.*, 951 F.2d 1414, 1424-26 (3d Cir. 1991) (same), *In re Martin Marietta Corp.*, 856 F.2d 619, 623-24 (4th Cir. 1988) (same), *and Permian Corp. v. United States*, 665 F.2d 1214, 1220-21 (D.C. Cir. 1981) (same), *with Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1978) (en banc) (allowing selective waiver). Still, district court opinions are more varied, and selective waiver remains a complicated question. In addition, the circuits disagree with respect to what effect they will give confidentiality agreements between the government and the person or entity producing documents to the government. Lakatos & Kazemi, *supra* note 96, at 249-50.

<sup>101</sup> *In re Steinhardt Partners*, 9 F.3d at 235.

<sup>102</sup> See 12 U.S.C. § 1828(x) (2012); 12 U.S.C. § 1785(j) (2012); Lakatos & Kazemi, *supra* note 96, 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.”); *cf.* 15 U.S.C. § 7215(b)(5)(A) (2012) (making “confidential and privileged as an evidentiary matter” “all documents and information prepared or received by or specifically for the [PCAOB] . . . in connection with an inspection” under specified sections of Title 15).

<sup>103</sup> 12 U.S.C. § 1828(x) (applying selective waiver to disclosures to banking agencies); *id.* § 1785(j) (defining selective waiver provision as applied to credit unions); *cf.* 15 U.S.C. § 7215(b)(5)(A) (creating an evidentiary privilege for certain disclosures made to the PCAOB).

<sup>104</sup> Lakatos & Kazemi, *supra* note 96, at 261.

<sup>105</sup> The Consumer Financial Protection Bureau (CFPB) has also been active in this arena. 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 would not constitute waiver. See Confidential Treatment of Privileged Information, 77 Fed. Reg. 39,617, 39,618 (July 5, 2012) (to be codified at 12 C.F.R. pt. 1070) (“The Bureau interprets . . . [its] authority as including the ability . . . to obtain privileged information without waiving any applicable privilege claimed by the provider of the information.”). The CFPB based this claim on its authority 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, and on the fact that it is the successor

worthwhile to narrate the SEC's efforts to obtain selective waiver power in some detail because this story reflects both how important the power to 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.<sup>106</sup> In 1984, the Commission supported enactment of a proposed amendment to the Securities and Exchange Act of 1934 that would have established selective waiver for any documents produced to the agency.<sup>107</sup> The amendment was referred to a House committee, which took no action.<sup>108</sup>

In 2002, the Commission proposed a regulation in which it simply gave itself selective waiver authority.<sup>109</sup> The regulation would have permitted selective waiver as to the SEC when the SEC and an issuer entered into a confidentiality agreement.<sup>110</sup> In the initial public comment period for the rule, 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.<sup>111</sup> In its final rule, however, the agency dropped the selective

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to prudential bank regulators that had been given that power by statute. *Id.* at 39, 618-19; *see also infra* note 155 (noting subsequent amendment of 12 U.S.C. § 1828(x) to add a reference to the CFPB).

<sup>106</sup> *See* Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. 6296, 6312 (Feb. 6, 2003) (to be codified at 17 C.F.R. pt. 205) (“[P]roposed legislation before Congress in [1984], 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.”).

<sup>107</sup> *See* Westinghouse Elec. Corp. v. Republic of Phil., 951 F.2d 1414, 1425 (3d Cir. 1991) (citation omitted).

<sup>108</sup> *See* Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. 6296, 6312 n.116 (Feb. 6, 2003) (to be codified at 17 C.F.R. pt. 205) (“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 Subcomm. on Telecomms., Consumer Protection, and Fin. of the Comm. on Energy and Commerce*, 98th Cong. 34, 51 (1984) (statement of John S.R. Shad, Chairman, SEC))).

<sup>109</sup> *See generally* Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. 71,670 (proposed Dec. 2, 2002) (to be codified at 17 C.F.R. pt. 205) (“Where an issuer, through its attorney, shares with the Commission, pursuant to a confidentiality agreement, information related to a material violation, such sharing of information shall not constitute a waiver of any otherwise applicable privilege or protection as to other persons.”).

<sup>110</sup> *See id.* at 71,693-94 (discussing the waiver provision of the 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 71,694.

<sup>111</sup> *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 . . . .” (internal quotation marks omitted)).

waiver provision. It reasoned that courts were unlikely to accept the notion that Congress had implicitly delegated the power to write a selective waiver rule to the SEC.<sup>112</sup>

The agency's next move was to return to Congress and ask it to enact legislation that would give the SEC selective waiver power.<sup>113</sup> The bill, titled the Securities Fraud Deterrence and Investor Restitution Act of 2003,<sup>114</sup> would have amended the Securities Exchange Act of 1934 to authorize regulated parties to share information with the Commission without waiving work-product protection or attorney–client privilege over that material as to any third party.<sup>115</sup> 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.”<sup>116</sup> 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.”<sup>117</sup> 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.<sup>118</sup>

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<sup>112</sup> See Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. 6296, 6312 (Feb. 6, 2003) (to be codified at 17 C.F.R. pt. 205). (“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 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.”).

<sup>113</sup> See generally Jeremy Burns, *Selective Waiver in the Era of Privilege Uncertainty*, 5 U.C. DAVIS BUS. L.J. 14 (2005) (discussing attempts to modify existing privilege law in Congress in 2004).

<sup>114</sup> H.R. 2179, 108th Cong. (2003).

<sup>115</sup> The relevant provision stated that

[n]otwithstanding any other provision of law, whenever the Commission and any person agree in writing to terms pursuant to which such person will produce or disclose to the Commission 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.

*Id.* § 4(e).

<sup>116</sup> See *Securities Fraud Deterrence and Investor Restitution Act of 2003: Hearing on H.R. 2179 Before the Subcomm. on Capital Mkts., Ins., and Gov't Sponsored Enters. of the H. Comm. on Fin. Servs.*, 108th Cong. 70 (2003) (testimony of Stephen M. Cutler, Director, Division of Enforcement, SEC).

<sup>117</sup> *Id.* at 71.

<sup>118</sup> See Memorandum from Daniel J. Capra, Reporter and Kenneth Broun, Consultant, to Advisory Committee on Evidence Rules 7-8 (Mar. 15, 2007), available at <http://www.klgates.com/>

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 SEC did not waive work-product privilege.”<sup>119</sup> State courts were not, however, particularly receptive to the SEC’s litigation campaign.<sup>120</sup> Moreover, even the agency’s sporadic successes in court were of little use because they left the law nationwide in an unsatisfying state of nonuniformity. This patchwork privilege regime does not accomplish the agency’s goal, which is to provide peace of mind to cooperating regulated entities.<sup>121</sup>

Finally, the SEC has also tried its hand at lobbying the federal judicial rulemaking process. In 2006 and 2007, the 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.”<sup>122</sup> The SEC,<sup>123</sup> as well as the

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files/upload/eDAT\_ER502\_Draft\_Cover.pdf (noting complaints from state court judges 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”).

<sup>119</sup> Burns, *supra* note 113; *see also* Letter from Brian G. Cartwright, Gen. Counsel, SEC, to Peter G. McCabe, Secretary, Comm. on Rules of Practice and Procedure of the Judicial Conference of the United States 2 n.1 (Feb. 16, 2007) [hereinafter SEC Rule 502 Letter], *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/EV%20Comments%202006/06-EV-062.pdf> (cataloging amicus briefs filed by the SEC on behalf of companies that provided materials to the SEC under confidentiality agreements).

<sup>120</sup> *See* Burns, *supra* note 113 (citing occasions on which state courts rejected the SEC’s selective waiver arguments).

<sup>121</sup> *See* Nolan Mitchell, Note, *Preserving the Privilege: Codification of Selective Waiver and the Limits of Federal Power over State Courts*, 86 B.U. L. REV. 691, 717 (2006) (“Greater clarity and predictability are required if corporations and the government are going to continue to cooperate in an effort to reduce corporate wrongdoing.”).

<sup>122</sup> Patrick M. Emery, Comment, *The Death of Selective Waiver: How New Federal Rule of Evidence 502 Ends the Nationalization Debate*, 27 J.L. & COM. 231, 265 (2009). The proposed rule on selective waiver to government agencies reads 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.

Commodity Futures Trading Commission (CFTC),<sup>124</sup> not only urged the Advisory Committee to include this “essential” government selective waiver provision in the final rule but also to amend the rule so that it would have preemptive effect over contrary state law.<sup>125</sup> 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.<sup>126</sup> Ultimately, the government selective waiver provision was dropped entirely from the final rule enacted by Congress.<sup>127</sup>

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

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*Id.* (citing Report of the Advisory Committee on Evidence Rules from Hon. Jerry E. Smith, Chair, Advisory Comm. on Evidence Rules, to Hon. David F. Levi, Chair, Standing Comm. on Rules of Practice and Procedure 6-7 (May 15, 2006), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/EV05-2006.pdf>; see also Broun & Capra, *supra* note 17, at 238-39 (discussing proposals to establish a selective waiver rule). See generally Noyes, *supra* note 82 (providing a history of Federal Rule of Evidence 502).

<sup>123</sup> See SEC Rule 502 Letter, *supra* note 119, at 2 (arguing that the selective waiver provision improves the efficiency of SEC investigations and the ability to provide relief to investors).

<sup>124</sup> See Letter from Eileen Donovan, Acting Sec’y to the Comm’n, Commodity Futures Trading Comm’n, to Peter G. McCabe, Sec’y, Comm. on Rules of Practice and Procedure 1 (Feb. 15, 2007), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/EV%20Comments%202006/06-EV-064.pdf> (arguing that selective waiver provision would provide certainty to parties willing to waive the privilege as to the CFTC without waiving as to private parties).

<sup>125</sup> See SEC Rule 502 Letter, *supra* note 119, at 7 (“[T]o 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 [the language on the Rule’s applicability in a federal or state proceeding] is intended to preempt any contrary state law.”).

<sup>126</sup> See Report of the Advisory Committee on Evidence Rules from Hon. Jerry E. Smith, Chair, Advisory Comm. on Evidence Rules, to Hon. David F. Levi, Chair, Standing Comm. on Rules of Practice and Procedure 3 (May 15, 2006), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/EV05-2006.pdf> (“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.”).

