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Craig Konnoth

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PRIVATIZATION'S PREEMPTIVE EFFECTS

Craig Konnoth*

Many states offer their citizens protections, benefits, and services that go well beyond those of federal law, ranging from consumer protection to education, environmental preservation, and healthcare. The Trump Administration and an increasingly conservative Supreme Court disapprove of many of these measures. However, rather than forthrightly use its power to pass statutes that preempt state law, the federal government, especially recently, has enabled, incentivized, and delegated power to private corporations to flout and displace state laws that the corporation might consider undesirable. Such privatized displacement of law, which functionally shades into outright preemption, is all the more problematic given private firms' lack of accountability, transparency, and democratic responsiveness. This allows federal instigation of displacement — which looks functionally like preemption — to stay out of the public eye.

Private firms displace state law with federal assistance in four ways, each of which gives escalating levels of discretion to private entities as to whether to displace state law. Under sovereign-shield displacement, contractors argue that they are essentially an arm of the federal government, and therefore are immune from suits under state law. Next, under contractual preemption, the federal government preempts state law, and leaves private entities to regulate the area. State regulation is displaced by private contract. Under incentivized displacement, the federal government provides incentives to undermine state policies and programs. For example, the Trump Administration sought to provide subsidies to private religious schools and health entities, which undercut state policies and programs with which the private entities compete. Finally, under delegated preemption, the federal government has sought to devolve the power to preempt certain state industry regulation to a firm in the industry. Each approach presents escalating dangers to the structure of federalism, of government, and of individual-protecting laws.

In adopting a solution, I place the vast literatures on privatization and state law displacement in full conversation for the first time. Federalism can be used to check and balance privatization. Just as the constitutional structure contemplates a bilateral system in which states check and balance the federal government, I propose a trilateral system, in which states have greater authority with the federal government over private entities, but the latter continue to have a voice. The federal government should give states the option of carrying out the functions of federal contractors ex ante, create forums for

* Associate Professor of Law, University of Colorado School of Law, Faculty Director, Health Data & Technology Initiative, Silicon Flatirons Center. My thanks to Bruce Ackerman, Fred Bloom, Jessica Bulman-Pozen, Guy-Uriel Charles, Jessica Clarke, Nathan Cortez, David Fagundes, Jennifer Hendricks, Lonny Hoffman, Aziz Huq, Derek Kiernan-Johnson, Ben Levin, Leah Litman, David Rubenstein, Audrey McFarlane, Lev Menand, Jon Michaels, Aziz Rana, Mark Rosen, Liz Sepper, Michaeljit Sandhu, Gavriel Schreiber, Miriam Seifter, Fred Smith, Ahmed White, the Houston External Workshop Series, and the University of Baltimore Faculty Colloquium for comments on this draft of this Article. For comments on earlier drafts, thanks to Sharon Jacobs, Dayna Matthew, Neil Siegel, Rabea Benhalim, Abbe Gluck, Aya Gruber, Sarah Krakoff, Ben Levin, Margot Kaminski, Kristin Madison, Helen Norton, Jenn Oliva, Nadav Orian Peer, Lucia Savage, Mark Squillace, the Colorado Law Work in Progress Colloquium, the Duke Culp Colloquium, and the Northeast Health Scholars Workshop, and to Seth Davis, Denise Grab, and Rory Van Loo for helpful conversations. Also, thanks are owed to Kelly Ilseng and Erin Vanek for *Bluebooking* assistance.

ongoing interaction between the entities, and give states enforcement authority ex post to address the harms of these preemptive effects in a structural manner.

INTRODUCTION

In the last few decades, many states have become the progressive protectors of citizens' rights, seeking to curb environmental pollution,¹ bolster public education,² preserve the health privacy of their citizens,³ and improve consumer protections against financial institutions and student loan corporations.⁴ The federal government, especially under the Trump Administration, has opposed these efforts,⁵ preferring to leave matters to the vicissitudes of the markets.

Yet, rather than openly preempting and prohibiting these — often popular — state initiatives, and bearing the political heat that such actions would bring, the federal government has taken a shrewder tack. It has turned to private corporations, and incentivized, assisted, and delegated to them the power to contravene and displace state laws — including laws that are often supposed to regulate those very corporations' interactions with the state's citizens. It is the corporation, rather than the federal government, that determines when this displacement of state law takes place. Further, because these firms, in the current legal landscape, are generally more well insulated from transparency mechanisms and meaningful legal review than are federal entities, their decision to unseat state law is not subject to democratic accountability.⁶ Since *private* entities are displacing *state* law, these actions have largely fallen through the cracks of the large literatures both on *privatization* and *preemption* (and preemption-related fields).

Consider the following scenarios:

Displacing state law enforcement: In July, the Federal Protective Service (FPS) of the Department of Homeland Security (DHS) rolled into Portland to suppress Black Lives Matter protestors, over the objection of Portland's mayor. Indeed, federal law enforcement tear gassed

¹ Sam Ricketts et al., *States Are Laying a Road Map for Climate Leadership*, CTR. FOR AM. PROGRESS (Apr. 30, 2020, 8:00 AM), <https://www.americanprogress.org/issues/green/reports/2020/04/30/484163/states-laying-road-map-climate-leadership> [<https://perma.cc/XDQ7-NCGT>].

² See, e.g., Howard Blume, *California Moves Toward New Limits on Charter Schools*, L.A. TIMES (June 10, 2019, 5:00 AM), <https://www.latimes.com/local/lanow/la-me-edu-charter-school-task-force-report-20190610-story.html> [<https://perma.cc/3AH9-N5SR>].

³ See Craig Konnoth, *Health Data Federalism*, B.U. L. REV. (forthcoming) (manuscript at 26–27) (on file with the Harvard Law School Library).

⁴ See Kate Sablosky Elengold & Jonathan D. Glater, *The Sovereign Shield*, 73 STAN. L. REV. (forthcoming 2021) (manuscript at 43), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3539622 [<https://perma.cc/R9RP-26SR>].

⁵ See, e.g., *id.*

⁶ See *infra* note 80.

a protest that included the mayor.⁷ FPS consists of approximately 1,300 officers, along with 13,000 contractors;⁸ some sources suggest that private contractors numbered among those deployed in Portland, thus displacing state and local policy regarding the protests.⁹

Displacing consumer rights: Large corporations like AT&T routinely require consumers to sign contracts that waive their litigation remedies.¹⁰ State law has limited this practice. The Supreme Court, led by its conservative wing, has read statutes like the Federal Arbitration Act (FAA) to preempt these consumer protections.¹¹ But the Act does not replace state protections with federal protections. Rather, after state law is preempted, there is a vacuum. The relationship between firms and individuals is set by private contracts, not state law. If these contracts contradict consumer-protective state law, the contracts prevail. And instead of state courts, consumers move to private arbitral forums.¹²

*Displacing environmental efforts*¹³: Many state programs subsidize renewable energy over coal.¹⁴ The Trump Administration explicitly took aim at these programs.¹⁵ The Administration could have potentially sought the authority from Congress simply to preempt state policy. However, as the Supreme Court has noted, preemption is a highly visible act;¹⁶ the federal government might want to avoid close scrutiny of its hostility to renewables. Rather, the government has introduced price controls that prevent renewables from offering their products at cheaper prices that undercut coal and gaining market share.¹⁷ Fewer private

⁷ *Portland Mayor Tear-Gassed by Federal Agents at Protest*, CBS NEWS (July 23, 2020, 2:45 PM), <https://www.cbsnews.com/news/portland-protest-mayor-ted-wheeler-tear-gas-federal-agents> [<https://perma.cc/JR2E-EWEE>].

⁸ Garrett M. Graff, *The Federal Crackdown in Portland Is "Legal." That's the Problem with It*, WASH. POST (July 22, 2020, 11:50 AM), <https://www.washingtonpost.com/outlook/2020/07/22/portland-constitution-dhs-crackdown-legality> [<https://perma.cc/XD2D-8VHM>].

⁹ Bill Conroy, *Private Contractor Assisting Feds in Quelling Portland Protests Is Revealed*, MEDIUM (Aug. 20, 2020), <https://wkc6428.medium.com/private-contractor-assisting-feds-in-quelling-portland-protests-is-revealed-d866eb6db1c5> [<https://perma.cc/YY82-K44F>].

¹⁰ See David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 464–65 (2011).

¹¹ See *id.* at 453–55.

¹² See *id.* at 453, 455.

¹³ See Ricketts et al., *supra* note 1.

¹⁴ See David Roberts, *The Trump Administration Just Snuck Through Its Most Devious Coal Subsidy Yet*, VOX (Dec. 23, 2019, 9:40 AM), <https://www.vox.com/energy-and-environment/2019/12/23/21031112/trump-coal-ferc-energy-subsidy-mopr> [<https://perma.cc/CQ3Y-6LPA>].

¹⁵ See *id.*

¹⁶ The visibility involves accountability to voters, and other political and institutional actors. See *infra* section II.E, pp. 1981–90 (explaining how privatized preemption helps escape this accountability).

¹⁷ See Roberts, *supra* note 14.

firms will therefore enter the renewables market: the federal government need not formally preempt state law.

*Displacing public education programs*¹⁸: States provide public education, which reaches a broad, racially, religiously, and socioeconomically diverse base of students. The Trump Administration, however, prioritized aiding charter schools over public schools.¹⁹ Again, no preemptive legislation is involved. Rather, the Administration sought to shift funding from public to private schools, through voucher programs,²⁰ and most recently, through manipulating COVID-19 school funding.²¹ This would undermine public schools, and bolster competing private schools, according to some advocates,²² again with no formal act of preemption.

Taking state land: Federal agencies have recently held that statute has delegated power to certain private entities to decide whether to take state land to build pipelines, even if, in some cases, state law promotes conservation efforts on that land.²³ Agencies have claimed that they lack the power to oversee such decisions.²⁴

My key focus here is on private firms displacing state law at the instigation or assistance of the federal government, and I seek to engage with the problem *conceptually* and *normatively*. The kind of state law displacement that concerns me involves both entities — the federal government brings private partners in, and those partners do its bidding. Without the federal government, the state law displacement that occurs here would not involve preemptive effects; without private entities, the displacement would be similar to standard preemption and its cognates.

¹⁸ See Sherry Posnick-Goodwin, *Let's Be Clear About Charter Schools*, CAL. TCHRS. ASS'N (Aug. 3, 2018), <https://www.cta.org/educator/posts/lets-be-clear-about-charter-schools> [https://perma.cc/W6DJ-UQ4P].

¹⁹ See OFF. OF MGMT. & BUDGET, BUDGET OF THE U.S. GOVERNMENT 40 (2018) <https://trumpwhitehouse.archives.gov/wp-content/uploads/2018/02/budget-fy2019.pdf> [https://perma.cc/4YFN-AHNF]; see also James Forman, Jr., *Do Charter Schools Threaten Public Education? Emerging Evidence from Fifteen Years of a Quasi-Market for Schooling*, 2007 U. ILL. L. REV. 839, 840.

²⁰ See Michael Stratford, *Trump Opens Up Federal Dollars for Private School Vouchers amid Pandemic*, POLITICO (Dec. 28, 2020, 8:18 PM), <https://www.politico.com/news/2020/12/28/trump-private-schools-pandemic-451757> [https://perma.cc/2WKD-Y79N].

²¹ Complaint for Declaratory and Injunctive Relief at 17, *Michigan v. DeVos*, No. 20-cv-04478 (N.D. Cal. July 7, 2020), <https://oag.ca.gov/system/files/attachments/press-docs/CARES%20Act%20K-12%20Funds%20Complaint.pdf> [https://perma.cc/E78V-LFUS].

²² Forman, *supra* note 19, at 840.

²³ See *infra* p. 1977.

²⁴ See Jennifer Danis & Michael Bloom, *Taking from States: Sovereign Immunity's Preclusive Effect on Private Takings of State Land*, 32 STAN. L. & POL'Y REV. (forthcoming) (manuscript at 32), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3631160 [https://perma.cc/A2DM-FT7C].

The first task is *conceptual*. We lack the vocabulary and the conceptual lexicon to reckon fully with this phenomenon. Preemption and displacement of state law have historically been a federal *government* function. Thus, scholarship on preemption and related doctrines has, with few exceptions, focused on government entities, not private entities,²⁵ and privatization scholarship has rarely engaged with federalism.²⁶

To be sure, existing doctrinal concepts capture *some* of what firms are doing under the umbrella of preemption or claims of immunity from suit. But other approaches — such as in situations where private schools are given a leg up over and displace the reach of public schools — lack doctrinal conceptualization. And yet others, such as in situations where private entities take state land, are liminal concepts that resemble, but do not quite count as, preemption.

Collectively, I refer to all these forms of displacement of state law as involving “preemptive effects.” This terminology seeks to emphasize that the effects of combined federal and private action in many cases are the same *as if* the federal government had engaged in preemption, even if the behavior does not quite count as preemption as a formal matter. In the scenarios I present, private entities have escalating levels of discretion as to whether to displace state law. My categories are thus organized around *the functional extent of privatized discretion* with respect to state law displacement, rather than *formal doctrinal categories*, which are, as I note above, too slippery in this context to do much work. Indeed, because preemption and related doctrines are focused on federal government prerogative, these doctrinal categories prove conceptually challenging as private entities gain greater power over displacement decisions. On this account, it does not matter whether the state law displacement is achieved through formal preemption — choosing federal law over state law — or through some other means.

I next turn to the *normative* effects of this private displacement. Whatever one’s views about the correct balance of power of state versus federal *governments* — a debate with which I do not engage — using *private firms*, rather than federal law, to displace protective state programs undermines the Constitution’s separation of powers between the

²⁵ See, e.g., Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 739 (2008) (“[There are] multiple categories of implied preemption, the exact number depending on who is doing the counting.”); Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2100–01 (2000) (offering several approaches).

²⁶ For an exhaustive listing of privatization scholarship, see sources cited *infra* notes 61–86, which I do not reproduce here for aesthetic reasons. Frequently cited works, among others, include Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 556–58 (2000); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1369 (2003); and JON D. MICHAELS, *CONSTITUTIONAL COUP* 57–58 (2017).

national and state governments.²⁷ It is a structural problem that demands a structural solution. While one might speak about the balance (or imbalance) between the government and private entities in the privatization context,²⁸ or between federal and state governments in that of federalism,²⁹ each of these bilateral balancing acts has grown somewhat lopsided. I therefore propose a potentially more stable *trilateral* system of checks and balances, where the federal government, states, and private entities can supervise and check each other. The federal government should bring states in as partners to oversee how private entities carry out their tasks. This would allow progressive states whose interests do not align with those of the national government to push back against private firms that undermine their interests.

At the same time, as scholars argue, private engagement may offer some benefits in terms of expertise and efficiency, and in any case, private entities are inevitably enmeshed within government.³⁰ Trilateral balancing means that they too will have a voice.

Part I first offers some background on the literatures of privatization and of preemption and its cognates, and defines both concepts. In short, privatization occurs when the federal government formally or informally delegates a function previously carried out by the government to a private entity. Preemption occurs when federal law displaces state law, though I also describe related doctrines that similarly result in the failure of state law to take effect.

Part II carries the *conceptual* weight of the paper. It gives us the conceptual tools to break down the kinds of preemptive effects we see, by offering four categories. In each subsequent category, the firm has greater discretion whether to displace state law. Under *sovereign-shield displacement*, federal contractors argue that they enjoy immunity from state suit under immunity doctrines. Thus, the FPS contract forces may claim immunity on this ground. This doctrine is usually premised on heightened government control and limited privatized discretion, and some of its constituent elements may have been “scaled back” to some extent at least in the twentieth century.³¹ That, and the fact that existing scholarship does engage the area uniquely, limits my detailed engagement with it.

²⁷ Indeed, as I argue in my work on health data regulation, there is a good argument to defer to the federal government in the field — but not to private firms. See Konnoth, *supra* note 3 (manuscript at 45).

²⁸ See *supra* notes 1–5 and accompanying text.

²⁹ See Victoria Nourse, *The Vertical Separation of Powers*, 49 DUKE L.J. 749, 777 (1999); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1450 (1987) (“As with separation of powers, federalism enabled the American People to conquer government power by dividing it.”).

³⁰ See Jon D. Michaels, Essay, *We the Shareholders: Government Market Participation in the Postliberal U.S. Political Economy*, 120 COLUM. L. REV. 465, 469 (2020).

³¹ David S. Rubenstein, *Supremacy, Inc.*, 67 UCLA L. REV. 1130, 1196–97 (2020).

Under the *contractual preemption* approach, the federal government preempts state regulation in an area of law, and, instead of regulating in itself, formally or informally allows the rules of interaction in the space to be determined by private contract. Thus, rather than looking to state law — on consumer services, airline services, or financial regulations, for example — we must look to arbitration agreements, airline contracts, and private regulators.

Next, under the *incentivized displacement* approach, which appears to have been a trademark of the Trump Administration, the federal government incentivizes private entities in ways that nullify state regulations and programs. To take the example discussed above: the federal government has set *minimum* price-bid requirements in energy markets for renewable energy sources. Such requirements counteract subsidies that states have offered renewables and support the survival of coal energy.³² Similarly, as noted above, the Administration has sought to assist private entities that compete with state programs: for example, providing parents vouchers for private schools, and monopolies to private healthcare information exchange entities, can harm state schools and state healthcare information exchanges.³³

Finally, under the *delegated preemption* approach, I describe how the government has delegated control to private entities in various spaces to develop rules and regulations that displace state law. Sometimes, the agency retains nominal authority to veto the rules that the private entities develop, as in the case of financial regulation. But Congress has purported to delegate full authority to private entities to engage in state land takings.

Part II concludes by suggesting that privatized preemptive effects are normatively problematic. They undermine federalism in problematic ways. They also tend to align against the public interest by enhancing corporate power. While corporate power is not *always* aligned against public interests — and I present some cases where the public and corporate interests are aligned — it often is. Enhancing corporate power to flout the state laws that bind them, then, presents normative concerns.

Where Part II lays the conceptual scene, Part III concludes with a normative prescription. Scholars have long sounded the alarm bells on both privatization and preemption (and related doctrines) — but rarely on both issues taken together. Many scholars suggest changes to privatization and preemption doctrine, respectively. Part III argues that the problem is not doctrinal — following in the footsteps of various other scholars, I argue that the issue is structural. The solution must be structural as well. Just as the Constitution creates a bilateral system of

³² See Roberts, *supra* note 14.

³³ See sources cited *supra* notes 2–3.

checks and balances between the states and federal government, I propose a trilateral system of structural checks and balances between the states, the federal government, and private entities. I argue that states should have greater supervisory authority, with the federal government, over private entities. However, given what I, with many other scholars, see as the inevitable enmeshment of private entities in government, these entities, too, will have a voice. Such a trilateral system is especially useful at times — like in recent years — when the federal government has relaxed oversight over private entities, and also allows us to leverage the expertise of both private and state entities. I offer three analytically separate approaches.³⁴

First, as an *ex ante* matter, if the federal government seeks to devolve functions, it should devolve functions to states rather than private entities. In the Affordable Care Act³⁵ (ACA), for example, the federal government has deputized both states and private contractors to develop health insurance exchanges — and according to some, states have done a better job.³⁶ Second, as an *ongoing* matter, the federal government should create forums where states and private entities both have a voice. This can involve informal advisory committees, or more formal multi-ownership corporations in which state, federal, and industry players all hold a stake. Finally, as an *ex post* matter, states can play a role in litigating and enforcing private malfeasance. Protective state law should, of course, be preempted to the lowest degree possible, so that it can be used to combat private misbehavior. However, states should also be given the authority to pick up federal slack, and to enforce *federal* law — especially when there is no private cause of action. Even when a private cause of action exists, I argue that state enforcement presents certain benefits.

I conclude by recognizing some of the limitations of my approach. First, some may argue that the structural solutions I offer are impractical — states might be bought out just as easily as the federal government. Second, much of the structure I offer is left to the policy discretion of the federal government — an unfriendly federal government may displace states or private entities. Yet I argue that my approach may often be the result of legislative compromise. And third, some may raise concerns about administrative ossification. I offer various pragmatic solutions to these questions.

³⁴ While analytically separate, I note that each of these methods can be deployed simultaneously. States may play the role of contractors in certain federal schemes while also acting as advisors and engaging in litigation proceedings. And the power of the state in each context is determined by its powers in other contexts — for example, whether it can successfully negotiate with private entities in ongoing oversight depends on whether it carries the stick of enforcement and litigation *ex post*.

³⁵ Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 and 42 U.S.C.).

³⁶ See *infra* p. 2007.

Finally, an important caveat to this Article is that for the purposes of analysis, I elide the divisions among federal and state governments, and indeed, within branches of government. I also do not address the role of local government, and recognize that deeper questions about the nature of lawmaking, statehood, and governmentality itself must await another day.

I. PRIVATIZATION, PREEMPTIVE EFFECTS, AND A SCHOLARLY LACUNA

The problem this Article grapples with involves the federal government using *private* entities to *preempt* and otherwise displace state law, usually law that protects consumers and burdens corporate power. This Part provides background on the two key concepts this problem raises: preemption and related doctrines, and privatization. It also explains why the current legal vocabulary does not give us a lexicon to grapple with the problem I describe here. State law displacement occurs primarily through preemption — and scholarship on preemption treats it as a situation where federal *law* preempts state *law*. Since we assume that only government makes law, preemption scholarship has naturally focused on government, not private, entities. Privatization scholarship similarly has not generally examined questions of federalism in detail. I also discuss exceptions to this scholarly lacuna where applicable.

A. *Preemption and Its Cognates in Scholarship*

State law can be displaced in various ways when encountering federal interests, but preemption is the primary vehicle for displacing state law.³⁷ Preemption scholarship has largely ignored privatized displacement of state law. While scholars offer different understandings of preemption, I favor Professor Tom Merrill's view that preemption occurs when the federal government acts under the Supremacy Clause.³⁸ That clause states that "the Laws of the United States which shall be made in Pursuance [to the Constitution]; . . . shall be the supreme Law

³⁷ There *are* other doctrines where state law is displaced in certain contexts. Of primary concern here are immunity claims, which I discuss below in the context of sovereign-shield claims. Those claims have received scholarly attention, as I discuss below, and concomitantly receive more limited treatment from me, as they are limited in the degree to which the private entity displaces state law.

³⁸ Merrill, *supra* note 25, at 733. In so doing, Merrill is (in my opinion, correctly) countering scholarship that argues that preemption occurs under the authority of the Necessary and Proper Clause. *Id.* As Merrill explains, "[t]he Supreme Court has repeatedly identified the Supremacy Clause as the source of its authority to declare state law displaced (preempted)." *Id.*; *see also id.* at 733 n.26 (collecting cases). Merrill offers additional historical considerations for grounding preemption in the Supremacy Clause. *Id.* at 734–35.

of the Land . . .”³⁹ Merrill therefore argues that for an action to count as preemption, a federal *law* must displace state law.⁴⁰

While it is obvious that a statute that passes Congress and is signed by the President counts as law, it is harder to determine whether administrative agencies make “law.” Merrill argues that agencies can engage in preemption, but only agency action with the force of law has preemptive force.⁴¹ The criteria for whether the agency has so acted are set primarily in *United States v. Mead Corp.*⁴² There, the Court held that notice-and-comment rulemaking and adjudications have “the force of law,” while informal agency guidance often does not.⁴³ Assuming that the *Mead* criteria translate into the context of preemption, only administrative action that has been taken with the degree of formality *Mead* requires would qualify as preemptive federal law. Such decisions generally involve more input by stakeholders and are often binding on future parties.⁴⁴

As only federal “law” can displace state policy, and since government actors make law, preemption scholarship generally focuses on *government* actors to the exclusion of private entities.⁴⁵ On one hand, Congress

³⁹ U.S. CONST. art. VI, cl. 2.

⁴⁰ Merrill, *supra* note 25, at 764. Other scholars seem to join Merrill in arguing that agencies must act with the force of law when preempting states. *See, e.g.*, Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695, 706 (2008); *see also* Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2071–72 (2008) (discussing, but not endorsing, these views). To clarify, most of these scholars collapse the question of whether the agency is taking preemptive action with whether the agency is taking preemptive action legitimately, and are focused on whether the preemptive action is legitimate. *See* David S. Rubenstein, *Administrative Federalism as Separation of Powers*, 72 WASH. & LEE L. REV. 171, 197–201 (2015) (describing how the locus of preemption action changed from Congress to agencies). The scholars who join Merrill are less comfortable with agency preemption. *See, e.g.*, Mendelson, *supra*, at 699; David S. Rubenstein, *Delegating Supremacy?*, 65 VAND. L. REV. 1125, 1153 (2012) (arguing that agency-made “law” cannot preempt); *see also* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1433 (2001) (permitting some role upon explicit congressional delegation).

⁴¹ Merrill, *supra* note 25, at 764.

⁴² 533 U.S. 218 (2001).

⁴³ *Id.* at 227; *see id.* at 226–27.

⁴⁴ *See, e.g., id.* at 232–33. Note that prominent scholars such as Professor Gillian Metzger caution that requiring high degrees of formality and rulemaking for preemption to occur “would create extraordinary obstacles to federal administrative governance.” Metzger, *supra* note 40, at 2072; *see id.* at 2102–03 (“[C]ourts could police the distinction between legislative and nonlegislative rules tightly, insisting on notice-and-comment procedures whenever an agency interpretive rule or policy statement had significant legal or practical effect on a state.”). If true force of law is not required for preemption, then the case for preemption in the scenarios I draw in Part II is made easier.

⁴⁵ Scholarly debate over the last seventy years has traditionally centered around the effects of federalism — whether federalism consists of federal and state governments acting in separate, insulated areas of so-called dual sovereignty, or whether it also contemplates areas of overlapping authority. *See, e.g.*, Jessica Bulman-Pozen, *From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism*, 123 YALE L.J. 1920, 1924 (2014) (describing this

passes laws that expressly preempt state action,⁴⁶ which courts interpret.⁴⁷ Federal courts may also find implied preemption.⁴⁸ On the other hand, and more controversially, federal *agencies* also engage in preemption,⁴⁹ in areas as diverse as immigration and healthcare.⁵⁰ The final actors in this relationship are states and their various components who might push back when they feel their authority has been challenged.⁵¹

Indeed, it is not just preemption scholarship that does not engage extensively with private entities — federalism scholarship in general, of which the preemption literature is a subpart, similarly centers the conversation on federal and state entities. The literature portrays these

debate). However, in the last few decades scholarly opinion has vindicated the overlap model. *See id.*

⁴⁶ I am sympathetic to the view that Congress, in many ways, is the true arbiter of federalism and the reach of federal preemption. *Cf.* Abbe R. Gluck, *Our [National] Federalism*, 123 YALE L.J. 1996, 1999 (2014) (“National Federalism goes further, embracing Congress as federalism’s primary source and viewing Congress as having as much, if not more, of a role to play in shaping federalism as do the courts.” This might “discomfit some, because this federalism leaves state power to the grace of Congress.”).

⁴⁷ *See, e.g.,* Altria Grp., Inc. v. Good, 555 U.S. 70, 76 (2008) (“If a federal law contains an express pre-emption clause, it does not immediately end the inquiry because the question of the substance and scope of Congress’ displacement of state law still remains.”).

⁴⁸ *See* sources cited *supra* note 25 (listing preemption categories). This occurs when the state law actually conflicts with federal law, *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963), acts as an obstacle to the goals of federal law, *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372–73 (2000), or where congressional regulation so pervasively occupies the field that courts infer that there is no room for state regulation. *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98 (1992) (plurality opinion). Courts also deploy constitutional doctrines to preempt state action — the dormant commerce clause, for example, precludes states from discriminating against interstate commerce, *see, e.g.,* *Quill Corp. v. North Dakota*, 504 U.S. 298, 309–11 (1992), and the Equal Protection Clause prohibits state laws that courts find discriminate based on various categories, *see, e.g.,* *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 626 (1969).

⁴⁹ *See supra* note 40.

⁵⁰ Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. 953, 1023–25 (2016); Cristina M. Rodriguez, *Negotiating Conflict Through Federalism: Institutional and Popular Perspectives*, 123 YALE L.J. 2094, 2101 (2014); Abbe R. Gluck & Nicole Huberfeld, *What Is Federalism in Healthcare For?*, 70 STAN. L. REV. 1689, 1797 (2018) (“It also is notable that Congress and federal courts remain largely on the sidelines when it comes to these intergovernmental negotiations.”).

Some greet this fact with caution. Metzger, *supra* note 40, at 2028 (“[T]he best approach . . . is . . . to advance federalism concerns within the overall rubric of administrative law.”); Brian Galle & Mark Seidenfeld, *Administrative Law’s Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 1946 (2008) (“Congress must expressly delegate [preemption] authority [to the agency] in the language of the statute itself.” (quoting Merrill, *supra* note 25, at 767) (alterations in original)). Others contend that “agencies outperform the other[]” branches of government in terms of their transparency, deliberativeness, and accountability in determining when and how to respect state law. *Id.* at 1939. *But see* Stuart Minor Benjamin & Ernest A. Young, *Essay, Tennis with the Net Down: Administrative Federalism Without Congress*, 57 DUKE L.J. 2111, 2150 (2008).

⁵¹ Bulman-Pozen, *supra* note 45, at 1921–22; Gillian E. Metzger, *Federalism and Federal Agency Reform*, 111 COLUM. L. REV. 1, 49 (2011) (“Perhaps *Wyeth* and the preemption decisions should be read as assigning the states a special role in policing federal administration across the board, through both direct and indirect measures.”).

entities sometimes at loggerheads as in the preemption context,⁵² but also as cooperative.⁵³ Sometimes, states “write the law alongside Congress,”⁵⁴ or play a major administrative role, as they did under the Affordable Care Act.⁵⁵ States may engage and lobby Congress.⁵⁶ Once again, however, private entities are left out of the picture.

