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Supremacy, Inc.

David S. Rubenstein

ABSTRACT

This Article opens a new area of study at the intersection of federalism and federal outsourcing. Public law scholars have decried privatization's distorting effects on constitutional rights, separation of powers, and administrative law. Missing from the literature, however, is a corresponding account for federalism. This Article pivots into that neglected space, with some urgency. In statehouses and courthouses around the nation, politicians and advocacy groups are mobilizing to hold federal contractors accountable to state law. Against these initiatives, the federal government and its contractors are hoping to find refuge in the Supremacy Clause.

The Supremacy Clause is the U.S. Constitution's primary mechanism for resolving inevitable conflicts of law between two sovereigns operating in the same territory; it was not designed for the triangulated clashes between states and private actors performing federal work by contract. Current doctrine, however, flattens the structural difference. In scattered and undertheorized precedents, the U.S. Supreme Court has held that federal contracts can displace state law, and that the federal government's constitutional immunity from state law extends to contactors. This Article shines critical light on these Supremacy Clause spinoffs and argues to overrule them on constitutional and normative grounds. Across the regulatory spectrum, contractors routinely stand in for federal actors. But their contracts need not, and should not, stand in for federal law.

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INTRODUCTION

Federal outsourcing has skyrocketed through the twenty-first century—too fast for the U.S. Constitution to keep up.[1] Private entities have always supplied the federal government with goods and services (such as pencils, laundry service, construction, military equipment, and so on).[2] Today, however, the government routinely hires private actors to *perform* federal functions.[3] For example, federal contractors fight in our wars, operate immigration prisons, collect student loans, draft laws, and implement major federal programs.[4] For better and worse, the marbling of public and private enterprise has transformed how government operates, if not also what government is.[5] Federal contracting can be a boon for government efficiency and enable federal programs that might otherwise be

1. This Article uses the terms "outsourcing" and "contracting" interchangeably to mean government acquisition of goods and services from private parties. The term "privatization" has a broader meaning, which can include any transfer of activity, goods, or functions from the public to the private sector. *See* KEVIN R. KOSAR, CONG. RSCH. SERV., RL33777, PRIVATIZATION AND THE FEDERAL GOVERNMENT: AN INTRODUCTION 2–3 (2006). In America, however, outsourcing is the most prevalent form of privatization. *Id.* at 12–20 (defining and describing various modes of privatization in the United States). Thus, for the purposes of this Article, I use all three terms interchangeably.
2. *See* JAMES F. NAGLE, A HISTORY OF GOVERNMENT CONTRACTING (1992) (providing a rich historical account of federal outsourcing); Daniel Guttman, *Public Purpose and Private Service: The Twentieth Century Culture of Contracting Out and the Evolving Law of Diffused Sovereignty*, 52 ADMIN. L. REV. 859, 881–90 (2000) (discussing the ideological and political shift toward federal outsourcing in the mid-to-late twentieth century).
3. *See, e.g.*, JON D. MICHAELS, CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO THE AMERICAN REPUBLIC 97 (2017) ("[O]utsourcing is completely and utterly ubiquitous—and still gaining speed."); Sidney A. Shapiro, *Outsourcing Government Regulation*, 53 DUKE L.J. 389, 389 (2003) ("The government has increasingly relied on private means to achieve public ends, not only involving services to the public, but the origination and implementation of regulatory policy as well . . . .").
4. Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 551–52 (2000) (discussing the pervasiveness of private actors in "regulation, service provision, policy design, and implementation"); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1398 (2003) (explaining that contractors "wield power over others" and "control third-parties' access to government benefits and resources"); P. W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY 63–64 (2003) (discussing use of military contractors on the battlefields). For in depth studies of federal outsourcing of immigration detention and federal student loan servicing, see *infra* Subpart II.A.
5. *See* Alfred C. Aman, Jr. & Landyn Wm. Rookard, *Private Government and the Transparency Deficit*, 71 ADMIN. L. REV. 437, 440 (2019) ("The 'government' with which the average citizen interacts is a complex admixture of private and public actors, empowered by an intricate web of statutes, regulations, contracts, and less formal partnerships."); Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397, 402–21 (2006) (describing the erosion of the public-private dichotomy occasioned by rampant government outsourcing).

infeasible.[6] Yet the efficiencies gained by federal outsourcing are owed, in part, to the asymmetrical accountability structures governing public and private action.[7] By dint of their private status, contractors generally operate beyond constitutional constraints even when they perform public functions.[8] Moreover, contractors are not subject to the Administrative Procedure Act,[9] the Freedom of Information Act,[10] and other public laws that govern federal action.[11] Arguably, these legal controls need not apply because, in theory, contractors will be held accountable to federal officials.[12]

While some commentators hail federal outsourcing as a key innovation of modern government,[13] others decry outsourcing's distorting effects on

6. Jack M. Beermann, *Administrative-Law–Like Obligations on Private[ized] Entities*, 49 UCLA L. REV. 1717, 1718 (2002) (arguing that privatization is more efficient "both because private entities are freed from restrictions placed only on government, and because private entities are subject to market discipline, which makes them better able to respond to changes in the social environment"); *see also* Stan Soloway & Alan Chvotkin, *Federal Contracting in Context: What Drives It, How to Improve It*, *in* GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 192, 194 (Jody Freeman & Martha Minow eds., 2009) (arguing that competitive outsourcing "can and generally does drive higher performance and improve service delivery").
7. *See* Guttman, *supra* note 2, at 862 (explaining that "in practice, two different sets of regulations have come to govern those doing the basic work of government[:]" those that apply to federal officials, on the one hand, and those that apply to federal contractors, on the other).
8. On rare occasions, private actors are treated as public actors under the "state action" doctrine, which is a judicial determination that private action should be treated as public action for constitutional purposes. *See* Metzger, *supra* note 4, at 1373. Absent exceptional circumstances, however, federal contractors do not generally qualify as public actors. *Id.*
9. Broadly speaking, the Administrative Procedure Act (APA) provides a general statutory framework of procedures agencies must follow and the availability and scope of judicial review of agency decisions. *See generally* 5 U.S.C. §§ 500–04, 551–59, 701–06. But federal contractors are not "agencies" for purposes of the Act. *Id.* § 551 (defining "agencies").
10. *See* 5 U.S.C. § 552; Aman & Rookard, *supra* note 5, at 446 ("Private providers almost always fall outside of the scope of [the Freedom of Information Act], even when they provide public services pursuant to contracts with public agencies.").
11. *See* Kimberly N. Brown, *"We the People," Constitutional Accountability, and Outsourcing Government*, 88 IND. L.J. 1347, 1361–63 (2013) (discussing the asymmetrical legal rules that apply to federal and private actors); Guttman, *supra* note 2, at 891–96 (same).
12. *See* Dan Guttman, *Governance by Contract: Constitutional Visions; Time for Reflection and Choice*, 33 PUB. CONT. L.J. 321, 324 (2004). Professor Guttman argues, however, that this theory of contractor accountability has failed to live up to its promise. *See id.* at 340 (explaining that, "by consequence of decades of personnel ceilings, much arguably inherently governmental work has long since been contracted out," and that "much of the workforce needed to assure official oversight is not classified as inherently governmental; e.g., the management and oversight of contractors"); *accord* PAUL C. LIGHT, THE GOVERNMENT INDUSTRIAL COMPLEX: THE TRUE SIZE OF THE FEDERAL GOVERNMENT, 1984–2018, at 65–72 (2018).
13. *See, e.g.*, E. S. SAVAS, PRIVATIZATION: THE KEY TO BETTER GOVERNMENT 4–6, 119–230 (1987) (noting "that privatization, properly carried out, generally leads to large increases in efficiency while improving or at least maintaining the level and quality of public services"); *see also generally* AL GORE & NAT'L PERFORMANCE REV., FROM RED TAPE TO RESULTS: CREATING A

constitutional rights, separation of powers, and administrative law.[14] These competing perspectives have spawned an impressive literature and a smorgasbord of reformist proposals.[15] Until now, however, federalism has been a virtual blind spot in the descriptive and prescriptive agendas. This Article pivots into that neglected space, where the action is unfolding today. Across the regulatory spectrum, state officials and advocacy groups are mobilizing to hold federal contractors accountable to state law. Meanwhile, the federal government and its contractors are hoping to quash these initiatives on federalism grounds.[16]

Examples from the student loan context crystalize these trends. Currently, the federal government owns more than $1 trillion in outstanding student debt.[17]

GOVERNMENT THAT WORKS BETTER & COSTS LESS (1993); DAVID OSBORNE & TED GAEBLER, REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR (1992).

14. Pertaining to constitutional rights, see generally Metzger, *supra* note 4, and PAUL R. VERKUIL, OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT 166–67 (2007) [hereinafter VERKUIL, OUTSOURCING SOVEREIGNTY]. Pertaining to separation of powers, see Paul R. Verkuil, *Outsourcing and the Duty to Govern*, *in* GOVERNMENT BY CONTRACT, *supra* note 6, at 310; Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. REV. 62, 72–73 (1990); Kenneth A. Bamberger, *Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State*, 56 DUKE L.J. 377 (2006); and MICHAELS, *supra* note 3, at 17 (characterizing privatization as perhaps the "greatest threat" to separation of powers because it usurps the checks and balances forged around administrative governance—what he calls "administrative separation of powers"). Pertaining to administrative law, see generally *id.*; Alfred C. Aman, Jr., *Privatization and Democracy: Resources in Administrative Law*, *in* GOVERNMENT BY CONTRACT, *supra* note 6, at 261; and Jeffrey A. Pojanowski, *Reconstructing an Administrative Republic*, 116 MICH. L. REV. 959 (2018) (reviewing MICHAELS, *supra* note 3). Missing from the literature, however, is a corresponding account for federalism.

15. Generally speaking, these proposals range from doctrinal, to regulatory, to institutional and contractual redesign. For an excellent collection of essays, capturing a range of scholarly viewpoints in favor and against reform, see GOVERNMENT BY CONTRACT, *supra* note 6.

16. *See, e.g.*, Federal Preemption and State Regulation of the Department of Education's (ED's) Federal Student Loan Programs and Federal Student Loan Servicers, 83 Fed. Reg. 10,619, 10,620–21 (Mar. 12, 2018) [hereinafter Preemption Guidance] (arguing that state regulatory requirements for federal student loan servicers violate the Supremacy Clause); GEO Grp., Inc. v. Newsom, No. 19-CV-02491 JLS (WVG), 2020 WL 5968759 (S.D. Cal. Oct. 8, 2020) (granting in part and denying in part plaintiffs' motion to preliminarily enjoin a California law barring private detention centers from operating in the state); United States v. California, 921 F.3d 865 (9th Cir. 2019) (preliminarily enjoining California law requiring the state attorney general to review the circumstances around apprehension of noncitizens detained in privately owned and operated facilities in the state, but upholding other aspects of the law).

17. *See Federal Student Loan Portfolio*, FED. STUDENT AID, https://studentaid.ed.gov/sa/about/data-center/student/portfolio [https://perma.cc/Y63V-QX4C] (select "Federal Student Aid Portfolio Summary" hyperlink) (reporting $1.290 trillion of outstanding direct loans at the end of the third quarter of 2020); Zach Friedman, *Student Loan Debt Statistics in 2020: A Record $1.6 Trillion*, FORBES (Feb. 3, 2020, 6:51 PM), https://www.forbes.com/sites/zackfriedman/2020/02/03/student-loan-debt-statistics/#10ae284d281f [https://perma.cc/LUM8-RZX6]

Rather than manage this huge portfolio in-house, the Department of Education (ED) contracts with private loan servicing companies to collect borrower payments and perform other administrative tasks.[18] According to the department's internal watchdog, these student loan servicers have engaged in systemic wrongdoing but are seldom sanctioned by the federal government.[19] To bridge the accountability gap, several states have enacted laws to monitor and regulate the federal government's student loan servicers.[20] In addition, a spate of lawsuits seek compensatory damages against federal student loan servicers under state consumer protection laws.[21]

Similar examples abound in the immigration context. Most detained migrants in the United States are held in facilities owned and operated by private prison companies under lucrative contracts.[22] Despite wideranging reports of

(providing a breakdown of outstanding federal and privately owned student debt, most of which is federally owned).

18. *See* OFF. OF INSPECTOR GEN., U.S. DEP'T OF EDUC., FEDERAL STUDENT AID: ADDITIONAL ACTIONS NEEDED TO MITIGATE THE RISK OF SERVICER NONCOMPLIANCE WITH REQUIREMENTS FOR SERVICING FEDERALLY HELD STUDENT LOANS 5–6 (2019) [hereinafter DEP'T EDUC. OIG REPORT], https://www2.ed.gov/about/offices/list/oig/auditreports/fy2019/a05q0008.pdf [https://perma.cc/37B4-PZSA]; *see also* U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-523, FEDERAL STUDENT LOANS: EDUCATION COULD IMPROVE DIRECT LOAN PROGRAM CUSTOMER SERVICE AND OVERSIGHT (2016).

19. DEP'T EDUC. OIG REPORT, *supra* note 18, at 10–11. These allegations are corroborated by numerous internal and external watchdog reports. For a useful collection and summary of such reports, see BEN KAUFMAN, STUDENT PROT. BORROWER CTR., ASSESSMENTS OF THE DEPARTMENT OF EDUCATION'S HANDLING OF THE STUDENT LOAN PORTFOLIO: A REVIEW (2019), https://protectborrowers.org/wp-content/uploads/2019/11/SLLI_Assessments-of-ED_A-Review.pdf [https://perma.cc/5F3A-2K5M].

20. *See, e.g.*, Assemb. 2251, 2015–2016 Leg., Reg. Sess. (Cal. 2016); H.R. 6915, 2015 Gen. Assemb., Reg Sess. (Conn. 2015); S. 19-002, 72nd Gen. Assemb., Reg. Sess. (Colo. 2019); D.C. Act 21-571, 2016 Council of D.C. (D.C. 2016); S. 1351, 100th Gen. Assemb., Reg. Sess. (Ill. 2017); S. 995, 129th Leg., Reg. Session (Me. 2019); Assemb. 455, 218th Leg., Reg. Sess. (N.J. 2019); H.R. 5936, 2019 Gen. Assemb., Reg. Sess. (R.I. 2019); S. 6029, 65th Leg, Reg. Sess. (Wash. 2018); S. 77, 2020 Gen. Assemb., Reg. Sess. (Va. 2020).

21. *See, e.g.*, Nelson v. Great Lakes Educ. Loan Servs., Inc., 928 F.3d 639 (7th Cir. 2019); People v. Navient Corp., No. 17 CH 761 (Ill. Cir. Ct. July 10, 2018); Pennsylvania v. Navient Corp., 354 F. Supp. 3d 529 (M.D. Pa. 2018), *interlocutory appeal certified*, 2019 WL 1052014 (M.D. Pa. Mar. 5, 2019); Dawson v. Great Lakes Educ. Loan Servs., No. 15-cv-475-jdp, 2019 U.S. Dist. LEXIS 210795 (W.D. Wis. Dec. 5, 2019); Lawson-Ross v. Great Lakes Higher Educ. Corp., No. 1:17-CV-253-MW/GRJ, 2018 WL 5621872, at **2–4 (N.D. Fla. Sept. 20, 2018), *vacated and remanded*, 955 F.3d 908 (11th Cir. 2020).

22. *See* Livia Luan, *Profiting From Enforcement: The Role of Private Prisons in U.S. Immigration Detention*, MIGRATION POL'Y INST. (May 2, 2018), https://www.migrationpolicy.org/article/profiting-enforcement-role-private-prisons-us-immigration-detention [https://perma.cc/J6PQ-DKPH]. The federal government currently spends approximately $3 billion each year on immigration detention, much of it for private detention. Emily Kassie, *Detained: How the US Built the World's Largest Immigration Detention System*, GUARDIAN (Sept. 24, 2019, 1:39

egregious health and rights violations in these facilities,[23] the Department of Homeland Security (DHS) routinely rehires and rarely sanctions the private prison companies at fault.[24] California has recently passed laws to monitor, regulate, and ultimately ban private immigration detention facilities in the state.[25] Moreover, in several jurisdictions, prison companies are defending against class action claims under state law.[26]

As these examples illustrate, state law offers a reservoir of possibility to hold contractors accountable in ways that the federal government does not. But therein lies the rub: State-level accountabilities may detract from the putative benefits of federal contracting. Thus, it is no wonder that the government and its contractors seek refuge in the Supremacy Clause.[27]

AM), https://www.theguardian.com/us-news/2019/sep/24/detained-us-largest-immigrant-detention-trump [https://perma.cc/HD8K-UWUG].

23. For a recent report from DHS's internal watchdog, see OFF. OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., OIG-19-47, CONCERNS ABOUT ICE DETAINEE TREATMENT AND CARE AT FOUR DETENTION FACILITIES (2019) [hereinafter DHS OIG 19-47], https://www.oig.dhs.gov/sites/default/files/assets/2019-06/OIG-19-47-Jun19.pdf [https://perma.cc/ENH6-PBMR]. *See also* Charles Lane, *ICE Failed to Hold Detention Center Contractors Accountable, Report Finds*, NPR (Feb. 1, 2019, 3:59 PM), https://www.npr.org/2019/02/01/690690056/ice-failed-to-hold-detention-center-contractors-accountable-report-finds [https://perma.cc/8RLN-VNH4] (chronicling DHS's internal watchdog reports about unpunished contractual and legal violations at private detention facilities).

24. *See* OFF. OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., OIG 19-18, ICE DOES NOT FULLY USE CONTRACTING TOOLS TO HOLD DETENTION FACILITY CONTRACTORS ACCOUNTABLE FOR FAILING TO MEET PERFORMANCE STANDARDS (2019) [hereinafter DHS OIG 19-18], https://www.oig.dhs.gov/sites/default/files/assets/2019-02/OIG-19-18-Jan19.pdf [https://perma.cc/J7EF-EZ5F]; MARY SMALL, DET. WATCH NETWORK, A TOXIC RELATIONSHIP: PRIVATE PRISONS AND U.S. IMMIGRATION DETENTION 7–10 (2016), https://www.detentionwatchnetwork.org/sites/default/files/reports/A%20Toxic%20Relationship_DWN.pdf [https://perma.cc/E4MW-ALKN] (discussing how DHS rarely elects to terminate contracts despite reported deficiencies in private facilities).

25. *See* CAL. GOV'T CODE § 12532 (West 2020); CAL. CIV. CODE § 670.9 (West 2020); CAL. GOV'T CODE § 7310 (West 2020); CAL. PENAL CODE §§ 5003.1, 5003.2 (West 2020). For discussion of the potential implications of California's initiatives, see David S. Rubenstein & Pratheepan Gulasekaram, *Privatized Detention & Immigration Federalism*, 71 STAN. L. REV. ONLINE 224 (2019).

26. *See* Petition for a Writ of Certiorari at 2–3, 3 n.1, GEO Grp., Inc. v. Menocal, 139 S. Ct. 143 (2018) (No. 17-1648), 2018 WL 2809390 (describing the litigation and citing parallel cases); Menocal v. GEO Grp., Inc., 113 F. Supp. 3d 1125, 1128 (D. Colo. 2015), *aff'd*, 882 F.3d 905 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 143 (2018); *infra* Subpart II.A.1 (discussing litigation).

27. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

Generally speaking, state law may run afoul of the Supremacy Clause in two ways. First, validly enacted federal law preempts contrary state law.[28] Second, under the intergovernmental immunity doctrine, the federal government and its instrumentalities are constitutionally immune from direct or discriminatory state regulation.[29] The more intriguing questions—and this Article's focus—are derivative. Specifically, to what extent may *federal contracts* preempt state law when federal law does not? And to what extent can the federal government's constitutional immunity from state law extend to its *contractors*?

To date, these questions of "Supremacy, Inc." have escaped the imagination of constitutional and privatization scholars alike. This Article intervenes to disrupt that complacency. Privatization's modus operandi is to change how government works.[30] New game, new rules. While reasonable minds can differ on what the new federalism rules should be, that conversation is long overdue.

The Supremacy Clause is the Constitution's primary mechanism for resolving conflicts of law between federal and state sovereigns.[31] It was not designed for the triangulated clashes amassing in our privatized era—between *states* and *private* actors doing *federal* work by contract. Current doctrine, however, flattens the structural difference. In scattered precedents, the U.S. Supreme Court has held that federal contracts can displace conflicting state law (what I call "preemption by contract"),[32] and that federal contractors may be constitutionally immune from state regulation (what I call "privatized immunity").[33] Following the Court's lead, the federal government and its contractors portray these doctrines as everyday federalism.

This Article rejects that premise and sounds the alarm. The doctrines of Supremacy, Inc. are an affront to first principles. Effectively, the laws of every state may be displaced by federal contracts, without the transparency, accountability, or

28. *See* Va. Uranium, Inc. v. Warren, 139 S. Ct. 1894, 1901 (2019) (explaining "[t]he Supremacy Clause supplies a rule of priority" as between federal and state law); Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288, 1297 (2016) ("Put simply, federal law preempts contrary state law."); *infra* Subpart III.A (discussing preemption doctrine).

29. *See infra* Subpart IV.A (discussing intergovernmental immunity doctrine).

30. *See infra* Subpart I.B (discussing the ideological underpinnings of modern privatization); Guttman, *supra* note 12, at 323 ("At mid-20th century, U.S. reformers undertook to grow Government through reliance upon contractors. Those present at the creation saw that they were engaging in reform of constitutional dimensions—i.e., a reform that would alter basic structures of Government."); *see also* KOSAR, *supra* note 1, at 4–6 (discussing academic and theoretical influences that helped shape the modern privatization movement).

31. *See* Bradford R. Clark, *Constitutional Compromise and the Supremacy Clause*, 83 NOTRE DAME L. REV. 1421 (2008) (providing a rich account of the drafting history and structural compromises forged around the Supremacy Clause).

32. *See infra* Part III (examining and critiquing this doctrine).

33. *See infra* Part IV (examining and critiquing this doctrine).

deliberation that inheres in federal lawmaking processes. Although that is one way to organize a federalist system, we should insist otherwise. In our privatized era, contractors routinely stand in for federal actors.[34] But their contracts need not, and should not, stand in as "supreme Law of the Land."[35]

Skeptics may reasonably worry that states and advocacy groups will overcompensate, overregulate, and obstruct federal programs.[36] Relatedly, it may be objected that state law accountabilities are unnecessary or counterproductive, given the federal controls already in place.[37] Excessive restrictions could hinder the government's ability to get its work done effectively and efficiently.[38] This Article gives voice to these and related concerns. Yet they must be understood in context.

34. *See* LIGHT, *supra* note 12, at 88 ("[M]illions of employees show up for work every day to do work once performed by federal employees."); Paul C. Light, *The True Size of Government: Tracking Washington's Blended Workforce, 1984–2015*, Volcker All., Oct. 2017, at 1, 3 tbl.1 (reporting that in 2015, the federal government's "blended workforce" included approximately 2 million federal employees, and more than 3.5 million contract employees); *see also infra* Subpart II.A (describing role of federal contractors in the areas of student loan servicing and immigration detention); Nicholas Bagley, *Bedside Bureaucrats: Why Medicare Reform Hasn't Worked*, 101 GEO. L.J. 519, 527–28, 532 (2013) (describing how explaining that Medicaid contractors often make coverage decisions and provide direct services to program beneficiaries).

35. *See* U.S. CONST. art. VI, cl. 2 (establishing that the Constitution, federal law, and treaties shall be the "supreme Law of the Land").

36. *Cf.* Steven J. Kelman, *Achieving Contracting Goals and Recognizing Public Law Concerns: A Contracting Management Perspective*, *in* GOVERNMENT BY CONTRACT, *supra* note 6, at 153, 177–78 (voicing concern that, if new legal regimes are brought to bear on federal outsourcing, such regimes could be "exploited by organizations seeking to use it for reasons unrelated to promotion of public law values—with major impacts on the ability of contracts to be expeditiously awarded and successfully administered . . . ."); Metzger, *supra* note 4, at 1454 (noting that Congress may not want to create federal causes of action against contractors, because such exposure "increases the costs of privatized programs, undermines the flexibility and efficiency that governments hope to gain through privatization, and deters private participation").

37. *See* 48 C.F.R. § 37.114 (requiring agency oversight, control, and monitoring of federal service contracts); *see also* Soloway & Chvotkin, *supra* note 6, at 204 ("[T]here is no evidence that substantial overhauls of procurement law, or the addition of new regulatory or statutory requirements, will meaningfully improve the process."); Ellen Dannin, *Red Tape or Accountability: Privatization, Public-ization, and Public Values*, 15 CORNELL J.L. & PUB. POL'Y 111, 154 (2005) (observing that "[w]hen regulation means prices rise to a level at which a contractor cannot make a profit and perform the work for less than government workers can, there is no point in privatizing"). For useful summaries of federal procurement, see generally Mathew Blum, *The Federal Framework for Competing Commercial Work Between the Public and Private Sectors*, *in* GOVERNMENT BY CONTRACT, *supra* note 6, at 63, and KATE M. MANUEL, L. ELAINE HALCHIN, ERIKA K. LUNDER & MICHELLE D. CHRISTENSEN, CONG. RSCH. SERV., R42826, THE FEDERAL ACQUISITION REGULATION (FAR): ANSWERS TO FREQUENTLY ASKED QUESTIONS (2015).

38. *See* Jody Freeman & Martha Minow, *Introduction: Reframing the Outsourcing Debates*, *in* GOVERNMENT BY CONTRACT, *supra* note 6, at 2, 13.