<sup>127</sup> See FED. R. EVID. 502(c). *The New Wigmore* sheds some light on the political economy here. See 2 IMWINKELRIED, *supra* note 11, § 6.12.4 n.126 (“According to [the Reporter, Professor Daniel Capra], defense attorneys do not like the section on selective waiver because it eliminates a common excuse for not cooperating with government investigators. He added that the plaintiffs’ bar is also unhappy with the provision because it will reduce evidence available for civil litigation following a government investigation. Due to the opposition, Capra said he believes the provision will be removed from the final version of the rule.” (quoting J.P. Finet, *Selective Waiver of Privilege Provision Likely to Be Pulled From Proposed Rule of Evidence*, 23 ABA/BNA LAWYERS’ MANUAL ON PROF’L CONDUCT 69 (Feb. 7, 2007))).

Congress, judicial rulemakers, 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.<sup>128</sup>

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 Commission could cut directly to its endpoint and promulgate a regulatory evidentiary privilege shielding from disclosure any materials produced by regulated entities to the agency. Perhaps the most surprising thing about section 6607 is that when Congress chose to delegate the power to privilege to an agency, the delegate it selected was the Department of Labor, not the SEC.

### 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.<sup>129</sup> These are areas that Professors Freeman and Rossi have dubbed “shared regulatory space.”<sup>130</sup> In such contexts, various government agencies at both the state and federal levels must coordinate their enforcement roles and regulatory agendas.<sup>131</sup>

It is not easy to maneuver in these shared regulatory spaces: “With the accretion of federal regulatory authority, the potential for conflicts between agencies, separately empowered by distinct statutory regimes, necessarily

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<sup>128</sup> See SEC Rule 502 Letter, *supra* note 119, at 2 n.1 (noting that the SEC has pressed 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).

<sup>129</sup> See J.R. DeShazo & Jody Freeman, *Public Agencies As Lobbyists*, 105 COLUM. L. REV. 2217, 2304 (2005) (noting the “complicated world of interagency process,” and that the dynamics of interagency interaction have “implications not only for theories of legislative control . . . but for our thinking about interest group theory, the separation of powers, and statutory interpretation”); see also David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 302 (2013) (“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.”).

<sup>130</sup> Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1173 (2012) (explaining the importance of agency coordination due to overlapping authority among the agencies and a need to define each agency’s area of responsibility); see also Jason Marisam, *Duplicative Delegations*, 63 ADMIN. L. REV. 181, 189 (2011) (defining “duplicative delegation” to refer to a situation where Congress “grant[s] the same authority to more than one agency without providing clear instructions about the division of responsibility among the agencies”).

<sup>131</sup> See Freeman & Rossi, *supra* note 130, at 1174 (noting the ways in which agencies communicate with, and are coordinated by, the White House).

grows.”<sup>132</sup> It is no longer adequate for one federal agency—say, EPA—to unilaterally make some goal—say, controlling the greenhouse gases emitted by automobiles—a regulatory priority.<sup>133</sup> Rather, EPA must consult other federal agencies with power in the relevant space, such as the National Highway Traffic Safety Administration (NHTSA).<sup>134</sup> State agencies may need or want a say as well.<sup>135</sup> As Professors DeShazo and Freeman explain, “[o]nce one peels back the skin of administrative decisionmaking, one finds not lone agencies making isolated decisions in a cocoon of bureaucratic insularity, but collections of agencies intervening in each other’s decisionmaking processes, sometimes quite formally and sometimes less so.”<sup>136</sup>

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 are constantly developing. Sometimes Congress directs the creation of these hybrid forms through statute;<sup>137</sup> at other times, the hybrid forms come into being at the direction of the President.<sup>138</sup> Some hybrid regulatory forms involve private organizations (or “marketized bureaucracy”),<sup>139</sup> while others include

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<sup>132</sup> Barron & Rakoff, *supra* note 129, at 302.

<sup>133</sup> See Jody Freeman, *The Obama Administration’s National Auto Policy: Lessons from the “Car Deal,”* 35 HARV. ENVTL. L. REV. 343, 353-58 (2011) (explaining the overlapping regulatory jurisdiction of the EPA and the National Highway Traffic Safety Administration (NHTSA) regarding fuel emissions).

<sup>134</sup> See *id.* at 353 (“[A]s 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.”).

<sup>135</sup> *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.”).

<sup>136</sup> DeShazo & Freeman, *supra* note 129, at 2303-04.

<sup>137</sup> See *id.* at 2261 (discussing how Congress intended in the Electric Consumers Protection Act to enlist some agencies to control other agencies); see also Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 207-11 (describing the statutory schemes set forth by Congress in delegating power to multiple agencies).

<sup>138</sup> See generally Jason Marisam, *The President’s Agency Selection Powers*, 65 ADMIN. L. REV. 821 (2013) (discussing instances in which the President reconciles agency overlap and employs his reorganization authority to transfer functions among agencies or to create or remove agencies); Daphna Renan, *Pooling Powers*, 115 COLUM. L. REV. (forthcoming Mar. 2015) (investigating how the executive directs agencies to coordinate or “pool” their activities to accomplish goals that would be challenging for individual agencies to accomplish separately).

<sup>139</sup> See Jon D. Michaels, *Privatization’s Progeny*, 101 GEO. L.J. 1023, 1041-42 (2013) (arguing that employer’s resistance to government bureaucracy has changed such bureaucracy to more closely resemble the private sector). See generally Jon D. Michaels, *Privatization’s Pretensions*, 77 U. CHI. L. REV. 717 (2010) (arguing that privatization is a “workaround” that allows policymakers to alter policies and accomplish public policy goals not otherwise attainable).

organizations of public actors that are not quite private.<sup>140</sup> Others use state governments to act as surrogates or agents of the federal government.<sup>141</sup> Still others involve foreign governmental entities working in concert with U.S. federal entities.<sup>142</sup>

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.<sup>143</sup> Consider the 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.<sup>144</sup> But they also want to be able to transmit or share information with other regulators without waiving the regulated party's privilege shielding that information.

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<sup>140</sup> See Jost, *supra* note 3, at 2045-47 (describing the role played by National Association of Insurance Commissioners, a private, nonprofit organization, in the ACA implementation scheme).

<sup>141</sup> See Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 590-92 (2011) (fitting state implementation of the ACA within a broader understanding of federalism, and exploring specific ways states have implemented the ACA as quasi-agents of the federal government); Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 715 (2011) (noting that the Clean Air Act was a specific example of a federal law that "instructs states to create and enforce 'state implementation plans'").

<sup>142</sup> The Dodd-Frank Act, for example, requires close coordination between the Board of Governors of the Federal Reserve System and foreign bank supervisors. See 12 U.S.C. § 5323 (2012) (requiring the Financial Stability Oversight Council to consult with foreign regulators regarding the application of heightened prudential standards to foreign nonbank financial companies); Enhanced Prudential Standards and Early Remediation Requirements for Covered Companies, 77 Fed. Reg. 594, 598 (proposed Jan. 5, 2012) (to be codified at 12 C.F.R. pt. 252) (proposing that the Board of Governors should "take into account the extent to which the foreign company is subject . . . to home country standards that are comparable to those applied to financial companies in the United States").

<sup>143</sup> Mark Fenster has addressed a complementary question—how open government laws might affect the private-public hybrid form:

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

Mark Fenster, *Seeing the State: Transparency As Metaphor*, 62 ADMIN. L. REV. 617, 649-50 (2010).

<sup>144</sup> See *supra* Section II.A.

This poses a problem once one considers the sheer number of regulators that 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 Federal Reserve Board, the Office of the Comptroller of the Currency (OCC), the Federal Deposit Insurance Corporation, the SEC, the CFTC, Office of Foreign Assets Control, Financial Crimes Enforcement Network, the Internal Revenue Service (IRS), and state and foreign bank supervisors.<sup>145</sup> “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.”<sup>146</sup>

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,

under 12 U.S.C. § 1821(t), 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.<sup>147</sup>

Another recently enacted statute authorizes sharing of information between federal and state agencies that have mortgage oversight authority without the loss of privilege.<sup>148</sup> A third statutory provision, enacted in 2010 as part of Dodd–Frank, permits the SEC to share information without loss of privilege with, inter alia, “any agency,” “any self-regulatory organization,”

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<sup>145</sup> Lakatos & Kazemi, *supra* note 96, at 260.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 274 n.73. The operative language was added to the Federal Deposit Insurance Act in 1992. See Housing & Community Development Act of 1992, Pub. L. No. 102-550, § 1544, 106 Stat. 3672, 4069 (amending 12 U.S.C. § 1821 to add section (t), titled “Agencies May Share Information Without Waiving Privilege”).

<sup>148</sup> See Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, § 1512, 122 Stat. 2654, 2820 (codified as amended at 12 U.S.C. § 5111 (2012)) (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 and State laws”).

and “any State securities or law enforcement authority.”<sup>149</sup> 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.<sup>150</sup> The Public Company Accounting Oversight Board (PCAOB) has the authority to share certain information without loss of privilege with the SEC, the Attorney General, and various other self-regulatory organizations and federal and state regulators.<sup>151</sup> A final example is 12 U.S.C. § 1828(b), which authorizes sharing of data pertaining to antitrust review of transactions without loss of federal or state privilege among the OCC, Office of Thrift Supervision, Federal Deposit Insurance Corporation, the Federal Reserve, the Attorney General, and the Federal Trade Commission.<sup>152</sup>

Without some such statutory safe harbor, however, agencies pool information at the 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.<sup>153</sup> 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.<sup>154</sup>

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<sup>149</sup> See Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929K, 124 Stat. 1376, 1860 (2010) (codified at 15 U.S.C. § 78x (2012)).

