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ESSAY

Privatized Detention & Immigration Federalism

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The vast majority of detained immigrants are held in facilities operated by private corporations.[1] This multibillion-dollar industry shapes immigration policies directly through contractual implementation, and indirectly through lobbying at all levels of government.[2] Over the past decade, academics and dedicated advocates have shed critical light on the structural causes and effects of privatized immigration detention, offering a range of policy prescriptions along the way.[3] Until now, however, federalism has been a virtual blind spot in that reformist agenda. Intervening, this Essay draws federalism into the spotlight. And not a moment too soon.

The Trump Administration is drastically expanding privatized immigration detention beyond its already inflated level.[4] Meanwhile, states and localities are asserting themselves as sites of resistance and assistance. Recently

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1. EMILY RYO & IAN PEACOCK, AM. IMMIGRATION COUNCIL, THE LANDSCAPE OF IMMIGRATION DETENTION IN THE UNITED STATES 2 (2018), https://perma.cc/FN64-SZE2; *Detention by the Numbers*, Freedom For Immigrants (2018), https://perma.cc/NL4W-8YE5.
2. Denise Gilman & Luis A. Romero, *Immigration Detention, Inc.*, 6 J. ON MIGRATION & HUM. SECURITY 145, 148 (2018); Livia Luan, *Profiting from Enforcement: The Role of Private Prisons in U.S. Immigration Detention*, MIGRATION POL'Y INST. (May 2, 2018), https://perma.cc/5W9P-GB8T.
3. *See, e.g.*, Jennifer M. Chacón, *Privatized Immigration Enforcement*, 52 HARV. C.R.-C.L. L. REV. 1, 37-43 (2017); Michael Sozan, Ctr. for Am. Progress, Solutions to Fight Private Prisons' Power over Immigration Detention (2018), https://perma.cc/2LSW-L8KG.
4. John Burnett, *Big Money As Private Immigrant Jails Boom*, NPR (Nov. 21, 2017, 5:00 AM ET), https://perma.cc/PWG4-QDPU; Zusha Elinson, *Trump's Immigrant-Detention Plans Benefit Private Prison Operators*, WALL ST. J. (July 2, 2018, 5:30 AM ET), https://perma.cc/BX9P-P753.

enacted California laws, for example, might drastically curtail private immigration detention by prohibiting localities from contracting with private prison companies and requiring state oversight of their existing facilities.[5] By contrast, Texas state officials have promulgated a licensing scheme to enable prolonged family immigration detention in privatized facilities.[6]

These trends give rise to an overarching question: What autonomy do states and local governments have to regulate, license, or otherwise monitor private immigration detention? More specifically, under what circumstances are private entities, by dint of their public contracts, shielded from subfederal law under the doctrines of preemption, intergovernmental immunity, and derivative immunity? And is there something unique about immigration that might skew the doctrinal analysis in favor of the federal government and its contractors?[7]

The federal government undoubtedly has an interest in immigration detention and its outsourcing to private actors. But states and localities do too, whether for humanitarian, fiscal, ideological, or other reasons. By mapping the myriad ways that privatized detention intersects with immigration federalism, this Essay provides crucial mooring for the doctrinal, political, and strategic battles ahead.

I. Privatized Immigration Detention

U.S. Immigration and Customs Enforcement (ICE) detains approximately 40,000 immigrants on an average daily basis. More than 70% of them are held in privately operated facilities under three types of contractual arrangements.[8] First, ICE contracts directly with private companies to operate so-called Contract Detention Facilities (CDFs). Second, ICE contracts directly with subfederal jurisdictions pursuant to Intergovernmental Service Agreements

5. *See* CAL. GOV'T CODE §§ 7284.6, 12532 (West 2019); CAL. CIV. CODE § 1670.9(a)-(b); *see also* United States v. California, 314 F. Supp. 3d 1077, 1085-86 (E.D. Cal. 2018) (declining to preliminarily enjoin section 12532).

6. *See* 26 TEX. ADMIN. CODE § 748.7 (2019) (state agency regulation to allow the licensing of family detention centers); *see also* Grassroots Leadership, Inc. v. Tex. Dep't of Family & Protective Servs., No. D-1-GN-15-004336, 2016 WL 9234059, at *3-4 (Travis Cty. Dist. Ct. Dec. 16, 2016) (temporarily enjoining the regulation), *rev'd*, No. 03-18-00261-CV, 2018 WL 6187433, at * 1, *7 (Tex. App. Nov. 28, 2018) (reversing on the ground that plaintiffs lacked standing).

7. *See generally* David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583 (2017) (explaining how sometimes, but not always, the Supreme Court's immigration jurisprudence departs from mainstream constitutional norms).