As already noted, federal contractors operate beyond public law constraints that apply to federal employees.[39] Indeed, federal outsourcing decisions are sometimes motivated or designed to circumvent constitutional and administrative checks.[40] Furthermore, the procurement process does not always work as it should, whether because of regulatory loopholes, insufficient competition, government dependencies on contractors, or some combination thereof.[41] Then, after contract formation, federal officials often lack the institutional incentive, know-how, or resources to effectively monitor contract performance.[42] This composite is quite vexing for a constitutional system that prides itself on accountable governance and overlapping safeguards of liberty.[43] Regardless of political control, and despite reams of critical commentary, federal

39. *See supra* notes 8–10 and accompanying text; *see also* Guttman, *supra* note 2, at 862 (explaining that "[t]he rules created to protect Americans against abuse by a bureaucracy of civil servants—including rules on conflict of interest, openness, and pay limits—are essentially inapplicable to those who do the same work in the status of contractors").

40. *See* Jon D. Michaels, *Privatization's Pretensions*, 77 U. CHI. L. REV. 717, 748–50 (2010) (describing how political appointees might prefer to contract around civil servants whose job protections embolden them to question or oppose an administration's policies).

41. *See id.*; Freeman & Minow, *supra* note 38, at 19 (explaining the disconnect between the theory and practice of "government by contract"); *id.* at 12 (noting that "many contracts—some for huge sums of money and involving highly sensitive functions—sidestep the procurement process entirely").

42. *See* Nina A. Mendelson, *Six Simple Steps to Increase Contractor Accountability*, *in* GOVERNMENT BY CONTRACT, *supra* note 6, at 241, 243, 245 n.14 (lamenting that federal agency supervision of contract performance is widely recognized as inadequate, and collecting citations to "countless reports documenting inadequate contract supervision by agencies" by the U.S. Government Accountability Office); VERKUIL, OUTSOURCING SOVEREIGNTY, *supra* note 14, at 148–52 (lamenting that contractor monitoring is quantitatively and qualitatively inadequate); *cf.* DONALD F. KETTL, SHARING POWER: PUBLIC GOVERNANCE AND PRIVATE MARKETS 39–40, 179–211 (1993) (stressing the need for close government monitoring); *see also infra* Subpart II.A (discussing accountability deficits in the immigration detention and student loan contexts, and how state-level initiatives may help close the gap).

43. *See* THE FEDERALIST NO. 51, at 322–23 (James Madison) (Clinton Rossiter ed., 1961) (proposing that separation of powers and federalism would bestow a "double security" for individual liberty); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 487 (1989) (explaining that administrative governance "became constitutionally tenable because the Court's vision of separation of powers evolved . . . to the more flexible (but far more complicated) proposition that power may be transferred *so long as* it will be adequately controlled"); *see also* Jody Freeman, *The Contracting State*, 28 FLA. ST. U. L. REV. 155, 156 (2000) ("Contracting could obscure traditional lines of accountability, enabling legislatures to take credit for doing little, while blaming private contractors for program failures."); MICHAELS, *supra* note 3, at 6 (arguing for the need of "cross-checking government to limit . . . myopic or abusive exercises of [government] power").

officials have proven unable or unwilling to close the accountability and transparency deficits in outsourced governance.[44]

Here's hoping for federalism. Operating from the outside in, states are unhinged from the incentive structures that blunt and skew contracting decisions and federal controls. Moreover, state interventions can expose problems that may otherwise go undetected and incentivize contractors to perform in ways that align with federal interests. These are the instrumental values of federalism at work—checking, challenging, and churning new ideas, not only for the sake of parochial interests, but also for the national welfare.[45] States are willing to play these roles, but will need theoretical traction and some doctrinal space to maneuver. This Article charts a way.

Part I bridges the privatization and federalism literatures, offering important contributions to both. The privatization literature teaches that outsourcing expands the federal government's regulatory reach.[46] Extending that insight to federalism, this Part offers a novel account of outsourcing's spillover effects on state autonomy and the federalist balance of power. Foremost, contracting expands the federal footprint in ways that increasingly step on states' toes. Moreover, state autonomy may be undercut when the federal government devolves or delegates responsibilities to private actors in lieu of state actors.

Part II thickens the account, building from the opposite direction. Expounding on the immigration and student loan examples above, this Part

44. *See* Metzger, *supra* note 4, at 1371–72 (canvassing some academic prescriptions, including amending administrative statutes to improve public oversight of privatized programs, imposing greater regulation and contractual controls on recipients of government funds, and ensuring program participants' access to private law remedies). For a small sampling of nondoctrinal proposals, see Alfred C. Aman Jr., *Privatization and the Democracy Problem in Globalization: Making Markets More Accountable Through Administrative Law*, 28 FORDHAM URB. L.J. 1477, 1500–05 (2001) (proposing reforms to administrative statutes and oversight); Freeman, *supra* note 4, at 201–07 (discussing ways to use government contracts to enhance accountability of privatized governance); and Mendelson, *supra* note 42, at 254–55 (offering a mix of prescriptions, including a statutory enactment that would codify a more restrictive version of *Boyle*'s government contractor defense).

45. For discussion and commentary on the asserted values of federalism, see generally Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499 (1995). *See also* Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) ("Perhaps the principal benefit of the federalist system is a check on abuses of government power."). While some federalism scholars associate the values of federalism with state *autonomy*, and others with state *authority*, these perspectives convene around the important role that states play in checking the federal government. *See, e.g.*, Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889, 1892–94 (2014).

46. Paul Light famously brought this "shadow of government" to the foreground more than twenty years ago. PAUL C. LIGHT, THE TRUE SIZE OF GOVERNMENT 37–44 (1999); *see also* LIGHT, *supra* note 12 (providing an updated account of how the contracting workforce has continued to grow).

illustrates how the federalist structure can have reverberating effects on privatization. Most notably, state law may be leveraged to make federal outsourcing more accountable and transparent. In these and other ways, the futures of federalism and privatization are inexorably linked, and hinge on the doctrinal contingencies of Supremacy, Inc.

Part III homes in on preemption by contract. If asked whether contracts can preempt state law, virtually all jurists and scholars would say no—only federal law can displace state law.[47] That is right in theory but wrong in practice. Federal contracts can displace state law in at least three ways under current doctrine. First, Congress may incorporate the terms of federal contracts by reference into an express preemption provision.[48] Second, federal agencies may do the same, by incorporating contractual terms by reference into binding regulations or orders.[49] Third, under federal common law, contractual specifications can preempt conflicting state law.[50] Despite their differences, these doctrinal strands have one thing in common: A federal contract supplies the conflict that displaces state law.

Those who defend or support preemption by contract may characterize it differently. They may say, for example, that *federal law* is displacing state law in each of the scenarios sketched above.[51] That conceptualization, if accepted, helps to square preemption by contract with the dictum that only federal law can displace state law. Yet it blinks realities on the ground, and more importantly, does not change the results: But for the federal contracts, there would be no conflict with state law, and thus no preemption. To characterize that as preemption by law

47. *See* Empire HealthChoice Assurance, Inc. v. McVeigh, 396 F.3d 136, 143 (2d Cir. 2005) (Sotomayor, J.) ("There is no constitutional basis for making the terms of contracts with private parties similarly 'supreme' over state law."); Nevils v. Grp. Health Plan, Inc., 418 S.W.3d 451, 463 (Mo. 2014) (Wilson, J., concurring) ("[T]he supremacy clause assigns primacy solely to federal law. It does not provide—or even suggest—that the terms of a contract between the federal government and a private . . . company can override [state] law . . . ." (emphasis omitted)), *vacated by* Coventry Health Care of Mo., Inc. v. Nevils, 576 U.S. 1048 (2015) (mem.); Arthur D. Little, Inc. v. Comm'r of Health & Hosps. of Cambridge, 481 N.E.2d 441, 452 (Mass. 1985) ("[T]his court has been unable to locate authority in this or any other jurisdiction which supports the proposition that a contract to which the Federal government is a party somehow constitutes Federal law for the purposes of the supremacy clause.").

48. *See* Coventry Health Care of Mo., Inc. v. Nevils, 137 S. Ct. 1190, 1194 (2017); *infra* Subpart III.A.1.b.

49. *See infra* Subpart III.A.2.

50. *See* Boyle v. United Techs. Corp., 487 U.S. 500, 504 (1988); *infra* Subpart III.A.3.b.

51. *See, e.g.*, *Coventry Health Care*, 137 S. Ct. at 1194 ("Section 8902(m)(1) itself, not the contracts [the agency] negotiates, triggers the federal preemption."); Bradford R. Clark, *Boyle as Constitutional Preemption*, 92 NOTRE DAME L. REV. 2129, 2141 (2017) ("The displacement of state law in these cases rests not on questionable notions of federal common law, but on . . . an actual conflict between state law and the constitutional provisions Congress employed to authorize the conduct in question.").

elides what makes preemption by contract different and dangerous. The doctrinal adjustment prescribed here is straightforward, relatively modest, and fully consonant with modern federalism theory. Namely, federal law *itself* must preempt state law (contracts cannot provide the requisite conflict).

Part IV turns to privatized immunity, which is a derivative of intergovernmental immunity. The name of the flagship doctrine—intergovernmental immunity—suggests that *non*governmental actors are not covered. Here again, however, theory and practice misalign. Under certain conditions, federal contractors may be constitutionally immune from state laws unless Congress clearly specifies otherwise.[52] This Article's doctrinal proposal would invert the default rule: States could regulate federal contractors unless Congress decides otherwise. So revised, federal contractors could still be immunized from state law. Yet that value-laden decision would have to be secured through proper lawmaking channels (rather than judicial fiat or constitutional default).

This Article takes no position on when, if ever, the Constitution should apply to federal contractors; there are tradeoffs at both spectral ends and in between. The crowning threat, however, is the asymmetrical doctrines that coddle federal outsourcing. On one hand, federal contractors are generally absolved from constitutional strictures (on the theory that the Constitution should not apply to private actors).[53] On the other hand, the same contractors enjoy constitutional immunity from state law (on the theory that the Supremacy Clause applies). This light-switching of the Constitution—off and on—is more than an abstract concern. It has real-world consequences for how modern government operates, and by extension, the people's rights and liberties.

It is time to rethink Supremacy, Inc. This Article's doctrinal prescriptions would *relegate* important decisions to federal political actors but would *not require* federal political action. That distinction matters. Unlike legislative, regulatory, or contractual fixes, the prescriptions advanced here do not depend on the federal government's grace to constrain its contracting options. Instead, checks would come from state law—subject, as always, to preemption by federal law or statutorily conferred contractor immunity.

52. *See* North Dakota v. United States, 495 U.S. 423, 434–37 (1990) (linking the Supremacy Clause to the intergovernmental immunity doctrine, under which states may not "discriminate" against the federal government or "those with whom it deals").

53. *See* Metzger, *supra* note 4, at 1369–70, 1403–06 (explaining how and why federal contractors are generally immune from constitutional strictures under the state action doctrine); *see also* Lillian BeVier & John Harrison, *The State Action Principle and Its Critics*, 96 VA. L. REV. 1767, 1786 (2010) ("Constitutional rules are almost all addressed to the government.").

I. PRIVATIZATION'S EFFECTS ON FEDERALISM

The privatization literature is flush with critical accounts of how federal outsourcing distorts constitutional rights, separation of powers, and administrative law.[54] This Part provides a corresponding account for federalism. Subpart I.A describes how federal outsourcing *levels up* federal power. Subpart I.B explains how federal outsourcing *levels down* state autonomy. Together, these bilateral effects place new stress on the Supremacy Clause and federalist structure.[55]

A. Leveling Up Federal Power

The story of modern federal contracting is part evolution, part revolution. The descriptive account offered here is necessarily brief and stylized, but sufficient for the project ahead.

1. Original Design

Federal outsourcing traces to the founding generation, when the federal government relied on private actors to deliver mail, provide security, and construct lighthouses, warships, and more.[56] By today's standards, however, early federal contracting was rather inconsequential.[57] The government relied on

54. *See supra* note 14 and accompanying text (collecting sources).

55. The ways that federal contracting levels-up federal power is a familiar point to privatization scholars. *See, e.g.*, MICHAELS, *supra* note 3, at 126–27 (discussing how federal outsourcing expands the federal government's regulatory footprint); LIGHT, *supra* note 46, at 37–44; Metzger, *supra* note 4, at 1377 ("[H]istory demonstrates that increased privatization often goes hand in hand with expansion rather than contraction in public responsibilities."). Until now, however, that insight has not been studied through a federalism lens. Scholars have not, for example, critically examined how federal contracting intersects with and potentially undercuts state autonomy as this Article does for the first time here. *See infra* Subpart I.B; *see generally* Parts III–IV. As this Article was nearing final production, at least two articles (of which the author is aware) were accepted for publication that grapple with some of these issues from different perspectives. Kate Elengold & Jonathan Glater, *The Sovereign Shield*, 73 STAN. L. REV. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3539622; Craig Konnoth, *Preemption Through Privatization*, 134 HARV. L. REV. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3572777.

56. *See* MICHAELS, *supra* note 3, at 24–27 (discussing the early history of federal outsourcing); *see also* Act of Aug. 20, 1789, ch. 10, § 3, 1 Stat. 54, 54 (instructing the Secretary of the Treasury to enter contracts for lighthouse construction and maintenance).

57. *Cf.* MICHAELS, *supra* note 3, at 29 (arguing that early Republic outsourcing was comparatively inconsequential because of differences in social, political, legal, and cultural expectations).

private markets as needed. Yet the scope of that demand was tempered by the original Constitution and public expectations of a limited federal government.[58]

Horizontally, the framers vested and divided federal power among the legislative, executive, and judicial branches.[59] Vertically, the framers divided power between federal and state sovereigns.[60] These structural prophylactics were not designed for government efficiency; they were designed to keep government in check.[61]

2. Rise of Administrative Governance

The sociolegal structures of the early Republic were largely rejected in the New Deal era.[62] Reeling from the Great Depression, the masses demanded protection from the dangerous, fickle, and self-dealing marketplace.[63] Public trust and responsibility were placed, instead, with the federal government and the burgeoning administrative state.[64] Although the Supreme Court initially resisted, prior constitutional conceptions and institutional arrangements gave way to new ones.[65]

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58. THE FEDERALIST NO. 45 (James Madison), *supra* note 43, at 292 ("The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite.").
59. U.S. CONST. art. I, § 1 (vesting federal legislative power in Congress); U.S. CONST. art. II, § 1 (vesting federal executive power in the President); U.S. CONST. art. III, § 1 (vesting judicial power in federal courts).
60. U.S. CONST. amend. X.
61. THE FEDERALIST NO. 51 (James Madison), *supra* note 43, at 322–23 (proposing that separation of powers and federalism would bestow a "double security" for individual liberty); THE FEDERALIST NO. 62 (James Madison), *supra* note 43, at 378 (acknowledging that "check[s] on legislation may, in some instances, be injurious as well as beneficial"); THE FEDERALIST NO. 73 (Alexander Hamilton), *supra* note 43, at 444 (proclaiming that defeat of "a few good laws" would be "amply compensated by the advantage of preventing a number of bad ones").
62. *See* WILLIAM YANDELL ELLIOTT, THE NEED FOR CONSTITUTIONAL REFORM: A PROGRAM FOR NATIONAL SECURITY 31–34, 200–02 (1935) (lamenting checks and balances as unworkable and arguing for increased presidential power); *see also* WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 221 (1908) ("[W]e must think less of checks and balances and more of coordinated power, less of separation of functions and more of the synthesis of action.").
63. *See* MICHAELS, *supra* note 3, at 41.
64. *Id.*
65. *See* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1249 (1994) (arguing that "[t]he actual structure and operation of the national government today has virtually nothing to do with the Constitution"); David S. Rubenstein, *The Paradox of Administrative Preemption*, 38 HARV. J.L. & PUB. POL'Y 267, 298–309 (2015) (discussing the constitutional concessions made for administrative governance in the New Deal and beyond).

For separation of powers, the Court relaxed the nondelegation doctrine so that Congress could broadly assign lawmaking functions to federal agencies.[66] In turn, agencies could govern more efficiently and effectively than Congress, free of the political and procedural rigors of the legislative gauntlet.[67] Meanwhile, on the federalism front, the Court stopped policing the boundaries of Congress's enumerated powers.[68] Consequently, Congress was free to regulate virtually any activity it wished—if not directly by the Commerce Clause, then indirectly by the Taxing and Spending Clauses, and amplified by the Necessary and Proper Clause.[69]

Collectively, the New Deal structural resettlements transfigured American government. The demise of the enumerated powers principle enabled Congress to stake far more federal regulatory turf; meanwhile, the demise of the nondelegation principle enabled politically insulated federal agencies to fill in the regulatory details. These judicial accommodations paved the way for more federal law, more federal-state regulatory overlap, and more displacement of state law in that overlapping space.[70]

From the 1940s through the 1960s, administrative governance became widely accepted and normatively entrenched.[71] Federal civil service laws drew professional, dedicated, and hardworking individuals into public service—often with more pay and job security than the private sector offered.[72] Moreover, the

66. For paradigmatic examples of the Court's post–New Deal tolerance for broad delegations, see, for example, *American Power & Light Co. v. Securities & Exchange Commission*, 329 U.S. 90, 105 (1946), and *Yakus v. United States*, 321 U.S. 414, 426 (1944).

67. *See* David S. Rubenstein, *"Relative Checks": Towards Optimal Control of Administrative Power*, 51 WM. & MARY L. REV. 2169, 2179–86 (2010); *cf.* Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919, 951, 959 (1983) (discussing the "finely wrought" and cumbersome legislative requirements of bicameralism and presentment).

68. *See* Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 17 (1950). In earlier times, the Court was more willing to construe the Commerce Clause strictly to prevent the expansion of federal power. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936); United States v. E. C. Knight Co., 156 U.S. 1, 17 (1895).

69. *See* H. Geoffrey Moulton, Jr., *The Quixotic Search for a Judicially Enforceable Federalism*, 83 MINN. L. REV. 849, 893 (1999) (explaining that "revolutionary changes in the national economy" caused the Court to construe Congress's enumerated powers broadly enough to allow it to regulate virtually any activity).

70. *See* Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869, 872–74 (2008).

71. *See* JACOB S. HACKER & PAUL PIERSON, AMERICAN AMNESIA: HOW THE WAR ON GOVERNMENT LED US TO FORGET WHAT MADE AMERICA PROSPER 137–42 (2016) (discussing how critics of administrative governance in the post–New Deal era were on the losing side of history and even marginalized in academic and political circles).

72. *See* MICHAELS, *supra* note 3, at 60; *see also* Gerald E. Frug, *Does the Constitution Prevent the Discharge of Civil Service Employees?*, 124 U. PA. L. REV. 942, 945 (1976) ("The civil service system has provided the equivalent of life tenure . . . absent what the government considers a serious act of misconduct.").

Administrative Procedure Act (APA) regularized the creation, implementation, and judicial oversight of federal agency action.[73] These legal structures set public administration on a very different course from its private counterparts. While the market was widely perceived as self-serving and wealth maximizing, the federal government was perceived as public-regarding and competent.[74]

3. Rise of Modern Federal Outsourcing

The script flipped in the 1970s. Public trust in government reached historic lows in reaction to the Watergate scandal, a struggling economy, and faltering regulatory programs.[75] A widespread view was that the national government "had given its best shot" but "had failed."[76] Seizing the moment, libertarian and conservative scholars championed free-market capitalism as the antidote to socialistic, overwrought, inefficient, and ineffective government.[77] On both pragmatic and ideological grounds, the conditions were ripe for a new public-private ordering: one in which private entities could reclaim the mantle, unencumbered by the bureaucratic and legal thickets that hobbled federal institutions.[78]

President Reagan rode these sentiments into the White House.[79] Although deregulation was a plank in his agenda, unwinding federal programs was easier said than done.[80] With deregulation mostly out of political reach, the Reagan

73. 5 U.S.C. §§ 500–04, 551–59, 701–06; *see also supra* note 9; Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc. 435 U.S. 519, 523–23 (1978) (describing the origins of the APA).
74. *See* MICHAELS, *supra* note 3, at 58–62.
75. *See* Todd Belt, *Nixon, Watergate, and the Attempt to Sway Public Opinion*, *in* WATERGATE REMEMBERED: THE LEGACY FOR AMERICAN POLITICS 147, 163 (Michael A. Genovese & Iwan W. Morgan eds., 2012); *Public Trust in Government: 1958–2019*, PEW RSCH. CTR. (Apr. 11, 2019), https://www.pewresearch.org/politics/2019/04/11/public-trust-in-government-1958-2019/ [https://perma.cc/Q93J-VME9].
76. Jeffrey R. Henig, *Privatization in the United States: Theory and Practice*, 104 POL. SCI. Q. 649, 656 (1989).
77. *See* KOSAR, *supra* note 1, at 4–5 (discussing academic and theoretical influences that helped shape the modern privatization movement); Ronald A. Cass, *Privatization: Politics, Law, and Theory*, 71 MARQ. L. REV. 449, 466–68 (1988) (describing why government bureaucracies are perceived as comparatively inefficient).
78. *See* Henig, *supra* note 76, at 653; KOSAR, *supra* note 1, at 4–5.
79. Ronald W. Reagan, U.S. President, First Inaugural Address (Jan. 20, 1981) (transcript available at https://www.reaganfoundation.org/media/128614/inaguration.pdf [https://perma.cc/2KYN-XXL4]) ("In this present [economic] crisis, government is not the solution to our problem . . . .").
80. *See* James T. Patterson, *Afterword: The Legacies of the Reagan Years*, *in* THE REAGAN PRESIDENCY: PRAGMATIC CONSERVATISM AND ITS LEGACY 355, 361–65 (W. Elliot Brownlee & Hugh Davis Graham eds., 2003) (explaining that interest groups of all stripes clung hard to their favored spending and regulatory programs).

Administration shifted gears to federal outsourcing.[81] For free-market capitalists, this was a second-best solution; a way to leverage private markets while leaving major government programs intact.[82]

It was not until the 1990s, however, that federal outsourcing began to take its current shape and character under the trope of "Reinventing Government."[83] With widespread bipartisan support, the Clinton Administration commercialized many key government services and programs.[84] At the start of his second term, President Clinton boasted that the "era of big government is over."[85]

And to casual observers it appeared that way. Really, however, only the size of the federal workforce was shrinking.[86] Measured by the amount of work done and money spent, the federal government's regulatory influence was quietly expanding.[87] Indeed, the hollowing federal workforce became a self-fulfilling reason for additional outsourcing.[88] With fewer in-house personnel on hand, the government's dependency on private markets intensified and normalized with each successive administration.[89] The manner and types of contracting have

81. This move was spurred, in large measure, by the highly influential work of the Heritage Foundation. *See generally* STUART M. BUTLER, MICHAEL SANERA & W. BRUCE WEINROD, MANDATE FOR LEADERSHIP II: CONTINUING THE CONSERVATIVE REVOLUTION (1984).
82. *See* Henig, *supra* note 76, at 653 (noting the connection between the privatization and anti–big government agendas); *see also* DONALD F. KETTL, THE NEXT GOVERNMENT OF THE UNITED STATES 44–49 (2009) (describing contracting as a political strategy that allowed officials to "preach[] the gospel of small government" while maintaining and even increasing the range of services provided).
83. *See generally* OSBORNE & GAEBLER, *supra* note 13.
84. *See* MICHAELS, *supra* note 3, at 99–102.
85. William J. Clinton, U.S. President, Address Before a Joint Session of the Congress on the State of the Union (Jan. 23, 1996) (transcript available at https://www.presidency.ucsb.edu/documents/address-before-joint-session-the-congress-the-state-the-union-10 [https://perma.cc/JY8M-H2X3]).
86. Paul C. Light, *Outsourcing and the True Size of Government*, 33 PUB. CONT. L.J. 311, 311–12 (2004) (noting that promises of reducing the size of the federal workforce "were only true using the narrowest definition of Government as being composed solely of full-time equivalent civil servants"); *see also supra* note 46 and accompanying text.
87. *See* LIGHT, *supra* note 46, at 37–44; Metzger, *supra* note 4, at 1377 ("[H]istory demonstrates that increased privatization often goes hand in hand with expansion rather than contraction in public responsibilities").
88. *See* LIGHT, *supra* note 12, at 65–72 (explaining how decades of federal hiring caps, cuts, and freezes leaves the federal government with "little choice but to use contract and grant employees to achieve its goals"); MICHAELS, *supra* note 2, at 100–02 (describing reductions in the number of federal employees in the 1990s and the corresponding uptick in the number of contractors).
89. *See* Steven L. Schooner, *Competitive Sourcing Policy: More Sail Than Rudder?*, 33 PUB. CONT. L.J. 263, 285–89 (2004); Guttman, *supra* note 2, at 875–76 (explaining how increased government services, combined with personnel ceilings, "meant that as agencies or programs were created, contracting became the norm for the administration of this growth"); *see also*

incrementally waxed and waned over the past few decades.[90] Yet far more important are the steady trajectories—upward in amount and outward in scope.[91]

Today, government outsourcing permeates virtually every corner of federal regulation.[92] Wherever there is federal law, there are federal contracts. Beyond rote implementation, contractors often play significant roles in planning and operational decisionmaking.[93] In lieu of federal actors, contractors interface with regulatory beneficiaries and act as gatekeepers to statutory benefits under major federal programs.[94] Moreover, contractual terms are often loosely drawn—by design—to allow contractors leeway for innovation, flexibility, cost-savings, and profits.[95] Thus, "[c]ontractors that supply sophisticated services over long periods of time can end up with significant discretion to set policy."[96] To some extent, the metes and bounds of delegated discretion can be limited by contractual specifications and close government oversight. Moreover, contracting can be fashioned in ways to protect and promote public values.[97] Still, some measure of

Soloway & Chvotkin, *supra* note 6, at 204 ("[T]he true size of government must be measured by budget and mission, and on that score the government has been steadily growing.").