<sup>150</sup> *Id.*

<sup>151</sup> See 15 U.S.C. § 7215(b)(5)(A)–(B) (2012). Since the enactment of Dodd–Frank in 2010, the PCAOB has also had the authority to share such information with foreign regulators charged with inspecting or overseeing public accounting firms. See 15 U.S.C. § 7215(b)(5)(C) (2012) (“Without the loss of its status as confidential and privileged in the hands of the Board . . . [information relating to a public accounting firm targeted by a foreign regulator’s investigation] may, at the discretion of the Board, be made available to the foreign auditor oversight authority . . .”).

<sup>152</sup> See 12 U.S.C. § 1828b(a) (2012) (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) (2012) (“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.”).

<sup>153</sup> See Lakatos & Kazemi, *supra* note 96, at 254–55 (explaining the steps that a government regulator should take to protect information produced pursuant to a selective waiver provision from third parties and from FOIA requests).

<sup>154</sup> See *id.* at 259–61 (advocating for expanded selective waiver protection under section 1828(x)).

Regulated parties may be less than thrilled at this prospect. When, for example, the Consumer Financial Protection Bureau (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 attorney–client privilege shielding the material,<sup>155</sup> it set off alarm bells in some quarters.<sup>156</sup> 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,<sup>157</sup> or with other entities who might disclose that information to private plaintiffs.<sup>158</sup>

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<sup>155</sup> See Confidential Treatment of Privileged Information, 77 Fed. Reg. 39,617, 39,621 (July 5, 2012) (codified at 12 C.F.R. pt. 1070) (“The rule will, however, also foreclose claims that any other person’s privilege has been waived by the Bureau’s disclosure of that person’s privileged information to another Federal or State agency.”); see also CFPB, CFPB STATEMENT OF INTENT FOR SHARING INFORMATION WITH STATE BANKING AND FINANCIAL SERVICES REGULATORS (2012), available at [http://files.consumerfinance.gov/f/201212\\_cfpb\\_statement\\_of\\_intent\\_for\\_sharing\\_information\\_with\\_sbsfr.pdf](http://files.consumerfinance.gov/f/201212_cfpb_statement_of_intent_for_sharing_information_with_sbsfr.pdf) (describing the CFPB’s information-sharing policies for state regulators). As authority for its position, 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, § 1, 126 Stat. 1589, 1589 (2012) (codified at 12 U.S.C. §§ 1821, 1828 (2012)). State law enforcement agencies still make no appearance. See *id.*

<sup>156</sup> See Bruce A. Green, *The Attorney-Client Privilege—Selective Compulsion, Selective Waiver, and Selective Disclosure: Is Bank Regulation Exceptional?*, 2013 J. PROF. LAW. 85, 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.”).

<sup>157</sup> Lakatos & Kazemi, *supra* note 96, 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.”).

<sup>158</sup> See, e.g., Sharon Nelles & Paul Saltzman, *Preserving the Bank Examination Privilege in the Wake of Public Disclosures by the Financial Crisis Inquiry Commission*, 4 Bloomberg Law Rep.—Banking & Fin. (BNA) No. 7 (2011), available at <http://www.sullcrom.com/siteFiles/Publications/Nelles-Saltzman-Bloomberg-Jul-2011.pdf> (describing how bank examination materials publicly released by the Financial Crisis Inquiry Commission have subsequently been sought by private plaintiffs in litigation against banks). For one example they cite of a plaintiff using such documents, see Memorandum in Support of Defendant’s Motion to Dismiss First Amended Consolidated Verified Shareholder Derivative Complaint at 18 n.12, *In re Citigroup Inc. S’holder Derivatives Litig.*, No. 11-2693 (S.D.N.Y. Aug. 13, 2012) (urging the court to disregard correspondence from the OCC and Federal Reserve to Citigroup because it “is protected by the bank

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 assurance that this sharing of information will not result in the loss of any privilege protecting the information it shares. A delegation of the power to write privileges would give an agency the broadest degree of latitude on this question, particularly if the delegation 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.”<sup>159</sup>

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<sup>160</sup>—then 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 ACA 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.<sup>161</sup> The ACA enlists states and state officials to create exchanges and to enforce the ACA's restrictions against insurance plans.<sup>162</sup> 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

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examination privilege” and was improperly disclosed on the Financial Crisis Inquiry Commission website).

<sup>159</sup> 29 U.S.C. § 1134(d)-(e) (2012).

<sup>160</sup> DeShazo & Freeman, *supra* note 129, at 2301 (“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 decisionmaking process—even if it is a lateral agency and not the lead agency implementing the relevant statute.”).

<sup>161</sup> See 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 32 million of the nation's 55 million uninsured.”).

<sup>162</sup> *Id.* at 578.

rebates to their policyholders.<sup>163</sup> Finally, the ACA requires consultation between federal agencies, the NAIC, and state officials “on a variety of issues central to the ACA’s implementation.”<sup>164</sup> 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 the ability to communicate regarding future actions without risking disclosure of their crosstalk. The discussion below will explore further whether or not allowing privilege over such communications is desirable.<sup>165</sup> For now, however, the point is simple. The incentive of an agency within the hybrid structure is to obtain the maximum amount of latitude 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 both the authority to communicate within a privileged channel and 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 delegation sounds strikingly similar to the actual language of section 6607.<sup>166</sup> This provision is proof positive not only that agencies want a broad power to specify the parameters of privilege but also that agency efforts to obtain such a power can eventually succeed.

### III. DELEGATING PRIVILEGE

The above discussion has sought to demonstrate why entrusting administrative agencies with delegations of the power to privilege would further the goals of effective enforcement of the law and efficient coordination between agencies. Taken alone, these are undoubtedly benefits; it lies in the public interest for agencies to enforce federal laws effectively and to coordinate their activities efficiently. But, as this Part explains, these benefits would be bought at a substantial price.

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<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 579.

<sup>165</sup> See *infra* Part III.

<sup>166</sup> See 29 U.S.C. § 1134(d)-(e) (2012).

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 the anticommandeering doctrine seeks to prevent.

#### A. *Accountability*

Establishing adequate oversight of the administrative state is a besetting problem of modern administrative law: “[o]ne of administrative law’s anxieties is the problem of authority delegated from more politically accountable actors to the unelected ones within administrative agencies.”<sup>167</sup> 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 hardwired mechanisms for making agencies transparent and accountable into the basic structure of the administrative state. It is not for nothing that FOIA was codified in the sections of the U.S. Code immediately preceding the rulemaking and adjudication provisions of the Administrative Procedure Act (APA).<sup>168</sup> In exchange for the ongoing privilege of wielding broad delegated power, agencies were required to be accountable to the courts and to the public.<sup>169</sup>

Privilege delegations will unsettle this bargain. It is a simple matter of foxes and henhouses.<sup>170</sup> 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. Agencies have an interest in the

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<sup>167</sup> Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1764 (2013).

<sup>168</sup> See 5 U.S.C. §§ 551–559 (2012).

<sup>169</sup> 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.”).

<sup>170</sup> 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.’”).

existence of evidentiary privileges that generously protect government officials and government information.<sup>171</sup>

Of course, the risk of regulatory self-dealing is omnipresent in the administrative state. EPA 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, however, 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, then, 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 the executive branch wield too much authority over the power to protect its own information.<sup>172</sup> The most obvious examples come from the sphere of national security. Consider executive use of classification power. The number of classified documents continues its relentless rise.<sup>173</sup> Even many government officials will admit that the apparatus of classification is

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<sup>171</sup> See generally 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 (2010) (discussing the motivations behind the desire for government secrecy and the harmful results of that secrecy).

<sup>172</sup> This argument is consonant with a growing scholarly literature examining strategic agency behavior aimed at self-insulation from external review. See Nou, *supra* note 167, at 1771 (describing how agencies utilize regulatory forms and strategies to insulate their decisions from review and reversal within the executive branch); see also Yehonatan Givati, *Strategic Statutory Interpretation by Administrative Agencies*, 12 AM. L. & ECON. REV. 95, 103-06 (2010) (using economic modeling to demonstrate that administrative agencies strategically choose their statutory interpretations); M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1446 (2004) ("Because the agency is able to choose the way its policy will operate and be evaluated in court, it may pick a form that is difficult to review, is not intensely reviewed, or is reviewed under circumstances favorable to the agency. If the agency secures its policy judgment solely (or primarily) because it picked its form to take advantage of these sorts of factors, that is troubling.").

<sup>173</sup> See Norman C. Bay, *Executive Power and the War on Terror*, 83 DENV. U. L. REV. 335, 352 n.119 (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. The record number of documents classified in 2004—15.6 million—was nearly double the number in 2001." (citation and internal quotation marks omitted)); 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." (citation omitted)).

running amok.<sup>174</sup> 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 *overclassification*.

The state secrets privilege offers a starker instance. This privilege is not a creature of statute;<sup>175</sup> it has a common law pedigree.<sup>176</sup> The federal courts therefore control the conditions under which the state secrets privilege can be invoked, but judicial controls on this area are lax.<sup>177</sup> Sometimes the executive's invocation of the state secrets privilege cannot even be challenged in court—because the executive has invoked the state secrets privilege.<sup>178</sup> When wielding this broad de facto authority to resist disclosure, has

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<sup>174</sup> See Fuchs, *supra* note 173, 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].’” (footnotes omitted)).

<sup>175</sup> 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 the Bush administration’s stance on “a broad and sweeping invocation and application of the state secrets privilege”).

<sup>176</sup> See *United States v. Nixon*, 418 U.S. 683, 710 (1974) (noting that the state secrets privilege implicates “areas of Art. II duties [in which] the courts have traditionally shown the utmost deference to Presidential responsibilities”); *United States v. Reynolds*, 345 U.S. 1, 6 & n.9, 7 (1953) (recognizing that the state secrets privilege protects the powers of the executive branch, though declining to decide whether it is constitutionally mandated). See generally IMWINKELRIED, *supra* note 11, § 8.2 (describing the state secrets privilege’s common law origins).

<sup>177</sup> See Amanda Frost, Essay, *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.’” (citation omitted)).