8. Tara Tidwell Cullen, *ICE Released Its Most Comprehensive Immigration Data Yet. It's Alarming.*, NAT'L IMMIGRANT JUST. CTR. (Mar. 13, 2018), https://perma.cc/AQB9-HFPA; NAT'L IMMIGRANT JUSTICE CTR., THE IMMIGRATION DETENTION TRANSPARENCY & HUMAN RIGHTS PROJECT: FREEDOM OF INFORMATION ACT LITIGATION REVEALS SYSTEMIC LACK OF ACCOUNTABILITY IN IMMIGRATION DETENTION CONTRACTING 5-6 (2015) (discussing various contractual arrangements for immigration detention).

(IGSAs). In turn, many of these localities subcontract with private corporations to provide detention services. This passthrough contracting structure is often prearranged and pre-negotiated among ICE, subfederal governments, and private contractors. Third, and less commonly, ICE directly contracts with the Department of Justice's U.S. Marshals Service, which in turn subcontracts with private entities to detain immigrants.

Privatized immigration detention has drawn sustained criticism in recent years. An overarching objection is to immigration detention, itself, which many critics argue is generally unnecessary, immoral, and rights-depriving.[9] Arguably, privatization makes matters exponentially worse.[10] Through outsourcing, privatization not only enables, but also encourages, federal detention policies that might otherwise be impracticable or politically infeasible.[11] Moreover, as is true in other privatized contexts, detention contractors are not subject to federal open records laws, civil service requirements, administrative law, constitutional requirements, and other legal checks that would otherwise apply to federal officials doing the same work.[12] And, even when competitively bid, the private detention market is highly susceptible to market manipulations because it is dominated by a few key players.[13]

9. *See* Chacón, *supra* note 3, at 18-28 (summarizing the main critiques and collecting citations); César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245 (2017) (advancing moral objections to immigration prisons); CARL TAKEI ET AL., ACLU, SHUTTING DOWN THE PROFITEERS: WHY AND HOW THE DEPARTMENT OF HOMELAND SECURITY SHOULD STOP USING PRIVATE PRISONS 6 (2016), https://perma.cc/3KV9-M6KH; *see also* Brief of Amici Curiae Immigrant Legal Resource Center et al. in Support of Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction at 3-15, United States v. California, 314 F. Supp. 3d 1077 (E.D. Cal. 2018) (No. 2:18-cv-00490-JAM-KJN), 2018 WL 3349101 (discussing concerns in immigration detention centers in California pertaining to health, safety, and access to counsel).

10. *See, e.g.*, MARY SMALL, DET. WATCH NETWORK, A TOXIC RELATIONSHIP: PRIVATE PRISONS AND U.S. IMMIGRATION DETENTION 2-3, 14 (2016), https://perma.cc/T82S-8H27; TAKEI ET AL., *supra* note 9, at 12-15 (arguing that "[i]n place of its current mass detention apparatus, the government should" utilize release on recognizance, bond, and a range of community-based detention alternatives with case management services).

11. Sharita Gruberg, *Trump's Executive Order Rewards Private Prison Campaign Donors*, CTR. FOR AM. PROGRESS (June 28, 2018, 9:00 AM), https://perma.cc/HK56-WPGJ (discussing lobbying and campaign contributions by the private prison industry, and explaining that "fixed pricing" contractual clauses "create[] an incentive for DHS to fill available bed space regardless of its actual need"); Luan, *supra* note 2 (describing how trends in increased immigration detention are connected to, and made possible by, the private prison industry).

12. *See* Jody Freedman & Martha Minow, *Introduction: Reframing the Outsourcing Debates*, *in* GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 1, 2-13 (Jody Freedman & Martha Minow eds., 2009) (canvassing these concerns with respect to government contracting generally).

13. *See* Luan, *supra* note 2 ("The three largest companies (CoreCivic, GEO Group, and Management and Training Corporation) account for more than 96 percent of the total number of private prison beds."); *see also* Bethany Carson & Eleana Diaz, *Payoff: How Congress Ensures Private Prison Profit with an Immigrant Detention Quota*, GRASSROOTS

The federal government oversees these private facilities, and its contracts generally include operational, safety, and performance standards that private facilities must meet.[14] But the government's oversight is blunted by political incentives, operational dependence on private detention space, and lack of transparency.[15]

Despite these critiques, including from federal oversight bodies,[16] government officials continue to promote privatized immigration detention through contract extensions and dubious policies. For instance, Congress has instituted detention bed quotas that, logistically, DHS must satisfy by outsourcing to private companies that lobbied for the quotas.[17] Moreover, through IGSA contracting and regulatory loopholes, ICE circumvents competitive market bidding and procedural requirements that would otherwise apply under federal acquisition regulations.[18]

II. Federalism as the New Privatization Battleground

Against this legal and political backdrop, immigrant advocacy groups have recently turned to state and local jurisdictions to curb immigration detention in general, and its privatized arm in particular. Meanwhile, ICE and its contractors have turned to politically hospitable jurisdictions to enable and expand privatized immigration detention.