There are three sets of exceptions to this scholarly lacuna, all published or forthcoming within the last year. First, Professor David Rubenstein compellingly explains how the federal government has declared that the provisions of certain contracts it has signed with private entities displace state law.⁵⁷ Second, coauthors Professors Roderick Hills and Richard Primus suggest that corporate delegation should be

⁵² Though that depends partially on whether the politics of the state and federal officials align or not. See Bulman-Pozen, *supra* note 45, at 1932 (“[S]tates facilitate competition between the Democratic and Republican parties and offer staging grounds for national networks seeking to further their agendas.”).

⁵³ Even in conciliatory contexts, the federal government “constructs its relationships with state and local actors in myriad ways: through delegation; by incorporating state and local officials into federal bodies, commissions, and regulatory regimes; or by crafting legislation or enforcement policies to address tensions that might arise when state and local actors exercise parallel but overlapping regulatory authority.” Rodríguez, *supra* note 50, at 2101. This enables the vision of cooperative federalism. See *id.*; Bulman-Pozen, *supra* note 45, at 1932 (“This state role challenges depictions of states as autonomous governments. In critical areas, states do not enjoy a realm in which to set their own policies; instead, they set national policy together with federal politicians and bureaucrats.”).

⁵⁴ Bulman-Pozen, *supra* note 45, at 1932. Congress may choose — at least on the Court’s account — a variety of relationships, including “parallel federalism,” “field-claiming federalism,” and “hybrid federalism.” Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 585 (2011). Such approaches “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.” *Id.* at 565.

⁵⁵ For example, states would set up and run insurance exchanges, where individuals could buy ACA-compliant policies. Abbe R. Gluck, *Federalism from Federal Statutes: Health Reform, Medicaid, and the Old-Fashioned Federalists’ Gamble*, 81 FORDHAM L. REV. 1749, 1750 (2013); see also Gluck, *supra* note 54, at 538 (“Congress uses state implementers to entrench new national programs . . .”). Others have offered similar accounts. See Mark D. Rosen, *Contextualizing Preemption*, 102 NW. U. L. REV. 781, 786 (2008) (setting up the choice between unilateralist and multilateralist approaches, with Congress taking the lead).

⁵⁶ See Gluck & Huberfeld, *supra* note 50, at 1779; Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 5–6 (1988) (noting that “[s]ome state and local governments have proven themselves formidable lobbyists and indefatigable litigants,” *id.* at 5, and discussing state litigation).

⁵⁷ Rubenstein, *supra* note 31, at 1166–90; see also David S. Rubenstein & Pratheepan Gulasekaram, Essay, *Privatized Detention & Immigration Federalism*, 71 STAN. L. REV. ONLINE 224, 225–27 (2019) (focusing on immigration detention contractors). Rubenstein explains focusing on government contracting because “[i]n America . . . outsourcing is the most prevalent form of privatization.” Rubenstein, *supra* note 31, at 1132 n.1. Because I accept the broader definition of privatization that some scholars adopt, I do not quite agree with this claim. See *infra* notes 75–77 and accompanying text. Indeed, most of what I call “contractual preemption” below does not involve government outsourcing.

treated with suspicion in federalism cases, including what I call “contractual preemption” below.⁵⁸ Finally, Rubenstein, and, independently, coauthors Professors Kate Elengold and Jonathan Glater describe how, in large part through immunity doctrines, private contractors have escaped state liability.⁵⁹ While their work takes center stage in my description of what I eponymously call sovereign-shield displacement, I argue below that in this context, we are the least likely to see independent preemptive decisions made by private entities. These scholars have also remarked on the scholarly lacuna in this area.⁶⁰ What all of these scholars have in common is discussing state law *displacement* (in general, to be distinguished from preemption in particular) by the federal government in cahoots with private entities.

B. Privatization Scholarship

If preemption and related scholarship does not engage private entities, the vast scholarship that examines privatization returns the favor. This, once more, does not bode well for an investigation of privatization’s preemptive effects.

Privatization can broadly be defined as the involvement of private entities in tasks that were once performed by the government.⁶¹ A recent report estimates that forty percent of the federal workforce consists of contract employees,⁶² and “\$320 billion . . . went to support the contract workforce in fiscal [year] 2010.”⁶³ Indeed, recent escalation of hostilities between the Trump Administration and Iran occurred when a

⁵⁸ Richard Primus & Roderick M. Hills, Jr., *Suspect Spheres, Not Enumerated Powers: A Guide for Leaving the Lamppost*, MICH. L. REV. (forthcoming) (manuscript at 44, 74), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3547613 [<https://perma.cc/J4Q4-2EHC>].

⁵⁹ Rubenstein, *supra* note 31, at 1190–202; Elengold & Glater, *supra* note 4 (manuscript at 15–20). Other scholars have also, in passing, addressed these immunity doctrines, but as Rubenstein and Elengold and Glater explain, they are among the first to squarely link privatization and state law displacement. See Kate Sablosky Elengold & Jonathan D. Glater, *The Sovereign in Commerce*, 73 STAN. L. REV. (forthcoming 2021) (manuscript at 16), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3670960 [<https://perma.cc/T8PP-NL4P>].

⁶⁰ See Elengold & Glater, *supra* note 4 (manuscript at 8); Rubenstein, *supra* note 31, at 1134 (noting that “federalism has been a virtual blind spot in the descriptive and prescriptive agendas” of privatization scholars); Elengold & Glater, *supra* note 59 (manuscript at 16) (“[F]ederalist scholars study the relationship between the states and the federal government; they have generally omitted the private sector, even though the private sector may cause shifts in federal-state relationships.”).

⁶¹ My definition here follows orthodoxy in privatization scholarship. Metzger, *supra* note 26, at 1377 (“[T]he term is conventionally understood to signify a transfer of public responsibilities to private hands.”); Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1230 (2003) (“[A] useful definition encompasses the range of efforts by governments to move public functions into private hands and to use market-style competition.”).

⁶² PAUL C. LIGHT, THE VOLCKER ALL., THE TRUE SIZE OF GOVERNMENT 3–4 (2017).

⁶³ Louis Peck, *America’s \$320 Billion Shadow Government*, FISCAL TIMES (Sept. 28, 2011), <http://www.thefiscaltimes.com/Articles/2011/09/28/Americas-320-Billion-Shadow-Government> [<http://perma.cc/4SDS-Y2FS>]. Contractors working for the government went from “an estimated

private military contractor — rather than government employees — suffered losses.⁶⁴ Privatization has, accordingly, received a massive amount of attention in the legal literature.⁶⁵

It is hard to characterize a literature that touches on so many topics in anything but the broadest of strokes.⁶⁶ Privatization scholarship touches on a broad range of areas — ranging from criminal,⁶⁷ prison,⁶⁸ welfare,⁶⁹ and education⁷⁰ law, among others. However, because most privatization involves contracting by the administrative state, much of the literature treats privatization as an issue of administrative doctrine. What is quite clear is that *federalism* is not a subject of extensive conversation in privatization circles.

As the administrative law literature shows, privatization can take many forms. At one end of the spectrum, private entities perform marginal tasks — for example, providing office supplies or providing janitorial personnel.⁷¹ Further along, they might play a role in shaping policy,⁷² or administer government programs. Medicare contractors often

4.4 million in 1999 to more than 7.5 million by the end of the 2005 fiscal year.” Paul C. Light, Opinion, *The Real Crisis in Government*, WASH. POST (Jan. 12, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/11/AR2010011103255.html> [<http://perma.cc/52NZ-HMFR>].

⁶⁴ Carten Cordell, *Contractors Keeping Close Eye on Aftermath of U.S. Strike on Iranian Leader*, WASH. BUS. J. (Jan. 3, 2020, 8:53 PM), <https://www.bizjournals.com/washington/news/2020/01/03/contractors-keep-close-eye-on-defense-response.html> [<https://perma.cc/P8UY-5CEJ>].

⁶⁵ This has caused protest in some circles. Chris Sagers, *The Myth of “Privatization,”* 59 ADMIN. L. REV. 37, 38, 42–45 (2007); Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1285 (2003) (“In other words, privatization can be a means of ‘publicization.’”).

⁶⁶ See Metzger, *supra* note 26, at 1377; Freeman, *supra* note 65, at 1286–87. John D. Donahue creates a dichotomy between situations where the government completely devolves control and situations where it maintains an ongoing, often contractual, relationship. JOHN D. DONAHUE, *THE PRIVATIZATION DECISION: PUBLIC ENDS, PRIVATE MEANS* 215 (1989). I believe that these arrangements are more complex, however. For example, privatization relationships may be seen as sitting within a larger continuum of relationships that the government might have with private entities, ranging from criminal law to licensing, insulation from liability, “subsidy through exemptions, deductions, or credits, . . . direct government support, . . . partnerships, . . . [and] publicly chartered entities . . .” Minow, *supra* note 61, at 1255–56.

⁶⁷ See Freeman, *supra* note 65, at 1295.

⁶⁸ See, e.g., *id.*; Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 450–62 (2005); Charles W. Thomas & Linda S. Calvert Hanson, *The Implications of 42 U.S.C. § 1983 for the Privatization of Prisons*, 16 FLA. ST. U. L. REV. 933, 953–56 (1989).

⁶⁹ See Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121, 1180–82 (2000).

⁷⁰ ANTONI VERGER ET AL., *THE PRIVATIZATION OF EDUCATION: A POLITICAL ECONOMY OF GLOBAL EDUCATION REFORM* 3–10 (2016).

⁷¹ See Freeman, *supra* note 65, at 1287 n.7.

⁷² Jody Freeman offers some sense of this variety, which includes “preparing testimony for agency officials appearing before Congress, supplying rationales to support regulatory decisions, responding to public comment on rules, and conducting public hearings required by federal law [S]olid waste collection; management and operation of select government facilities and

make coverage decisions and provide direct services to individuals.⁷³ Further, the kinds of private entities vary — they may involve for-profit, out-to-make-a-profit, or nonprofit entities that seek to help society as a whole; they may also involve entities that discriminate against certain groups of individuals.⁷⁴

Finally, although it may seem controversial,⁷⁵ I agree with those scholars such as Professors Jody Freeman and Matthew Diller who suggest that *deregulation* — government retreat from regulation in an area that *was* subject to government involvement — is a form of privatization. When the government withdraws from an area in which it was enmeshed, leaving it to the control of private entities, it is, “in effect, a statement that those needs are matters of private, rather than public, concern and that any assistance must be obtained from private sources.”⁷⁶ Similarly, administrative “deregulation of a particular industry,” which leaves the rules of conduct for private entities to develop, also counts as privatization.⁷⁷ Indeed, the privatization here is, in some ways, more thorough than if the government contracted out the service. Imagine the government decided to contract out public school services to a private entity — here, the government still has some involvement. But if the government ceases to provide education altogether, education will have been fully privatized and left completely to the market.

While private entities span a vast variety of forms, privatization critics argue that many private entities that do engage with government

programs such as hospitals, mental health facilities, and waste water treatment plants; security services such as police, corrections, fire, and ambulance services; parks and recreation services; road and bridge construction, repair, maintenance and lighting; vehicle repair and maintenance; and day care.” *Id.* at 1287 n.7 (quoting WERNER Z. HIRSCH, *PRIVATIZING GOVERNMENT SERVICES: AN ECONOMIC ANALYSIS OF CONTRACTING OUT BY LOCAL GOVERNMENTS* 128–29 (1991)) (alteration in original).

⁷³ Nicholas Bagley, *Beside Bureaucrats: Why Medicare Reform Hasn't Worked*, 101 *GEO. L.J.* 519, 527 (2013).

⁷⁴ See *Fulton v. City of Philadelphia*, 922 F.3d 140, 147–48 (3d Cir. 2019), *cert. granted*, 140 S. Ct. 1104 (2020).

⁷⁵ See Harold I. Abramson, *A Fifth Branch of Government: The Private Regulators and Their Constitutionality*, 16 *HASTINGS CONST. L.Q.* 165, 168–74 (1989) (distinguishing relationships that involve “no formal connection between government and private regulators,” *id.* at 169, from other private regulator arrangements).

⁷⁶ Matthew Diller, *Form and Substance in the Privatization of Poverty Programs*, 49 *UCLA L. REV.* 1739, 1742 (2002).

⁷⁷ Freeman, *supra* note 65, at 1287; Diller, *supra* note 76, at 1742 (“The ultimate form of privatization is simply the absence of any governmental action.”). In other contexts, government withdrawal has been referred to as privatization. Thus, one may privatize an industry by devolving government control of functions to private entities. While some may suggest this is a different form of privatization, in the analytical account I offer, it remains on the spectrum — instead of the government contracting with a private firm to run the industry, it gives the firm up to the market. In other countries, such privatization has been discussed in the context of privatization of, for example, sectors of the industry. See Sunita Kikeri & John Nellis, *An Assessment of Privatization*, 19 *WORLD BANK RSCH. OBSERVER* 87, 97–103 (2004).

lack the internal checks and balances that characterize agencies,⁷⁸ and are less oriented towards the public good,⁷⁹ less accountable,⁸⁰ less deliberative,⁸¹ and more biased against competitors.⁸² At the same time, *like* administrative agencies, private contractors often (but not always)

⁷⁸ See Freeman, *supra* note 26, at 665 (“[A] public/private regime characterized by multiple and overlapping checks might produce enough aggregate accountability.”); Jon D. Michaels, *Privatization’s Pretensions*, 77 U. CHI. L. REV. 717, 719 (2010) (“[W]orkarounds [through privatization] enable the executive to exercise greater unilateral discretion — at the expense of the legislature, the judiciary, the people, and successor administrations.”).

⁷⁹ Minow, *supra* note 61, at 1248; Kenneth A. Bamberger, *Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State*, 56 DUKE L.J. 377, 399 (2006) (“Private firm agents . . . are structured around strong corporate self-interest — the very interest the legal and economic literatures are most concerned will capture public decisionmaking. And they are ‘permeable,’ in that they are particularly responsive to influences other than the interests of regulator-principal, such as the behavior of competitors, the interests of consumers, and the pressures of the market.” (footnotes omitted)).

⁸⁰ Critics argue that private entities lack accountability both to the public and also to the government entities that allegedly oversee them. Danielle Keats Citron, *Technological Due Process*, 85 WASH. U. L. REV. 1249, 1297 (2008); Horton, *supra* note 10, at 473–74; Freeman, *supra* note 65, at 1305–06 (“[T]he APA specifically excludes both grants and contracts from the demands of notice-and-comment rulemaking normally applicable to federal agencies. Moreover, the APA subjects only agency action to potential judicial review Private actors need not comply with any of the APA’s procedural requirements, nor must they, generally speaking, observe the disclosure provisions of the Freedom of Information Act (FOIA) or the open-meeting obligations of other sunshine laws that apply exclusively to government actors. Private contractors notably escape the civil-service protection rules, as well as the conflict-of-interest and ethics rules that apply to public employers.” (footnotes omitted)); Bagley, *supra* note 73, at 527–28, 532; Aaron R. Cooper, Note, *Sidestepping Chevron: Reframing Agency Deference for an Era of Private Governance*, 99 GEO. L.J. 1431, 1462 (2011); Sidney A. Shapiro, *Outsourcing Government Regulation*, 53 DUKE L.J. 389, 404, 411 (2003) (“[A]n agency’s reliance on private parties creates several important transaction costs for the agency [T]he agency lacks the expertise to oversee the standards-writing process in an effective manner. Second, to the extent that a politically powerful industry supports private standard setting, the agency may find it politically difficult to engage in extensive rewriting.”); Bamberger, *supra* note 79, at 399 (same); Steven Davidoff Solomon & David Zaring, *Transactional Administration*, 106 GEO. L.J. 1097, 1104 (2018) (“[G]overnance by deal allows the Executive to act decisively without broader participation, and hence with a higher chance that the policy incorrectly represents the popular will.”).

⁸¹ Freeman, *supra* note 26, at 559.

⁸² See Shelley Welton, *Public Energy*, 92 N.Y.U. L. REV. 267, 282–85 (2017) (citing Steven Kelman, noting that only tasks where you can change private entities out for the competitors make sense for privatization) (citing Steven J. Kelman, *Achieving Contracting Goals and Recognizing Public Law Concerns: A Contracting Management Perspective*, in GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 153, 154–57 (Jody Freeman & Martha Minow eds., 2009)); Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 HARV. J.L. & PUB. POL’Y 931, 934 (2014) (“‘Industry regulating itself’ really means ‘some people in industry regulating other people in industry,’ ‘people regulating their own competitors,’ or perhaps even ‘incumbents regulating potential entrants.’ This perspective invites one to fear self-interested bias and anticompetitive behavior.”); Emily Hammond, *Double Deference in Administrative Law*, 116 COLUM. L. REV. 1705, 1710 (2016) (“This is cause for concern: A regulated industry that regulates itself has numerous incentives to dampen participation of statutory beneficiaries [and] engage in anticompetitive conduct toward weaker members”).

enjoy immunity from suit.⁸³ Some of the scholarship seeks to adapt administrative doctrine to ensure more oversight of private entities.⁸⁴ On the other hand, even critics acknowledge that engaging private entities can promote expertise, efficiency, and compliance.⁸⁵ Nonetheless, the lack of a prominent federalism focus in privatization scholarship is understandable — many of the Trump Administration's more innovative moves towards privatized preemptive effects occurred only in the last two years of that Administration.

* * *

With the current state of the scholarship, the legal literature lacks a vocabulary to deal with the problem of privatization's preemptive effects. But the calculus is easy. Private entities are carrying out administrative functions (privatization scholarship). Administrative agencies seek to preempt state law (preemption scholarship). Add the two together. This means that with various levels of discretion, *private corporations* have the power to *preempt and otherwise displace the very state laws and programs designed to regulate those corporations*. This is precisely what is happening today — but few are looking.⁸⁶

II. PRIVATIZATION'S PREEMPTIVE EFFECTS: A TYPOLOGY

There are four approaches that corporations may take to displace state law. First, they may claim that they are shielded from suit because of their relationship with the federal government. Next, private *contract* law may take precedence over state law. Third, corporations may take federal *incentives* to stymie state laws and policies. In this scenario, the

⁸³ See Volokh, *supra* note 82, at 985–95 (laying out a good overview of the doctrine as it is used in antitrust cases); Hammond, *supra* note 82, at 1709.

⁸⁴ Hammond, *supra* note 82, at 1766 (applying doctrines such as hard-look review to administrative rulemaking); *id.* at 1721–22 (arguing for a revival of the so-called private nondelegation doctrine, whose only prominent, surviving application occurred in 1936) (citing *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936)); Dina Mishra, *An Executive-Power Non-Delegation Doctrine for the Private Administration of Federal Law*, 68 VAND. L. REV. 1509, 1601 (2015) (same); Miriam Seifter, *Second-Order Participation in Administrative Law*, 63 UCLA L. REV. 1300, 1353 (2016); Edward Lee, *Recognizing Rights in Real Time: The Role of Google in the EU Right to Be Forgotten*, 49 U.C. DAVIS L. REV. 1017, 1037–42 (2016) (describing internal participatory procedures that some private entities have adopted); Stefan J. Padfield, *Finding State Action When Corporations Govern*, 82 TEMP. L. REV. 703, 705–06 (2009) (arguing that private entities should be subject to constitutional constraints); Freeman, *supra* note 26, at 667–71 (arguing for a contractual mechanism that better reflects the interdependence of private and public entities); Bamberger, *supra* note 79, at 407–08 (suggesting similar mechanisms as those that exist in the administrative state); Metzger, *supra* note 26, at 1374 (arguing that the government should engage in oversight).

⁸⁵ See *infra* notes 341–343.

⁸⁶ One commenter has made the suggestion in passing that privatization is an alternative to federalism. See Gluck, *supra* note 55, at 1772 (“[O]ne alternative to state-led federal statutory schemes is a bigger federal government, [and] another alternative is more privatization of what previously had been government work.”).

federal government does not outright preempt state law. Rather, it engages in activity that incentivizes entities to act in ways that undermine the operative effect of state law. Fourth, the federal government may *delegate* outright the decision as to whether to displace state law; that is, it may delegate preemption decisionmaking authority altogether to a private entity.

Each category involves greater discretion to private entities, greater legal novelty, and, concomitantly, fewer examples. Note that while displacement categories (2) and (4) (probably) count as preemption, category (1) falls in a different doctrinal bucket, and category (3) falls into no doctrinal bucket at all. Nonetheless, all of these actions displace state law *as if* the federal government engaged in preemption. The following table offers a summary of the forthcoming argument.

	Examples	Scope of Private Discretion	Doctrinal Framework
1. Sovereign Shield	Military contractor immunity. 2020 Portland contractor immunity (e.g. 2020 Portland Protests).	Limited, in theory.	Mostly immunity doctrines (derivative and inter-governmental).
2. Contractual	Preemption by entire contracts: Federal Employees Health Benefits Act (FEHBA), Federal Employees' Group Life Insurance Act (FEGLIA). Preemption on certain issues: Federal Arbitration Act (FAA), Americans with Disabilities Act (ADA).	Private firms have greater discretion as to what terms to include in the contract.	Supreme Court has referred to this as "preemption," though questions remain.
3. Incentivized	Carrots: CARES Act loans, health data network monopoly. Sticks: Federal Energy Regulatory Commission (FERC) price floors.	Depends on scope of the incentive.	Unclear.

4. Delegated	Delegation to self-regulated bodies: Federal Industry Regulatory Authority (FINRA). Delegation to firms: Natural Gas Act (NGA) land takings.	De facto, great discretion, sometimes unreviewable.	Unclear.
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A fuller explanation of each category follows. Within each category, I carry out a two-step analysis. I first offer practical examples and possible subcategories. Second, I consider the degree to which private entities have power over displacing state law, and relatedly, I expose the slipperiness of the concepts and doctrinal categories involved. As each category shifts control away from the federal government to private entities, it becomes less clear that traditional conceptualizations of “preemption” or related doctrines apply — though I follow the Supreme Court’s lead in whether I use the term preemption, or something else.

It bears mentioning, however, that the degree of conceptual or doctrinal incoherence is not a predictor of practical danger: situations where private entities lack discretion are not necessarily less dangerous or threatening to federalism than situations where they do, as the last section of this Part explains.

A. Sovereign-Shield Displacement

Private entities have argued in various contexts that they are not subject to suits under state law when acting in the capacity of government contractors. Elengold and Glater persuasively break down these claims into three categories, which together form what they call a “sovereign shield” that displaces state law.⁸⁷ While the case law often lumps these categories together,⁸⁸ I largely stick to those categories in my brief recounting below, sometimes offering my own gloss.

1. *Mechanisms and Examples.* — First, contractors may claim that *certain* state laws are preempted when they interfere with federal procurement decisions. Thus, in *Leslie Miller, Inc. v. Arkansas*,⁸⁹ the Court held that a federal procurement statute preempted a state requirement that the contractor have a license in the state.⁹⁰ In another case, *Boyle*

⁸⁷ Elengold & Glater, *supra* note 4 (manuscript at 4) (“We find that contractors have relied on their relationship with the federal government without precisely defining or distinguishing these doctrines.”).

⁸⁸ *See id.* (manuscript at 9).

⁸⁹ 352 U.S. 187 (1956) (per curiam).

⁹⁰ *Id.* at 190.

v. United Technologies Corp.,⁹¹ the Court held that subjecting a military contractor to state tort liability for a defective aircraft would also have problematic effects for government procurement.⁹² While the grounds of the decision are murky,⁹³ one reading of the case is that the Court held state tort law to be preempted in favor of maintaining the robustness of federal procurement capacity.

Far more common appear to be claims of immunity as opposed to preemption. On this account, contractors claim either derivative or intergovernmental immunity from suit. Derivative immunity arises from contractors acting as agents of the federal government.⁹⁴ The federal government is immune from suit unless it explicitly consents to suit; when acting as agents of the federal government, so are contractors (or so they claim). Intergovernmental immunity arises from the Court's dicta in *McCulloch v. Maryland*⁹⁵ that states lack "power . . . to . . . burden, or in any manner control, the operations of" federal law.⁹⁶ The question here is largely whether states seek to single out the federal government for unique burdens.

After canvassing a vast number of cases, Elengold and Glater offer five factors that determine when and whether courts determine that this "sovereign shield" applies.⁹⁷ First, does Congress appear to have intended for the contractors to be shielded?⁹⁸ Second, is the entity a public corporation, or otherwise an "arm" of the federal government merely doing the government's "bidding"?⁹⁹ Third, does the contractor have limited discretion?¹⁰⁰ Fourth, did the contractor stick to the contractual specifications?¹⁰¹ And fifth, does the state law "affect[] federal policy-making or decisionmaking"?¹⁰² The closer one gets to "yes" on any of these factors, the more likely a court is to find that a sovereign shield exists.¹⁰³

⁹¹ 487 U.S. 500 (1988).

⁹² See *id.* at 512.

⁹³ Elengold & Glater, *supra* note 4 (manuscript at 16 n.67, 20) (noting that scholars may "quibble" over the exact doctrinal placement of *Boyle*, and that lower courts both "separate" and "conflate" *Boyle* with other doctrines).

⁹⁴ See W. Logan Lewis, Note, *Campbell-Ewald Co. v. Gomez: Diminishing the Derivative Sovereign Immunity Doctrine and the Social Costs of Increasing Liability to Government Contractors*, 59 WM. & MARY L. REV. 1491, 1494 (2018).

⁹⁵ 17 U.S. (4 Wheat.) 316 (1819).

⁹⁶ *Id.* at 436.

⁹⁷ Elengold & Glater, *supra* note 4 (manuscript at 23).

⁹⁸ See *id.* (manuscript at 23–25).

⁹⁹ See *id.* (manuscript at 25–27).

¹⁰⁰ See *id.* (manuscript at 27–30).

¹⁰¹ See *id.* (manuscript at 30–32).

¹⁰² *Id.* (manuscript at 32); see *id.* (manuscript at 32–35).

¹⁰³ See *id.* (manuscript at 23) ("No single factor appears to be sufficient on its own to guarantee application of the sovereign shield.").

2. *Concept and Doctrine.* — Preemption and immunity doctrines seek to protect federal government prerogatives. Sovereign-shield displacement falls most squarely within traditional doctrinal categories, because it demands a great degree of federal government control.

Each of the factors above demands that the private entity lack discretion. Thus, one influential decision reads *Boyle* to demand that “the discretion over significant details and all critical design choices will be exercised by the government.”¹⁰⁴ Similarly, note Elengold and Glater, “[i]f the contractor retains authority to determine if and how to implement the contract, then they are acting outside of the protected sovereign shield.”¹⁰⁵

What follows is that, if the courts apply the sovereign-shield tests correctly, private entities in this context have the least degree of control over whether state law is displaced. All three other forms of private preemption *may* have the effect of displacing state law: with contractual preemption, firms can often decide whether to include contractual terms; with incentivized displacement, firms can choose whether to accept federal blandishments; and with delegated preemption, firms may exercise their discretion. In the sovereign-shield context, by contrast, firms have no option: the federal government *tells them what to do* — and if that includes state law displacement, so be it. Thus, “[a]s the Fifth Circuit subsequently put it, the [sovereign-shield doctrine] ‘stripped to its essentials’ is a defense that ‘the Government made me do it.’”¹⁰⁶

In theory, therefore, the decision as to whether to preempt is not left to the firm — it rests in the hand of the omnipotent federal government. To be sure, firms can (and do) aggressively pursue such defenses in litigation, as Elengold and Glater, and Rubenstein, show.¹⁰⁷ But — and this is critical — even if the firm did *not* want to flout state law, it would have no choice. The federal government would have decreed that the firm act in ways inconsistent with state laws and policies, and the firm would have to follow that direction.

¹⁰⁴ *Trevino v. Gen. Dynamics Corp.*, 865 F.2d 1474, 1481 (5th Cir. 1989). This reading comes from *Boyle*’s creation of a three-factor test, holding 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 [such that the United States had the final say].

Boyle v. United Techs. Corp., 487 U.S. 500, 512 (1988) (emphasis added).

¹⁰⁵ Elengold & Glater, *supra* note 4 (manuscript at 27).

¹⁰⁶ *Id.* (manuscript at 19) (quoting *In re Katrina Canal Breaches Litig.*, 620 F.3d 455, 465 (5th Cir. 2010)); *see also In re Joint E. & S. Dist. N.Y. Asbestos Litig.*, 897 F.2d 626, 632 (2d Cir. 1990).

¹⁰⁷ *See* Elengold & Glater, *supra* note 59 (manuscript at 40–45); Rubenstein, *supra* note 31, at 1158–60.

Indeed, this may be seen in the context of the federal mobilization in Portland. There, if the federal government did indeed use contractors, the contractors were at best “borrowed servants.”¹⁰⁸ The party that was liable for the decision to flout Portland’s autonomy was not the contractor involved, but rather, DHS.¹⁰⁹ DHS would therefore be the proper party to sue. Of course, in other cases, the nexus between the federal government and the contractor is more questionable, but again, if applied rigorously, the sovereign shield applies in situations where private entity discretion is at its nadir.

B. Contractual Preemption

On this approach to preemption, Congress usually passes a law that preempts state law in a certain area. However, instead of subjecting the area to federal regulation, the federal government cedes the area to private entities, whose decisions ultimately determine, usually by contract, whether state law will be displaced. There remain elements of traditional preemption, since the federal government has merely preempted state law, but private entities are an important part of the narrative. The rules of conduct between parties will be privatized. They are no longer determined by state law, but rather by private contractual arrangements.

i. Mechanisms and Examples. — There are two ways in which this contractual preemption has played out. First, federal law grants a certain class of contracts — usually federal contracts — preemptive power over state law. Here, within a *specific* class of contracts, any contractual term within the contract, no matter the issue to which it pertains, preempts state law.