<sup>178</sup> See *Clapper v. Amnesty Int’l*, 133 S. Ct. 1138, 1149 n.4 (2013) (finding that the government was not required to disclose whether it was intercepting the respondents’ communications because it was the respondents’ burden to prove standing, not the government’s burden to disprove standing); *id.* at 1155 (holding that plaintiffs lacked Article III standing to challenge government surveillance); *Al-Haramain Islamic Found., Inc. 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). For an insightful discussion of *Clapper*, see Stephen I. Vladeck, *Standing and Secret Surveillance*, 10 ISJLP 551, 552 (2014) (“In rejecting the plaintiffs’ standing to pursue such

the executive used this power with prudence and circumspection? The consensus answer is no.<sup>179</sup>

Those who defend broad executive power to withhold information by classification or state secrets uniformly do so by basing their arguments on the national security interest at stake.<sup>180</sup> 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 latitude 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 that executive branch information be accessible to review by the public. But as a thick literature attests, executive agencies evade the requirements of open government laws with dismaying frequency: “[T]hose 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 threat to their work.”<sup>181</sup> Agencies are more often censoring documents or outright denying access to them.<sup>182</sup>

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claims, [*Clapper*] seized upon the secret nature of the alleged governmental surveillance that the plaintiffs sought to challenge. Because such secrecy prevented the plaintiffs from showing that the government’s interception of their communications was ‘certainly impending,’ they could not establish the injury-in-fact required by the Court’s prior interpretations of Article III’s case-or-controversy requirement.” (footnotes omitted)).

<sup>179</sup> See, e.g., Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1267 n.113 (2007) (collecting scholarly criticisms of state secrets doctrine); D. A. Jeremy Telman, *Intolerable Abuses: Rendition for Torture and the State Secrets Privilege*, 63 ALA. L. REV. 429, 468-69 (2012) (arguing that the state secrets privilege “has become a vehicle for judicial abdication” because courts often defer to government declarations that sought-after documents contain national security secrets).

<sup>180</sup> 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:

[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.

Laura K. Donohue, *The Shadow of State Secrets*, 159 U. PA. L. REV. 77, 87 (2010).

<sup>181</sup> Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 892 (2006) (footnotes omitted); see also WENDY GINSBERG, CONG. RESEARCH SERV., R41933, THE FREEDOM OF INFORMATION ACT (FOIA): BACKGROUND, LEGISLATION, AND POLICY ISSUES 14-15

The executive branch is also becoming more aggressive in invoking privileges that shield government deliberations from the public. Perhaps the most relevant metric of this tendency is the executive's increasing invocation of the deliberative process privilege.<sup>183</sup> The number of invocations of this privilege has risen to record highs.<sup>184</sup> In recent cases, the Justice Department has invoked the privilege to shield documents reflecting agency deliberations over how to respond to press articles covering the agency's projects.<sup>185</sup>

A distinct concern arises from authorizing agencies to resist disclosure of inter-agency communications. Consider an aspect of an issue that has been in the news lately: "parallel construction." This term refers to one agency "remaking" a case that another agency has already made but using differently sourced information, in order to obscure the fact that its investigation drew on information gathered by the other agency. For example, recent reports have shown that domestic law enforcement agencies, such as the Drug Enforcement Agency (DEA), have used intelligence gathered by the National Security Agency (NSA) to further their criminal investigations.<sup>186</sup> These revelations are disturbing because it has been generally assumed that legal and practical constraints prevent foreign intelligence and surveillance

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(2014) (describing how federal agencies claimed 30,514 FOIA exemptions using 130 different statutes in 2012).

<sup>182</sup> See Ted Bridis & Jack Gillum, *U.S. Cites Security More to Censor, Deny Records*, ASSOCIATED PRESS, Mar. 16, 2014, available at <http://bigstory.ap.org/article/us-cites-security-more-censor-deny-records> ("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.").

<sup>183</sup> See 2 IMWINKELRIED, *supra* note 11, § 7.4.2 (describing the reluctance of Congress and the lower federal courts to recognize a formal investigatory privilege).

<sup>184</sup> See Bridis & Gillum, *supra* note 182 ("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.").

<sup>185</sup> See Imwinkelried, *supra* note 60, at 534-36 (discussing a case in which a court applied deliberative process privilege to Federal Reserve Board Senior Vice President's "personal opinions and recommendations regarding formulation of the agency's substantive response" to an inquiry from a news network (internal quotation marks omitted)); see also TODD GARVEY & ALISSA M. DOLAN, CONG. RESEARCH SERV., RL34097, CONGRESS'S CONTEMPT POWER AND THE ENFORCEMENT OF CONGRESSIONAL SUBPOENAS: LAW, HISTORY, PRACTICE, AND PROCEDURE 47 (2014) (describing invocation of deliberative process privilege with respect to documents "concerning the [Department of Justice'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 STUD. Q. 167, 179-81 (2013).

<sup>186</sup> See John Shiffman & David Ingram, *IRS Manual Detailed DEA's Use of Hidden Intel Evidence*, REUTERS, Aug. 7, 2013, available at <http://www.reuters.com/article/2013/08/07/us-dea-irs-idUSBRE9761AZ20130807> (describing how the DEA funnels information from the NSA to government authorities like the IRS to allow them to launch investigations).

agencies from conducting or assisting domestic law enforcement efforts.<sup>187</sup> But it is not merely in the spheres of national security or foreign intelligence that such restrictions exist. There are walls that restrict inter-agency cooperation within domestic law as well, such as the rules that regulate the joint conduct of criminal and civil investigations.<sup>188</sup>

This is the dark side of agency cooperation—the zone in which agency cooperation exacts a toll upon important, even constitutional, values. It is true that there is substantial disagreement about what precise rules restrict 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 invoke a privilege that shields inter-agency communications from disclosure in court.<sup>189</sup> 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 a functional web of rules and structures that renders agency action and communications open to disclosure and that restricts 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.

### B. Preemption

“Preemption of state regulatory authority by national law is the central federalism issue of our time.”<sup>190</sup> Across a wide spectrum of substantive

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<sup>187</sup> This is why others, less delicately, have referred to parallel construction as “intelligence laundering.” Andrew O’Hehir, *The NSA-DEA Police State Tango*, SALON (Aug. 10, 2013 12:30 PM), [http://www.salon.com/2013/08/10/the\\_nsa\\_dea\\_police\\_state\\_tango/](http://www.salon.com/2013/08/10/the_nsa_dea_police_state_tango/), archived at <http://perma.cc/M8TN-FSV9> (quoting Electronic Frontier Foundation attorney Hanni Fakhoury, who apparently coined this phrase).

<sup>188</sup> See *United States v. Posada Carriles*, 541 F.3d 344, 354-55 (5th Cir. 2008) (describing principles governing dual investigations by the civil and criminal branches of a government agency or dual investigations by separate agencies); *United States v. Scrushy*, 366 F. Supp. 2d 1134, 1138-39 (N.D. Ala. 2005) (finding an improper merger of civil and criminal investigations by the SEC and the Department of Justice).

<sup>189</sup> See 29 U.S.C. § 1134(d)-(e) (2012) (authorizing, inter alia, the privileging of communications between the Department of Justice and various agencies with civil enforcement authority).

<sup>190</sup> Young, *supra* note 170, at 869.

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.<sup>191</sup> 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?

As an initial matter, agencies may be more willing than courts or Congress to make new privileges. Courts are notably reluctant to expand privilege law.<sup>192</sup> And the creation of new privileges by legislation is constrained both by congressional reluctance to create new privileges and by the fact that courts have essentially imposed a clear statement rule on legislation that purports to create new privileges.<sup>193</sup> In contrast, federal administrative agencies are likely to be able to manufacture federal privileges at a much more rapid clip. As a threshold matter, agencies are better able to write rules than Congress is to write and rewrite statutes.<sup>194</sup> In addition, agencies are likely to be prolific authors of new privilege rules because of the administrative imperatives discussed above.<sup>195</sup> The power to write privilege rules is a tempting one.

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<sup>191</sup> See generally Jamelle C. Sharpe, *Legislating Preemption*, 53 WM. & MARY L. REV. 163 (2011) (arguing that the propriety of preempting state law with federal law is a high stakes question that determines who controls legal policy on diverse legal issues). The role of agencies in preemption is receiving increasing scholarly attention. See Miriam Seifter, *States as Interest Groups in the Administrative Process*, 100 VA. L. REV. 953, 980 n.114 (2014) (collecting sources from the growing literature on administrative federalism).

<sup>192</sup> See, e.g., *Pierce Cnty. 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.” (citation omitted)); *Univ. of Pa. v. EEOC*, 493 U.S. 182, 189 (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.” (citation omitted)); *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”).

<sup>193</sup> See sources cited *supra* note 192.

<sup>194</sup> 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., Commentary, *Political Accountability and Delegated Power: A Response to Professor 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).

<sup>195</sup> See *supra* Part II.

A second consideration worth noting is that the existing judicial rule-making process has demonstrated a marked sensitivity to federalism concerns—a sensitivity that is notably lacking in an average agency rule-making proceeding. The Judicial Conference’s Committee on Federal–State Jurisdiction, which is charged with considering federalism concerns, monitors the judicial rulemaking process, including the process for generating draft rules of privilege.<sup>196</sup> Organizations such as the Conference of State Chief Justices monitor the work product of the rules committees and offer commentary on federalism issues.<sup>197</sup> Any 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.<sup>198</sup>

This process has predictably resulted in rules of evidence that accommodate state interests. Consider the state law proviso of Federal Rule of Evidence 501. During the debates surrounding the adoption of this rule, some 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.”<sup>199</sup> As a result, Congress decided to preserve the application of state privilege law in

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<sup>196</sup> See Noyes, *supra* note 82, at 695 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 . . . .” (citation and internal quotation marks omitted)). Noyes also quotes Judge Frederick P. Stamp, a former chair of that Committee, who explains that the Committee’s 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. . . . state courts play an essential role in our justice system ably handling questions of both state and federal law.” *Id.* (citation omitted).

<sup>197</sup> See, e.g., Capra & Broun, *supra* note 118, at 5 (“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 where the disclosed material is then offered in a state proceeding . . . .”); *id.* at 7-8 (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 it would change the law of privilege in virtually every state, because most of the states do not recognize selective waiver”).

<sup>198</sup> See 28 U.S.C. § 2074(b) (2012) (“Any such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress.”).