90. *See* LIGHT, *supra* note 12, 34–76 (mapping trends from the Reagan administration through the early Trump administration).

91. *Id.; see Contract Spending Analysis: How Has Federal Contract Spending Changed Over Time?*, USASPENDING.GOV, https://datalab.usaspending.gov/contracts-over-time.html [https://perma.cc/K8XL-4Q2K] (last visited Nov. 15, 2019); Daniel Snyder, *Federal Contract Spending Trends: Five Years in Five Charts*, FED. NEWS NETWORK (Jan. 22, 2019, 4:53 PM), https://federalnewsnetwork.com/fiscal-2019-federal-contracting-playbook/2019/01/federal-contract-spending-trends-five-years-in-five-charts [https://perma.cc/5LEJ-CWEZ].

92. *See* MICHAELS, *supra* note 3, at 97 (noting the "ubiquity" of federal outsourcing).

93. *See, e.g.*, Freeman, *supra* note 4, at 551–52 (discussing the pervasiveness of private actors in "regulation, service provision, policy design, and implementation"); Steven L. Schwarcz, *Private Ordering*, 97 NW. U. L. REV. 319, 319–29 (2002) (describing different forms of private involvement in regulation).

94. *See infra* Subpart II.A (describing the role of federal contractors in the areas of student loan servicing and immigration detention); Metzger, *supra* note 4, at 1398 (explaining that contractors "wield power over others" and "control third-parties' access to government benefits and resources").

95. *See* Mendelson, *supra* note 42, at 243; *see also* U.S. GEN. ACCT. OFF., GAO-02-1049, CONTRACT MANAGEMENT: GUIDANCE NEEDED FOR USING PERFORMANCE-BASED SERVICE CONTRACTING 1 (2002) ("To achieve greater cost savings and better outcomes . . . Congress and the administration have encouraged greater use of performance-based service contracting.").

96. Mendelson, *supra* note 42, at 242.

97. *See generally* Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1285 (2003) (making the positive case for "publicization," through which "private actors increasingly commit themselves to traditionally public goals as the price of access to lucrative opportunities"). For instance, as a contractual condition, the government may require that private entities abide by antidiscrimination norms beyond what federal law provides. *Id.* at 1288, 1323–24.

discretion and policymaking inheres in all programmatic execution.[98] Governance by contract is no exception.

The *choice* between insourcing and outsourcing is what makes the combination so potent. Because the Constitution does not constrain the choice, Congress may select the mode or admixture that it deems most efficient and effective.[99] Cost considerations generally factor heavily in outsourcing decisions.[100] But as Jon Michaels explains, efficiency can be measured in terms of political and operational expedience, not just costs.[101] Thus, when political leaders anticipate pushback from tenured federal civil servants, it may be more "efficient" to pay a premium to contractors who owe their jobs and loyalty to the officials who hired them.[102] Moreover, through various "workarounds," agencies can achieve "distinct public policy goals that . . . would be impossible or much more difficult to attain."[103]

B. Leveling Down State Autonomy

Beyond leveling up federal power, outsourcing can level down state power in at least three ways. First, federal outsourcing occupies regulatory space that might otherwise default to the states. When agencies lack resources or expertise to implement federal programs, private markets can do the work.[104] Through a

98. *See* Metzger, *supra* note 4, at 1395–96, 1410; *see also* Freeman & Minow, *supra* note 38, at 3 (observing that even "when contractual terms are clear, there can be a stunning failure of government oversight").

99. *Cf.* Metzger, *supra* note 4, at 1370–73 (explaining that the Constitution generally does not apply to federal outsourcing). For discussions of the efficiency argument in favor of contracting, see KOSAR, *supra* note 30, at 4; *see also supra* note 6 and accompanying text. *But cf.* Alexander Volokh, *Privatization and the Elusive Employee-Contractor Distinction*, 46 U.C. DAVIS L. REV. 133 (2012) (contending that the ostensible differences between the two groups are contingent ones that turn on disparities in how public employees and contractors are directed and compensated).

100. While costs weigh heavily, the loadstar for modern federal acquisition is "best-value"—determined by a range of considerations, such as cost, performance, quality, and reliability. *See* 48 C.F.R. § 1.102(a) (defining and describing best-value contracting); *see also* KOSAR, *supra* note 30, at 6; COM. ACTIVITIES PANEL, IMPROVING THE SOURCING DECISIONS OF THE GOVERNMENT: FINAL REPORT 108–09 (2002) (describing the congressionally convened panel's understanding of efficiency and cost savings as the dominant motivations for contracting out at all levels of government).

101. MICHAELS, *supra* note 3, at 127; *see also* HERBERT A. SIMON, VICTOR A. THOMPSON & DONALD W. SMITHBURG, PUBLIC ADMINISTRATION 488–512 (1991) (discussing the meaning of "efficiency" and suggesting that the term is vague and contested).

102. MICHAELS, *supra* note 3, at 127.

103. Michaels, *supra* note 40, at 719.

104. *See* Kelman, *supra* note 36, at 153, 155 (describing the benefits of hiring contractors to perform services outside of an agency's "core competencies").

privatization lens, this is a win for national interests: Thanks to contractors, no federal projects are left undone. And it is a win for private interests: Thanks to the federal government, work is always needed.

A federalism lens offers a different perspective. By constitutional design, our system of dual sovereignty presupposes that regulatory residue will fall to the states.[105] When work is outsourced simply because it can be, some measure of state autonomy will be undercut. Even in scenarios where all agree that regulation is needed, there is still the question of *which* sovereign should meet that demand. Federal contracting can skew that choice in favor of centralization in contexts where regulation might have been decentralized into smaller political communities. States and localities, if given the choice, might opt to outsource—including to the very same cast of private providers.[106] But in those scenarios, the choices to outsource, to whom, and on what terms, would be left to states and their subunits. Federal contracting can disrupt that autonomy.

Second, federal outsourcing fills regulatory space that Congress might otherwise devolve to states through "cooperative federalism" arrangements. Under such arrangements, the federal government explicitly confers authority (and usually money) to states, which in turn implement federally prescribed programs and goals.[107] Cooperative federalism arrangements position the federal and state governments in a type of principal-agent relationship, with states acting as agent.[108] To the extent that federal outsourcing may cut into cooperative federalism, this too must be accounted for in any fair measure of privatization's effects on our federalist system.[109] Instead of directly (or exclusively) outsourcing to private markets, the federal government could affirmatively devolve programmatic authority and outsourcing discretion to state and local

105. *See* U.S. CONST. amend. X; *see also supra* notes 60–61 and accompanying text.
106. The privatization movement for the provision of government services took root at the state and local levels in the 1970s, mostly ahead of the federal curve. *See generally* SAVAS, *supra* note 13 (providing a history and generally favoring state and local outsourcing); Dru Stevenson, *Privatization of Welfare Services: Delegation By Commercial Contract*, 45 ARIZ. L. REV. 83 (2003) (less favorably reviewing state and local outsourcing, especially welfare programs); *see also infra* note 110 (discussing state outsourcing).
107. *See* Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1265, 1297 (2009). For prominent examples of cooperative federalism, see, for example, 33 U.S.C. §§ 1251–1387 (Clean Water Act); 42 U.S.C. § 1396a (Medicaid); 42 U.S.C. §§ 7401–7642 (Clean Air Act); 42 U.S.C. §§ 18001, 18031, 18041 (Supp. 2007–2011) (Affordable Care Act); and 47 U.S.C. § 252(e)(5) (telecommunications).
108. *See* Bulman-Pozen & Gerken, *supra* note 107, at 1265.
109. This intersection of privatization and cooperative federalism arrangements is a much-needed study on its own, but mostly beyond the scope of this one (which is focused on Supremacy Clause doctrine).

governments.[110] Whether such arrangements cut in favor or against state autonomy depends on empirics, contestable theoretical baselines, and context.[111] If nothing else, the readiness of private markets overhangs the incentive structures in cooperative federalism arrangements, including Congress's choice to create such programs in the first place.[112] Perhaps now more than ever, states must compete with federal agencies *and* private industries for regulatory assignments. This extra layer of competition can lead Congress to choose private entities over states, removing discretionary and operational levers that states might otherwise enjoy in their role as "federal servants."[113]

Third, federal outsourcing can directly and indirectly displace state law. This federalism effect is the main focus of Parts III and IV. As the federal footprint expands, it tends to come into more contact with overlapping state interests.[114] The additional overlap leads to more federal-state conflicts which, in turn, can lead to more displacement of state law. When contractors enable (or lobby, or draft) federal laws, state law may be displaced in contexts where it otherwise might not.

110. *See* Abbe R. Gluck, *Federalism From Federal Statutes: Health Reform, Medicaid, and the Old-Fashioned Federalists' Gamble*, 81 FORDHAM L. REV. 1749, 1772 (2013) (noting that two alternatives to "state-led federal statutory schemes" are "a bigger federal government," and "more privatization of what previously had been government work"); *see also* Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 N.Y.U L. REV. 1121, 1180 (2000) (describing this transmission of authority in regards to TANF programs); Abbe R. Gluck & Nicole Huberfeld, *What Is Federalism in Healthcare For?*, 70 STAN. L. REV. 1689, 1774–75 (2018) (discussing how Congress devolved authority to states to create and administer health insurance exchanges under the Affordable Care Act, and how both federal and state governments turned to private entities to perform these functions).

111. *Cf.* Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 565 (2011) (describing how cooperative federalism arrangements "offer[] a means for deeper entrenchment of federal statutory norms . . . [and] a low-visibility, low-pressure way for the federal government to enter a field of lawmaking traditionally governed by the states"); David S. Rubenstein, *Administrative Federalism as Separation of Powers*, 72 WASH. & LEE L. REV. 171, 179–208 (2015) (offering an account of "structural pluralism," which entails competing conceptions of separation of powers, federalism, and their cross-pollination in doctrine and institutional design); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243 (2005) (canvassing, comparing, and contrasting a variety of federalism models).

112. *See* Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 672 (2001) (describing the factors influencing "[t]he federal government's increasing willingness to allow states to superintend the implementation of federal law").

113. *See* Bulman-Pozen & Gerken, *supra* note 107, at 1266 (arguing that states may gain important "leverage" and "discretion" in cooperative federalism programs simply by choosing how to accomplish their goals and which ones to prioritize).

114. *See* Tafflin v. Levitt, 493 U.S. 455, 458 (1990) (explaining the power of the states in our federal system is "concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause"); *see also* Robert A. Schapiro, *From Dualism to Polyphony*, *in* PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION 33, 42 (William W. Buzbee ed., 2009).

Still, the full measure of outsourcing's impact on state autonomy is contingent on how conflicts between federal and state interests are resolved in the *absence* of conflicting federal law. That is why the doctrines of Supremacy, Inc. require close attention.[115] Insofar as federal contracts can have preemptive effects, state law may be displaced with no input from state representatives, and without procedural and deliberative frictions associated with federal lawmaking.[116]

Thus far, this Article has described how modern outsourcing affects the federalist structure: by leveling up federal power and leveling down state autonomy. The plot thickens below. States are pushing back in ways that can change the incentive structures, efficiencies, and accountabilities around federal contracting. Through this expanded frame, a nascent dynamic emerges. Federal, state, and private actors are jockeying for position on the contested field of Supremacy, Inc. And for good reason: The contours of federalism and federal contracting are both in play.

II. FEDERALISM'S EFFECTS ON PRIVATIZATION

The privatization literature features a recursive debate about how best to accommodate the values of *efficient* and *accountable* governance.[117] In theory, federal outsourcing can be both efficient and accountable. Yet in practice, more accountability usually entails less efficiency, and vice versa. Indeed, that is often why federal outsourcing is perceived as more efficient; it operates outside of the accountability structures that would apply to federal actors doing the same work.[118] The intrigue is how to strike the best balance between efficiency and accountability in government performance. This Article makes no pretense of resolving that grand puzzle. Rather, it adds federalism to the calculus. The

115. Ernie Young's work has stressed the importance of protecting state autonomy through preemption doctrine more generally. *See, e.g.*, Ernest A. Young, *"The Ordinary Diet of the Law": The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 254, 264–69 (2011) ("The doctrine of preemption, grounded in the Supremacy Clause rather than in Article I's scheme of limited and enumerated powers, is the key instrument by which the law manages [the] overlap" between federal and state law). The doctrinal prescriptions set forth in this Article are different, but in the same spirt. *See infra* Subparts III.C, IV.C.

116. *See infra* notes 328–334 and accompanying text (discussing the so-called political and procedural safeguards of federalism).

117. For an incisive treatment of this debate, see Freeman, *supra* note 97, at 1291–1314.

118. *See* Freeman & Minow, *supra* note 38, at 5 ("Much contracting is immune from the traditional laws and procedures that would apply to public agencies doing the same work, simply because it is performed by private contractors.").

possibilities of state law interventions complement and complicate accounts that have focused exclusively on federal interventions.[119]

Certainly, good reasons exist to not impose the full panoply of public-law constraints on government contractors; excessive restrictions could hinder the government's ability to get its work done effectively and efficiently.[120] As matters currently stand, however, there may be no meaningful federal controls. States could help. Whatever the way forward, federalism—and federalism doctrine—should be part of the discussion.

To prime that discussion, Subpart II.A offers two case studies: one involving immigration detention, the other involving student loans. These studies offer a disquieting glimpse of government by contract. Federal acquisition law is structured around a set of theoretical assumptions: First, that contractors do not perform "inherently governmental" functions; second, that federal officials are willing and able to hold contractors accountable.[121] It is widely recognized, however, that the extant regime falls short of those ideals in practice.[122] The immigration detention and student loan case studies offer crisp examples of the dissonance.

119. *See* Metzger, *supra* note 4, at 1375 (noting the uphill challenges of proposals that "depend on the government's willingness to restrict its freedom to rely on private partners"); *accord* MICHAELS, *supra* note 3, at 202 (recognizing the challenge of statutory and regulatory reform "because it requires the political branches to undertake measures likely to be unpopular, expensive, and at odds with their own self-interests").

120. *See* Freeman & Minow, *supra* note 38, at 13.

121. *See* Guttman, *supra* note 12, at 324 ("Government procurement law, for its part, accepts, as a given, that officials, not contractors, remain in control, and that these officials possess the skills and experience needed to supervise and evaluate the basic work of Government."); Guttman, *supra* note 2, at 862 (explaining that, in practice, the federal government effectively outsources functions that could be deemed inherently governmental).

122. Guttman, *supra* note 12, at 340 (explaining that, "by consequence of decades of personnel ceilings, much arguably inherently governmental work has long since been contracted out," and that "much of the workforce needed to assure official oversight is not classified as inherently governmental; e.g., the management and oversight of contractors"); Mendelson, *supra* note 42, at 243 n.14 (collecting citations to "countless reports documenting inadequate contract supervision by agencies" by the U.S. Government Accountability Office). Even champions of the procurement regime agree that reforms are needed. For example, Steve Kelman, who was a chief architect of acquisition reforms in the 1990s, later acknowledged that "the administration of contracts once they have been signed, has been the neglected stepchild of [procurement system reform] efforts." Steven Kelman, *Strategic Contracting Management*, in MARKET-BASED GOVERNANCE: SUPPLY SIDE, DEMAND SIDE, UPSIDE, AND DOWNSIDE 88, 89–90, 93 (John D. Donahue & Joseph S. Nye, Jr. eds., 2002). Despite wide consensus about the accountability shortfalls in federal contractors, commentators differ about the putative causes and cures. For a sampling of competing perspectives, see Kelman, *supra* note 36; Soloway & Chvotkin, *supra* note 6; and Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 AM. U. L. REV. 627 (2001).

Beyond that, these case studies gesture to a neglected possibility. The battle lines around federal outsourcing has shifted to the federalism front, with states on the front line. While much remains undecided, the implications of these nascent trends are easily discernable. Holding federal contractors accountable to state law will impinge on contracting efficiency. In this way, contracting's tradeoffs between efficiency and accountability merge with federalism's tradeoffs between centralized and decentralized governance.[123] From this conceptual reset, Subpart II.B uses the case studies to anchor the stakes of Supremacy, Inc. This synthesis of federalism and privatization will then serve as a bridge to the Article's remainder.

A. Case Studies

1. Immigration Detention

Beginning in the mid-1990s, the federal government increasingly turned to the private sector to build and operate immigration detention facilities.[124] Since then, the number of immigrant detainees has steadily increased in step with industry profits.[125] That is no coincidence. Throughout much of this period, detention bed "quotas" were guaranteed by congressional appropriations.[126] To satisfy the quotas, DHS outsourced immigration detention to the same prison

123. *Cf.* Heather K. Gerken, *Federalism 3.0*, 105 CALIF. L. REV. 1695, 1699 (2017) (discussing federalism debates that "pit the values of centralization against those associated with state autonomy"); William W. Buzbee, *Federalism Hedging, Entrenchment, and the Climate Challenge*, 2017 WIS. L. REV. 1037, 1039 (conceiving of "[f]ederalism hedging" as a "regulatory choice to retain overlapping, interacting, and often intertwined federal and state roles even in a setting where the apparently ideal regulatory regime would rely on exclusive federal regulation that would preempt state roles"); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 913 (1994) ("Decentralization, being an instrumental, managerial strategy, is no different in degree from any other policy; like cost or administrative convenience, it is simply one factor that political decision-makers should take into account.").

124. *See* Kassie, *supra* note 22 (mapping the rise in private immigration detention over the past three decades); *see also* César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1371–72 (2014) (linking the rise in immigration detention to the war-on-drugs movement in the late twentieth century).

125. *See* EMILY RYO & IAN PEACOCK, AM. IMMIGR. COUNCIL, THE LANDSCAPE OF IMMIGRATION DETENTION IN THE UNITED STATES 6 fig.1 (2018), https://americanimmigrationcouncil.org/sites/default/files/research/the_landscape_of_immigration_detention_in_the_united_states.pdf [https://perma.cc/JLF7-K49X] (mapping a five-fold increase in immigration detainee population from 1994–2017); Luan, *supra* note 22 (describing how trends in increased immigration detention are connected to, and made possible by, the private prison industry).

126. *See* Anita Sinha, *Arbitrary Detention? The Immigration Detention Bed Quota*, 12 DUKE J. CONST. L. & PUB. POL'Y 77, 85–88, 90–97 (2017). The quotas were not firm targets, but rather requirements that DHS have a minimum number of detention beds available. *Id.* at 81. Although DHS was not obligated to *fill* those beds, it was required to pay for them. *Id.*

companies that lobbied Congress for the quotas in the first place.[127] In recent years, the number of immigrants detained in private prisons has reached record levels.[128] President Trump's hawkish immigration policies,[129] coupled with unprecedented migration to the U.S.–Mexico border,[130] have generally boded well for private prison companies and their shareholders.[131]

For more than a decade, scholars and watchdogs have cast critical light on the "immigration industrial complex."[132] An overarching objection is to mass immigration detention, which many critics view as immoral, generally unnecessary, and highly inefficient compared to alternatives, such as ankle bracelets.[133] Further, private immigration detention facilities have been repeatedly charged with wide-ranging civil and human rights violations, including substandard medical care, exploitative labor practices, denial of due process, improper use of force, and impeding access to legal counsel.[134] Because private prison companies are foremost accountable to shareholders, the industry is incentivized to maximize profits by cutting operational costs (too often, it seems, at the expense of inmates' rights and wellbeing).[135]

127. *See id.* at 85–88.
128. *See* Dara Lind, *Congress's Deal on Immigration Detention, Explained*, VOX (Feb. 12, 2019, 11:00 AM), https://www.vox.com/2019/2/12/18220323/immigration-detention-beds-congress-cap [https://perma.cc/9ETC-LHTV].
129. *See, e.g.*, Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 25, 2017) (requiring the detention of all noncitizens apprehended for violating immigration laws and calling for an allocation of "all legally available resources" for the immediate construction, operation, and control of detention facilities near the border with Mexico, or for the establishment of contracts for such facilities).
130. *See* Alan Gomez, *Border Patrol Apprehended Record Number of Migrant Families in May as Trump Threatens Mexico*, USA TODAY (June 5, 2019, 8:29 PM), https://www.usatoday.com/story/news/nation/2019/06/05/migrant-arrests-surge-us-mexico-border-trump-threatens-tariffs/1358895001 [https://perma.cc/5NSH-DJGS].
131. *See* Zusha Elinson, *Trump's Immigrant-Detention Plans Benefit Private Prison Operators*, WALL ST. J. (July 2, 2018, 5:30 AM), https://www.wsj.com/articles/trumps-immigrant-detention-plans-benefit-these-companies-1530523800 [https://perma.cc/5QZH-GD93].
132. Tanya Golash-Boza, *The Immigration Industrial Complex: Why We Enforce Immigration Policies Destined to Fail*, 3 SOCIO. COMPASS 295 (2009) (describing the coalescing forces that spur and sustain the "immigration industrial complex"); *see also* Luan, *supra* note 22; RYO & PEACOCK, *supra* note 125; SMALL, *supra* note 24;
133. *See* Jennifer M. Chacón, *Privatized Immigration Enforcement*, 52 HARV. C.R.-C.L. L. REV. 1, 18–28 (2017) (summarizing the main critiques and collecting citations).
134. *See* RYO & PEACOCK, *supra* note 125, at 1–2; DHS OIG 19-18, *supra* note 24 (reporting that contractors failed to notify ICE of sexual assaults and employee misconduct, using tear gas instead of approved pepper spray, and commingling detainees with serious criminal histories with those who might be at risk of sexual assault); DHS OIG 19-47, *supra* note 23 (reporting problems with food, inappropriate segregation practices, absence of recreation, poor conditions, bad clothing, and lack of in-person visitation).
135. *See* SMALL, *supra* note 24, at 2–3, 14.

As is true in other privatized settings, the private prison industry is not subject to federal open records laws, civil service requirements, administrative law, or other legal checks that would apply to federally owned and operated detention centers.[136] Moreover, through regulatory loopholes, DHS circumvents competitive market bidding and procedural requirements that would otherwise apply under federal acquisition law.[137] Even when competitively bid, contractual awards are highly susceptible to market manipulations. The three largest prison companies account for about 95 percent of private immigration detention beds.[138] That market dominance makes DHS reliant on these industry giants and negates federal cost-savings that more competitive markets offer.[139]

Private immigration detention is subject to agency oversight, and the contracts generally include operational, safety, and performance standards that facilities must meet.[140] Much of the agency's oversight responsibility, however, is

136. *See supra* notes 8–11 and accompanying text. The Supreme Court has not definitively resolved whether private immigration detention centers qualify as state actors for constitutional purposes, and if so, in what contexts. On one hand, the Court has held that *Bivens* liability for constitutional torts does not extend to federal prison contractors. *See* Minneci v. Pollard, 565 U.S. 118 (2012). On the other hand, however, prison contractors may be held liable under 42 U.S.C. § 1983 for certain constitutional violations. *Cf.* West v. Atkins, 487 U.S. 42 (1988); Richardson v. McKnight, 521 U.S. 399 (1997). For additional commentary outside of the immigration context, see Alexander Volokh, Keynote, *The Modest Effect of* Minneci v. Pollard *on Inmate Litigants*, 46 AKRON L. REV. 287, 295 n.55 (noting that the "Supreme Court has never ruled that private prisons are state actors, thought it has assumed as much"); Alexander A. Reinert & Lumen N. Mulligan, *Asking the First Question: Reframing* Bivens *After* Minneci, 90 WASH. U. L. REV. 1473, 1503 (2013) (noting that "there appears to be no means [for federal inmates] of enforcing federal constitutional norms" against federally contracted private prisons).

137. *See, e.g.*, OFF. OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., OIG-18-53, IMMIGRATION AND CUSTOMS ENFORCEMENT DID NOT FOLLOW FEDERAL PROCUREMENT GUIDELINES WHEN CONTRACTING FOR DETENTION SERVICES 3–5 (2018) [hereinafter DHS OIG 18-53]; *see also infra* note 161 and accompanying text (describing alleged procurement improprieties by ICE).

138. *See* Luan, *supra* note 22 ("The three largest companies (CoreCivic, GEO Group, and Management and Training Corporation) account for more than 96 percent of the total number of private prison beds.").

139. *See* John D. Donahue, *The Transformation of Government Work: Causes, Consequences, and Distortions*, *in* GOVERNMENT BY CONTRACT, *supra* note 6, at 41, 45 ("Without competition much of [contracting's] rationale collapses.").