Second, federal law declares that state law over *a certain set of issues* is preempted. Here, the government effectively (though not explicitly) grants *any* private contract (as opposed to just a specific class of contracts) the power to override state law. But terms pertaining only to *certain issues* can preempt state law.

(a) Preemption of Specific Contracts. — In the first bucket, consider a federal law that states that “[t]he terms of any contract . . . which relate to [federal employee health benefits] shall supersede and preempt any State or local law . . . which relates to health insurance or plans.”¹¹⁰ Rubenstein offers the examples of the Federal Employees Health

¹⁰⁸ For example, the *Boyle* analysis in *Trevino v. General Dynamics Corp.*, 865 F.2d 1474, ran parallel to a borrowed servant doctrine analysis. *See id.* at 1488.

¹⁰⁹ *See Acting Secretary Wolf’s Statement on Oregon Agreeing to Cooperate in Quelling Portland Violence*, DEP’T OF HOMELAND SEC. (July 29, 2020), <https://www.dhs.gov/news/2020/07/29/acting-secretary-wolfs-statement-oregon-agreeing-cooperate-quelling-portland> [<https://perma.cc/R327-JTJK>].

¹¹⁰ 5 U.S.C. § 8902(m)(1).

Benefits Act¹¹¹ (FEHBA) and the Federal Employees' Group Life Insurance Act of 1954¹¹² (FEGLIA).¹¹³ FEHBA litigation led to *Coventry Health Care of Missouri, Inc. v. Nevils*,¹¹⁴ in which the contract that the federal government negotiated with an insurance company provided for certain contractual remedies that state law prohibited.¹¹⁵ Nonetheless, when a federal employee sued to prohibit enforcement of those contractual terms, the Court held that the state law was preempted by the federal statute.¹¹⁶ In other words, federal statute required that private contract take precedence over state law in determining the rules of the relationship between the employee and his insurer.

As another example, consider the Employee Retirement Income Security Act of 1974¹¹⁷ (ERISA). Designed to regulate employee benefits,¹¹⁸ ERISA broadly preempts all state laws that "relate to" employee benefit plans.¹¹⁹ It next saves state regulation of insurance from such preemption,¹²⁰ but then specifies that state regulation with respect to self-funded plans — essentially, where employers bear the risk of employee illness — remains preempted.¹²¹ In one case, a plaintiff argued that when it comes to self-funded employers, state laws must give way to contracts because of a federal provision that each plan "shall" be administered "in accordance with the documents and instruments governing the plan."¹²² In other words, much as with government benefits contractors in *Coventry*, here, *self-funded* employers could write contracts that took precedence over state law. The Court ultimately did not rule on that argument.

Contractual preemption claims involving statutory delegations are the most common, but courts have also found preemption by contract terms. Consider *United States v. Little Lake Misere Land Co.*,¹²³ in

¹¹¹ Pub. L. No. 86-382, 73 Stat. 708 (1959) (codified as amended in scattered sections of 5 U.S.C.).

¹¹² Ch. 752, 68 Stat. 736 (codified as amended in scattered sections of 5 U.S.C.).

¹¹³ See Rubenstein, *supra* note 31, at 1169-70.

¹¹⁴ 137 S. Ct. 1190 (2017).

¹¹⁵ See *id.* at 1194.

¹¹⁶ *Id.* at 1194-95.

¹¹⁷ Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 26 and 29 U.S.C.).

¹¹⁸ Jesselyn Alicia Brown, Note, *ERISA and State Health Care Reform: Roadblock or Scapegoat?*, 13 YALE L. & POL'Y REV. 339, 340 (1995).

¹¹⁹ 29 U.S.C. § 1144(a).

¹²⁰ *Id.* § 1144(b)(2)(A) (exempting "any law of any State which regulates insurance, banking, or securities" from preemption).

¹²¹ See *id.* § 1144(b)(2)(B).

¹²² Konnoth, *supra* note 3 (manuscript at 33) (citing Brief in Opposition at 22, *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936 (2016) (No. 14-181)).

¹²³ 412 U.S. 580 (1973).

which the federal government purchased land from a seller who reserved mineral rights beneath the land.¹²⁴ The sales contract determined a period of prescription, after which the federal government would obtain the mineral rights.¹²⁵ Louisiana, however, adopted a statute saying that prescription periods for mineral rights in land contracts involving the United States were invalid.¹²⁶ Relying on choice-of-law cases emphasizing the need for uniformity of and finality in federal contracting, and the scarcity of federal funds, the Court elevated the contractual term over the state law, under what appeared to be federal common law: “A Congress solicitous of the interests of private vendors in the certainty of contract would hardly condone state modification of the contractual terms specified by the United States itself as vendee”¹²⁷

While this category of contractual preemption involves federal contracts, it is important to note that the arguments here do not depend on sovereign-shield-type arguments. Those arguments turn on the degree to which the contractor is identifiable with the federal government, and

¹²⁴ *Id.* at 582.

¹²⁵ *Id.* at 583.

¹²⁶ *Id.* at 584.

¹²⁷ *Id.* at 598–99; *see id.* at 594–99. Rubenstein notes that *Boyle* involved preemption by contract terms. Rubenstein, *supra* note 31, at 1182 (“[S]tate law was precluded from applying because it conflicted with contractual specifications agreed upon in an arms-length proprietary deal.”). *Boyle* did cite *Little Lake* in passing. *See Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988). However, while there is ambiguity, I would contend that *Boyle* falls more clearly within the sovereign-shield bucket. The Court did look to the contractual terms between the military contractor and the government, but the determinative factor was not the fact that there was a conflicting *contract* as in the cases I describe here, but the fact that the contract represented the instructions of the federal government to which the contractor was bound as a stand-in of a government official. *See id.* at 505 (“That liability may be styled one in tort, but it arises out of performance of the contract The present case involves an independent contractor performing its obligation under a procurement contract, rather than an official performing his duty as a federal employee, but there is obviously implicated the same interest in getting the Government’s work done.”). Indeed, the core of *Boyle*’s holding that I describe above turned on the degree of government control involved, rather than details of the contract. Rubenstein himself does not discuss *Little Lake*, though he recognizes that *Boyle* may also have invoked concepts relating to intergovernmental immunity. *See* Rubenstein, *supra* note 31, at 1178–82. Elengold and Glater similarly argue that *Boyle* fell into the immunity rather than preemption bucket. Elengold & Glater, *supra* note 4 (manuscript at 16 n.67) (noting that “[b]ased on our understanding of the history of these doctrines and our endeavor to unearth and mine the case law for relevant factors for application of derivative sovereign immunity defenses,” *Boyle* should be understood as an immunity case). That is not the case with *Little Lake* — indeed, there, then-Justice Rehnquist concurred separately, offering an intergovernmental immunity rationale. *See* 412 U.S. at 608 (Rehnquist, J., concurring).

That said, I freely admit that some dicta in *Boyle* suggest that contractual preemption has occurred. *See Boyle*, 487 U.S. at 507–09 (noting that in other hypothetical cases, where a “contractor could comply with both its contractual obligations and the state-prescribed duty of care . . . state law would [not] be pre-empted,” *id.* at 509). I am thus perfectly willing to concede that in *Boyle*-type situations, where the government exerts close control through contract, we may see both sovereign-shield *and* contractual-preemptive effects.

operating under its tutelage. In these cases, the arguments do not inquire into that issue at all — indeed, *Little Lake* did not even involve a contractor. Rather, the question is whether the contract has a term — no matter the discretion it provides — that gives it force independent of state law.

(b) *Preemption on Specific Issues.* — Situations involving preemption by entire contracts are more infrequent than cases where certain issues are preempted. In these contexts, the federal government rarely explicitly recognizes that the contract overrides state law. But the effect is the same. In other words, by repealing the state law, the federal statute effectively dictates that private contract rather than state law determines the duties between parties, at least as to certain issues.¹²⁸ In such situations, the government usually preempts state law over a certain *area*, effectively delegating to *any* private entity (not just government benefits contractors or self-funded employers) the ability to write contracts that chart a different course from state law, but *only with respect to that particular policy*.

¹²⁸ Professor Jonathan Nash's description of "null preemption" — a scenario where Congress preempts state law, but replaces it with no federal regulation — does not engage with privatization as I do. His focus is on government actors. Jonathan Remy Nash, *Null Preemption*, 85 NOTRE DAME L. REV. 1015, 1036 (2010) ("[T]he legislature, or an executive branch actor, could effect each of the two steps necessary for null preemption."); *id.* at 1038 (focusing on "the legislative and executive branches").

More applicable is Roderick Hills and Richard Primus's helpful discussion of what they call "frustration-of-purpose preemption." Primus & Hills, *supra* note 58 (manuscript at 62). Some scholars suggest that when Congress preempts states, and fails to regulate, it simply creates a "void" where, presumably, the market determines the duties of the parties. *See, e.g.*, Nash, *supra*, at 1018. But as Hills and Primus explain:

'[M]arket' is just a neutral-sounding word for the firm itself. In practice [such] preemption operates as a delegation of power to private firms It also delegates to regulated firms considerable practical power to affect whether the federal standards will be updated over time, because under-staffed federal agencies sometimes lack the personnel to collect and review data about adverse effects arising from the use of the firms' products

Primus & Hills, *supra* note 58 (manuscript at 62–63).

The Court has recently made an analogous observation. In *Murphy v. National Collegiate Athletic Ass'n*, 138 S. Ct. 1461 (2018), the Court explained: "When a State completely or partially repeals old laws banning sports gambling, it 'authorize[s]' that activity." *Id.* at 1474 (alteration in original). The definition of "authorization" is contextual — and depends on whether the state previously regulated in that area. The Court continued:

The concept of state 'authorization' makes sense only against a backdrop of prohibition or regulation. A state is not regarded as authorizing everything that it does not prohibit or regulate. No one would use the term in that way. For example, no one would say that a State 'authorizes' its residents to brush their teeth or eat apples or sing in the shower. We commonly speak of state authorization only if the activity in question would otherwise be restricted.

Id.

Consider the Airline Deregulation Act¹²⁹ (ADA), which preempts any “[s]tate . . . law . . . related to a . . . service of an air carrier.”¹³⁰ This displaced a slew of state regulation — including state consumer protection law, contract law, and environmental law.¹³¹ The Supreme Court has held that the ADA preempts plaintiffs’ suits against airlines under state law.¹³² As a result, the airlines’ duties to their passengers are determined by the airlines themselves: plaintiffs may “seek[] recovery solely for the airline’s alleged breach of its own, self-imposed undertakings.”¹³³ Private industry, rather than the states, determines what the legally enforceable duties are between the airline and its passengers. As California Deputy Solicitor General, I was one of the primary authors of a brief that argued that “[t]he States . . . share a compelling interest in ensuring that ADA preemption remains properly” limited as “[o]verly aggressive judicial interpretation of the ADA stymies states’ legitimate regulatory and enforcement efforts.”¹³⁴ As we explained, “state regulation in areas such as environmental protection, transportation for emergency services, professional licensing, privacy, employment discrimination, and contract . . . have been challenged as preempted under the ADA.”¹³⁵

Another example of this phenomenon is the Federal Arbitration Act¹³⁶ (FAA). The FAA states that an agreement to arbitrate “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”¹³⁷ In a series of highly contested, often 5–4, decisions in the last decade, the Supreme Court has read this language as preempting any state law that fails to “place[] arbitration contracts ‘on equal footing with all other contracts.’”¹³⁸ Many of these arbitration agreements prohibit the use of

¹²⁹ Pub. L. No. 95-504, 92 Stat. 1705 (1978) (codified as amended in scattered sections of 49 U.S.C.).

¹³⁰ 49 U.S.C. § 41713(b)(1).

¹³¹ See, e.g., *Nw., Inc. v. Ginsberg*, 572 U.S. 273, 276 (2014) (holding that the ADA displaces state doctrine of good faith and fair dealing).

¹³² See *id.*

¹³³ *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 228 (1995).

¹³⁴ Brief of California et al. as Amici Curiae Supporting Respondent at 1, *Nw., Inc.* (No. 12-462) (citing *People v. Delta Air Lines, Inc.*, No. CGC-12-526741 (Cal. Super. Ct. May 9, 2013) (holding that the ADA preempts state consumer privacy protections as applied to an airline’s mobile phone application); *Huntleigh Corp. v. La. State Bd. of Priv. Sec. Exam’rs*, 906 F. Supp. 357, 362 (M.D. La. 1995) (holding that the ADA preempts the Louisiana Private Security Regulatory and Licensing Law as applied to a contractor responsible for airport security)).

¹³⁵ *Id.* at 23–24; see *id.* at 24 n.12 (citing relevant cases); see also *infra* pp. 2010–11 for a fuller discussion.

¹³⁶ 9 U.S.C. §§ 1–16. As Deputy Solicitor General, I also worked on issues related to the Federal Arbitration Act.

¹³⁷ 9 U.S.C. § 2.

¹³⁸ *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015) (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)); see also *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1431

class litigation and class arbitration,¹³⁹ leaving consumers effectively powerless — individual litigants cannot hire representation to fight a fifty-dollar cellphone bill.

Nonetheless, the Court has held that the Act displaces state law in favor of arbitration contract provisions, including in cases of state court interpretations of contract,¹⁴⁰ judicial application of state unconscionability doctrine,¹⁴¹ and state prohibitions of class waivers in arbitration agreements,¹⁴² among others. While most of the scholarship here focuses on issues of consumer protection, at least some scholars recognize that privatization plays a role as well.¹⁴³ As with the ADA, private contract displaces state law. More than this, the locus of dispute resolution is itself privatized, moving from courts to privatized arbitration bodies: “[C]ompanies have invoked the [FAA] to create a parallel system of civil procedure for consumer and employment cases.”¹⁴⁴ Thus, once Congress passes a federal statute preempting state regulation, its delegation can span a spectrum from formal delegation, subject to agency supervision, to informal, and anywhere in between.

2. *Concept and Doctrine.* — This subsection answers two questions: what level of discretion do private firms have to displace state law under contractual preemption, and relatedly, how does contractual preemption fall conceptually within our understanding of preemption doctrine.

Contractual preemption offers firms a great deal of discretion — indeed, private contract, rather than federal law, does much of the heavy lifting. Consider the *Coventry* context. In a previous case, involving a near-identical situation to *Coventry*, then-Judge Sotomayor suggested that the federal statute did not preempt the law by itself — rather, on its face, the federal statute said “[t]he terms of any *contract* . . . preempt [conflicting] State or local law.”¹⁴⁵ As then-Judge Sotomayor noted: “There is no constitutional basis for making the terms of contracts with private parties . . . ‘supreme’ over state law.”¹⁴⁶

Next, take the Court’s decision in *AT&T Mobility LLC v. Concepcion*,¹⁴⁷ which, a decade ago, heralded its new approach to the

(2019) (Kagan, J., dissenting); *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17, 18 (2012) (per curiam); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

¹³⁹ See, e.g., *DIRECTV*, 136 S. Ct. at 466.

¹⁴⁰ *Id.* at 471.

¹⁴¹ See *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 71–72 (2010).

¹⁴² *Concepcion*, 563 U.S. at 340, 352.

¹⁴³ Horton, *supra* note 10, at 480.

¹⁴⁴ *Id.* at 437.

¹⁴⁵ *Empire HealthChoice Assurance, Inc. v. McVeigh*, 396 F.3d 136, 143 & n.5 (2d Cir. 2005) (quoting 5 U.S.C. § 8902(m)(1)).

¹⁴⁶ See *id.* at 143. Rubenstein raises identical concerns. Rubenstein, *supra* note 31, at 1183.

¹⁴⁷ 563 U.S. 333, 341 (2011). It bears noting that scholarship has historically treated these cases, where a statute preempts state law without creating a federal regulatory scheme, as involving so-

Federal Arbitration Act. That decision concerned an arbitration contract provision that prohibited consumers from proceeding against companies as a class.¹⁴⁸ California law prohibited such class arbitration waivers, as they would prevent consumers from banding together and proceeding against AT&T.¹⁴⁹ The Supreme Court held such law preempted¹⁵⁰ — but only because the arbitration contract at issue contained a class arbitration waiver. But for AT&T's decision to use a class arbitration waiver, state law would survive. The ERISA context presents a similar scenario — but for a firm's decision to self-fund their insurance plan, a consumer's insurance benefits would be state law determined. The duties of the parties are determined by private contractual arrangements, rather than state prescription; the former displaces the latter.

Indeed, in contractual-preemption contexts, private firms have *discretion* as to whether state law should be displaced. They can choose, for example, whether or not to include language in the contract that displaces state law. In sovereign-shield contexts, by contrast, immunity relies on the fact that the firm *lacks* discretion; it is federal policy and decisionmaking that determines whether the contractor is immune from suit.¹⁵¹

Notably, while the only judicial qualm regarding the discretion of firms was raised by then-Judge Sotomayor, she was considering a context where the government engages in formal contracting. But her concern holds less force when it comes to such government contracts — which are thus closer to sovereign-shield-type situations. In the *Coventry* case, for example, Congress formally stated that federal contracts preempted state law.¹⁵² The contract was then negotiated by the federal Office of Personnel Management — and like all contracts, would have been subject to federal agency review.¹⁵³ But at the less formal end of the spectrum, there is *no* federal action. The contracts AT&T negotiates with its customers, whose arbitration provisions displaced California law, are definitively not federal law. Private discretion there is at its zenith.

called “deregulatory preemption,” see generally Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1181–83 (2018) (describing this phenomenon in American cities); Richard Briffault, Essay, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 2014 (2018), or “null preemption,” Nash, *supra* note 128, at 1017. I depart from these scholars, however, in arguing that it is not that regulation disappears, but rather, that state regulation is displaced by private contract.

¹⁴⁸ *Concepcion*, 563 U.S. at 336.

¹⁴⁹ *Id.* at 340.

¹⁵⁰ *Id.* at 352.

¹⁵¹ See *supra* pp. 1959–60.

¹⁵² *Coventry Health Care of Mo., Inc. v. Nevils*, 137 S. Ct. 1190, 1194 (2017); 5 U.S.C. § 8902(m)(1).

¹⁵³ See *Coventry*, 137 S. Ct. at 1195 (citing 5 U.S.C. §§ 8901–8913).

That point raises a second question. Preemption is a creature of the Constitution. If there is “no constitutional basis” for private arrangements displacing state law, then it is unclear that such purported displacement of state law counts as preemption at all — and perhaps rather than contractual “preemption” I should use the term contractual “displacement” of state law.

Recall from Part I that for preemption to occur, there must be some federal action that counts as law — either Congress passes a statute, or an agency takes some action that counts as law.¹⁵⁴ Only such law counts as “the supreme Law of the Land,” which, under the Constitution, preempts state law.¹⁵⁵ If the private arrangements here do not count as law, then even if they somehow displace state law, they should not count as “preemption” as a formal matter as then-Judge Sotomayor suggested — especially in cases where entities have greater discretion.

Whether or not such private action counts as preemption as a formal matter is, nonetheless, practically moot as not a single Justice on the Court shares this concern.¹⁵⁶ As Justice Ginsburg held on behalf of a unanimous Court in *Coventry*, “the statute, not a contract, strips state law of its force”; Justice Sotomayor did not write separately.¹⁵⁷ The same is true about the Federal Arbitration Act. Indeed, as Justice Ginsburg explained for the Court, “[m]any other federal statutes preempt state law in this way, leaving the context-specific scope of preemption to contractual terms [T]he Federal Arbitration Act . . . preempt[s] state laws that . . . interfere with [arbitration] contracts. This Court has several times held that those statutes preempt state law.”¹⁵⁸ This aside is all the more remarkable since Justice Ginsburg has largely rejected the Court’s holdings that arbitration contracts can displace state law.¹⁵⁹

To conclude, then, I follow the Supreme Court in using the term “preemption” here, rather than displacement, or preemptive effects. But I also believe that this shows the conceptual precariousness of “preemption” when we bring private entities into the mix.

¹⁵⁴ See *supra* notes 37–40 and accompanying text.

¹⁵⁵ See U.S. CONST. art. VI, cl. 2.

¹⁵⁶ Even Justice Sotomayor did not reiterate her concerns from *Empire HealthChoice Assurance, Inc. v. McVeigh*, 396 F.3d 136 (2d Cir. 2005), in *Coventry*, though they seem equally applicable. See *supra* notes 145–46 and accompanying text.

¹⁵⁷ *Coventry*, 137 S. Ct. at 1198. While Justice Thomas did write a concurring opinion, he joined the Court’s opinion and focused his concerns on the expansion of executive power rather than preemption or privatization. *Id.* at 1199–200 (Thomas, J., concurring). Justice Gorsuch took no part in the decision. *Id.* at 1199.

¹⁵⁸ *Id.* at 1198–99 (majority opinion) (citations omitted).

¹⁵⁹ See *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015) (Ginsburg, J., dissenting); see also *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1420 (2019) (Ginsburg, J., dissenting); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1633 (2018) (Ginsburg, J., dissenting); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 357 (2011) (Breyer, J., dissenting, joined by Ginsburg, J.).

C. Incentivized Displacement

Contractual delegation involves a top-down decision by the federal government that private entities should have the discretion to displace state law on certain issues through contract. It has been characteristic of federal behavior long before the Trump Administration. However, in recent years, private entities have played a role in displacing state law in novel ways. The federal government may use private entities to displace state programs through incentives — an approach that was realized most fully in the Trump Administration. Notably, given the novelty of this approach, the Administration took these steps mostly in fairly obscure regulatory areas.

1. *Mechanisms and Examples.* — There are potentially two ways in which incentivized displacement might take place: First, by transferring money or resources to private entities to get them to carry out preferred policies. And second, possibly, by imposing on firms costs that incentivize them to undermine state policy.

(a) *Carrots.* — First, the federal government may incentivize private entities to undermine the operative effect of state programs by offering them carrots: subsidies, grants, or other kinds of sweeteners.

The simplest example involves education. Many states are trying to decrease state support of privatized education programs. California, for example, has limited charter schools based (fairly or unfairly) on the perception that they are simply part of a broader privatization and profiteering phenomenon.¹⁶⁰ Charter schools are often run by private entities, which are frequently exempt from the requirements that apply to public agencies.¹⁶¹ Further, some argue that charter schools compete with public schools — engaging in a process called “cream-skimming,” — taking the best students, and leaving more expensive students in public schools.¹⁶² On this account, this makes public schools less competitive, enhances the problems they experience, and diminishes the scope of their activities.

The Trump Administration, however, consistent with its privatization mandate, sought to give a leg up to charter and private schools. First, in July 2019, it announced a program that allows charter schools to get direct federal funding, whereas earlier, the schools had to go through state agencies.¹⁶³ In this way, private schools can flourish even

¹⁶⁰ See Posnick-Goodwin, *supra* note 18; Blume, *supra* note 2.

¹⁶¹ Metzger, *supra* note 26, at 1388–91; Peter Greene, *Charter Schools Are Not Public Schools*, FORBES (Feb. 2, 2019, 3:10 PM), <https://www.forbes.com/sites/petergreene/2019/02/02/charter-schools-are-not-public-schools/#1c96764c6832> [<https://perma.cc/CH74-XU6T>].

¹⁶² Forman, *supra* note 19, at 840.

¹⁶³ Applications for New Awards; Expanding Opportunity Through Quality Charter Schools Program (CSP), 84 Fed. Reg. 31,852 (July 3, 2019).

if the relevant states want to do away with government support for private schools.

Second, President Trump repeatedly pushed legislation and initiatives that would establish private education vouchers that would effectively subsidize private schools.¹⁶⁴ Allocating benefits to competing private schools, as it cuts funding to traditional public schools, harms the latter, limiting the quality and number of enrolled students, and therefore limiting the reach of state education programs.

Third, in recently filed litigation, states have alleged that the Department of Education has promulgated guidance that would divert millions of dollars of coronavirus relief funding from public schools to private schools.¹⁶⁵ A set of related plaintiffs, including the NAACP, school districts, and individual students, alleged that this “coercive set of restrictions intended to illegally divert federal funds from public to private education institutions”¹⁶⁶ was “particularly troubling because private schools, unlike public schools, were already eligible for forgivable loans under the Payroll Protection Plan — meaning [the administrative action] would have inexplicably doubled-up federal aid to private schools at the expense of America’s public school students.”¹⁶⁷

Subsidies are not the only way in which the federal government can encourage displacement of state programs. Take the example of health data networks. As a related article describes, the federal government provided significant assistance to state health data networks in the past.¹⁶⁸ As of 2016, the federal government has shifted its subsidies — from assisting states to assisting private data networks to compete with those of states — and provided a monopoly-oversight authority over health data networks with a single industry-based private entity.¹⁶⁹ This privately run, federally backed monopoly is thus poised to displace state efforts in this field.¹⁷⁰

(b) *Sticks*. — So far, I have offered examples where the federal government has transferred money or resources to a private entity to carry out preferred federal policies, instead of carrying out the policies itself.

¹⁶⁴ See OFF. OF MGMT. & BUDGET, *supra* note 19, at 40; Stratford, *supra* note 20; Press Release, U.S. Dep’t of Educ., Trump Administration Unveils Plan for Historic Investment in America’s Students Through Education Freedom Scholarships (Feb. 28, 2019), <https://www.ed.gov/news/press-releases/trump-administration-unveils-plan-historic-investment-americas-students-through-education-freedom-scholarships> [<https://perma.cc/2YPL-4N6V>] (citing Education Freedom Scholarships and Opportunity Act, S. 634, 116th Cong. (2019)).

¹⁶⁵ See *supra* notes 20–21 and accompanying text; Complaint for Declaratory and Injunctive Relief, *supra* note 21, at 2–3.

¹⁶⁶ Complaint for Declaratory and Injunctive Relief at 7, NAACP v. DeVos, No. 20-cv-01996 (D.D.C. July 22, 2020).

¹⁶⁷ *Id.* at 5.

¹⁶⁸ Konnoth, *supra* note 3 (manuscript at 19).

¹⁶⁹ *Id.* (manuscript at 35–38).

¹⁷⁰ See *id.* (manuscript at 38).

That seems to fall comfortably within the definition of privatization. And those policies displace state policies. Other incentives are possible: the federal government can also *penalize* firms in ways that displace state policies. What should we think of those? Consider an example.

Trump Administration appointees to the Federal Energy Regulatory Commission (FERC) have taken steps that counteract clean energy programs that states have put into place. Under the Federal Power Act,¹⁷¹ states have general authority to determine whether their energy comes from clean energy sources or not — so-called “resource decisionmaking.”¹⁷² Some states have sought to increase the use of renewable energy resources, for example, by instituting subsidies such as credits for zero greenhouse gas emissions for energy production.¹⁷³

Energy producers of all kinds offer bids to supply energy on various kinds of energy markets.¹⁷⁴ At issue here are so-called capacity markets for what is, effectively, buffer energy capacity: energy buffers are required if, for example, a factory suddenly has unexpected demand for energy.¹⁷⁵ State subsidies meant that renewable producers were offering lower prices than those of coal producers on these markets.¹⁷⁶

In 2019, FERC explicitly decided to counteract this state policy.¹⁷⁷ However, it does not have statutory authority to forbid states from enacting policies regarding energy production. Nonetheless, while states have the discretion to determine where their power comes from and set retail market rates, FERC has the power to set rates that are “just and reasonable” on wholesale markets.¹⁷⁸ Over a dissent, and opposition from several Democratic senators, FERC held that energy producers

¹⁷¹ 16 U.S.C. §§ 791a–828c.

¹⁷² See *Calpine Corp. v. PJM Interconnection, LLC*, 169 FERC ¶ 61,239, para. 11 (Dec. 19, 2019) (Glick, dissenting).

¹⁷³ *Id.* at para. 19 (majority opinion); see also Felix Mormann, *Market Segmentation vs. Subsidization: Clean Energy Credits and the Commerce Clause's Economic Wisdom*, 93 WASH. L. REV. 1853, 1863–64 (2018) (“RPS [renewable portfolio standards] policies generally require electric utility companies to source a certain share of the electricity they sell to end-users from renewable sources of energy. Utilities prove their compliance with these requirements by submitting to their regulator RECs [renewable energy credits] in the amount of the utility’s share of sales that the RPS requires to come from renewables. Eligible power plant operators normally receive one such credit for every megawatt hour of electricity generated from renewable resources. Nonutility power generators can sell their RECs to utilities in order to receive a premium on top of their income from power sales in the wholesale electricity market.” (footnotes omitted)).

¹⁷⁴ These include, for example, both wholesale and capacity markets. See *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1293 (2016).

¹⁷⁵ *Id.*; Roberts, *supra* note 14.

¹⁷⁶ Roberts, *supra* note 14.

¹⁷⁷ *Id.*; see *ISO New Eng. Inc.*, 162 FERC ¶ 61,205, para. 22 (Mar. 9, 2018). “Absent a showing that a different method would appropriately address particular state policies, we intend to use the MOPR [Minimum Offer Price Rule] to address the impacts of state policies on the wholesale capacity markets.” *Id.* (emphasis added).

¹⁷⁸ *Hughes*, 136 S. Ct. at 1292. Note that not all of the country relies on organized wholesale markets for energy production.

receiving state subsidies had to offer their products at a minimum price.¹⁷⁹

In other words, FERC is seeking to partially undo state policy through price controls. States instituted policies that made renewable energy production cheap. This allowed renewables to offer their products at cheaper prices on certain energy markets. Without federal intervention, these cheaper prices would have meant that energy utilities would purchase their energy from renewables rather than coal sources.