<sup>199</sup> Note, *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1467 (1985) (footnotes omitted).

federal courts rather than enact a federal law of privilege applicable to state law claims.<sup>200</sup>

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.<sup>201</sup> The initial discussion draft of Rule 502(c) dealt with situations where the inadvertent disclosure of privileged materials was made to a state agency.<sup>202</sup> The Advisory Committee on Evidence Rules "determined that it would be overreaching to try to control disclosures made at the state level."<sup>203</sup> Ultimately, the Committee "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."<sup>204</sup> 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.<sup>205</sup>

Agencies charged with promulgating regulatory evidentiary privileges are unlikely to be as attuned to state policy interests. Because "[a]gency action . . . evades both the political and the procedural safeguards of

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<sup>200</sup> 3 JACK B. WEINSTEIN & MARGARET A. BERGER, *WEINSTEIN'S FEDERAL EVIDENCE* § 501 App.101(1)(a) (Joseph M. McLaughlin ed., 2d ed. 2011) (describing congressional misgivings with the Federal Rule of Evidence 501 privilege provision); Broun & Capra, *supra* note 17, at 262 ("[A] concern for state prerogatives led Congress to reject the Advisory Committee's original proposals for federal rules of privilege."); John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 694 (1974) (describing Congress's refusal to let the initial draft of the Federal Rules of Evidence go into 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").

<sup>201</sup> See FED. R. EVID. 502(b) (stating that inadvertent disclosures made in a federal proceeding or to a federal agency do not operate as waivers of privilege).

<sup>202</sup> See Capra & Broun, *supra* note 118, at 6-8 (discussing objections to the initial draft raised by various constituencies).

<sup>203</sup> Broun & Capra, *supra* note 17, at 263.

<sup>204</sup> Lakatos & Kazemi, *supra* note 96, at 253-54 (quoting Advisory Comm. on Evidence, Minutes of the Meeting of April 12-13, 2007, at 16, available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/EVo4-2007-min.pdf>) (internal quotation marks omitted).

<sup>205</sup> See Capra & Broun, *supra* note 118, at 5 (noting the "many comments from lawyers and lawyer groups suggesting . . . 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").

federalism,”<sup>206</sup> states cannot count on agencies to give meaningful protection to values of federalism.<sup>207</sup> States cannot rely on agencies because “[t]he states have no direct role in the ‘composition and selection’ of federal administrative agencies.”<sup>208</sup> Committees of concerned judges do not look over agencies’ shoulders as they draft preemptive rules to offer guidance on how to respect principles of federal–state comity. Even when agencies are required to consider federalism concerns by executive order, they often ignore those mandates.<sup>209</sup>

All of these factors are likely to make federal agencies more indifferent to state concerns—and more apt to give regulatory evidentiary privileges preemptive effect—when they are performing privilege rulemaking. But perhaps the most important factor militating toward broad regulatory preemption will be this: unless federal regulatory evidentiary privileges preempt state laws on discovery and disclosure, 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 asks parties that it is investigating to produce documents to it, including materials shielded by attorney–client privilege and work-product protection. In state court lawsuits, investigated parties and the SEC have argued that materials produced to the SEC should be treated as privileged in civil

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<sup>206</sup> Young, *supra* note 170, at 870.

<sup>207</sup> See *id.* at 895–96 (arguing that particular instances of preemption violate the modern concept of federalism); see also Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695, 718 (2008) (arguing that courts should not read statutes to authorize an agency to preempt state law “[b]ecause agencies lack an institutional focus on the value of retaining an independent state role and preserving state sovereignty”); cf. Galle & Seidenfeld, *supra* note 194, at 1985 (arguing that, in some cases, agency action may be the preferred method for upholding values of federalism). Professors Galle and Seidenfeld argue that agencies are democratic, deliberative, transparent, and better able to assess the policy costs and benefits of federalism than Congress. *Id.* at 1962–68, 1988–90. 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.

<sup>208</sup> Young, *supra* note 170, at 869–70.

<sup>209</sup> See Catherine M. Sharkey, *Inside Agency Preemption*, 110 MICH. L. REV. 521, 527 (2012) (noting, with regard 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.” (citation omitted)). 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.

litigation.<sup>210</sup> More than one state court has rejected that claim.<sup>211</sup> The SEC, if authorized to promulgate regulatory evidentiary privileges, will likely draft selective waiver regulations for documents produced to it that will preempt any state rules that would otherwise make such documents discoverable. If the SEC's rules did not preempt the contrary state discovery rules, then the state policy favoring full discovery in state court lawsuits would thwart the aims of the federal regulatory evidentiary privilege.<sup>212</sup> Is the SEC really the institution that should be charged with determining that state discovery rules in state court suits should be trumped so that the SEC can more easily carry out its enforcement mission? Discovery battles over materials produced to the SEC occasionally arise in cases far afield from federal securities law.<sup>213</sup>

State open government or "sunshine" laws offer another example. State sunshine acts clearly embody an important and widely shared state interest.<sup>214</sup> Consider a lawsuit under a Florida state sunshine act that sought disclosure of Florida state officials' communications during the "weekly phone calls" between the Department of Health and Human Services (HHS) and Florida state officials to discuss the implementation of the ACA.<sup>215</sup> Or, alternatively, imagine a lawsuit seeking communications between the Florida state insurance regulator and consultants to the NAIC, a group with strong insurance industry ties, regarding the state's regulatory priorities in the aftermath of the ACA rollout. In either case, should the Department of Labor really be the entity charged with determining whether such communications should be privileged from disclosure under Florida's extensive open government laws? In both contexts, the state's interests in

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<sup>210</sup> See SEC Rule 502 Letter, *supra* note 119, at 5-7; see also *supra* text accompanying notes 118-121.

<sup>211</sup> See Mitchell, *supra* note 121, at 717-26 (discussing state courts' rejection of selective waiver arguments).

<sup>212</sup> See SEC Rule 502 Letter, *supra* note 119, at 7 (describing the need to preempt state laws and rules on waiver to ensure that plaintiffs cannot obtain privileged information supplied to the federal government "simply by bringing an action in a state court").

<sup>213</sup> See, e.g., Gruss v. Zwirn, No. 09-6441, 2013 WL 3481350, at \*1, \*5-7 (S.D.N.Y. July 10, 2013) (rejecting a selective waiver argument regarding materials shared with the SEC in a suit raising state law defamation, breach of contract, and promissory estoppel claims).

<sup>214</sup> See 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.").

<sup>215</sup> See Metzger, *supra* note 161, at 579 ("HHS is instructed to consult with NAIC and other state stakeholders on a variety of issues 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."); *supra* text accompanying notes 161-164.

securing public disclosure are likely to be given short shrift by a federal agency trained on efficiently achieving its mission.

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 robust 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 implicate a more esoteric variety of state concern: the states' interest in monitoring and overseeing their agencies and their officials. Consider, for example, section 6607, which authorizes the Secretary of Labor to promulgate a privilege applicable to communications between, inter alia, HHS and a state insurance department relating to any inquiry undertaken by any of the agencies.<sup>216</sup> Under this provision, the Secretary of Labor is authorized to privilege communications not only between or among these entities, but also between and among any of their agents, consultants, or employees.<sup>217</sup> Depending on their precise structure, such privileges could cover a thick and important slice of the state personnel responsible for monitoring health insurance plans. If a new federal regulatory evidentiary privilege shielded the communications of state officials from discovery or disclosure under state law, it would obstruct the capacity of the state to monitor these state personnel.

No single constitutional doctrine neatly applies to this potential erosion of state interests. But the doctrine that is most closely implicated is the anticommandeering doctrine. The anticommandeering doctrine emerged in the 1990s as part and parcel of the Supreme Court's renascent attentiveness to federalism concerns.<sup>218</sup> The core of anticommandeering doctrine is narrow, requiring only that the federal government “may not compel the

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<sup>216</sup> See 29 U.S.C. § 1134(d)-(e) (2012).

<sup>217</sup> *Id.*

<sup>218</sup> See Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism*: New York, Printz, and Yeskey, 1998 SUP. CT. REV. 71, 127-29 (discussing the emergence of the anticommandeering doctrine).

States to enact or administer a federal regulatory program.”<sup>219</sup> But where it applies, the jurisprudence of anticommandeering 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.”<sup>220</sup>

Courts and scholars have offered various justifications for the anticommandeering doctrine. The most prominent is grounded in considerations of political economy. On this view, embraced by Justice O’Connor in *New York v. United States*, Congress may not undercut the political accountability of state officials by rearranging and tangling the lines of authority that constrain them. State officials become less accountable to their state constituents when they are “coerced” into implementing federal law, because then they “cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.”<sup>221</sup> Federal commandeering also diminishes the accountability of state officials by

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<sup>219</sup> *Printz v. United States*, 521 U.S. 898, 933 (1997) (quoting *New York v. United States*, 505 U.S. 144, 188 (1992)) (internal quotation marks omitted).

<sup>220</sup> Adler & Kreimer, *supra* note 218, at 72. What separates (acceptable) “supremacy” of federal law from (unacceptable) federal “commandeering”? The line is not easy to draw, particularly where the federal law in question affects state courts and not merely state executive officials. The Supreme Court has repeatedly held that state courts can be required to apply federal law, up to and including being required to honor federal privileges, under the Supremacy Clause and the State Judges Clause. *See Haywood v. Drown*, 556 U.S. 729, 733-37, 740-41 (2009) (holding that a New York law requiring prisoners to bring all claims against state corrections officers in the court of claims violated the Supremacy Clause because the law impermissibly blocked state courts from hearing a class of federal claims under § 1983); *Pierce Cnty. v. Guillen*, 537 U.S. 129, 132-33, 146-47 (2003) (holding that a federal statute shielding information collected in connection with particular federal highway safety programs from discovery in both state and federal trials was valid under the Commerce Clause); *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359, 361-62, (1952) (holding that the validity of releases under the Federal Employers’ Liability Act is a federal question to be determined by federal law and that the state trial court erred by applying Ohio law); *Testa v. Katt*, 330 U.S. 386, 387, 392-94 (1947) (holding that a Rhode Island state court could not refuse to enforce a federal law merely because it had a policy against federal statutes it considered “penal”). Separately, however, the Court has also held that anticommandeering concerns can emerge where federal law does not merely incidentally affect how state institutions and agents operate but also transforms those institutions by specifically altering how those institutions function as sovereigns. *See Printz*, 521 U.S. at 932 (noting that laws with an “incidental application to the States” are evaluated differently than laws of which “it is the whole *object* . . . to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty”). Whether a given law is acceptably “supreme” federal law or unacceptable “commandeering” will thus turn on how the law is formally structured and worded. *See also infra* notes 226, 227, 238 and accompanying text. Thanks to Anne O’Connell and to Gillian Metzger for their very helpful comments on the interplay between supremacy and commandeering.

