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ARTICLE

The Sovereign Shield

Kate Sablosky Elengold & Jonathan D. Glater*

Abstract. As the federal government has come to rely increasingly on private companies to perform government functions, more businesses are testing the power of the resulting contractual relationships to shield themselves from liability, regulation, and oversight. Such nongovernmental entities seek the benefit of what we call the federal government's *sovereign shield* by exploiting three doctrines: preemption, derivative sovereign immunity, and intergovernmental immunity. Because these contractors provide services supporting every conceivable government action, allowing them to act with impunity puts citizens at risk across myriad aspects of their lives.

This Article untangles the doctrines that extend the sovereign shield to private actors and exposes the alliance that such extension enables between the executive branch and businesses. We explain how this alliance shifts the balance of power in three ways: in favor of the federal government at the expense of the states, in favor of the executive branch at the expense of the legislature, and in favor of private enterprise at the expense of consumers. Using student-loan servicers as a case study, this Article lays bare how government contractors try to exploit the sovereign shield. And it sounds an alarm about the consequences of this particular alliance: injured consumers with no path to redress and destabilization of the principles of federalism and separation of powers.

* Kate Sablosky Elengold is an Assistant Professor of Law, University of North Carolina School of Law. Jonathan D. Glater is a Professor of Law, University of California, Los Angeles. The Authors would like to thank the faculties at Georgia State University School of Law and University of California, Irvine, for their helpful comments. This Article benefitted from feedback we received at the Consumer Law Scholars Conference at Berkeley Law, the AALS panel on Regulatory Abdication and Student Loans, a UNC scholarship workshop, and the UNC Festival of Legal Learning. We are grateful for the feedback we received from Leah Litman, Eric Biber, Will Corbett, Anne Joseph O'Connell, Seth Frotman, Craig Konnoth, Sarah Bloom Raskin, Nicholas Smith, Dan Zibel, Joseph Smith, Jr., Andy Hessick, David Rubenstein, Danielle D'Onfro, Angela Littwin, and Nirej Sekhon. We benefitted enormously from superb research assistance from Daniel Root, Winston Hanks, Kyle Kelly, Luke P. de Leon, Nina Benjamin, Mallory Morris, and Jared Church. We are enormously grateful to the editors and staff at the *Stanford Law Review* for their thoughtful and insightful editing.

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Introduction

The federal government is a unique actor in the national economy. Powerful legal doctrines protect the government from liability for harmful acts and from regulation by states. As the government has come to rely on private businesses to perform an ever-increasing number of tasks,[1] federal contractors have sought to expand those legal doctrines to protect their conduct from oversight and regulation.[2] Both the federal government—more precisely, its executive branch—and federal contractors benefit from this arrangement: Contractors enjoy liability protection and the federal government quietly expands the scope of its authority.

As a sovereign, the federal government has the power to preempt state law, to dictate the limits of regulation of its conduct, and to specify whether, where, and when it can be sued.[3] These benefits—preemption,

1. *See* PAUL R. VERKUIL, OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT 23-24 (2007) (describing the privatization of the military, public-service obligations, prisons and state-level services, and agency functions); Jody Freeman & Martha Minow, *Introduction: Reframing the Outsourcing Debates*, *in* GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 1, 1-15 (Jody Freeman & Martha Minow eds., 2009); Jack M. Sabatino, *Privatization and Punitives: Should Government Contractors Share the Sovereign's Immunities from Exemplary Damages?*, 58 OHIO ST. L.J. 175, 179, 183-84 (1997) (recognizing that the government has increased its "programmatic responsibilities . . . to meet societal needs" and that it has "increasingly been looking to contract with the private sector to carry out all or parts of certain activities customarily performed by public employees"); Kimberly N. Brown, *Government by Contract and the Structural Constitution*, 87 NOTRE DAME L. REV. 491, 493 (2011) ("The use of common procurement and service contracts for routine supplies and maintenance is uncontroversial. But government contracting is much more audacious, encompassing some of the most highly sensitive functions within the core responsibilities of government.").
2. Daniel Guttman, *Public Purpose and Private Service: The Twentieth Century Culture of Contracting Out and the Evolving Law of Diffused Sovereignty*, 52 ADMIN. L. REV. 859, 924 (2000) (arguing that "political, and consequential scholarly, neglect of the big picture degree to which third parties . . . perform the basic work of government," combined with an "insistence that the basic work of government is, in fact and in law, performed by officials," has "limited the application of traditional legal concepts that might order developments and render third party government accountable").
3. These powers and immunities generally stem from the Supremacy Clause of the U.S. Constitution. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . ."). And while scholars have traced the muddy origin of federal sovereign immunity to case law, not to the Constitution, *see* Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521, 522 (2003), courts have treated the doctrine as an indirect benefit of the Supremacy Clause. *See id.* (recognizing that the sovereign-immunity doctrine developed in part by "drawing support from some aspects of constitutional architecture"); *see also* The Siren, 74 U.S. (7 Wall.) 152, 154 (1869) ("The [sovereign immunity] doctrine rests upon reasons

footnote continued on next page

intergovernmental immunity, and sovereign immunity, respectively—together form the *sovereign shield* that protects the federal government from regulation and legal liability.

There has long been debate about the utility of this sovereign shield.[4] Because this Article is primarily concerned with private actors, it puts those debates to one side, focusing instead on the *reach* of the sovereign shield. Government contracting is big business, touching on innumerable kinds of government action.[5] In an era of extensive federal reliance on private means to achieve governmental ends, we ask how far the sovereign shield does and should extend to nongovernmental actors—that is, to those businesses performing "public" work.[6] This Article addresses four critical questions: Can

of public policy; the inconvenience and danger which would follow from any different rule. It is obvious that the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the government. The exemption from direct suits is, therefore, without exception. This doctrine of the common law is equally applicable to the supreme authority of the nation, the United States.").

4. That is, for years some scholars have questioned the justifications for and doctrinal interpretations of any form of sovereign immunity. *See, e.g.*, Jackson, *supra* note 3, at 538 (observing that "there are very substantial arguments that the principle of sovereign immunity should have no application to the United States, [and] there are competing arguments that some aspects of sovereign immunity doctrine—notably, those relating to judicially compelled payments from Treasury funds—are either required by, or consistent with, the U.S. Constitution at the federal level" (footnote omitted)); *see also infra* note 69.

5. In fiscal year 2018, the federal government spent more than $550 billion on government contracts, which accounts for approximately 40% of the government's discretionary spending. *Federal Government Contracting for Fiscal Year 2018 (Infographic)*, U.S. GOV'T ACCOUNTABILITY OFF.: WATCHBLOG (updated May 29, 2019), https://perma.cc/KD92-L6AQ; *see also* VERKUIL, *supra* note 1, at 23-24. *See generally* Freeman & Minow, *supra* note 1 (explaining the phenomenon and scope of government outsourcing and identifying attendant legal, economic, and political concerns).

6. *See* Jon D. Michaels, *Privatization's Pretensions*, 77 U. CHI. L. REV. 717, 717-18 (2010) (describing the articulated positive and negative aspects of privatization). In a forthcoming article, we argue that the line between public and private work has been blurred, even when undertaken by government officials. *See* Kate Sablosky Elengold & Jonathan D. Glater, *The Sovereign in Commerce*, 73 STAN. L. REV. (forthcoming May 2021), https://perma.cc/L7ZW-N8QV. There, we argue that the sovereign shield should be available based on the nature of the work rather than the status of the actor. *Id.* Further, we argue that the sovereign shield should only be applicable when the government or its contractor provides a noncommercial service. *Id.* And to be clear, what we mean here by "public" is simply that it is work that the government wants done. We do not seek to invoke debate over what constitutes quintessentially public or nonpublic activity, a distinction that has been criticized as fundamentally unworkable. *See* Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1446 (2003) (describing the critique that "no principled distinction exists between government power and private power").

the potent doctrines forming the sovereign shield shelter private companies, contracted to conduct public business, from civil actions? Can they immunize government contractors from state or federal regulation? If so, under what circumstances? And what are the doctrinal and normative implications of such protection?

These are the challenges posed by the expansion of the sovereign shield. This Article examines federal contractors' use of the sovereign shield doctrines—preemption, derivative sovereign immunity, and intergovernmental immunity—to avoid legal liability and regulation. We find that contractors have relied on their relationship with the federal government to escape accountability without precisely defining or distinguishing the sovereign-shield doctrines, using prevailing doctrinal confusion to push the boundaries of the doctrines.[7] Whether contractors have enjoyed more success when using these doctrines in litigation is difficult to assess, and we do not here attempt a quantitative analysis. Rather, we suggest that the attempted exploitation of doctrinal confusion itself constitutes a meaningful and worrisome phenomenon, whether resulting in impunity for a contractor in a specific case or not.

The benefits of expanding the sovereign shield do not flow solely in one direction. Rather, this Article argues that expansion to cover nongovernmental actors enables and fosters a mutually beneficial alliance between corporate contractors and the executive branch.[8] We argue that this alliance operates to strip legal remedies from private individuals and state governments and to impede oversight from state and federal regulators.

These sly, sideways moves reduce the power of individuals and states out of sight of public scrutiny or democratic accountability. Relationships are constructed and conduct is protected through private contract negotiations, in individual courtrooms, or in confidential settlements. When private entities perform federally authorized functions, they may wholly escape state regulation and liability under state law as a result. If the contractor performed the same work for a different client, state power would not yield. But when the federal government is the client, the sovereign-shield doctrines may be invoked, and the contractual relationship with the federal government results in a discreet federal

7. Although sovereign-shield defenses are not new, they have seen a recent resurgence. *See* Lawrence S. Sher & Peter H. Vogel, Feature Comment, *The Government Contractor Defense—A Call for Clarity After the Supreme Court's* Campbell-Ewald *Decision*, 58 GOV'T CONTRACTOR ¶ 248 (2016) (pointing to the Supreme Court's recent decision in *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016), to argue for an expansive sovereign shield).

8. *See* Michaels, *supra* note 6, at 731-33 (noting that the executive branch is the "overseer of the administrative state" and, as such, is "both the contractor's principal and also an agent to the rest of the government").

power grab.[9] Together, the executive branch and its corporate servants evade accountability to individual consumers, states, and even other federal overseers in ways that neither could in isolation. The shield would not function as a matter of law were the federal government not involved (due to the nature of the doctrines), and it would not function as a matter of politics if the private companies were not involved (due to mechanisms of federal-agency democratic oversight).[10] It is the combination of reliance on the private sector and the potential availability of a sovereign shield that (1) effectively limits the power of the consumer and the state government; and (2) upsets longstanding balances of power between consumers and companies, states and the federal government, and the executive and legislative branches.[11]

This Article makes three contributions and is thus organized in three parts. The first contribution is to define and disaggregate the doctrines underlying the sovereign shield. Over time, parties and courts have muddled the doctrines of preemption, derivative sovereign immunity, and intergovernmental immunity. Part I sets out the history and current state of these doctrines. It then excavates from the doctrinal morass five thematic factors that courts use to analyze whether the sovereign shield should be extended to nongovernmental actors like federal contractors. In so doing, it offers shape and structure for those seeking to apply, or understand the application of, these doctrines in their current form.

The second contribution is to lay bare how government contractors attempt to exploit these doctrines to stretch the sovereign shield. Federal contractors have asserted sovereign-shield theories in as many types of circumstances as there are federal contracts. A private-prison group operating under a contract with Immigration and Customs Enforcement relied on preemption principles to seek to avoid liability under state minimum-wage

9. *See* Guttman, *supra* note 2, at 890 (arguing, with reference to the increase of private contracts in public work, that "[t]he quiet workings of personnel ceilings were accompanied by bipartisan silence on the changing nature of the federal workforce").

10. Democratic oversight includes both oversight by the legislature directly and, via mechanisms such as the Freedom of Information Act, oversight by civil society. *See* David A. Super, *Privatization, Policy Paralysis, and the Poor*, 96 CALIF. L. REV. 393, 457 (2008) (warning that "many of the laws and rules that currently require program information to be made public will not apply to contractors").

11. This is not the only way to analyze the phenomenon. David Rubenstein, in his insightful article that explores the ways in which federal supremacy may be exploited by private actors, warns of the danger that federal contracts alone may preempt state law. David S. Rubenstein, *Supremacy, Inc.*, 67 UCLA L. REV. 1130, 1167 (2020) (describing "[p]reemption by contract," in which "a federal statute may not itself conflict with state law," but the "federal contract supplies the displacing conflict"). Rubenstein argues that, because of their effects on federalism, preemption by contract and privatized immunity defenses should be disallowed on constitutional and normative grounds. *Id.* at 1188-90, 1199-202.

laws in Washington.[12] A construction company under contract to do flood-control work for the Army Corps of Engineers defended itself against negligence claims by citing derivative-sovereign-immunity principles.[13] Contractors with the Atomic Energy Commission and the Department of Energy asserted various sovereign-shield theories to defend against allegations of willful, wanton, and grossly negligent conduct in their management of enriched uranium.[14] A United States Navy contractor sought to avoid liability for seizing two privately owned trucks by asserting that the seizure "was an exercise of a power to requisition private property for war purposes essentially inherent in the sovereign."[15] An advertising company under contract with the United States Navy to send marketing solicitations sought protection from liability under the federal Telephone Consumer Protection Act (TCPA) by asserting a derivative-sovereign-immunity defense.[16] A bank providing juror-compensation cards defended against allegations that it had prevented jurors from receiving full compensation and had charged them outrageous fees by hiding behind a contract with the Department of the Treasury.[17] These are but a few examples of instances in which government contractors have sought the benefit of the sovereign shield.[18]

Part II presents an in-depth look at one particular group of federal contractors: private entities servicing the Department of Education's student-

12. *See* Washington v. GEO Grp., Inc., 283 F. Supp. 3d 967, 972-73, 976 (W.D. Wash. 2017) ("Defendant argues that 'uniformity of detention programs' is a dominant federal interest precluding enforcement of the State minimum wage laws." (quoting GEO's Motion to Dismiss Complaint at 22, *GEO Grp.*, 283 F. Supp. 3d 967 (No. 17-cv-05806), 2017 WL 11372119, ECF No. 10)). The same entity has also claimed derivative sovereign immunity under the same set of facts in California. *See* Novoa v. GEO Grp., Inc., No. 17-cv-02514, 2018 WL 4057814, at *3 (C.D. Cal. Aug. 22, 2018) (order denying motion to dismiss) ("Defendant argues GEO is immune from suit . . . because GEO was authorized by ICE to administer the Work Program at the $1 daily wage rate and such authorization was validly conferred by Congress."); *see also* United States v. California, 921 F.3d 865, 878-91 (9th Cir. 2019) (discussing the applicability of intergovernmental immunity and conflict preemption to various California statutes relating to enforcement of federal immigration law).

13. Portis v. Folk Constr. Co., 694 F.2d 520, 521, 523-24 (8th Cir. 1982).

14. Lamb v. Martin Marietta Energy Sys., Inc., 835 F. Supp. 959, 960-66 (W.D. Ky. 1993).

15. Vietzke v. Austin Co., 54 F. Supp. 265, 267 (E.D. Wash. 1944).

16. Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663, 667, 672-73 (2016).

17. Scott v. J.P. Morgan Chase & Co., 296 F. Supp. 3d 98, 102-04, 106 (D.D.C. 2017).

18. Further, it is not just government contractors who use sovereign-shield doctrines to avoid or evade liability. Noncontractor defendants often point to preemption in an attempt to avoid state law liability. Patients seeking to take advantage of state healthcare consumer-protection legislation, for example, have regularly been thwarted by preemption by the Employee Retirement Income Security Act. *See* Erin C. Fuse Brown, *Consumer Financial Protection in Health Care*, 95 WASH. U. L. REV. 127, 184-94 (2017).

loan portfolio. We use student-loan servicers as a case study because the government–industry relationship and its consequences illustrate the doctrinal and normative implications of extending the sovereign shield to businesses acting on behalf of the federal government. This is a timely and practical topic because federal and state courts and legislatures are currently wrestling with the application of preemption and immunity defenses to federal student-loan contractors. It is also a theoretically useful one; student-loan servicers operate in a highly structured system in which consumers, states, corporations, and the federal government all inhabit clearly defined roles.

This Article's third contribution, presented in Part III, is to explore the normative implications of an expansive and undefined sovereign shield. Our most crucial observation is that the combination, collapse, and conflation of the preemption and immunity doctrines have allowed nongovernmental actors to expand the size and scope of the sovereign shield in ways that serve the interests of both private businesses and the executive branch, individually and collectively. Treating the sovereign shield as malleable, these private actors, with support from their federal-agency partners, have exploited doctrinal complexity to evade liability under both state and federal law, regulation by individual states, and even federal oversight. Although even a single contractor evading liability at the expense of a single consumer is a problem, that is not our biggest concern.[19] Rather, the incoherence of the doctrine opens the door to a powerful alliance between government and industry that threatens to destabilize the balance of power in multiple arenas and leave without recourse those harmed by a variety of products or services.

The question of *how* to limit the expansion of the sovereign shield is the subject of a companion article, forthcoming in these pages, that builds on the diagnosis we offer here.[20] In this second article, entitled *The Sovereign in Commerce*, we explore potential doctrinal moves to confine the phenomenon we identify. In searching for a solution, the companion piece uncovers an uncomfortable truth: The answer does not depend on better distinguishing public and private actors. In other words, delineating between "public" and "private" is the wrong approach. We suggest that the analytic difficulty of fashioning a fix does not arise simply because the federal government relies increasingly on contractors that assume a dual character. Rather, we argue the problem is that the *federal government* has assumed a dual character: It is in the retail business. Put slightly differently, the problem is not *who* is doing the government's business, but *what business* the government is doing. It is not the

19. *See infra* Part III.B (explaining how, even when contractors are stopped from asserting a sovereign-shield defense in a particular case, doctrinal incoherence continues to benefit government contractors and their government partners at the expense of consumers and states).