However, with federal price controls, explicitly targeted at state subsidization for renewable energy, state policies about where the energy comes from are effectively nullified. As the dissenting, Obama-appointed FERC Commissioner wrote, “the Commission is attempting to establish a set of price signals . . . that will supersede state resource decisionmaking and better reflect the Commission’s policy priorities. It is hard to imagine how the Commission could much more directly target or aim at state authority over resource decisionmaking.”¹⁸⁰ This approach “block[s] any state effort to economically regulate the externalities associated with electricity generation.”¹⁸¹ In other words, even though FERC does not formally preempt state policy, it denies the state policy operative effect.

The problem with this scenario is that it is unclear whether it counts as privatization. After all, the government is not paying private entities in money or kind to do something — carrot-type incentives. Rather, it seems to be *regulating* private entities, deliberately imposing restrictions and regulations for following state policy.¹⁸²

The problem here exposes the conceptual limitations of privatization. Stick-type incentives allow federal entities to displace state regulation they cannot outright preempt. For example, if a federal agency lacks the statutory authority to preempt state law, it might simply make life difficult for firms that follow state policy (as did FERC). Thus, rather than doing the dirty work of preemption itself, the federal government once more “convinces” firms to act in ways that further federal policy — federal policy, in other words, is being carried out through private action at the federal government’s behest. At the end of the day, if someone does your dirty work for you either because you have paid

¹⁷⁹ *Calpine Corp. v. PJM Interconnection, LLC*, 169 FERC ¶ 61,239, para. 45 (Dec. 19, 2019) (Glick, dissenting) (“To implement this scheme, PJM and the Independent Market Monitor will need to become the new subsidy police, regularly reviewing the laws and regulations of 13 different states and D.C. — not to mention hundreds of localities and municipalities — in search of any provision or program that could conceivably fall within the Commission’s definition of State Subsidy.”); see Roberts, *supra* note 14.

¹⁸⁰ *Calpine Corp.*, 169 FERC at para. 12 (Glick, dissenting).

¹⁸¹ *Id.* at para. 17.

¹⁸² Intent seems a fair barometer: as one *Harvard Law Review* Note explains, purposivism is alive and well in few areas of law, but preemption is one of them. While this is not traditional preemption as the next subsection describes, I believe that it is close enough. Note, *Preemption as Purposivism’s Last Refuge*, 126 HARV. L. REV. 1056, 1056 (2013).

them money or held a gun to their head, you have still outsourced the job. Thus, while this may not be privatization, I believe that it comes close.

2. *Concept and Doctrine.* — The questions at stake in this category raise three questions regarding state law displacement. First, what level of discretion do firms have to displace state law? Second, when can we reasonably say that state law has been displaced? And third, how does this fit within current doctrinal understandings of state law displacement?

First, as with contractual preemption, firms' discretion can vary. Where federal incentives are limited, firms may be able to eat their losses and still follow state policy, without losing market share.¹⁸³

The second, harder question, is whether the federal government is seeking to displace state law. My position is that any federal action that departs from the status quo, that benefits private entities over states, counts as displacement.

Now, some might argue that we must consider a different baseline than the status quo: What if the federal government is simply remedying subsidies it has *already* provided to state schools or health data networks? Then it is not displacing state programs, but rather, remedying the finger it placed on the scales on behalf of states. But the federal government may have many other regulatory benefits that it provides states apart from subsidies — or that it has failed to provide states. I believe that coming to normative agreement as to what an appropriate baseline should be, departure from which should count as “displacing” or “enhancing” state law, is not possible. The status quo is the better baseline.

From the other side, some might argue that I am being insufficiently cognizant of states' rights. A withdrawal of support, they would argue, should count as displacing state law, even if the federal government does not then throw its support behind private entities. On this account, *South Carolina v. Baker*,¹⁸⁴ in which the Court addressed a federal statute that took away tax-advantaged status for state bonds¹⁸⁵ — thereby, presumably undermining state programs — would count as a kind of incentivized preemption. Federal action would result in individuals relying less on state bond programs for their investments, and moving toward private bond programs, unless the states increased the interest they offered. My response — which is more tentative than that to the prior objection — is that the federal government did not take action to advantage, or engage in any way with, private entities here, so *private*

¹⁸³ Some may say that since the federal government has induced action, it limits the firms' options more. I discuss how contractual preemption, however, also creates incentives at the end of this section.

¹⁸⁴ 485 U.S. 505 (1988).

¹⁸⁵ *Id.* at 507.

entities did not displace the state program. Unlike the FERC example above, the federal government did not act on private entities at all. Nonetheless, if that objection is unsatisfying, and readers prefer to treat *Baker* as a case of incentivized preemption, since the federal government's action, through incentives, displaced a state program relative to private lending, that does not affect my overall argument.

The third question is how this theory of displacement fits within existing doctrines of state law displacement. The short answer is — it doesn't, at least not comfortably. The main state law–displacement doctrine is preemption. But here, the law itself is not formally invalidated. Rather, state policy is undermined because a state program would be crowded out by federal engagement in a field.¹⁸⁶ Accordingly, as a formal matter, no court would hold that states are preempted from also providing services.¹⁸⁷ Rather, it is the market (in the sense of the citizen-consumers of services) that would have displaced the state government, rather than formal congressional pronouncement.¹⁸⁸

Nonetheless, some might argue that what is at issue here is not much further from what the Supreme Court has already called preemption in the contractual context I describe above. There, the federal government did not declare state law invalid. Rather, its policies ceded space to *private entities* to, by contract, act in ways that undermined state law.¹⁸⁹

¹⁸⁶ Scholars have mainly discussed the “crowd out” theory in the context of taxation. See David Freeman Engstrom, *Drawing Lines Between Chevron and Pennhurst: A Functional Analysis of the Spending Power, Federalism, and the Administrative State*, 82 TEX. L. REV. 1197, 1241 n.178 (2004). On this account, federal taxation crowds out a state's ability to tax its citizens, preventing states from providing services. However, as Professor David Freeman Engstrom notes, “an equally plausible explanation for any ‘crowd-out’ phenomenon is that federal policymaking crowds out state-level taxation by occupying the field of desirable public services. If federal-level programs fulfill the democratic policy preferences of the citizenry, then demand for additional public services cannot justify a greater state-imposed tax burden.” *Id.* This is the conceptualization of crowd-out theory to which I refer.

¹⁸⁷ I am also assuming here that a court would not find field preemption exists.

¹⁸⁸ The displacement that occurs may exceed that of commandeering. Cf. Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629, 1634 (2006) (noting that when federal regulation displaces state regulation in traditional preemption, commandeering might present less of an intrusion on state sovereignty).

¹⁸⁹ I offer contractual preemption as an analogy, but unlike in the contractual delegation scenario, the Supreme Court has offered limited direct guidance here. The closest the Court may have come to discussing this point is in *New York v. United States*, 505 U.S. 144 (1992), which is best known for striking down a federal provision that required states to regulate nuclear waste disposal in a certain way, or to take title to the waste. *Id.* at 153, 188. The Court explained that this provision essentially gives states the choice of being ordered by Congress to carry out federal regulation, or “commandeer[ed] . . . into the service of federal regulatory purposes,” by taking title to the waste. *Id.* at 175. My focus, however, is a provision that the Court upheld, which gave states the choice between regulating waste, or being subject to federal surcharges and access restrictions. *Id.* at 153. The Court agreed that Congress had the power to regulate the waste itself, and therefore, to charge states the surcharges and apply the restrictions. *Id.* at 174. This regulation was constitutional as Congress has the “power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation.” *Id.* at 167. In such a scenario,

Here, not only has the federal government created *space* for private entities to act in ways inconsistent with state programs, but it has also induced such behavior through sticks and carrots.¹⁹⁰

The big difference, however, is that unlike in the contractual-preemption context, the state law or program still remains *formally* valid. It is all very well that the state's program may end up ineffectual — that its clean energy programs might fail or its schools may end up empty. But the laws that administer the energy subsidies and education programs remain formally valid state law. A response to this is that the functional effect of the federal action is the same as any federal action invalidating the state law.

How one comes down on this objection probably depends on one's view on deeper questions about the nature of law. Legal philosophers have questioned whether a law that has no practical effect because, for example, the state is unable to enforce it, still counts as law.¹⁹¹ Some philosophers conclude that the formal existence of law suffices; others argue that for a law truly to count as existing it must have practical and operational effect.¹⁹² If no one complies with the law, or if the law has no functional effect, then it no longer exists. The quandary here is a version of that conflict: In formal terms, the law continued to exist, even though no one complied with it. However, if the state program has no effect, because circumstances beyond the state's control have displaced it, then it is fair, on some understandings of the law at least, to argue that the program does not exist.¹⁹³

the citizens of a state “may continue to supplement that program to the extent state law is not preempted.” *Id.* at 168. While it is likely that the Court was using the term preemption in the formal sense — that is, Congress has passed a law that explicitly or implicitly prohibits the state from acting in a certain area — it does not make it clear.

¹⁹⁰ FERC adjudications and notice-and-comment rulemaking have the force of law. A similar situation might arise when the federal government creates a program such as Medicare that — while agency-run to a large degree, *see* Bagley, *supra* note 73, at 527 (describing major private involvement) — may displace state-provided services. However, to my knowledge, the federal government usually intervenes when a state has not carried out a task, requiring federal intervention: no state has ever challenged a federal agency in taking on a task that the state did not already have a stake in. Medicare, for example, was meant to address the problems seniors experienced from lacking healthcare. *Id.* at 521.

¹⁹¹ *See* JOSEPH RAZ, *AUTHORITY OF THE LAW* 85–86 (2d ed. 2009) (“At the one extreme is the claim that a law created in the appropriate manner exists and is valid; its efficacy or inefficacy does not affect its existence and validity . . .” *Id.* at 85. On the other “is the argument that laws exist because and to the extent that they are socially accepted and followed; social customs are laws even if not enacted, whereas enacted law is not valid if it has no roots in social practices.” *Id.* at 86.).

¹⁹² *See id.*

¹⁹³ This functional view of what state law *is* when it comes to preemption also creates symmetry. When courts examine whether and how a state law undermines federal law, they do not look simply at whether Congress formally rescinded state law — that is, express preemption. Nor do they look only to the words of the congressional statute. Courts take a purposivist, functional approach to see whether, as a practical matter, the state law harms federal goals. If it does, courts conclude that the state and federal laws clash, and in that clash, the state law must give way as a formal matter.

Whatever one's views on these jurisprudential questions — and I venture none of my own here — under Supreme Court doctrine at least, I very much doubt this scenario counts as preemption. In a case decided the year after *Coventry*, *Murphy v. NCAA*,¹⁹⁴ the Court appears to have taken a more formalistic view of preemption. The Court indeed quotes *Coventry* for the proposition that preemption does not require certain kinds of formalism.¹⁹⁵ But addressing the question of whether Congress forbade states from authorizing gambling “by law,” the Court noted that preemption “simply provides ‘a rule of decision,’” presumably to courts, to follow federal law rather than state law.¹⁹⁶ Thus, at the risk of overreading *Murphy*, it is possible to argue that where there is no formal federal provision — administrative or legislative — that instructs a court to disregard a state provision, then no preemption may have occurred.

At the very least, however, it seems clear that incentivized displacement does not easily fit into the concept of preemption.

D. Delegated Preemption

So far, I have outlined situations where the federal government has passed on increasing levels of control over the preemptive act to the private entity. At its most extreme, the federal government may delegate preemptive authority to private entities with degrees of oversight that go from minimal, to effectively none at all.

i. Mechanisms and Examples. — Consider the Securities Exchange Act of 1934.¹⁹⁷ The Act sets up so-called self-regulatory organizations, namely, registered national securities associations such as the Financial Industry Regulatory Authority (FINRA).¹⁹⁸ FINRA has important regulatory powers, such as administering exams that qualify individuals as stockbrokers, overseeing firms in the industry, and expelling members for wrongdoing.¹⁹⁹ While the Securities and Exchange Commission

So too here. Where the federal and state laws clash, and the state law gives way as a practical matter, it should also give way as a formal matter. See Daniel J. Meltzer, *Preemption and Textualism*, 112 MICH. L. REV. 1, 9 (2013) (noting that it would be “unworkable for judges to rely on a purely textual approach” in a preemption context).

¹⁹⁴ 138 S. Ct. 1461 (2018).

¹⁹⁵ *Id.* at 1480 (“[W]e do not require Congress to employ a particular linguistic formulation when preempting state law.” (quoting *Coventry Health Care of Mo., Inc. v. Nevils*, 137 S. Ct. 1190, 1199 (2017))).

¹⁹⁶ *Id.* at 1479 (quoting *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1383 (2015)).

¹⁹⁷ 15 U.S.C. §§ 77a–78pp.

¹⁹⁸ *Id.* § 780-3(b).

¹⁹⁹ *In re Series 7 Broker Qualification Exam Scoring Litig.*, 510 F. Supp. 2d 35, 36 (D.D.C. 2007), *aff'd*, 548 F.3d 110 (D.C. Cir. 2008). FINRA oversees “more than 624,000 brokers across the country.” *About FINRA*, FIN. INDUS. REGUL. AUTH., <https://www.finra.org/about> [<https://perma.cc/88XB-J27M>]. In 2015, FINRA enforcement raised \$93.8 million in fines. *Statistics*, FIN. INDUS. REGUL. AUTH., <https://www.finra.org/media-center/statistics>

(SEC) putatively exercises close oversight over the rules FINRA develops for the industry,²⁰⁰ scholars suggest that the SEC exerts deferential review, and that FINRA has great autonomy in regulating its industry.²⁰¹ And of course, FINRA self-regulation has precedence over state law. Plaintiffs have sued FINRA and its predecessors for a host of harms under state law such as lost wages from errors administering qualification exams.²⁰² They have also claimed protections and privileges under state law, such as procedural protections in disputes,²⁰³ and the right to maintain personal trading accounts.²⁰⁴ Courts have held that the Act — or in several cases, the FINRA rules themselves, adopted by a private self-regulatory organization — preempts state law.²⁰⁵

The finance context is not the only field in which the federal government has taken over regulatory authority from states and formally given it to private industry. In the energy context, for example, the federal government began to preempt existing state law in 1978,²⁰⁶ in 2005, it devolved some regulatory authority to a private entity.²⁰⁷ Yet another example is the ADA. Recall the statute preempted state laws in a range of areas. In place of state regulation, however, in addition to effectively deferring to private contracts, as I describe above, the Federal Aviation Administration has allowed airlines to police themselves under a self-certification program for plane safety, which has allegedly proved disastrous.²⁰⁸

[https://perma.cc/HUQ2-4UEP]. In 2016, FINRA exacted over \$170 million in fines, though during the years of the Trump Administration the number has dropped to less than half that. *See id.*; *see also* Jonathan Macey & Caroline Novogrod, *Enforcing Self-Regulatory Organization's Penalties and the Nature of Self-Regulation*, 40 HOFSTRA L. REV. 963, 974 (2012) (noting that FINRA's expulsion power is very important).

²⁰⁰ Macey & Novogrod, *supra* note 199, at 984 n.118.

²⁰¹ Hammond, *supra* note 82, at 1736; *see also* *Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc.*, 191 F.3d 198, 206–07 (2d Cir. 1999) (noting that FINRA (then known as the National Association of Securities Dealers) action in that case could not be attributed to the government).

²⁰² *See In re Series 7*, 510 F. Supp. 2d at 36–37.

²⁰³ *See, e.g., Credit Suisse First Bos. Corp. v. Grunwald*, 400 F.3d 1119, 1128 (9th Cir. 2005); *Jevne v. Superior Ct.*, 111 P.3d 954, 957–58 (Cal. 2005).

²⁰⁴ *See, e.g., Bloemendaal v. Morgan Stanley Smith Barney LLC*, No. EDCV 10-1455, 2011 U.S. Dist. LEXIS 61772, at *16, *24 (C.D. Cal. May 23, 2011).

²⁰⁵ *Grunwald*, 400 F.3d at 1128 (“SRO rules approved by the Commission preempt conflicting state law.”); *Bloemendaal*, 2011 U.S. Dist. LEXIS 61772, at *17 (“SRO rules may preempt state law.”); *In re Series 7*, 510 F. Supp. 2d at 49; *Jevne*, 111 P.3d at 972.

²⁰⁶ *See FERC v. Mississippi*, 456 U.S. 742, 772 (1982) (Powell, J., concurring in part and dissenting in part) (citing Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117).

²⁰⁷ Hammond, *supra* note 82, at 1742 (citing Energy Policy Act of 2005, 16 U.S.C. § 8240(c)(2)(D)).

²⁰⁸ Aaron C. Davis & Marina Lopes, *How the FAA Allows Jetmakers to “Self-Certify” that Planes Meet U.S. Safety Requirements*, WASH. POST (Mar. 15, 2019, 9:25 PM), https://www.washingtonpost.com/investigations/how-the-faa-allows-jetmakers-to-self-certify-that-planes-meet-us-safety-requirements/2019/03/15/96d24d4a-46e6-11e9-90fo-occfeec87a61_story.html [https://perma.cc/4BZE-XYZT].

As noted, in these contexts, agencies have nominal review authority although “agency practice indicates that the power of review is rarely exercised with sincere diligence.”²⁰⁹ However, the agency may also *disclaim* the ability to review a private decision to preempt.

Thus, as one forthcoming article by Jennifer Danis and Michael Bloom describes, the federal government has delegated to private entities the decision as to whether to take state land for federally approved projects.²¹⁰ For example, the Natural Gas Act²¹¹ (NGA) permits the “holder of a certificate of public convenience” to condemn land it deems necessary to build a natural gas pipeline.²¹² Once FERC grants a certificate, it is then up to the private entity as to whether it wishes to take state land — or so FERC has held.²¹³ Indeed, importantly, FERC has disclaimed any authority to itself review the private entity’s decision regarding a state landtaking, as the statute only gives FERC the power to issue a certificate, but leaves to the private entity the decision as to whether to take state land.²¹⁴ Courts have largely disallowed such privatized takings on sovereign immunity grounds, but litigation is ongoing.²¹⁵

Some might suggest that taking of state land does not clearly involve preempting or displacing state policy, though it clearly affects state policies regarding land use. Indeed, the Federal Power Act, unlike the NGA, precludes private taking when state law establishes the land as a “park, recreation area or wildlife refuge.”²¹⁶ This suggests, according to FERC, that the NGA allows private entities to displace certain state conservation efforts; the FPA does not.²¹⁷

One could, of course, imagine a range of other possibilities closer to traditional forms of preemption. Private entities may not be entirely delegated the power to preempt, but may play an advisory role, or have other responsibilities in a variety of government organizations, through which they can influence the scope of preemption ultimately employed.

2. *Concept and Doctrine.* — The level of discretion firms have varies, as I describe above. Whether this counts as preemption in turn depends on what the federal government can validly do. To be sure, in

²⁰⁹ Cooper, *supra* note 80, at 1462; *see also* Solomon & Zaring, *supra* note 80, at 1104 (“[G]overnance by deal allows the Executive to act decisively without broader participation, and hence with a higher chance that the policy incorrectly represents the popular will.”).

²¹⁰ Danis & Bloom, *supra* note 24 (manuscript at 1).

²¹¹ 15 U.S.C. §§ 717–717z.

²¹² *Id.* § 717f(h).

²¹³ PennEast Pipeline Co., 170 FERC ¶ 61,064, para. 25 (Jan. 30, 2020).

²¹⁴ Danis & Bloom, *supra* note 24 (manuscript at 32).

²¹⁵ *See In re PennEast Pipeline Co.*, 938 F.3d 96, 113 (3d Cir. 2019), *cert. granted*, No. 19-1039, 2021 WL 357257 (U.S. Feb. 3, 2021).

²¹⁶ 16 U.S.C. § 814.

²¹⁷ *PennEast Pipeline Co.*, 170 FERC at paras. 42–43.

many of the cases I describe above, as in the FINRA context, courts describe what is happening as preemption.²¹⁸ That may turn on the level of delegation — if there is at least some rubber-stamp agency authority, the displacement of state law may count as preemption; if not it is not validly preemption. The courts have not been clear, and the Supreme Court has not pronounced on the matter.

Whether the action involved counts as preemption relates to the question of whether the federal government can delegate preemptive power. Recall from Part I that preemption can only occur when the federal government acts with force of law.²¹⁹ Does a private entity then “make law” on behalf of the federal government that can preempt state programs and policy? On that too, there is limited guidance, and I conclude as I do in each of the previous scenarios that preemption doctrine is simply not well developed enough to provide a concrete answer.

I first consider the two cases in which the private nondelegation doctrine has come up in the Supreme Court in the last century and then turn to its doctrinal underpinnings. First, during the New Deal era, in *Carter v. Carter Coal Co.*,²²⁰ the Court invalidated a statute that allowed coal miners and producers to enter labor agreements that bound other coal producers in the area.²²¹ The Act was invalid, the Court reasoned, because here government power was not delegated “to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business.”²²² It reasoned that “[t]he delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question.”²²³

At the federal level, *Carter Coal* lay dormant,²²⁴ until earlier this decade, when the D.C. Circuit invoked the doctrine to strike down a statute which gave Amtrak, along with the Federal Railroad Administration (FRA), the power to develop regulations regarding railroad schedules and performance.²²⁵ First, the court held that Amtrak

²¹⁸ See, e.g., *Credit Suisse First Bos. Corp. v. Grunwald*, 400 F.3d 1119, 1128 (9th Cir. 2005) (finding that “SRO rules approved by the Commission preempt conflicting state law”).

²¹⁹ See *supra* notes 37–44 and accompanying text.

²²⁰ 298 U.S. 238 (1936).

²²¹ *Id.* at 310.

²²² *Id.* at 311.

²²³ *Id.*

²²⁴ As Metzger put it, “the most salient characteristic of current private delegation doctrine is its dormant status.” Metzger, *supra* note 26, at 1438.

²²⁵ *Ass’n of Am. R.Rs. v. U.S. Dep’t of Transp.*, 721 F.3d 666, 677 (D.C. Cir. 2013), *vacated and remanded*, 135 S. Ct. 1225 (2015).

was a private corporation.²²⁶ Next, while the court recognized that private entities often play a role in government, here, Amtrak crafted its own regulations and the FRA could not act without Amtrak's permission.²²⁷ The private company had authority equal to that of the agency. The Supreme Court reversed the D.C. Circuit, holding that Amtrak was not, in fact, a private entity,²²⁸ not reaching the question of private nondelegation.²²⁹

With the cases in mind, let us take a step back to understand the scope of the possible reasoning underlying the doctrine: (a) due process, (b) nondelegation doctrine, and (c) procedural due process.

Carter Coal itself is unclear. The decision refers to "due process,"²³⁰ but, as Professor Emily Hammond notes, "it did so in connection with 'personal liberty and private property,'"²³¹ which fits in best with the *Lochner*-esque substantive due process reasoning in vogue at the time.²³² Such a constitutional basis is, of course, no longer valid.

The *Amtrak* case, in turn, produced two concurrences that appear to rest on two other constitutional considerations. Justice Thomas, first, argued that *Carter Coal* was nothing more than standard application of nondelegation doctrine more generally "that forbid Congress to allocate

²²⁶ *Id.*

²²⁷ *Id.* at 671.

²²⁸ *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1228 (2015).

²²⁹ *Id.* at 1234. Some scholars suggest that the private delegation doctrine remains active. Thus, they argue:

[The New Deal Court] did more than just construe the intelligible-principle imperative as a rule. It also layered on an additional, equally categorical rule barring delegations of state authority to private parties. This 'private delegation' carve-out barred *all* delegations of rulemaking authority to private parties. It has never morphed into a standard and remains hard-edged today, foreclosing such delegations irrespective of how carefully and thoroughly Congress specifies an intelligible principle.

Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 *YALE L.J.* 346, 359 (2016) (citing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935)). However, their New Deal citation is to *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, which held the delegation to private trade associations to write rules regarding competition unconstitutional, not primarily because of its privatized nature, but because of the vagueness of the congressional standard — a staple of antidelegation doctrine of the period. *See id.* at 531–37. Indeed, the Court also struck down a delegation to the President to approve codes by private industry because of the few "limits" on the "exercise of the President's discretion." *Id.* at 538; *see id.* at 542. Thus, with the demise of the nondelegation doctrine, courts have referred to the decision as "aberrational," *United States v. Frank*, 864 F.2d 992, 1010 (3d Cir. 1988), and "abandoned," *Indep.-Nat'l Educ. Ass'n v. Indep. Sch. Dist.*, 223 S.W.3d 131, 135 (Mo. 2007) (en banc). The scholars also cite Justice Alito's concurrence in the *Amtrak* case. Huq & Michaels, *supra*, at 359 n.40 (citing *Ass'n of Am. R.Rs.*, 135 S. Ct. at 1237 (Alito, J., concurring)); *id.* at 425 n.366 (same). But again, if the private nondelegation doctrine were a hard-and-fast rule, I believe that this concurrence would have been the majority opinion.

²³⁰ *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936).

²³¹ Hammond, *supra* note 82, at 1723 (quoting *Carter*, 298 U.S. at 311).

²³² *See Synar v. United States*, 626 F. Supp. 1374, 1383 n.8 (D.D.C. 1986) (per curiam, joined by Scalia, J.) (noting "the [*Carter Coal*] holding appears to rest primarily upon denial of substantive due process rights").

power to an ineligible entity, whether governmental or private” — that is to say, neither federal agencies nor private entities are appropriate delegates.²³³ Justice Thomas’s concurrence may herald an increasing appetite on the Court to strike down, or heavily narrow, delegation doctrine. While some scholars suggested only a few years ago that “modern delegation is here to stay,”²³⁴ circumstances appear to have changed.²³⁵ But a broader assessment of nondelegation doctrine as a whole and derivatively, of agency preemption, is beyond the scope of this Article.

Finally, one might argue that the private nondelegation doctrine is based in procedural due process, which is one reading of Justice Alito’s *Amtrak* concurrence, and indeed of *Carter Coal* itself.²³⁶ That is to say, giving Amtrak — or a coal company — the power to make determinations is unfair to its competitors.²³⁷ This dominant reading of the corporate nondelegation doctrine,²³⁸ however, only prohibits lawmaking in *certain circumstances*.²³⁹ When the delegation does not create bias and anticompetitive conduct, it is valid. Thus, one scholar has argued that the privatized displacement that arbitration creates — displacing state substantive and procedural rules in favor of the arbitration contract — is acceptable as long as we eliminate bias.²⁴⁰ We must “focus on *policing* exercises of delegated power for abuse.”²⁴¹

In other words, the issue of what counts as valid delegation of law-making authority — and thus, what counts as valid “preemption” in this case — is still open to question. That said, enough courts have treated

²³³ *Ass’n of Am. R.Rs.*, 135 S. Ct. at 1252 (Thomas, J., concurring in the judgment).

²³⁴ Gillian B. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1895 (2015) (contending the nondelegation doctrine “debate will no doubt continue, but it has been eclipsed by reality; modern delegation is here to stay”).

²³⁵ See Evan C. Zoldan, *The Fifth Vote for Non-Delegation*, JURIST (Dec. 14, 2019, 4:47 PM), <https://www.jurist.org/commentary/2019/12/evan-zoldan-the-fifth> [https://perma.cc/E7L2-9MSC].

²³⁶ See *Ass’n of Am. R.Rs. v. U.S. Dep’t of Transp.*, 821 F.3d 19, 34 (D.C. Cir. 2016) (offering that reading of *Carter Coal* on remand).

²³⁷ See *Ass’n of Am. R.Rs.*, 135 S. Ct. at 1237 (Alito, J., concurring) (“Our Constitution, by careful design, prescribes a process for making law, and within that process there are many accountability checkpoints. It would dash the whole scheme if Congress could give its power away to an entity that is not constrained by those checkpoints. The Constitution’s deliberative process was viewed by the Framers as a valuable feature . . .” (citations omitted)); Hammond, *supra* note 82, at 1726. This understanding also tracks the D.C. Circuit’s reasoning on remand, where it held that even if Amtrak was a public entity, its profit motive undermined its ability to regulate its competitors. See 821 F.3d at 34.

²³⁸ See Hammond, *supra* note 82, at 1726; Volokh, *supra* note 82, at 973–80; Alexander “Sasha” Volokh, *The Shadow Debate over Private Nondelegation in DOT v. Association of American Railroads*, 2015 CATO SUP. CT. REV. 359, 372 & n.74; Andrea Nishi, Note, *Privatizing Sentencing: A Delegation Framework for Recidivism Risk Assessment*, 119 COLUM. L. REV. 1671, 1701 (2019). But see Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1757 (2002) (adopting a delegation approach).

²³⁹ See Horton, *supra* note 10, at 442.

²⁴⁰ Matthew A. Shapiro, *Delegating Procedure*, 118 COLUM. L. REV. 983, 992 (2018).

²⁴¹ *Id.*

instances of delegation preemption as preemption that I term it as such — even though, as in other scenarios, the concept is slippery in this context.²⁴²

* * *

It bears noting that while I present ideal types above, the categories shade into each other. Contracts, which allow AT&T to insert an arbitration clause, also incentivize Verizon and T-Mobile to insert such clauses so that they are not at a competitive disadvantage, even if that ultimately displaces state policy. Contractual and incentivized displacement thus converge. Similarly, a broad-enough contract that delegates great power, including over preemption, to a private oversight entity shades contractual preemption into delegated preemption. This is in addition to the difficulties, sometimes, of distinguishing private entities from public entities. Government-run corporations, for example, show characteristics of both public and private entities. As the entities are more “public” in nature, the problems I outline here might be less problematic.²⁴³

E. The Heightened Danger of Privatized Preemption to Federalism

Despite their convergence, some might find that the typology I describe above builds on itself in terms of the concerns raised. As I discuss below, preemption and delegation occur openly, while incentivized preemption is sometimes harder to see.²⁴⁴ Delegated preemption, as the last section concludes, might present problems for the notion of sovereignty itself. All else being equal, that might suggest a clear hierarchy of concerns.