These countercurrents are, in some ways, an extension of the "subfederal immigration revolution" that began in earnest about a decade ago, as states and localities entered the immigration fray to unprecedented extents.[19] The legal

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LEADERSHIP (Apr. 2015), https://perma.cc/Y25R-77JG (noting that CoreCivic and GEO Group operate eight of the ten largest detention centers).

14. NAT'L IMMIGRANT JUSTICE CTR. & DET. WATCH NETWORK, LIVES IN PERIL: HOW INEFFECTIVE INSPECTIONS MAKE ICE COMPLICIT IN IMMIGRATION DETENTION ABUSE 6-10, 13 fig.6, 15 (2015), https://perma.cc/JC6X-FCU8 (noting the multiple reviewing bodies and the multiple performance standards and guidelines specified in detention contracts, as well as the number of failed inspections).
15. *Id.* at 4-5; SMALL, *supra* note 10, at 3, 7-14.
16. *See, e.g.*, HOMELAND SEC. ADVISORY COUNCIL, REPORT OF THE SUBCOMMITTEE ON PRIVATIZED IMMIGRATION DETENTION FACILITIES 9-17 (2016), https://perma.cc/EDD8-LTPY.
17. *See* Anita Sinha, *Arbitrary Detention? The Immigration Detention Bed Quota*, 12 DUKE J. CONST. L. & PUB. POL'Y 77, 85-88, 90-97 (2016) (discussing legislative history of bed quota).
18. For a summary of federal acquisition laws, see generally Mathew Blum, *The Federal Framework for Competing Commercial Work Between the Public and Private Sectors*, *in* GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY, *supra* note 12, at 63. For critical reports of ICE's regulatory circumvention, see OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., OIG-18-53, IMMIGRATION AND CUSTOMS ENFORCEMENT DID NOT FOLLOW FEDERAL PROCUREMENT GUIDELINES WHEN CONTRACTING FOR DETENTION SERVICES 3-5 (2018); and SMALL, *supra* note 10, at 7.
19. PRATHEEPAN GULASEKARAM & S. KARTHICK RAMAKRISHNAN, THE NEW IMMIGRATION FEDERALISM 57-86 (2015) (surveying uptick in state and local laws pertaining to noncitizens); David S. Rubenstein, *Immigration Structuralism: A Return to Form*, 8 DUKE J.

templates of that movement, however, do not fill the *privatized* chapter ahead. Fresh work and analysis are needed at the intersection of privatization and immigration federalism—which we expound on and call "Immigration Federalism, Inc." in forthcoming work.

To jumpstart that project, the discussion below offers examples of recently enacted state laws and litigation initiatives directed at private immigration detention. We then canvass the federalism doctrines most pertinent to the dawning political and legal battles.

A. State Law

At the forefront, California hopes to constrain the operation and expansion of privatized immigration detention through two recently enacted bills.[20] First, California Assembly Bill 103 (AB 103) requires the state Attorney General to inspect and report on conditions in all immigration jails in the state. Toward those ends, AB 103 expressly grants the state Attorney General access to the facilities, detainees, and records of any immigration detention facility in California.[21] In addition, AB 103 prohibits localities from signing IGSA immigration detention contracts with the federal government.[22]

Second, California Senate Bill 29 (SB 29) prevents localities from entering new immigration detention contracts with private prison companies, and prevents the modification or renewal of existing contracts.[23] Moreover, to promote transparency and accountability, SB 29 extends the California Public Records Act to private immigration detention facilities within the state,[24] and requires a 180-day period of public notice and comment before a locality conveys property or issues a permit relating to private immigration detention.[25]

In contrast to California, Texas is coordinating with the federal government and prison industry to facilitate and expand privatized immigration detention, most notably for family detention. The Texas Department of Family and Protection Services recently promulgated a rule that,

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CONST. L. & PUB. POL'Y 81, 81-82 (2013) (explaining that "[a]t the heart of the 'subfederal immigration revolution' are two core questions:" first, "*what* to do about our 'broken' immigration system," and second, "*which* institution of government, relative to others, has the power to do what").