20. Elengold & Glater, *supra* note 6.

identity of the actor but the nature of the action that creates the challenge. If this analysis is correct, then the appropriate fix rests on proper classification not of the actor, but of the conduct—a process that the Supreme Court has undertaken in other contexts.[21]

Our goal in our larger project is not to attack government contractors or government agencies for alleged misdeeds.[22] Nor is it to suggest that federal government activities should be limited or constrained,[23] or that they should be provided directly or through contractors.[24] Rather, in this diagnostic piece, we sound an alarm about the ways in which the current doctrinal framework opens the door to an expansive, ill-defined, and dangerous barrier to accountability. We warn of the resulting alliance between industry and the executive branch—what we term an *alliance of Goliaths*—that threatens simultaneously to destabilize and undermine the constitutional principles of federalism and separation of powers and to eliminate avenues of redress for injured individuals. In our second piece, we suggest a doctrinal response, separating commercial and noncommercial conduct and proposing increased liability for commercial conduct.[25] We recognize that we cannot fully explore

21. For example, in construing the extent of a federal law's "sue-and-be-sued" clause as applied to a wholly owned public corporation of the United States, the Justices distinguished between the conduct of the business that was "commercial," which could sustain a claim resulting in liability, and the conduct that was public, which could not. Thacker v. Tenn. Valley Auth., 139 S. Ct. 1435, 1443 (2019) ("[S]uits based on a public corporation's *commercial* activity may proceed as they would against a private company; only suits challenging the entity's *governmental* activity may run into an implied limit on its sue-and-be-sued clause."). For a full explanation and additional doctrinal context, see Elengold & Glater, *supra* note 6 (manuscript at Part IV.A).

22. With respect to student-loan servicers, those allegations are documented in complaints and audits. *See, e.g.*, Conditionally Redacted First Amended Complaint for Permanent Injunction, Civil Penalties, Restitution & Other Equitable Relief at 1-2, 6-32, People v. Navient Corp., No. CGC-18-567732 (Cal. Super. Ct. Oct. 16, 2018) [hereinafter *People v. Navient* Complaint].

23. In fact, scholars have made a compelling case that devolving more power and responsibility to the states would be problematic. *See* Miriam Seifter, *Further from the People? The Puzzle of State Administration*, 93 N.Y.U. L. REV. 107, 110 (2018) ("Despite the common refrain that state government is closer to the people, modern state administration often produces just the opposite effect." (footnote omitted)).

24. Debate over the costs and benefits of outsourcing of government activities to private entities has raged for decades, with proponents extolling efficiency gains and critics warning of the erosion of democratic values. *See, e.g.*, VERKUIL, *supra* note 1, at 1-4. *See generally* JON D. MICHAELS, CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO THE AMERICAN REPUBLIC (2017) (outlining a general history of the modern U.S. administrative state and arguing against the trend toward privatizing services traditionally provided by the federal government). But that battle is well beyond the scope of the present Article.

25. And in the third and final piece of our larger project, we offer a theoretical framework for applying sovereign-shield defenses to noncommercial conduct. Kate Sablosky

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in these two papers the sovereign-shield phenomenon, which crosses the boundaries of constitutional, administrative, and consumer law scholarship.[26] Yet our overall project aims to bring an under-studied phenomenon into the light,[27] for the size, scope, and application of the sovereign shield deserve careful and skeptical scrutiny.

I. Expanding the Sovereign Shield

When applied to government contractors,[28] three doctrines—preemption, derivative sovereign immunity, and intergovernmental immunity—have been invoked to extend the protections afforded to the federal government to private actors based on their relationship with the sovereign. This Part examines these doctrines.

Each of the three doctrines may stand alone, but in the context of the sovereign shield they have become intermingled and confused over time.[29] For example, lawyers and scholars generally think of preemption and immunity as two distinct, unrelated doctrines, and the doctrines do have different histories and different applications. Private parties unrelated to the federal government can assert preemption as a defense to an action, while derivative-sovereign-

Elengold & Jonathan D. Glater, Qualified Sovereignty (unpublished manuscript) (on file with authors).

26. For an exposition of how the phenomenon slips through scholarly gaps, see Elengold & Glater, *supra* note 6 (manuscript at Part I) (situating our theory and its application within the broader literature).

27. *See id.* (manuscript at 12) ("[T]he aggregate effects of the trends enabling private businesses to deploy the doctrines that make up the sovereign shield—trends including increasing privatization and rising levels of political polarization—may have received less attention precisely because they do not fit neatly into a single scholarly category." (footnotes omitted)).

28. These doctrines have been applied to parties beyond government contractors. Preemption can be asserted as a defense by any party seeking to shield itself from state law liability where a federal law has preemptive effect. *See* Susan J. Stabile, *Preemption of State Law by Federal Law: A Task for Congress or the Courts?*, 40 VILL. L. REV. 1, 5 (1995) ("If a federal law expressly or impliedly preempts state law, the state law cannot be used by a plaintiff to impose liability on a defendant, regardless of whether the defendant's conduct in fact constituted a violation of state law and regardless of whether federal law provides the plaintiff with any remedy."); *see also* North Dakota v. United States, 495 U.S. 423, 437-39 (1990) (applying intergovernmental immunity to cover "the Federal Government or those with whom it deals"). This Article, however, focuses on how government contractors use their relationship with the sovereign to exploit and expand the sovereign shield.

29. This is due, in part, to the effects of "constitutional borrowing" or "borrowing" across doctrines. *See* Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459, 461 (2010) ("[C]onstitutional borrowing is the practice of importing doctrines, rationales, tropes, or other legal elements from one area of constitutional law into another for persuasive ends.").

immunity and intergovernmental-immunity defenses are reserved for parties with a connection to the sovereign.

Nevertheless, a review of the case law reveals a picture that is considerably blurrier. This is primarily due to the way that the Supreme Court has approached sovereign-shield cases. As set forth below, the Supreme Court has identified the above doctrines in various ways, sometimes tracing ostensibly distinct doctrines to common sources without clear explanation or guidance. Lower courts have therefore struggled to apply the sovereign-shield doctrines. Courts have failed to distinguish between the doctrines or set forth clear rules or guidance for their application, and principles and precedents cited in support of one doctrine are invoked to justify outcomes in cases involving another. Nongovernmental actors, in alliance with their contracting federal agencies, have taken advantage of the confusion around sovereign-shield defenses. They fluidly exploit the principles underlying the three doctrines to arrive at the same end: protecting both the executive and the contractor from liability and regulation and increasing their individual and collective power.

Mapping the Court's relevant doctrines is a befuddling task, and scholars have generally avoided it.[30] We take it on. This Part introduces the sovereign-shield doctrines, traces their history, and sets out their current operation. We illustrate the prevailing doctrinal incoherence and seek to unearth common themes and trends. While we do not make an empirical claim about how often defendants are successful in invoking any (or all) of these doctrines, the doctrines' availability alone is destabilizing.[31] We then formulate five factors distilled from the case law to identify the circumstances in which courts currently protect private actors from liability through sovereign-shield

30. The most extensive treatment related to these issues is in a recent article by David Rubenstein. *See generally* Rubenstein, *supra* note 11. Rubenstein defines "preemption by contract" in reference to both preemption and intergovernmental-immunity doctrines. *Id.* at 1178-79 (describing the interplay of federal contract, federal sovereign immunity, and federal legislative preemption in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988)). Rubenstein's treatment of these doctrines draws on important federalism literature, introducing the intersection of capitalism and notions of supremacy. *Id.* at 1137-38. This Article applies a related, but different, framework. Rather than looking at the mechanisms by which federal agencies can extend preemption to private actors through contract, this Article looks at the ways in which federal contractors and their partner agencies have entered into a mutually beneficial relationship to expand the size and scope of the sovereign shield, which includes, but is not limited to, preemption and intergovernmental immunity. In so doing, it offers a broader lens—encompassing power grabs beyond those traditionally understood as federalism concerns—through which to analyze the problem. In another article, Craig Konnoth focuses on the intersection of privatization and preemption. Craig Konnoth, *Preemption Through Privatization*, 134 HARV. L. REV. (forthcoming 2021), https://perma.cc/RAW6-BTC2. Konnoth, however, does not analyze the interplay between preemption and immunity defenses or the executive–corporate alliance created by the sovereign shield. *Id.*

31. *See, e.g.*, *infra* note 379 and accompanying text.

doctrines. Although we argue that these doctrines are problematic as they currently exist, our mapping should be useful to courts and lawyers navigating the sovereign shield.

A. The Sovereign-Shield Doctrines

Federal preemption doctrine, derivative-sovereign-immunity doctrine, and intergovernmental-immunity doctrine have become muddled over time. As applied to nongovernmental actors, both preemption and intergovernmental immunity trace their foundations to *Leslie Miller, Inc. v. Arkansas*, a Supreme Court case in which an Arkansas licensing regulation was challenged as applied to a federal government contractor.[32] Lower courts also look to the Supreme Court's decision in *Boyle v. United Technologies Corp.* for application of a particular form of derivative sovereign immunity generally applied to military contractors, although the Court's analysis in that case relied almost exclusively on notions drawn from the preemption doctrine.[33] One judge explained how these three doctrines have influenced one another to expand the scope of protection for contractors, observing that "if the authority were validly bestowed on the contractor and the contractor did not exceed the scope of the authority so conferred, the contractor cannot be held liable for executing the will of the sovereign."[34] Put simply: "The United States is extending its sovereign immunity to the contractor."[35] Courts have also largely collapsed derivative sovereign immunity and intergovernmental immunity: Under both doctrines, nongovernmental actors derive the benefits of the federal government's authority to avoid suit absent consent.

A wholesale exposition of these doctrines is unnecessary for purposes of our project. Rather, the important task at hand is to consider whether, when, and how a government contractor can take advantage of each doctrine. We therefore trace the development of each doctrine with a specific eye toward its treatment when asserted by or on behalf of nongovernmental actors who are acting in concert with the federal government (that is, government contractors).

To that end, the latter portion of this Part identifies and synthesizes the factors that courts currently consider in applying the sovereign-shield doctrines to federal government contractors. By parsing the Supreme Court's jurisprudence, as filtered through the lower courts, we identify five factors upon

32. 352 U.S. 187, 187-90 (1956) (per curiam).

33. 487 U.S. 500, 504-08 (1988).

34. Richland-Lexington Airport Dist. v. Atlas Props., Inc., 854 F. Supp. 400, 421 (D.S.C. 1994).

35. *Id.*

which courts generally rely to determine whether any sovereign-shield defenses apply to shelter a government contractor from liability. Although courts' analyses often conflate the sovereign-shield doctrines, where possible, we call attention to each factor's derivation from or relationship to a particular doctrine.

1. Preemption

Federal preemption of state law rests on the Supremacy Clause of the Federal Constitution.[36] Put slightly differently, when a court concludes that a state law does not apply because it is preempted by federal law, this resolves a question of constitutional law. Although there are technically three kinds of preemption, which we set out below, at the core of the doctrine, preemption arises when there is a conflict between state law and federal law. When that happens, the "Supremacy Clause supplies a rule of priority."[37] While one need not be a government actor, or in relationship with a government actor, to assert that federal law preempts state law, government contractors can invoke the doctrine by suggesting that some combination of statute, agency direction, and contract can be read to preempt state law.[38] In this way, government contractors cite their status as such as a shield against liability. When successful, the result is that the contractor cannot be held liable for violations of state law.

Courts have recognized both *express* and *implicit* preemption.[39] Express preemption occurs when federal lawmakers include in legislation an explicit statement of their intention to replace potentially applicable state laws.[40] Implicit preemption can take one (or both) of the following forms. First, a state law may "actually conflict[] with federal law," resulting in *conflict* preemption.[41] Conflict exists when, for example, it may be impossible to comply simultaneously with the demands of state law and those of federal law. This

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

37. Va. Uranium, Inc. v. Warren, 139 S. Ct. 1894, 1901 (2019) (plurality opinion).

38. *See* David S. Rubenstein, *Delegating Supremacy?*, 65 VAND. L. REV. 1125, 1147-53 (2012) (defining and critiquing the ways in which agencies exert discretion in determining preemption); Rubenstein, *supra* note 11, at 1167-68 (arguing that agency contracts can operate to preempt state law).

39. Some courts describe two forms of preemption, express and implied (or implicit), and then treat field preemption and conflict preemption as forms of implied preemption. *See, e.g.*, Linsley v. FMS Inv. Corp., No. 11-cv-961, 2012 WL 1309840, at *3 (D. Conn. Apr. 17, 2012) ("Federal preemption of a state statute can be express or implied . . . ." (quoting SPGGC, LLC v. Blumenthal, 505 F.3d 183, 188 (2d Cir. 2007))). Other courts may begin slightly differently, describing three forms of preemption. *See, e.g.*, Nelson v. Great Lakes Educ. Loan Servs., 928 F.3d 639, 646 (7th Cir. 2019) ("Preemption can occur in three different ways: express, conflict, and field.").

40. *Nelson*, 928 F.3d at 646.

41. English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990).

subtype of conflict preemption is sometimes called impossibility preemption.[42] The Court has concluded that conflict preemption may also arise when the state law at issue "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[43] This so-called obstacle preemption is more controversial than impossibility preemption because of the risk of inconsistency and subjectivity inherent in evaluating whether a state law creates an "obstacle" to a federal purpose and, if so, whether it is enough of an obstacle to justify preemption. How this assessment is to be conducted is not entirely clear;[44] criticism of the doctrine is therefore unsurprising.[45] The second type of implicit preemption is *field* preemption, which occurs when "federal law so thoroughly occupies a legislative field '"as to make reasonable the inference that Congress left no room for the States to supplement it."'"[46]

Although the search for preemption seeks to resolve a constitutional problem, preemption is not analyzed as a distinct, constitutional claim.[47] If Congress has the constitutional authority to legislate as it has, then the critical question becomes one of intent[48]: Did federal lawmakers seek to preempt application of state law or did they not? Whether preemption is proper or desirable is not a consideration.

This process for allocation of power between the federal government and the states has concerned some scholars, who worry that courts could quietly shift the balance.[49] Analysis of congressional intent does not require a

42. *See* Wyeth v. Levine, 555 U.S. 555, 573 (2009).

43. Arizona v. United States, 567 U.S. 387, 399 (2012) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

44. The Supreme Court has not particularly helped. *See, e.g.*, Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373 (2000) ("What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects . . . .").

45. Daniel J. Meltzer, *Preemption and Textualism*, 112 MICH. L. REV. 1, 35-43 (2013) (describing criticisms of the discretion afforded to judges assessing obstacle preemption).

46. Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 516 (1992) (quoting Fid. Fed. Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 153 (1982)).

47. Marin R. Scordato, *Federal Preemption of State Tort Claims*, 35 U.C. DAVIS L. REV. 1, 21 (2001) ("[P]reemption jurisprudence does not, in a direct way, involve the court in establishing, or considering, fundamental limits on the nature and scope of federal power."). Of course, courts' decisions *do* affect the nature and scope of federal power, but may do so unobtrusively and without explicit discussion of the federalism interests at stake. What distinguishes preemption doctrine from, say, Commerce Clause jurisprudence is that in the case of the former, "[t]he Constitution has already clearly made and announced the fundamental judgment regarding the relation of federal and state power: so long as the federal government has the constitutional power to enact the law, then the federal law is granted supremacy . . . ." *Id.*

48. *See, e.g.*, Nelson v. Great Lakes Educ. Loan Servs., 928 F.3d 639, 647 (7th Cir. 2019).

49. *See, e.g.*, S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685, 694 (1991) (warning not only that preemption can "fortify[] the substantive

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reviewing court to consider the possibility that neutering state law may create a "regulatory vacuum,"[50] leaving consumers vulnerable to misconduct that the state had sought to prevent.

Forays by courts, including the Supreme Court, into determining whether Congress intended to preempt state law have taken different paths, often employing inconsistent logic.[51] The diversity of opinions has meant that a discerning reader can reliably predict how a reviewing court will ultimately resolve any preemption dispute based on the cases cited. If a court will resist finding preemption, its opinion will likely cite precedential language emphasizing the general presumption against giving effect to preemption.[52] The presumption, if it is recognized, is characterized as particularly strong when the state has legislated in an area traditionally entrusted to the states, including areas that implicate the states' police powers.[53] On the other hand, if a court is going to find that a federal law does preempt state law, it will likely draw upon language regarding the importance of preventing state acts that may "frustrate" Congress's purpose.[54]

There is no dominant doctrinal resolution to questions of preemption, and that absence further heightens the risk of inconsistent and subjective or arbitrary decisions. This risk is at times evident in the Court's application of the rules ostensibly articulated in foundational cases, such as *Leslie Miller, Inc. v. Arkansas*, involving potential conflicts between state and federal law.[55] In that

injuries to the public that flow from misguided or weak national regulation," but also that it "is inherently 'jurispathic;' it kills off one line, perhaps even an entire scheme, of a particular community's law" (footnote omitted)).

50. *Id.* at 694-95.

51. *See, e.g.*, Meltzer, *supra* note 45, at 3 (describing a "plethora of [preemption] cases known for their lack of consistency, a complex set of crosscurrents, [and] a broad set of subject matters"). *But see* Ernest A. Young, *"The Ordinary Diet of the Law": The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 258 (arguing that "the admittedly divergent results and approaches in the [Roberts] Court's preemption cases do not generally stem from confusion, incompetence, or the subordination of legal principle to result-oriented preferences[, but] reflect, instead, the fact that any overarching framework of preemption principles must be applied to interpret a range of quite diverse statutory regimes").

52. *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 460-61 (1991).

53. *See, e.g.*, Pennsylvania v. Navient Corp., 354 F. Supp. 3d 529, 548 (M.D. Pa. 2018) (placing "consumer protection . . . within the traditional police power of the state" and consequently applying the presumption against preemption); *see also* Peete-Bey v. Educ. Credit Mgmt. Corp., 131 F. Supp. 3d 422, 430 (D. Md. 2015).

54. *See, e.g.*, Leslie Miller, Inc. v. Arkansas, 352 U.S. 187, 190 (1956) (per curiam).