<sup>221</sup> *New York v. United States*, 505 U.S. 144, 169 (1992).

allowing them to pass the blame for their actions to federal officials.<sup>222</sup> State officials might desire federal commandeering for this precise reason.<sup>223</sup> A second and distinct theory of anticommandeering doctrine justifies it by emphasizing its expressive dimensions.<sup>224</sup> On this view, states cannot act as meaningful political counterweights 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.”<sup>225</sup>

Why are these two rationales for anticommandeering doctrine relevant to federal regulatory evidentiary privileges? As an initial matter, such privileges might expressly single out state officials<sup>226</sup> and “direct” them to act or refrain from acting in some particular way—for example, they may make federal officials the exclusive “holders” of the new privilege and thereby restrict state officials from disclosing the protected communications.<sup>227</sup> In addition, by insulating the communications of state officials or their agents from external scrutiny, federal regulatory evidentiary privileges

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<sup>222</sup> See *id.* at 183 (“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 intergovernmental allocation of authority. Where state officials purport to submit to the direction of Congress in this manner, federalism is hardly being advanced.”).

<sup>223</sup> See *id.* Blame-shifting may also occur in the opposite direction, enabling federal government officials to evade electoral accountability by shifting public ire to state officials. See *id.* 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.”).

<sup>224</sup> See Adam B. Cox, *Expressivism in Federalism: A New Defense of the Anti-Commandeering Rule?*, 33 LOY. L.A. L. REV. 1309, 1329 (2000) (arguing that the Supreme Court, in enforcing the anticommandeering rule, prevents the erosion of state autonomy by limiting congressional disregard for that autonomy while simultaneously expressing support for it).

<sup>225</sup> *Id.*

<sup>226</sup> *Printz v. United States* explained that laws with an “incidental application to the States” are evaluated differently than laws of which “it is the whole *object* . . . to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty.” 521 U.S. 898, 932 (1997). A regulatory evidentiary privilege specifically drafted to apply to state officials’ communications would not be a law of general applicability that has merely “incidental application” to state officials. See *New York v. United States*, 505 U.S. 144, 160 (1992) (“This litigation presents no occasion to apply or revisit the holdings of [*Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), and similar cases involving generally applicable laws], as this is not a case in which Congress has subjected a State to the same legislation applicable to private parties.”).

<sup>227</sup> If so drafted, a regulatory evidentiary privilege would “direct the functioning of the state executive,” *Printz*, 521 U.S. at 932, by requiring state officials to keep newly privileged communications confidential and by prohibiting them from waiving privilege over those materials. Cf. *infra* note 238.

could undermine “the structural framework of dual sovereignty”<sup>228</sup> by making state officials whose communications are privileged less wary of, and thus less responsive to, monitoring by other state officials and by the state public. This sort of attenuation of the accountability of state government would be problematic for exactly the same reasons that ordinary commandeering is problematic.

To illustrate these points, consider a recent and live controversy involving the states, the federal government, and the public. In 2009 and 2010, during the run-up to the enactment of the ACA, President Obama frequently promised that “if you like your plan, you can keep it.”<sup>229</sup> But many plans issued on the individual market fell short of the Act’s minimum coverage regulations and cost caps.<sup>230</sup> 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 as noncompliant with the Act.<sup>231</sup> Some commissioners took this option; many others declined.<sup>232</sup> 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.<sup>233</sup>

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.<sup>234</sup> Press

<sup>228</sup> *Printz*, 521 U.S. at 932.

<sup>229</sup> See *Obama: “If You Like Your Health Care Plan, You’ll Be Able to Keep Your Health Care Plan,”* POLITIFACT.COM, <http://www.politifact.com/obama-like-health-care-keep/> (last visited Nov. 7, 2014), archived at <http://perma.cc/46PA-XFJ2> (enumerating thirty-seven 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”).

<sup>230</sup> Juliet Eilperin, Amy Goldstein & Lena H. Sun, *Obama Announces Change to Address Health Insurance Cancellations*, WASH. POST (Nov. 14, 2013), [http://www.washingtonpost.com/politics/obamato-to-announce-change-to-address-health-insurance-cancellations/2013/11/14/3be49d24-4d37-11e3-9890-a1e0997fboco\\_story.html](http://www.washingtonpost.com/politics/obamato-to-announce-change-to-address-health-insurance-cancellations/2013/11/14/3be49d24-4d37-11e3-9890-a1e0997fboco_story.html), archived at <http://perma.cc/PG9-NWWG>.

<sup>231</sup> *Id.*

<sup>232</sup> See Caroline Humer & Curtis Skinner, *State Insurance Regulators Hesitate to Embrace Obamacare Fix*, REUTERS, Nov. 15, 2013, available at <http://www.reuters.com/article/2013/11/16/us-usa-healthcare-states-idUSBRE9AE19P20131116>.

<sup>233</sup> *Id.*

<sup>234</sup> See *id.* (“[Wisconsin Deputy Insurance Commissioner] Schwartzer said he was looking to hear back from administration officials as soon as possible with more information that would help

reports also indicated that state and federal regulators were participating in joint conference calls concerning how to implement the administration's proposed "fix."<sup>235</sup>

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 ACA 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 communications on this issue between the federal executive branch and the state insurance commissioners would prevent the public from ever knowing the full story behind how these choices were made. 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,"<sup>236</sup> 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."<sup>237</sup> 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?<sup>238</sup>

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Wisconsin decide how to proceed, though he said that like some other states the department had already encouraged insurers to issue early renewals on expiring policies through most of 2014.").

<sup>235</sup> *See 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.").

<sup>236</sup> *New York v. United States*, 505 U.S. 144, 169 (1992).

<sup>237</sup> *Cox*, *supra* note 224, at 1329.

<sup>238</sup> The vulnerability of any new federal regulatory evidentiary privilege to an anticommandeering attack will, of course, depend on how it is structured and worded. One way to mitigate commandeering concerns posed by such a regulation would be to structure any new federal regulatory evidentiary privilege applicable to state officials along the lines of the common-interest privilege, a variant or offshoot of attorney–client privilege. *See* IMWINKELRIED, *supra* note 11,

This illustration demonstrates the complicated and important ways in which a regulatory evidentiary privilege might affect the political economy surrounding state officials and institutions that collaborate in the implementation and enforcement of federal regulatory schemes.<sup>239</sup> The natural impulse may be to confer on the state participants in such schemes the same rights and privileges possessed by their federal counterparts—up to and including the prerogative to communicate and share information within the federal–state regulatory apparatus without worries over subsequent disclosure. But clothing state participants with that power could have the side effect of altering the degree to which state officials can be held accountable for their decisionmaking by their state-level principals. 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 political institutions.”<sup>240</sup> 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.

#### D. *A Summary*

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 separate from, and logically prior to, the question of whether any particular regulatory evidentiary privilege that the Department of Labor ultimately promulgates is well-crafted and sensible. Put another

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§ 6.8.1 (noting that “the so-called joint defense, pooled information, or common legal interest privilege . . . comes into play in situations in which allied parties and their lawyers meet to pool information and develop common legal strategies” (footnotes omitted)). Some courts have held each participant in a communication that is shielded by the common interest privilege is a holder of the privilege and can thus waive the privilege as to his own communication. *Id.* § 6.8.1 n.150. If so designed, a federal regulatory evidentiary privilege would not permit federal regulators to prevent the disclosure of state officials’ communications. This, in turn, would substantially curb formal commandeering concerns and would limit the ability of state officials to exploit the new federal privilege to resist disclosure and discovery. Thanks to Edward Imwinkelried for pointing out this possibility and its significance.

<sup>239</sup> Many such collaborative schemes exist. See Abbe R. Gluck, *Federalism from Federal Statutes: Health Reform, Medicaid, and the Old-Fashioned Federalists’ Gamble*, 81 *FORDHAM L. REV.* 1749, 1755–57 (2013) (describing the “ubiquitous and complex” involvement of states in implementing federal programs since the New Deal).

<sup>240</sup> Cox, *supra* note 224, at 1327.

way, one can and should evaluate a delegation before a delegate starts to wield its delegated power.<sup>241</sup>

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 used in the realm of privilege.<sup>242</sup> Giving agencies the power to privilege risks compromising agency accountability, state regulatory interests, and the principles that motivate the anticommandeering 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 proposed rules of evidentiary privilege issued by executive agencies for comment; and, ultimately, to the state and federal courts as they opine on the scope and enforceability of such regulatory evidentiary privileges. These intermediate conclusions also provide the necessary foundation for tackling the fundamental challenge at issue here: what body should authorize 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.

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<sup>241</sup> Cf. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472-73 (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.”).

<sup>242</sup> It is true that Congress could enact a federal statutory privilege that applied to communications between federal and state officials, and that such a statute would also obscure the lines of accountability for state officials. For that matter, Congress could also enact statutes that would gut federal agency accountability or that would trump state discovery provisions or state open government laws. But Congress, because it is charged with representing and balancing the various competing interests of the multiple constituencies that it represents, has a much more attenuated interest than does an executive agency in actually achieving those results. A federal agency dominated by a focus on achieving its regulatory and enforcement goals is *more* likely than Congress to adopt broad evidentiary privileges, with *less* consideration of the countervailing accountability and state regulatory and governance interests.