20. Christina Fialho & Grisel Ruiz, Freedom for Immigrants & Immigrant Legal Res. Ctr., Guide To: Dignity Not Detention 2 (2017), https://perma.cc/ZJ9Z-ZQ7C.
21. CAL. GOV'T CODE § 12532 (West 2019). The first report was released in February 2019. XAVIER BECERRA, CAL. ATTORNEY GEN., THE CALIFORNIA DEPARTMENT OF JUSTICE'S REVIEW OF IMMIGRATION DETENTION IN CALIFORNIA (2019).
22. CAL. GOV'T CODE § 7310(a). In addition, section 7310(b) prohibits localities from expanding existing contracts for detention. *Id.* § 7310(b).
23. *Id.* § 1670.9(a)-(b).
24. *Id.* § 1670.9(c).
25. *Id.* § 1670.9(d)(1)-(2).

for the first time, established a state licensing scheme for family detention centers that are "operated by or under a contract with [ICE]."[26] Designed with the intent to enable the federal government to detain immigrant children and parents together, this licensing scheme waives general prohibitions that apply to other child residential centers in the state.[27]

The impetus for this licensing scheme was a 2015 judicial holding that family immigration detention centers must be state-licensed for the care of children, pursuant to the terms of the so-called *Flores* Settlement.[28] Prior to this federal district court decision, the Texas agency had consistently disclaimed jurisdiction to license family immigration detention centers in the state.[29]

In addition to subfederal laws that specifically target private detention, generally applicable subfederal laws have also been invoked to restrict and enable private detention facilities. For example, extant municipal powers over zoning, construction, and land use provide localities with some discretion over private detention facilities.[30] Moreover, private causes of action under general state laws provide a potential basis for holding prison operators legally accountable.

Perhaps most notably, several pending class action lawsuits seek money damages against private prison companies under state minimum wage and unjust enrichment laws.[31] The crux of these state law claims is that prison

26. 26 TEX. ADMIN. CODE § 748.7 (2019).

27. *Id.* After the rule was promulgated, the state began the process of issuing licenses to family detention centers. In response, advocacy groups have challenged the rule on administrative law grounds. Grassroots Leadership, Inc. v. Tex. Dep't of Family & Protective Servs., No. D-1-GN-15-004336, 2016 WL 9234059, at *3-4 (Travis Cty. Dist. Ct. Dec. 16, 2016) (temporarily enjoining the regulation), *rev'd*, No. 03-18-00261-CV, 2018 WL 6187433, at *1, *7 (Tex. App. Nov. 28, 2018) (reversing on the ground that plaintiffs lacked standing). In the meantime, the private prison industry has lobbied the Texas legislature to pass a bill along the same lines, one of which passed in the state Senate but not in the House of Representatives. *See* S. 1018, 85th Leg., Reg. Sess. (Tex. 2017).

28. Flores v. Johnson, 212 F. Supp. 3d 864, 869, 877-80 (C.D. Cal. 2015), *aff'd in relevant part sub nom. Flores v. Lynch*, 828 F.3d 898, 906 (9th Cir. 2016). For a summary of the origins and subsequent litigation over the *Flores* Settlement, see Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 83 Fed. Reg. 45,486, 45,486 (Sept. 7, 2018).

29. *Grassroots Leadership*, 2018 WL 6187433, at *2.

30. *See, e.g.*, TACOMA, WASH., LAND USE REGULATORY CODE §§ 13.06.100.C.5, 13.06.200.C.5, 13.06.300.D.3, 13.06.400.C.5 (2018) (changing city zoning laws to make private detention facilities unpermitted in several areas); Ed Bierschenk, *Gary Says No To GEO Detention Center*, NORTHWEST IND. TIMES (May 4, 2016), https://perma.cc/82P9-UYYY (city council vote to deny permit to private prison company for immigration detention center); Teddy Wilson, *Texas County Terminates Immigrant Detention Center Contract with ICE, For-Profit Prison*, REWIRE.NEWS (June 26, 2018, 4:31 PM), https://perma.cc/3KHH-HFRK.

31. There are at least eight lawsuits of this nature currently pending around the country, which also allege violations of federal law, including the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 112, 114 Stat. 1464, 1486-87 (codified as amended at 18 U.S.C. § 1589(a) (2017)). *See* Petition for a Writ of Certiorari at 2, 3 & n.1,

companies are unlawfully employing immigrant detainees at their facilities for little or no pay.[32] Beyond championing the rights of the class action detainees, this impact litigation is a coordinated and calculated attack on privatized immigration detention itself.[33]

B. Inflecting Federalism Doctrines with Privatization

The viability of the foregoing interventions will depend, in large measure, on a set of federalism doctrines that could potentially shield prison companies from subfederal regulation and liability. Those doctrines include: (1) intergovernmental immunity, (2) preemption, and (3) derivative immunity.[34]