55. *See, e.g.*, North Dakota v. United States, 495 U.S. 423, 452 (1990) (Brennan, J., concurring in the judgment in part and dissenting in part) (criticizing the plurality for mischaracterizing a question of federal immunity as one involving preemption and warning that "[t]his characterization is not only at odds with the reasoning in the opinions themselves but suggests a rigid demarcation between the two Supremacy

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case, Leslie Miller, Inc., a private entity, bid for, executed, and began work on a contract with the United States Air Force for construction at a base in Arkansas, and the state accused Leslie Miller of violating a state licensing rule.[56] The Court found that the Armed Services Procurement Act of 1947[57] preempted the Arkansas licensing requirement because otherwise the state could effectively nullify decisions made under the federal law.[58] The Court reasoned that the state could prevent the federal government from "selecting the lowest responsible bidder."[59] This case is particularly significant when a challenged state law similarly restricts the federal government's ability to make choices about with whom, for what price, and for what to contract.

As is suggested by courts' focus on congressional intent, the power to preempt belongs to Congress. As the administrative state has grown, however, federal agencies have also sought to use their authority to preempt state law,[60] and Congress can effectively "delegate supremacy"[61] to agencies.[62] Further, the

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Clause doctrines of federal immunity and pre-emption which is not present in our cases").

56. *Leslie Miller*, 352 U.S. at 187-88.

57. Armed Services Procurement Act of 1947, ch. 65, 62 Stat. 21 (1948) (codified as amended at 10 U.S.C. § 2381).

58. *See Leslie Miller*, 352 U.S. at 190.

59. *Id.* Intriguingly, from the perspective of contemporary statutory interpretation, the Justices did not cite a theory of construction that enabled the presumption of the federal legislative purpose; presumably it was purposivism. The relevant provision of the federal law, the Armed Services Procurement Act, did not solely state that the goal of the selection process was to obtain the lowest price. *See* Armed Services Procurement Act of 1947, § 3(b), 62 Stat. at 23 (calling for awards to be "made . . . to that responsible bidder whose bid . . . will be most advantageous to the Government, price and other factors considered"). Even more intriguingly, the Court in *Leslie Miller* did not refer to the concept of preemption at all, but instead cited an earlier case holding that the "immunity of the instruments of the United States from state control in the performance of their duties extends to a requirement that they desist from performance until they satisfy a state officer." 352 U.S. at 190 (quoting Johnson v. Maryland, 254 U.S. 51, 57 (1920)). Thus, a seminal case on preemption appears to invoke intergovernmental immunity.

60. *See, e.g.*, La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 369 (1986).

61. *See* Rubenstein, *supra* note 38, at 1126-27 (remarking on the reach of this agency power and developing an argument that "administrative policies crafted by unelected agency officials are beyond the Supremacy Clause's purview" (emphasis omitted)). Rubenstein also argues, in another article, that government contracts *themselves* can have preemptive effect. *See* Rubenstein, *supra* note 11, at 1137. Although our Article considers the arguments that contractors make as to why they are entitled to derived supremacy based on their contracts, we do not assert that the contracts themselves have preemptive effect. This Article is primarily concerned with application of derived supremacy arising from statute, not from contract.

62. *See, e.g.*, Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984) ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.").

Supreme Court has recognized that, in certain circumstances, the agency's interpretation of whether a statute preempts state law can hold great weight.

The Court has set out the circumstances under which a court should defer to an agency's interpretation of federal statutory text, generally concluding that a court should defer to the agency's interpretation if that interpretation is reasonable.[63] However, the degree of deference due to an agency's assertion of preemption in particular is not clearly settled[64] and appears to be contextual. When an agency interpretation receives less deference—for example, when the agency is not acting pursuant to legislative instruction to fulfill statutory gaps[65]—factors relevant to determining the degree of deference include the "thoroughness evident in [the judgment's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[66] In litigation over the District of Columbia's legislation aimed at the conduct of student-loan servicers, for example, the trial judge did not defer to the Department of Education's assertion that the District's regulatory effort was preempted by the Higher Education Act of 1965. This was because, the judge wrote, the Department's interpretation took the form of an informal statement and was not the product of a formal rulemaking process.[67] We will return to the court's analysis in this case below.[68]

63. *Id.* at 845 (explaining that once a court finds that Congress did not explicitly address the issue addressed by the agency, "the question . . . [is] whether the Administrator's view . . . is a reasonable one").

64. Student Loan Servicing All. v. District of Columbia, 351 F. Supp. 3d 26, 48 (D.D.C. 2018).

65. See United States v. Mead Corp., 533 U.S. 218, 227-32 (2001) (recognizing the difference between agency actions taken to fill a gap that Congress explicitly or implicitly left the agency to fill, which are entitled to *Chevron* deference, and agency actions taken without any indication that Congress meant to delegate authority to the agency, which are not entitled to *Chevron* deference).

66. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

67. *Student Loan Servicing All.*, 351 F. Supp. 3d at 48-50. The judge reasoned that *Chevron* deference, accorded by a court to an agency interpretation of authorizing legislation, was not appropriate here because the Department of Education had issued only "informal guidance." *Id.* at 48-49. Nor was so-called *Auer* deference, which is accorded to an agency's interpretation of its own regulation, appropriate. *Id.* at 49 n.16 (citing Auer v. Robbins, 519 U.S. 452 (1997)). Because the Department of Education's informal guidance constituted an interpretive claim about the preemptive effect of its own regulations, the judge concluded, *Skidmore* deference—a lesser degree than that described in *Chevron*—was appropriate. *Id.* at 48-49 (citing *Skidmore*, 323 U.S. at 138, 140).

68. *See infra* notes 301-09 and accompanying text.

2. Derivative sovereign immunity

Derivative sovereign immunity arises from sovereign immunity—federal, state, foreign, or tribal[69]—and protects private government contractors from legal liability when their actions giving rise to an injury were directed by the government. The general rationales for shielding government contractors from liability are connected to the purposes behind sovereign immunity itself: "helping to avoid 'unwarranted timidity' in performance of public duties, ensuring that talented candidates are not deterred from public service, and preventing the harmful distractions from carrying out the work of government that can often accompany damages suits."[70] Derivative sovereign immunity is not absolute.[71] A nongovernmental party asserting derivative sovereign immunity must identify and stay within the bounds of a theory of sovereign immunity that would protect the federal government were it the defendant.[72]

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69. *See* Katherine Florey, *Sovereign Immunity's Penumbras: Common Law, "Accident," and Policy in the Development of Sovereign Immunity Doctrine*, 43 WAKE FOREST L. REV. 765, 771-84 (2008) (detailing the four types of sovereign immunity and arguing that courts have borrowed concepts across sovereign-immunity types). Because the focus of this Article is on federal government contractors, we focus exclusively on federal derivative sovereign immunity, which is challenging not only because federal sovereign immunity has been "described as a 'ghost[] . . . haunt[ing] the early Republic,'" but also because federal sovereign immunity is the least explored form of sovereign immunity and "one of 'the greatest mysteries' in American law." *Id.* at 776 (second and third alterations in original) (first quoting Christine A. Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV. L. REV. 1381, 1383 (1998); and then quoting Guy I. Seidman, *The Origins of Accountability: Everything I Know About the Sovereign's Immunity, I Learned from King Henry III*, 49 ST. LOUIS U. L.J. 393, 395 (2005)).

70. Filarsky v. Delia, 566 U.S. 377, 389-90, 393-94 (2012) (quoting Richardson v. McKnight, 521 U.S. 399, 409 (1997)) (extending qualified immunity to a government contract attorney sued under 42 U.S.C. § 1983). For a more detailed explanation of the history and purposes of sovereign immunity, see generally Florey, *supra* note 69; and Sabatino, *supra* note 1, at 197-201 (setting out the objectives of sovereign immunity).

71. Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663, 672 (2016). Rather, derivative sovereign immunity more closely resembles government-official immunity, which is generally qualified. McMahon v. Presidential Airways, Inc., 502 F.3d 1331, 1346 (11th Cir. 2007) (noting that "status as a [government] agent" is a necessary, but not sufficient, condition for extending sovereign immunity to private contractors). Absolute immunity is only extended to private government contractors "in the narrow circumstances where the public interest in efficient government outweighs the costs of granting such immunity." Mangold v. Analytic Servs., Inc., 77 F.3d 1442, 1447 (4th Cir. 1996) (referencing the principles underlying the absolute immunity recognized in *Westfall v. Erwin*, 484 U.S. 292 (1988), and *Barr v. Matteo*, 360 U.S. 564 (1959)).

72. *See, e.g.*, *McMahon*, 502 F.3d at 1353 (rejecting immunity based on the *Feres* doctrine because "derivative immunity can be no broader than the sovereign immunity that grounds it, and the government's *Feres* immunity only extends to suits brought by soldiers"). The *Feres* doctrine stems from *Feres v. United States* and holds that the federal "[g]overnment is not liable under the Federal Tort Claims Act for injuries to

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For example, government contractors have pointed to a number of theories of sovereign immunity—some more successful than others—to ground their derivative-sovereign-immunity defenses: official qualified immunity,[73] exceptions to the federal sovereign-immunity waiver in the Federal Tort Claims Act (the FTCA),[74] and the *Feres* doctrine,[75] to name a few.[76] This Subpart focuses on the two primary cases that the Supreme Court has used to create scaffolding for resolving derivative-sovereign-immunity questions: *Yearsley v. W. A. Ross Construction Co.*[77] and *Boyle v. United Technologies Corp.*[78]

In *Yearsley* and *Boyle*,[79] the Court offered guidance to help lower courts determine whether and when government contractors should obtain the benefit of derivative immunity.[80] Under these two cases, private actors enjoy

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servicemen where the injuries arise out of or are in the course of activity incident to service." 340 U.S. 135, 146 (1950).

73. *See Filarsky*, 566 U.S. at 393-94 (extending qualified immunity to a contract lawyer retained by the city to assist in an official government investigation).

74. *See In re* KBR, Inc., Burn Pit Litig., 744 F.3d 326, 341-42, 345 (4th Cir. 2014) (rejecting the defendant's assertion that it was entitled to derivative sovereign immunity based on the "discretionary function" exemption to the Federal Tort Claims Act); *McMahon*, 502 F.3d at 1352 (declining to entertain the defendant's assertion that it was entitled to derivative sovereign immunity based on the "combatant activities" exemption to the Federal Tort Claims Act).

75. *See supra* note 72; *McMahon*, 502 F.3d at 1339, 1355-56 (recognizing that the *Feres* doctrine supplements the FTCA exemptions for tort liability in barring soldiers from suing the United States for injuries incurred incident to military service, but declining to extend the doctrine to government contractors).

76. Not all parties or courts are so careful as to identify and analyze the sovereign-immunity theory upon which the contractor grounds its derivative-sovereign-immunity claim.

77. 309 U.S. 18 (1940).

78. 487 U.S. 500 (1988).

79. There is a serious question about whether *Boyle* even belongs in this Subpart or whether it has been considered primarily (or exclusively) as a preemption defense. *See infra* notes 91-105 and accompanying text. Based 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, we place *Boyle* alongside *Yearsley*. While one could legitimately quibble with our placement, it should not affect the ultimate analysis and usefulness of this exposition. In fact, the debate reinforces one of the critical premises of this Article—that these defenses are interwoven, borrowed, and exploited to expand the scope of the sovereign shield, without those asserting the defenses worrying too much about the original intent and meaning behind any one doctrine.

80. *See Yearsley*, 309 U.S. at 20-21; *Boyle*, 487 U.S. at 511-12. There is quite a bit of debate about whether the doctrines discussed in this Subpart are technically derivative *immunity*. Several courts use the term and concept of immunity in applying these doctrines. *See, e.g.*, Portis v. Folk Constr. Co., 694 F.2d 520, 524 (8th Cir. 1982) (citing to *Yearsley* as the "leading case establishing the shared immunity doctrine"); Lamb v. Martin Marietta Energy Sys., Inc., 835 F. Supp. 959, 962-66 (W.D. Ky. 1993) (evaluating

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immunity from state and federal legal claims because of their relationships with the United States.[81] The basic logic is this: "The United States, as sovereign, is immune from suit" unless it explicitly consents to be sued.[82] This is true even if the sovereign has violated a citizen's rights.[83] When the sovereign employs a private actor to do its bidding, the benefits of sovereign immunity extend to that private actor.

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the applicability of the defendant's immunity defenses to a relationship similar to that in *Yearsley* and using the term "immunity" when discussing the defendant's government-contractor defense despite classifying that defense as involving federal preemption); *McMahon*, 502 F.3d at 1343 (pointing to *Yearsley* as the origin of derivative sovereign immunity and of the proposition that "a common law agent may sometimes share in the sovereign immunity of the United States, because '[t]he action of the agent is the act of the government'" (alteration in original) (quoting *Yearsley*, 309 U.S. at 22)). Other courts have rejected traditional application of the immunity construct. *See, e.g.*, Rodriguez v. Lockheed Martin Corp., 627 F.3d 1259, 1265-66 (9th Cir. 2010) (holding that the government-contractor defense "allows a contractor-defendant to *receive the benefits* of sovereign immunity *when a contractor complies* with the specifications of a federal government contract," and that "the government contractor defense is not a grant of immunity but is only a corollary financial benefit flowing from *the government's* sovereign immunity" (quoting *In re* Hanford Nuclear Rsrv. Litig., 534 F.3d 986, 1000 (9th Cir. 2008))); Ackerson v. Bean Dredging, LLC, 589 F.3d 196, 207, 210 (5th Cir. 2009) (noting that *Yearsley* did not mention sovereign immunity, but recognizing that defendants were "entitled to government-contractor immunity under *Yearsley*"); Anchorage v. Integrated Concepts & Rsch. Corp., 1 F. Supp. 3d 1001, 1008 (D. Alaska 2014) ("[T]his Court does not construe *Yearsley* to involve derivative sovereign immunity. Rather, it is a case that accords protection from suit to a private contractor when it is acting solely at the government's authority and direction, while expressly recognizing the potential liability of the government itself." (footnote omitted)). The question usually arises in the debate over whether derivative sovereign immunity is jurisdictional and thus ripe at the motion-to-dismiss phase or for interlocutory appeal, an issue that is outside the scope of this Article. *See, e.g.*, *Ackerson*, 589 F.3d at 207-08.

81. *See Yearsley*, 309 U.S. at 20-21; *Boyle*, 487 U.S. at 511-12. The analysis underlying derivative *federal* sovereign immunity is similar to, but not as clear as, the analysis underlying derivative state sovereign immunity and derivative tribal sovereign immunity. In those cases, courts have identified and applied specific factor-based tests to determine whether an entity is entitled to derivative sovereign immunity as an arm of the state or the tribe. *See, e.g.*, S.C. Dep't of Disabilities & Special Needs v. Hoover Universal, Inc., 535 F.3d 300, 303 (4th Cir. 2008) (setting out a "nonexclusive list of four factors" to be considered in determining whether "a State-created entity is functioning as an arm of the State or its alter ego"); Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort, 629 F.3d 1173, 1187 (10th Cir. 2010) (setting out six factors to determine whether a "tribe's economic entity qualifies as a subordinate economic entity entitled to share in a tribe's immunity").

82. United States v. Sherwood, 312 U.S. 584, 586 (1941). Federal sovereign immunity "is not mentioned in the Constitution and was not explicitly recognized by the Supreme Court until 1821." Florey, *supra* note 69, at 776-77.

83. This is because sovereign immunity is a jurisdictional question; it does not turn on the merits underlying the action. United States v. Mitchell, 463 U.S. 206, 212 (1983) ("It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction.").

In *Yearsley*, the Supreme Court held that a private company was not liable under an eminent-domain theory because the company was acting pursuant to a contract with the government of the United States.[84] Because the government authorized the contractor's action and the authority was validly conferred by Congress, the Court held that "there [was] no liability on the part of the contractor for executing [the government's] will."[85] Although *Yearsley* never used the term "immunity," and courts have called it a "cryptic decision,"[86] it remains the seminal case for deriving immunity from a contractor's relationship with a sovereign entity.[87] Since the 1940 *Yearsley* decision, the Court has held that federal contractors do not "share the Government's *unqualified* immunity from liability and litigation."[88] But the Court has also recognized that government contractors retain some immunity as a result of their contractual relationship with the United States.[89] To determine whether a contractor is entitled to this limited immunity, courts have generally looked to two factors: (1) the relationship between the government and the contractor; and (2) the nature and extent of the government's role in specifying the manner in which the contractor must perform.[90]

In *Boyle*, the Supreme Court looked to principles of preemption to adopt a new "[g]overnment contractor defense."[91] In that case, the heirs of a United States marine helicopter copilot brought suit against the defendant

84. 309 U.S. at 19-21.

85. *Id.*

86. McMahon v. Presidential Airways, Inc., 502 F.3d 1331, 1343 (11th Cir. 2007); *see also* Jason Malone, *Derivative Immunity: The Impact of* Campbell-Ewald Co. v. Gomez, 50 CREIGHTON L. REV. 87, 88 (2016) ("For the seventy-six years that followed *Yearsley*, courts seem to have languished in a state of confusion and inconsistency in applying a common law immunity to service-providing contractors.").

87. Courts have used different terms for application of the *Yearsley* doctrine, including "derivative sovereign immunity," *see In re* KBR, Inc., Burn Pit Litig., 744 F.3d 326, 342-43 (4th Cir. 2014), and "shared immunity," *see* Portis v. Folk Constr. Co., 694 F.2d 520, 524 (8th Cir. 1982). Other courts have rejected application of the term "immunity" when discussing the *Yearsley* doctrine. *See supra* note 80. However, the Supreme Court has seemingly embraced the notion of "immunity" as applied to the *Yearsley* doctrine. *See* Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663, 672-73 (2016).

88. *Campbell-Ewald*, 136 S. Ct. at 672 (emphasis added).

89. *Id.*

90. *See infra* Part I.B.2.