140. *See* U.S. IMMGR. & CUSTOMS ENF'T, PERFORMANCE–BASED NATIONAL DETENTION STANDARDS 2011, at 19–20 (rev. ed. 2016), https://www.ice.gov/doclib/detention-standards/2011/pbnds2011r2016.pdf [https://perma.cc/4BU8-CTN5] (requiring, among other things, clean and safe facilities; adequate food services and personal hygiene; access to medical care, reasonable disability accommodations, telephone, mail, and recreational programs; and access to legal materials and visitation rights). Congress, through appropriations legislation, has imposed certain requirements on the conditions of detention. *See, e.g.*, H.R.J. Res. 31, 116th Cong. (2019) (enacted); H.R. Rep. No. 116-9, at 475–77, 479–80, 482–83 (2019) (Conf. Rep.) (directing immigration agencies to report their compliance with applicable detention facility standards and to provide certain other detention-related information); *see also* Joint

outsourced to other private entities (who, in turn, have long been criticized for their cost-saving and box-ticking practices).[141] Moreover, contractual terms and federal standards for immigration detention leave much discretion to private prison operators.[142] And to be clear, that discretion extends well beyond the breakfast menu. Prison contractors determine which detainees stay in solitary confinement and for what reasons, along with countless other decisions that affect the lives of inmates and their family members (which include U.S. citizens).[143]

DHS's dependency on private immigration detention reduces federal incentives to hold contractors accountable, and so the government seldom does in any meaningful or sustained way.[144] Indeed, a recent report from ICE's internal watchdog castigates the agency for "not adequately follow[ing] up on identified deficiencies or systematically hold[ing] facilities accountable for correcting deficiencies," a problem that "stretch[ed] back many years."[145] Perhaps with more transparency, federal officials would be more readily accountable for not holding federal contractors accountable. Seemingly by design, however, this system is tangled in a web of complexity and opacity.[146] It is only because of the painstaking work of internal and external watchdogs that some light has recently been cast on the "toxic relationships" forged around private immigration detention.[147]

Explanatory Statement, 164 CONG. REC. H2045, H2547 (daily ed. Mar. 22, 2018) (calling for unannounced inspections by agency oversight officials).

141. *See* OFF. OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., OIG-18-67, ICE'S INSPECTIONS AND MONITORING OF DETENTION FACILITIES DO NOT LEAD TO SUSTAINED COMPLIANCE OR SYSTEMIC IMPROVEMENTS 2–10 (2018) [hereafter DHS OIG 18-67], https://www.oig.dhs.gov/sites/default/files/assets/2018-06/OIG-18-67-Jun18.pdf [https://perma.cc/H3SQ-CQBW].

142. *Cf.* Mendelson, *supra* note 42, at 252 ("[A]lthough an agency may hold a contractor responsible for inadequate contract performance, the effectiveness of that remedy depends on the agency drafting well-specified contracts and on the investing of agency resources in contract enforcement actions, something an overtaxed agency may not have the will to do, especially in the context of a longer-term service contract.").

143. *See* Tara Tidwell Cullen, *ICE's Use of Solitary Confinement Has Gotten Worse*, NAT'L IMMIGRANT JUST. CTR. (May 21, 2019), https://www.immigrantjustice.org/staff/blog/ices-use-solitary-confinement-has-gotten-worse [https://perma.cc/YWH4-NB9Z].

144. *See* SMALL, *supra* note 24, at 12.

145. DHS OIG 18-67, *supra* note 141, at 4.

146. *See* MARY SMALL & HEIDI ALTMAN, NAT'L IMMIGRANT JUST. CTR., ICE LIES: PUBLIC DECEPTION, PRIVATE PROFIT (2018), https://www.immigrantjustice.org/sites/default/files/content-type/research-item/documents/2018-02/IceLies_DWN_NIJC_Feb2018.pdf [https://perma.cc/7PQ6-JECC].

147. *See* SMALL, *supra* note 24, at 13 (reporting that "documents have only been available through slow-moving and resource intensive Freedom of Information Act (FOIA) requests and litigation").

There is a plethora of prescriptions available to curb, correct, and check private immigration detention.[148] To date, however, the same sociopolitical forces that conspire toward mass immigration detention also conspire to impede meaningful federal reform.[149] In 2018, for example, eighteen members of Congress sent a letter to top-ranking agency officials in three federal departments, exhorting them to intervene on behalf of a private prison company in a class action lawsuit filed by immigrant detainees.[150] The letter warns: "Unless your agencies act to intervene . . . , immigration enforcement efforts will be thwarted, and the end result will be millions of dollars of unnecessary . . . expenses for immigration detention."[151]

For present purposes, the class action lawsuit that prompted the congressional letter is especially noteworthy because it includes state law causes of action[152] (and at least five other pending lawsuits raise similar claims).[153] The crux of the state law claims is that prison companies are grossly underpaying detainees who participate in a so-called Voluntary Work Program (VWP). These detainees receive as little as $1 for a full day's work, allegedly in violation of state minimum wage and unjust enrichment laws.[154] Legal merits aside, the private prison companies slash costs (and reap profits) when detainees clean and maintain the facilities, prepare and serve food to its inhabitants, and so on.[155] Through a privatization lens, this is efficient. Again, however, a federalism lens offers a

148. *See, e.g.*, DHS OIG 18-67, *supra* note 141, at 15–16; SMALL & ALTMAN, *supra* note 146, at 8; SMALL, *supra* note 24, at 2–3.
149. *See* César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 CALIF. L. REV. 1449, 1501–07 (2015) (discussing path dependence and political economy of privatized immigration detention); DHS OIG 19-18, *supra* note 24, at 12 (reporting that federal agents assigned to inspect detention centers may have "unachievable workloads" that prevent them from being able to provide "appropriate oversight").
150. *See* Betsy Swan, *Republicans Say Forced Labor Is Good for Detained Immigrants in Letter Defending Private Prison*, DAILY BEAST (Mar. 19, 2018, 11:47 AM), https://www.thedailybeast.com/republicans-say-forced-labor-is-good-for-detained-immigrants-in-letter-defending-private-prison?ref=scroll [https://perma.cc/24YQ-VLL3].
151. Exhibit A to Defendant's Reply Brief at 5, Novoa v. GEO Grp. Inc., No. 5:17-cv-02514 (C.D. Cal. Mar. 12, 2018).
152. *See, e.g.*, Menocal v. GEO Grp., Inc., 113 F. Supp. 3d 1125, 1128 (D. Colo. 2015) (certifying class action claims brought under state and federal law), *aff'd*, 882 F.3d 905 (10th Cir. 2018). The alleged violations of federal law, including the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 112, 114 Stat. 1464, 1486–87 (2000) (codified as amended at 18 U.S.C. § 1589(a)), are beyond the scope of this Article.
153. *See* Petition for a Writ of Certiorari at 2, 3 n.1, GEO Grp., Inc. v. Menocal, 139 S. Ct. 143 (2018) (No. 17-1648) (describing the litigation and citing parallel cases).
154. *See, e.g.*, *Menocal*, 113 F. Supp. 3d at 1128.
155. *See* Jacqueline Stevens, *One Dollar Per Day: The Slaving Wages of Immigration Jail From 1943 to Present*, 29 GEO. IMMIGR. L.J. 391, 401–03 (2015).

different perspective: Rather than hire state residents for jobs at market rate, federal contractors are receiving a windfall in the form of immigrant labor.[156]

In addition to these class action lawsuits, states are experimenting with ways to directly and indirectly regulate private immigration detention facilities. For example, California Assembly Bill 103 requires the state attorney general to inspect and report on conditions in all immigration jails within the state.[157] Further, California Assembly Bill 32 prohibits new contracts for immigration detention in the state.[158] More indirectly, the New York State Senate recently passed a bill that would prohibit its state-chartered banks (which include many of the world's largest) "from investing in and providing financing for private prisons."[159] If the money stops flowing, that will be a major jolt to the prison industry on a national scale.[160]

In response, the prison industry is pushing back. Politically, industry representatives are actively lobbying government officials to curb state interventions of private immigration detention. Moreover, through procurement fast tracking, ICE signed new contracts in California with private detention facilities in December 2019, which skirted the state's January 1, 2020 cutoff date for such contracts.[161] Meanwhile, in court, private prison companies are seeking to

156. *See id.* at 418–19.

157. CAL. GOV'T CODE § 12532 (West 2020). The first report was released in February 2019. XAVIER BECERRA, OFF. OF THE CAL. ATT'Y GEN., THE CALIFORNIA DEPARTMENT OF JUSTICE'S REVIEW OF IMMIGRATION DETENTION IN CALIFORNIA (2019), https://oag.ca.gov/sites/all/files/agweb/pdfs/publications/immigration-detention-2019.pdf [https://perma.cc/86QJ-SU6H]. Another recently enacted California law prevents state and local governments from extending or renewing contracts with private immigration detention facilities. CAL. GOV'T CODE § 1670.9(a)–(b) (West 2020). For further discussion of these state initiatives, see Rubenstein & Gulasekaram, *supra* note 25.

158. *See* CAL. PENAL CODE §§ 5003.1, 5003.2 (West 2020).

159. *See* S. 5433A, 2019–2020 Leg. Sess. (N.Y. 2020); Morgan Simon, *New York Could Become First State to Be Completely Done with Private Prisons*, FORBES (June 18, 2019, 2:50 PM), https://www.forbes.com/sites/morgansimon/2019/06/18/new-york-to-become-first-state-to-be-completely-done-with-private-prisons [https://perma.cc/P3CZ-TY5M].

160. Two major banks—Wells Fargo and JPMorgan Chase—have already cut financial ties with the private prison industry in response to mass public pressure. *See* Simon, *supra* note 159.

161. In a letter to ICE, California's two U.S. senators and nineteen Democratic members of Congress expressed concern that the agency's "streamlined" solicitation and fifteen-year contract term could violate federal procurement laws. Letter from Cal. Cong. Members, to Chad F. Wolf, Acting Sec'y, U.S. Dep't of Homeland Sec., & Matthew T. Albence, Acting Dir., U.S. Immigr. & Customs Enf't (Nov. 14, 2019) (on file with author). More specifically, the letter signatories were concerned that ICE's solicitation was "intended to favor incumbent contractors," which "would be in direct contradiction with the spirit of full and open competition required by federal procurement law." *Id.* at 3. Undeterred, ICE signed contracts totaling nearly $6.5 billion with the companies that run California's four private immigrant detention centers less than two weeks before California's ban on such contracts sprang into effect. *See* Andrea Castillo, *ICE Signs Contracts Extending Private Immigrant Detention*

nullify state regulations and dismiss state law claims under the Supremacy Clause—thus far with mixed results.[162]

2. Federal Student Loan Servicing

Before 2010, the federal student loan program was dominated by private loans that were financially guaranteed by the United States.[163] Beginning in 2010, the federal government transitioned to a "Direct Loan" program, under which the federal government is the student lender.[164] Moreover, as part of a financial bailout for the student loan industry, the federal government purchased almost all of the outstanding privately owned student debt.[165] Today, the federal government's assets include upwards of $1 trillion in collectable student loans.[166]

The Department of Education (ED) contracts with "student loan servicers" to manage borrowers' accounts, process payments, assist borrowers, and communicate with borrowers about repayment options.[167] This outsourcing decision was a financial bailout too, as cash-strapped financial institutions would butterfly into market-dominant federal contractors in the post-

Centers Ahead of California Ban, L.A. TIMES (Dec. 23, 2019, 6:03 PM), https://www.latimes.com/california/story/2019-12-23/ice-signs-contracts-extending-private-immigrant-detention-centers-ahead-of-california-ban [https://perma.cc/GD2P-9Q9U].

162. *See, e.g.*, United States v. California, 921 F.3d 865, 872–73, 878 (9th Cir. 2019) (temporarily enjoining some but not all of Cal. A.B. 103); Menocal v. GEO Grp., Inc., 882 F.3d 905 (10th Cir. 2018) (granting class certification on some of plaintiff's state law claims), *cert. denied*, 139 S. Ct. 143 (2018); GEO Grp., Inc. v. Newsom, No. 19-CV-02491 JLS (WVG), 2020 WL 5968759 (S.D. Cal. Oct. 8, 2020) (granting in part and denying in part plaintiffs' motion to preliminarily enjoin a California law barring private detention centers from operating in the state).

163. *See* JULIE MARGETTA MORGAN, WHO PAYS? HOW INDUSTRY INSIDERS RIG THE STUDENT LOAN SYSTEM—AND HOW TO STOP IT 2 (2018), https://rooseveltinstitute.org/wp-content/uploads/2018/06/How-Industry-Insiders-Rig-the-Student-Loan-System.pdf [https://perma.cc/3Y38-V5UN].

164. *See* Ensuring Continued Access to Student Loans Act of 2008, Pub. L. No. 110-227, 122 Stat. 740 (codified as amended in scattered sections of 20 U.S.C.); MORGAN, *supra* note 163, at 5.

165. *See* 20 U.S.C. §§ 1087a, i (granting broad authority to the Department of Education to purchase student loans from private student lenders); MORGAN, *supra* note 163, at 2–3.

166. *See* Friedman, *supra* note 17 (mapping the rise and current size of outstanding student debt); *see also Federal Student Loan Portfolio*, *supra* note 17 (select "Federal Student Aid Portfolio Summary" hyperlink) (reporting $1.290 trillion of outstanding direct loans at the end of the third quarter of 2020).

167. *See* 20 U.S.C. § 1087f (delegating authority to the Secretary of Education to select and contract with loan servicers); DEP'T EDUC. OIG REPORT, *supra* note 18, at 5–6.

2010 student loan regime.[168] Currently, fewer than a handful of industry players manage approximately 90 percent of the government's student debt portfolio.[169]

If extensive federal student lending is in the public's interest, and if doing so is made logistically possible only with private loan servicers, then perhaps this is the best we can hope for. But, here again, the underlying premises are highly contestable.[170] The federal bailout of the student loan industry led to excessive lending and excessive defaults, with devastating effects on local, state, and national economies.[171] Moreover, as Seth Frotman explains, student debt has led to an economic "generational divide" that could have been avoided if student borrowers

168. *See* MORGAN, *supra* note 163, at 4–5.

169. *See* DEP'T EDUC. OIG REPORT, *supra* note 18, at 5–6 (reporting that, as of September 2017, approximately $950 billion in federal student loans were assigned to PHEAA ($319 billion), Great Lakes ($236 billion), Navient ($215 billion), and Nelnet ($180 billion)). In 2019, Nelnet acquired Great Lakes, thus consolidating two of the top four federal loan servicers. *See* Press Release, Nelnet, Nelnet Completes Acquisition of Great Lakes Educational Loan Services, Inc. (Feb. 7, 2018), http://www.nelnetinvestors.com/news/press-release-details/2018/Nelnet-Completes-Acquisition-of-Great-Lakes-Educational-Loan-Services-Inc/default.aspx [https://perma.cc/77YL-7NW4]. Still, it is not clear how this acquisition will affect market competition. Nelnet reports that, "[g]oing forward, Great Lakes and Nelnet will continue to service their respective government-owned portfolios on behalf of the Department, while maintaining their distinct brands, independent servicing operations, and teams." *Id.*

170. *See* Seth Frotman, *Broken Promises: How Debt-Financed Higher Education Rewrote America's Social Contract and Fueled a Quiet Crisis*, 2018 UTAH L. REV. 811, 822–31. The private profiteering was foreseeable. *Id.*

171. *See id.* at 815–25; William Elliot, *How Student Debt Stunts Financial Growth*, ATLANTIC (Mar. 1, 2015), https://www.theatlantic.com/business/archive/2015/03/how-student-debt-stunts-financial-growth/386300 [https://perma.cc/K8BZ-2V8M]. Student loan defaults ruin credit ratings, which has domino effects on the housing and automobile markets. *See, e.g.*, Sophie Caronello, *Why Jerome Powell Is Worried About Growing Student Debt*, BLOOMBERG (Mar. 1, 2018, 9:31 AM), https://www.bloomberg.com/news/articles/2018-03-01/why-jerome-powell-is-worried-about-growing-student-debt-chart [https://perma.cc/6TPB-RYKU] (reporting on Federal Reserve Chair's congressional testimony that student debt "absolutely could hold back growth" on the U.S. economy); Christine DiGangi, *Can You Be Denied an Apartment Because of Bad Credit?*, YAHOO FIN. (Dec. 13, 2014), https://finance.yahoo.com/news/denied-apartment-because-bad-credit-130049897.html [https://perma.cc/5EGS-L8UE] ("The most well–known consequence of having bad credit is trouble getting loans or credit cards, but a low credit score can also make it difficult to find a place to live."). Even without defaults, the financial burdens of student debt cut into other consumer markets. *See* Frotman, *supra* note 170, at 817; Meta Brown & Sydnee Caldwell, *Young Student Loan Borrowers Retreat From Housing and Auto Markets*, FED. RSRV. BANK N.Y. (Apr. 17, 2013), http://libertystreeteconomics.newyorkfed.org/2013/04/youngstudent-loan-borrowers-retreat-from-housing-and-auto-markets.html [https://perma.cc/JZ5B-CW5Q]; *see also* Alvaro Mezza, Daniel Ringo & Kamila Sommer, *Can Student Loan Debt Explain Low Homeownership Rates for Young Adults?*, CONSUMER & CMTY. CONTEXT, Jan. 2019, at 2, 5, https://www.federalreserve.gov/publications/files/consumer-community-context-201901.pdf [https://perma.cc/6J2Z-73Z7].

had received the protections inscribed in federal law.[172] Further, recent studies demonstrate how student debt is both a consequence and cause of racial and gender disparities.[173] These are just some of the domino effects of the broken student loan system.[174]

The student loan industry is often blamed for these socioeconomic harms.[175] A recurring allegation is that federal student loan servicers cut operational costs by

172. Frotman, *supra* note 170, at 823, 833–45; *see* WILLIAM ELLIOT & MELINDA LEWIS, ASSETS & EDUC. INITIATIVE, UNIV. OF KAN., STUDENT LOANS ARE WIDENING THE WEALTH GAP: TIME TO FOCUS ON EQUITY 7 (2013), http://aedi.ssw.umich.edu/sites/default/files/publications/publication-cd-reports-r 1.pdf [https://perma.cc/995Y-F4X4] ("[D]espite our collective belief in an American dream of equitable opportunities for all, higher education today increasingly reinforces patterns of relative privilege, particularly as students rely more and more on student loans to finance college access."); *see also* Elissa Nadworny, *Families, Not Just Students, Feel the Weight of the Student Loan Crisis*, NPR (Sept. 4, 2019, 6:01 AM), https://www.npr.org/2019/09/04/755221033/families-not-just-students-feel-the-weight-of-the-student-loan-crisis [https://perma.cc/X3Y9-NN54]; Caitlin Zaloom, *How Paying for College Is Changing Middle-Class Life*, N.Y. TIMES (Aug. 30, 2019), https://www.nytimes.com/2019/08/30/opinion/sunday/college-tuition.html [https://perma.cc/LN5V-MFUX]; Mikhail Zinshteyn, *Saddled With Debt, Recent Grads Can't Save*, AARP (May 29, 2019), https://www.aarp.org/money/credit-loans-debt/info-2019/recent-grads-delay-saving.html [https://perma.cc/8B67-YMAR].

173. *See* Daniela Kraiem, *The Cost of Opportunity: Student Debt and Social Mobility*, 48 SUFFOLK U. L. REV. 689, 699 (2015) ("Students with unmanageable debt are more likely to be low-income, female, black, and have dependent family members such as children or elderly parents."); MARK HUELSMAN, DĒMOS, DEBT TO SOCIETY: THE CASE FOR BOLD, EQUITABLE STUDENT LOAN CANCELLATION AND REFORM 8–12 (2019), https://www.demos.org/sites/default/files/2019-06/Debt%20to%20Society.pdf [https://perma.cc/T559-GKYV] (reporting that, because of wealth and income disparities, students of color are both more likely to need higher amounts of student loans and more likely to default); Judith Scott-Clayton & Jing Li, *Black–White Disparity in Student Loan Debt More Than Triples After Graduation*, BROOKINGS INST. (Oct. 20, 2016), https://www.brookings.edu/research/black-white-disparity-in-student-loan-debt-more-than-triples-aftergraduation [https://perma.cc/4YME-KSR4]; Judith Scott-Clayton, *The Looming Student Loan Default Crisis Is Worse Than We Thought*, BROOKINGS INST. (Jan. 11 2018), https://www.brookings.edu/wp-content/uploads/2018/01/scott-clayton-report.pdf [https://perma.cc/C5LY-T89C].

174. Frotman, *supra* note 170, at 821, 825 ("It is increasingly clear that the student debt crisis is much broader than a series of individual student loan defaults. As more Americans pursue higher education, only to be weighed down by unaffordable student debt, this supposed equalizer is quickly turning into one of the greatest forces cementing economic inequality in this nation.").

175. *See* Nelson v. Great Lakes Educ. Loan Servs., Inc., 928 F.3d 639, 643–45 (7th Cir. 2019) (summarizing allegations of widespread loan servicing abuses and mistakes); DEP'T EDUC. OIG REPORT, *supra* note 18, at 10–11 (reporting about "recurring instances of [industry] noncompliance primarily in two areas: consumer protection (servicer representatives not informing borrowers of the available repayment options) and income-driven repayment (servicers incorrectly calculating income-driven payment amounts)"); CONSUMER FIN. PROT. BUREAU, STAYING ON TRACK WHILE GIVING BACK: THE COST OF STUDENT LOAN SERVICING BREAKDOWNS FOR PEOPLE SERVING THEIR COMMUNITIES 29–31 (2017), http://files.consumerfinance.gov/f/documents/201706_cfpb_PSLF-midyear-report.pdf [https://perma.cc/LH86-J8WG] (reporting deceptive practices by federal loan servicers have

unlawfully steering financially struggling borrowers into less favorable, and more costly, loan repayment programs.[176] Moreover, federal student loan servicers have notoriously gummed up statutory forgiveness programs, such as public service loan forgiveness and permanent disability loan discharge.[177]

ED is blamed as well, for allowing and enabling these transgressions.[178] According to a 2019 report from ED's Inspector General, the department has insufficient procedures and policies to detect patterns in industry wrongdoing.[179] Even when industry noncompliance was detected, ED rarely used available contract provisions to hold the offending loan servicers accountable.[180] Consequently, the report concludes, ED undercut important incentives that were included in the contracts to protect student borrowers, their families, and taxpayer dollars.[181] Adding insult to injury, ED has instructed its contractors not to share information with the federal Consumer Financial Protection Bureau (CFPB) and legislative oversight committees.[182]

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caused some borrowers to believe, incorrectly, that their loan payments were contributing toward forgiveness).

176. *See*, *e.g.*, *Nelson*, 928 F.3d at 642; *see also* Lawson-Ross v. Great Lakes Higher Educ. Corp., No. 1:17-CV-253-MW/GRJ, 2018 WL 5621872, at *2–4 (N.D. Fla. Sept. 20, 2018); *cf.* DEP'T EDUC. OIG REPORT, *supra* note 18, at 10–11.

177. *See, e.g.*, CONSUMER FIN. PROT. BUREAU, *supra* note 175, at 29–31; Zach Friedman, *Student Loan Forgiveness Program Rejects 99% of Applicants*, FORBES (Sept. 24, 2018, 8:32 AM), https://www.forbes.com/sites/zackfriedman/2018/09/24/public-service-loan-forgiveness-rejected/#342c71b91824 [https://perma.cc/3RYB-G6K7]; Clare Lombardo & Cory Turner, *Student Loan Borrowers With Disabilities Aren't Getting Help They Were Promised*, NPR (Dec. 4, 2019, 5:00 AM), https://www.npr.org/2019/12/04/776058798/why-student-loan-borrowers-with-disabilities-arent-getting-the-help-they-deserve?utm_campaign=storyshare&utm_source=twitter.com&utm_medium=social [https://perma.cc/RBE2-QKJ6].

178. *See* MORGAN, *supra* note 163, at 6 ("[T]he Department of Education has gone to great lengths to shield these companies from responsibility—and in doing so, deprives borrowers of potential remedies to their debt."). Congress is arguably to blame, too, for building so much complexity into student loan repayment programs. *See A $1.5 Trillion Crisis: Protecting Student Borrowers and Holding Student Loan Servicers Accountable: Hearing Before the H. Comm. on Fin. Servs.*, 116th Cong. (Sept. 10, 2019) (statement of Jason D. Delisle) (deflecting blame away from student loan servicers and arguing that the perceived mistreatment of borrowers may actually be the result of the design of the loan program itself, not in how loans are serviced).

179. *See* DEP'T EDUC. OIG REPORT, *supra* note 18, at 2.

180. *Id.*

181. *Id.*

182. *See* Michael Stratford, *Company Managing Public Service Loan Forgiveness Refuses to Testify Before House Panel*, POLITICO (Sept. 17, 2019), https://www.politico.com/story/2019/09/17/student-loan-company-refuses-to-testify-1500740 [https://perma.cc/L4GQ-8WMP]; Letter from Kathleen L. Kraninger, Dir. of Consumer Fin. Prot. Bureau, to Senator Elizabeth Warren (Apr. 23, 2019), https://legacy.npr.org/documents/2019/may/042319-letter.pdf [https://perma.cc/4C49-VU5P]; Chris Arnold, *Exclusive: Turf War Blocked CFPB From Helping Fix Student Loan Forgiveness Program*, NPR (Oct. 15, 2019), https://www.npr.org/2019/10/

To close the accountability gap, several states have recently enacted licensing and reporting laws directed at student loan servicers.[183] Some states have also created private causes of action against loan servicers who violate state consumer protections.[184] Moreover, some state attorneys general have directly sued federal loan servicers under preexisting state law.[185] Apart from protecting the rights of student borrowers, these state-centric efforts have the potential to make federal student loan servicing more accountable and transparent on a systemic level.

In defense, the federal government and its contractors argue that federal law *and* federal contracts displace state law.[186] In March 2018, ED took the unusual step of publishing its Supremacy Clause defenses in a non-binding "preemption guidance" in the Federal Register.[187] If ED and its contractors have their way, the

15/769326896/exclusive-turf-war-blocked-cfpb-from-helping-fix-student-loan-forgiveness-program [https://perma.cc/AN6X-LCSU].