1. Intergovernmental Immunity

Under the intergovernmental immunity doctrine, a state may not discriminate "against the Federal Government or those with whom it deals."[35] Under this doctrine, state law will not be deemed discriminatory unless the regulatory scheme, viewed in its totality, treats the government or its contractors *worse* than the comparable reference group.[36]

In theory, all of the California and Texas state laws discussed above may be subject to challenge under the intergovernmental immunity doctrine, insofar as they directly regulate federal contractors. To date, however, only California AB 103's review-and-reporting provision has been challenged by the federal government.[37]

Thus far, in *United States v. California*, a federal district court has ruled that AB 103 did not discriminate against the federal government, and so did not run

GEO Grp., Inc. v. Menocal, 139 S. Ct. 143 (2018) (No. 17-1648), 2018 WL 2809390 (describing the litigation and citing parallel cases).

32. *See, e.g.*, Menocal v. GEO Grp., Inc., 113 F. Supp. 3d 1125, 1128 (D. Colo. 2015), *aff'd*, 882 F.3d 905 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 143 (2018).

33. *Cf. One Dollar Per Day: The Slaving Wages of Immigration Jail Work Programs: A History and Legal Analysis, 1943-Present*, BUFFET INST. FOR GLOB. STUD., https://perma.cc/TM2G-5F2W (archived Feb. 1, 2019) (tracking case developments).

34. Private prison companies operating on federal land may also be shielded by the federal enclave doctrine. *See generally* Emily S. Miller, *The Strongest Defense You've Never Heard Of: The Constitution's Federal Enclave Doctrine and Its Effect on Litigants, States, and Congress*, 29 HOFSTRA LAB. & EMP. L.J. 73 (2011) (discussing the federal enclave doctrine); *see also* Lockhart v. MVM, Inc., 97 Cal. Rptr. 3d 206, 211-13 (Cal. Ct. App. 2009) (applying the doctrine to shield private contractor from liability under state law employment claims). Few private detention facilities are currently located on federal enclaves. But that can change in line with political, doctrinal, and economic incentives. *See infra* Part III.

35. *See* North Dakota v. United States, 495 U.S. 423, 434-35 (1990) (opinion of Stevens, J.).

36. *Id.* at 437-38.

37. *See* United States v. California, 314 F. Supp. 3d 1077, 1085, 1093 (E.D. Cal. 2018). The lawsuit also challenges the legality of two other California laws, SB 54 and AB 450, which are beyond the scope of this essay. *Id.* at 1085.

afoul of the intergovernmental immunity doctrine.[38] Meanwhile, neither the federal government nor their private contractors have yet to raise an intergovernmental immunity objection to Texas's licensing scheme, even though it is arguably more intrusive than California's review-and-reporting requirements.[39] The federal government's contrasting litigation positions in California and Texas are striking, if not also revealing of its political and strategic motivations.

2. Preemption

Apart from intergovernmental immunity, subfederal law may be preempted under the Supremacy Clause. To start, the federal government or its contractors might argue that state policies targeting private immigration facilities are preempted by the Constitution under the "exclusivity doctrine."[40] Under that immigration-specific federalism doctrine, only the federal government may regulate the admission and expulsion of immigrants.

Alternatively, subfederal laws pertaining to immigration detention may arguably be preempted by congressional statutes and binding administrative regulations.[41] Beyond that, the Court in *Arizona v. United States* strongly indicated, if not held, that ICE's *non*binding immigration enforcement policies could preempt conflicting state laws,[42] for reasons that might reverberate in the detention context.

Seizing on all of these theories, the Trump Administration has argued that California's AB 103 review-and-reporting requirement is preempted by the Constitution via the exclusivity principle, the Immigration and Nationality Act (INA), administrative policies, or some combination thereof.[43] Without parsing these intermingling preemption theories, the district court held in *United States v. California* that the government was unlikely to succeed on any of them. According to the court, there was "no indication" that Congress intended

38. *Id.* at 1093.

39. *Compare* Appellants' Brief at 6, 8-9, Tex. Dep't of Family & Protective Servs. v. Grassroots Leadership, Inc., No. 03-18-00261-CV, 2018 WL 6187433 (Tex. App. Nov. 28, 2018) (noting that Texas's licensing review detected problems that resulted in the firing of employees, additional staffing, and improved conditions at the family detention centers), *with California*, 314 F. Supp. 3d at 1091 (remarking that, as currently formulated, AB 103 has more bark than bite).

40. *See* Rubenstein & Gulasekaram, *supra* note 7, at 603-06 (discussing the exclusivity doctrine).