91. 487 U.S. 500, 504-07, 511-13 (1988). Because preemption undergirds *Boyle* immunity, courts do not require a strict principal–agent relationship between the government and the contractor. *See* Andrew Finkelman, *Suing the Hired Guns: An Analysis of Two Federal Defenses to Tort Lawsuits Against Military Contractors*, 34 BROOK. J. INT'L L. 395, 408-09 (2009) (contrasting the immunity provided by *Yearsley* with the government-contractor defense in *Boyle*).

corporation in tort, alleging that the company's defective design led to the marine's death.[92] Justice Scalia, writing for the majority, held that where state law significantly conflicts with federal policy in an area of uniquely federal interest, the federal contractor cannot be held liable under state law.[93] As the Fifth Circuit subsequently put it, the *Boyle* doctrine "[s]tripped to its essentials" is a defense that "[t]he Government made me do it."[94]

Although related to *Yearsley* and the derivative-sovereign-immunity doctrine, the *Boyle* decision is regularly discussed in preemption analysis.[95] The Court in *Boyle* looked to the FTCA to find federal policy in conflict with state law.[96] Although the federal government waives its sovereign immunity for certain tort actions through the FTCA, it maintains a "discretionary function" exemption, which protects its discretionary decisionmaking from ex post judicial review.[97] The Court determined that selecting an appropriate design for military equipment is "assuredly a discretionary function within the meaning" of the FTCA.[98] So long as a government official engaged in discretionary decisionmaking and the contractor followed the official's instructions, the Court reasoned, holding the contractor liable would significantly conflict with

92. *Boyle*, 487 U.S. at 502-03.

93. *Id.* at 504-07, 511-13. This very much sounds like the kind of analysis conducted when a defendant argues that a cause of action is implicitly preempted because to permit it would conflict with a federal objective.

94. *In re* Katrina Canal Breaches Litig., 620 F.3d 455, 465 (5th Cir. 2010) (alteration in original) (quoting *In re* Joint E. & S. Dist. N.Y. Asbestos Litig., 897 F.2d 626, 632 (2d Cir. 1990)).

95. *See, e.g.*, *In re* KBR, Inc., Burn Pit Litig., 744 F.3d 326, 342 n.6 (4th Cir. 2014) (asserting that the defendant's turn to derivative sovereign immunity, rather than preemption, made *Boyle* "inapposite"); Saleh v. Titan Corp., 580 F.3d 1, 5 (D.C. Cir. 2009) (relying on *Boyle* to analyze the defendants' preemption argument); Goepel v. Nat'l Postal Mail Handlers Union, 36 F.3d 306, 314 (3d Cir. 1994) (recognizing that *Boyle* is not a "complete preemption" case, but noting that it is a preemption case nonetheless); Donn v. A.W. Chesterton Co., 842 F. Supp. 2d 803, 808-09 (E.D. Pa. 2012) ("Any analysis of implied preemption in the context of Federal Government procurement of military equipment from private contractors to be used in connection with the national defense—whether it be field or conflict preemption—must begin with *Boyle v. United Technologies Corp.*" (citation omitted)). Even though *Boyle* relies on preemption principles, which are not limited to those working in coordination with the federal government, "it appears that the proximity of contractors to the protected official decisional process provide[d] protection for the contractor" in *Boyle*. Guttman, *supra* note 2, at 914.

96. *Boyle*, 487 U.S. at 511-12; *see also* Mary J. Davis, *The Supreme Court and Our Culture of Irresponsibility*, 31 WAKE FOREST L. REV. 1075, 1094 (1996).

97. *Boyle*, 487 U.S. at 511 (quoting 28 U.S.C. § 2680(a)).

98. *Id.* The FTCA explicitly excludes government contractors from its definition of "federal agency." 28 U.S.C § 2671. The *Boyle* Court did not apply the FTCA to the contractor; rather, it looked to the FTCA provision to find a significant conflict with state law. *Boyle*, 487 U.S. at 511.

uniquely federal interests.[99] Thus, in *Boyle*, the Court created a new kind of immunity arising out of the preemption model.[100] Since 1988, *Boyle* immunity has primarily been applied to military contractors,[101] but some courts have extended *Boyle* to nonmilitary contracts[102] and nonmilitary contractors.[103]

There is much debate about the overlap between *Yearsley* and *Boyle*. Some courts take great pains to separate the two doctrines,[104] while others explicitly conflate them.[105] In fact, the doctrines have different conceptual foundations. *Yearsley* is rooted in traditional principal–agent concepts and has been applied to claims arising under both state and federal law.[106] *Boyle* is rooted in the construct

99. Thus, the Court in *Boyle* found that the defendants met the necessary conditions for displacing state law: "(1) [T]he 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." *Boyle*, 487 U.S. at 512.

100. This was a slippery move. At a critical juncture in its opinion in *Boyle*, the Court acknowledged that "[i]n most fields of activity . . . this Court has refused to find federal pre-emption of state law in the absence of either a clear statutory prescription or a direct conflict between federal and state law." *Id.* at 504 (citations omitted). But the Court then turned to "federal common law" to recognize preemption in "a few areas, involving 'uniquely federal interests.'" *Id.* (quoting Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981)). Ultimately, the Court recognized that state law may be displaced—preempted—when uniquely federal interests are at stake, allowing for a lesser conflict (one that would not ordinarily lead to preemption) to provide a basis for preemption. *See id.* at 507-08. Thus, these doctrines, derivative immunity and preemption, blur.

101. The Ninth Circuit, for example, has explicitly limited the defense to the context of military contractors. *See* Cabalce v. Thomas E. Blanchard & Assocs., 797 F.3d 720, 731 (9th Cir. 2015) (recognizing that *Boyle* does not extend to nonmilitary contractors).

102. *See, e.g.*, Johnson v. Grumman Corp., 806 F. Supp. 212, 216-17 (W.D. Wis. 1992) (holding that the defense was applicable when the United States Postal Service procured mail-delivery vehicles); *see also* Richland-Lexington Airport Dist. v. Atlas Props., Inc., 854 F. Supp. 400, 422-23 (D.S.C. 1994) (holding that the defense was applicable for a nonmilitary performance contract).

103. *See, e.g.*, Carley v. Wheeled Coach, 991 F.2d 1117, 1118 (3d Cir. 1993) (holding that the "government contractor defense is available to nonmilitary contractors under federal common law").

104. *See, e.g.*, *Cabalce*, 797 F.3d at 731-33 (separately analyzing whether the defendant could avail itself of either the government-contractor defense of *Boyle* or derivative sovereign immunity under *Yearsley*).

105. *See, e.g.*, United States *ex rel.* Ali v. Daniel, Mann, Johnson & Mendenhall, 355 F.3d 1140, 1146 (9th Cir. 2004) ("The government contractor defense recognized in *Boyle* and *Yearsley* 'protects a government contractor from liability for acts done by him while complying with government specifications during execution of performance of a contract with the United States.'" (quoting McKay v. Rockwell Int'l Corp., 704 F.2d 444, 448 (9th Cir. 1983))).

106. *See, e.g.*, Cunningham v. Gen. Dynamics Info. Tech., Inc., 888 F.3d 640 (4th Cir. 2018) (applying *Yearsley* analysis to a claim arising under the federal Telephone Consumer Protection Act); Criscione v. U.S. Nuclear Regul. Comm'n, No. 19-cv-02087, 2020 WL 5912567 (D. Md. Oct. 6, 2020) (assessing instrumentality immunity as applied to claims

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of preemption. Debate over such distinctions, however, is peripheral to the aim of this Article. What matters is the single thematic factor arising from a close jurisprudential analysis of both these cases and their progeny: the role of the government, effectively the principal, in designing and implementing the specific terms of performance to be followed by the contractor, the potential agent. In other words, did the government dictate the actions, or did the government leave them to the contractor's discretion? If the former, immunity may attach to the contractor; if the latter, immunity is likely unavailable.

3. Intergovernmental immunity

The doctrine of intergovernmental immunity, which traces its roots to the Supreme Court's constitutional analysis in *McCulloch v. Maryland*,[107] declares that states "have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government."[108] In other words, states cannot regulate or discriminate against the federal government.[109] Since 1819, the Supreme Court and lower courts have looked to the intergovernmental-immunity doctrine to analyze the constitutionality of a number of state tax levies, including, for example, shareholder taxes,[110] sales taxes,[111] use taxes,[112] and pension taxes.[113] Although

arising under the federal Energy Reorganization Act); Portis v. Folk Constr. Co., Inc, 694 F.2d 520, 524 (8th Cir. 1982) (citing to *Yearsley* and the doctrine of "shared immunity" to determine whether the defendant could face liability under Arkansas negligence law); Ackerson v. Bean Dredging LLC, 589 F.3d 196, 204 (5th Cir. 2009) (holding that the defendants were entitled to immunity under *Yearsley* for claims arising under state law).

107. 17 U.S. (4 Wheat.) 316, 425, 436 (1819) (holding that Congress has the power to incorporate a national bank and that a state cannot constitutionally tax its branches).

108. *Id.* at 436.

109. *See, e.g.*, Boeing Co. v. Movassaghi, 768 F.3d 832, 842 (9th Cir. 2014). The doctrine of intergovernmental immunity also applies when there is a conflict between other entities with sovereign immunity: foreign governments, tribal governments, and state governments. *See, e.g.*, Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1498 (2019). This Article, however, is exclusively focused on the intergovernmental immunity that arises when state actions affect federal interests.

110. *See* Nat'l Bank v. Kentucky, 76 U.S. (9 Wall.) 353, 359-63 (1870) (considering whether a state can tax bank stock when the tax is collected directly from the bank).

111. *See* Alabama v. King & Boozer, 314 U.S. 1, 6-9, 14 (1941) (considering whether the application of a state sales tax on a supplier to the federal government "infringe[d] any constitutional immunity of the United States from state taxation").

112. *See* United States v. Township of Muskegon, 355 U.S. 484, 485, 487 (1958) (considering whether a township could levy a property tax against a contractor using government-owned land).

113. *See* Dawson v. Steager, 139 S. Ct. 698, 702-04 (2019) (considering whether a state could exempt from taxes the pension benefits of certain former state and local law-

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sometimes called "intergovernmental tax immunity," the doctrine has not been limited to taxation. The Court has also invoked the doctrine to assess state regulation of health,[114] safety,[115] environmental standards,[116] and economic well-being.[117] As with preemption and derivative sovereign immunity, private parties can assert intergovernmental immunity as a defense to an alleged statutory violation where that statute arguably regulates the federal government.[118]

After a careful review of the jurisprudence, we have identified particular themes that courts discuss as relevant to their derivative-intergovernmental-immunity analysis. The first set of themes is connected to the contracted work that the state law seeks to regulate. These themes include the character of the contractor and the government's role in overseeing the public project. The second set of themes is connected to the kind of state regulation sought to be enforced. These themes include congressional intent regarding the role of the state and the state's effective control of the government.

We begin with the first set of themes. The Supreme Court has recognized that, when the federal government turns to the private sector for assistance—because the private sector provides expertise, experience, and efficiencies, for example—the benefits of the private sector come with the downsides. In other words, immunity does not automatically flow to the contractor. In *United States v. Pennsylvania Environmental Hearing Board*, for example, the Third Circuit found that a government contractor could not claim immunity from

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enforcement employees without also exempting the benefits of former federal law-enforcement employees). For a thorough mapping and analysis of the application of intergovernmental immunity in the tax context, including a recognition that the law of intergovernmental immunity has been anything but straight and clear, see THOMAS REED POWELL, VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION 88-141 (The Lawbook Exch., Ltd. 2002) (1956).

114. *See* Ohio v. Thomas, 173 U.S. 276, 277-78, 283 (1899) (considering whether a state's health standards for oleomargarine could be extended to a federally owned eating house for disabled volunteer soldiers).

115. *See* Johnson v. Maryland, 254 U.S. 51, 55-57 (1920) (considering whether a state could arrest an employee of the United States Postal Office for driving without the required state license).

116. *See* Hancock v. Train, 426 U.S. 167, 168, 198-99 (1976) (considering whether Kentucky's implementation of the Clean Air Act was applicable to federal facilities located in the state), *superseded by statute*, Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 116, 91 Stat. 685, 711 (codified as amended at 42 U.S.C. § 7418).

117. *See* Penn Dairies, Inc. v. Milk Control Comm'n, 318 U.S. 261, 266, 269-71 (1943) (considering whether a state's minimum-price regulations for milk were constitutional as applied to milk dealers selling to federal installations).

118. *See infra* notes 311-13, 327-29 and accompanying text (explaining how the Pennsylvania Higher Education Assistance Agency (PHEAA) asserted the doctrine of intergovernmental immunity to avoid liability under state statutes).

civil penalties for violating state environmental laws when the federal government "deliberately opted for the 'genius' of private enterprise in the operation of" its Scranton plant.[119] Because the government "enjoy[ed] the benefits that are derived from private operation . . . it must also suffer any reciprocal burdens," including "compliance with state pollution regulations."[120] Thus, in assessing whether intergovernmental immunity might attach to the nongovernmental actor, courts evaluate the character of the contractor and the government's goals in turning to the private sector.

The second set of themes—involving whether Congress intended to allow states to play a role in controlling or implementing federal law—is connected to the kind of regulation sought to be enforced. These themes are also connected to field preemption, the question of whether Congress intended to occupy the field fully.[121] Issues of field preemption are opaque, but they turn on Congress's express or implied intent and whether, if a state may regulate the federal government, that state effectively controls the federal enterprise.

B. Pulling Together the Five-Factor Framework

Subpart A set out the doctrinal outline of preemption, derivative sovereign immunity, and intergovernmental immunity, while recognizing

119. 584 F.2d 1273, 1279 (3d Cir. 1978).

120. *Id.* This is not unique to the intergovernmental immunity context. In *Powell v. United States Cartridge Co.*, the Court held that federal labor laws applied to private companies contracted to operate federal ordnance plants in Missouri, Arkansas, and Texas. 339 U.S. 497, 498-99, 502-04 (1950), *superseded by statute*, Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 401, 80 Stat. 830, 841-42 (codified as amended at 29 U.S.C. § 207). Looking at the operations contracts, the Court noted "a reflection of the fundamental policy of the Government to refrain, as much as possible, from doing its own manufacturing and to use, as much as possible (in the production of munitions), the experience in mass production and the genius for organization that had made American industry outstanding in the world." *Id.* at 506.

121. *See* Student Loan Servicing All. v. District of Columbia, 351 F. Supp. 3d 26, 46, 55-56 (D.D.C. 2018) (noting that the "intergovernmental immunity doctrine provides the federal government a minimum level of constitutional protection, but Congress can provide a 'further degree of immunity' by acting to preempt a state law or regulation that would otherwise be constitutionally permissible," and further noting that to ascertain whether Congress has taken the preemptive step, courts consider "the substantive nature and reach of the federal regulatory scheme that Congress [has] adopt[ed]" (first quoting North Dakota v. United States, 495 U.S. 423, 435 (1990); and then quoting Sickle v. Torres Advanced Enter. Sols., LLC, 884 F.3d 338, 346 (D.C. Cir. 2018))). The role of congressional intent came to a head in the milk-price-control context. *Compare* Penn Dairies, Inc. v. Milk Control Comm'n, 318 U.S. 261, 278-79 (1943) (holding that a state milk-control law could constitutionally be applied to military-encampment suppliers), *with* Paul v. United States, 371 U.S. 245, 254-55 (1963) (holding that a similar law was now unconstitutional because, in the intervening years, Congress "revised and restated the federal procurement policy . . . [for] the War and Navy Departments").

that, over time, the doctrines have been collapsed and interwoven. Like others, we recognize that these doctrines are in a state of disarray.[122] Even so, courts must decide cases. Therefore, it is critical to understand the factors that courts currently use to determine whether to apply the sovereign shield to government contractors. This Part identifies five factors that courts have used to analyze sovereign-shield defenses asserted by nongovernmental actors.

The five factors are: (1) congressional intent; (2) the character of the contracted institution and its contract; (3) the discretion of the contractor; (4) the contractor's adherence to the precise terms of the contract; and (5) the actual or potential impact of state regulation on federal policymaking and decisionmaking. These factors arose again and again in our review of case law grappling with the application of the sovereign shield to nongovernmental actors. Where relevant, we also point out subfactors that have facilitated courts' analyses of one of the five factors.

These five factors are distilled from a century of case law, established by the Supreme Court and implemented by lower courts, but they have not been articulated as a test by any court. The identified factors both overlap and work together. In that way, even though different sovereign-shield doctrines may seemingly turn on some factors rather than others, in application, the factors operate similarly and rest on the same sorts of factual observations. We therefore treat the factors as a single set relevant to the sovereign-shield defenses generally. No one factor appears to be sufficient on its own to guarantee application of the sovereign shield.

1. Congressional intent

The first factor is congressional intent. Courts consider whether Congress intended to shield nongovernmental actors from liability by preempting state law or extending immunity to those actors. This factor is particularly important for preemption, *Boyle*-immunity, and intergovernmental-immunity defenses.

Discerning legislative intent is easiest when lawmakers address the possibility of preemption or immunity explicitly. So courts look to see whether a federal statute expressly preempts state law, such that a state law

122. *See* Paul Wolfson, *Preemption and Federalism: The Missing Link*, 16 HASTINGS CONST. L.Q. 69, 70-71 (1988) ("Although the Supreme Court has referred to four categories of preemption in almost every one of its recent preemption cases, the categories are useless in difficult cases." (footnote omitted)); Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After* Garcia, 1985 SUP. CT. REV. 341, 345 ("The most plausible explanation of the repeated frustration of judicial intervention in the area of state-national relations is the failure of judges and scholars to produce a viable theory of federalism that would help to develop workable principles for the judicial resolution of federalism-related disputes.").

claim cannot lie against the contractor, or extends immunity such that the court would have no jurisdiction over the contractor. Such an inquiry should be self-evident, in that the federal statute contains (or does not contain) language prohibiting the application of state law.[123] More difficult to identify are instances of implicit preemption. One form of implicit preemption is field preemption, which courts find when the federal government completely dominates an area such that potentially competing authorities must be excluded.[124] This determination requires a court to assess whether Congress has legislated so comprehensively that states have no regulatory space left, as the Court has found with certain aspects of immigration law[125] and federal energy regulation.[126] In addition to explicit preemption and *Boyle*-immunity defenses, field preemption is also relevant to intergovernmental-immunity defenses.[127]

The question of implicit preemption becomes most difficult, and the reasoning potentially most controversial, in the realm of conflict preemption, when a court finds that state law puts an obstacle in the way of a federal objective. This should not be surprising, because the court must pose and answer an unanswerable question. As David Dana has put it, that question is, "if Congress had spoken directly and unambiguously to the precise preemption question at hand, which it did not, what would it have said?"[128] Given the level of indeterminacy in this question, Dana observes that "it is hard to resist the conclusion that 'congressional intent' in an implied preemption case often reflects more than anything else the deciding court's vision as to what kinds of state laws it thinks would harm, obstruct, or frustrate federal law."[129]

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123. *But see* Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 517-18 (1992) (finding clear congressional intent to preempt state law, but then engaging in further analysis to "identify the domain expressly pre-empted").