183. *See, e.g.*, Assemb. 2251, 2015–2016 Leg., Reg. Sess. (Cal. 2016); S. 19-002, 72nd Gen. Assemb., Reg. Sess. (Colo. 2019); H.R. 6915, 2015 Gen. Assemb., Reg. Sess. (Conn. 2015); D.C. Act 21-571, 2016 Council of D.C. (D.C. 2016); S. 1351, 100th Gen. Assemb., Reg. Sess. (Ill. 2017); L.D. 995, 129th Leg., Reg. Session (Me. 2019); Assemb. 455, 218th Leg., Reg. Sess. (N.J. 2019); H.R. 5936, 2019 Gen. Assemb., Reg. Sess. (R.I. 2019); S. 6029, 65th Leg., Reg. Sess. (Wash. 2018); S. 77, 2020 Gen. Assemb., Reg. Sess. (Va. 2020).

184. *See, e.g.*, COLO. REV. STAT. ANN. § 5-20-112 (West 2020); Student Loan Bill of Rights, ch. 431, 2019 Me. Laws 431 (to be codified at 9-A ME. Stat. § 14-110); Student Loan Bill of Rights Act, ch. 199, 2019 R.I. Pub. Laws 199 (to be codified at R.I. Gen. Laws §§ 19-33-13).

185. *See, e.g.*, Pennsylvania v. Navient Corp., 354 F. Supp. 3d 529 (M.D. Pa. 2018); People v. Pa. Higher Educ. Assistance Agency, No. 1:19-cv-09155-ER (S.D.N.Y. Oct. 3, 2019); *see also* Danielle Douglas-Gabriel, *Court Denies Student Loan Servicer's Bid to Dismiss Massachusetts Lawsuit*, WASH. POST. (Mar. 1, 2018, 5:05 PM), https://www.washingtonpost.com/news/grade-point/wp/2018/03/01/court-denies-student-loan-servicers-bid-to-dismiss-massachusetts-lawsuit [https://perma.cc/5VYJ-HUSV] (discussing state-led litigation).

186. *See, e.g.*, Statement of Interest of the United States at 24, Perez v. Pa. Higher Educ. Assistance Agency, No. 3:18-cv-1114 (MPS) (D. Conn. Dec. 20, 2019) ("In addition to conflict preemption stemming from the Privacy Act itself, Connecticut's disclosure requirements are also preempted by the servicers' contracts with Education."); Statement of Interest by the United States at 20–21, Massachusetts v. Pa. Higher Educ. Assistance Agency, No. 1784-CV-02682, 2018 WL 4849404 (Mass. Super. Ct. Jan. 8, 2018) ("Plaintiff's claims are also preempted to the extent that they conflict with the Department's contract with [the defendant student loan servicer].").

187. *See* Preemption Guidance, *supra* note 16 (proffering a mix of preemption and intergovernmental immunity defenses). Prior to joining the Trump administration, the agency official (Kathleen Smith) who signed the "preemption guidance" led the Education Finance Council, a lobbying group representing student loan industry participants. MORGAN, *supra* note 163, at 10. Ms. Smith has since left her government post and is now Senior Vice President & Director of Pennsylvania Higher Education Assistance Agency (PHEAA), which is one of the leading federal student loan servicers. *See* Michael Stratford, *Student-Loan Behemoth Tightens its Ties to Trump and DeVos*, POLITICO (Sept. 9, 2019, 5:03 AM), https://www.politico.com/story/2019/09/09/student-loans-donald-trump-betsy-devos-1712812 [https://perma.cc/LN36-5L6D].

state law claims will be dismissed before discovery and trial (where much more might be learned about the merits of the allegations, one way or the other).

B. Stakes of Supremacy, Inc.

The foregoing case studies provide useful analytical grist for the Article's remainder. Ultimately, the accountability and transparency that state law might bring to federal outsourcing is contingent on how the Supremacy Clause is interpreted and applied in this contested space.

Generally speaking, state law may be displaced or nullified under the Supremacy Clause in two ways.[188] First, it is a familiar principle that "federal law preempts contrary state law."[189] Second, under the less familiar intergovernmental immunity doctrine, states may not directly regulate the federal government or its instrumentalities, and may not discriminate against the federal government or "those with whom it deals."[190]

New and old questions about the Supremacy Clause's scope are coming to a head in the case studies above. In both settings, private litigants are suing federal contractors under generally applicable state law, such as unjust enrichment and consumer protection laws. It is a truism that federal law preempts conflicting state law. The more intriguing question raised in the litigation, and my focus in Part III, is whether state law must yield to *federal contracts* in contexts where federal law, itself, does not conflict with state law (what I call "preemption by contract").[191] Additionally, in both case studies, state laws that directly regulate federal contractors test the boundaries of intergovernmental immunity doctrine. It is well settled that the federal government is constitutionally immune from direct or discriminatory state regulation.[192] The knottier question, treated in Part IV, is whether and under what circumstances the federal government's immunity should radiate to shield its contractors from state law (what I call "privatized immunity").

188. *See* North Dakota v. United States, 495 U.S. 423, 434 (1990); *cf.* United States v. New Mexico, 455 U.S. 720, 733–35 (1982).
189. *See* Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288, 1297 (2016). The Court's phrasing ("federal law preempts contrary state law") is an oversimplification, but it is close enough for present purposes. *See generally infra* Part III (discussing preemption doctrine and elaborating on how the "federal law" preemption formula elides important nuance).
190. *North Dakota*, 495 U.S. at 434–37; *see generally infra* Subpart IV.A (discussing intergovernmental immunity doctrine).
191. Whether federal law preempts state law in the immigration detention and student loan cases require close attention, and fine-grain analysis, of the specific federal and state laws at issue. That analysis may be decisive in those cases but is beyond the scope of this Article. The more generalized question, taken up here, is whether federal contracts can displace state law in the event that federal law does not.
192. *See North Dakota*, 495 U.S. at 434.

Existing doctrine countenances these Supremacy Clause spinoffs, but the Court's reasoning is thin and woefully inattentive to the pathologies of modern federal contracting.[193] Meanwhile, the doctrines of Supremacy, Inc. have mostly escaped academic scrutiny. The few notable exceptions either predate modern federal outsourcing, or focus on discrete aspects or cases.[194] This Article provides the first comprehensive study—and with important payoff.

The doctrines of Supremacy, Inc. look very different, and more dangerous, in combination. Moreover, when viewed in historical and legal context, these doctrines acquire new hue. States are hardly the ideal or most obvious source for holding federal contractors accountable. But, if states can help, that bidding should be taken seriously. If holding contractors accountable to state law interferes with federal efficiency, that is a fair constitutional price for outsourced governance. Should the nation not wish to pay it, the federal government can shield its contractors with federal laws.

III. PREEMPTION BY CONTRACT

The Supremacy Clause provides, in relevant part, that federal "Laws . . . made in Pursuance [of the Constitution]" shall be "supreme Law of the Land," notwithstanding any "Contrary" state law.[195] Validly enacted federal statutes clearly qualify as supreme law under this provision.[196] Moreover, the Supreme Court has long held that federal common law and agency action with the force of

193. *See infra* Parts III–IV.

194. Although some attention has been paid to preemption by contract, it has been partial. As explained in detail below, preemption by contract has three strands. Only one has received scholarly attention; the federal common law "government contractor defense" originating in *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504–05 (1988). Meanwhile, privatized immunity from state regulation has received hardly any attention at all. Arthur Miller and Laurence Tribe (writing separately) offered important insights many decades ago, well before the rise of modern federal contracting in the 1990s. *See* Arthur S. Miller, *State Power Over the Federal Contractor: A Problem in Federalism*, 11 VAND. L. REV. 175 (1957); Laurence H. Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682, 682 (1976) (noting the dearth of scholarship at the time). Treatises on constitutional law, including Professor Tribe's, provide useful guides through the morass of intergovernmental immunity cases. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 6-6 to 6-34 (3d ed. 2000) [hereinafter TRIBE, AMERICAN CONSTITUTIONAL LAW]; WILLIAM J. RICH, MODERN CONSTITUTIONAL LAW §§ 34:58—34:64 (3d ed. 2011). By their nature, however, these treatise accounts are primarily designed to explain and describe the doctrine we have, not to challenge or steer it in new directions, as this Article hopes to achieve.

195. U.S. CONST. art. VI, cl. 2.

196. *See infra* Subpart III.A.1.a (discussing statutory preemption doctrine).

law can preempt conflicting state law.[197] Thus, under modern preemption doctrine, all three federal branches can make laws that preempt contrary state law.

From this starting position, a simple model helps to illustrate differences within the preemption tent. Broadly speaking, preemption requires: (1) authorization in federal law; and (2) conflict with state law. In everyday preemption cases, federal law itself satisfies both prongs. Most commonly, state law that conflicts with a federal statute is preempted under the Supremacy Clause.[198] Alternatively, a federal statute may not itself conflict with state law, but may authorize a federal agency to make binding regulations.[199] In turn, state law may be preempted if it conflicts with a binding agency regulation.[200] In these patterned examples, federal law—in some form or another—both conflicts with and authorizes the displacement of state law.

Preemption by contract is different. When it occurs, federal law provides the predicate authorization, but a federal contract supplies the displacing conflict. None of this is (yet) to say that preemption by contract is unconstitutional or illegitimate. The model sketched above simply highlights the points of departure between what I call preemption by contract, on the one hand, and more conventional forms of preemption by law, on the other.

Subpart III.A elaborates on these variations in the Supreme Court's preemption jurisprudence. Subpart III.B argues that preemption by contract is constitutionally dubious, inconsistent with modern federalism theory,

197. *See infra* Subpart III.A.1.a (discussing administrative preemption doctrine); *infra* Subpart III.A.3.a (discussing federal common law preemption). It is debatable whether agency regulations and federal common law should qualify as supreme federal law. *See* S. Candice Hoke, *Transcending Conventional Supremacy: A Reconstruction of the Supremacy Clause*, 24 CONN. L. REV. 829, 848–49, 855–58 (1992) (noting the ambiguity in the constitutional text and historical record regarding whether agency regulations and federal common law qualify as supreme federal law); Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 740–42 (2010) (opining that "as an [sic] historical matter, 'Laws . . . made in Pursuance [of the Constitution]' referred only to Acts of Congress," but that changed circumstances counsel for broadly interpreting the Supremacy Clause to encompass lawmaking commands of federal agencies and federal courts (emphasis omitted) (footnote omitted)). For present purposes, this Article takes as given that binding federal agency action and federal common law can preempt conflicting state law under existing doctrine.

198. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211 (1824) (stating that preemption occurs when state laws "interfere with, or are contrary to the laws of Congress, made in pursuance of the constitution").

199. *See infra* Subpart III.A.2.a.

200. *See, e.g.*, CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 676 (1993) ("We hold that, under the [Federal Railroad Safety Act], federal regulations adopted by the Secretary of Transportation pre-empt respondent's negligence action . . . ."); Geier v. Am. Honda Motor Co., Inc., 529 U.S. 861, 866 (2000) (holding that plaintiff's defective design claim "conflicts with the objectives of FMVSS 208, a[n agency] standard authorized by the [National Traffic and Motor Vehicle Safety] Act, and is therefore pre-empted by the Act.").

unnecessary, and potentially dangerous. Subpart III.C prescribes a doctrinal fix that would foreclose preemption by contract and considers some alternative approaches.

A. Preemption by Law vs. Preemption by Contract

Federal contracts can displace state law in at least three ways under current doctrine. First, Congress may incorporate the terms of federal contracts by reference into an express preemption provision.[201] Second, federal agencies may do the same, by incorporating contractual terms by reference into binding regulations or orders.[202] Third, under federal common law, contractual specifications can preempt conflicting state law.[203]

In each of these scenarios, it may be argued that federal law—not contracts—is doing the preemptive work. Because of differences in interpretive methodologies, there is no avoiding that conceptual snag in close cases. Rather than try to resolve it, this Article's more modest goal is to bring the interpretive choices and their consequences into sharper focus. Ultimately, the interpretive choice may simply be a normative one: namely, whether the federal law at issue *ought* to be interpreted in a way that legitimates the displacement of state law by contract.

1. Legislative Preemption

a. By Law

Under the Court's familiar taxonomy, Congress may statutorily preempt state law expressly or impliedly.[204] Congress does so expressly when it promulgates a statute that explicitly withdraws state jurisdiction over a subject or field.[205] Congress impliedly preempts state law in three ways. First, Congress impliedly preempts a regulatory field when it enacts sufficiently pervasive and detailed legislation targeting a certain industry or type of conduct ("field preemption").[206] Second, Congress impliedly preempts state law that poses an obstacle to the

201. *See* Coventry Health Care of Mo., Inc. v. Nevils, 137 S. Ct. 1190, 1194 (2017); *infra* Subpart III.A.1.b.
202. *See infra* Subpart III.A.2.
203. *See* Boyle v. United Techs. Corp., 487 U.S. 500, 504 (1988); *infra* Subpart III.A.3.b.
204. *See* Arizona v. United States, 567 U.S. 387, 399–401 (2012).
205. *Id.* at 399 (citing Chamber of Com. of U.S. v. Whiting, 563 U.S. 582, 592 (2011)).
206. *Id.* (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990)).

accomplishment of lawful federal objectives ("obstacle preemption").[207] Third, Congress impliedly preempts state law when it would be impossible for a party to comply with both federal and state law ("impossibility preemption").[208]

These classifications are notorious untidy, if not also misguided.[209] This Article, however, takes and leaves the Court's statutory preemption jurisprudence as given. As recently summarized by the Court, its cases have identified different types of preemption, "but all of them work in the same way: Congress enacts a law that imposes restrictions or confers rights on private actors; a state law confers rights or imposes restrictions that conflict with the federal law; and therefore the federal law takes precedence and the state law is preempted."[210]

b. By Contract

Preemption by contract is nowhere reflected in the foregoing schema. Rather, it occurs derivatively via statutes that incorporate the terms of federal contracts by reference. For example, the Federal Employees Health Benefits Act (FEHBA) provides, in relevant part, that "[t]he *terms of any contract* under this chapter which relate to the nature, provision, or extent of coverage or [health benefits] . . . *shall supersede and preempt* any State or local law . . . , which relates to health insurance or plans."[211]

The Supreme Court recently upheld this statute against a constitutional challenge in *Coventry Health Care of Missouri, Inc. v. Nevils*.[212] As framed by the Court, the issue was whether Congress could imbue the "terms of a [federal] contract" with preemptive effect.[213] The Court held yes, but that was hardly a foregone conclusion.[214]

207. *Id.* (citing Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963)).
208. *Id.* (citing Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).
209. *See* Wyeth v. Levine, 555 U.S. 555, 587 (2009) (Thomas, J., concurring) ("My review of this Court's broad implied pre-emption precedents, particularly its 'purposes and objectives' pre-emption jurisprudence, has increased my concerns that implied pre-emption doctrines have not always been constitutionally applied."); S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685, 735–37 (1991) (arguing for a logical reorganization of the doctrinal categories of preemption and subsumation of all types as species of conflict); Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 231 (2000) ("[C]onstitutional law has no place for the Court's fuzzier notions of 'obstacle' preemption, under which state law is preempted whenever its practical effects would stand in the way of accomplishing the full purposes behind a valid federal statute.").
210. Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1480 (2018).
211. 5 U.S.C. § 8902(m)(1) (emphasis added).
212. 137 S. Ct. 1190 (2017).
213. *Id.* at 1198.
214. *Id.*

A decade earlier, the Court greeted the same preemption statute with suspicion in *Empire Healthchoice Assurance, Inc. v. McVeigh*.[215] There, the issue was whether FEHBA's preemption provision supplied a basis for federal court jurisdiction.[216] In the course of rejecting that argument, the Court remarked that the statute was "unusual" because it rendered "contract terms" preemptive.[217] In the Second Circuit opinion under review in *McVeigh*, then-Judge Sotomayor thought the preemption statute was more than just unusual.[218] "[A] literal reading" of the statute, she wrote, "is highly problematic, and probably unconstitutional, because only federal law may preempt [state law]."[219] She continued: "There is no constitutional basis for making the *terms of contracts* . . . 'supreme' over state law."[220]

Subsequently, in *Hillman v. Maretta*,[221] the Supreme Court was faced with a similar preemption provision contained in the Federal Employees' Group Life Insurance Act of 1954 (FEGLIA), which states, in relevant part: "[T]he provisions of any *contract* under [FEGLIA] which relate to the nature or extent of coverage or benefits . . . shall supersede and *preempt any law of any State* . . . , which relates to group life insurance to the extent that the law or regulation is *inconsistent with the contractual provisions*."[222] Writing for the Court, Justice Sotomayor held that the state law claim at issue was obstacle preempted under other FEGLIA provisions, thus dodging the constitutional question posed by the express preemption clause.[223]

In *Coventry*, the Court took the question head on. First, the Court explained that its prior musings in *McVeigh* about the "unusual" nature of FEHBA's express preemption provision were mere dicta.[224] Now that the issue was squarely presented, the *Coventry* Court decided that "the statute, not a contract, strips state law of its force."[225] The Court reasoned that "[w]ithout [the statute], there would

215. 547 U.S. 677 (2006).
216. Specifically, the issue in *McVeigh* was whether 28 U.S.C. § 1331 gives federal courts subject matter jurisdiction over FEHBA reimbursement actions. *Id.* at 683. The insurance carrier in that case argued, among other things, that 5 U.S.C. § 8902(m)(1) itself conferred federal jurisdiction. *Id.* at 697. The Court disagreed. *Id.*
217. *Id.* at 697 (citing Empire Healthchoice Assurance Inc. v. McVeigh, 396 F.3d 136, 143–45 (2d Cir. 2005)).
218. Empire Healthchoice Assurance, Inc. v. McVeigh, 396 F.3d 136, 143 (2d Cir. 2005).
219. *Id.* (emphasis omitted).
220. *Id.* (emphasis added).
221. 569 U.S. 483 (2013).
222. *Id.* at 487–88 (quoting 5 U.S.C. § 8709(d)(1)).
223. *Id.* at 490.
224. Coventry Health Care of Mo., Inc. v. Nevils, 137 S. Ct. 1190, 1198 (2017).
225. *Id.*; *see id.* at 1194 ("Section 8902(m)(1) itself, not the contracts [the agency] negotiates, triggers the federal preemption.").

be no preemption of state insurance law."[226] The Court acknowledged that "FEHBA contract terms have preemptive force," but found that unremarkable because state law is displaced "only" when "the contract terms fall within the statute's preemptive scope."[227] Moreover, the Court took solace in the fact that "[m]any other federal statutes" previously found to preempt state law leave "the context-specific scope of preemption to contractual terms."[228] Although the phrasing in FEHBA's preemption clause differed from those "other federal statutes," the Court found the differences inconsequential because the provisions "manifest[ed] the same intent to preempt state law."[229]

The Court's reasoning in *Coventry* is highly unsatisfying for what it does *not* say. It is true—but only half true—that "there would be no preemption" without the statute.[230] The unstated remainder is that there would be no preemption without the contractual conflict with state law. Likewise, the Court's observation that state law is displaced only when the contract terms fall within the statute's scope is accurate but incomplete, again, because state law is displaced only when it conflicts with the contractual terms.[231] Simply put, federal law was necessary, but insufficient, to preempt state law. The contractual conflict with state law was also necessary to the preemptive result.

The *Coventry* opinion also failed to explain why the existence of similar preemption statutes was a reason to uphold the statute at issue. In other constitutional contexts, the Court's inquiry has been "sharpened rather than blunted" by the frequency of constitutionally suspect statutes.[232] Moreover, the

226. *Id.* at 1198.
227. *Id.*
228. *Id.* The Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 29 U.S.C.), for example, preempts "any and all State laws insofar as they . . . relate to any employee benefit plan." 29 U.S.C. § 1144(a). And the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–16, limits the grounds for denying enforcement of "written provision[s] in . . . contract[s]" providing for arbitration, thereby preempting state laws that would otherwise interfere with such contracts. 9 U.S.C. § 2. Without explicitly deciding whether these other statutes were compatible with the Supremacy Clause, the Court has held that those statutes preempt state law. *See, e.g.*, Gobeille v. Liberty Mut. Ins. Co., 136 S. Ct. 936, 942–47 (2016) (holding that ERISA preempted a Vermont law requiring certain entities to report healthcare claims information for inclusion in a state healthcare database); Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530, 532–34 (2012) (holding the FAA preempted state law claims).
229. *Coventry*, 137 S. Ct. at 1198–99.
230. *Id.* at 1198.
231. *Id.*
232. *See* Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919, 944 (1983) ("[O]ur inquiry is sharpened rather than blunted by the fact that congressional veto provisions are appearing with increasing frequency in statutes which delegate authority to executive and independent agencies[.]"); *cf.* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 499 (2009) ("[T]hat a given law or procedure is efficient, convenient, and useful in facilitating functions of

fact that the Court has ruled state law preempted by "other similar statutes" falls flat because the constitutional issue was not vetted in those other cases.[233]

Finally, the Court's observation that Congress intended to have contractual terms preempt state law is true but irrelevant.[234] The constitutional issue was whether Congress exceeded its *powers*, not whether Congress *intended* for the federal contracts to have preemptive effect.[235] By analogy, Congress may intentionally commandeer states, legislatively veto executive action, violate due process, and so on. Those intentions, however, say nothing about whether Congress may constitutionally do those things.[236] In *Coventry*, the Court effectively conflated the questions of power and intent.

Justice Thomas wrote a short concurring opinion in *Coventry* to express "one reservation."[237] He admonished that "[a] statute that confers on an executive

government, standing alone, will not save it if it is contrary to the Constitution." (citing Bowsher v. Synar, 478 U.S. 714, 736 (1986))).

233. Indeed, Justice Ginsburg, who authored *Coventry*, was a vociferous critic in some of those preemption cases, albeit for different reasons. *See, e.g.*, DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463, 471 (2015) (Ginsburg, J., dissenting) (lamenting the Court's holdings that arbitration contracts can displace state law under the FAA); *see also Gobeille*, 136 S. Ct. at 948 (Thomas, J., concurring) (questioning "whether any provision of Article I authorizes Congress to prohibit States from applying a host of generally applicable civil laws to ERISA plans," and suggesting the Court should address, head-on, the clause's constitutionality in a future case); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 357 (2011) (Breyer, J., dissenting) (expressing concerns about the breadth of the Court's preemption jurisprudence under the FAA).

234. *Coventry*, 137 S. Ct. at 1199.

235. *Coventry* presented two questions: "Does FEHBA's express-preemption prescription, § 8902(m)(1), override state law prohibiting subrogation and reimbursement; and if § 8902(m)(1) has that effect, is the statutory prescription consistent with the Supremacy Clause, U.S. Const. Art. VI, cl. 2?" *Id.* at 1194. The former was a question of statutory interpretation, for which congressional intent is generally relevant if not dispositive. But once the Court resolved that interpretive question, the *constitutional* question was whether the statute—as interpreted—was consistent with the Supremacy Clause. *Id.* Under norms of constitutional adjudication, congressional intent might establish that Congress expected or hoped that its statute was constitutional, not that it *was* constitutional. *See* Marbury v. Madison, 5 U.S. 137, 177 (1803) (establishing that when an Act of Congress is alleged to conflict with the Constitution, "[i]t is emphatically the province and duty of the judicial department to say what the law is").

236. *See* United States v. Windsor, 570 U.S. 744, 774–75 (2013) (holding that federal Defense of Marriage Act violated due process); Printz v. United States, 521 U.S. 898 (1997) (holding that the federal government cannot conscript state and local officers into federal service); *Chadha*, 462 U.S. at 944–46 (holding that the legislative veto is unconstitutional); Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 392 (1995) (holding that Amtrak was a governmental entity for the purposes of a First Amendment challenge, even though the statute under which Amtrak was created disclaimed agency status); *see also* Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 51 (2015) ("Congressional pronouncements . . . are not dispositive of Amtrak's status as a governmental entity for purposes of separation of powers analysis under the Constitution." (citation omitted)).

237. *Coventry*, 137 S. Ct. at 1199 (Thomas, J., concurring).

agency the power to enter into contracts that pre-empt state law . . . might unlawfully delegate legislative power to the President insofar as the statute fails sufficiently to constrain the President's contracting discretion."[238] His opinion appreciates that preemption by contract straddles separation of powers and federalism: There are virtually no limits on Congress's delegation of authority to executive officials, who in turn can negotiate contractual terms that displace state law. Justice Thomas's concurrence seems more directly aimed at the separation of powers concern than the federalism concern.[239] Still, it captures what makes preemption by contract doubly concerning.

These conceptual difficulties still leave open the interpretive possibility, seized upon in *Coventry*, that "Section 8902(m)(1) itself," not the contracts, "triggers the federal preemption."[240] If by "triggers" the Court means *initiates*, then I agree.[241] But coming full circle, what the statute initiates is the displacement of state law by federal contracts. Alternatively, if the Court is implying that the statute *itself* displaces state law, then I demur.

Here again is the relevant text: "[T]he terms of any *contract* under this chapter which relate to the nature, provision, or extent of coverage or [health benefits] . . . *shall supersede and preempt* any State or local law . . . , which relates to health insurance or plans."[242] There are no rights or restrictions on private parties in this text, much less any that conflict with the state insurance laws at issue in *Coventry*.[243] At most, this federal statute makes preemption contingent on an exogenous conflict between federal contracts and state law.