²⁴² I would also argue — with limited doctrinal support — that preemption is a nondelegable power that is an essential aspect of federal sovereignty. To delegate that kind of power away to private entities, as distinguished from public ones, would strike at the heart of our understanding of lawmaking and sovereignty itself. To some degree, I believe that such an approach harms the dignity of states, which in turn harms their sovereignty — our understanding of the state as the state. I cannot fully explicate those views here, but follow the approach taken by Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1927–28 (2003). See generally Primus & Hills, *supra* note 58 (manuscript at 44) (intriguingly arguing that such delegations are “suspect” under the innovative “suspect spheres” scheme they develop). Since this argument has very limited doctrinal footing, though, I do not rest my argument on it.

²⁴³ One example that reveals how these issues come together involves the creation of a national currency. I describe this below. *Infra* pp. 1999–2000.

²⁴⁴ Such “sly, sideways moves reduce the power of individuals and states indirectly.” Elengold & Glater, *supra* note 4 (manuscript at 5).

But all else is generally not equal. As someone with priors on both issues,²⁴⁵ broadly preempting consumer protection law through arbitration clauses is worse than allowing a private entity to preempt a narrow swathe of state privacy legislation. Each modality further presents its own concerns to the operation of federalism, at least on certain understandings of how it works, and the level of private discretion as to whether to preempt does not necessarily track the harm that individuals might experience on the ground.

Private preemption may present a greater threat to federalism than traditional preemption by undermining three safeguards that the Supreme Court has suggested help bolster federalism.²⁴⁶ This threat affects both the regulatory autonomy of states as well as their standing as important players in the constitutional system.²⁴⁷ I refer to these safeguards as pragmatic, democratic, and institutional. On the Court's account, these safeguards would usually protect citizen-protecting programs that the Trump Administration targeted. To be sure, some scholars are skeptical of how important these safeguards are for federalism, and others' concerns might depend on whether the area involved implicates traditional areas of state regulation — but I do not seek to be drawn into that debate. For those who believe the Court is right and that these safeguards are important for federalism, privatized preemption is a concern, as, by using private firms, the federal government is able to perform an end-run around these protections. Finally, if privatization undermines federal structures of government, it can undermine

²⁴⁵ See Konnoth, *supra* note 3 (manuscript at 45).

²⁴⁶ Although I do not advance the argument here, the lack of accountability and other safeguards in private preemption raise concerns about using the market to address harms in general.

²⁴⁷ I recognize here that federalism encompasses a range of values, ranging from the autonomy of states to regulate without federal interference, to their standing and “dignity.” See Resnik & Suk, *supra* note 242, at 1922–23. By federalism values, I read the Court to mean both the literal ability of states to regulate certain areas and have vibrant programs without federal interference, as well as expressive concepts regarding their standing in the constitutional firmament. See Adam B. Cox, *Expressivism in Federalism: A New Defense of the Anti-commandeering Rule?*, 33 LOY. L.A. L. REV. 1309, 1328–29 (2000); Todd E. Pettys, *Competing for the People's Affection: Federalism's Forgotten Marketplace*, 56 VAND. L. REV. 329, 335–37 (2003) (“[A]t least three requirements must be met if the two sovereigns are to compete with one another in the way that the Framers expected: each must possess a ‘proving ground,’ . . . ; each must be sufficiently autonomous from the other to enable it to make its own strategic decisions . . . and the sovereigns’ activities and relationships with one another must be sufficiently transparent to enable citizens to allocate praise and blame appropriately.” *Id.* at 337.); Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1369 (2001); see also *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1478 (2018) (saying of commandeering: “A more direct affront to state sovereignty is not easy to imagine.”). But see Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism*: New York, Printz, and Yeskey, 1998 SUP. CT. REV. 71, 142 (arguing that the expressive argument fails in the commandeering line of cases).

other second-order constitutional values that federalism is designed to protect, namely, separation of powers.²⁴⁸

The Court has discussed versions of these safeguards most clearly in the so-called commandeering cases. In these cases, the Court held that Congress cannot commandeer state officials, that is, order state officials to carry out tasks according to federal dictates. For example, in *New York v. United States*,²⁴⁹ the Court struck down a federal provision that required states to provide for the disposal of all nuclear waste within their borders and take title to any waste that could not be disposed of.²⁵⁰ This provision, according to the Court, gave states the choice of being ordered by Congress to carry out federal regulation, or “commandeer[ed]’ . . . into the service of federal regulatory purposes,” by taking title to the waste.²⁵¹ Five years later, the Court decided *Printz v. United States*,²⁵² where Congress instructed chief state law enforcement officers to conduct background checks on gun owners under the Brady Handgun Violence Prevention Act.²⁵³ Such commandeering, the Court held once again, was unconstitutional.²⁵⁴ Finally, most recently in 2018, in *Murphy v. NCAA*,²⁵⁵ the Court held that a federal provision that forbade states from authorizing “by law” certain kinds of gambling commandeered state legislatures to behave in a certain way, and therefore was unconstitutional.²⁵⁶

First, by commandeering, Congress gets around *pragmatic* safeguards of federalism. As the Court explained, the alternative to commandeering states would be for Congress to preempt state law under a national program and administer this program itself, using federal funds.²⁵⁷ As Professor Neil Siegel explains in the context of *Printz*, it would have been hard for Congress to develop a federal background checking program run by federal officials: such a program “requires a ‘boots on the ground’ . . . commitment from the federal government that may be lacking. The preemption ‘threat,’ in other words, may not be

²⁴⁸ It is also arguable that such an approach engages in what Professors Josh Sellers and Erin Scharff refer to as “structural preemption,” in that state programs are being displaced by privatized program structures. See generally Joshua S. Sellers & Erin A. Scharff, *Preempting Politics: State Power and Local Democracy*, 72 STAN. L. REV. 1361 (2020). That is a more complicated discussion that I cannot engage with here.

²⁴⁹ 505 U.S. 144 (1992).

²⁵⁰ See *id.* at 149, 152–54.

²⁵¹ *Id.* at 175.

²⁵² 521 U.S. 898 (1997).

²⁵³ Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified as amended at 18 U.S.C. §§ 921–922, 925A); see *Printz*, 521 U.S. at 902–03.

²⁵⁴ *Printz*, 521 U.S. at 933.

²⁵⁵ 138 S. Ct. 1461 (2018).

²⁵⁶ *Id.* at 1470; see *id.* at 1481.

²⁵⁷ See *id.* at 1477, 1479–81.

credible.”²⁵⁸ Forcing Congress to carry out the preemption itself rather than commandeer state law would therefore increase the cost of federal regulation and deter federal intervention.²⁵⁹

Privatized preemption, however, similarly gets around these pragmatic safeguards. Congress may formally delegate authority to a private entity, as in the case of FINRA. In those contexts, the entity often charges membership and other fees to member organizations,²⁶⁰ which obviates the need for federal investment. In informal situations, as in the case of the Federal Arbitration Act, Congress need not even engage in formal delegation — state law is preempted simply by the operation of private entities.²⁶¹

The inducements are even more lopsided in the case of incentivized preemption. Imagine if, in *Printz*, instead of putting “boots on the ground,” as Siegel suggests, Congress simply contracted with private security companies around the country to carry out background checks. Administrative startup costs can be diminished through private contracting — which, in turn, decrease the potential cost of displacing the state program. Similarly, in the case of school voucher programs, the federal government can distribute school vouchers to private schools it prefers, rather than opening up its own federal government schools. Such subsidies allow for the displacement of state-school clientele more efficaciously. Further, the federal government can more easily fine-tune exactly the extent to which it displaces the state program by modulating its funding to private entities over time. Such incentivized preemption also requires less expenditure: under this regime, if some private entities are already in the market, the federal government need only provide a subsidy, rather than paying for the activity itself. This helps stretch the federal dollar. And it can condition the subsidies on the private entity running the program according to federal requirements. Finally, one might argue that school vouchers allow the federal government to create an end-run around doubts that the Supreme Court has raised about whether Congress could in fact open up federal schools.²⁶²

²⁵⁸ Siegel, *supra* note 188, at 1631, 1678; *see id.* at 1631, 1666–67; *see also* *Murphy*, 138 S. Ct. at 1477 (reasoning that anticommandeering doctrine “prevents Congress from shifting the costs of regulation to the States. If Congress enacts a law and requires enforcement by the Executive Branch, it must appropriate the funds needed to administer the program. It is pressured to weigh the expected benefits of the program against its costs. But if Congress can compel the States to enact and enforce its program, Congress need not engage in any such analysis.”).

²⁵⁹ *See* Siegel, *supra* note 188, at 1644 n.73.

²⁶⁰ *See* *Schedule of Registration and Exam Fees*, FIN. INDUS. REGUL. AUTH., <https://www.finra.org/registration-exams-ce/classic-crd/fee-schedule> [<https://perma.cc/A3WC-5AQU>].

²⁶¹ *See supra* p. 1941.

²⁶² *See* *United States v. Lopez*, 514 U.S. 549, 565–66 (1995) (“We do not doubt that Congress has authority under the Commerce Clause to regulate numerous commercial activities that substantially affect interstate commerce and also affect the educational process. That authority, though broad, does not include the authority to regulate each and every aspect of local schools.”).

Second, the *New York-Printz* line of cases suggests *democratic* constraints on federalism. When engaging in preemption, the federal government must tread carefully or risk inviting political backlash from the populace. As the Court explained in *New York*, if the federal government preempts and carries out certain kinds of regulation, it “makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular.”²⁶³ Such political safeguards become less pronounced, however, if the federal government is able to hide behind state officials it has commandeered. The public might attribute the regulation, not to the federal government, but to the commandeered state officials who are more directly engaging in the regulation.²⁶⁴ Citizens will find it harder to attribute responsibility and trace the government action that produces final outcomes.

If this is correct, the use of private entities similarly diminishes federal accountability. In some ways, the concerns that characterize commandeering are just as present in the context of privatization — instead of hiding behind commandeered state officials, federal entities hide behind private entities. “[S]econd-order agreements,” Professor Michael Vandenberg observes, “reduce transparency by introducing an additional layer of institutions into the regulatory process.”²⁶⁵ However, the problem is greater with private entities, as they are not subject to a range of accountability-forcing laws and doctrines.²⁶⁶ Private entities are also exempt from freedom of information requirements that characterize government operation and, in practice, as Hammond’s study of various privatized entities has shown, develop rules in secrecy.²⁶⁷

Depending on the modality of privatized preemption used, different approaches can harm federalism interests in different ways. To take

²⁶³ *New York v. United States*, 505 U.S. 144, 168 (1992). The Court here seemed to be contemplating a situation where the program failed or was unpopular for non-federalism-related reasons. However, federalism might also factor into the considerations of the populace. *See also Murphy*, 138 S. Ct. at 1477 (making a similar argument).

²⁶⁴ *New York*, 505 U.S. at 169.

²⁶⁵ Michael P. Vandenberg, *The Private Life of Public Law*, 105 COLUM. L. REV. 2029, 2070 (2005) (“This complexity undermines attempts by government and the public to understand the effects of regulations on firm behavior.”); *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.”).

²⁶⁶ Freeman offers an overview. Freeman, *supra* note 65, at 1305–06 (“Moreover, the APA subjects only agency action to potential judicial review. . . [N]or must [private actors], generally speaking, observe the disclosure provisions of the Freedom of Information Act (FOIA) or the open-meeting obligations of other sunshine laws that apply exclusively to government actors. Private contractors notably escape the civil-service protection rules, as well as the conflict-of-interest and ethics rules that apply to public employers.” (citations omitted)).

²⁶⁷ *See* Hammond, *supra* note 82, at 1747–48; Solomon & Zaring, *supra* note 80, at 1104 (“[G]overnance by deal allows the Executive to act decisively without broader participation, and hence with a higher chance that the policy incorrectly represents the popular will.”).

concrete examples: the contracts that produce the preemption in the context of the Federal Arbitration Act are less visible than federal statutes, and less subject to public scrutiny. The same is true of the other forms of privatized preemption. Incentivized preemption does not involve publicly visible statutes: rather, it involves federal subsidies made to entities, some of which may already have market share — it will be hard to tease apart government activity from private activity. And as I note in the previous paragraph, with delegated preemption, private contractors are not subject to Freedom of Information Act requests and other requirements to elucidate any preemption decision.

In each of these cases, Congress can plausibly pass the buck to the private entity by arguing that *Congress* did not make the proximate decision to preempt; rather, it was the private entity in the way it chose to write its contract, engage in market activity, or exercise its delegated preemptive power. And even when the subsidies are made openly, actors may not realize what the federal government is doing. Indeed, in my conversations with numerous actors in the space, including a former Obama Administration official, many did not recognize the ramifications of offering subsidies to private entities or giving a private entity regulatory authority.²⁶⁸

Third, and finally, privatized preemption can undermine *institutional* safeguards to federalism. These constraints are most fully described in a thread of scholarship called process federalism. Under this account of federalism, which “has absolutely dominated the field for decades,” rather than looking to courts, states have sufficient representation in Congress and administrative clout to protect themselves from federal encroachment — they do not need additional protections.²⁶⁹ Courts should primarily work to ensure simply that the political process of federal-state bargaining proceeds without bias or interference. For example, they may require Congress to “speak clearly” if it wants to preempt state law.²⁷⁰ The political process itself can produce victories. Professor Abbe Gluck’s work on the passage of the Affordable Care Act, for example, notes the disagreement between the Senate and the House on whether states should have the option to run health insurance exchanges — the pro-state control version, which originated in the Senate, won the day.²⁷¹

²⁶⁸ These conversations were largely confidential, and were carried out with the goal to vet my claims in Konnoth, *supra* note 3. Many of my interlocutors indicated that they had not thought of the second-order effects of the government’s approach.

²⁶⁹ Heather K. Gerken, *Federalism 3.0*, 105 CALIF. L. REV. 1695, 1703 (2017).

²⁷⁰ Gluck, *supra* note 54, at 597 n.171; Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 TEX. L. REV. 1, 123 (2004).

²⁷¹ Gluck, *supra* note 54, at 575.

Nonetheless, as commentators have noted, such political safeguards are less visible in other kinds of institutions. For example, as Justice Stevens has noted, “[u]nlike Congress, administrative agencies are clearly not designed to represent the interests of States, yet with relative ease they can promulgate comprehensive and detailed regulations that have broad pre-emption ramifications for state law.”²⁷² Professor Catherine Sharkey, however, has documented in some detail how administrative agencies, under pressure from both the President and Congress, have nevertheless incorporated federalism analyses into their regulatory processes, for example, by incorporating “federalism impact statements.”²⁷³

Now, it is possible that firms that serve wide consumer clientele may seek to make decisions in the public interest, as I discuss briefly below.²⁷⁴ But as a general matter firms serve different masters: for-profit entities, at least, must make profits to serve stockholders over consumers where interests do not align,²⁷⁵ and nonprofits might have other allegiances that promote the interests of some groups over others.²⁷⁶ They therefore have no reason to listen to, much less follow, structural dictates that would give a voice to the states.²⁷⁷ This phenomenon may even lead to jurisdictional favoritism: when the federal government takes over a task, it is subject to pressure from all fifty states to behave in an impartial manner (though it may give sweetheart deals to certain states²⁷⁸). But apart from behaving in biased and anticompetitive ways towards others in the same industry,²⁷⁹ firms may also preference states that give them

²⁷² *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 908 (2000) (Stevens, J., dissenting).

²⁷³ See Catherine M. Sharkey, *Inside Agency Preemption*, 110 MICH. L. REV. 521, 528–30, 562–63 (2012).

²⁷⁴ See *infra* note 334 and accompanying text.

²⁷⁵ See Minow, *supra* note 61, at 1248; Bamberger, *supra* note 79, at 399 (“Private firm agents . . . are structured around strong corporate self-interest — the very interest the legal and economic literatures are most concerned will capture public decisionmaking. And they are ‘permeable,’ in that they are particularly responsive to influences other than the interests of regulator-principal, such as the behavior of competitors, the interests of consumers, and the pressures of the market.” (citations omitted)); Rubenstein, *supra* note 31, at 1155 (“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).”).

²⁷⁶ See, e.g., Gaby Del Valle, *The Salvation Army Says It Doesn’t Discriminate Against LGBTQ People. Critics Say That’s Not True.*, VOX (Dec. 16, 2019, 8:00 AM), <https://www.vox.com/the-goods/2019/12/16/21003560/salvation-army-anti-lgbtq-controversies-donations> [<https://perma.cc/K4GA-KP5B>]; see also Rubenstein, *supra* note 31, at 1137–38 (noting that “the laws of every state may be displaced by federal contracts, without the transparency, accountability, or deliberation that inheres in federal lawmaking processes”).

²⁷⁷ Cf. Freeman, *supra* note 26, at 559 (“[Civic republicanism] displays an overriding concern with the integrity of the deliberative process.”).

²⁷⁸ See Ian Millhiser, *Trumpcare’s “Alaska Bribe” Has a Big Constitutional Problem*, THINKPROGRESS (Sept. 22, 2017, 10:08 AM), <https://thinkprogress.org/trumpcare-alaska-bribe-constitutional-problem-f1dc649686aa/> [<https://perma.cc/5J2C-4Y5P>].

²⁷⁹ See sources cited *supra* note 82 (discussing bias).

their own sweetheart deals, or that have larger markets, and treat other states more harshly. Thus, an oil-and-gas firm might be more vindictive toward states and take more land if the states' oil-and-gas laws are not friendly to the industry.²⁸⁰

Privatized preemption — or privatization that has preemptive effects — therefore has implications on both sets of entities involved in the preemptive act. Congress and agencies will have fewer practical and democratic incentives not to preempt. Firms, similarly, lack the institutional incentives to avoid preemption. Both sets of factors can present grave harms to the vertical separation of powers between states and the federal government.

All of these concerns, finally, translate also to *separation-of-powers* harms.²⁸¹ First, there are *separation-of-powers* harms between the branches of government. On one hand, getting around the *institutional* safeguards that Congress offers aggrandizes the Executive. As Professor Jon Michaels notes, privatization gives the executive branch “greater unilateral discretion — at the expense of the legislature, the judiciary, the people, and successor administrations,” especially given the limited procedural accountability private entities offer when compared to administrative agencies.²⁸² On the other hand, if Congress is partisan and does not trust the Executive, it may delegate power to private entities, thus getting around *pragmatic* safeguards. As one commentator asks: “[W]hat if Congress eliminates the Secretary of Labor’s enforcement function and places it instead in the hands of the states or private individuals?”²⁸³ But while delegation to states may also constitute an end

²⁸⁰ See *supra* notes 210–213 and accompanying text.

²⁸¹ Several scholars have written about the relationship between horizontal and vertical separation of powers. The most often cited pieces are Clark, *supra* note 40; Ernest A. Young, *Executive Preemption*, 102 NW. L. REV. 869 (2008); and Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459 (2012).

²⁸² Michaels, *supra* note 78, at 719; see *id.* at 718 (citing JODY FREEMAN & MARTHA MINOW, GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 1–6 (2009)); Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 WASH. U. L.Q. 1001, 1062 (2004) (arguing that privatization allows the Executive to act unilaterally in the context of military activities); *id.* at 1011, 1062–74 (arguing that using military contractors enables the President (1) to evade congressional caps on the number of troops; (2) to short circuit Congress’s oversight role; (3) to evade Senate power over military appointments of officers; and (4) to compromise congressional ability to regulate military disciplinary procedures); Scott M. Sullivan, *Private Force / Public Goods*, 42 CONN. L. REV. 853, 861 (2010).

²⁸³ Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. REV. 62, 65 (1990); see *id.* at 94–112 (exploring ways to reconcile delegations of power outside of the federal government with separation-of-powers principles); see also Evan Caminker, Comment, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341, 374–80 (1989); cf. Barak Medina, *Constitutional Limits to Privatization: The Israeli Supreme Court Decision to Invalidate Prison Privatization*, 8 INT’L J. CONST. L. 690, 697–701 (2010).

run around the Executive, at least some states will belong to the political party of the Executive, thus decreasing partisanship.

In other cases, getting around pragmatic safeguards might involve undermining the separation of powers within agencies. Michaels, for example, targets privatization specifically for undermining separation of powers in the administrative state. On Michaels's account, internal administrative separation of powers and checks and balances come from the fact that agencies are accountable to three sets of actors.²⁸⁴ Agencies are responsive to political masters "above" them, primarily through political appointees eager to enact the President's agenda.²⁸⁵ Next, they must also listen to regulated entities and members of the public "below" them, through procedures such as notice and comment.²⁸⁶ Finally, agencies are also staffed by experts, who are invested in a professional, rather than political, identity, which resists external pressure. Their professional role — as chemists, physicists, doctors, social workers — rather than their political role, comes first.²⁸⁷ These individuals often have job security that allows them to act as "potentially formidable counterweights, quite capable of shaping administrative policy."²⁸⁸

Privatization allows entities to undermine many of the forces in this space that seek to preserve federalism. Thus, career federal civil servants might engage in "picket fence federalism," that is, develop relationships with their state counterparts that are stronger than their relationships with other members of the federal administration.²⁸⁹ In such cases, as Rubenstein notes, "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."²⁹⁰

Not all the harms I outline apply to every form of preemption equally. Some may find that the contractual and delegated preemption approaches involve more transparent behavior by the federal government than the incentivized preemption approach — the latter better allows the federal government to disguise its behavior. On the other hand, the formal constitutional concerns may appear gravest when the federal government delegates its preemption power to a private entity. But as a functional matter, the ultimate extent of the harm will depend on the

²⁸⁴ MICHAELS, *supra* note 26, at 58–59.

²⁸⁵ *Id.* at 59–60.

²⁸⁶ *Id.* at 61–62.

²⁸⁷ *Id.* at 61.

²⁸⁸ *Id.*

²⁸⁹ Roderick M. Hills, Jr., *The Eleventh Amendment as Curb on Bureaucratic Power*, 53 STAN. L. REV. 1225, 1227 (2001).

²⁹⁰ Rubenstein, *supra* note 31, at 1149.

kinds of private entities involved and the scope and context of the regulation.

III. FEDERALISM AS A CHECK ON PRIVATIZATION

Many might oppose privatized preemptive effects for different reasons quite apart from substantive policy preferences. Some believe that it is important to maintain the integrity of states — perhaps because the Constitution has a special solicitude for states or because states have greater accountability towards their constituents.²⁹¹ Other reasons may sound in concerns over privatization. Indeed, one might be quite phlegmatic about, or even support, federally run schools or uniform privacy laws — offering federal options to compete with those of states may be salutary. But *private* involvement undermines civic republicanism and the integrity of the deliberative process,²⁹² can harm due process,²⁹³ and can reduce competition, since existing contractors may engage in anti-competitive behavior.²⁹⁴ The fact that a *private* entity, rather than another sovereign government, displaces democratically enacted state law continues the move towards a neoliberal future where private firms, rather than governments, determine the conditions of people's lives, as scholars such as Michaels have powerfully explored.²⁹⁵

To address these concerns, this Part offers solutions. First, it explains why the doctrinal solutions that critics both of state law displacement and of privatization offer are insufficient to address this particular problem, and otherwise have limitations. Second, it explains that in recent years, both the federalism and privatization literatures, recognizing the interlinked natures of the private and the public and of the federal and state governments, have moved towards structural and legislative solu-

²⁹¹ See, e.g., Young, *supra* note 247, at 1369.

²⁹² See Freeman, *supra* note 26, at 559.

²⁹³ See Citron, *supra* note 80, at 1297; Freeman, *supra* note 65, at 1305–06 (“[T]he APA specifically excludes both grants and contracts from the demands of notice-and-comment rulemaking normally applicable to federal agencies. . . . Private actors need not comply with any of the APA’s procedural requirements”); Hammond, *supra* note 82, at 1722–23; Horton, *supra* note 10, at 473–74.

²⁹⁴ See sources cited *supra* note 82.

²⁹⁵ See Michaels, *supra* note 30, at 470 (“[N]eoliberalism involves the valorization and elevation of market practices, goals, and theories to such an extent that the State should not only promote free enterprise but also reconstitute itself along decidedly businesslike lines.”); *id.* at 471 (“[B]usinesses are making some sovereign-seeming interventions. . . . Today we see social-media, high-tech, and gig economy firms undertaking initiatives that are more akin to governing and regulating than they are to ordinary commercial buying, selling, or trading.”). See generally Jon D. Michaels, *Sovereigns, Shopkeepers, and the Separation of Powers*, 166 U. PA. L. REV. 861 (2018) (arguing that such government-market mergers undermine the constitutional scheme).

tions. The fact that these separate literatures have independently converged on similar solutions, many of which sound in “new governance” literature, is telling.²⁹⁶

Thus, third, I too suggest legislative, balanced, structural solutions that give states more oversight over privatization. By bringing states into the privatization literature, and private entities into the federalism literature, the balance I seek is, to some degree, trilateral, between states, the federal government, and private entities — albeit tilted in favor of government entities. The Part concludes by briefly applying the solutions I offer to the examples above and addressing objections.

A. Doctrinal Solutions and Their Limitations

How best can we limit private power and reassert state power in this context? Many scholars focus on doctrinal levers in their respective fields.²⁹⁷ To expand the power of states, for example, federalism scholars press courts to reduce Congress’s Commerce Clause or spending powers, enhance presumptions against preemption, and adopt clear-statement rules that would prohibit courts from reading federal law as preempting state law unless Congress has clearly said preemption is required.²⁹⁸

Privatization opponents, in turn, address doctrines by which private entities escape liability. Scholars have noted that when private contractors are sued, courts have often held that these actors are not state actors

²⁹⁶ “New governance” scholarship seeks to push responsibility away from the federal government and to embed governance with other, more localized, actors. See, e.g., Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 348 (2004) (discussing “sectoral isomorphism” between the public sector, the private sector, and civil society); *id.* at 382–84.

²⁹⁷ See Elengold & Glater, *supra* note 59 (manuscript at 3–4 & n.3) (identifying “a doctrinal fix to the problem of the exploitation and abuse of the sovereign shield,” *id.* (manuscript at 3 n.3), where the “sovereign shield” represents the interconnected doctrines of “federal preemption, sovereign immunity, and intergovernmental immunity,” *id.* (manuscript at 3)); Rubenstein, *supra* note 31, at 1185–88 (noting the need for a “doctrinal anomaly” correction, *id.* at 1185, through doctrinal adjustments).

²⁹⁸ See Randy E. Barnett, Lecture, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581, 585–86 (2010) (deploying both Spending Clause and Commerce Clause arguments to attack the constitutionality of the Affordable Care Act’s individual mandate); see also Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 588 (2012) (deploying similar arguments to hold that the Commerce Clause does not justify the Act’s individual mandate, and holding that Congress’s spending power justifies the mandate but not the Medicaid expansion); Ilya Shapiro, *Ruling Striking Down Obamacare Comes Six Years Late and a Dollar Short*, CATO INST.: BLOG (Dec. 18, 2018, 8:56 AM), <https://www.cato.org/blog/ruling-striking-down-obamacare-comes-six-years-late-dollar-short> [<https://perma.cc/7BY3-6D52>] (describing Barnett as “the intellectual godfather” of the original ACA challenge).

under the state action doctrine and so do not have to comply with constitutional protections.²⁹⁹ On the flipside, even as they are treated as nongovernmental for the purposes of the state action doctrine, when they are working for the government, private entities often (but not always) enjoy governmental immunity and other kinds of immunity, such as antitrust immunity; advocates suggest eliminating these kinds of immunities to subject private entities to greater accountability.³⁰⁰

These approaches have merit in the long run and should be pursued. In the shorter run, they are of limited use for three reasons.

First, Supreme Court constitutional doctrine is far from flexible — to take the state action doctrine for example, commentators have been pushing for a broadening of its criteria with little success for decades.³⁰¹ Immunity doctrine has, if anything, moved in the other direction, making it even harder to hold government (and by extension private contractors) liable for wrongdoing. Indeed, a prominent scholar recently suggested that we “[b]id[] [f]arewell to [c]onstitutional [t]orts.”³⁰² While there may be case law that has never been explicitly overruled that can be deployed to limit the reach of privatization,³⁰³ the current composition of the Supreme Court makes it harder to advance those claims.

²⁹⁹ See e.g., Hammond, *supra* note 82, at 1731. While the Court, at one point, took a broad view of what constituted state action, and was willing to extend constitutional protections to actions in which private entities played a significant role, the 1980s and 1990s saw a sharp retrenchment. Metzger, *supra* note 26, at 1412–13. Although the line between private and state action is “far from straight,” the Court is increasingly unlikely to hold that state action has occurred. *Id.* at 1414; see also *id.* at 1415 (“[T]he pervasive thrust of the Court’s recent decisions strongly suggests that privatization is likely to result in a denial of state action.”).

³⁰⁰ See, e.g., *Standard Inv. Chartered, Inc. v. Nat’l Ass’n of Sec. Dealers, Inc.*, 637 F.3d 112, 116 (2d Cir. 2011) (per curiam) (discussing instances in which FINRA is immune from suit as a governmental entity); see Hammond, *supra* note 82, at 1731–32 (“If it is surprising to see that [private organizations] 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.”). Rubenstein also focuses on the question of intergovernmental immunity doctrine as a solution. See, e.g., Rubenstein, *supra* note 31, at 1142. Indeed, the two forms of oversight are related.

³⁰¹ See, e.g., Charles L. Black, Jr., *The Supreme Court, 1966 Term — Foreword: “State Action,” Equal Protection, and California’s Proposition 13*, 81 HARV. L. REV. 69, 70 (1967).