124. *See* Arizona v. United States, 567 U.S. 387, 401, 415 (2012) (holding that the federal government had "occupied the field of alien registration" such that state legislative efforts were preempted, but also holding that a specific state law requirement might nevertheless survive if it could be "construed in a way that [does not] create[] a conflict with federal law").

125. *Id.* at 401.

126. Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288, 1297 (2016). The Court here found that Maryland impermissibly trespassed on the federal domain in the context of energy regulation. *Id.*

127. Penn Dairies, Inc. v. Milk Control Comm'n, 318 U.S. 261, 271-72 (1942) (noting judicial reluctance to extend federal immunity to state tax and regulatory authority and indicating that the "inquiry . . . must be whether the state's regulation of this contractor in matter of local concern conflicts with Congressional legislation or with any discernible Congressional policy").

128. David A. Dana, *Democratizing the Law of Federal Preemption*, 102 NW. U. L. REV. 507, 510 (2008).

129. *Id.*

This conundrum makes recourse to the statutory text even more significant to a court's analysis. For example, as some courts have concluded when declining to find preemptive effect, the choice of Congress to include express preemption language in some provisions but not in others is compelling evidence that lawmakers generally did not intend to restrict state involvement.[130] This rests on the canon of construction *expressio unius est exclusio alterius*: to express one is to exclude the other.[131] Had Congress wished to give federal law preemptive effect, they certainly knew how to do so, and if they did not do so, that means they did not wish to do so.

That is not the end of the analysis, however, because there is also a well-recognized, though inconsistently adhered-to, presumption against finding federal preemption, especially in those spheres traditionally regulated by the state.[132] The police power, which includes the power to protect consumers from economic harm, is one of those spheres.[133] Thus, while congressional silence in isolation is insufficient to overcome a finding of preemption, when bolstered by this presumption, the case for preemption is further weakened.

To the extent that federal agencies assert their authority to claim preemption, doctrine allows for consideration of the agency's views, with proper skepticism if an agency either acts without due care or changes position on an issue without adequate explanation.[134] The Supreme Court has allowed

130. *See, e.g.*, Wyeth v. Levine, 555 U.S. 555, 574-75 (2009) (recognizing that Congress had not enacted an express preemption provision for prescription drugs in the Federal Food, Drug, and Cosmetic Act, even where it did so for medical devices, and noting that "[i]ts silence on the issue, coupled with its certain awareness of the prevalence of state tort litigation, is powerful evidence that Congress did not intend FDA oversight to be the exclusive means of ensuring drug safety and effectiveness"); Nelson v. Great Lakes Educ. Loan Servs., Inc., 928 F.3d 639, 648 (7th Cir. 2019) ("[T]he several specific preemption provisions in the HEA weigh against attributing to Congress a desire to preempt state law broadly. The specific preemption provisions show that Congress considered the issue of preemption and decided to preempt on particular topics.").

131. *See, e.g.*, Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 517 (1992) (relying on *expressio unius* in its preemption discussion); Pub. Health Tr. of Dade Cnty. v. Lake Aircraft, Inc., 992 F.2d 291, 294-95 (11th Cir. 1993) (same).

132. *Wyeth*, 555 U.S. at 565 ("[I]n all pre-emption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,' . . . we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" (second and third alterations in original) (quoting Medtronic v. Lohr, 518 U.S. 470, 485 (1996))).

133. *Id.*; *see also* Student Loan Servicing All. v. District of Columbia, 351 F. Supp. 3d 26, 47 (D.D.C. 2018) (applying the presumption against preemption in a case related to "[c]onsumer protection," an "area that traditionally has been regulated by the states"); Farina v. Nokia Inc., 625 F.3d 97, 104, 117 (3d Cir. 2010) (applying the presumption in a consumer suit).

134. *See* Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2125-26 (2016).

for varying degrees of deference depending on the process that produced the agency interpretation. The often-cited formulation comes from *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, in which the Court described circumstances where a regulatory agency's interpretation of a statute should garner deference: (1) if the statute is ambiguous; and (2) the agency's analysis is "based on a permissible construction of the statute."[135] But *Chevron* deference "is warranted only 'when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.'"[136] If *Chevron* does not apply, an agency interpretation is "'entitled to respect' only to the extent it has the 'power to persuade,'"[137] and the more process that went into generating the interpretation, the more persuasive a court is likely to find it.[138]

2. Character of the contracted institution and its contract

In determining whether a private actor is subject to liability notwithstanding a contractual relationship with the federal sovereign, courts regularly consider: (1) the character of the contracted institution, (2) the defined relationship between the contractor and the government, and (3) the kind of contract. These subfactors hold particular import in the context of derivative-sovereign-immunity and intergovernmental-immunity defenses.

The first subfactor is the "character" of the institution seeking immunity.[139] The Supreme Court, in early cases including *McCulloch v. Maryland*, explained that immunity should be extended to public corporations created for "national purposes."[140] Such public corporations

135. 467 U.S. 837, 843 (1984). The standard may be even lower—meaning a court's degree of deference may be greater—when an agency interprets its own regulations. *See* Auer v. Robbins, 519 U.S. 452, 461 (1997).

136. Gonzales v. Oregon, 546 U.S. 243, 255-56 (2006) (quoting United States v. Mead Corp., 533 U.S. 218, 226-27 (2001)).

137. *Id.* at 256 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

138. *See Skidmore*, 323 U.S. at 140 (explaining that the degree of deference "will depend upon the thoroughness evident in [the judgment's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control").

139. *See* Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 867-68 (1824) (holding that the Bank of the United States was not subject to the taxing powers of the State of Ohio).

140. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 409, 411, 436 (1819) ("The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else."). The Bank of the United States itself was an unusual type of government instrumentality, with "ownership of stock divided between the United States and private persons." POWELL, *supra* note 113, at 90-91.

have included the Bank of the United States and its branches,[141] housing for disabled volunteer soldiers,[142] and the U.S. Post Office Department.[143] Public corporations created for national purposes are not the same as private corporations that provide supplies or services to the United States via contract. Thus, Chief Justice Marshall distinguished the Bank of the United States, which was "not considered as a private corporation, whose principal object is individual trade and individual profit; but as a public corporation, created for public and national purposes," from a "mere private corporation, engaged in its own business, with its own views."[144] "[T]he casual circumstance of [the latter] being employed by the government in the transaction of its fiscal affairs, would no more exempt its private business from the operation of [the taxing] power, than it would exempt the private business of any individual employed in the same manner."[145] Today, although many public corporations are governed by so-called sue-and-be-sued clauses in their authorizing legislation,[146] private corporations operating as government contractors are not so governed. Lower courts therefore continue to consider whether a defendant contractor performs an "important governmental function" in assessing whether the contractor can benefit from the sovereign shield.[147]

Second, because the benefits of the sovereign shield should only flow to nongovernmental entities that are doing the government's bidding, courts look to whether the contracted institution is an instrumentality, arm, or agent of the federal government.[148] While not dispositive by

141. *McCulloch*, 17 U.S. (4 Wheat.) at 436; *Osborn*, 22 U.S. (9 Wheat.) at 867-68.

142. Ohio v. Thomas, 173 U.S. 276, 283 (1899).

143. Johnson v. Maryland, 254 U.S. 51, 55-57 (1920).

144. *Osborn*, 22 U.S. (9 Wheat.) at 859.

145. *Id.* at 859-60.

146. *See* FDIC v. Meyer, 510 U.S. 471, 475 (1994); Loeffler v. Frank, 486 U.S. 549, 554 (1988).

147. *See* United States v. Michigan, 851 F.2d 803, 806 (6th Cir. 1988) ("One significant factor in determining whether a particular entity is a federal instrumentality is whether it performs an important governmental function."); Davis v. Mgmt. & Training Corp. Ctrs., No. 98-4175, 2000 WL 1701773, at *4-5 (D. Kan. Sept. 28, 2000) (assessing the defendant contractor's role in performing important governmental functions in evaluating a preemption claim, and cataloging similar cases).

148. *See Osborn*, 22 U.S. (9 Wheat.) at 860 (noting that the opinion in *McCulloch v. Maryland* rested on the Court's conclusion that the Bank of the United States was an "instrument" that was "necessary and proper for carrying into effect the powers vested in the government of the United States"); *Thomas*, 173 U.S. at 283 (observing that the defendant was engaged in "superintending the internal government and management of a Federal institution, under the lawful direction of its board of managers and with the approval of Congress"); *Johnson*, 254 U.S. at 55-56 (recognizing that *McCulloch* dealt with the states' power to tax the "instrumentalities" of the United States); Curry v. United States, 314 U.S. 14, 17-18 (1941) (holding that government suppliers were not

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itself,[149] courts have generally declined to extend immunity to, for example, private actors or entities that do not rise to the level of a federal government "instrumentalit[y]"[150] or "'servant' of the United States in agency terms."[151] Today, courts continue to recognize that there is no "bright line rule or specific test" to determine whether a nongovernmental entity is a federal instrumentality, relying instead on "various factors to aid their determination."[152]

The character of the institution—whether it rises to the level of an agent or instrumentality of the United States—is intimately related to the kind of relationship it holds with the federal government. Courts have looked to contractual language to determine whether the contractor should be treated as an extension of the government for immunity purposes.[153] For example, in *United States v. Pennsylvania Environmental Hearing Board*,[154] the contractors' status as "independent contractors" weighed against extending intergovernmental immunity.[155] The court was particularly hesitant to apply

immune from state taxation in part because they were not "agents or instrumentalities of the Government"); United States v. Boyd, 378 U.S. 39, 48 (1964) (holding that contractors had not "been so incorporated into the government structure as to become instrumentalities of the United States and thus enjoy governmental immunity"); Lamb v. Martin Marietta Energy Sys., Inc., 835 F. Supp. 959, 963 (W.D. Ky. 1993) (citing *Boyd* in rejecting the defendant's derivative-sovereign-immunity defense); Hamm v. Boeing Co., 216 So. 2d 288, 291 (Ala. 1968) (recognizing, in assessing intergovernmental immunity, that "the critical question becomes one of determining what the relationship is between the United States Government and government contractor with respect to the purchase of tangible personal property").

149. *See infra* notes 152-56.

150. *See Lamb*, 835 F. Supp. at 963 (W.D. Ky. 1993) (citing *Boyd*, 378 U.S. at 48).

151. United States v. Township of Muskegon, 355 U.S. 484, 486 (1958); *see also* Mount Olivet Cemetery Ass'n v. Salt Lake City, 164 F.3d 480, 486 (10th Cir. 1998) ("There is no bright line rule or specific test to determine if an entity is a federal instrumentality."); United States v. Jackson County, 696 F. Supp. 479, 484 n.3 (W.D. Mo. 1988) (distinguishing *Muskegon* by pointing to its language recognizing that a tax might be unlawful if the contractor was a "servant" of the United States).

152. Tewelde v. Albright, 89 F. Supp. 2d 12, 15-16 (D.D.C. 2000) (finding that the American Embassy Association (AEA) was not a federal instrumentality for purposes of holding the Department of State liable for AEA's alleged discriminatory acts); *see also* United States v. Michigan, 851 F.2d 803, 806 (6th Cir. 1988) (considering whether an entity was a federal instrumentality for purposes of intergovernmental tax immunity); *Jackson County*, 696 F. Supp. at 484 n.3.

153. This is consistent with application of the FTCA to government contractors. While the FTCA explicitly excludes contractors from the definition of "federal agency," 28 U.S.C. § 2671, a contractor can nevertheless be considered an employee for FTCA purposes if the federal government oversees and controls the day-to-day performance of the contract. United States v. Orleans, 425 U.S. 807, 813-15 (1976).

154. 584 F.2d 1273 (3d Cir. 1978).

155. *Id.* at 1278-79; *see also supra* note 120.

the sovereign shield because the government turned to the private sector for its innovation, efficiency, and expertise.[156] Similarly, under the agency principles underlying *Yearsley* immunity, courts have looked to see if the contractor is hired as an "independent contractor," expected to use its expertise and discretion to decide how best to get the job done, or as something more akin to an agent of the United States, just following orders.[157] We discuss this idea further in the Subpart that follows. Courts also look to the payment structure defined in the contract as a signal. In both *Powell v. United States Cartridge Co.* and *Alabama v. King & Boozer*,[158] the contractors' use of a "cost-plus-a-fixed-fee" payment structure militated against the extension of immunity because such a fee structure signaled a separation between the government and the contractor.[159] This analysis has been similarly employed by the lower courts.[160]

3. Discretion of the contractor

The third factor is whether a federal contractor retains discretion in the implementation of the contract. This factor is a primary concern for derivative-sovereign-immunity defenses arising under either *Yearsley* or *Boyle*. It can also become relevant to intergovernmental-immunity assertions. If the contractor retains authority to determine how to implement the contract, then

156. *See Pa. Env't Hearing Bd.*, 584 F.2d at 1279.

157. *See* McMahon v. Presidential Airways, Inc., 502 F.3d 1331, 1343 (11th Cir. 2007) (citing Whitaker v. Harvell-Kilgore Corp., 418 F.2d 1010, 1015 (5th Cir. 1969)) ("[T]o make out a claim of derivative sovereign immunity in this circuit, the entity claiming the immunity must at a bare minimum have been a common law agent of the government at the time of the conduct underlying the lawsuit."); Cabalce v. Thomas E. Blanchard & Assocs., 797 F.3d 720, 732-33 (9th Cir. 2015) (declining to confer derivative immunity to a federal contractor because the contractor "did not plausibly demonstrate that it completely lacked discretion" in its work).

158. 314 U.S. 1 (1941).

159. Powell v. U.S. Cartridge Co., 339 U.S. 497, 506-07 (1950), *superseded by statute*, Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 401, 80 Stat. 830, 841-42 (codified as amended at 29 U.S.C. § 207); *King & Boozer*, 314 U.S. at 13-14; *see also* 48 C.F.R. § 16.306(a) (2019) ("A cost-plus-fixed-fee contract is a cost-reimbursement contract that provides for payment to the contractor of a negotiated fee that is fixed at the inception of the contract. The fixed fee does not vary with actual cost, but may be adjusted as a result of changes in the work to be performed under the contract. This contract type permits contracting for efforts that might otherwise present too great a risk to contractors, but it provides the contractor only a minimum incentive to control costs.").

160. *Whitaker*, 418 F.2d at 1014 (rejecting the defendant's attempts to take advantage of derivative-sovereign-immunity protection in reliance on the analysis of the Court in *Powell*); Durnil v. J. E. Dunn Constr. Co., 186 F.2d 27, 29 (8th Cir. 1951) (same).

they are acting outside of the zone of conduct protected by the sovereign shield.

There are two principal inquiries. First, did the contractor lack sufficient discretion in its actions such that it is appropriate to treat the contractor's action as government action? If the contractor retained discretion in implementing the contract terms, courts are unlikely to extend sovereign benefits to the private actor.[161] If the contractor lacked discretion, courts ask a second question, which is the subject of the next Subpart: Did the contractor exceed its authority under the contract?

The Fourth Circuit's recent decision in *Cunningham v. General Dynamics Information Technology, Inc.* is instructive in exploring what it means for a government contractor to lack discretion in developing and implementing a contract.[162] In *Cunningham*, the federal government, through the Centers for Medicare and Medicaid Services (CMS), contracted with defendant General Dynamics Information Technology (GDIT) to call applicants to inform them of their rights under the Affordable Care Act.[163] CMS told GDIT exactly when to call (over a set five-day period), whom to call (approximately 2.65 million numbers), in what order to call (CMS divided the numbers into seven lists and specified which numbers to call on which days), and what to say (CMS provided scripts for each call).[164] When a putative class brought suit against GDIT for violating the TCPA, the Fourth Circuit ruled that, because GDIT had "performed exactly as CMS directed," it was entitled to immunity from suit pursuant to the *Yearsley* doctrine.[165]

This is consistent with other courts' analyses of contractors' discretion. In *Cabalce v. Thomas E. Blanchard & Associates*, for example, the Ninth Circuit held that a government contractor could not take advantage of *Yearsley* immunity where the contractor "did not plausibly demonstrate that it completely lacked discretion" (that is, the contractor *did* have discretion) in implementing its contract.[166] The court noted a lack of evidence that any "government employee or agency controlled or substantially supervised the day-to-day" work under the contract and reiterated that "derivative sovereign immunity, as discussed in *Yearsley*, is limited to cases in which a contractor 'had no

161. *See, e.g.*, *Cabalce*, 797 F.3d at 732-33.

162. *See* 888 F.3d 640, 647-49 (4th Cir. 2018).

163. *Id.* at 643-44.

164. *Id.* at 644.

165. *See id.* at 647-49 (finding that the government "validly conferred . . . authorization" for GDIT to undertake the challenged action).

166. 797 F.3d at 733.

discretion in the design process and completely followed government specifications.'"[167]

The focus on discretion (or lack thereof) is also consistent with courts' application of *Boyle* immunity and intergovernmental immunity, and it echoes fundamental agency principles that make a principal liable for the actions of an agent that acted on instructions. Under *Boyle,* immunity is appropriate if "the discretion over significant details and all critical design choices will be exercised by the government."[168] For example, where government oversight focused on the cost of a material but not its composition, a court found that the government did not exercise sufficient oversight to shield the contractor from composition-related liability.[169] Directives that are not at least "reasonably precise" are insufficient[170]: Providing only general directives, without more specific instructions, allows a contractor significant discretion, which undercuts the contractor's demand for immunity.[171] And in the intergovernmental-immunity context, courts look to the role of federal government agents or officials in implementing the work of the contract. For example, in *Ohio v. Thomas,* the Court extended immunity to the overseer of a government-owned eating house because the federal government maintained control of every aspect related to the issue at hand: regulation of oleomargarine.[172] The Court recognized that Congress had included "detailed estimates for rations to be furnished the inmates, and that the appropriation for rations included oleomargarine as part thereof."[173] Therefore, Congress "in effect provided oleomargarine as part of the rations for the inmates of the home."[174] In contrast, in *United States v. Township of Muskegon,* the Court deemed constitutional a state tax imposed on a federal government lessee because the Court recognized the corporate activities at the property, noted

167. *Id.* at 726, 732 (first quoting Cabalce v. VSE Corp., 922 F. Supp. 2d 1113, 1116 (D. Haw. 2013); and then quoting *In re* Hanford Nuclear Rsrv. Litig., 534 F.3d 986, 1001 (9th Cir. 2008)).