41. *See id.* at 602-03; David S. Rubenstein, *Delegating Supremacy?*, 65 VAND. L. REV. 1125, 1137-38, 1147-52 (2012) (comparing and contextualizing the Supreme Court's statutory and administrative preemption doctrines).

42. *See* 567 U.S. 387, 410 (2012) (holding that federal law preempted provisions of SB 1070, at least in part because of its potential conflict with federal immigration enforcement priorities).

43. Plaintiff's Motion for Preliminary Injunction and Memorandum of Law in Support at 18-22, *California*, 314 F. Supp. 3d 1077 (No. 2:18-cv-00490-JAM-KJN), 2018 WL 1473199; *see also California*, 314 F. Supp. 3d at 1090.

to deprive states of their authority to oversee "detention facilities operating within their borders."[44] Moreover, the court explained, the contracts at issue "expressly contemplate compliance" with subfederal law, and "AB 103's review process does not purport to give California a role in determining whether an immigrant should be detained or removed from the country."[45]

A lingering question, unaddressed by the court in *California*, is whether the terms of *federal contracts* can directly or indirectly preempt state laws. This question is front and center in the state wage law litigation against private detention centers,[46] but its potential significance extends much further.

As a purely formal matter, federal contracts do not qualify as "Laws," and thus arguably fall beyond the Supremacy Clause's purview.[47] Under current doctrine, however, the terms of federal contracts may be relevant to preemption in at least three ways.

First, Congress might pass an express preemption statute that incorporates, by reference, the terms of federal contracts.[48] Under that scenario, the federal statute arguably does the preemptive work, but a necessary condition would be a conflict between subfederal law and the statutorily incorporated contractual terms.[49] Second, along similar lines, DHS might pass a regulation that in substance or effect imbues detention contracts with preemptive effect.[50] To date, neither Congress nor DHS has done so, but both are foreseeable possibilities.

Third, state law may be preempted by federal contracts under the auspice of federal common law—specifically, by the "contractor defense" espoused by the Supreme Court in *Boyle v. United Technology Corp.*[51] There, in the context of a military procurement contract, the Court reasoned that "the liability of

44. *California*, 314 F. Supp. 3d at 1091.

45. *Id.* While noting that the contracts contemplate compliance with subfederal law, the court did not elaborate on the doctrinal significance of such contractual terms. For instance, the court did not explain whether or under what circumstances such contractual clauses could save state law from being preempted in the event of conflicts between state and federal law.

46. *See supra* notes 31-33 and accompanying text (discussing this litigation).

47. The Supremacy Clause provides that the "Constitution," "Laws . . . made in Pursuance thereof," and "all Treaties" have preemptive effect. U.S. CONST. art. VI; *cf.* Empire HealthChoice Assurance, Inc. v. McVeigh, 396 F.3d 136, 143 (2d Cir. 2005) (Sotomayor, J.) ("[W]e generally take for granted that it is law, and not a mere contract term, that carries the preemptive force." (emphasis omitted)), *aff'd*, 547 U.S. 677 (2006).

48. There are very few examples of this in the United States Code. For one example, however, see 5 U.S.C. § 8902(m)(1) (2017), which provides that "[t]he terms of any contract under this chapter which relate to the nature, provision, or extent of coverage or [health care] benefits . . . shall supersede and preempt any State or local law, or any regulation issued thereunder, which relates to health insurance or plans."

49. Coventry Health Care of Mo., Inc. v. Nevils, 137 S. Ct. 1190, 1194 (2017) (upholding the constitutionality of 5 U.S.C. § 8902(m)(1) and deeming the state laws at issue preempted by the statute itself).

50. At least, there is no indication in the Court's jurisprudence that suggests otherwise.

51. 487 U.S. 500 (1988).

independent contractors performing work for the Federal Government . . . is an area of uniquely federal interest."[52] State law that is in "significant conflict" with that interest, the Court held, must give way if the government "approved reasonably precise specifications" to which the contractor complied.[53]

Without questioning the general applicability of the contractor defense in the wage law litigation against private detention centers, at least one district court determined that the elements of the defense were not met.[54] Specifically, the court found that the relevant contract "does not prohibit Defendant from paying detainees in excess of $1/day," and "specifically contemplate[d]" that the defendant will comply with "[a]pplicable . . . state and local labor laws."[55] Under those circumstances, the court rejected the private facility's contractor defense for lack of a "'significant conflict' between a federal interest and state law."[56]

3. Derivative Immunity

The Supreme Court has long held that "[t]he United States, as sovereign, is immune from suit" unless it unequivocally and expressly consents to suit.[57] In its purest form, federal sovereign immunity applies only to the U.S., its agencies, and its employees. Under federal common law, however, private entities may enjoy qualified "derivative immunity" based on their contractual relationship with the federal government.