³⁰² Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 933 (2019) (“[R]ecent cases exhibit aggressive judicial lawmaking with respect to official immunity.”). Metzger offers additional concerns with which I am in full agreement. First, she points out that “by assigning determinative weight to the presence vel non of government involvement in specific challenged acts, current state action doctrine arguably gets matters exactly backwards. Such a focus denies constitutional protection against private conduct where the government has given private actors broad discretion over operation of government programs” — the broader the discretion, the less likely the private actor counts as a state actor. Metzger, *supra* note 26, at 1371. Further, “[t]he central challenge posed by privatization is not just how to enforce the core principle of constitutional accountability, but how to do so without transferring the political branches’ regulatory authority to the courts.” *Id.* at 1373.

³⁰³ See, e.g., *Marsh v. Alabama*, 326 U.S. 501, 509 (1946) (finding First Amendment protections still applicable in a private company town).

Federalism doctrine has changed — but that, to my mind, has more to do with the composition of the Court and the specific issues at stake than with a fundamental change in the persuasiveness of the scholarship and Supreme Court briefs.³⁰⁴

Second, more importantly, doctrinal solutions may reach unnecessarily broadly. An interesting aspect of the privatized preemption phenomenon is that it fits uncomfortably with political preferences. Historically, especially during the Reagan era, privatization and federalism were seen as allies — harmonious, devolutionary phenomena that served the cause of small government.³⁰⁵ Authority was devolved to states, which in turn would devolve it further to localities and private contractors.³⁰⁶ Thus, both federalism and privatization were associated with the more conservative end of the political spectrum.

This political alignment means that at least some supporters of federalism do not object to privatization generally, but may have concerns when it undermines the prerogatives of states. They may therefore not support a broad push to diminish the role of private entities in government. On the flipside, some progressive opponents of privatization — such as myself — may not be strong champions of federalism. More targeted solutions are required.

Third, and finally, both federalism and privatization can bring unique benefits. States and private entities often serve different markets. State schools, for example, offer services to a more socioeconomically and racially diverse group of students than private schools.³⁰⁷ While private health data entities might bring more technical expertise,

³⁰⁴ As Justice Breyer has suggested, recent expansions of state sovereign immunity have much to do with the composition of the Court. *See* *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1506 (2019) (Breyer, J., dissenting) (writing for four Justices and arguing it is “dangerous to overrule a decision only because five Members of a later Court come to agree with earlier dissenters on a difficult legal question”).

³⁰⁵ *See* Douglas W. Kmiec & Eric L. Diamond, *New Federalism Is Not Enough: The Privatization of Non-public Goods*, 7 HARV. J.L. & PUB. POL’Y 321, 322–23 (1984).

³⁰⁶ *See* Diller, *supra* note 69, at 1180 (noting that devolution to counties in the Temporary Assistance for Needy Families context is “also accompanied by a trend toward ‘privatization’”); Jon Michaels, *Deforming Welfare: How the Dominant Narratives of Devolution and Privatization Subverted Federal Welfare Reform*, 34 SETON HALL L. REV. 573, 588 (2004) (“This devolution revolution, which ushered in a process-oriented movement for locating legislative and regulatory authority at lower levels of government . . . was complemented by calls for greater privatization — at every level of government. What, the argument went, would be more efficient than harnessing the productive capacities of the private sector?” (footnote omitted)); *see also* John A. Powell & Stephen Menendian, *Beyond Public/Private: Understanding Excessive Corporate Prerogative*, 100 KY. L.J. 43, 43–44 (2011) (describing then-presidential candidate Mitt Romney’s response to an interview question as going beyond “the traditional conservative refrain of federalism and states’ rights,” *id.* at 43, to endorse “devolution of governmental responsibility . . . to private business wherever possible,” *id.*).

³⁰⁷ *Public and Private School Comparison*, NAT’L CTR. FOR EDUC. STAT., <https://nces.ed.gov/fastfacts/display.asp?id=55> [<https://perma.cc/2PNG-EUWG>].

state health data networks may serve smaller providers and use data they collect for public-health activities in ways in which private entities have no experience.³⁰⁸ I offer further examples below. A solution that preserves a role for both states and private entities best aligns with existing priorities and approaches.

B. Overlapping Solutions from Federalism and Privatization

Prominent scholars of privatization and federalism have looked beyond doctrine in the last several years to determine how best to deal with public-private and federal-state relationships. Although conversations *between* the scholarships are scant, it is telling that we see common themes independently emerging in both. First, many argue that trying to separate out the private and public — or federal and state — into distinct realms is difficult. Rather, these entities are interlinked in necessary and productive ways. Second, they argue that solutions are structural in nature, and often legislative. Third, while many structural solutions are offered, a balancing-of-interests approach may be the best path forward.

i. Integration. — First, the scholarship on both privatization and federalism suggests that any solution should be *integrated*. Privatization scholar Jody Freeman, for example, draws from administrative and critical legal studies scholarship and argues against thinking of administration as a top-down endeavor. “[E]very aspect of policy making, implementation, and enforcement,” she notes, “depends on the combined efforts of public and private actors. They must work out how to deliver a service, design a standard, and implement a rule.”³⁰⁹ These actors are not monolithic, but each, in turn, consists of subgroups and individuals, with different sets of interests.³¹⁰ Each set of actors is interdependent, participating with each other to produce certain results. At each point of delivery, design, or implementation, stakeholders — including those we think of as regulators, the regulated, and those in between (including contractors) — engage in a series of interactions and negotiations with each other against a certain set of background conditions.³¹¹ Freeman suggests that instead of relying on the Constitution’s or the

³⁰⁸ See Mike Miliard, *State and Regional HIEs: “Don’t Count Us Out Just Yet!”*, HEALTHCARE IT NEWS (Jan. 28, 2019, 9:51 AM), <https://www.healthcareitnews.com/news/state-and-regional-hies-dont-count-us-out-just-yet> [<https://perma.cc/VUW7-VY2Y>] (“[I]f you go looking for the people that have the last mile wired and/or have the data available — and in some cases have it in normalized, curated repositories, ready to be exchanged — it’s the [government-managed health information exchanges].”).

³⁰⁹ Freeman, *supra* note 26, at 572.

³¹⁰ *Id.* at 572–73 (“[W]hen you engage with an agency, you are not just engaging with ‘the agency’ as an insulated entity; you are engaging a set of relationships, those internal to the agency and those they develop with other entities.”).

³¹¹ *Id.*

Administrative Procedure Act's command-and-control approaches to regulation, the government can require private entities to act accountably in its contracts with them; such an approach might even internalize good-governance norms into private firms.³¹²

Freeman's approach in the privatization context has echoes in the federalism literature. Rather than try to tease apart federal and state rules and functions, federalism scholars in recent years have increasingly approached federalism as a series of negotiated relationships among a range of actors — state and federal agencies and legislators, among others. Professors Abbe Gluck and Nicole Huberfeld, most notably, argue against static conceptions of federalism that see states as having specific, constitutionally defined roles, or as acting as delivery mechanisms for federal policies.³¹³ Rather, giving the example of negotiation in the wake of the Affordable Care Act, they argue that federalism involves “dynamic and adaptive” cycling through existing academic models and those that have yet to be imagined.³¹⁴ For example, when the Supreme Court invalidated the ability of the federal government to force states to expand Medicaid, it did not end the conversation and negotiation between states and federal entities; instead, it simply changed the background rules for negotiation.³¹⁵ Federal-state programs therefore involve negotiations that more finely tune the initial contract represented in the Constitution.³¹⁶

2. *Structural Solutions.* — Many federalism and privatization scholars have looked to structural, often legislatively developed solutions, rather than judicial doctrine, as the primary source of protection for each set of schemes. The so-called process-federalism scholarship that I describe above, in particular, which has dominated federalism scholarship “for decades,” shows how congressional structures can integrate state and national interests in a single forum.³¹⁷ Thus, many believe that these legislative structures, rather than litigation, should be the primary safeguard of federalism.

³¹² See *id.* at 665–68.

³¹³ See Gluck & Huberfeld, *supra* note 50, at 1695.

³¹⁴ *Id.* at 1694.

³¹⁵ States, in particular, could leverage greater benefits from the federal government. *Id.* at 1736 (describing how states gained leverage against the federal government from the Supreme Court's holding in favor of federalism).

³¹⁶ See Christopher L. Eisgruber, *The Fourteenth Amendment's Constitution*, 69 S. CAL. L. REV. 47, 51 (1995) (“The idea that the Constitution is a kind of contract, among the states or among the people, has long figured prominently in American constitutional thought.”).

³¹⁷ See Gerken, *supra* note 269, at 1703; see also Gluck *supra* note 54, at 560–64 (discussing various structural features Congress might create to embed federal norms in state operation, and how states, in turn, shape those norms).

Beyond the structural approach the Constitution provides to protect federalism in *statutory* enactments, executive branch officials have similarly adopted structural protections to protect states at the *administrative level*, including agency review and continuous collaboration with state officials. The “Federalism” Executive Order of 1999 requires agencies to “encourage” states to develop their own programs and policies, to defer to those policies where possible, and, when creating federal policy, to do so in consultation with states.³¹⁸ Preemption should be avoided, and state officials should be notified and consulted with.³¹⁹ It also requires that each agency have a “federalism official” within the agency who assesses and minimizes the preemptive impacts of agency action and oversees the consultation with local officials.³²⁰ In 2009, President Obama reinforced these requirements by issuing a preemption memorandum, that, *inter alia*, required agencies to carry out a ten-year retrospective, to ensure compliance with the 1999 Executive Order.³²¹

Prominent strands of the privatization literature have similarly pressed structural solutions. Professor Gillian Metzger, for example, offers an “analysis [that] is structural in focus.”³²² Metzger’s structure requires the federal government to impose mechanisms for supervising private entities to make them accountable.³²³ To maintain flexibility, “the political branches,” such as Congress, should develop the structure “in the first instance.”³²⁴

Finally, scholars who have advanced doctrinal solutions have also sometimes considered structural solutions. For example, though his focus is doctrinal, Professor Rubenstein also contemplates that Congress and agencies may limit intergovernmental immunity that renders private entities immune from state suit based on state regulation.³²⁵ Solutions such as this should be expanded upon, as I do below.³²⁶

³¹⁸ Exec. Order No. 13,132, 3 C.F.R. §§ 206, 208 (2000), *reprinted in* 5 U.S.C. § 601 at 93–95 (2012).

³¹⁹ *Id.*

³²⁰ See Memorandum from Jacob J. Lew, Dir., Off. of Mgmt. & Budget, to the Heads of Exec. Dep’ts & Agencies & Indep. Regul. Agencies 2 (Oct. 28, 1999), <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2000/moo-02.pdf> [<https://perma.cc/4P43-5CHT>].

³²¹ Preemption: Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 24,693, 24,693–94 (May 20, 2009). This memorandum was issued two months after a major loss in the Supreme Court, which admonished the Food & Drug Administration for failing, *inter alia*, to give states the opportunity to comment on an action the agency had adopted with “preemptive effect[s].” *Wyeth v. Levine*, 555 U.S. 555, 577 (2009).

³²² Metzger, *supra* note 26, at 1459.

³²³ *Id.* at 1374 (“[T]he crucial constitutional question is whether adequate accountability mechanisms exist by which to ensure that private exercises of government power comport with constitutional requirements.”).

³²⁴ *Id.* at 1456.

³²⁵ Rubenstein, *supra* note 31, at 1196–97.

³²⁶ The first question here is whether state law is preempted — if it is, intergovernmental immunity is a moot point, as Rubenstein notes. *Id.* at 1165. This would not address the most egregious

3. *Balancing Power.* — A third strand in both the privatization and federalism scholarships suggests that good governance lies in separating powers to produce a balanced equilibrium. Where the first section makes the point that “integration” is *inevitable*, this section argues that integration produces checks and balances that are *desirable*.

The federalism scholarship, of course, has long celebrated a so-called “vertical” separation of powers. The vertical separation of power that characterizes federalism promotes deliberation rather than autocratic, one-minded implementation.³²⁷ For example, Professors Heather Gerken and Jessica Bulman-Pozen note that federalism allows the expression and enactment of dissenting views.³²⁸ The friction that federalism creates between the states can “spur[] democratic engagement” from the citizenry.³²⁹ Splitting sovereignty, the Framers theorized, would also prevent any one government from behaving tyrannically; for example, states could resist federal power in various ways.³³⁰ Indeed, states like California and New York sought to resist federal policy under the Trump Administration on issues such as immigration on precisely this ground.³³¹

Some privatization scholars such as Freeman are somewhat sympathetic to private involvement. Because of their limited accountability to political actors and to the people, as I describe above,³³² private entities disturb this equilibrium.³³³ And, as the previous Part suggests, private firms often disturb this equilibrium in ways that prioritize profit-making over consumer interests.

situations, however — where there is no intergovernmental immunity because the private entity, such as those falling under the Federal Arbitration Act scenario I described above, *supra* section II.B.1.b, pp. 1963–65, would have no formal relationship with the government. As Rubenstein acknowledges, this doctrine has been “scaled back” in the past. Rubenstein, *supra* note 31, at 1196–97.

³²⁷ See *supra* section II.E, pp. 1981–99.

³²⁸ Jessica Bulman-Pozen & Heather K. Gerken, Essay, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1309 (2009).

³²⁹ Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 MICH. L. REV. 57, 63 (2014).

³³⁰ See *id.* at 81.

³³¹ See *United States v. California*, 921 F.3d 865, 873 (9th Cir. 2019) (upholding most of California’s law).

³³² See *supra* p. 1985; see also *supra* note 80.

³³³ See Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 437–40 (2009). See generally Jon D. Michaels, *Separation of Powers and Centripetal Forces: Implications for the Institutional Design and Constitutionality of Our National-Security State*, 83 U. CHI. L. REV. 199 (2016). As Metzger and Michaels explain, governance is not monolithic, and there is a need for equilibrium within the government. They are focusing on equilibrium at the federal level. But I am offering an extra level, telescoping out from the federal government and bringing states into the mix.

And yet, engaging private entities offers two sets of advantages. First, firms can be a salutary counterbalance to state demands — especially where market interests align with consumer interests,³³⁴ and when nonprofits are involved. For example, during the COVID-19 epidemic, Apple and Google resisted calls from public health departments to grant access to their phone users' location data for contact tracing.³³⁵ Another such example involves firms' decisions not to provide states with death penalty drugs: providing such drugs is “bad for business.”³³⁶ To be sure, neither case involves federalism, as the federal government was involved in neither decision.

In the nonprofit context, Professor Hills describes how in the 1960s, as part of the war against poverty, the federal government provided funding directly to private nonprofit organizations. These “community action agencies” (CAAs) were focused on assisting low-income households, and the Johnson Administration believed that “‘community action’ would instill low-income persons with a sense of confidence and self-esteem that would motivate them to overcome poverty.”³³⁷ But state and local governments “disliked the notion that federal money would bypass them and go to some private persons over whom they had no control and whose motives they distrusted.”³³⁸ After facing resistance from the Administration, they successfully lobbied Congress to bring CAAs under local government control: as one congressperson said, supporting community action was part of “‘a poverty cult . . . composed of intellectuals from every social science discipline’ who were undermining traditional values of discipline and education.”³³⁹ Thus, I am inclined to agree with supporters of the community action plan who argued that the change would support sometimes corrupt state and local

³³⁴ See Kristen Eichensehr, *Digital Switzerlands*, 167 U. PA. L. REV. 665, 713–14 (2019) (explaining that “[s]ometimes, [private firms rather than consumers] are the only parties in a position realistically to challenge government demands,” *id.* at 713, because they have greater resources and greater likelihood of having legal standing); see also *id.* at 715–18 (noting that sometimes firms' interests may align with consumers' interests, but in many cases consumers are not necessarily listened to).

³³⁵ Reed Albergotti & Drew Harwell, *Apple and Google Are Building a Virus-Tracking System. Health Officials Say It Will Be Practically Useless*, WASH. POST (May 15, 2020, 3:22 PM), <https://www.washingtonpost.com/technology/2020/05/15/app-apple-google-virus> [<https://perma.cc/9YYV-HPMP>].

³³⁶ Raymond Bonner, *Capital Punishment Is Bad for Business*, POLITICO MAG. (Apr. 28, 2015), <https://www.politico.com/magazine/story/2015/04/capital-punishment-is-bad-for-business-117435> [<https://perma.cc/HD6M-HEWJ>]. This situation might also involve an example of “international” state law displacement. As scholars have argued, European export laws have helped displace state death penalty objectives as well. James Gibson & Corinna Barrett Lain, *Death Penalty Drugs and the International Moral Marketplace*, 103 GEO. L.J. 1215, 1242–44 (2015).

³³⁷ Roderick M. Hills, Jr., *Federalism in Constitutional Context*, 22 HARV. J.L. & PUB. POL'Y 181, 187 (1998).

³³⁸ *Id.* at 188.

³³⁹ *Id.* at 188–89 (quoting 113 CONG. REC. 32,703 (1967) (remarks of Rep. Williams)).

governments and “completely submerge community groups and the poor.”³⁴⁰

Second, engaging firms may enhance the effectiveness of a policy. Firms may be more nimble than the federal government, and may have greater expertise in a field;³⁴¹ but to me, the most important point is norm internalization and compliance as Freeman describes.³⁴² Engaging private entities internalizes the policy within firm — and market — practices.³⁴³

One of the rare, but important, historical examples that may count as privatized displacement of state law helps demonstrate how these concerns come together. As Lev Menand and Professor Morgan Ricks describe, before the Civil War, states issued their own currency.³⁴⁴ The National Banking Act of 1863 created for-profit federally chartered banks that meant “war” on state banks, as they “aimed to forcibly displace all other money issuing businesses.”³⁴⁵ The federal government deliberately outsourced the task of currency circulation to these banks, and rejected states as players.³⁴⁶

Some legislators did argue that “money should be ‘made by the [g]overnment and not by banks.’”³⁴⁷ Yet proponents of the for-profit corporation scheme presented several arguments that sounded in both the need for effectiveness and the need to check government. First, private engagement would allow currency to more efficiently enter the hands of the people when the war was over: “[I]t would be impossible for the federal government, by spending money, to provide greenbacks ‘in sufficient amounts for the wants of the people.’”³⁴⁸ To ensure widespread currency adoption, there “must be a combination between the

³⁴⁰ 113 CONG. REC. 32,636–67 (remarks of Rep. Hawkins).

³⁴¹ See Minow, *supra* note 61, at 1242–46 (pointing to “[c]ompetition and [i]ncentives for [i]mprovement,” *id.* at 1243, as well as development of “new knowledge and infrastructure,” *id.* at 1245).

³⁴² That is, one can help inculcate a sense of public values in firms by directing them toward the public interest, according to some authors. Freeman, *supra* note 65, at 1285 (“In other words, privatization can be a means of ‘publicization.’”).

³⁴³ See Michael J. Trebilcock & Edward M. Iacobucci, *Privatization and Accountability*, 116 HARV. L. REV. 1422, 1443 (2003); see also Christopher Serkin, *Public Entrenchment Through Private Law: Binding Local Governments*, 78 U. CHI. L. REV. 879, 882 (2011).

³⁴⁴ Lev Menand & Morgan Ricks, *Federal Corporate Law and the Business of Banking*, 88 U. CHI. L. REV. (forthcoming 2021) (manuscript at 21–22), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3663351 [<https://perma.cc/A3XX-C55U>].

³⁴⁵ *Id.* (manuscript at 24); see also *id.* (manuscript at 23–25).

³⁴⁶ *Id.* (manuscript at 27) (“Few if any supporters of the [National Bank Act] appeared to favor state bank notes over greenbacks.”).

³⁴⁷ *Id.* (quoting CONG. GLOBE, 38th Cong., 1st Sess. 1433 (1864) (statement of Rep. Brooks) (alteration in original) and listing several sources expressing the same sentiment).

³⁴⁸ *Id.* (manuscript at 28) (quoting U.S. DEP’T OF TREASURY, REPORT OF THE SECRETARY OF THE TREASURY ON THE STATE OF THE FINANCES 197 (1875)).

interests of private individuals and the Government.”³⁴⁹ Second, a check against government power was required. The “‘hazards’ of direct governmental issue included temptation to overissue, depreciating paper, and national bankruptcy”³⁵⁰ as well as “political favoritism in lending decisions.”³⁵¹ In ameliorating these “hazards,” “outsourcing was a premodern form of administrative independence.”³⁵² While this historical example does not quite map onto today’s versions of privatized state law displacement, it comes close enough, and raises considerations that counsel against a complete exclusion of private entities (at least, when they are subject to heightened control).³⁵³

C. *Checking Privatization Through Federalism*

On one hand, we seek to avoid the lack of accountability, possible biases, and other harms that come with privatization. We also wish to preserve roles for federalism and state sovereignty.

In what follows, I argue for structural solutions that promote trilateral interaction and power balances among the state and federal governments, as well as private firms. I do not suggest here that private firms are the coequals of states;³⁵⁴ indeed, the scheme I offer would give states certain supervisory authority over firms. While states should be involved in formal and informal ways in all programs, I analytically separate out points of state involvement as *ex ante*, that is, before the privatization decision is made; ongoing, that is, in administering programs; and *ex post*, in cases involving oversight and litigation.

1. *Trilateral Power Balancing.* — As I show above, federalism and privatization scholars have offered structural schemes to address harms they see arising in each context. However, bilateral structural balancing can often be problematic. As Professor Sharon Jacobs observes in the

³⁴⁹ *Id.* (quoting U.S. DEP’T OF TREASURY, *supra* note 348, at 198).

³⁵⁰ *Id.* (manuscript at 27) (quoting Treasury Secretary Salmon Chase).

³⁵¹ *Id.* (manuscript at 29).

³⁵² *Id.*

³⁵³ I do not offer this example above because this early example does not quite map onto existing schemes of privatized state program displacement. As Menand and Ricks explain, on one hand, “[t]he [National Banking Act]’s framers referred to national banks not as private businesses subject to federal regulation but as ‘agencies’ or ‘instruments’ of the federal government.” *Id.* (manuscript at 26). At the same time, Menand and Ricks emphasize the private nature of these entities, and the fact that they are shaped by corporate charters rather than administrative law. *Id.* (manuscript at 27) (“Congress understood that it was outsourcing the public function of money creation.”). Perhaps, the best understanding is that they are “joint ventures with the federal government. They were not merely private businesses but generators of seigniorage.” *Id.* (manuscript at 31).

³⁵⁴ *Cf.* Michaels, *supra* note 333, at 211 (linking public/private separation of power with horizontal and vertical separation of power and arguing that it is “arguably the most historically significant and universally recognized of all the divisions”).

context of interagency balancing, there is the problem of “lopsided aggrandizement.”³⁵⁵ If one party in the relationship is not interested in exerting its power, or is captured, or is incompetent, then the other party gets all the power. Once lopsided, a bilateral relationship can descend into a vicious circle, with the more powerful party using its power to exact concessions from its weaker partner.

We can see this problem in the federalism and privatization contexts. In the context of federalism, national power has clearly outstripped that of states since the nation’s founding.³⁵⁶ Federal power is also clearly lopsided — it is the rare case indeed in which states have defeated federal attempts to claim an area of regulation.³⁵⁷ On the flipside, in the privatization context, there appears to have been capture, such that the federal government has not pursued its duties of supervising private entities faithfully. As commentators explain at length, the Trump Administration, in particular, sought to “double down on the use of private parties to develop public projects.”³⁵⁸ Indeed, some suggest that some of the Administration’s “federal contracting arrangements” arose “as a result of corruption.”³⁵⁹

Adding states to the balancing mix changes the equation in important ways. First, states offer a variety of political interests that would check malfeasance or nonfeasance by an executive entity. In arguing that federalism is an important check on separation of powers battles, Professor Bulman-Pozen elaborates on this point. As she explains, Congress often enlists states as participants in federal schemes of enforcement.³⁶⁰ In that capacity, states governed by opposing parties as

³⁵⁵ Sharon B. Jacobs, *The Statutory Separation of Powers*, 129 YALE L.J. 378, 432–37 (2019).

³⁵⁶ Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1249 (1994).

³⁵⁷ See *United States v. Comstock*, 560 U.S. 126, 148–49 (2010) (“The Federal Government undertakes activities today that would have been unimaginable to the Framers in two senses; first, because the Framers would not have conceived that *any* government would conduct such activities; and second, because the Framers would not have believed that the *Federal* Government, rather than the States, would assume such responsibilities. Yet the powers conferred upon the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government’s role.” (quoting *New York v. United States*, 505 U.S. 144, 157 (1992))).

³⁵⁸ Solomon & Zaring, *supra* note 80, at 1114.

³⁵⁹ Rebecca Klar, *Warren Proposes Federal Task Force to Investigate Trump “Corruption,”* THE HILL (Jan. 21, 2020, 9:58 AM), <https://thehill.com/homenews/campaign/479114-warren-proposes-federal-task-force-to-investigate-trump-corruption> [<https://perma.cc/Q9W7-PAZY>]; see also Nicole Narea, *A Year in Trump Corruption*, WASH. MONTHLY (Jan./Feb./Mar. 2018), <https://washington-monthly.com/magazine/january-february-march-2018/a-year-in-trump-corruption> [<https://perma.cc/Y7CA-6G3S>] (listing Trump businesses that benefited from business contractors and administration employees); Dan Diamond & Adam Cancryn, *Trump Allies Received Hundreds of Thousands of Dollars Under Federal Health Contract*, POLITICO (Nov. 12, 2019, 5:00 AM), <https://www.politico.com/news/2019/11/12/federal-health-funneled-dollars-trump-allies-069638> [<https://perma.cc/VZ6L-8BEC>].

³⁶⁰ Bulman-Pozen, *supra* note 281, at 462.

that of the administration — and with fifty states, one can expect at least some states to be governed by an opposing party — play a role in pressing the federal executive to behave appropriately.³⁶¹

To be sure, some states will likely be aligned with the federal approach. But several states will not, and will provide a counterweight in ways I describe below. In the administrative agency context, Bulman-Pozen documents how states may diverge from the federal policy, goad the federal agency into a desirable policy, or curb the federal agency from enacting policies the state thinks to be undesirable.³⁶² States can achieve this through many means, including threatening to sue private entities when federal agencies have declined to do so, or adopting different policies of their own when they have power to write the rules.³⁶³ Thus, if the federal agency is reliant on the state to achieve the goals of regulation, state non-cooperation short of litigation can bring the federal program to a halt.³⁶⁴

However, the issue here is not (always) one of naked partisanship. States may also adopt a different program from the Executive because of independent state interests. Californians may have concerns about pollution, not just because of partisan allegiance, but because of the high population density of California's cities.³⁶⁵ New York might care about financial regulation, as the central locus for the finance industry.³⁶⁶ States may also have an understanding of specific citizen concerns, may be responsive to a different set of constituents, and may possess information that other states do not — any of which might invite an uncooperative stance.³⁶⁷

A similar dynamic is present in the context of privatization. As I describe further in the next sections, state attorneys general from New York, California, and other states have combined forces to challenge the behavior of federal private contractors — including student

³⁶¹ *Id.* at 462–63.

³⁶² *Id.* at 478–86.

³⁶³ *See id.* at 480–81, 483–84.

³⁶⁴ *Id.* at 481–82. To be sure, not all states have the same degree of influence, but there exists sufficient policy variation among even the largest and most powerful states (depending on the metric one uses) to create opposition, and sufficient policy homogeneity among groups of smaller states to enable alliances.

³⁶⁵ John King, *California Cities Most Densely Populated in U.S.*, SFGATE (Aug. 6, 2012, 2:47 PM), <https://www.sfgate.com/bayarea/place/article/California-cities-most-densely-populated-in-US-3436611.php> [https://perma.cc/B663-VKSS].

³⁶⁶ *See* Arjun Reddy, *New York Reclaims the Crown as the World's Top Financial Center*, *Survey Says*, INSIDER (May 29, 2019, 4:00 PM), <https://markets.businessinsider.com/news/stocks/survey-new-york-reclaims-crown-as-top-financial-center-2019-5-1028240244> [https://perma.cc/K2J2-W2CS].

³⁶⁷ *Cf.* Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 721 (2011) (exploring how state enforcement may diverge from federal enforcement for these reasons).

loan companies who administer loans for the government.³⁶⁸ Notably, at the time these suits were initiated, many (but not all) of the attorneys general hailed from a different party than the Trump Administration. Some of these states also have, on average, younger constituents, who may have more of an interest in ensuring good behavior by student loan companies.³⁶⁹

The federal government has argued that such state intervention is preempted³⁷⁰ — but the intervention is, itself, a check on collusion between federal government and private entities. First, even if there are alliances and collusion that diminish the possibility of oversight,³⁷¹ the third party in a trilateral alliance — here, states — will be incentivized to carry out the necessary oversight.

Second, a trilateral system will help address the problem of lopsided aggrandizement, where private entities may be able to siphon off too much power in a certain area of activity. For example, Jonathan Chait argues that many of the activities that former Education Secretary Betsy DeVos championed were part of a broader system of “regulatory capture” in which the Department of Education came under the sway of industry.³⁷² In this situation, it might be hard for the federal government to summon the political will and strength to fight back against private entities. States, however, will be able to exercise appropriate oversight as the next sections describe.

Third, trilateral balances help avoid impasses when there *is* disagreement between two entities.³⁷³ Assuming that the state and federal actors, and private entities, all have differing interests from each other (which is not always true),³⁷⁴ adding a third player to the tug-of-war between states and the federal government or the federal government and private entities can offer a tiebreaker, a way to resolve impasses. To be sure, in many bilateral situations, one entity is stronger than the other, and can simply overrule its counterpart. This, however, can breed resentment and conflict. When the impasse is resolved through a third vote, the resolution appears more democratic and fair.