238. *Id.*
239. *See, e.g.*, *Ass'n of Am. R.Rs.*, 575 U.S. at 75–77 (Thomas, J., concurring) (critiquing modern delegation doctrine); *see also* Catherine M. Sharkey, *Against Freewheeling, Extratextual Obstacle Preemption: Is Justice Clarence Thomas the Lone Principled Federalist?*, 5 N.Y.U. J.L. & LIBERTY 63, 74–75 (2010) (explaining how "Justice Thomas's conservative judicial philosophy" has translated in his preemption jurisprudence, and his general insistence that "state law is pre–empted only by federal law 'made in Pursuance' of the Constitution . . . —not by extratextual considerations of the purposes underlying congressional [action or] inaction.'" (internal citations and quotations omitted)). Justice Thomas's concurring opinion in *Coventry* seems to assume that if Congress had significantly constrained the president's discretion, then the separation of powers and federalism problems might be cured. *Coventry*, 137 S. Ct. at 1199.
240. *Coventry*, 137 S. Ct. at 1194.
241. *See, e.g.*, *Trigger*, MERRIAM-WEBSTER DICTIONARY (Sept. 29, 2020), https://www.merriam-webster.com/dictionary/trigger [https://perma.cc/X796-C6FH] (defining trigger).
242. 5 U.S.C. § 8902(m)(1) (emphasis added).
243. *Cf.* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1480 (2018) (explaining that under the Court's statutory preemption doctrine, "Congress enacts a law that imposes restrictions or confers rights on private actors; a state law confers rights or imposes restrictions that conflict with the federal law; and therefore the federal law takes precedence and the state law is preempted").

So construed, the statute at issue in *Coventry* falls into a larger class of modalities that may be referred to as "latent preemption."[244] As discussed further below, preemption by agency regulation is another type of latent preemption.[245] Tellingly, in the administrative preemption context, the Court generally attributes the displacement of state law to the source of the preemptive conflict—namely, to the agency regulation.[246] To my mind, that is a far more natural and fair characterization of the preemption dynamics at play. If nothing else, the juxtaposition of the Court's characterization of preemption by regulation, on the one hand, and preemption by contract, on the other, suggests that the latter depends on conceptual accommodations beyond those already made for administrative governance.

2. Executive Preemption

a. By Law

The Supreme Court has long held that "[f]ederal regulations have no less pre-emptive effect than federal statutes."[247] Occasionally, Congress expressly delegates preemption authority to an agency.[248] Such authorization is akin to the

244. This term is inspired by what Stephen Gardbaum refers to as "latent exclusivity." *See* Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 783 (1994) (explaining that, in the pre–New Deal era, when Congress enacted laws in a field in which it was empowered to legislate, state law was deemed inoperative in the field without regard to whether particular state laws conflicted with the substance of the federal regime). Latent preemption is different insofar as state law is displaced by a conflict with downstream federal action.
245. *See infra* Subpart III.A.2.a.
246. *See, e.g.*, Geier v. Am. Honda Motor Co., 529 U.S. 861, 865 (2000) (concluding that the Act, "taken together with" the agency regulation at issue, preempted plaintiff's common law claim); CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 676 ("We hold that, under the [Federal Railway Safety Act], federal regulations adopted by the Secretary of Transportation pre-empt respondent's negligence action . . . insofar as it asserts that [the] train was traveling at an excessive speed). *See also infra* Subpart III.A.2.a (discussing these and other cases).
247. *See* La. Pub. Serv. Comm'n v. Fed. Commc'n. Comm'n, 476 U.S. 355, 369 (1986) ("[A] federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority."); 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."); *see also* David S. Rubenstein, *Delegating Supremacy?*, 65 VAND. L. REV. 1125, 1137–38, 1147–52 (2012) (comparing and contextualizing the U.S. Supreme Court's statutory and administrative preemption doctrines).
248. *See, e.g.*, 47 U.S.C. § 253(a), (d) (authorizing the Federal Communications Commission to preempt "any [state] statute, regulation, or legal requirement" that "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service"); 30 U.S.C. § 1254(g) (preempting any statute that conflicts with "the purposes and the requirements of this chapter" and permitting the Secretary of the Interior to "set forth any State law or regulation which is preempted and superseded"); 49

statutory provision at issue in *Coventry*, but with an important difference. Specifically, in the administrative preemption context, the displacement of state law generally turns on a putative conflict with binding agency regulations or orders (not a federal contract).

For example, the Federal Railroad Safety Act of 1970 (FRSA) permitted states to have safety standards for trains "until such time as the Secretary [of Transportation] has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement."[249] Subsequently, the Secretary issued regulations, including one pertaining to maximum train speeds.[250] In *CSX Transportation, Inc. v Easterwood*, a widow brought a wrongful death action, under state law, alleging that her husband was killed by a train operating at an excessive speed.[251] According to the Court, preemption "depend[ed] on whether the regulations issued by the Secretary cover[ed] the subject matter" of the widow's state law claims.[252] The Court held that "under the FRSA, federal regulations" preempted the widow's negligence claim insofar as it conflicted with the agency's speed regulations.[253]

Agencies may also preempt state law without an express delegation of preemption authority. In *City of New York v. FCC*,[254] for example, Congress had authorized the Federal Communications Commission (FCC) to "establish technical standards relating to the facilities and equipment of cable systems which a franchising authority may require in the franchise."[255] Pursuant to this general delegation, the FCC promulgated regulations for cable-signal quality,[256] as well as a regulation that expressly preempted any state law in the same field.[257] New York and other cities challenged the FCC's authority to field preempt technical standards set by local franchising authorities.[258] Rejecting that challenge, the Court explained: "The phrase 'Laws of the United States' [in the Supremacy Clause] encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization."[259] The Court

U.S.C. § 5125(d) (authorizing the Secretary of Transportation to decide whether a state or local statute that conflicts with the regulation of hazardous waste transportation is preempted).

249. CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 662 n.2 (1993) (quoting 45 U.S.C. § 434).
250. *See* 49 C.F.R. § 213.9(a) (2018).
251. *CSX Transp.*, 507 U.S. at 665.
252. *Id.*
253. *Id.*
254. 486 U.S. 57 (1988).
255. *Id.* at 61 (quoting 47 U.S.C. § 544(e) (1982)).
256. *Id.* at 63.
257. *Id.* at 61–62.
258. *Id.* at 62.
259. *Id.* at 63.

further reasoned: "[I]n a situation where state law is claimed to be pre-empted by federal regulation, a 'narrow focus on Congress' intent to supersede state law [is] misdirected,' for '[a] pre-emptive regulation's force does not depend on express congressional authorization to displace state law.'"[260]

Broader still, agency action with the force of law may impliedly preempt state law,[261] even if Congress has not expressly delegated preemption authority to the agency (as in *CSX Transportation*),[262] and even without an express preemption regulation by the agency (as in *City of New York*).[263] *Geier v. American Honda Motor Co.*[264] was such a case. There, an injured motorist alleged that Honda had negligently and defectively designed the car without a driver's side airbag.[265] Honda argued in defense that the tort claims were expressly preempted by statute and impliedly preempted by agency regulation.[266] The Court determined that Congress had not expressly preempted the claims,[267] but agreed with Honda that the statute, "taken together with" the agency's regulation, preempted the lawsuit.[268]

b. By Contract

The Court has not directly addressed whether agencies can authorize preemption by contract, but they presumably can if Congress has not foreclosed the option. *Coventry* holds that Congress may preempt state law by incorporating contracts by reference into federal statutes.[269] Moreover, as explained above, agencies can preempt state law pursuant to a general delegation of lawmaking authority.[270] Thus, absent contrary indicators from Congress or the Court, it follows that agencies can preempt state law by incorporating contractual terms by reference into binding regulations and orders.[271]

260. *Id.* at 64 (quoting Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 154 (1982)).
261. *See infra* notes 262–266 and accompanying text.
262. *See supra* notes 249–253 and accompanying text.
263. *See supra* notes 254–260.
264. 529 U.S. 361 (2000).
265. *Id.* at 865.
266. *See id.* at 866–67.
267. *Id.* at 867–74.
268. *Id.* at 865; *see also id.* at 871–72 (explaining that the existence of express preemption and saving provisions in the statute does not foreclose Congress's implied authorization for preemption in the event of an actual conflict between state law and the agency's safety standards).
269. *See* Coventry Health Care of Mo., Inc. v. Nevils, 137 S. Ct. 1190, 1194, 1198 (2017).
270. *See supra* note 247 and accompanying text.
271. Whether agencies may do so by *other* means is less clear, although conceivable under existing case law.

3. Judicial Preemption

a. By Law

Rounding out the federal branches, state law may also be preempted by "federal common law."[272] Federal common law is variously defined in the literature, but a conventional definition will suffice here: It is judge-made law in the absence of directly controlling federal constitutional or statutory provisions.[273] Simply put, federal common law starts where other federal laws end.[274] And, in the event of a clash between state law and federal common law, the latter has preemptive effect.[275]

In *Erie Railroad Co. v. Tompkins*, the Court famously held that federal courts must apply state law—not "federal general common law"—in cases invoking federal diversity jurisdiction.[276] On federalism grounds, the Court explained that applying federal general common law in such cases would intrude on state sovereignty.[277] Despite *Erie*'s structural admonishments, the Court never fully relinquished its discretionary authority to apply *preexisting* federal common law.[278] Nor has the Court disclaimed authority to formulate *new* federal common

272. *See* Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 890–91 (1986).

273. *See id.* at 890 ("'[F]ederal common law' . . . refer[s] to any rule of federal law created by a court (usually but not invariably a federal court) when the substance of that rule is not clearly suggested by federal enactments—constitutional or congressional." (emphasis omitted) (footnotes omitted)); *see also* Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 5 (1985) (describing federal common law as judicially crafted "rule of decision that is not mandated on the face of some authoritative federal text").

274. *See* Clearfield Tr. Co. v. United States, 318 U.S. 363, 367 (1943) (finding that where federal interests are sufficiently implicated and there is no applicable act of Congress, "it is for the federal courts to fashion the governing rule of law according to their own standards," which preempts conflicting state law).

275. *See* Field, *supra* note 272, at 897 ("Although at one point there was some doubt, it is now established that a federal common law rule, once made, has precisely the same force and effect as any other federal rule. It is binding on state court judges through the supremacy clause.").

276. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79–80 (1938). The literature on *Erie* is vast. *See* EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA 2 (2000) (remarking that *Erie* literature had reached "staggering proportions"). For excellent surveys of the literature, see *id.*, and Ernest A. Young, *A General Defense of* Erie Railroad Co. v. Tompkins, 10 J.L. & ECON. POL'Y 17, 18 (2013) (surveying the literature and arguing that *Erie* was the "most important federalism decision of the twentieth century"). For a critical review of *Erie*, see, for example, Suzanna Sherry, *Wrong, Out of Step, and Pernicious:* Erie *as the Worst Decision of All Time*, 39 PEPP. L. REV. 129 (2011).

277. *See Erie*, 304 U.S. at 79 (explaining that rules of general federal common law were an "invasion of the authority of the state, and, to that extent, a denial of its independence").

278. *Cf.* Hernandez v. Mesa, 140 S. Ct. 735, 749–50 (2020) (declining to extend federal common law constitutional tort claim under *Bivens* to a new context, but not overruling *Bivens*).

law when "a significant conflict" exists between state law and "uniquely federal" interests.[279]

The modern Court is generally loathe to fashion new federal common law rules or extend old ones.[280] Thus, the cases in which federal courts "may engage in common lawmaking are few and far between."[281] One such case, however, is directly pertinent here.[282]

b. By Contract

At the dawn of the privatization revolution, the Court in *Boyle v. United Technologies Corporation* fashioned a common law rule, commonly referred to as

279. *See* Tex. Indus. v. Radcliff Materials, 451 U.S. 630, 641 (1981) (listing areas of previously recognized federal common law); Nw. Airlines v. Transp. Workers Union, 451 U.S. 77, 95 (1981) (stating that federal courts have authority "to fashion federal common law in cases raising issues of uniquely federal concern" (footnotes omitted)); *see also* Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1264 (1996) ("Notwithstanding *Erie*'s embrace of judicial federalism, and its oft–quoted assertion that '[t]here is no federal general common law,' the Supreme Court has subsequently recognized numerous 'enclaves of federal judge–made law which bind the States.'" (footnotes omitted)); ERWIN CHEMERINSKY, FEDERAL JURISDICTION 368 (5th ed. 2007) ("[F]ederal common law has developed in an ad hoc fashion . . . . The Court has devoted little attention to developing general principles for when federal common law may or may not be created.").

280. *See, e.g.*, City of Milwaukee v. Illinois, 451 U.S. 304, 312–13 (1981) ("The enactment of a federal rule in an area of national concern, and the decision whether to displace state law in doing so, is generally made . . . by the people through their elected representatives in Congress."); *see also Mesa*, 140 S. Ct. at 742 (explaining the Court's general reluctance to create or extend federal common law); O'Melveny & Myers v. Fed. Deposit Ins. Corp., 512 U.S. 79 (1994) (declining the invitation to create federal common law). Whether or not federal common law is constitutionally legitimate is beyond the scope of this Article. For contrasting treatments of this issue, see Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 805 (1989) ("[T]here are no fundamental constraints on the fashioning of federal rules of decision."); Merrill, *supra* note 273, at 32–46 (identifying "preemptive lawmaking" as a legitimate form of federal common law); Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 PACE L. REV. 263, 265 (1992) (defending "a fairly broad (though not limitless) conception of the lawmaking power of the federal courts"); Caleb Nelson, *The Legitimacy of (Some) Federal Common Law*, 101 VA. L. REV. 1, 64 (2015) (defending some forms of federal common law); Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutional" Perspective*, 83 NW. U. L. REV. 761 (arguing that the Rules of Decision Act prohibits any federal common law); Clark, *supra* note 279 (offering a legitimizing theory, in constitutional structure, for certain categories of federal common law but not others).

281. Rodriguez v. Fed. Deposit Ins. Corp., 140 S. Ct. 713, 716 (2020).

282. *See* Boyle v. United Techs. Corp., 487 U.S. 500, 504 (1988) ("[W]e have held that a few areas, involving 'uniquely federal interests,' are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed . . . by the courts—so-called 'federal common law'" (citation omitted)).

the "government contractor defense."[283] Under this judicially crafted law, federal contractors can be shielded from state laws that conflict with contractual specifications.[284] The *Boyle* case arose when a marine was killed in a helicopter manufactured by a federal contractor.[285] Because the federal government was immune from civil liability, the marine's father sued the contractor for negligent design under state law.[286] In a sharply divided opinion, the Supreme Court held that state law was preempted, not by any federal statute, but rather by federal contracts under the auspice of federal common law.[287]

On the threshold question of whether to fashion a new federal common law rule, the Court first determined that civil liabilities arising out of the performance of federal contracts implicate a "uniquely federal interest."[288] The Court found this federal interest to be closely related to two others recognized in prior cases: namely, the rights and obligations of the United States under federal contracts,[289] and the civil liability of federal agents for actions taken within the scope of their duties.[290]

283. *Id.* at 511–12. Lower federal courts had applied variations of the government contractor defense prior to the Supreme Court's imprimatur in *Boyle*. *See, e.g.*, VIVIAN S. CHU & KATE M. MANUEL, CONG. RSCH. SERV., R41755, TORT SUITS AGAINST FEDERAL CONTRACTORS: AN OVERVIEW OF THE LEGAL ISSUES 12–15 (2011); RODNEY M. PERRY, CONG. RSCH. SERV., R43462, TORT SUITS AGAINST FEDERAL CONTRACTORS: SELECTED LEGAL ISSUES 2–3 (2014).

284. *Boyle*, 487 U.S. at 512.

285. *Id.* at 502.

286. *Id.* at 502–03.

287. *Id.* at 512–13.

288. *Id.* at 504–06.

289. *Id.* at 504–05; *see also* Clearfield Tr. Co. v. United States, 318 U.S. 363, 366–67 (1943) (finding the rights and obligations of United States with respect to commercial paper must be governed by uniform federal rule).

290. *Boyle*, 487 U.S. at 505. The Court also drew support from its decision in *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940), which had immunized a federal contractor from civil liability stemming from its performance of a service contract. *See id.* at 20–21. The lower courts are split on whether *Yearsley* applies to immunize federal service contractors from state and federal law, or only federal law. In *Yearsley*, the Supreme Court held that a landowner could not hold a federal contractor civilly liable for the erosion of land caused by the construction of dikes pursuant to the federal government's specifications. *Id.* at 20–21. Citing *Yearsley*, the Court recently affirmed that a federal contractor who simply performs as directed by the government may be shielded from liability under *federal* law. *See* Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663, 672–74 (2016) (recognizing the "derivative immunity" doctrine but holding that the contractor at issue was not entitled to immunity because it disregarded the "[g]overnment's explicit instructions" and violated federal law). If *Yearsley* applies only to immunize contractors from federal law, then it is beyond the scope of this Article (because it does not entail the preemption of state law). If *Yearsley* applies to state law, however, then it is not entirely clear whether the "derivative immunity" doctrine would be more or less protective than *Boyle*'s contactor defense. On one hand, *Yearsley* may be more protective insofar as it immunizes contractors performing as directed, *Yearsley*, 309 U.S. at 18–21, even if the government did not express a particular interest in the action that gave rise to the state law challenge, *see Boyle*, 487 U.S. at 509, 512. On the other hand, *Yearsley* repeatedly referred to the contractor as the government's "agent," *Yearsley*, 309 U.S. at 21–22, whereas *Boyle*'s

The Court acknowledged the difference in *Boyle*, which involved "an independent contractor performing its obligation under a procurement contract, rather than an official performing his duty as a federal employee . . . ."[291] Nonetheless, the Court opined, both scenarios "obviously implicated the same interest in getting the Government's work done."[292]

Turning to the second requirement for new federal common law, the Court determined that a "significant conflict" existed between state law and the federal government's interest in the military helicopter's design.[293] The Court explained that "the state-imposed duty of care that is the asserted basis of the contractor's liability . . . is precisely contrary to the duty imposed by the Government contract."[294] Moreover, the Court explained, the Federal Torts Claim Act (FTCA) retained the federal government's sovereign immunity against lawsuits arising from the performance of "discretionary functions" performed by federal employees.[295] The Court acknowledged that the FTCA's exemption did not apply to private causes of action against federal contractors.[296] Still, the Court reasoned, "[i]t makes little sense" to insulate the federal government from tort liability "when it produces the equipment itself, but not when it contracts for the production."[297] Further, the Court surmised that applying state law would burden or impede the federal government's objective because "the contractor will decline to manufacture the design specified by the Government, or it will raise its price."[298]

Importantly, the Court noted that the mere existence of a federal contract was insufficient to displace state law,[299] and that preempting all tort liability for government contractors was "too broad" a response.[300] Instead, the Court explained, state tort law was barred where there was a direct conflict with a government-imposed duty, and where the federal government had a "significant

contractor defense does not appear to require an agency-type relationship, *see Boyle*, 487 U.S. at 509, 512.

291. *Boyle*, 487 U.S. at 509.
292. *Id.*
293. *Id.* at 507–09.
294. *Id.* at 509.
295. *Id.* at 511; *see* 28 U.S.C. § 2680(a) (retaining federal sovereign immunity over "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused").
296. *Boyle*, 487 U.S. at 511.
297. *Id.*
298. *Id.* at 507.
299. *Id.*
300. *Id.* at 510.

interest" in the design feature at issue.[301] With these considerations in mind, the Court concluded that:

> Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.[302]

Four justices dissented. In the lead dissent, Justice Brennan argued that the "Court lacks both authority and expertise to fashion such a rule" of federal common law.[303] In his view, the Court's recognition of a government contractor defense was an improper usurpation of Congress's lawmaking power at the expense of state law.[304] Justice Stevens wrote a separate dissenting opinion, which further emphasized that it was Congress's job, not the Court's, to "balance the conflicting interests in the efficient operation of a massive governmental program and the protection of the rights of the individual."[305]

These dissenting viewpoints harken to *Erie*[306] and reflect an overarching concern with preemption by federal common law. It bears noting, however, that objecting to preemption by contract would have been a considerably narrower ground for dissent. The *Boyle* Court was so preoccupied with the broader question of whether to fashion new federal common law that it seemed to miss the significance of a judicially fashioned rule that imbues federal contracts with preemptive effect. At the time, the significance of this may simply have been out of view: *Boyle* was decided just prior to the rise of modern federal outsourcing and the "reinventing government" movement of the 1990s.

Lower federal courts have since extended *Boyle* along two dimensions. First, the government contractor defense now generally applies to manufacturers of civilian goods.[307] Second, the defense has been expanded and modified to cover service contractors.[308] Thus, what began as a defense for military equipment

301. *Id.*; *see id.* at 508–09 (distinguishing a situation where the government's procurement contract does not specify the manufacturing feature at issue).
302. *Id.* at 512.
303. *Id.* at 516 (Brennan, J., dissenting).
304. *Id.* at 531 ("We are judges not legislators, and the vote is not ours to cast.").
305. *Id.* at 531–32 (Stevens, J., dissenting).
306. *See supra* notes 276–277 and accompanying text.
307. *See, e.g.*, Carley v. Wheeled Coach, 991 F.2d 1117, 1118 (3d Cir. 1993).
308. *See, e.g.*, Hudgens v. Bell Helicopter/Textron, 328 F.3d 1329, 1334–45 (11th Cir. 2003) (accepting government contractor defense of a company providing helicopter maintenance to the Army); Richland-Lexington Airport Dist. v. Atlas Props., Inc., 854 F. Supp. 400, 421–24 (D.S.C. 1994) (applying the defense to a company supplying decontamination services to the

contractors has metastasized in the lower courts into a more generally applicable preemption shield. For its part, the Supreme Court has offered little to no additional guidance on *Boyle*'s extensions, but has noted in dicta that the contractor defense is a "special circumstance" in which the "government has directed a contractor to do the very thing that is the subject of the claim."[309]

Like in *Coventry*, it is possible to say that federal law is doing the preemptive work in cases where the government contractor defense operates to displace state law. It should be emphasized, however, that *Boyle* explicitly disclaimed statutory preemption under the FTCA.[310] Bradford Clark has offered an alternative justification for *Boyle*'s government contractor defense: specifically, that state law was displaced by the structural Constitution or the statutes employed by Congress which authorized the procurement.[311] As I understand it, this conceptualization legitimizes the Court's fashioning or authorization of the government contractor defense. Still, nothing in the Constitution itself, or any federal statute of which I am aware, conflicted with the state tort claim at issue in *Boyle*. Rather, state law was precluded from applying because it conflicted with contractual specifications agreed upon in an arms-length proprietary deal. But for that conflict, state law would have applied.

* * *

The foregoing discussion explained how preemption by contract is different than other types of preemption. Specifically, federal law authorizes the displacement of state law, but a contractual conflict with state law is a necessary condition for preemption to occur. This descriptive rendering does not resolve the constitutional and normative questions swirling around preemption by contract. My account does, however, reframe the terms of debate—including in some potentially uncomfortable and disruptive ways. The discussion below turns to these related questions and concerns.

Environmental Protection Agency). In the context of a service contract, the *Boyle* test remains essentially the same: (1) the government must have approved reasonably precise procedures to be followed in providing the service; (2) the contractor's performance must have conformed to those procedures; and (3) the contractor must have warned the government about dangers in those procedures that were known to it, but not to the government. *See* Hudgens, 328 F.3d at 1335.

309. Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 74 n.6 (2001).

310. *See Boyle*, 487 U.S. at 511.

311. *See* Clark, *supra* note 51, at 2141 ("The displacement of state law in these cases rests not on questionable notions of federal common law, but on . . . an actual conflict between state law and the constitutional provisions Congress employed to authorize the conduct in question."); *see also generally* Clark, *supra* note 280 (developing a theory of federal common law preemption tethered to the structural constitution).

B. Rethinking Preemption by Contract

The Supremacy Clause's text, structure, and drafting history leave no doubt that only valid federal law can displace state law.[312] Jurists and scholars disagree about what *types* of federal law should qualify for preemptive effect—most notably here, whether administrative regulations and federal common law qualify as "supreme Law of the Land."[313] Yet, to my knowledge, all agree that federal *contracts* do not make the cut.[314] Although law is a capacious concept, contracts clearly are not the type of "Laws" contemplated in the Supremacy Clause. Thus, state law cannot be displaced merely because it conflicts with the terms of federal contracts; it is axiomatic that "an agency literally has no power to act, let alone pre-empt the [law] of a sovereign State, unless and until Congress confers power upon it."[315]

From this starting position, the legitimacy of preemption by contract depends in large measure on a mixed question of theory and fact. Is it the authorizing federal law, the resulting federal contracts, or their combination that

312. *See* U.S. CONST. art. VI, cl. 2; Clark, *supra* note 280 (providing an in-depth account of the drafting history and structural compromises forged around the Supremacy Clause); Michael D. Ramsey, *The Supremacy Clause, Original Meaning, and Modern Law*, 74 OHIO ST. L.J. 559 (2013); *cf.* Peter L. Strauss, *The Perils of Theory*, 83 NOTRE DAME L. REV. 1567, 1591–92 (2008) (offering another reading that would include all federal law but not denying the force of Clark's originalist interpretation).

313. U.S. CONST. art. VI, cl. 2. These debates are beyond this Article's scope. For a small sample regarding executive preemption, compare Young, *supra* note 70, at 895–96 (arguing that executive preemption is constitutionally problematic, but that it is "probably too late in the day to insist" on it), and Rubenstein, *supra* note 65, at 268–69 (arguing that executive preemption is a paradox, because it requires that agency action be simultaneously treated as "non-Law" for purposes of separation of powers, and "Law" for purposes of federalism), with Strauss, *supra* note 312 (arguing that executive preemption is constitutional under nonoriginalist interpretation and normatively desirable), and Monaghan, *supra* note 197 (similar). For a small sampling of the debate around federal common law and its preemptive effects, see *supra* notes 197, 280, and *infra* notes 333–336 and accompanying text.