## IV. PRIVILEGE AND INSTITUTIONAL CHOICE

Institutions matter in administrative law. “Perhaps the central question in administrative law is how decision-making authority should be allocated among political institutions.”<sup>243</sup> Privilege law is novel terrain for those concerned with the architecture of administrative governance. But the foregoing analysis suggests some considerations that ought to govern the choice of the institution responsible for generating any new corpus of privilege law that may be applicable to administrative agencies.

It is worth beginning with the obvious point that such an institution need not be an agency. The law of privilege may need revision in order to better serve the needs of an increasingly complex federal administrative state. But there is no good reason why these revisions must be authored by agencies themselves. Ultimately, the ballgame here is to select (or create) an institutional process that will prompt privilege law to move as much as necessary, but no further, in the direction of ensuring that agencies can achieve legitimate regulatory goals. As the story of the Housekeeping Act illustrates,<sup>244</sup> this is most likely to occur if the institution given the privilege pen has no intrinsic incentive to write rules that will insulate agencies from external review. Although myriad checks constrain the process of agency rulemaking,<sup>245</sup> these boundaries are capacious enough that they leave considerable leeway (both practical and legal) within which agencies may act strategically to promulgate privilege regulations that will protect themselves from scrutiny by the public and review by courts and other government actors. Simple principles of public choice theory suggest that agencies will likely use that leeway.<sup>246</sup>

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<sup>243</sup> Gersen, *supra* note 137, at 201.

<sup>244</sup> See *supra* Section I.C.

<sup>245</sup> Checks on agency rulemaking aim to ensure that agencies will write sensible rules consistent with their statutory mandates. For example, when it acts by notice and comment rulemaking, an agency must engage in a reasoned decisionmaking process that is at least partly open to public scrutiny; it must often face intramural pushback, from agency inspectors general; it must frequently face extramural review of its work product by the White House or by the Office of Information and Regulatory Affairs (OIRA); and it must ensure its rules comport with applicable statutory standards and judicial doctrines, or else face legal attack. See Amy Baron-Evans & Kate Stith, *Booker Rules*, 160 U. PA. L. REV. 1631, 1642 (2012) (explaining how the U.S. Sentencing Commission was not subject to the normal checks on federal agencies that would have ensured “honesty, transparency, and accountability in rulemaking”).

<sup>246</sup> See sources cited *supra* note 172 (collecting some recent scholarly literature exploring strategic agency behavior in the specific context of self-insulation from external review). Max Weber’s insights on the nature of bureaucracies are also relevant here. Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 921 (2006) (describing Weber’s argument that “[i]n bureaucratic organizations, information enables its holder to perform his or her functions—often more effectively by virtue of keeping that information from others—and to amass power” and concluding

This observation naturally suggests a second important point. To capture the benefits of agency expertise without incurring its costs, any institution charged with drafting new rules of privilege ought to be able to benefit from agency experience—that is, it must be open to accepting substantive input from agencies such as the SEC, CFPB, the Department of Justice, or the Department of Labor on the reforms to privilege law they believe are necessary. The dynamics of information flow among agencies, state actors, and regulated parties are complex and important. The emergence of new hybrid administrative forms<sup>247</sup> means that these dynamics are arguably becoming increasingly complex and important with the passage of time. Agencies will have important insights into those evolving dynamics. Agencies therefore need to have a meaningful voice in the institution charged with developing any new set of privilege rules that may be necessary.

Third, another kind of expertise also has an obvious role to play: expertise in the formulation of privilege law. Privileges exist to serve “extrinsic goals,” such as promoting the social policy that favors frank communications between lawyer and client or husband and wife; they do not exist to further the “epistemic goal” of improving the quality of truth-seeking by litigants, courts, or agencies.<sup>248</sup> Evaluating these social policy questions is a difficult job, and not only when the task at hand requires considering exotic constitutional issues of federalism and commandeering, but also in its simplest, “plain vanilla” incarnation. The institution charged with developing privilege law must therefore be expert *at privilege law*. It should have a primary mandate of developing and improving privilege law, not a primary mandate of regulating pension plans, oil refineries, or drug labels.

Executive branch agencies lack this important variety of expertise.<sup>249</sup> It is true, of course, that many agencies have systems of adjudication that

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that “efforts to stop bureaucratic secrecy or to impose disclosure requirements to mitigate it run counter to the necessary and inevitable dynamics of the bureaucratic state, as well as its resistance to change”).

<sup>247</sup> See *supra* Section II.B.

<sup>248</sup> Frederick Schauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 U. PA. L. REV. 165, 167-68 (2006) (categorizing rules of evidence as either serving “extrinsic goals” or serving the “(internally) epistemic” goal of “increasing the accuracy and efficiency of factfinding under circumstances of jury decisionmaking”).

<sup>249</sup> Cf. Green, *supra* note 156, at 97-98 (“[I]t seems doubtful that the [CFPB] is the best-positioned public 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.”).

resolve a massive volume of cases.<sup>250</sup> Agencies are therefore old hands at writing agency-level rules of procedure and even agency-level rules of evidence,<sup>251</sup> rules that frequently deviate from the federal rules in order to promote more efficient fact-finding by agency adjudicators.<sup>252</sup> What is pertinent here, however, is that no agency has adopted an agency-level code of *privilege* that purports to supplant otherwise applicable privilege law. As Professor Pierce noted, “[c]ourts, agencies and commentators seem to be in agreement that all agencies must recognize claims of evidentiary privilege to the same extent that courts must recognize such claims.”<sup>253</sup> Agencies are experienced adjudicators, but they are *not* experienced authors of privilege rules.<sup>254</sup>

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<sup>250</sup> The aggregate volume of agency adjudication is enormous. Indeed, the sheer number of cases (or “adversarial proceedings”) decided by agencies dwarfs the number of cases decided by federal courts. See Anne Joseph O’Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 936 (2009) (noting that, in 2007, “Article III and bankruptcy judges conducted about 95,000 adversarial proceedings, including trials, while federal agencies completed over 939,000 such proceedings, including immigration and social security disputes”).

<sup>251</sup> The APA authorizes agencies to “rule on offers of proof and receive relevant evidence,” 5 U.S.C. § 556(c)(3) (2012), and to admit “[a]ny oral or documentary evidence,” *id.* § 556(d). It also requires that agencies “as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.” *Id.*; see also A GUIDE TO FEDERAL AGENCY ADJUDICATION 94 (Jeffrey B. Litwak ed., 2d ed. 2012) (“Subject to the requirements of APA § 556 and of due process, agencies may prescribe their own rules of evidence.”).

<sup>252</sup> See Richard J. Pierce, Jr., *Use of the Federal Rules of Evidence in Federal Agency Adjudications*, 39 ADMIN. L. REV. 1, 5-6 (1987) (“There are 280 regulations that govern evidentiary decisionmaking by federal agencies. . . . The majority [of agency regulations]—243 of 280—make no reference to the [Federal Rules of Evidence] and appear not to impose any constraints on the discretion of ALJs to admit evidence. Often these provisions either parrot the APA or paraphrase it. The other 37 evidentiary regulations make some reference to the [Federal Rules of Evidence].”).

<sup>253</sup> *Id.* at 8. This rule “makes eminently good sense,” Professor Pierce continues, because

[t]he reasons for recognizing evidentiary privileges differ fundamentally from the reasons that support adoption of most evidentiary rules. Evidentiary privileges exist not because they further the truth-seeking function, but because forced disclosure of some types of information will cause substantial harm to other social values. Since the harm resulting from forced disclosure of privileged information is identical whether the information is disclosed in a judicial proceeding or an administrative proceeding, the law of privileges should apply equally to both types of proceedings.

*Id.* (footnote omitted).

<sup>254</sup> Kenneth Culp Davis prefaced his discussion of privileges within agencies by remarking that “[t]he subject of privileges in the administrative process is so unimportant that it was not mentioned in the 1958 Treatise. It may not be worth mentioning now.” See KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE, § 16.10 (2d ed. 1980). He goes on to explain that because of the “quite simple” fact that “agencies respect the rules of privilege,” “litigation on the subject does not develop. . . . Any privilege that is based on substantive policy is obviously as appropriate for an agency proceeding as for a court proceeding.” *Id.*

If independence, accessibility, and expertise are vital considerations, the remaining design considerations are no less vital. The institution charged with revising privilege law ought to have a process for elaborating those rules that is transparent, in the sense that it is open to the public, in order to counter the risk of capture by the powerful interests with a stake in the evolution of the law of privilege. And because privilege law implicates important state interests, the institution's processes should preserve meaningful opportunities for state input.

Creating such an institution from scratch would be quite a challenge.<sup>255</sup> Fortunately, an institution already exists that satisfies most, if not all, of the design constraints outlined: the judicial rulemaking process.<sup>256</sup> A special subcommittee of the Advisory Committee on Evidence Rules could easily be 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 transparent and apolitical. It has recently demonstrated its ability to consider federalism interests when enacting privilege rules.<sup>257</sup> It is accessible to federal agencies, state agencies, and the public, and it is receptive to input from these parties. As an institution, it has no stake in reducing executive accountability at either the state or federal level, nor is it beholden to an entity with those incentives. It has no skin of its own in the game. Its ultimate work product—rules of privilege that become law only if enacted by Congress—will receive deference by courts, including the Supreme Court.<sup>258</sup> And it has critically relevant expertise in the examination and enunciation of a fair and transsubstantive set of privilege rules.

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<sup>255</sup> 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. Such a 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. Alternatively, one might also imagine creating a specialized OIRA-like review process targeted specifically at vetting regulatory evidentiary privileges prior to final adoption of those rules. Each idea has its respective virtues. But neither seems to offer significant advantages or safeguards relative to the existing judicial rulemaking process.

<sup>256</sup> See Lumen N. Mulligan & Glen Staszewski, *The Supreme Court's Regulation of Civil Procedure: Lessons from Administrative Law*, 59 UCLA L. REV. 1188, 1201-02 (2012) (describing the seven-step process for adopting new civil rules, a process that incorporates widespread publication of draft rules, notice and comment periods, a requirement of explanation, a requirement for the inclusion of dissenting views, public hearings, multiple levels of review, and multiple vetogates).

<sup>257</sup> See Broun & Capra, *supra* note 17, at 261-69 (describing committee deliberations on how Federal Rule of Evidence 502 should affect state courts and disclosures made to state agencies).