³⁶⁸ See *infra* pp. 2011–12.

³⁶⁹ See *Population Distribution by Age: 2019*, KAISER FAM. FOUND., <https://www.kff.org/other/state-indicator/distribution-by-age> [<https://perma.cc/6TKS-W9MH>].

³⁷⁰ See *infra* p. 2011.

³⁷¹ Cf. sources cited *supra* note 84 and accompanying text.

³⁷² Jonathan Chait, *Trump, DeVos, and the Creation of an American Oligarchy*, N.Y. MAG.: INTELLIGENCER (Aug. 31, 2017), <http://nymag.com/intelligencer/2017/08/trump-devos-and-the-creation-of-an-american-oligarchy.html> [<https://perma.cc/5RXX-QUXR>].

³⁷³ In other words, long-term balance remains among the actors, even while, in the short term, one actor may be outvoted.

³⁷⁴ Some argue that state agencies may surreptitiously undermine the policies of nonfederal entities, to blunt the exercise of federal power. Hills, *supra* note 289, at 1227.

To be clear, in advocating for a kind of trilateral balance, I am not suggesting that other kinds of balancing should be ignored. Balances internal to the Executive to which I allude above should be maintained. But those balances sometimes fail, as scholars such as Professor M. Elizabeth Magill point out.³⁷⁵ Redundancies and failsafes are desirable when the stakes are so high.³⁷⁶

Next, Magill in turn has criticized the dominant concept of separation of powers altogether in a series of important articles.³⁷⁷ While her criticism is focused on the horizontal separation of governmental powers — judicial, legislative, and executive³⁷⁸ — among different branches, some of her criticisms translate to this context. She questions the distinctions and connections between balancing, competing, and separating powers,³⁷⁹ and notes that thinking about the entities involved in a unitary way is problematic since they are composed of numerous interests.³⁸⁰

My argument for trilateral balancing is primarily addressed to those who have argued for bilateral balancing — which itself boasts many disciples, and which is vulnerable to the same criticisms Magill levels. Further, I do not seek to delineate separate spheres of activity for states, or the federal government, or private entities, or suggest that they should compete with each other in providing services. Indeed, part of the goal is to limit the federally imposed state-private competition I identify above.³⁸¹ But I believe some kind of balance, where the interests of states can openly be aired and are not completely eviscerated, is desirable. Finally, I recognize the variety of state and private interests involved and I consider neither these interests, nor the federal government, as acting univocally. I believe there is less homogeneity at the table when states are involved — even if one prefers the metaphor of multilateralism or pluralism over trilateralism.³⁸²

³⁷⁵ M. Elizabeth Magill, *Can Process Cure Substance? A Response to Neal Katyal's "Internal Separation of Powers,"* 116 YALE L.J. Pocket Part 125 (2006), <http://yalelawjournal.org/forum/can-process-cure-substance-a-response-to-neal-katyala82175-a8220internal-separation-of-powersa8221> [<https://perma.cc/9JT6-WZPE>].

³⁷⁶ Cf. Neal Kumar Katyal, Essay, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2324–27 (2006) (discussing the need for redundancy in the executive branch).

³⁷⁷ See, e.g., M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1174 (2000).

³⁷⁸ See *id.* at 1128.

³⁷⁹ *Id.* at 1176–77.

³⁸⁰ See, e.g., M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 605–06 (2001).

³⁸¹ See *supra* section II.C.1, pp. 1968–72.

³⁸² Some philosophers would argue that in addition to governmental institutions, healthy liberal democracies are dependent upon the appropriate functioning of multiple institutions including corporations, the family, and labor. See, e.g., AXEL HONNETH, *FREEDOM'S RIGHT: THE SOCIAL*

Finally, trilateral structures are not immune to the problems of bilateral structures. For example, if both federal and private entities seek to carry out certain tasks, there may be little that states can do, alone, to stop them. But given their various interests and different political inclinations, the states can — and have — put up some resistance at least, as I suggest below. They should continue to act as a counterweight.

2. *Ex Ante Steps: States as “Contractors.”* — Offering trilateral structural solutions has implications *ex ante*, before any privatization decision is made. In all three modalities I describe, the federal government subsidizes or devolves power to private entities. Instead of, or in addition to, devolution to private entities, the federal government should devolve power to states.³⁸³ Like private “contractors,” states can also be government “contractors” for certain functions. Instead of devolving power to contractors, or subsidizing private entities, such as private schools or health data networks, the federal government can rely on states to carry out the task for them. Such an approach would undermine each of the three approaches of privatized preemption above, by displacing private firms with states.

The Affordable Care Act (ACA) provides an excellent example of such devolution, though other such programs exist.³⁸⁴ The Act provided for health insurance exchanges — a virtual marketplace, or website, on which individuals and some businesses can pick health insurance plans, which also provide heightened consumer protections.³⁸⁵ The Act provides two mechanisms for exchanges. Some exchanges are federally run;³⁸⁶ and the federal government contracted much of the operation of those exchanges to private entities.³⁸⁷

FOUNDATIONS OF DEMOCRATIC LIFE 131 (Joseph Ganahl trans., Polity Press 2014) (2011). Bringing private institutions into the conversations furthers this recognition.

³⁸³ Cf. Bulman-Pozen, *supra* note 281, *passim* (describing how states hold power concurrently with federal agencies); Miriam Seifter, *Further from the People? The Puzzle of State Administration*, 93 N.Y.U. L. REV. 107, 130 (2018) (“[S]tates today are in a sense the proxy workers for the federal government, implementing myriad federal programs and grants. . . . State executive agencies are, in many ways, doing the bulk of American governing, even as attention focuses on their national counterpart.” (footnote omitted)).

³⁸⁴ Just in the healthcare context, for example, Medicaid is a joint federal-state program, where state entities receive federal funding to administer a program and the federal government defines some of the program’s requirements, to which the state can add. See, e.g., *Wis. Dep’t of Health & Fam. Servs. v. Blumer*, 534 U.S. 473, 485 (2002) (describing how the federal government used its discretion to leave certain decisions to the states).

³⁸⁵ See Craig Konnoth, *Concentric Regulation in the U.S. Health System* 9 (Feb. 16, 2021) (unpublished manuscript) (on file with the Harvard Law School Library).

³⁸⁶ 42 U.S.C. §§ 18031(b)(1), 18041(c)(1). See generally *King v. Burwell*, 135 S. Ct. 2480, 2487 (2015) (describing federal and state exchanges).

³⁸⁷ Bill Allison, *Good Enough for Government Work? The Contractors Building Obamacare*, SUNLIGHT FOUND. (Oct. 9, 2013, 3:34 PM), <https://sunlightfoundation.com/2013/10/09/aca-contractors> [<https://perma.cc/YDY3-RCWW>].

However, not all exchanges are federally run. Although the House's version of the ACA would have placed exchanges in the hands of the federal government, Congress adopted the Senate's version of the bill, which gave *states* the option of administering exchanges instead of the federal government.³⁸⁸ To some degree, states themselves were like contractors. The federal government gave states money to put together state exchanges. However, the federal government sought to promote state exchanges, and states used this role and other leverage to negotiate with the federal government to realize state values and priorities.³⁸⁹ The federal government only turned to private contractors when states refused.³⁹⁰

Interestingly, both scholars and popular commentators have, in passing, analogized the position of states under the ACA to contractors. Abbe Gluck notes that instead of "state-led federal statutory schemes," one alternative (apart from the federal government providing the service itself) "is more privatization of what previously had been government work."³⁹¹ Others have a less positive view of this role: "States are being treated like contractors to the federal government, not sovereign entities empowered by the Constitution. They are ordered to set up new exchange bureaucracies lest the federal government sweep in and do it for them."³⁹²

Nonetheless, giving the states the first option of refusal, before turning to private contractors, is federalism respecting and avoids preemptive privatization. It also allows states to determine the extent to which they wish to develop uniform solutions and how. Sometimes, states might offer — and adopt — solutions from other states. For example, the State of Connecticut adopted a better working health insurance exchange and decided to "package [its] services and expertise and make them available to other states, . . . avoiding a duplication of effort."³⁹³

³⁸⁸ See Gluck, *supra* note 54, at 578 n.118. As Gluck explains, "[t]he House preferred a new federal-government-run model of insurance provision, and the Senate preferred a state-run model." *Id.* Ultimately, because Democratic Senator Edward Kennedy died, and was replaced by Republican Senator Scott Brown, the Democrats lost their filibuster-proof majority in the Senate, and the House was forced to pass the already-voted-upon Senate version of the bill giving power to the states. *Id.*

³⁸⁹ Gluck & Huberfeld, *supra* note 50, at 1773–74.

³⁹⁰ I do not mean to suggest that the distinctions are as neatly drawn as I portray here. As Gluck and Huberfeld's work shows, the combinations and permutations that characterize the ACA are dizzying. Indeed, Deloitte worked as a federal contractor as well as a state contractor. See *id.* at 1775; Allison, *supra* note 387.

³⁹¹ See Gluck, *supra* note 55, at 1772.

³⁹² *10 Reasons ObamaCare Is a Government Takeover of Health Care*, Galen Guide No. 2, GALEN INST. (Fall 2012), <https://galen.org/projects/galen-guides/#gg2> [<https://perma.cc/JK4Z-5MYZ>].

³⁹³ Gluck & Huberfeld, *supra* note 50, at 1774 (quoting Robert Pear, *Connecticut Plans to Market Health Exchange Expertise*, N.Y. TIMES (Feb. 24, 2014), <https://www.nytimes.com/2014/02/25/us/connecticut-plans-to-market-health-exchange-expertise.html> [<https://perma.cc/63WF-D6ED>]).

States created learning collaboratives and other informal networks to learn from each other.³⁹⁴ Others used private contractors — or in this case, perhaps, “subcontractors” — but on their own terms. Indeed, after their own efforts to create health insurance exchanges ran into hurdles, several states “us[ed] the same consulting firms,” such as Deloitte, “that had successfully shepherded other states through similar transitions.”³⁹⁵

Notably, there is evidence to suggest that the private contractor-run exchanges performed worse than the state-run exchanges. As the Sunlight Foundation notes, “the [Obama] administration turned the task of building its futuristic new health care technology planning and programming over to legacy contractors with deep political pockets.”³⁹⁶ The results were “[p]roblem-plagued online exchanges that make it all but impossible for consumers to buy insurance and hundreds of millions of dollars in the coffers of some of the biggest lobbying powerhouses in Washington.”³⁹⁷ By contrast, many state exchanges were more successful; some states that sought private contractors hired those who had done a good job in other states.³⁹⁸

One can imagine the federal government choosing at the outset to adopt federalism-respecting devolution in other fields as well, such as financial regulation, by devolving authority to states as part of a coordinated program, rather than contracting out to private entities.³⁹⁹ However, there are limitations to this proposal. Transitioning to a state-based system after years of privatized regulation in situations such as financial regulation would likely be too difficult. Such an approach may also not be possible in cases where the federal government seeks to avoid burdensome ex ante state regulation of entities. In other cases, the federal government may deliberately want to circumvent state processes that they feel will not meet federal priorities. Thus, ex ante solutions are not always possible.

3. *Ongoing Steps: Federalist Private-Public Consultations & Partnerships.* — In situations where ex ante solutions are not possible, in all three of the modalities I describe above, the federal government should bring states into the process of overseeing programs that it has

³⁹⁴ *Id.* at 1772–73. States also participated in formal networks, which included the “Center for Consumer Information and Insurance Oversight (CCIO); the Health Care Reform Regulatory Alternatives Working Group of the National Association of Insurance Commissioners; the State Health Exchange Leadership Network of the National Academy for State Health Policy; the National Governors Association; and the National Conference of State Legislatures (NCSL).” *Id.* (footnotes omitted).

³⁹⁵ *Id.* at 1775.

³⁹⁶ Allison, *supra* note 387.

³⁹⁷ *Id.*

³⁹⁸ Gluck & Huberfeld, *supra* note 50, at 1774–75.

³⁹⁹ See *supra* p. 1940 (describing the recent trend of the federal government delegating authority to private entities rather than states).

delegated to private entities, rather than allowing states to be displaced entirely. Such involvement can exist along a spectrum.

At one end of the spectrum are informal consultation and roundtables hosted by federal agencies. The Environmental Protection Agency, for example, has frequently convened such consultations with stakeholders.⁴⁰⁰ Such informal engagement would appear to be the minimum required level of consultation to comply with the Federalism Executive Order.⁴⁰¹

Moving along the spectrum might involve more formalized advisory committees, to which both state and industry players may make appointments. To my knowledge, while several such advisory committees exist, they either have federal and state government-appointed members,⁴⁰² or federal government and industry-appointed members.⁴⁰³

Even further on the spectrum one might find formal organizations, such as commissions with administrative powers. For example, the Amtrak Northeast Corridor Commission is made up of members from Amtrak, the federal Department of Transportation, representatives from numerous state and local departments, as well as a nonvoting representative from CSX, a Fortune 500 transportation company.⁴⁰⁴ The Commission recommends policy on a range of issues from equipment design and scheduling to marketing,⁴⁰⁵ but also makes policy with respect to allocation of costs between the high-volume Northeast Corridor mainline that connects Boston, New York, Philadelphia, and Washington, D.C., and other, lower-volume branch lines.⁴⁰⁶

⁴⁰⁰ See, e.g., ABOVE GROUND STORAGE TANK GUIDE § 340 (Supp. 2011) (Westlaw) (describing Environmental Protection Agency roundtable with business and state officials to counsel on state operating permit programs); cf. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, § 919A (2010) (requiring United States Comptroller General to “consult with State attorneys general, State securities officials, the [SEC], the Financial Industry Regulatory Authority (‘FINRA’), NYSE Regulation, investor advocates, brokers, dealers, retail investors, institutional investors, and academics” on particular activities).

⁴⁰¹ See *supra* p. 1996.

⁴⁰² The Federal Communications Commission (FCC), for example, has been given explicit authority to create joint committees with federal- and state-appointed members. See 47 U.S.C. § 410(b). Such committees “provide a forum for an ongoing dialogue between [the FCC], the states, and local and regional entities regarding the deployment of advanced telecommunications capabilities.” Federal-State Joint Conference on Advanced Telecommunications Services, 14 FCC Rcd. 17,622, 17,623 (1999). The Federal Advisory Committee Act (FACA), Pub. L. No. 92-463, 86 Stat. 770 (1972), would control agency development of such advisory committees as a general matter. *Id.* § 9, 86 Stat. at 773–74.

⁴⁰³ See, e.g., *Health IT Standards Committee*, HEALTH IT, <https://www.healthit.gov/hitac/committees/health-it-standards-committee> [<https://perma.cc/DA3E-97UE>] (including, apart from federal agency representatives, members from different parts of the health system, including medical providers, researchers, and the like).

⁴⁰⁴ *Commission Members*, NE. CORRIDOR COMM’N, <https://nec-commission.com/commission/members/> [<https://perma.cc/JLB9-RBE5>].

⁴⁰⁵ 49 U.S.C. § 24905(b)(2). I thank Steph Tai for pointing this statute out to me.

⁴⁰⁶ *Id.* § 24905(c)(1).

Finally, at the most formal end of the spectrum, there could be corporations in which federal, state, and private entities have controlling or ownership interest.⁴⁰⁷ Each entity may respectively have the ability to appoint individuals to the boards of directors for the corporations. While some United States mixed-ownership corporations, where the government has an actual ownership stake and a real say in the direction of the corporation, are now defunct, these corporations have been increasingly prevalent in countries like China.⁴⁰⁸ In most situations in the United States, the federal government either owns the corporation outright, or owns none of the corporation, simply having the power to appoint a small minority of shareholders. Under the latter scenario, the government has very limited power.⁴⁰⁹ Where the government seeks to outsource control completely to a private corporation, it might consider having diversified ownership that includes both state and federal stakeholders.

If one axis considers the formality of the state-federal-private entity, the other axis considers how power should be divided. States may only have an advisory role, may have veto power, may have the sole power to initiate, but not adopt, proposals (or vice versa), or may have power over only certain kinds of programs. But even in informal contexts, where states can exercise fewer formal checks and balances, they will have at least persuasive power. A seat at the table, and the threat of mobilizing popular opinion if they are disregarded, might be sufficient in some circumstances. The flipside is also true — the federal government can allot a spectrum of power to private entities. The federal government largely plays the role of arbiter, determining to what degree to bind its own powers, either de jure or de facto, in deference to private or state entities.

Indeed, the federal government can look to states to discover a variety of ways in which to incorporate private entities. In the field of health data regulation, to take just one example, several states have incorporated private entities in advisory committees or councils to government

⁴⁰⁷ See 31 U.S.C. § 9101; see also A. Michael Froomkin, *Reinventing the Government Corporation*, 1995 U. ILL. L. REV. 543, 554–55.

⁴⁰⁸ See Froomkin, *supra* note 407, at 555 n.54 (citing the now defunct Resolution Trust Corporation (RTC) and Resolution Funding Corporation (REFCORP) as examples); Zhujia Yin et al., *Study on the Ownership Balance and the Efficiency of Mixed Ownership Enterprises from the Perspective of Heterogeneous Shareholders*, PLOS ONE (Apr. 3, 2018), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0194433> [<https://perma.cc/PD7L-ED4N>]; Zhong Nan, *Mixed Ownership Reform to Expand*, CHINA DAILY (Nov. 21, 2018, 7:33 AM), <https://www.chinadaily.com.cn/a/201811/21/WS5bf499aca310eff303289f70.html> [<https://perma.cc/3FH4-3932>]; see also Elengold & Glater, *supra* note 59 (manuscript at 27–28) (describing various such corporations in the World War I and New Deal eras, such as a government grain corporation).

⁴⁰⁹ Froomkin, *supra* note 407, at 573 & n.154.

bodies.⁴¹⁰ Power is apportioned, not just among private entities, but among different branches of government, with both the legislative and executive branches involved in appointing members.⁴¹¹ State law often specifies industries, representatives from which must be included on such councils.⁴¹² One of the more innovative models is Connecticut's. In addition to acting through its own agency, the state implemented certain data policy decisions through a health data institute based at the University of Connecticut.⁴¹³ Connecticut also mandated an advisory board made up of representatives from private groups.⁴¹⁴ Balance existed between the public and private interests: the university health data institute had the final say, unless a *majority* of the private board objected; at that point, the state agency would make the final decision.⁴¹⁵

Thus, while there are a variety of structures that can be put into place, with various allocations of power, the task is simple: create a forum for negotiation, a place where private entities, states, and federal entities can all bring their expertise, their own unique sense of roles and responsibilities. The bargaining power of each entity will be determined by various factors, ranging from their formal power in the negotiating context, their ability to mobilize popular opinion, their financial clout, and other factors.

4. *Ex Post Steps: Litigation Authority over Private Entities.* — Assume that the federal government goes with private contractors, rather than states-as-contractors, *ex ante*, or that the federal government subsidizes private actors. Assume, also, that state involvement in *ongoing* governance is limited. States should still be given the power to engage in oversight of private firms *ex post*.

Such oversight can take two forms: first, through state *law*, and second, through state *enforcement*. First, as former colleagues and I have argued before the Court, state law provides essential oversight over industry in the context of the Airline Deregulation Act.⁴¹⁶ As we explained, in numerous cases, private entities have argued that their contractual provisions effectively preempted “state regulation in areas such

⁴¹⁰ See, e.g., Health Data and Advisory Council Consolidation Act, 1984 Cal. Stat. 4566, 4568–69; cf. Colorado Health Data Commission Act, 1985 Colo. Sess. Laws 929, 930.

⁴¹¹ Sometimes both branches actually make appointments, and other times legislative consent is required for gubernatorial nominations. See 1985 Colo. Sess. Laws at 930; Utah Health Data Authority Act, 1990 Utah Laws 1437, 1438; 1984 Cal. Stat. at 4568–69 (dividing appointments between the governor, the Speaker of the Assembly, and the Senate Rules Committee, but also giving the governor the power to choose the chairperson without legislative involvement); Act of Apr. 26, 1983, 1983 Iowa Acts 40, 41.

⁴¹² See, e.g., 1985 Colo. Sess. Laws at 930.

⁴¹³ Office of Health Care Access Act, 1994 Conn. Spec. Acts 1343, 1346, 1349–50.

⁴¹⁴ *Id.*

⁴¹⁵ *Id.* at 1350.

⁴¹⁶ See Brief of California et al. as Amici Curiae Supporting Respondent, *supra* note 134, at 1–2, 23–25.

as environmental protection, transportation for emergency services, professional licensing, privacy, employment discrimination, and contract.⁴¹⁷ Due to the preemption of state law, important protections for state citizens were compromised.⁴¹⁸ Similarly, in the context of the Federal Arbitration Act, state contract law designed to promote the ability of consumers to hold large companies accountable through collective litigation processes, such as class actions, has been compromised.⁴¹⁹

Another area of ongoing battle where the federal government seeks to preempt state consumer rights law through contract is in the area of student loans. The federal government has purchased a vast amount of student debt from private entities and has contracted with private loan servicers to manage these accounts, collect payments, and interact with borrowers.⁴²⁰ The Department of Education's Office of the Inspector General found in 2019 that many of these contractors engaged in egregious practices, including failing to inform borrowers of beneficial repayment options, miscalculating their payments when they *did* repay, and not informing them of how their interest would capitalize.⁴²¹ Even worse, the Department knew of much of this malfeasance and turned a blind eye, failing to record such instances and failing to hold contractors liable.⁴²²

While the federal government slacked, states deployed state-law protections. States sued loan servicers under state law, alleging sharp practices.⁴²³ States introduced additional bills that give borrowers or government officials the right to sue when servicers behave badly.⁴²⁴ Of course, the contractors, and even the federal government, have claimed that these laws are preempted — both in court filings and in administrative guidance.⁴²⁵ They both argue that Congress has followed the contractual delegation model I outline in Part I, and if not, may poten-

⁴¹⁷ *Id.* at 23.

⁴¹⁸ *Id.* at 1.

⁴¹⁹ *See supra* p. 1941.

⁴²⁰ 20 U.S.C. § 1087f (granting broad authority to the Department of Education to purchase student loans from private student lenders).

⁴²¹ OFF. OF INSPECTOR GEN., U.S. DEP'T OF EDUC., A05Q0008, FEDERAL STUDENT AID: ADDITIONAL ACTIONS NEEDED TO MITIGATE THE RISK OF SERVICER NONCOMPLIANCE WITH REQUIREMENTS FOR SERVICING FEDERALLY HELD STUDENT LOANS 11-14 (2019).

⁴²² *Id.* at 15-16.

⁴²³ *People v. Navient Corp.*, No. 17 CH 761, slip op. at 2 (Ill. Cir. Ct. July 10, 2018); *Pennsylvania v. Navient Corp.*, 354 F. Supp. 3d 529, 533 (M.D. Pa. 2018).

⁴²⁴ *See, e.g.*, S.B. 19-002, 72d Gen. Assemb., Reg. Sess. (Colo. 2019); Assemb. B. 455, 218th Leg., Reg. Sess. (N.J. 2018); S. 1958, 2019 N.Y. State Assemb., Reg. Sess. § 723 (N.Y. 2019).

⁴²⁵ Federal Preemption and State Regulation of the Department of Education's Federal Student Loan Programs and Federal Student Loan Servicers, 83 Fed. Reg. 10,619 (Mar. 7, 2018); Statement of Interest by the United States at 1-2, *Commonwealth v. Pa. Higher Educ. Assistance Agency*, No. 1784-CV-02682, 2018 WL 1137520 (Mass. Super. Ct. Jan. 8, 2018).

tially hold that they are immune from state regulation as federal instrumentalities.⁴²⁶ As in the *Coventry* case, federal law, along with the contracts approved by the Department of Education, preempt state law protections.⁴²⁷ If courts rule otherwise, private entities will be subject to an important form of oversight.

However, state law does not always survive preemptive challenge, as the Federal Arbitration Act and Airline Deregulation Act lines of cases suggest. Nonetheless, states can still play a role — through enforcement. Consider federal health-privacy rules, issued under the Health Insurance Portability and Accountability Act of 1996⁴²⁸ (HIPAA). These rules, for the first time, created a national privacy and security standard for health information, addressing numerous abuses that had gone unpunished. Indeed, with the advent of big health data, the last few years have seen a record number of violations⁴²⁹ — and concomitant fines. In 2018, large health insurer Anthem paid \$16 million in fines for security violations — dwarfing the Department of Health and Human Services’s (HHS) 2016 record of \$5.55 million.⁴³⁰ In 2019, Aetna settled violations arising from disclosure of the HIV status of over 10,000 individuals living with HIV.⁴³¹

The original federal health-privacy regulation of 2000 (the HIPAA Privacy Rule) only gave the federal government enforcement authority.⁴³² In 2009, Congress passed the Health Information Technology for Economic and Clinical Health (HITECH) Act⁴³³ that sought “improved [HIPAA] enforcement.” The Act states that “the attorney general of the State, as *parens patriae*, may bring a civil action” to enforce HIPAA, through both injunctions and damages, though such action is paused if the federal government is also pursuing action.⁴³⁴ HIPAA is not

⁴²⁶ Rubenstein, *supra* note 31, at 1199–202. I believe that because the intergovernmental immunity doctrine has a limited reach, such a holding would be suspect. But if courts so hold, Rubenstein is correct in pressing for congressional and/or administrative solutions. *Id.*

⁴²⁷ See *supra* p. 1961.

⁴²⁸ Pub. L. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of the U.S. Code).

⁴²⁹ *Health Information Privacy Complaints Received by Calendar Year*, HHS (Mar. 30, 2020), <https://www.hhs.gov/hipaa/for-professionals/compliance-enforcement/data/complaints-received-by-calendar-year/index.html> [<https://perma.cc/3Q6R-F8M8>].

⁴³⁰ *Anthem Pays OCR \$16 Million in Record HIPAA Settlement Following Largest U.S. Health Data Breach in History*, HHS (Oct. 15, 2018), <https://www.hhs.gov/about/news/2018/10/15/anthem-pays-ocr-16-million-record-hipaa-settlement-following-largest-health-data-breach-history.html> [<https://perma.cc/P86V-JK6S>].

⁴³¹ Shelby Livingston, *Aetna Settles California Lawsuit over HIV Privacy Breach*, MOD. HEALTHCARE (Jan. 31, 2019, 12:00 AM), <https://www.modernhealthcare.com/article/20190131/NEWS/190139978/aetna-settles-california-lawsuit-over-hiv-privacy-breach> [<https://perma.cc/QG2H-5MGW>].

⁴³² Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462 (2000).

⁴³³ Pub. L. No. 111-5, 123 Stat. 226, 467 (2009) (codified in scattered sections of 42 U.S.C.).

⁴³⁴ 42 U.S.C. § 1320d-5(d).

unique — Congress similarly allows such *parens patriae* suits in anti-trust contexts.⁴³⁵ Professor Maggie Lemos, in particular, has explored numerous contexts in which Congress delegated enforcement authority to states, and notes that state enforcement can often be more aggressive than that of federal agencies.⁴³⁶

To be sure, the HIPAA context, and those that Lemos outlines, do not center on privatization. And in many cases, states, as I envisage it, would be asked to oversee the behavior of stand-ins for federal agencies — private entities with whom they have contracted to carry out federal tasks. But, as Professor Bulman-Pozen's work shows, states have also acted as effective "fire alarms" when it comes to oversight of the behavior of administrative agencies themselves — particularly when the agency belongs to an opposing political party.⁴³⁷ They often have the relevant expertise to monitor their federal counterparts, and are more likely to be able to gin up congressional interest given the relationships states have with their congressional officials.⁴³⁸

Thus, the scheme can easily be modified in contexts where the federal government has given over state authority to private entities. In such scenarios, as with HIPAA, the federal government should explicitly recognize the power of states to enforce even federal law, to address the doctrinal limitations I described earlier in this Part. For example, the federal government can negotiate contracts with private entities with explicit waivers of immunity for enforcement by state entities; regulatory schemes like FINRA's can similarly recognize the right of states to enforce federal law where the federal government has fallen down on its duty. States can be given the authority, not just to stand in the shoes of individuals that have been harmed, but the general authority to enforce regulations. Further, the federal government should assign its contractual authority to states as joint enforcers.⁴³⁹ In this way, when the federal government is derelict in its enforcement duty — as in the case of student-loan servicers — states can fill in the gap by enforcing federal law.⁴⁴⁰

⁴³⁵ See 15 U.S.C. § 15c.

⁴³⁶ Lemos, *supra* note 367, at 719; see also 18 U.S.C. § 248(c)(3) (enforcement to allow access to abortion clinics); 15 U.S.C. § 2073(b)(1) (enforcement with respect to consumer product safety); 33 U.S.C. § 1365(h) (allowing state governors to bring suits for violations of Clean Water Act); 42 U.S.C. § 7604 (Clean Air Act); Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 633, 672–73 (2001) (also discussing state enforcement).

⁴³⁷ Bulman-Pozen, *supra* note 281, at 496, 501.

⁴³⁸ *Id.* at 497.

⁴³⁹ Cf. Metzger, *supra* note 26, at 1472 (noting that supervision allows "enforce[ment of] regulatory requirements and contractual promises").

⁴⁴⁰ *Commonwealth v. Pa. Higher Educ. Assistance Agency*, No. 1784-CV-02682, 2018 WL 1137520, at *1 (Mass. Super. Ct. Mar. 1, 2018) (making federal Consumer Financial Protection Act claims); *Pennsylvania v. Navient Corp.*, 354 F. Supp. 3d 529, 533 (M.D. Pa. 2018) (same).