This doctrine traces to the 1940 decision of *Yearsley v. W.A. Ross Construction Co.*, in which the Supreme Court extended federal immunity to a contractor who was constructing dikes pursuant to the federal government's specifications.[58] Citing *Yearsley*, the Court recently affirmed that a federal contractor who simply performs as directed by the government may be shielded from liability for injuries caused by its conduct.[59]

In the wage law litigation, immigration detention contractors have relied on this theory of derivative immunity in lieu of, or seemingly interchangeably

52. *Id.* at 505 n.1.

53. *Id.* at 512.

54. *See* Menocal v. GEO Grp., Inc., 113 F. Supp. 3d 1125, 1134-35 (D. Colo. 2015), *aff'd*, 882 F.3d 905 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 143 (2018).

55. *Id.* at 1135 (second alteration in original) (emphasis omitted).

56. *Id.* On this logic, cases may come out differently depending on the contractual terms and state laws at issue. But, for reasons visited in Part III, there is room to argue that the contractor defense should not apply to immigration detention contracts at all.

57. United States v. Mitchell, 445 U.S. 535, 538 (1980) (alteration in original) (quoting United States v. Sherwood, 312 U.S. 584, 586 (1941)).

58. 309 U.S. 18, 20-21 (1940).

59. *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672-74 (2016) (citing *Yearsley*, 309 U.S. 18); *see also id.* at 672 (recognizing the doctrine but holding that the contractor at issue was not entitled to immunity because it disregarded the "[g]overnment's explicit instructions" and violated federal law).

with, the preemption contractor defense discussed above.[60] Again, without questioning the doctrine's potential applicability to the state law claims at issue, lower courts have yet to find the requirements of derivative immunity met under the circumstances and procedural posture of the cases.[61]

III. A Federalism Agenda for Privatized Immigration Detention

State and local regulation of privatized immigration detention is raising new doctrinal, theoretical, and practical concerns for advocates, commentators, and jurists. Because the prison companies are *private* actors, they operate outside the purview of constitutional and administrative law.[62] Yet, because they are performing *public* functions pursuant to government contracts, courts might afford them immunities and legal defenses enjoyed by public actors.

This asymmetrical accountability scheme makes privatized detention attractive as a business proposition, but requires revisiting in light of recent privatization trends.[63] Federalism offers an as-yet untapped reservoir of regulatory authority to check federal outsourcing in ways that other legal structures have not delivered. In this concluding Part, we offer some preliminary thoughts and a research agenda for further study.

First, the doctrinal waters remain choppy and unsettled in key respects. An overarching wild card is immigration exceptionalism, which might distort judicial consideration of all the pertinent federalism doctrines. For instance, questions linger over the preemptive scope of the exclusivity principle (which may be fading away) and the preemptive effect of nonbinding immigration enforcement policies (which may be edging in).[64] Similar uncertainty shadows the intergovernmental immunity doctrine. Immigration detention has no clear

60. *Compare Menocal*, 113 F. Supp. 3d at 1134-35 (denying defendant's preemption contractor defense under *Boyle*), *with* Novoa v. GEO Grp., Inc., No. EDVC 17-2514 JGB, 2018 WL 4057814, at *3 (C.D. Cal. Aug. 22, 2018) (denying defendant's derivative immunity defense under *Yearsley*).

61. *See, e.g.*, *Novoa*, 2018 WL 4057814, at *3; Nwauzor v. GEO Grp., Inc., No. 3:17-cv-05769-RJB, 2018 WL 4150909, at *1 (W.D. Wash. Aug. 6, 2018).

62. *See* Freeman & Minow, *supra* note 12, at 10-11 (explaining that federal outsourcing occurs mostly beyond constitutional and administrative law constraints).

63. *See* Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1371 (2003) (arguing that "constitutional law's current approach to privatization is fundamentally inadequate in an era of increasingly privatized government"); *see also* JON D. MICHAELS, CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO THE AMERICAN REPUBLIC 1-20 (2017) (detailing tensions between trends in federal outsourcing and separation-of-powers principles).

64. As we discuss in more detail elsewhere, the Supreme Court seems to be moving away from applying the exclusivity principle in cases where it arguably applies; yet the Court has also recently intimated (if not held) that nonbinding immigration enforcement policies can preempt conflicting state law. *See* Rubenstein & Gulasekaram, *supra* note 7, at 605-07 (discussing these doctrinal countercurrents in *Arizona v. United States*, 567 U.S. 387, 410 (2012)).

analogs; it is an ostensibly civil system that notoriously mimics criminal incarceration in key respects.[65] Thus, when testing for state discrimination against the federal government and its contractors, is the comparative reference group non-immigration civil detention, criminal jails, or something else? Likewise, in the context of family immigration detention, it is unclear whether the appropriate comparison is child care facilities or other types of detention facilities.