<sup>258</sup> See *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 609 (2009) (citing the “important virtues” of rules enacted through the Rules Enabling Act process, which draws on the “collective experience of bench and bar” and “facilitates the adoption of measured, practical solutions”); *id.* at

A final virtue of the judicial rulemaking procedure is that it is the best avenue for getting proposed new rules of agency privilege drafted and teed up for Congress to enact. This is not as foolish a hope as it may seem. Even in the midst of historically unprecedented levels of gridlock, Congress has in fact been able to legislate new privileges, and the privileges it has been willing to create are privileges that relate to administrative agencies. On four occasions between 2008 and 2012, Congress added or amended statutes to give agencies greater leeway to receive and share information without loss of privilege.<sup>259</sup> If the judicial rulemaking process were tasked with taking a comprehensive crack at the problem of agencies and privilege, Congress may eventually be willing to endorse its recommended changes to privilege law.

I do not want to overstate the case. It is true that entrusting the judicial rulemaking process with the creation of new privilege rules on agency selective waiver and inter-agency privilege may ultimately leave privilege law unchanged. 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.<sup>260</sup> Even assuming judicial rulemakers determine new privileges are necessary, Congress may not agree. It would not be the first time that has happened: as in the 1970s, Congress may eventually decide that privileges are best forged through the common-law decisionmaking

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610 (Thomas, J., concurring) (noting that Congress's choice of the judicial rulemaking process "is entitled to our full respect"); James E. Pfander, *Collateral Review of Remand Orders: Reasserting the Supervisory Role of the Supreme Court*, 159 U. PA. L. REV. 493, 497 n.19 (2011) (noting that *Swint v. Chambers County Commission*, 514 U.S. 35, 48 (1995), "emphasizes the openness of the rulemaking process, the involvement of bench-bar committees, and the role of Congress in passing on proposed rule changes").

<sup>259</sup> For example, 12 U.S.C. § 1821(t) was amended in 2012 to add the CFPB to the list of agencies that can share information without waiving privilege. 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, § 1, 126 Stat. 1589, 1589 (2012) (codified at 12 U.S.C. § 1821(t) (2012)). In 2010, Congress enacted 15 U.S.C. § 78x(f), which permitted the SEC to share information with other agencies without loss of privilege. Investor Protection and Securities Reform Act of 2010, Pub. L. No. 111-203, § 929k, 124 Stat. 1822, 1860-61 (codified at 15 U.S.C. 78x(f) (2012)). In 2008, Congress enacted 12 U.S.C. § 5111, which permitted federal and state agencies to share information about mortgage licensing without the loss of privilege and also preempted state laws that would provide a weaker privilege. Secure and Fair Enforcement for Mortgage Licensing Act of 2008, Pub. L. No. 110-289, § 1512, 122 Stat. 2810, 2820 (codified as amended at 12 U.S.C. § 5111 (2012)). In 2010, Congress enacted 15 U.S.C. § 7215(b)(5)(C), which let the PCAOB share information with foreign oversight authorities without loss of privilege.

<sup>260</sup> See *supra* Section II.A.

process rather than through positive lawmaking.<sup>261</sup> That result would not be a failure, but just as much of a success as if Congress does ultimately enact a new set of privilege rules. By allocating the development of privilege law to the judicial rulemaking process, Congress will ensure that the decision on adopting new privileges is being channeled through an optimally designed institutional process, rather than ensuring that the process will achieve some preferred substantive result that it is not in a position to determine *ex ante*.

The judicial rulemaking process was an obvious and available option to the Congress that enacted the Affordable Care Act. It would have provided agencies a forum in which they could have made the case that evidentiary privilege law needed to be reformed in the wake of the ACA. 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 ACA was slowly making its way through Congress.

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 law of privilege? 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, due to the absence of any congressional deliberation on 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.<sup>262</sup> On the binary view, the choice of delegation is on or off: either Congress delegates power or it retains power for itself. But there is also a

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<sup>261</sup> See Imwinkelried, *supra* note 19, at 42-44 (describing how Congress balked at codifying certain privilege rules, preferring common-law development).

<sup>262</sup> See 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 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." (footnote omitted)).

third player that the binary view ignores: the courts.<sup>263</sup> The federal courts also serve as congressional delegates, in the sense that they, too, may be entrusted by Congress with the primary responsibility for articulating and enforcing a substantive body of law.<sup>264</sup> By focusing 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."<sup>265</sup>

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 may be every bit as important as the choice to delegate,"<sup>266</sup> 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 delegate choice can give a satisfying explanation of why Congress would swap its choice of delegate in this sudden and dramatic way. The best case study of choice of delegate is Professor Margaret Lemos's study of Title VII, a statute that confers authority upon both courts and agencies to interpret and implement.<sup>267</sup>

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<sup>263</sup> *Id.*

<sup>264</sup> Professor Lemos "treats statutes that contain substantial gaps or ambiguities, and give courts primary *interpretive* authority to resolve those uncertainties" as equivalent to delegations to courts. *Id.* at 365 n.6. This has some functional truth, but there is nonetheless a certain inconsistency in an approach that, on the one hand, heralds the significance of congressional choice of delegate but, on the other hand, counts as "choices" drafting ambiguities that are surely often inadvertent. Oddly, Professor Lemos does not address what must be 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 reason 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 . . . ." (emphasis added)). 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. See 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.").

<sup>265</sup> Lemos, *supra* note 262, at 366.

<sup>266</sup> *Id.*

<sup>267</sup> See Lemos, *supra* note 262, at 380-81 (contrasting the decisions of courts and agencies when placed in the role of delegate under Title VII).

Her conclusions are interesting but admittedly limited.<sup>268</sup> Most saliently for our purposes, because her case study is essentially diagnostic and evaluative rather than predictive, Professor Lemos's 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 for choice of delegate is also of limited help here. Professor Stephenson's model treats congressional choice of delegate as a function of many factors, including legislators' time horizons, the number of issues salient to legislators, the cost to legislators of policy instability over time and incoherence across issues, variance in policy outcomes between courts and legislators, and the predicted value of those outcomes to the legislator.<sup>269</sup> 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.<sup>270</sup> However, it is hard to imagine that such a change did in fact drive the enactment of this particular delegation. For one thing, if legislator preference, 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 administrative bodies, would have appeared to Congress to be suddenly preferable to federal courts in terms of the attributes most relevant to the model.<sup>271</sup> 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.

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<sup>268</sup> See *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.").

<sup>269</sup> See Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035, 1049-57 (2006) (employing a formal model to "analyze the implications that a set of assumptions about legislators, agencies, and courts have for the legislative allocation of interpretive power"); see also Daniel A. Farber, *Modeling Coherence, Stability, and Risk Aversion in Legislative Delegation Decisions*, 119 HARV. L. REV. F. 157, 158 (2006) (offering a table identifying the variables in Stephenson's model).

<sup>270</sup> See Jacob E. Gersen & Adrian Vermeule, Essay, *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").

<sup>271</sup> See Stephenson, *supra* note 269, 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).

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, "[t]he 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 interbranch political dynamics."<sup>272</sup> 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."<sup>273</sup>

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.<sup>274</sup> 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."<sup>275</sup> 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.

The delegation swap effectuated by section 6607 is most easily understood when viewed in this "new and more realistic light"<sup>276</sup> of party competition. Through section 6607, Congress named as its delegate the Department of Labor, a nonindependent executive agency over which Congress and the President could exert control, and thereby replaced a

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<sup>272</sup> Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Power*, 119 HARV. L. REV. 2311, 2315 (2006).

<sup>273</sup> *Id.* at 2364.

<sup>274</sup> *See 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.

<sup>275</sup> Stephenson, *supra* note 269, 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. Matthew C. Stephenson, *The Legislative Choice Between Agencies and Courts: A Response to Farber and Vermeule*, 119 HARV. L. REV. F. 183, 187 (2006).

<sup>276</sup> Levinson & Pildes, *supra* note 272, at 2315.

delegate—the federal courts—that is far more insulated from 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 White House, 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.<sup>277</sup> One can extend that observation to predict that in such a scenario one would also see a Democratic Congress shifting delegated 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 for changes to the law of privilege?<sup>278</sup> One plausible explanation for this choice is that the SEC, unlike the Department of Labor, is an independent agency.<sup>279</sup> The party-competition

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<sup>277</sup> See *id.* 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.”)

<sup>278</sup> See *id.* 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 giving up power to its institutional archrival by delegating to executive agencies. Has Congress lost sight of its own institutional interests?”).

<sup>279</sup> See Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 771 (2013) (“Generally defined as entities whose heads enjoy

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 command: “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 . . . .”<sup>280</sup> The converse should also be true: Congress will prefer to delegate to agencies subject to political control—rather than 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.<sup>281</sup> By observing how these aspects of privilege law develop now that they have been handed over to the Secretary of Labor, we have the chance to test whether and to what extent Congress’s choice of delegate truly matters. Put differently, we will be able to assess how the corpus of privilege law produced by courts compares with the corpus of

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(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).”). Datla and Revesz argue that independence, rather than being a binary trait, in fact is a continuum:

All 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.

*Id.* at 826 (footnote omitted) (internal quotation marks omitted).

<sup>280</sup> Levinson & Pildes, *supra* note 272, at 2358.

<sup>281</sup> Lemos, *supra* note 262, at 372 (“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 269, 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.” (footnotes omitted)).

privilege law that will eventually be produced by agencies. Will temporal consistency diminish while inter-issue consistency increases, as Professor Stephenson's model suggests? 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 nonindependent 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 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, interbranch 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 ACA, there is not one that contains any substantive discussion of either privilege delegations or of section 6607. This Article's goal is to begin that conversation.

## APPENDIX

**Sec. 6607. Permitting Evidentiary Privilege and Confidential Communications.**<sup>282</sup>

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].<sup>283</sup>

“(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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<sup>282</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 6607, 124 Stat. 119, 781-82 (2010) (codified at 29 U.S.C. § 1134(d)-(e) (2012)).

<sup>283</sup> The statute referred to “this title.” 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, Subchapter 1—Protection of Employee Benefits Rights.