168. *In re* Katrina Canal Breaches Litig., 620 F.3d 455, 461 (5th Cir. 2010) (quoting Trevino v. Gen. Dynamics Corp., 865 F.2d 1474, 1481 (5th Cir. 1989)).

169. *In re Katrina,* 620 F.3d at 461-63.

170. *See id.* at 464-65; Davis, *supra* note 96, at 1099 (arguing that courts have adopted overly expansive readings of "reasonably precise specifications" in applying *Boyle* to subsequent fact patterns (quoting Boyle v. United Techs. Corp., 487 U.S. 500, 512 (1988))).

171. *In re Katrina,* 620 F.3d at 464-65 ("By providing only general instructions regarding the compaction method, the [government] ensured that [the contractor] would have significant discretion over the method chosen. The exercise of that discretion by [the contractor] is not protected by the [government-contractor-immunity] doctrine").

172. 173 U.S. 276, 282 (1899).

173. *Id.*

174. *Id.*

that the government did not reserve necessary control over the activities and financial gain of the lessee, and concluded that the lessee was "free within broad limits to use the property as it thought advantageous and convenient in performing its contracts and maximizing its profits from them."[175]

4. Whether the contractor exceeds its authority under contract

Once a court has determined that the government provided sufficient instruction to the contractor to justify a potential extension of immunity, the court then turns to the fourth factor: whether the contractor exceeded its authority in implementing the government's instructions.

Most courts recognize that, to take advantage of a sovereign-shield defense, government contractors must do more than simply "stay[] within the thematic umbrella of the work that the government authorized."[176] When considering whether a contractor has exceeded its authority, courts have generally construed the scope of the contractor's authority narrowly and specifically.[177] The Fourth Circuit has held, for example, that violating military directives and breaching a contract with the government can take a government contractor outside the protections of *Yearsley* immunity.[178]

Consider the Supreme Court's analysis in *Campbell-Ewald Co. v. Gomez*,[179] a 2016 case analyzing facts similar to those in *Cunningham* and claims also under the TCPA. In *Campbell-Ewald*, the United States Navy contracted with

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175. 355 U.S. 484, 486 (1958); *see also* Powell v. U.S. Cartridge Co., 339 U.S. 497, 500 (1950) (finding that although the government did reserve "large rights of supervision, auditing and inspection," the contracting entity was responsible for the hiring, assignments, supervision, and pay of its employees), *superseded by statute*, Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 401, 80 Stat. 830, 841-42 (codified as amended at 29 U.S.C. § 207); Alabama v. King & Boozer, 314 U.S. 1, 13 (1941) ("[H]owever extensively the Government may have reserved the right to restrict or control the action of the contractors in other respects, neither the reservation nor the exercise of that power gave to the contractors the status of agents of the Government to enter into contracts or to pledge its credit.").

176. *In re* KBR, Inc., Burn Pit Litig., 744 F.3d 326, 345 (4th Cir. 2014) (holding that the lower court erred in dismissing the plaintiff's case on derivative-sovereign-immunity grounds and pointing to the need to assess evidence about the specific contract and KBR's actions in accordance with the contract); *see also* Cunningham v. Gen. Dynamics Info. Tech., Inc., 888 F.3d 640, 647 (4th Cir. 2018).

177. *See, e.g.*, *In re KBR*, 744 F.3d at 344-45 (determining that *Yearsley* supported the plaintiffs' narrower view that the contractor exceeded its authority with respect to specific terms of the contract rather than the contractor's broader view that it "acted within the scope of its scope of authority by performing general waste management and water treatment functions"); Norat v. Fluor Intercontinental, Inc., No. 14-cv-04902, 2018 WL 1382666, at *14 (D.S.C. Mar. 19, 2018).

178. *In re KBR*, 744 F.3d at 345.

179. 136 S. Ct. 663 (2016).

Campbell-Ewald Company, a nationwide advertising agency, to develop and execute a multimedia recruiting campaign that included mass text messaging.[180] There the contractor retained the responsibility to generate a list of phone numbers under the contract, but it could only send messages to those who had "opted in" to receiving Navy solicitations.[181] When an individual alleging that he did not opt in to receive the texts filed suit against Campbell-Ewald, asserting that the messages he received violated the TCPA, the Court affirmed the lower court's decision denying summary judgment for Campbell-Ewald.[182] It held that if, as alleged, the contractor violated both federal law and the government's explicit instructions, that would jettison any immunity shield derived from the government's sovereignty.[183] *Campbell-Ewald* and *Cunningham* differ in the amount of discretion afforded the contractor and, more importantly, in the contractors' actions with respect to the government's instructions.[184]

Similarly, once the government provides reasonably precise specifications, the contractor can only remain within the reach of *Boyle* if the contractor actually followed those instructions. Under this construction of the *Boyle* doctrine, there are only two choices. Either: (1) the federal government is the active decisionmaker and the government contractor is an implementer, in which case the actions are truly those of the government and should be shielded from liability; or (2) the federal government chooses not to be in charge, ceding decisionmaking responsibility to the private contractor, in which case the actions are truly those of the private actor and should not be shielded from liability for negligence or other torts. One district court

180. *Id.* at 667.

181. *Id.*; *see also Cunningham*, 888 F.3d at 648 ("Notably, this scenario is vastly distinguishable from the facts of *Campbell-Ewald*.").

182. *Campbell-Ewald*, 136 S. Ct. at 667-69, 674.

183. *Id.* at 672-74.

184. Malone, *supra* note 86, at 109-10 ("The United States Supreme Court's recent decision in *Campbell-Ewald Co. v. Gomez* not only lends support to the existence of derivative immunity as a doctrine distinct from *Boyle v. United Technologies Corp.*, but outlines when derivative immunity may be extended pursuant to common law agency principles." (footnotes omitted)). Although there is evidence to show that the Supreme Court's overall trend is to be more protective of sovereign immunity, at least in some circumstances, *see* Florey, *supra* note 69, at 820, we disagree with Malone's conclusion that *Campbell-Ewald* indicated that "derivative immunity should not be narrowly construed." Malone, *supra* note 86, at 111. Rather, we view *Campbell-Ewald* as consistent with courts' previous decisions on derivative-sovereign-immunity shields and suggest that the Court's opinion makes clear that the doctrines should be applied only in limited factual circumstances. *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, 1506 (2018) (arguing that *Campbell-Ewald* contracted, rather than expanded, the scope of derivative sovereign immunity).

explained that the "government contractor defense" is available where "the government hires a contractor to perform a given task, and specifies the manner in which the task is to be performed, and the contractor is later haled into court to answer for a harm that was caused by the contractor's compliance with the government's specifications . . . ."[185] The court compared that scenario to another in which "the contractor is hired to perform the same task, but is allowed to exercise discretion in determining how the task should be accomplished," explaining that the contractor would not be entitled to derivative sovereign immunity "if the manner of performing the task ultimately causes actionable harm to a third party . . . because the harm can be traced, not to the government's actions or decisions, but to the contractor's independent decision to perform the task in an unsafe manner."[186]

In addition to drawing a line between the government's decisionmaking and the contractor's decisionmaking, courts look to the source of the alleged injury to determine whether the blame should lie with the government or with the contractor. In *Ackerson v. Bean Dredging LLC*, for example, a class of plaintiffs alleged that the defendants' dredging activities damaged protective wetlands in the Mississippi River Gulf Outlet, which in turn resulted in extensive damage to the New Orleans region during Hurricane Katrina.[187] The Fifth Circuit found that the defendant contractors were entitled to immunity under the *Yearsley* doctrine because the plaintiffs' complaint failed to allege that the contractor defendants "exceeded their authority or in any way deviated from Congress's direction or expectations."[188] Importantly, the *Ackerson* court determined that the plaintiffs' allegations attacked the dredging project as a whole; the plaintiffs did not point to any specific or separate act of negligence by the defendant contractors in executing the contract.[189] In the *Boyle* context, the court in *Adams v. Alliant Techsystems, Inc.* used the same analysis to come to the opposite conclusion: Where the contractor was unable to establish that the alleged injury was "the necessary and unavoidable consequence" of manufacturing munitions for the Army or that "the work cannot be done without inflicting the injury," the nongovernmental actor was not entitled to the benefit of *Boyle* immunity, presumably because conduct that was not contractually required caused the harm.[190]

185. Bixby v. KBR, Inc., 748 F. Supp. 2d 1224, 1242 (D. Or. 2010).

186. *Id.*

187. 589 F.3d 196, 202-03 (5th Cir. 2009).

188. *Id.* at 207.

189. *Id.*

190. 201 F. Supp. 2d 700, 708 (W.D. Va. 2002) (quoting Schrader v. Hercules, Inc., 489 F. Supp. 159, 161 (W.D. Va. 1980)).

Both the third factor and the fourth rest on an agency-like analysis of the relationship between the federal government and its contractor. In the typical case outside the context of federal outsourcing, the court looks at agency relationships in order to determine whether liability of the agent continues upward to reach that agent's principal.[191] In sovereign-shield cases, however, the court is performing an inverted agency analysis: The court looks at the relationship to determine whether attributes of the principal extend *downward* to protect the agent that caused the harm. We explore the risks and possibilities of this inverted agency analysis more in a companion article.[192] For present purposes, the critical observation is that when a court asks whether the sovereign is really responsible, the answer determines whether the agent is *protected* alongside its principal, rather than determining whether the principal is *liable* alongside its agent.

5. Effect on federal policymaking and decisionmaking

The fifth factor is the opaque question of whether a state law or regulation impermissibly affects federal policymaking or decisionmaking.

A review of cases suggests the following guidance: Where the state seeks to regulate the United States and its installations directly, the Constitution prohibits such regulation absent congressional consent.[193] But where the state seeks to regulate private actors in their contracts with the United States, the Constitution permits such regulation absent congressional action to extend immunity.[194] Congress can "endow" government corporations and contractors

191. *See* WILLIAM A. KLEIN, J. MARK RAMSEYER & STEPHEN M. BAINBRIDGE, BUSINESS ASSOCIATIONS: CASES AND MATERIALS ON AGENCY, PARTNERSHIPS, LLCS, AND CORPORATIONS 36 (10th ed. 2018) (explaining the significance of the relationship between a tortfeasor and the entity that is the tortfeasor's alleged principal in the context of torts occurring at gas stations).

192. *See* Elengold & Glater, *supra* note 6 (manuscript at 46).

193. *See* Hancock v. Train, 426 U.S. 167, 198-99 (1976) (holding that state permitting requirements were improper as applied to federal installations absent congressional authorization), *superseded by statute*, Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 116, 91 Stat. 685, 711 (codified as amended at 42 U.S.C. § 7418); Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 180 (1988) ("It is well settled that the activities of federal installations are shielded by the Supremacy Clause from direct state regulation unless Congress provides 'clear and unambiguous' authorization for such regulation." (quoting EPA v. California *ex rel.* State Water Res. Control Bd., 426 U.S. 200, 211 (1976))); Boeing Co. v. Movassaghi, 768 F.3d 832, 836 (9th Cir. 2014) (addressing "a state's authority, as opposed to the federal government's authority," to "mandate more stringent cleanup procedures, not generally applicable within the state, to a particular site where the federal government undertook to clean up nuclear contamination it created").

194. Penn Dairies, Inc. v. Milk Control Comm'n, 318 U.S. 261, 271 (1943) ("And we have held that [state regulatory] burdens, save as Congress may act to remove them, are to be regarded as the normal incidents of the operation within the same territory of a dual

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with immunity, but it must do so explicitly.[195] Courts, lacking clear congressional instructions, have relied at least in part on that lack of instructions to reject attempts to extend immunity to congressionally created corporations,[196] building contractors,[197] government lessees,[198] and operations contractors[199]—even when the burden on the contractor becomes an economic burden on the United States.[200]

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system of government, and that no immunity of the national government from such burdens is to be implied from the Constitution which established the system . . . ."); *see also* United States v. Boyd, 378 U.S. 39, 51 (1964) ("If [cost implications for the federal government] unduly intrude upon the business of the Nation, it is for Congress, in the valid exercise of its proper powers, not this Court, to make the desirable adjustment.").

195. Keifer & Keifer v. Reconstruction Fin. Corp., 306 U.S. 381, 388-89 (1939) (concluding that absent a congressional intent to endow a governmental corporation with governmental immunity, "the government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work").

196. *Id.* at 395-96.

197. Alabama v. King & Boozer, 314 U.S. 1, 8 (1941) ("Congress has declined to pass legislation immunizing from state taxation contractors under 'cost-plus' contracts for the construction of governmental projects.").

198. United States v. Township of Muskegon, 355 U.S. 484, 486 (1958); United States v. City of Detroit, 355 U.S. 466, 474-75 (1958).

199. Powell v. U.S. Cartridge Co., 339 U.S. 497, 512 (1950) (pointing to the fact that Congress could have, but chose not to, expressly exempt "employees engaged in producing munitions for use by the United States in war" from the Fair Labor Standards Act), *superseded by statute*, Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 401, 80 Stat. 830, 841-42 (codified as amended at 29 U.S.C. § 207).

200. Penn Dairies, Inc. v. Milk Control Comm'n, 318 U.S. 261, 269 (1943); *see also* Curry v. United States, 314 U.S. 14, 18 (1941) (recognizing that a state tax will burden the government "only as the economic burden is shifted to it through operation of the contract," which is insufficient to confer immunity on a contractor); United States v. Boyd, 378 U.S. 39, 44 (1964) ("The Constitution immunizes the United States and its property from taxation by the States, but it does not forbid a tax whose legal incidence is upon a contractor doing business with the United States, even though the economic burden of the tax, by contract or otherwise, is ultimately borne by the United States." (citation omitted) (citing James v. Dravo Contracting Co., 302 U.S. 134 (1937); Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466 (1939); and *King & Boozer*, 314 U.S. 1)). *But see* Boeing Co. v. Movassaghi, 768 F.3d 832, 839 (9th Cir. 2014) (finding the tax cases "inapposite as they discuss generally applicable state tax laws, which resulted in merely an increased economic burden on federal contractors . . . [and] did not regulate what the federal contractors had to do or how they did it pursuant to their contracts"). It is important to note that Congress's power to legislate around the first principles of government immunity is limited to Congress. It does not extend to federal agencies. *See Penn Dairies*, 318 U.S. at 276-78 (finding an Army regulation that specifically addressed state price-fixing law did not "immunize government contractors from local price-fixing regulations which would otherwise be applicable"). Nor does it extend to the language of the government contract. *See id.* at 277 (citing favorably the opinion of the Comptroller General that "since the constitutional applicability of local price regulations to government contractors was doubtful, the right of the government to challenge their validity should not be foreclosed by contractual provisions"). And it

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Courts further consider "whether the state law effectively controls the [federal] enterprise."[201] This is an ill-defined inquiry, but its importance is clear: States cannot effectively grant themselves veto power over federal decisions. It is helpful, therefore, to look at some examples to understand the lines drawn by the courts. The Supreme Court has held that states could not tax the capital of the Bank of the United States, but were permitted to tax the shares, for example, even when the tax was collected from the bank itself.[202] The former represented a tax on the capital of a federal installation; the latter represented a tax on the profits made by individuals interacting with the federal installation. In another context, the Court held that a Florida law regulating the sale and distribution of commercial fertilizer was unconstitutional as applied directly to the United States' distribution of commercial fertilizer in Florida as part of a national soil-conservation program.[203] On the other hand, the Court held that a North Dakota law regulating sale and transportation of alcohol in the state was constitutional as applied to liquor suppliers selling to federal military installations.[204] The Court explained:

> Whatever burdens are imposed on the Federal Government by a neutral state law regulating its suppliers "are but normal incidents of the organization within the same territory of two governments." A state regulation is invalid only if it regulates the United States directly or discriminates against the Federal

remains unaffected by the United States government's position on the matter in litigation. *See, e.g., King & Boozer*, 314 U.S. at 13-14 (rejecting the intervenor government's position that its contractor was entitled to derivative immunity). In fact, in the great majority of intergovernmental-immunity cases cited herein, the United States or its agencies have intervened, sought to intervene, or spoken on behalf of the contractor seeking an extension of immunity. *See, e.g., id.* at 7; *Penn Dairies*, 318 U.S. at 268; *Muskegon*, 355 U.S. at 485; United States v. Ga. Pub. Serv. Comm'n, 371 U.S. 285, 286 (1963). Involvement on one side of the case was not decisive. In fact, it was not relevant.

201. Lamb v. Martin Marietta Energy Sys., Inc., 835 F. Supp. 959, 964 (W.D. Ky. 1993) (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 436 (1819)).

202. *Compare McCulloch*, 17 U.S. (4 Wheat.) at 436-37 (holding that the states may not impose a tax on the operations of the Bank of the United States but may still tax the "real property of the bank, in common with the other real property within the State, [and] . . . the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the State"), *and* Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 867 (1824) (holding that the states may impose a tax on the "property of the contractor . . . as the property of other citizens," but that the states may not impose a tax on "the act of purchasing, or of conveying the articles purchased"), *with* Nat'l Bank v. Kentucky, 76 U.S. (9 Wall.) 353, 359-63 (1870) (holding that a state could tax the shares of the National Bank, even when the tax was collected from the bank itself).

203. Mayo v. United States, 319 U.S. 441, 442-43, 447 (1943) (distinguishing the case from previous cases because the required "inspection fees [were] laid *directly* upon the United States" (emphasis added)).