The federal contractor and derivative immunity defenses are also sprinkled with doctrinal uncertainty. Courts and litigants in the wage law litigation have thus far assumed that these federal common law doctrines apply to privatized immigration detention.[66] Yet that assumption is contestable. Lower courts, for example, are split on whether and how the contractor defense should extend beyond *military* and *procurement* contexts, and wrestle with how (if at all) derivative immunity differs from the contractor defense.[67] And, even if these defenses might generally apply to immigration detention, they arguably should not apply to IGSA arrangements where private contractors are not in direct contractual privity with the federal government.

Second, the viability of federalism-based initiatives to assist or resist privatized detention is highly contingent, both politically and legally. Federalism only sets the parameters of federal power and state autonomy—it will not resolve how federal, subfederal, and private actors navigate within or around those parameters. Immigrant advocates intend to leverage subfederal law to curb the proliferation of privatized immigration facilities and improve conditions in them. But that end is not guaranteed; it depends on as-yet unpredictable policy responses of federal and subfederal governments to the changing doctrinal landscape.

For its part, the federal government may respond in ways that render subfederal regulations moot. Among other options, DHS might move private facilities to federal enclaves where they would be immune from state law;[68] concentrate immigration detention in hospitable jurisdictions; pass preemptive

65. *See* César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1382-92 (2014).

66. *See supra* notes 54-56, 60-61 and accompanying text.

67. *See* RODNEY M. PERRY, CONG. RESEARCH SERV., R43462, TORT SUITS AGAINST FEDERAL CONTRACTORS: SELECTED LEGAL ISSUES 5-8 (2014) (discussing lower court splits); Jason Malone, *Derivative Immunity: The Impact of* Campbell-Ewald Co. v. Gomez, 50 CREIGHTON L. REV. 87, 106, 115-18 (2016) (canvassing ambiguities in the derivative immunity doctrine, both independently and in relation to the contractor defense).

68. Indeed, the Trump Administration has announced plans to expand immigration detention on military bases and other federal lands. Jolie McCullough & Chris Essig, *The Trump Administration Is Making Plans To Detain More Immigrants in Texas. Here's Where They Would Be Held.*, TEX. TRIB. (Aug. 2, 2018, 12:00 AM), https://perma.cc/5NSJ-MUH8.

regulations; or outsource immigration detention to county and local jails in hospitable states, where conditions may be even worse.[69]

Moreover, any doctrinal "wins" in one state can reverberate as "losses" elsewhere. For example, if California successfully argues that state monitoring of private detention centers is not preempted by federal law, then Texas may rely on the same reasoning to successfully defend its licensing scheme. Conversely, if the U.S. successfully argues in California that state monitoring is preempted, then detainees in family detention might successfully defeat Texas's licensing scheme on parallel grounds.

Of course, distinctions can and will be drawn between the state laws at issue, such that legal victories in one jurisdiction will not necessarily backfire elsewhere. It depends, in large measure, on the grounds and reasoning upon which cases are decided. For example, if immigration detention is deemed to be an exclusively federal prerogative, then, under the exclusivity principle, state laws would be constitutionally preempted regardless of whether they hinder or help the federal government's detention policies. By contrast, if the basis for preemption is that state law conflicts with the Administration's enforcement and detention priorities, then distinctions between cooperative and uncooperative state laws could very well matter to the preemption calculus.

Depending on how the doctrine develops, the federal government may face trade-offs too, in ways that could align with immigrant interests and public law values more generally. For instance, if the federal contractor and derivative immunity defenses depend on direct contractual privity between ICE and private operators, then the federal government (and its contractors) may be incentivized toward direct contractual arrangements. That direct contracting, in turn, would trigger a set of federal procurement laws that promote transparency and market competition, in ways that ICE currently avoids through IGSA arrangements.

It is beyond the scope of this Essay to limn all the possibilities and perils of immigration federalism's privatized frontier. Subsequent work will provide normative perspective on these doctrinal quandaries, with an eye toward how legal solutions may interact with the political and contextual dynamics of this new chapter of immigration federalism.

69. *See, e.g.*, Gilman and Romero, *supra* note 2 at 150; HOMELAND SEC. ADVISORY COUNCIL, *supra* note 16, at 7-8 ("emphas[izing] that it would not represent improvement to phase out private contractors if the result were heavier use of county jails," which for a variety of reasons are not well suited for immigration detention).