314. *See* U.S. CONST. art. VI, cl. 2; *see also* Empire HealthChoice Assurance, Inc. v. McVeigh, 396 F.3d 136, 143 (2d Cir. 2005) (Sotomayor, J.) ("There is no constitutional basis for making the terms of contracts with private parties similarly 'supreme' over state law."); Nevils v. Grp. Health Plan, Inc., 418 S.W.3d 451, 463 (Mo. 2014) (Wilson, J., concurring) (stating that "the supremacy clause assigns primacy solely to federal law. It does not provide—or even suggest—that the terms of a contract between the federal government and a private . . . company can override [state] law"), *vacated by* Coventry Health Care of Mo., Inc. v. Nevils, 576 U.S. 1048 (2015) (mem.); *see also* Arthur D. Little, Inc. v. Comm'r of Health & Hosps. of Cambridge, 481 N.E.2d 441, 452 (Mass. 1985) ("[T]his court has been unable to locate authority in this or any other jurisdiction which supports the proposition that a contract to which the Federal government is a party somehow constitutes Federal law for the purposes of the supremacy clause.").

315. New York v. Fed. Energy Regul. Comm'n, 535 U.S. 1, 18 (2002) (quoting La. Pub. Serv. Comm'n v. Fed. Commc'ns Comm'n, 476 U.S. 355, 374 (1986)).

displaces state law? As a purely descriptive matter, it is the combination: Federal law of one type or another provides the necessary authorization, and a federal contract supplies the necessary conflict. State law is displaced only when *both* conditions are met. If that is a fair characterization, then the notion that it is *only* federal law doing the preemptive work may fairly be characterized as a legal fiction.[316]

When legal fictions exist elsewhere in the law, they are generally supported by an overriding policy interest or sustained to avoid bigger problems.[317] Most pertinent here, for example, administrative law brims with legal fictions to legitimize the combination of legislative, executive, and judicial functions in federal agencies.[318] Arguably, the function and legitimacy of administrative governance depends on such fictions.[319] Moreover, modern federal contracting is justified, in part, on a pair of theoretical assumptions: first, that contractors do not perform "inherently governmental" functions; and second, that contactors "will be sufficiently accountable to public officials."[320] These ideals, however, are belied by realities on the ground.[321] Still, the fictions are

316. Black's Legal Dictionary defines "legal fiction" as an "assumption that something is true even though it may be untrue, made esp[ecially] in judicial reasoning to alter how a legal rule operates; specif[ically], a device by which a legal rule or institution is diverted from its original purpose to accomplish indirectly some other object." *Legal Fiction*, BLACK'S LAW DICTIONARY (8th ed. 2004). Other definitions are available in American jurisprudence, but nothing in my argument depends on definitional nuance.

317. For a classic treatment of legal fictions, see LON L. FULLER, LEGAL FICTIONS (1967). *See also* Peter J. Smith, *New Legal Fictions*, 95 GEO. L.J. 1435, 1441 (2007) (offering a taxonomy of legal fictions, whereby judges rely on "crafting a legal rule on a factual premise that is false or inaccurate").

318. *See* City of Arlington v. Fed. Commc'ns Comm'n, 569 U.S. 290, 304, n.4 (2013) ("Agencies make rules . . . [that] take 'legislative' . . . forms, but they are exercises of—indeed, under our constitutional structure they *must be* exercises of—the 'executive Power.'"); *see also id.* at 315 (Roberts, C.J., dissenting) ("[T]he citizen confronting thousands of pages of regulations . . . can perhaps be excused for thinking that it is the agency really doing the legislating."); *see also* FTC v. Ruberoid Co., 343 U.S. 470, 487–88 (1952) (Jackson, J., dissenting) ("Administrative agencies have been called quasi-legislative, quasi-executive, or quasi-judicial, as the occasion required, in order to validate their functions within the separation-of-powers scheme of the Constitution. The mere retreat to the qualifying 'quasi' is implicit with confession that all recognized classifications have broken down . . . .").

319. *See* Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting) (citing the "'necessities' of government" as a reason for the Court's toothless nondelegation doctrine); *see also* Kathryn A. Watts, *Rulemaking as Legislating*, 103 GEO. L.J. 1003 (2015) (analyzing legal fictions around nondelegation doctrine and the Court's "stubborn" adherence to the fictions).

320. *See* Guttman, *supra* note 2, at 862 ("The [inherently government function] principle—murky in its own right—increasingly became a fiction (or fig leaf) by the limits imposed on the allowable numbers of civil servants.").

321. *Id.*

sustained because federal outsourcing has reached the echelon of governance structures that are too big to fail.[322]

Preemption by contract has no such warrant. If the sun sets on this doctrinal anomaly, Congress will remain free to delegate policymaking power, and agencies would remain free to make policy. Further, the federal political branches could continue to outsource federal functions to private entities. Put otherwise, foreclosing preemption by contract would leave the defining features of modern government fully intact.

Moreover, foreclosing preemption by contract would not necessarily disrupt other types of preemption. Although the Supremacy Clause has been liberally construed to give preemptive force to federal common law and agency regulations, the displacement of state law by federal contracts is categorically different. A theoretic justification for administrative preemption is that the agency's authorizing statute (not the agency's regulation) is doing the preemptive work.[323] Along similar lines, a theoretic justification for certain types of federal common law preemption may be that the Constitution itself is doing the preemptive work.[324]

These lines of reasoning peg preemption to the *authorizing* source of federal law rather than to the *conflicting* source of federal law. But it is still federal law (of one type or another) that conflicts with state law. The same cannot as easily be said for preemption by contract and, more to the point, need not be said. On formal, functional, political, and procedural grounds, there is a world of difference between displacing state law because it conflicts with federal law, and displacing state law because it conflicts with a federal contract. To equate the two throws in the constitutional towel and provides no easy or obvious stopping point.

For instance, if Congress broadly delegates policymaking authority to an agency (such that preemption authority is implied),[325] can that agency head preempt state law in a tweet, or in a nonpublished memorandum sent to midlevel

322. *Cf.* Brown, *supra* note 11, at 1361 ("[D]ebate over whether the federal government should outsource is a futile exercise. It is here to stay.").

323. *See* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1326, 1375, 1433–34 (2001) (suggesting that when Congress delegates policymaking power to agencies, it is effectively Congress that preempts state law, thus potentially alleviating any Supremacy Clause problem); *see also* Ramsey, *supra* note 312, at 566–67 ("To the extent that an agency (or the President directly) acts with statutory authority, the statutory authority supplies the basis for displacing state law.").

324. *See* Clark, *supra* note 51, at 2141 (arguing that in many contexts of federal common law preemption, including *Boyle* preemption, can be conceptually lodged in the structural constitution).

325. *See supra* notes 264–268 and accompanying text (discussing implied administrative preemption).

personnel, or in a regulation that imbues everything on the agency's website with preemptive effect?[326] If only a conflict with federal law can displace state law, the answer to these questions would be no. But if state law may be displaced by a conflict with contracts, which are not "Laws," the possibilities are seemingly endless. Thus, if doctrinal lines must be drawn, one that separates preemption by law and non-law seems far more principled and manageable than the alternatives.

These conditions provide a sturdy foundation toward a new consensus. Jurists and scholars widely agree, in theory, that federal contracts cannot displace state law. That instinct should not be abandoned for the fiction that federal law is doing the preemptive work. Federal contracting needs more legal friction, not legal fiction. Because preemption by contract is different than preemption by law, these can and should be treated differently. Jurists and scholars who support federal common law and administrative preemption can categorically reject preemption by contract without ceding further ground. Meanwhile, those who believe that federal common law and administrative regulations should not qualify as "supreme Law of the Land" will have all the same reasons (and more) to reject preemption by contract.

It goes without saying that unauthorized or *ultra vires* federal action cannot displace state law. But that principle, in practice, is hardly limiting. With very few exceptions, the Supreme Court has placed no substantive limits on the scope of Congress's enumerated powers, and no meaningful limits on Congress's ability to delegate policymaking or contracting authority to federal agencies.[327] Thus, under

326. Although the Court's doctrine is still developing on this point, even *nonbinding* administrative policies—which do not have the "force of law"—might qualify for preemptive effect in certain contexts. *See* Arizona v. United States, 567 U.S. 387, 408 (2012) (holding that a provision of Arizona's S.B. 1070 was preempted, in part because of its potential conflict with federal immigration enforcement priorities); *id.* at 445 (Alito, J., concurring in part and dissenting in part) (describing as "remarkable" the federal administration's position that "a state law may be pre–empted, not because it conflicts with a federal statute or regulation, but because it is inconsistent with a federal agency's current enforcement priorities . . . [which] are not law"). Most recently, in *Kansas v. Garcia*, 140 S. Ct. 791 (2020), the Court rejected a preemption argument based in part on federal enforcement priorities, without expressly abrogating *Arizona*'s contrary indications. *Id.* at 807 ("[T]he possibility that federal enforcement priorities might be upset is not enough to provide a basis for preemption. The Supremacy Clause gives priority to 'the Laws of the United States,' not the criminal law enforcement priorities or preferences of federal officers." (citing U.S. CONST., art. VI, cl. 2))). *See also* Wyeth v. Levine, 555 U.S. 555, 576–77 (2009) (holding that nonbinding regulatory preamble could not have preemptive effect); Rubenstein, *supra* note 111, at 237–45 (arguing that foreclosing preemption by nonbinding agency action would not only promote federalism, but also indirectly promote separation of powers principles).

327. *See supra* notes 63–68 and accompanying text (discussing the demise of the enumerated powers and nondelegation principle in the post–New Deal era). To be sure, the Court on occasion has sanctioned Congress's use of certain regulatory tools—for example, Congress cannot commandeer state officials to administer federal programs. *See* Printz v. United States,

modern federalism theory, the primary means to protect state autonomy are political and procedural. The political safeguards include the states' representatives in Congress;[328] the procedural safeguards reside in the difficulty of making federal law.[329] As Brad Clark explains, if any of the specified veto players withhold their consent, then no new federal law is created, and preexisting state and federal law remains intact.[330] In these ways, federal lawmaking provides modes of public transparency, deliberation, and accountability that federal contracting—by design—is not structured to provide.

Even without federal contracting, the political process does not safeguard federalism very well.[331] Many decisions affecting state interests are not actually made by Congress; instead, they are made by agency officials who are not politically beholden to states.[332] Moreover, compared to Congress, agencies can and do make federal law much more easily; indeed, Congress often delegates to agencies precisely for this reason.[333] Thus, as Ernie Young explains, "shifting preemptive authority away from Congress to . . . executive institutions that do not represent the states . . . amounts to a significant threat to state autonomy."[334]

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521 U.S. 898, 935 (1997) (holding that Congress may not commandeer state officials to be enforcement agents of federal regulatory programs); *see also* New York v. United States, 505 U.S. 144, 161 (1992) (asserting that Congress may not commandeer state legislators to enact laws in service of federal regulatory programs). Moreover, Congress cannot use the spending power to "coerce" states into service. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 576 (2012) (striking down a spending condition requiring states to participate in a significant expansion of Medicaid or risk forfeiting all federal Medicare funding). Congress also cannot use the commerce power to compel individuals into a market. *Id.* at 588. But none of these are subject-matter limitations on the regulatory domains that Congress may stake for federal occupation.

328. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 556 n.11 (1985) (opining that "the political process ensures that laws that unduly burden the States will not be promulgated" (citing Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 558 (1954))); *see also* City of Milwaukee v. Illinois, 451 U.S. 304, 312–13 (1981) ("The enactment of a federal rule in an area of national concern, and the decision whether to displace state law in doing so, is generally made . . . by the people through their elected representatives in Congress.").

329. *See* Clark, *supra* note 323, at 1326.

330. *Id.*; *see also* Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1792 (2005) ("A national government that can act only with difficulty, after all, will tend to leave considerable scope for state autonomy.").

331. *See* Young, *supra* note 70, at 869 (explaining that the political and procedural safeguards of federalism "have little purchase on executive action"). For a contrary view, see Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2098 (2008) (arguing that administrative law can serve as a vehicle to "amplif[y] the political safeguards").

332. *See* Young, *supra* note 115, at 280.

333. *See* Rubenstein, *supra* note 67, at 279–80 (discussing a range of reasons why Congress might choose to delegate, with some reasons more benign than others).

334. *See* Young, *supra* note 115, at 280.

Preemption by contract takes an airborne leap in the same direction, away from the political and procedural safeguards of federalism. Efficiency is the coin of the privatization realm. And a most efficient way to displace state law is by contract.

C. Ending Preemption by Contract

The fix proposed here is relatively modest. Specifically, preemption doctrine should require that federal law *itself* displace or conflict with state law. Moreover, the doctrinal test would be relatively easy to administer: But for the contract, does state law conflict with federal law? If the answer is no, then state law can apply. This doctrinal adjustment strikes a fair balance. State law could still be preempted by federal law, and the federal government could still contract. But federal contracts could not displace state law.

Of course, other doctrinal adjustments are possible. More ambitiously, for example, some may prefer to foreclose administrative and federal common law preemption (which presumably would prevent agencies and federal courts from imbuing contracts with preemptive force). Those doctrinal ships have long sailed, however.[335] By contrast, preemption by contract is still in the harbor; its sails may be cut while leaving the remainder of the preemption fleet unscathed. On pragmatic grounds, this modesty is a virtue. Isolating preemption by *contract* avoids having to unwind or revisit debates over the types of *federal law* covered by the Supremacy Clause.[336]

Going smaller is an option, too. For instance, assuming that *Coventry* remains good law, the Court has all the more reason to discard *Boyle*'s federal common law contractor defense.[337] *Boyle* stood on shaky 5–4 ground from the start because it represented a new federal common law rule that intruded on state sovereignty without Congress's imprimatur.[338] The dissenting opinions

335. *See, e.g.*, Young, *supra* note 70, at 896–900 (lamenting that "[i]t is probably too late in the day to insist that federal agency action cannot create supreme federal law," and prescribing compensating doctrines instead); *see also* Clark, *supra* note 329, at 1433 (making conceptual peace with judicial and executive preemption to align more closely with existing doctrine).

336. *See supra* notes 197, 280, 335 and accompanying text.

337. *See supra* Subpart III.A.1 (discussing *Coventry*); *supra* Subpart III.A.3 (discussing *Boyle*).

338. *See supra* notes 303–305 and accompanying text; *see also* Thomas W. Merrill, *The Disposing Power of the Legislature*, 110 COLUM. L. REV. 452, 463 (2010) (arguing that *Boyle*'s embrace of federal common law was an aberration because "[b]oth before and after the decision, recourse to federal common law was noticeably diminishing"); *see also* William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217, 1231 (2002) (characterizing *Boyle* as a "breathtaking" example of judicial activism because it "transgressed federalism concerns" and "ignored separation of powers"). *But cf.* Clark, *supra* note 51, at 2130

in *Boyle* excoriated the majority's imposition of a high-stakes value judgment that Congress itself had not made—between contractor immunity and compensatory causes of action.[339] Now that Congress has been greenlighted to authorize preemption by contract, there is even less reason why the judiciary should countenance this form of preemption in situations where Congress has not.[340]

Going smaller still, *Boyle* might be narrowed instead of overruled. *Boyle*'s formula calls for preemption when state law conflicts with "reasonably precise [contractual] specifications."[341] The Court has not offered any meaningful guidance on this standard, and lower courts are split on how precise the contractual specifications must be to displace state law.[342] Nina Mendelson argues in favor of requiring more contractual precision, which may indirectly promote better contractual performance and federal oversight.[343] I have no objection to her prescription and fully agree with her reasons for it.

My sense, however, is that we can do better. The government contractor defense, in any form, pegs preemption to federal contracts. Beyond ontological objections, preemption by contract is analytically fraught. If there is ambiguity in the contractual specifications, then it is highly uncertain which tools of

(arguing that *Boyle* may be justified on a theory of constitutional preemption, which "avoids reliance on disfavored doctrines of judicial discretion such as federal common law").

339. *See* Boyle v. United Techs. Corp., 487 U.S. 500, 530 (1988) (Brennan, J., dissenting) ("At bottom, the Court's analysis is premised on the proposition that any tort liability indirectly absorbed by the Government so burdens governmental functions as to compel us to act when Congress has not."); *id.* at 531–32 (Stevens, J., dissenting) (contending that Congress was better equipped than the Court to "balance[e] . . . the conflicting interests in the efficient operation of a massive governmental program and the protection of the rights of the individual").

340. In the years leading up to *Boyle*, Congress had considered legislative proposals for a government contractor defense and rejected them. *See Boyle*, 487 U.S. at 515 & n.1 (Brennan, J., dissenting); *see also Indemnification of Government Contractors: Hearing on S. 1254 Before the S. Comm. on the Judiciary*, 99th Cong. 21 (1985) (statement of Richard K. Willard, Acting Assistant Attorney General, Civil Division, Department of Justice) (objecting to a 1985 bill that would have reduced the tort liability exposure of contractors). Moreover, in the years since, Congress has considered legislative proposals for context-specific government contractor defenses—some were enacted, some were not. *See infra* note 405 and accompanying text.

341. *Boyle*, 487 U.S. at 512.

342. *See* Mendelson, *supra* note 42, at 246–47; *see also* Perry, *supra* note 283, at 5–7.

343. *See* Mendelson, *supra* note 42, at 247–48, 254–55 (proposing to tighten *Boyle*'s contractor defense by federal statute). As she explains, "the overbroad application of the government contractor defense undermines" federal contractors' incentives to "exercise reasonable care," "especially in the context of long-term service contracts," which often contain broadly worded performance-based standards. *Id.* at 248. *See also* Mary J. Davis, *The Supreme Court and Our Culture of Irresponsibility*, 31 WAKE FORREST L. REV. 1075, 1094 (1996) (arguing that courts have applied overly expansive readings of "reasonably precise specifications" in applying *Boyle* to subsequent fact patterns).

construction ought to apply: federalism canons of construction,[344] federal common law rules of contract interpretation,[345] or some special admixture. Unlike federal statutes, there is no legislative history for federal contracts, and the purpose or import of particular contract clauses may be elusive. Eventually, courts might sort through these normatively inflected puzzles.[346] But, if only a conflict with federal law can displace state law, then those subsidiary judgments would be unnecessary.

Preemption by contract is an affront to first principles. Its abrogation would make Supremacy Clause jurisprudence more coherent, not less so. To say that federal law is doing the preemptive work is not an argument in favor of preemption by contract; it is a concession that contracts cannot preempt state law. Rather than legitimate this aberrational doctrine, the Court should revisit and end it.

IV. PRIVATIZED IMMUNITY

As earlier explained, state laws directed at federal contractors may have to clear two Supremacy Clause hurdles: preemption and intergovernmental immunity.[347] This Part turns to the latter doctrine. Unlike preemption, which generally requires a conflict between state law and federal law, intergovernmental immunity is implied from the Supremacy Clause and constitutional structure.[348] Under this doctrine, federal contractors may be immunized from state law in situations where there are *no conflicts* with any federal statutes, regulations, or contractual terms.

344. *Cf.* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (finding congressional occupation of the field is not to be presumed "in a field which the States have traditionally occupied"); *Boyle*, 487 U.S. at 507–08 (explaining that in "an area of uniquely federal interest," "[t]he conflict with federal policy need not be as sharp as that which must exist for ordinary pre-emption").

345. *Cf.* Nathaniel E. Castellano, *"Other Transactions" Are Government Contracts, and Why It Matters*, 48 PUB. CONT. L.J. 485, 512–14 (2019) (providing a summary of the interpretive rules that apply to federal contracts, which differ in some key respects from the interpretive rules that generally apply to private contracts).

346. Bridget Fahey maps a startling array of interpretive methodologies that courts have utilized to interpret intergovernmental agreements. *See* Bridget A. Fahey, *Federalism by Contract*, 129 YALE L.J. 2326 (2020). Unlike procurement contracts between federal and private actors, intergovernmental agreements are written instruments between federal and subfederal governments. When federal procurement contracts are employed to displace law, however, many of the same theoretical and analytical puzzles arise.

347. *See supra* Subpart II.B.

348. *See* McCulloch v. Maryland, 17 U.S. 316 (4 Wheat.) (1819); *see also infra* notes 350–351 and accompanying text.

Subpart IV.A maps the origins, limitations, and extensions of intergovernmental immunity. Subpart IV.B critiques the Court's extension of this doctrine to federal contractors—what I call "privatized immunity." Subpart IV.C prescribes a doctrinal recalibration. Under this proposal, federal contractors could still be immunized from state law, but such immunity would have to be earned through the federal political process.

A. Intergovernmental Immunity

The origins of intergovernmental immunity trace to the seminal case of *McCulloch v. Maryland*.[349] Writing for the Court, Chief Justice Marshall held that: (1) Congress had the constitutional authority to charter the Second National Bank;[350] and (2) Maryland could not tax the Bank's notes because "states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of . . . the powers vested in the general government."[351] Nothing in the Supremacy Clause's text mentions federal immunity from state law.[352] In canonical dictum, however, Chief Justice Marshall explained that the immunity principle "so entirely pervades the constitution, is . . . so interwoven with its web, so blended with its texture, as to be incapable of being separated from it, without rending it into shreds."[353]

In *McCulloch*, and for next century or so, the Court was loath to treat intergovernmental immunity as a matter of degree.[354] State laws that interfered with the federal government or its instrumentalities, even remotely, were routinely quashed.[355] For example, state taxation and regulation that indirectly

349. *McCulloch*, 17 U.S. at 425–37.
350. *Id.* at 424.
351. *Id.* at 436.
352. *See id.* at 396, 405, 432 (referring to federal supremacy); Hoke, *supra* note 197, at 854 (arguing that the Supremacy Clause "does not explicitly support [Chief Justice] Marshall's embroidery").
353. *McCulloch*, 17 U.S. at 426.
354. *See id.* at 430 (warning against enmeshing courts in the "perplexing" business, "so unfit for the judicial department," of attempting to delineate "what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power"); *see also* Dawson v. Steager, 139 S. Ct. 698, 704 (2019) (eschewing de minimis exception to intergovernmental tax immunity doctrine).
355. *See, e.g.*, Johnson v. Maryland, 254 U.S. 51, 57 (1920); *see also* Ohio v. Thomas, 173 U.S. 276, 278, 283 (1899) (invalidating a state law that required the person in charge of an eating house at a federal home for disabled veterans to put out a small printed sign that would read "oleomargarine sold and used here"). In *Osborn v. Bank of the United States*, 22 U.S. 738 (1824), the Supreme Court considered Ohio's attempt to tax the National Bank. *Id.* Writing for the Court, Chief Justice Marshall reified *McCulloch's* holding that the bank was immune from state taxation. *Id.* at 867–68. In dicta, the Chief Justice rhetorically asked: "Can a

raised the federal government's cost of doing work were categorically nullified.[356]

Beginning in the New Deal era, however, the Court reined in the intergovernmental immunity doctrine.[357] Pointedly, the Court held that state laws that *indirectly* affected the federal government's work were no longer categorically barred.[358] The indirect effects of state law on the federal government, the Court explained, "are normal incidents" of "two governments" operating in the same territory.[359] Moreover, this conceptual shift was necessary to respect state sovereignty—otherwise, too much state law would be displaced by a judicially crafted doctrine implied from the Constitution.[360]

In its modern form, the intergovernmental immunity doctrine now prohibits states from: (1) directly regulating the federal government or its instrumentalities; or (2) discriminating against the federal government or those with whom it deals.[361] The discussion below elaborates on these doctrinal prongs as they pertain to federal contractors.

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contractor for supplying a military post with provisions, be restrained from making purchases within any State, or from transporting the provisions to the place at which the troops were stationed? or [sic] could he be fined or taxed for doing so?" *Id.* at 867. The Court's answer in *Osborn* was no. *Id.* Under modern intergovernmental immunity doctrine, however, the answer is contextually contingent. *Cf.* North Dakota v. United States, 495 U.S. 423, 436–39 (1990) (upholding nondiscriminatory state law regulation of out-of-state liquor sold to military base); *see also infra* Subpart IV.A.1–2 (discussing evolution of intergovernmental immunity doctrine and its application to federal contractors).

356. *See, e.g.*, Panhandle Oil Co. v. Mississippi *ex rel.* Knox, 277 U.S. 218 (1928) (concerning a state tax on military contractor); *see also* Dobbins v. Comm'rs of Erie Cnty., 41 U.S. 435 (1842) (concerning a tax on federal employees).

357. Although the reach of *McCulloch*'s intergovernmental immunity holding has been reined in, Chief Justice Marshall's nationalistic impulses continue to influence the doctrine's application and reach. *See, e.g.*, Hancock v. Train, 426 U.S. 167, 178 (1975) (citing *McCulloch*, 17 U.S. at 426–27); *see also* Hoke, *supra* note 197, at 832–33, 855 (challenging the "centralizing tendencies" underlying Chief Justice Marshall's Supremacy Clause jurisprudence).

358. James v. Dravo Contracting Co., 302 U.S. 134, 160–61 (1937); *see also* North Dakota v. United States, 495 U.S. 423, 434–45 (1990) (noting that, in the New Deal era, the Court "decisively rejected" and "thoroughly repudiated" the notion that "any state regulation which indirectly regulates the Federal Government's activity is unconstitutional").