204. North Dakota v. United States, 495 U.S. 423, 426, 443-44 (1990) (plurality opinion).

> Government or those with whom it deals. In addition, the question whether a state regulation discriminates against the Federal Government cannot be viewed in isolation. Rather, the entire regulatory system should be analyzed to determine whether it is discriminatory "with regard to the economic burdens that result." Claims to any further degree of immunity must be resolved under principles of congressional pre-emption.[205]

Where it appears that the state can override a federal decision about how to implement a federal policy or program, courts have generally barred the application of state statutes to the federal government. For example, in *Leslie Miller*, the Court held that "[s]ubjecting a federal contractor to the Arkansas contractor license requirements would give the State's licensing board a virtual power of review over the federal determination of 'responsibility' and would thus frustrate the expressed federal policy of selecting the lowest responsible bidder."[206] These cases are distinct from those involving states' efforts to impose "safety or other requirements on a contractor who does business" with the federal government; in those cases, courts have upheld state regulation.[207]

II. The Case of Student-Loan Servicers

Part I set out the doctrines and analyses that constitute the sovereign shield as applied to nongovernmental actors. Understanding the doctrine is more than an academic exercise: It is necessary to see how government contractors are turning to preemption and immunity defenses—clouding, conflating, and exploiting them—to extend the sovereign shield. Our case study in this Part involves private companies servicing almost $1.6 trillion of government-owned student debt.[208] Federal contractors have become the primary point of

205. *Id.* at 435 (citations omitted) (first quoting Helvering v. Gerhardt, 304 U.S. 405, 422 (1938); and then quoting Washington v. United States, 460 U.S. 536, 544 (1983)).

206. Leslie Miller, Inc. v. Arkansas, 352 U.S. 187, 190 (1956) (per curiam); *see also* Pub. Utils. Comm'n v. United States, 355 U.S. 534, 544-45 (1958) (finding a conflict "between the federal policy of negotiated rates and the state policy of regulation of negotiated rates" such that the state regulation would affect the United States' ability to negotiate rates for its military shipments); Johnson v. Maryland, 254 U.S. 51, 55, 57 (1920) (holding that a postal-service employee was immune from prosecution under a state law regulating driver's licenses because the state law impinged on the federal government's "duty . . . to employ persons competent for their work").

207. *See, e.g.*, *Pub. Utils. Comm'n*, 355 U.S. at 543 (citing Balt. & A. R. Co. v. Lichtenberg, 4 A.2d 734 (Md. 1939)); James Stewart & Co. v. Sadrakula, 309 U.S. 94, 104-05 (1940); Penn Dairies, Inc. v. Milk Control Comm'n, 318 U.S. 261, 278-79 (1943).

208. *Federal Student Loan Portfolio*, FED. STUDENT AID, https://perma.cc/BH4W-FSU9 (archived Feb. 9, 2021) (to locate, click "Federal Student Aid Portfolio Summary" to download the Excel spreadsheet) (indicating that the total amount of outstanding federal student loans is nearly $1.6 trillion). This is big business. As of April 2020, the United States Department of Education reported a combined current contract amount of around $4.1 billion, at least $2.4 billion of which arose out of the Office of Federal

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contact for borrowers: Servicers handle billing, collection, repayment plans, loan consolidation, and other tasks.[209]

Student borrowers and state attorneys general have accused these private companies of violating state and federal law in performing their servicing contracts.[210] They have claimed, for example, that servicers do not provide accurate or adequate information to borrowers,[211] that they steer borrowers into costly forbearance options instead of more favorable repayment plans,[212] that they misapply payments,[213] that they charge amounts not owed,[214] and that they have failed to correctly administer congressionally created debt-forgiveness programs like the Public Service Loan Forgiveness Program[215] and

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Student Aid. *See* Off. of the Chief Fin. Officer, *Contracts Information*, U.S. DEP'T EDUC., https://perma.cc/V3HB-9AQV (archived Feb. 9, 2021) (to locate, click "Active Contracts" to download the Excel spreadsheet). Many of these contracts are multi-year contracts, spanning from one to ten years. *Id.*

209. *See Loan Servicing Contracts*, FED. STUDENT AID, https://perma.cc/D4EJ-7NWY (archived Feb. 10, 2021). As of the most recent filings, the Department of Education contracts with Conduent Education Services (formerly ACS Education Services), PHEAA (which does business with the federal government under the name FedLoan Servicing), Great Lakes Educational Loan Services, Nelnet Servicing, Navient (Sallie Mae), Aspire, COSTEP, EdFinancial/ESA, EDGEucation/CF, EdManage, Kentucky/KSA, MOHELA, NHHELC, OSLA, and VSAC to service its student-loan portfolio. *Id.* Conduent Education Services, however, is "in the process of winding down its business." *Consumer Financial Protection Bureau Settles with Conduent Education Services*, CONSUMER FIN. PROT. BUREAU (May 1, 2019), https://perma.cc/MLW9-J4MR. These are similar services to other "privatized" industries. *See* Metzger, *supra* note 6, at 1380-94 (recognizing the vast influence of private contractors over programs and participants in Medicare and Medicaid, welfare, public education, and federal prisons).

210. Between January 1, 2018, and November 6, 2020, more than 13,000 complaints have been filed with the Consumer Financial Protection Bureau (CFPB) alleging problems with student-loan servicing. *See Consumer Complaint Database*, CONSUMER FIN. PROT. BUREAU, https://perma.cc/G7R9-8ZZF (archived Feb. 9, 2021). Separately, the attorneys general of California, New York, Massachusetts, and Pennsylvania have all filed lawsuits against student-loan servicers over their managing of borrowers. *See People v. Navient* Complaint, *supra* note 22; Complaint, New York *ex rel.* James v. Pa. Higher Educ. Assistance Agency, No. 19-cv-09155, 2020 WL 2097640 (S.D.N.Y. May 1, 2020), 2019 WL 5095707, ECF No. 1 [hereinafter *James* Complaint]; Commonwealth v. Pa. Higher Educ. Assistance Agency, No. 1784CV02682-BLS2, 2018 WL 1137520 (Mass. Super. Ct. Mar. 1, 2018); Pennsylvania v. Navient Corp., 967 F.3d 273 (3d Cir. 2020).

211. *See People v. Navient* Complaint, *supra* note 22, ¶¶ 123-125.

212. Pennsylvania v. Navient Corp., 967 F.3d 273, 280-81 (3d Cir. 2020).

213. *Id.* at 282.

214. Commonwealth v. Pa. Higher Educ. Assistance Agency, No. 1784CV02682-BLS2, 2018 WL 1137520, at *1 (Mass. Super. Ct. Mar. 1, 2018).

215. New York *ex rel.* James v. Pa. Higher Educ. Assistance Agency, No. 19-cv-09155, 2020 WL 2097640, at *1-2 (S.D.N.Y. May 1, 2020); Reavis v. Pa. Higher Educ. Assistance Agency, 467 P.3d 588, 590-91 (Mont. 2020).

total and permanent disability discharge.[216] The New York Attorney General, for example, alleged that the mistakes and incompetence of the Pennsylvania Higher Education Assistance Agency (PHEAA) have driven the low number (a dismal 1%) of applicants who have been approved for relief pursuant to Public Service Loan Forgiveness and that the company has misrepresented information concerning benefits available to borrowers who have cancer, failing to afford them legally mandated relief during treatment.[217] These alleged acts stem in part from the incentives that servicers have to maximize profits, which, in the absence of contractual requirements to the contrary, give them no reason to care about borrowers' best interests.[218] All told, at least seven state attorneys general[219] and countless private plaintiffs have sued servicers for violations of state law, while the federal Consumer Financial Protection Bureau (CFPB),[220] at least four state attorneys general,[221] and

216. *See People v. Navient* Complaint, *supra* note 22, ¶¶ 93-99 (alleging that student-loan servicer Navient improperly and incorrectly reported loans that had been discharged under the Total and Permanent Disability Discharge program, harming the borrowers); *id.* ¶¶ 114-17 (alleging that the student-loan servicer made false statements to borrowers about the conditions and requirements of the Total and Permanent Disability Discharge program). *See generally* Clare Lombardo & Cory Turner, *Student Loan Borrowers with Disabilities Aren't Getting Help They Were Promised*, NPR (Dec. 4, 2019, 5:00 AM ET), https://perma.cc/2GTR-LZHM (citing systemic problems with the implementation of the total and permanent disability discharge program).

217. *See James* Complaint, *supra* note 210, ¶¶ 6-21, 75, 316-20.

218. In fact, in court filings, at least one servicer has asserted that its "relationship with borrowers is that of an arm's-length loan servicer, not a fiduciary counselor . . . and there is no expectation that the servicer will 'act in the interest[s] of the consumer.'" Memorandum of Law in Support of Defendants' Motion to Dismiss Plaintiff's Complaint Under Rule 12(b)(6) or, in the Alternative, for a More Definite Statement Under Rule 12(e) at 20-21, Consumer Fin. Prot. Bureau v. Navient Corp., No. 17-cv-00101, 2017 WL 3380530 (M.D. Pa. Aug. 4, 2017), 2017 WL 10543348, ECF No. 29 (quoting 12 U.S.C. § 5531(d)(2)(C)).

219. See *supra* note 210 (citing to complaints by the attorneys general of California, New York, Massachusetts, and Pennsylvania); Complaint, State v. Navient Corp., No. 17-2-01115-1, 2017 Wash. Super. LEXIS 14368 (Wash. Super. Ct. July 17, 2017); Complaint, People v. Navient Corp., No. 2017-CH-00761 (Ill. Cir. Ct. Jan. 18, 2017), 2017 WL 374522; Complaint, Grewal v. Navient Corp., No. EXS-C-172-2020 (N.J. Super. Ct. Oct. 20, 2020), 2020 WL 7873544.

220. *See, e.g.*, Complaint for Permanent Injunction & Other Relief, Consumer Fin. Prot. Bureau v. Navient Corp., No. 17-cv-00101, 2017 WL 3380530 (M.D. Pa. Aug. 4, 2017), 2017 WL 191446, ECF No. 1 (alleging that the student-loan servicer's practices violated several federal laws, including the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692p).

221. *See supra* note 210; *see also James* Complaint, *supra* note 210 (alleging that a student-loan servicer violated both state and federal laws).

several private consumers have sued servicers for violations of federal law.[222] At least eleven states and the District of Columbia have introduced legislation that seeks to regulate or implement oversight of student-loan servicers operating in their states.[223] And at least one congressional oversight committee has sought testimony when investigating servicer conduct.[224]

In response, student-loan servicers have sought to evade liability and oversight. Servicers use the principles underlying the sovereign shield to try to avoid liability under both state[225] and federal[226] law, and to resist legislative oversight at both the state[227] and federal[228] levels. Servicers argue that their relationship with the federal Department of Education constitutes a defense to their actions.[229] They have even gone so far as to argue that their "federal-ness"

222. *See, e.g.*, Humphrey v. Navient Sols., Inc., 473 F. Supp. 3d 889, 894 (W.D. Wisc. 2020) (upholding a jury verdict in a suit by a student-loan borrower who alleged violations of the federal Fair Credit Reporting Act by a student-loan servicer).

223. *See, e.g.*, Assemb. 2251, 2016 Leg. (Cal. 2016); H.R. 6915, 2015 Gen. Assemb., Jan. Sess. (Conn. 2015); S. 19-002, 72d Gen. Assemb. (Colo. 2019); D.C. Council 21-571 (2016); S. 1351, 100th Gen. Assemb. (Ill. 2017); S. 995, 129th Leg., 1st Reg. Sess. (Me. 2019); Assemb. 455, 218th Leg. (N.J. 2018); S. 1958, 242d Leg., Reg. Sess. (N.Y. 2019); H.R. 5936, 2019 Gen. Assemb., Jan. Sess. (R.I. 2019); S. 6029, 65th Leg., Reg. Sess. (Wash. 2018); S. 77, 2020 Leg. (Va. 2020); H.D. 594, 2019 Leg., Reg. Sess. (Md. 2019).

224. *An Examination of State Efforts to Oversee the $1.5 Trillion Student Loan Servicing Market: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Fin. Servs.*, 116th Cong. 1-2 (2019); *see also* Memorandum from the House Fin. Servs. Majority Staff to House Comm. on Fin. Servs. Members (June 11, 2019), https://perma.cc/XV4F-T9BV (describing concerns about servicer conduct that prompted congressional hearings).

225. *See, e.g.*, Memorandum in Support of Motion for Judgment on the Pleadings or, Alternatively, for Certification for Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b), Chae v. SLM Corp., No. 07-cv-02319, 2008 WL 11342464 (C.D. Cal. Nov. 26, 2007), ECF No. 42.

226. *See, e.g.*, *James*, 2020 WL 2097640, at *18 (describing the servicer's argument that the New York Attorney General could not enforce a federal law providing for payment of damages by the defendant).

227. For example, servicers filed a lawsuit challenging the licensing regime established by the legislature of the District of Columbia based on, among other arguments, federal preemption and intergovernmental immunity. *See* Student Loan Servicing All. v. District of Columbia, 351 F. Supp. 3d 26, 41-42 (D.D.C. 2018). Servicers also opposed state legislative efforts. *See, e.g.*, *Hearing on S. 129 Before the J. Comm. on Consumer Prot. & Prod. Licensure*, 119th Gen. Court (Mass. 2017) (statement of Winfield Crigler, Executive Director, Student Loan Servicing Alliance), https://perma.cc/QD5D-RS8Y (opposing state legislation governing servicers); *see also infra* notes 233-37.

228. *See, e.g.*, Michael Stratford, *Company Managing Public Service Loan Forgiveness Refuses to Testify Before House Panel*, POLITICO (Sept. 17, 2019, 3:49 PM EDT), https://perma.cc/9URA-5CKB.

229. Pa. Higher Educ. Assistance Agency v. Perez, 457 F. Supp. 3d 112, 122 (D. Conn. 2020) (describing the servicer's argument that the presumption against preemption did not apply "where . . . a state purports to regulate federal contracts and contractors" (quoting

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under the Higher Education Act should block state law claims against them.[230] Their arguments thus seamlessly and confusingly interweave preemption, derivative-sovereign-immunity, and intergovernmental-immunity doctrines, fashioning from the muddle an argument for application of a far-reaching sovereign shield. And they have fashioned this argument with the explicit support of their contracting partner, the Department of Education.[231] In several circumstances, servicers have successfully avoided judicial and regulatory scrutiny, closing off avenues of redress for potentially meritorious claims and preventing legislative review of servicer conduct.[232]

For example, when the trade group Student Loan Servicing Alliance (SLSA) sued the District of Columbia to stop the District from implementing legislation to oversee and license student-loan servicers operating in its jurisdiction, SLSA sought relief by mounting a preemption challenge to the local legislation.[233] Only later, once the United States filed a statement of interest raising an intergovernmental-immunity defense, did SLSA assert that such a defense was also included in its complaint.[234] As support, SLSA pointed to the portion of its complaint that asked for relief under the Supremacy Clause, arguing that it covered both preemption and intergovernmental immunity.[235] Even though the court claimed that it was not persuaded by this argument, it nevertheless decided "in its discretion" to consider the intergovernmental-immunity challenge.[236] Although the case was ultimately

Plaintiff's Opposition to State Defendants' Motion for Summary Judgment at 13, *Perez*, 457 F. Supp. 3d 112 (No. 18-cv-01114), ECF No. 68)).

230. *See* Brief of Appellee at 11, 15, 30, Lawson-Ross v. Great Lakes Higher Educ. Corp., 955 F.3d 908 (11th Cir. 2020) (No. 18-14490), 2019 WL 268379.

231. The Department of Education, for example, produced a memorandum arguing that states' efforts to regulate servicers' conduct were preempted by federal law. *See* 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, 10,620 (Mar. 12, 2018).

232. *See, e.g.*, Chae v. SLM Corp., 593 F.3d 936, 944-50 (9th Cir. 2010) (holding that claims alleging misrepresentation under California state law were preempted by the Higher Education Act); *Student Loan Servicing All.*, 351 F. Supp. 3d at 75-76 (enjoining the District of Columbia from enforcing consumer-protection laws against student-loan servicers as related to the Federal Direct Loan Program and government-owned Federal Family Education Loan Program loans); *see also infra* notes 318-20 and accompanying text (describing PHEAA's ability to skirt congressional oversight by pointing to its contractual relationship with the Department of Education).

233. *Student Loan Servicing All.*, 351 F. Supp. 3d at 36.

234. *Id.* at 72.

235. *Id.* at 72-73.

236. *Id.* at 73.

withdrawn,[237] the district court's opinion essentially invalidated the District's attempts to regulate the servicers.[238]

This Part offers a brief introduction to the student-loan legislative and regulatory scheme. It then analyzes the varied attempts by the private loan-servicer companies contracting with the Department of Education to evade liability and oversight by claiming that their relationship with the federal government entitles them to the protections of the sovereign shield.

A. A Brief Introduction to Student-Loan Servicing

In 1965, with the passage of the Higher Education Act, Congress incentivized higher education by creating a financial structure—consisting of loans, grants, and work-study—to allow more people to finance their studies.[239] At first, commercial lenders like banks originated, held, and serviced student loans, which received government guarantees.[240] In 1972, Congress created a new enterprise, the Student Loan Marketing Association, better known as Sallie Mae, to supplement banks.[241] Congress set the terms of federal student loans, which the federal government subsidized and ultimately guaranteed,[242] and also set the rate of return received by the lenders that made them.[243] These guaranteed loans, whether made by Sallie Mae or a bank or

237. *See* Student Loan Servicing All. v. Taylor, No. 19-7001, 2019 WL 2158372 (D.C. Cir. May 15, 2019).

238. Dena Aubin, *Court Invalidates Part of D.C. Student Loan Servicer Law*, REUTERS (Nov. 26, 2018, 2:53 PM), https://perma.cc/3ZNS-4DGW.

239. Higher Education Act of 1965, Pub. L. No. 89-329, §§ 401, 421, 441, 79 Stat. 1219, 1232, 1236, 1249-50 (codified as amended at 20 U.S.C. §§ 1070a, 1071, 1087-51) (creating a federal infrastructure for student lending).

240. *See id.* § 421, 79 Stat. at 1232.