This scheme brings four advantages. First, such enforcement delegation to or coordination with state attorneys general fits the states-as-contractors model I describe above. States here are assisting the federal government with tasks that the latter may lack the political will (in cases of capture) or the resources to carry out. In the case of HIPAA, for example, the federal government set up training for state attorneys general.⁴⁴¹ Industry commentators have noted the “ramp[ing] up” of state attorney general actions.⁴⁴² Indeed, the action against Aetna for the breach of HIV-related information (that I described above) was the result of an action pursued by the State of California.⁴⁴³ In 2018, twelve state attorneys general joined forces to pursue yet another high-profile case.⁴⁴⁴ Such actions have clearly filled a lacuna that the federal government lacked the resources to fill. As commentators note, the federal government’s enforcement actions have been “slumping” even as states “pick[] up [the] slack.”⁴⁴⁵

The second benefit arises from the possibly greater constitutional standing of states to enforce federal law when compared to private entities. The HITECH statute that created state enforcement authority for HIPAA refers to the states’ *parens patriae* authority.⁴⁴⁶ Most private litigants will lack sufficient constitutional standing to demand that private entities follow federal law, unless they can show a concrete, particularized, and redressable injury, specific to themselves, and the lack of alternative avenues of redress.⁴⁴⁷ Thus, even if Congress gave private entities a cause of action to address private malfeasance, the Court might hold that those entities lack standing.⁴⁴⁸ States likely have greater

⁴⁴¹ *State Attorneys General*, HHS (Dec. 21, 2017), <https://www.hhs.gov/hipaa/for-professionals/compliance-enforcement/state-attorneys-general/index.html> [https://perma.cc/R9VS-7PAX].

⁴⁴² Mary Chaput, *State Attorney General HIPAA Enforcement Ramps Up*, CLEARWATER COMPLIANCE (June 27, 2019), <https://clearwatercompliance.com/blog/state-attorney-general-hipaa-enforcement-ramps-up> [https://perma.cc/5EFW-QYV7].

⁴⁴³ *Id.*

⁴⁴⁴ Brian Annulis et al., *12 State Attorneys General Unite in the First Multi-state Enforcement of Alleged HIPAA Privacy Breach*, ANKURA (Dec. 19, 2018), <https://ankura.com/insights/12-state-attorneys-general-unite-in-the-first-multi-state-enforcement-of-alleged-hipaa-privacy-breach> [https://perma.cc/TT36-MZKA].

⁴⁴⁵ Marianne Kolbasuk McGee, *Are State AGs Picking Up Slack in HIPAA Enforcement?*, CAREERS INFO SEC. (Sept. 14, 2018), <https://www.careersinfosecurity.com/are-state-ags-picking-up-slack-in-hipaa-enforcement-a-11516> [https://perma.cc/B59Y-V5L4].

⁴⁴⁶ See Health Information Technology for Economic and Clinical Health Act (HITECH Act), Pub. L. No. 111-5, 123 Stat. 115, 226, 274 (2009).

⁴⁴⁷ *Massachusetts v. EPA*, 549 U.S. 497, 517–18 (2007).

⁴⁴⁸ Freeman, *supra* note 26, at 668 (“Perhaps beneficiaries should be entitled to sue as third parties, or afforded a private right of action to seek enforcement of a statutory scheme of which the contract is a crucial part.”). Freeman goes on to discuss the limits of such an approach, as I discuss below. See *id.* at 669.

constitutional standing, however. The scope of state *parens patriae* authority is the subject of vast debate in the literature, but the thrust of the discussion is that the Court appears to be more solicitous of the ability of states to stand as guardians of their citizens.⁴⁴⁹ Case law suggests that states may act as voluntary arms of federal prosecutorial enforcement.⁴⁵⁰

Third, state authority helps address a problem that scholars such as Lemos, Metzger, and Freeman address. On one hand, as Lemos notes, certain public entities — here the federal government — may have limited enforcement resources, or be subject to capture by the regulated entities.⁴⁵¹ On the other hand, the federal government may not want to create private causes of action, which “increase[] the costs of privatized programs, undermine[] the flexibility and efficiency that governments hope to gain through privatization, and deter[] private participation.”⁴⁵² Similarly, Freeman expresses concern that private enforcement could “frustrate the government’s objectives,”⁴⁵³ for example, through overenforcement.

Fourth, assigning enforcement power to state attorneys general is a way to enhance the democratic legitimacy of state enforcement.⁴⁵⁴ As Lemos explains: “The prototypical federal civil enforcer is a specialist agency headed by political appointees. Similar agencies exist at the state level. Yet when federal law authorizes enforcement by states, it bypasses state agencies in favor of [mostly elected] state attorneys general.”⁴⁵⁵ Unlike agency attorneys, state attorneys general are less likely to have ongoing relationships with industry that may deter enforcement.

State enforcement raises similar, and yet different, considerations than those raised by the other kinds of state involvement I describe above. To be sure, “[s]tates unquestionably enjoy more power when

⁴⁴⁹ See *Massachusetts*, 549 U.S. at 519 (noting that states have a special role to play in the constitutional scheme to protect citizens’ rights); Claudine Columbres, Note, *Targeting Retail Discrimination with Parens Patriae*, 36 COLUM. J.L. & SOC. PROBS. 209, 236 (2003) (“Considering the flexibility of *parens patriae* and its successes in a number of closely analogous contexts, the state, in its role as *parens patriae*, may greatly succeed where individual § 1981 cases have failed” in the context of retail discrimination.). See generally Note, *State Standing in Police-Misconduct Cases: Expanding the Boundaries of Parens Patriae*, 16 GA. L. REV. 865 (1982) (discussing cases where *parens patriae* has helped address police misconduct).

⁴⁵⁰ *Printz v. United States*, 521 U.S. 898, 934 (1997) (finding a background check law constitutional with respect to states that did so voluntarily, but not states that did not want to do so).

⁴⁵¹ Lemos, *supra* note 367, at 705.

⁴⁵² Metzger, *supra* note 26, at 1454.

⁴⁵³ Freeman, *supra* note 26, at 669.

⁴⁵⁴ Cf. Jessica Bulman-Pozen, *Administrative States: Beyond Presidential Administration*, 98 TEX. L. REV. 265, 298 (2019) (noting how state engagement in federal administrative schemes can enhance democratic legitimacy); Lemos, *supra* note 367, at 747 (“[T]he attorney general’s authority to enforce federal law is best understood as a default rule that the state legislature could change.”).

⁴⁵⁵ Lemos, *supra* note 367, at 721–22.

they are able to write the rules as well as enforce them.”⁴⁵⁶ On the other hand, assigning enforcement authority to state attorneys general, rather than simply relying on state agencies to write rules, “open[s up] the black box” of state relationships by bringing in a greater range of state agencies and interests into the federalism relationship — especially where the state attorney general and state executive are from different parties.⁴⁵⁷ Moreover, state enforcement might offer a limited compromise — short of avoiding preemption altogether or rendering states contractors. Further, just like consultative approaches, state enforcement can come in different forms — for example, scholars have proposed additional limitations on state enforcement in some situations.⁴⁵⁸ At the same time, state enforcement authority, unlike other kinds of state engagement, can create a kind of “horizontal aggrandizement,”⁴⁵⁹ where an enforcement action might alter the behavior of a private entity across the nation. Nonetheless, Lemos cautions against overstating the case.⁴⁶⁰

States therefore offer a happy medium and important check — the ability to enforce federal law, without having to give over enforcement authority to private individuals.⁴⁶¹ Further, states must often notify the relevant federal agency before carrying out enforcement, allow the federal agency to intervene, and defer when a federal action is pending.⁴⁶² Giving states authority in the contexts of privatization can respect their role as bastions of federalism, while at the same time checking private authority.⁴⁶³

* * *

How all of this might play out in the examples of the previous Part depends on the scenario. Education and law enforcement are functions

⁴⁵⁶ *Id.* at 741. This therefore suggests that the number of interests involved exceed those of simply fifty states.

⁴⁵⁷ *Id.* at 746–47.

⁴⁵⁸ *See id.* at 763.

⁴⁵⁹ *Id.* at 751 (quoting Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 VILL. L. REV. 951, 955–56 (2001)).

⁴⁶⁰ *Id.* at 750–51 (“Jurisdictional limitations may preclude states from using state law to reach out-of-state defendants, but those limitations evaporate when states are empowered to enforce federal law. . . . Again, these critiques are not limited to enforcement but apply with equal force to regulation. One state’s demanding labeling requirements may affect products nationwide, and another state’s lax environmental standards may increase pollution in neighboring states. Bigger and more powerful states may have an advantage over smaller states in these respects. . . .”).

⁴⁶¹ An alternative is to permit individuals to sue, but to allow states to take over the individual suit, again, as many statutory schemes provide.

⁴⁶² Lemos, *supra* note 367, at 761.

⁴⁶³ While I imagine congressional authorization for state enforcement authority, I elsewhere discuss whether agencies can create state enforcement authority absent explicit congressional authorization, concluding, tentatively, yes, depending on the statutory framework. Konnoth, *supra* note 3 (manuscript at 63–66).

that I think are appropriately contracted out to the states, which have long been in those businesses. The federal government might consider other tasks such as financial regulation. And in general, states should be given oversight and enforcement power where possible, even if they are not performing the task as contractors themselves.

D. Objections

Three sets of objections may arise regarding the balance I offer. First, some might argue that I am overoptimistic about Congress's and agencies' desire to offer a role for states. On the flipside, some might argue that I am giving too much power to states. Finally, some might raise ossification concerns. I address each in turn.

i. Uncooperative Feds. — Some might argue that I am overoptimistic that Congress and administrative agencies will adopt the solutions I offer. Federal legislation, they might say, is just as uncertain a bulwark against many of the ills I describe as is judicial doctrine. This objection merits two responses. At the outset, federalism scholarship itself acknowledges that much of federalism as we know it today relies on congressional programs — indeed, as Professor Gluck puts it, the federalism is “intrastatutory.”⁴⁶⁴ The reliance I suggest is no different.⁴⁶⁵

In some cases Congress distrusts federal bureaucrats, especially if they are from an opposing party, as Professor Hills has documented.⁴⁶⁶ State oversight and engagement — with congressional players knowing that some of the overseers will be from their own party (or their wing of the party) — may therefore be an attractive compromise. We see this dynamic in the privatization context.

Recall the ACA state exchanges. The House, which was more progressive and more strongly in favor of the ACA, wanted federal control over exchanges — control that, as we have seen, ultimately devolved to private contractors.⁴⁶⁷ It was the Senate — including moderate Democrats that were lukewarm supporters of the law — that demanded state control as a condition of passing the ACA.⁴⁶⁸

That dynamic can be extrapolated more broadly. In such situations, those pushing federal programs, whether Republicans or Democrats, may often be forced to compromise, as with the ACA. Proponents of a policy might press for federal control — which may devolve to contractors, especially when they are of the same party as the President and her administration, as with the ACA. Opponents and non-supporters (or

⁴⁶⁴ See Gluck, *supra* note 54, at 538.

⁴⁶⁵ See *supra* note 364 and accompanying text.

⁴⁶⁶ Hills, *supra* note 337, at 188, 193.

⁴⁶⁷ See *supra* notes 384–387 and accompanying text.

⁴⁶⁸ See *supra* pp. 2005–07.

lukewarm supporters) — in the case of the ACA, moderate Democrats — might be more wary.

But if it is hard for the latter groups to block the proposal from going through altogether, they might seek to devolve control to states. As they would be aware, “[i]n a nation with fifty states, a sizeable number are always governed by the party out of power at the national level.”⁴⁶⁹ Indeed, this is precisely why scholars such as Bulman-Pozen suggest that states — both Republican and Democratic — often oppose federal action, depending on who is in power, and why “some federal politicians will be enamored of state authority: their party is in the minority at the national level.”⁴⁷⁰

These are the politicians who will play a role here. While Bulman-Pozen focuses on Democrat-Republican divides, as the ACA dynamic reveals, some, such as moderate Democrats from swing (or Republican-leaning) states, may have to advocate increased state oversight over programs run by members of their own party. Those who oppose the policy — whether it involves creating a federal program like the ACA or subsidizing private entities like private schools — should at least demand state oversight or involvement as the price of passage, as moderate Democrats did with the ACA.

Most importantly, Congress *has* adopted the so-called “opportunistic federalism” to which I refer.⁴⁷¹ As empirical work suggests, “as partisan congruence among national level political institutions increases, the incentive to shift power to subnational counterparts decreases.”⁴⁷² Bulman-Pozen similarly documents examples where members of the opposing party in Congress back state efforts against a hostile administration when the minority and the state administration belonged to the same party.⁴⁷³ While I rely most heavily on the ACA, we see similar provisions — with states “contracted” to do the work of federal regulation and enforcement, if they want to — in environmental and health

⁴⁶⁹ Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1090 (2014); see also Bulman-Pozen, *supra* note 281, at 501 (“Simply put, there will never be party unity between the federal executive and all fifty states.”).

⁴⁷⁰ Bulman-Pozen, *supra* note 469, at 1092; see also *id.* at 1093 n.57 (“[T]he minority party at the national level will opportunistically seek to protect state autonomy.”).

⁴⁷¹ See Ernest A. Young, *Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror*, 69 BROOK. L. REV. 1277, 1279 (2004) (“[T]he Framers designed our system of horizontal and vertical separation of powers around the expectation that individuals and groups would support one institution or the other at any given time for politically opportunistic reasons.”); see also DANIEL J. ELAZAR, *AMERICAN FEDERALISM: A VIEW FROM THE STATES* 53 (3d ed. 1984) (“[T]he acts of Congress have tended to give the states a firm share in virtually all federal domestic programs, including several in which the federal government is apparently given the constitutional right to claim exclusive jurisdiction.”).

⁴⁷² George A. Krause & Ann O’M. Bowman, *Adverse Selection, Political Parties, and Policy Delegation in the American Federal System*, 21 J.L. ECON. & ORG. 359, 363 (2005).

⁴⁷³ See Bulman-Pozen, *supra* note 469, at 1102–03.

and safety areas, among others.⁴⁷⁴ One can fairly expect the same dynamic in the context of privatization.

On the flipside, there is also some indication that administrative agencies have been more solicitous of federalism concerns. In a review of agency action taken in response to the Obama Administration's 2009 memorandum requiring agency compliance with the federalism dictates of the Clinton and Reagan Administrations, Professor Sharkey finds that the memorandum produced "real transformations within some federal agencies."⁴⁷⁵ Through interviews with high-level officials, as well as independent review of regulations and guidance, Sharkey assesses the actions of five agencies and points to changes in rules, litigation positions, and guidance taken to diminish the preemptive effect of past agency action.⁴⁷⁶ While the memorandum does not mandate delegation to states, it does require consultation, the issuance of federalism impact statements,⁴⁷⁷ and OMB enforcement.⁴⁷⁸

There are coherent reasons for this approach. As I suggest above, state officials are often closer to how the rules actually work on the ground, and in many instances, federal officials require state assistance to obtain buy-in. Further, federal officials may rely on engagement with states, sometimes through voluntary acquiescence, to put into place policies in times of congressional gridlock.⁴⁷⁹ Embedding programs with states further ensures that programs outlast particular administrations, arguably even more than embedding them with federal contractors.⁴⁸⁰ Thus, "states [are] necessary engines of national policymaking."⁴⁸¹ Finally, sometimes the federal government *does* want to pass the

⁴⁷⁴ *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 268–69 (1981) (upholding Surface Mining Control and Reclamation Act of 1977, which required the states to implement environmental regulations for mining); *State Plans*, U.S. DEP'T OF LAB., <http://www.osha.gov/dcsp/osp/index.html> [<https://perma.cc/H7HQ-E6UG>] (showing that some states that have opted to administer their own OSHA plans).

⁴⁷⁵ Sharkey, *supra* note 273, at 528. Interestingly, in her exhaustive interviews and research, Sharkey does not appear to uncover agency action that was taken in response to privatization. Indeed, it is quite possible, given the scholarly lacuna in this area, that agencies simply do not realize that privatization can produce preemptive effects.

⁴⁷⁶ *Id. passim*.

⁴⁷⁷ These include:

- (1) 'a description of the extent of the agency's prior consultation with State and local officials';
- (2) 'a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation';
- and (3) 'a statement of the extent to which the concerns of State and local officials have been met.'

Id. at 530 (quoting Exec. Order No. 13,132, 3 C.F.R. §§ 206, 207 (2000)).

⁴⁷⁸ *Id.*; see also Metzger, *supra* note 40, at 2082 ("In practice, however, it is not at all clear that the federal courts have been more sensitive to *state* regulatory interests than agencies have been, and at times courts have been strong enforcers of federal uniformity over *state* control." (emphasis added)).

⁴⁷⁹ Bulman-Pozen, *supra* note 50, at 955.

⁴⁸⁰ See Bulman-Pozen, *supra* note 454, at 312; Michaels, *supra* note 78, at 739–44.

⁴⁸¹ Bulman-Pozen, *supra* note 50, at 997.

buck — and while it cannot force the states to accept it, the states can do so voluntarily. Thus, under the ACA, HHS has the responsibility to define “essential health benefits” that all insurers must cover.⁴⁸² As commentators note, “HHS . . . ducked that controversial decision by delegating the question to the states.”⁴⁸³ To be sure, there remains much to do. But if the past is prologue, future administrations are likely to emphasize the importance of federalism in agency decisionmaking.

2. *Irresponsible States.* — The second problem is that states have not been the best exponents of good government in all situations. Scholars have offered various concerns regarding states as contractors, consultants, and enforcers.

First, Professor Miriam Seifter notes that in many contexts when states act as contractors, they fall down on the job, such as the implementation of the Safe Drinking Water Act⁴⁸⁴ in Flint, Michigan, and the disastrous failures in the fields of natural gas pipeline inspection, voter registration, and subsidized housing standards.⁴⁸⁵ Next, when acting as consultants, “states will often push political agendas that expertise-based legitimacy eschews,” and may undermine agency adherence to congressional or presidential mandate.⁴⁸⁶ And third, Professor Metzger raises concerns about state enforcement, namely, the possibility of politically motivated lawsuits by states.⁴⁸⁷

The problems these scholars offer are threefold. First, state agency capture: states “will often exacerbate” bias “by channeling powerful private influences.”⁴⁸⁸ Second, there is a lack of lines of responsibility. Professor Justin Weinstein-Tull explains that because federal programs often do not assign responsibility clearly, state and local agencies may take federal monies, but then play the game of passing the buck — and nothing gets done.⁴⁸⁹ And third, perhaps most egregiously, there is a lack of transparency and accountability. When acting as contractors, many “state-level agencies” suffer from “relative opacity,” failing to keep, or process, records.⁴⁹⁰ When acting as consultants, state-federal interactions may not be transparent.⁴⁹¹ States may also be weak enforcers.

⁴⁸² See *id.* at 978.

⁴⁸³ Abbe R. Gluck, Anne Joseph O’Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1817 (2015).

⁴⁸⁴ Pub. L. No. 93-523, 88 Stat. 1660 (1974) (codified as amended at 42 U.S.C. §§ 300f–300j).

⁴⁸⁵ Seifter, *supra* note 383, at 112–13.

⁴⁸⁶ Miriam Seifter, *States, Agencies, and Legitimacy*, 67 VAND. L. REV. 443, 448 (2014).

⁴⁸⁷ Metzger, *supra* note 51, at 71–72.

⁴⁸⁸ Seifter, *supra* note 486, at 448.

⁴⁸⁹ Justin Weinstein-Tull, *State Bureaucratic Undermining*, 85 U. CHI. L. REV. 1083, 1086–87 (2018).

⁴⁹⁰ Seifter, *supra* note 383, at 110.

⁴⁹¹ *Id.*

While federal agencies lack the budget to oversee programs,⁴⁹² state legislatures operate part time, earn less, and lack “strong committee system[s].”⁴⁹³ Public interest groups and state media are weaker (and weakening) at the state level, even if, at the federal level, they remain relatively robust.⁴⁹⁴ Thus, private interests often outgun public interest groups.⁴⁹⁵

The concerns these scholars raise are important but should inform rather than rule out the solutions I suggest. Not only is the task comparative, but there are also ways in which many of these concerns can be addressed.

First, in terms of bias, Seifter herself notes that she does “not suggest that state government necessarily fares worse on the whole.”⁴⁹⁶ And indeed, where these scholars are concerned about private influence on states, which then lobby the federal government, the problem I outline here involves direct, successful lobbying and collusion between the federal government and private entities. Even if states are sometimes bad actors in this way, they are mere middlepersons.

More importantly, what I have shown is (some) states attempting to step in and shine light upon, and sometimes undermine, these private-federal relationships. States, as I note above, represent a range of interests across the country. These interests may be those of competitors of federal contractors; often, they are magnanimous interests seeking to undo the harm of rapacious student lending and private prisons. To the extent that capture is the product of cultural and ideological alignment between private interests and regulators, as Professor James Kwak has compellingly argued, different cultural milieus across the fifty states may ensure ideological diversity.⁴⁹⁷

Indeed, while Seifter is correct that public interest organizations as a *general* matter are less powerful at the state level, certain public interest organizations are likely to strategically concentrate their resources in certain key states. They will be more likely to be able to change state policy using their resources, rather than the behemoth of federal practice — the goal is to build up to the latter. Converting those states helps create a movement. For example, the private-prison abolition

⁴⁹² *Id.* at 145 n.243 (citing Eloise Pasachoff, *Agency Enforcement of Spending Clause Statutes: A Defense of the Funding Cut-Off*, 124 *YALE L.J.* 248, 307–08, 326–28 (2014)).

⁴⁹³ *Id.* at 145; *see id.* at 144–45.

⁴⁹⁴ *Id.* at 146.

⁴⁹⁵ *Id.* at 137.

⁴⁹⁶ *Id.* at 153.

⁴⁹⁷ *See* James Kwak, *Cultural Capture and the Financial Crisis*, in *PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT* 71, 74 (Daniel Carpenter & David A. Moss eds., 2014).

movement has been successful in some states and is building outward.⁴⁹⁸ Thus, at least *some* states will likely be effective fire alarms for federal-private relationships.

The second and third concerns can be dealt with through institutional design, based on the excellent proposals that scholars like Seifter, Weinstein-Tull, and others offer. For example, federal funding conditions should include transparency, record keeping, and other requirements. Further, “federal regulators could insist on better state monitoring as a condition of delegating authority to states in cooperative federalism programs.”⁴⁹⁹

Similarly, funding conditions could make specific lines of responsibility. Where they do not — or cannot, because state officials responsible for the administration of certain items are independently elected and not subject to state control — federal programs might either seek local buy-in or simply relegate states to consultative roles as I describe above.⁵⁰⁰

Ultimately, whatever program appears appropriate, the extent of discretion federal entities offer states may vary depending on federal preference and perception of state competence — though states are often given great latitude. But whatever the case, the tripartite balance that I recommend would seek to ensure that while states have a voice, their voice does not overwhelm.

3. *Administrative Ossification.* — Finally, some scholars may also raise concerns about reinforcing administrative ossification.⁵⁰¹ Ossification concerns are context specific: if administrative nimbleness, sometimes achieved through privatization, is deployed toward harmful ends, then ossification that limits such harm is desirable in its own right; and overlapping oversight might obviate such harm altogether.⁵⁰²

⁴⁹⁸ Catherine Kim, *Private Prisons Face an Uncertain Future as States Turn Their Backs on the Industry*, VOX (Dec. 1, 2019, 3:53 PM), <https://www.vox.com/policy-and-politics/2019/12/1/20989336/private-prisons-states-bans-california-nevada-colorado> [https://perma.cc/PW93-J4XC].

⁴⁹⁹ Seifter, *supra* note 383, at 172. See generally Pasachoff, *supra* note 492 (arguing for better enforcement of funding conditions).

⁵⁰⁰ Weinstein-Tull, *supra* note 489, at 1110–11. Sometimes, courts have held that federal law does indeed determine grants of authority and funding. See Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures’ Control*, 97 MICH. L. REV. 1201, 1202–03 (1999).

⁵⁰¹ See, e.g., Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1386 (1992) (stating that ossification “is one of the most serious problems currently facing regulatory agencies”).

⁵⁰² Even if ossification is a concern, scholars debate its harms and benefits. See generally Aaron L. Nielson, *Optimal Ossification*, 86 GEO. WASH. L. REV. 1209 (2018) (offering both sides of the debate). Notably, scholars who have raised similar concerns as I have come to the same conclusion. For example, Rubenstein notes that “[s]keptics may reasonably worry that states and advocacy groups will overcompensate, overregulate, and obstruct federal programs.” David S. Rubenstein, *State Regulation of Federal Contractors: Three Puzzles of Procurement Preemption*, 11 U.C. IRVINE

Ultimately, the ossification concern raises a question of tradeoffs that permeates scholarship on administrative law, and which goes beyond the scope of this Article.⁵⁰³ Ultimately, Rubenstein puts it well: “[C]ontracting’s tradeoffs between efficiency and accountability merge with federalism’s tradeoffs between centralized and decentralized governance.”⁵⁰⁴

CONCLUSION

Justice Kennedy famously observed that “[t]he Framers split the atom of sovereignty.”⁵⁰⁵ If corporations are players in “Our Federalism,”⁵⁰⁶ though, what role do they play in this atomic structure?⁵⁰⁷ Are they in the nucleus, or merely tiny electrons on the periphery? I would posit that they are somewhere in the middle, and ever moving closer to the center, already key players within the federal-state drama. This recognition demonstrates that “our federalism’s” focus on government actors is insufficient.

My intervention offers a mere preliminary foray, presenting a taxonomy of preemption through privatization and suggesting ways in which states can be brought back into the mix in structural ways to check the power of firms. My claims are necessarily limited, and indeed, critics might offer various concerns.

Some might suggest that if the state can be treated as a contractor, or as coequal to, and merely a means to check, private contractors, it reduces the dignity of the state and undermines the normative difference between government and corporation in our constitutional system.⁵⁰⁸ In some battles with the states, private entities will be permitted to displace

L. REV. 207, 226 (2020). Relatedly, it may be objected that state law accountabilities are unnecessary or counterproductive, given the federal controls already in place. But he concludes that the lack of competition, insufficient oversight, and the like, in many contexts, mean that some curbing is needed. Thus, “[j]ust as Ulysses bound himself to the mast in order to resist the siren’s song, foreclosing administrative supremacy may save agencies from needlessly succumbing to preemption’s temptation.” Rubenstein, *Delegating Supremacy?*, *supra* note 40, at 1187.

⁵⁰³ Rubenstein, *supra* note 31, at 1152.

⁵⁰⁴ *Id.* at 1154.

⁵⁰⁵ U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

⁵⁰⁶ A famous characterization taken from *Younger v. Harris*, 401 U.S. 37, 44 (1971).

⁵⁰⁷ See, e.g., Hammond, *supra* note 82, at 1731–32 (discussing such congressional delegation without considering federalism).

⁵⁰⁸ Indeed, privatization scholar Paul Verkuil asks: “[I]s . . . the term ‘public sector’ . . . a viable social concept” in an era of “transcendent privatization”? Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397, 401 (2006) (“Stated alternatively, is the public-private distinction, which has demarked law and political theory from the earliest times, still meaningful in an era of transcendent privatization?”); cf. Freeman, *supra* note 65, at 1286 (suggesting that privatization “will effectively turn private actors into public ones”).

state law, further harming state dignity.⁵⁰⁹ Nonetheless, the solutions I offer here are relentlessly practical — without them, the state may be deprived of any role, no matter its dignity, in an increasingly privatized federal government.

Some may also argue that the solutions I offer will not work. Indeed, I acknowledge that despite the examples I offer, further empirical and contextual analysis is required to test my hypotheses. Beyond empirics, as a conceptual matter, while I have focused on the question of preemption, the narrative here could be extended. For example, how do the trilateral relationships I describe play out when the situation is not conflict prone (as is the case when law is displaced or preempted) but cooperative, or somewhere in between? Thus, for example, could Congress require states to privatize as a condition of federal funding, that is, to siphon the federal dollars to contractors? Similarly, do states and private entities continue to interact in the shadow of federal preemption?⁵¹⁰ How might the different federal-state-private balances play out in different contexts, using different approaches to power allocation? How do localities play a role in this mix (a question I deliberately elide for the purposes of this Article)?⁵¹¹ And even more fundamentally,⁵¹² how do all of these interactions help shape our conception of government, of the public and private, and of citizenship? These are all questions that must be answered for us to develop a fuller understanding of “our federalism.”⁵¹³

⁵⁰⁹ Cf. *Alaska Dep’t of Env’t Conservation v. EPA*, 540 U.S. 461, 517–18 (2004) (Kennedy J., dissenting) (stating that allowing agency action to preempt state law reduced “[t]he federal balance . . . to a single agency official,” *id.* at 517, and “relegat[ed] States to the role of mere provinces or political corporations, instead of coequal sovereigns entitled to the same dignity and respect,” *id.* at 518).

⁵¹⁰ For example, Professor Benjamin Sachs shows compellingly how, despite being preempted, states continue to negotiate labor regulation with firms. Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153, 1155 (2011).

⁵¹¹ In ongoing work, for example, I seek to examine how localities may displace state policy, again, often, by hiring private entities. See Jan Hoffman, *Opioid Settlement Offer Provokes Clash Between States and Cities*, N.Y. TIMES (Mar. 13, 2020), <https://www.nytimes.com/2020/03/13/health/opioids-settlement.html> [<https://perma.cc/DRZ9-VZBH>] (offering an example of this phenomenon).

⁵¹² See *New York v. United States*, 505 U.S. 144, 181 (1992) (“The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals.”).

⁵¹³ See Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549, 1551 (2012).