359. Helvering v. Gerhardt, 304 U.S. 405, 422 (1938).

360. *See id.*; *see also North Dakota*, 496 U.S. at 443–44 (reifying this principle).

361. *See North Dakota*, 495 U.S. at 436–37; South Carolina v. Baker, 485 U.S. 505, 516–23 (1988) (discussing evolution of the intergovernmental immunity doctrine). Worth noting is that the Supreme Court's decisions do not draw discernable distinctions between state tax laws and state regulations; the Court cites the cases interchangeably. *See, e.g.*, Mayo v. United States, 319 U.S. 441, 446–48 (1943). There is an argument, however, that they *should* be treated differently. *Cf. North Dakota*, 495 U.S. at 454 n.3 (Brennan, J., concurring in part and dissenting in part) ("[T]he fact that nondiscriminatory taxes have not been found to obstruct federal operations does not mean that nondiscriminatory regulations can be assumed to be equally harmless, as

1. Prong One: Legal Incidence Test

Under the first prong, courts apply the "legal incidence" test.[362] As its name suggests, this test focuses on where the legal incidence of state law falls.[363] State laws that *directly* regulate the federal government or its instrumentalities are constitutionally prohibited.[364] By contrast, state laws that *indirectly* affect the federal government or its instrumentalities (economically or otherwise) clear this doctrinal hurdle.[365]

For purposes of this test, federal contractors generally do not qualify as federal instrumentalities,[366] unless they are "so intimately connected with the exercise of a power or performance of a [federal] duty," or "so assimilated by the Government as to become one of its constituent parts."[367] Contractors generally do not make the cut.

United States v. Boyd is instructive on this point.[368] There, the Atomic Energy Commission (AEC) contracted with private entities to perform work in a nuclear facility under the agency's general direction.[369] The government argued that a close working relationship made the contractors federal agents, and therefore, tax immune instrumentalities of the United States.[370] The Court brusquely rejected

our cases make evident."); Boeing Co. v. Movassaghi, 768 F.3d 832, 839–40 (9th Cir. 2014) (opining that state regulations affect federal programs in ways that state taxation does not).

362. *See* TRIBE, *supra* note 194, § 6-34 (discussing the legal incidence test).

363. *See id.*

364. *See North Dakota*, 495 U.S. at 439 ("Congress has the power to confer immunity from state regulation on Government suppliers beyond that conferred by the Constitution alone . . . ." (citations omitted)); Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 180 (1988) ("It is well settled that the activities of federal installations are shielded by the Supremacy Clause from direct state regulation unless Congress provides 'clear and unambiguous' authorization for such regulation.").

365. *See* United States v. Boyd, 378 U.S. 39, 44 (1964) (explaining that intergovernmental immunity doctrine "does not forbid a tax whose legal incidence is upon a contractor doing business with the United States, even though the economic burden of the tax, by contract or otherwise, is ultimately borne by the United States"); *accord* United States v. New Mexico, 455 U.S. 720, 733–34 (1982).

366. *See* RICH, *supra* note 194, § 34:54 ("Independent contractors or employees are not considered federal instrumentalities."); United States. v. Muskegon Township, 355 U.S. 484, 486–87 (1958) (finding that contractor was not a federal instrumentality); Penn Dairies v. Milk Control Comm'n of Pa., 318 U.S. 261, 269–70 (1943) ("[T]hose who contract to furnish supplies or render services to the government are not [federal instrumentalities] and do not perform governmental functions . . . ." (citations omitted)); *New Mexico*, 455 U.S. at 736 (reifying that "something more than the invocation of traditional agency notions" is required for intergovernmental immunity to attach).

367. *New Mexico*, 455 U.S. at 735–38 (citations omitted).

368. *Boyd*, 378 U.S. at 39.

369. *Id.* at 41.

370. *Id.* at 44.

that argument.[371] Had the agency "buil[t] or operat[ed] the plant with federal employees immunity could have attached to the facility.[372] But, precisely because the AEC elected to outsource the work, the Court could not find that the contractors were "so incorporated into the government structure as to become instrumentalities of the United States."[373] Rather, the contractors were distinct entities pursuing "private ends," whose actions remained "commercial activities carried on for profit."[374]

Thus, absent special circumstances, states generally clear the first prong of the intergovernmental immunity doctrine if they directly regulate federal contractors, as opposed to the federal government itself.[375] The doctrine's second prong, discussed below, is where states more often get tripped up.

2. Prong Two: Antidiscrimination Test

Under this prong, state law cannot "discriminate" against the federal government "or those with whom it deals."[376] Because contractors clearly "deal" with the federal government, the pivotal issue is whether state law "discriminates" against the federal government or its contractors on account of that relationship.[377] Discrimination has a special meaning in this context.[378] To qualify as discriminatory, state law must treat the federal government or its contractors *worse* than similarly situated constituents in the state.[379] Moreover, when testing for discrimination, courts assess the state regulatory scheme *as a whole*.[380] This functional approach can cut both ways. State laws that appear nondiscriminatory, when viewed in isolation, may be deemed discriminatory when considered

371. *Id.* at 47–48.
372. *See id.* at 48.
373. *Id.*
374. *Id.* at 44, 48.
375. It bears noting that a state's motivation to directly regulate contractors in lieu of the federal officials is probably not relevant under current doctrine. *Cf.* Dawson v. Steager, 139 S. Ct. 698, 704 (2019) (remarking in an intergovernmental *tax* immunity case, which is a closely related subject, that state motivations are irrelevant to the discrimination analysis).
376. North Dakota v. United States, 495 U.S. 423, 438 (1990); South Carolina v. Baker, 485 U.S. 505, 523 (1988).
377. *See* United States v. County of Fresno, 429 U.S. 452, 462–64 (1977) (requiring that regulations be imposed equally on all similarly situated constituents of a state and not based on a constituent's status as a government contractor or supplier).
378. *See* Washington v. United States, 460 U.S. 536, 544–45 (1983).
379. *See id.*; *see also Dawson*, 139 S. Ct. at 705 ("Whether a State treats similarly situated state and federal employees differently depends on how the State has defined the favored class.").
380. *See North Dakota*, 495 U.S. at 438 ("A state provision that appears to treat the Government differently on the most specific level of analysis may, in its broader regulatory context, not be discriminatory.").

alongside other provisions. Conversely, state laws that are discriminatory on their face may not, in fact, leave the federal government or its contractors worse off.[381]

The seminal case of *North Dakota v. United States* is highly instructive in these regards.[382] There, the United States sought declaratory and injunctive relief against the application of North Dakota's regulation of liquor sold to federal military bases.[383] The state regulations at issue subjected out-of-state liquor suppliers to labeling and monthly reporting requirements,[384] which made it more expensive for out-of-state suppliers to sell its products to the military bases.[385] When these suppliers threatened to increase their prices or stop selling to military bases, the United States sued to enjoin the state's regulatory scheme on intergovernmental immunity and preemption grounds.[386] In a plurality decision, the Court rejected both claims.[387]

Regarding preemption, the plurality found no conflict between federal procurement laws and the state laws at issue.[388] In a forthcoming article, I expound on whether and to what extent federal procurement laws preempt state regulations.[389] More my focus here, however, are the reasons why the plurality rejected the government's intergovernmental immunity defense.

First, North Dakota cleared the legal incidence test (prong one) because the labeling and reporting requirements fell directly on the out-of-state suppliers.[390] The plurality acknowledged that the government might be indirectly burdened with increased liquor costs, yet that was immaterial under the legal incidence test, which looks to where the legal burden directly falls.[391] Second, the plurality found that North Dakota cleared the antidiscrimination test (prong two).[392] Although the state laws at issue treated in-state and out-of-state suppliers differently, the regulatory regime as a whole did not leave the government worse off.[393] The comparative reference group, according to the plurality, was other liquor retailers in the state. Under the state regime at issue, all other liquor retailers were required

381. *See id.*
382. *See id.*
383. *Id.* at 426, 428–29.
384. *Id.* at 428–29.
385. *Id.* at 429.
386. *Id.* at 429–30.
387. *Id.* at 436–39.
388. *Id.* at 439–44.
389. David S. Rubenstein, *State Regulation of Federal Contractors: Three Puzzles of Procurement Preemption*, 11 U.C. IRVINE L. REV. (forthcoming 2020) (on file with author).
390. *North Dakota*, 495 U.S. at 436–37.
391. *Id.* at 437–38.
392. *Id.* at 437–39.
393. *Id.* at 438–39; *see id.* at 439; *id.* at 445–46 (Scalia, J., concurring in the judgment).

to purchase from state-licensed wholesalers, whereas the government had the additional option of purchasing from out-of-state wholesalers who complied with the state's labeling and reporting requirements.[394] Consequently, the government was deemed no worse off under the statutory scheme as a whole.[395]

In other cases, however, the Court has struck down state laws directed at private actors under the antidiscrimination principle. In *Davis v. Michigan Department of the Treasury*, for example, a retired federal employee challenged Michigan's taxation of his federal retirement benefits.[396] Michigan argued that only the federal government, not private entities or individuals, are immune from state laws.[397] The Court disagreed, stating:

> It is true that intergovernmental tax immunity is based on the need to protect each sovereign's governmental operations from undue interference by the other. But it does not follow that private entities or individuals who are subjected to discriminatory taxation on account of their dealings with a sovereign cannot themselves receive the protection of the constitutional doctrine.[398]

Thus, when no "significant differences between the two classes" justify differential treatment, private entities who deal with the federal government are entitled to constitutional immunity against discriminatory state laws, even if the government is not a party in the case.[399]

B. Constitutional Immunity vs. Immunity by Other Means

Apart from sheer inertia, constitutional immunity for federal contractors has never been fully rationalized by the Court and has mostly been discredited.[400] The

394. *Id.* at 439.
395. *Id.* The plurality's holistic approach was controversial. *See id.* at 445–48 (Scalia, J., concurring in the judgment) (lamenting the judicial mischief that this approach can engender but agreeing with the result reached in the case in light of special considerations under the Twenty-First Amendment of the U.S. Constitution); *see also id.* at 451–52 (Brennan, J., concurring in the judgment in part and dissenting in part) (disagreeing with conclusions reached by the plurality's holistic approach with respect to North Dakota's labeling requirement, in light of the economic burdens imposed on the suppliers and passed on to the government).
396. 489 U.S. 803, 805–06 (1989).
397. *Id.* at 814.
398. *Id.* (citations omitted).
399. *Id.* at 816 (quoting Phillips Chem. Co. v. Dumas Indep. Sch. Dist., 361 U.S. 376, 383 (1960); *see also* Boeing Co. v. Movassaghi, 768 F.3d 832, 842 (9th Cir. 2014) ("When the state law is discriminatory, a private entity with which the federal government deals can assert immunity.").
400. *See* South Carolina v. Baker, 485 U.S. 505, 518, 520 (1988) (explaining that the rationale for the rule was that "any tax on income a party received under a contract with the government was a tax on the contract and thus a tax 'on' the government because it burdened the government's

doctrine was scaled back during the twentieth century to respect state sovereignty, and it should be scaled back today for all the same reasons and more. Emphatically, the normative question is not whether federal contractors should be immune from state law. Rather, the questions are *who should decide* and *by what means*. Intergovernmental immunity is a judicial invention conjured from the Supremacy Clause. When this constitutionally derived immunity attaches, state law is displaced even when there is no conflict with any federal statutes or regulations (or contracts). This automatic protection may be necessary or desirable for the federal government and its instrumentalities, as Chief Justice Marshall held in *McCulloch*.[401] As applied to federal contractors, however, intergovernmental immunity is a constitutional windfall.

Under the state action doctrine, federal contractors generally are absolved from having to comply with constitutional rights and separation of powers principles.[402] That being so, why should the Constitution apply to shield federal contractors from state law?[403] Federal contractors are getting all the constitutional breaks, but they do not need this one. If the political will exists, Congress can indemnify[404] or immunize[405] contractors from state law liabilities. Moreover,

power to enter into the contract," and that history revealed that to be an untenable proposition).

401. McCulloch v. Maryland, 17 U.S. 316, 426–32 (1819); *see also* Johnson v. Maryland, 254 U.S. 51 (1920) (recognizing that *McCulloch* dealt with the state's power to tax the "instrumentalities" of the United States).

402. *See supra* note 8; *infra* note 414 and accompanying text (discussing general rule and the exception under the state action doctrine).

403. Emily Hammond has expressed a similar concern over self-regulatory organizations (SROs). *See* Emily Hammond, *Double Deference in Administrative Law*, 116 COLUM. L. REV. 1705, 1731–32 (2016) ("If it is surprising to see that SROs are not government actors for constitutional purposes, it is baffling to discover that they are treated as government actors [with immunity] when they are sued for money damages arising out of common law claims." (emphasis omitted)).

404. *See, e.g.*, 42 U.S.C. § 2210 (indemnity scheme for federal licensees pertaining to nuclear facilities and nuclear material); 50 U.S.C. § 1431 (delegating authority to the president to subdelegate special contracting "whenever [the president] deems that such action would facilitate the national defense"); Exec. Order No. 10,789, 23 Fed. Reg. 8897 (Nov. 14, 1958) (indemnifying contractors for claims arising out of unusually hazardous or nuclear risks pursuant to 50 U.S.C. § 1431).

405. Congress has considered legislative proposals for context-specific government contractor defenses—some were enacted, some were not. Examples of immunity statutes include 6 U.S.C. § 442 (creating the rebuttable presumption that the government contractor defense shall apply to the seller of qualified antiterrorism technologies in lawsuits related to the deployment of such technologies), and 42 U.S.C. § 247d-6d (allowing immunity for "covered person[s]"—in the event of a public health emergency declaration—from liability relating to certain countermeasures against disease). In other contexts, however, Congress has rejected bills to immunize federal contractors from state law. *See, e.g.*, Gulf Coast Recovery Act (GCRA), S. 1761, 109th Cong. § 5 (2005). If enacted, the GCRA would have established immunity for

Congress may do so at the wholesale level (to cover all federal contractors), or at the retail level (to cover contractors performing certain types of functions).[406] Indeed, Congress could even codify the intergovernmental immunity doctrine as it currently exists.[407]

Intergovernmental immunity doctrine excuses Congress from these difficult choices. Instead, courts decide. In theory, the doctrinal guardrails in place help prevent judicial freewheeling. In practice, however, the antidiscrimination test is mired in indeterminacy and judicial discretion. Even when a state favors or disfavors a class based on some statutorily expressed criteria, the comparative reference group may have similarities and differences within that domain.[408]

Examples from the case studies help to illustrate this point. Recall that a recent California law seeks to directly regulate private immigration detention facilities in the state.[409] Immigration detention is technically civil incarceration, not criminal.[410] That being so, is the comparative reference group *all* detention facilities in the state? Or only other *civil* detention facilities? If the latter, which civil facilities are included? For instance, are mental health institutions included in the comparative reference group?[411] The student loan cases raise similar questions. Is the comparative reference group all private loan servicers (for cars, credit cards, boats, houses, etc.), or just some but not others? Do student loan *collectors* make the cut, or are they sufficiently distinguishable from student loan *servicers*? Again, no objectively correct answer exists because there will always be

contractors performing post-disaster recovery work, through a rebuttable presumption of the government contractor defense. *See also* Steven L. Schooner & Erin Siuda-Pfeffer, *Post-Katrina Reconstruction Liability: Exposing the Inferior Risk-Bearer*, 43 HARV. J. LEGIS. 287, 291–97 (2006) (comparing and contrasting federal contractor indemnity and immunity statutes, and arguing against passage of the GCRA on normative grounds).

406. *See supra* note 405 and accompanying text.

407. It effectively did so in the post–New Deal era with respect to tax immunities of federal employees. *See* 4 U.S.C. § 111(a) (2006) (generally prohibiting state taxation of the "pay or compensation" of "officer[s] or employee[s] of the United States," but exempting "taxation [that] does not discriminate against the officer or employee because of the source of the pay or compensation"); Dawson v. Steager, 139 S. Ct. 698, 702–03 (2019) (explaining that Congress codified the intergovernmental tax immunity doctrine in 1939 to entrench it into law).

408. *See Dawson*, 139 S. Ct. at 705 ("Whether a State treats similarly situated state and federal employees differently depends on how the State has defined the favored class.").

409. *See supra* note 158 and accompanying text.

410. *See* Emily Ryo, *Fostering Legal Cynicism Through Immigration Detention*, 90 S. CAL. L. REV. 999, 1016 (2017) ("[A]lthough [immigration detention] is legally classified as civil and not criminal confinement, the conditions of confinement are usually indistinguishable from those of criminal incarceration.").

411. *See* Rubenstein & Gulasekaram, *supra* note 25**Error! Bookmark not defined.**, at 234–35 (flagging this issue for further study).

similarities and differences, and loose judgments about which similarities and differences matter.

This indeterminacy is normatively problematic for two related reasons. First, the indeterminacy itself can have spillover effects on state autonomy. For instance, states may *under*regulate contractors, fearing that a reviewing court will deem the contractors worse off compared to some as-yet judicially unspecified reference group. Conversely, states might *over*regulate private markets out of concern that a court will deem a more narrowly tailored law discriminatory. For example, a state wishing to regulate private immigration facilities may feel obliged to regulate private mental health facilities simply to avoid discrimination claims from the prison industry. More generally, the doctrinal indeterminacy means that courts (not Congress) are essentially making decisions about contractor immunity. On institutional and normative grounds, however, Congress is much better suited for making the necessary value judgments about whether, and under what circumstances, contractors should be immune from state law.

C. Ending Privatized Immunity

Again, the fix is rather straightforward and relatively modest: End privatized immunity. Reformulated, the intergovernmental immunity doctrine would prohibit states from: (1) directly regulating the federal government or its instrumentalities; or (2) discriminating against the federal government or *its instrumentalities* (omitting those with "whom the government deals" from constitutional cover).[412] This reformulation leaves the core doctrine intact, but changes the default rule for federal contractors. In scenarios left unresolved by Congress, only the federal government and its instrumentalities would be constitutionally immune from state regulation.

To begin, this adjustment would make the doctrine more cohesive. As it currently stands, the legal incidence test (prong one) extends to federal instrumentalities, whereas the antidiscrimination test (prong two) extends to federal contractors. As earlier explained, there is a lot of conceptual space between federal instrumentalities and federal contractors.[413] Instrumentality status requires a far closer-knit relationship with the federal government, which justifies treating instrumentalities *as arms* of the federal government for constitutional

412. *Cf.* North Dakota v. United States, 495 U.S. 423, 436–37 (1990).
413. *See supra* notes 366–373 and accompanying text.

purposes.[414] But there is scant justification for extending constitutional immunity to contractors dealing with the government at *arm's length*.

Under my proposal, federal contractors could still be shielded from state regulation, but the federal political branches must affirmatively absolve its contractors from state regulations and liabilities.[415] If immunity cannot be legislatively secured for contractors, that is the political and procedural safeguards of federalism at work.[416] Any residual burdens on the federal government are ones that our federalist system presupposes.

These principles were well represented in *United States v. New Mexico*, in which the Court first determined that a federal contractor managing an atomic laboratory did not qualify as a federal instrumentality.[417] Upholding a nondiscriminatory state tax against the contractor, the Court explained: "If the immunity of federal contractors is to be expanded beyond its narrow constitutional limits, it is *Congress* that must take responsibility for the decision."[418] "And this allocation of responsibility," the Court continued, "is wholly appropriate" because "the political process is 'uniquely adapted to accommodating the competing demands'" of federal and state interests.[419]

The Court has oft repeated these maxims when speaking of nondiscriminatory state laws.[420] My argument here is that these maxims apply just as well to state laws that have a discriminatory effect on federal contractors.[421] In both contexts, the political process is fully capable of making choices about contractor immunity. Indeed, Congress has considered many bills that would do so; some pass, some do not.[422] Whether state law is discriminatory, in the doctrinal sense, might be factored into the political calculus when making legislative

414. *Cf.* Dep't of Transp. v. Ass'n of Am. R.R.s, 135 S. Ct. 1225, 1230–34 (2015) (holding that Amtrak is a governmental entity in light of the policymaking and decisional power it has over third parties); Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 394 (1995) (holding that Amtrak "is an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution").
415. *See North Dakota*, 495 U.S. at 439 ("Congress has the power to confer immunity from state regulation on Government suppliers beyond that conferred by the Constitution alone . . . .").
416. *See supra* notes 328–334 and accompanying text (discussing the political and procedural safeguards of federalism).
417. 455 U.S. 720, 736–37 (1982).
418. *Id.* at 737 (emphasis added).
419. *Id.* at 737–38.
420. *See, e.g.*, United States v. City of Detroit, 355 U.S. 466, 474 (1958) (noting that if political or economic considerations favor contractor immunity, "[s]uch complex problems are ones which Congress is best qualified to resolve").
421. It is important to recall here that discrimination has a special meaning in the intergovernmental immunity context. *See supra* notes 378–381 and accompanying text.
422. *See supra* note 405 (collecting examples).

decisions. For example, Congress has explicitly drawn distinctions between discriminatory and nondiscriminatory state taxation of federal employees, forbidding the former but generally allowing the latter.[423]

Alternatively, the federal government could restructure its relationship with contractors so that they become federal instrumentalities. That choice would rarely be exercised, and the reasons why are telling: Instrumentality status would render contractors public actors for constitutional purposes (and potentially subject to additional public law constraints).[424] In the vast majority of cases, neither the government nor contractors would opt for that. In any event, my proposal leaves the option open. When exercised, instrumentality status will entail closer-knit working relationships and heightened federal accountabilities, thus mitigating the need for state law accountabilities.[425]

Some may object to my proposal on the ground that Congress should not have to affirmatively decide questions of contractor immunity. Putting the onus on Congress would, as a practical matter, expose contractors to liability by the default of congressional inaction. Understood in context, however, concerns about overburdening Congress either misfire or backfire. Federal outsourcing often rides the fast lane, gassed by moneyed interests and widespread bipartisan support. Thus, if Congress cannot muster the political will to affirmatively immunize federal contractors, then that may speak more to the merits than it does about beltway politics. Or, if politics is to blame for congressional ambivalence or gridlock, then who will fix the pathologies and accountability shortfalls in federal contracting?

The states offer that possibility—perhaps not optimally or directly, but nevertheless in ways that can help. State regulations, such as licensing and reporting requirements, can make federal contractors more accountable for

423. *See supra* note 407 and accompanying text; 4 U.S.C. § 111(a) (2006) (generally prohibiting state taxation of the "pay or compensation" of "officer[s] or employee[s] of the United States," but exempting "taxation [that] does not discriminate against the officer or employee because of the source of the pay or compensation").

424. *See supra* notes 8, 414 and accompanying text.

425. In a similar vein, Gillian Metzger has urged the need for greater constitutional accountability in public-private arrangements and prescribes a reformulated private nondelegation doctrine that could be satisfied through a federally orchestrated mix of accountability mechanisms. *See* Metzger, *supra* note 4, at 1371 (exposing how the state action doctrine "creates perverse incentives for governments to forego close oversight of their private partners, even though such oversight is an important means for ensuring that private actors adhere to constitutional requirements"). My proposal to foreclose privatized immunity is not specifically aimed at tightening the bonds between federal officials and contractors. But a happy incidence of my proposal is that it might nudge private-public relationships toward instrumentality status—that is, when *constitutional* immunity from state law is deemed to be worth it, all things considered.

their actions. In many if not most cases, that accountability can incentivize contractors to perform in ways that *align* with federal laws and contractual requirements that are already in place but underenforced by federal officials. Under those conditions, the federal government might wish to leverage states as force multipliers.

Surely, some states, in some contexts, might overregulate and intentionally interfere with federal programs. And in virtually all cases, state regulations may add costs in time and money to federal contracting operations. These are legitimate concerns. But they are not of a magnitude that should absolve Congress from having to make the difficult policy choices at issue.

As a threshold matter, state law that obstructs or substantially interferes with federal programs might be preempted under preexisting or responsively enacted federal law. And if not preempted, that is a very good indicator that state law is either not interfering with federal programs, or interfering in banal, benign, or beneficial ways. Moreover, on pragmatic and programmatic grounds, state regulation of federal contractors is not inherently problematic; it is contextually contingent. In some scenarios, state interference can spoil good federal programs or make bad programs worse. In other scenarios, however, state regulation can smoke out problems in outsourced federal programs and improve them. Indeed, under certain conditions, state regulations might even save the government money—whether by improving contractual performance, spreading the cost of contractor monitoring, or otherwise.

Accountability comes at a price, and it may be worth paying. In any event, the answer to that cost-benefit analysis is not in the Constitution. It must be hashed out in the political process through proper lawmaking channels.

CONCLUSION

James Madison famously professed the need for "auxiliary precautions" to keep government in check.[426] Separation of powers and federalism, he argued, would provide a "double security" for the "rights of the people."[427] Subsequently, the New Dealers called for more efficient and effective federal power, which administrative governance could provide.[428] In the post–New Deal era, checks and balances were still important, but satisfied through other means—most notably, through procedural and substantive limits on agency action.[429] Now, federal

426. *See* THE FEDERALIST NO. 51 (James Madison), *supra* note 43, at 322.
427. *Id.* at 322–23.
428. *See supra* Subpart I.A.2.
429. *Id.*

contracting involves a similar set of dynamics but lunges further: It aspires to the same ideals of efficient and effective governance, but eschews the checks and balances forged around administrative governance.[430] We need a constitutional backup plan for the structures that federal contracting has displaced. Our federalist system provides it. If there is going to be a stand, now is the time to have it. The doctrines of Supremacy, Inc. are a good place to start.

430. *See generally* MICHAELS, *supra* note 3.