241. SLM Corp., Annual Report (Form 10-K), item 1, at 2 (Feb. 26, 2015). Sallie Mae subsequently converted into a private corporation, which then split into two publicly traded entities, one servicing loans and one originating them. *Id.*

242. 20 U.S.C. §§ 1077a, 1078.

243. In the Higher Education Act of 1965, Congress delegated to the secretary of the then-Department of Health, Education, and Welfare the authority to set interest rates on education loans, subject to limits included in the statute. Higher Education Act of 1965, Pub. L. No. 89-329, § 427(a)(2)(D), (b), 79 Stat. 1219, 1238-40 (codified as amended at 20 U.S.C. § 1077(a)(2)(D), (b)). In subsequent legislation, Congress set interest rates directly. *See, e.g.*, Act of Feb. 8, 2002, Pub. L. No. 107-139, §1(a)(1), 116 Stat. 8, 8 (codified as amended at 20 U.S.C. § 1077a) (fixing interest rates for specific categories of federal student loans). More recently, Congress effectively set student-loan interest rates to zero in response to the COVID-19 pandemic. Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 3513, 134 Stat. 281, 404 (2020) (codified at 20 U.S.C. § 1001 note (COVID-19 Pandemic Education Relief)) (temporarily suspending accrual of interest on federal student loans).

other commercial lender, were called Federal Family Education Loan Program (FFELP) loans.[244]

This structure endured until the 2008 financial crisis, which interrupted some commercial lenders' access to capital to extend new student loans.[245] In 2008, Congress passed the Ensuring Continued Access to Student Loans Act (ECASLA), which authorized the Department of Education to acquire loans from commercial lenders so that they could use the proceeds to make new loans to student borrowers.[246] In 2010, Congress enacted the Student Aid and Fiscal Responsibility Act (SAFRA), a rider to the Health Care and Education Reconciliation Act.[247] SAFRA ended the guaranteed-loan program,[248] and student borrowers consequently had to turn to what (until then) had been a much smaller direct lending program: the William D. Ford Federal Direct Loan Program.[249] Through direct lending, the Department of Education itself originates and owns all new federal loans.[250] Although the government no longer offers FFELP loans, more than 11 million Americans still owe $246 billion combined of guaranteed-loan debt.[251] And more than 35 million Americans owe roughly $1.3 trillion combined in direct-loan debt.[252]

Despite ending the guaranteed-loan program, the 2010 statutory change did not excise private companies from the student-lending scheme. Rather, Congress specifically authorized the Department of Education to contract with private companies to keep track of borrowers' obligations and to handle

244. 34 C.F.R. § 682.100(a) (2019).

245. GEORGE MILLER, ENSURING CONTINUED ACCESS TO STUDENT LOANS ACT OF 2008, H.R. REP. NO. 110-583, at 3 (2008) (explaining how "turmoil in the U.S. credit markets has made it difficult for some lenders in the federally guaranteed student-loan program to secure the capital needed to finance college loans, leading some lenders to scale back their lending activity").

246. Ensuring Continued Access to Student Loans Act of 2008, Pub. L. No. 110-227, § 7(b), 122 Stat. 740, 746-47 (codified as amended at 20 U.S.C. § 1087i-1).

247. Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, §§ 2201-2213, 124 Stat. 1029, 1071-81 (codified as amended in scattered sections of 20 U.S.C.).

248. *See id.* §§ 2201-2208.

249. Although SAFRA ended funding for the guaranteed-loan program, it did not touch the direct-loan program, through which the Department of Education extended loans directly to students. *See* 34 C.F.R. § 685.10 ("Under the William D. Ford Federal Direct Loan (Direct Loan) Program (formerly known as the Federal Direct Student Loan Program), the Secretary makes loans to enable a student or parent to pay the costs of the student's attendance at a postsecondary school.").

250. *See id.*

251. *Federal Student Loan Portfolio*, *supra* note 208 (summarizing data collected in the National Student Loan Data System as of Q4 2020).

252. *Id.*

billing, collection, repayment plans, loan consolidation, and other tasks.[253] Since the passage of ECASLA and SAFRA, the Department of Education has relied on contractors to manage an increasing volume of student-loan originations and servicing.[254] The Department, touting the promise and benefit of private-sector efficiency, energy, and expertise,[255] turned to private companies to "deliver the best-in-business service" to their customers.[256] To manage the increased lending under the Direct Loan Program, the Department of Education hired private companies using indefinite-delivery, indefinite-quantity, performance-based contracts.[257] As a result, the nearly 36 million

253. The Higher Education Act delegates to the Secretary of Education the authority to contract directly with private companies to service the Department of Education's student loans. *See* 20 U.S.C. § 1087f.

254. *See Federal Student Aid: Performance-Based Organization Review: Joint Hearing Before the H. Subcomm. on Gov't Operations of the Comm. on Oversight & Gov't Reform & the Subcomm. on Higher Educ. on Workforce Training of the Comm. on Educ. & the Workforce*, 114th Cong. 11 (2015) (statement of James W. Runcie, Chief Operating Officer, Office of Federal Student Aid, Department of Education) (discussing increasing volume of loan originations and servicing); ERNST & YOUNG LLP, TIVAS SERVICING CAPACITY ASSESSMENT 3, 5-7, 17 (2011), https://perma.cc/G3R2-F2JX (noting that the Department of Education's Office of Federal Student Aid and a preexisting servicer were responsible for servicing loans once the FFEL program was shut down, and warning of the challenge of managing increasing numbers of borrowers); *see also* Press Release, U.S. Dep't of Educ., Secretary DeVos Announces Intent to Enhance FSA's Next Generation Processing and Servicing Environment: Creating the Foundation of Tomorrow's Student Loan Program (Aug. 1, 2017), https://perma.cc/X7R5-LANF (quoting Dr. A. Wayne Johnson, the Department of Education's Chief Operating Officer of Federal Student Aid, as saying that the federal student-loan program is "the equivalent of being the largest special purpose consumer bank in the world"). Federal law permits the Department of Education to enter into contracts for "the servicing and collection of [direct loans]." 20 U.S.C. § 1087f(b)(2).

255. *See* Steven J. Kelman, *Achieving Contracting Goals and Recognizing Public Law Concerns: A Contracting Management Perspective*, *in* GOVERNMENT BY CONTRACT, *supra* note 1, at 153, 154-55 (arguing that contracting "has substantive goals and aims" and pointing to modern transaction-cost economics, which recognizes that contracting "brings the well-known advantages of the marketplace," as a rationale for utilizing government contractors); *see also* Press Release, U.S. Dep't of Educ., U.S. Department of Education Expands Its Student Loan Servicing Capacity: Stabilizing Student Loan Market, Protecting Borrowers and Safeguarding (June 17, 2009), https://perma.cc/SQC5-X26B (asserting that the hiring of outside servicers would ensure that "students have access to federal student loans and that, in partnership with the private sector, schools and borrowers receive excellent service" (quoting then-Secretary of Education Arne Duncan)).

256. *Federal Student Aid Contracts*, FED. STUDENT AID, https://perma.cc/2MDH-LH4F (archived Feb 9, 2021).

257. OFF. OF INSPECTOR GEN., U.S. DEP'T OF EDUC., ED-OIG/A02L0006, FEDERAL STUDENT AID'S AWARD AND ADMINISTRATION OF THE TITLE IV ADDITIONAL SERVICERS CONTRACTS: FINAL AUDIT REPORT 3 & n.1 (2013), https://perma.cc/RK7T-RR2F. The turn to private contractors was due to the "sudden increase in current and potential loan volume that the Department will be responsible for servicing" due to legislation

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recipients of federal student loans[258] interact primarily with private companies that service their loans and collect on their debts.[259] As of this writing, four companies—PHEAA, Great Lakes, Navient, and Nelnet—service 83% of the government's education-debt portfolio.[260]

B. Servicers and the Sovereign Shield

Student-loan servicers face allegations of unfair and deceptive practices, fraud, and other consumer-protection violations, and they are battling lawsuits

governing student loans. *See* U.S. Dep't. of Educ. & Great Lakes Educ. Loan Servs., Contract for Commercial Items 19 (2009), https://perma.cc/WCY7-T2VG. Indefinite-delivery, indefinite-quantity contracts "provide for an indefinite quantity of services for a fixed time" and are "used when [the government] can't determine . . . the precise quantities of supplies or services that the government will require during the contract period." *Indefinite Delivery, Indefinite Quantity Contracts*, U.S. GEN. SERVS. ADMIN., https://perma.cc/8JD3-TF6Y (last updated Nov. 9, 2020). These contracts are "playing an increasingly dominant role in federal procurement." Steven L. Schooner, *Indefinite-Delivery/Indefinite-Quantity Contracts: Time to Correlate Practice and Policy?*, 32 NASH & CIBINIC REP. ¶ 44 (2018).

258. *See Portfolio Summary*, FED. STUDENT AID, https://perma.cc/L7CT-PTMH (archived Apr. 11, 2021).

259. *See Loan Servicing Contracts*, *supra* note 209. There are four primary servicers (Great Lakes Educational Loan Services, Nelnet Servicing, PHEAA, and Navient) and, as of this writing, ten smaller, nonprofit servicers (Aspire, COSTEP, Edfinancial/ESA, EDGEucation/CF, EdManage, Kentucky/KSA, MOHELA, NHHELC, OSLA, and VSAC). *See id.* In addition, the Department of Education's Office of Federal Student Aid has signed contracts with five companies—Edfinancial Services LLC, F.H. Cann & Associates LLC, MAXIMUS Federal Services Inc., MOHELA, and Texas Guaranteed Student Loan Corporation (Trellis Company)—to "support customers through direct engagement via contact centers and provide back-office processing support for students, parents, borrowers and partners at more than 5,800 postsecondary institutions." Press Release, U.S. Dep't of Educ., U.S. Department of Education's Office of Federal Student Aid Announces New Contracts with Five Companies to Improve Customer Service, Increase Accountability (June 24, 2020), https://perma.cc/RNY9-ZAUQ. It is not clear whether these functions constitute "servicing."

260. OFF. OF INSPECTOR GEN., U.S. DEP'T OF EDUC., ED-OIG/A05Q0008, FEDERAL STUDENT AID: ADDITIONAL ACTIONS NEEDED TO MITIGATE THE RISK OF SERVICER NONCOMPLIANCE WITH REQUIREMENTS FOR SERVICING FEDERALLY HELD STUDENT LOANS 6 (2019), https://perma.cc/2E68-YKSY. These contracts are lucrative. Just in federal servicing, for example, PHEAA currently holds more than $57 million in contracts. Off. of the Chief Fin. Officer, *supra* note 208. Navient holds more than $39 million in contracts with the Department of Education. *Id.* Nelnet, which operates Nelnet Servicing, LLC, acquired Great Lakes Educational Loan Services, Inc. in February 2018. Press Release, Nelnet, Nelnet Completes Acquisition of Great Lakes Educational Loan Services, Inc. (Feb. 7, 2018), https://perma.cc/A5K6-MKMK. As of December 31, 2019, Nelnet Servicing (having absorbed Great Lakes) serviced $423.8 billion of student loans for more than 13 million student borrowers under its federal contracts. Nelnet, Inc., Annual Report (Form 10-K), item 1, at 4-5 (Feb. 27, 2020), https://perma.cc/32H7-C7UC.

filed by state attorneys general and private plaintiffs.[261] This is an issue working its way through the courts right now. We have identified sixteen court cases involving student-loan servicers currently pending or recently closed in state or federal court.[262] Servicers have attempted to deploy the sovereign shield in all but one of these cases.[263]

261. *See supra* notes 210-22 and accompanying text; *see also* Danielle Douglas-Gabriel, *Court Rules Student Loan Companies Are Subject to State Consumer Laws, Contrary to Trump Administration's Stance*, WASH. POST (June 28, 2019, 12:25 PM PDT), https://perma.cc/QA3D-K2V4.

262. Complaint, Student Loan Servicing All. v. District of Columbia, 351 F. Supp. 3d 26 (D.D.C. 2018) (No. 18-cv-00640), ECF No. 1; Complaint, Pele v. Pa. Higher Educ. Assistance Agency, 53 F. Supp. 3d 857 (E.D. Va. 2014) (No. 13-cv-01531), ECF No. 1; Class Action Complaint, Lawson-Ross v. Great Lakes Higher Educ. Corp., No. 17-cv-00253, 2018 WL 5621872 (N.D. Fla. Sept. 20, 2018), ECF No. 1; Class Action Complaint, Hyland v. Navient Corp., No. 18-cv-09031, 2019 WL 2918238 (S.D.N.Y. July 8, 2019), 2018 U.S. Dist. Ct. Pleadings LEXIS 15609, ECF No. 1; Class Action Complaint, Chery v. Conduent Educ. Servs. LLC, No. 18-cv-00075, 2019 WL 1427140 (N.D.N.Y. Mar. 29, 2019), 2018 U.S. Dist. Ct. Pleadings LEXIS 7580, ECF No. 1; Complaint for Violations of False Claims Act 31 U.S.C. §§ 3729 *et seq.*, United States *ex rel.* Oberg v. Nelnet, Inc., No. 07-cv-00960, 2009 WL 10676201 (E.D. Va. Dec. 1, 2009), ECF No. 1; Complaint for Permanent Injunction & Other Relief, Consumer Fin. Prot. Bureau v. Navient Corp., *supra* note 220; Class Action Amended Complaint, Chae v. SLM Corp., No. 07-cv-02319, 2007 WL 9706711 (C.D. Cal. Sept. 14, 2007), ECF No. 3; *People v. Navient* Complaint, *supra* note 22; Class Action Complaint, Nelson v. Great Lakes Educ. Loan Servs., Inc., No. 17-cv-00183, 2017 WL 6501919 (S.D. Ill. Dec. 19, 2017), ECF No. 1; Complaint, *supra* note 219; Complaint, *supra* note 210; Complaint for Permanent Injunction & Other Relief, Pennsylvania v. Navient Corp., 354 F. Supp. 3d 529 (M.D. Pa. 2018) (No. 17-cv-01814), ECF No. 1; Class Action Complaint, Travis v. Navient Corp., 460 F. Supp. 3d 269 (E.D.N.Y. 2020) (No. 17-cv-04885), 2017 U.S. Dist. Ct. Pleadings LEXIS 35518, ECF No. 1; Class Action Complaint, Daniel v. Navient Sols., LLC, 328 F. Supp. 3d 1319 (M.D. Fla. 2018) (No. 17-cv-02503), ECF No. 1; Verified Complaint, Genna v. Sallie Mae, Inc., No. 11-cv-07371, 2012 WL 1339482 (S.D.N.Y. Apr. 17, 2012), ECF No. 1.

263. Plaintiff's Reply in Support of Its Cross-Motion for Summary Judgment at 1, *Student Loan Servicing All.*, 351 F. Supp. 3d 26 (No. 18-cv-00640), ECF No. 33 (asserting a preemption defense); *Student Loan Servicing All.*, 351 F. Supp. 3d at 46 (discussing SLSA's challenges to "the D.C. law . . . all based on the Supremacy Clause of the Constitution," including intergovernmental immunity); Pennsylvania Higher Education Assistance Agency's Memorandum of Law in Support of Motion to Dismiss Complaint Based on Eleventh Amendment at 1-5, *Pele*, 53 F. Supp. 3d 857 (No. 13-cv-01531), ECF No. 5 (asserting derivative state sovereign immunity); Defendant Great Lakes Higher Education Corporation's Motion to Dismiss & Incorporated Memorandum of Law at 5-10, *Lawson-Ross*, 2018 WL 5621872 (No. 17-cv-00253), ECF No. 26 (asserting a preemption defense); Memorandum of Law in Support of Defendants' Motion to Dismiss Plaintiffs' Class Action Complaint at 1-2, 7-12, *Hyland*, 2019 WL 2918238 (No. 18-cv-09031), ECF No. 23 (asserting a preemption defense); Defendants' Memorandum of Law in Support of Their Motion to Dismiss Plaintiff's Amended Complaint at 2, 12-15, *Chery*, 2019 WL 1427140 (No. 18-cv-00075), ECF No. 20-1 (asserting a preemption defense); Memorandum of Law in Support of Motion to Dismiss of Defendant Pennsylvania Higher Education Assistance Agency at 4-13, *Oberg*, 2009 WL 10676201 (No. 07-cv-00960), 2009 WL 5081033, ECF No. 98 (asserting a state-sovereign-immunity defense); Memorandum in Support of Defendants' Motion for

footnote continued on next page

The servicers have attempted to conflate and exploit preemption, derivative-sovereign-immunity, and intergovernmental-immunity defenses to expand the sovereign shield to cover their conduct.[264] Fighting to avoid potential liability under state and federal law, to undermine state regulation, and to forestall federal oversight, the servicers have argued that they act on behalf of the federal government—because of their contractual relationships with the Department of Education—as a defense.[265] In most of these cases, in a role reversal of the traditional principal–agent relationship, the servicers have been explicitly encouraged or supported by the Department of Education.[266] Outside the context of government contracting, an entity potentially designated a principal has a powerful incentive to deny the existence of an agency relationship, because otherwise that principal faces vicarious liability

Summary Judgment at 2, 22-24, *Chae*, 2007 WL 9706711 (No. 07-cv-02319), 2008 WL 2844792, ECF No. 154 (asserting a preemption defense); Verified Answer of Defendants Navient Corporation; Navient Solutions, LLC; Pioneer Credit Recovery, Inc. & General Revenue Corporation to Revised First Amended Complaint at 20-22, People v. Navient Corp., No. CGC-18-567732 (Cal. Super. Ct. Jan. 18, 2019) (asserting a preemption defense); Memorandum in Support of Defendant's Motions to Strike & to Dismiss Plaintiff's First Amended Class Action Complaint at 1-2, 13-17, *Nelson*, 2017 WL 6501919 (No. 17-cv-00183), 2017 U.S. Dist. Ct. Motions LEXIS 99978, at *11-12, 33-41, ECF No. 29 (asserting a preemption defense); Defendants' Motion to Dismiss the Complaint at 1-2, 9-13, State v. Navient Corp., No. 17-2-01115-1, 2017 Wash. Super. LEXIS 14368 (Wash. Super. Ct. July 17, 2017) (asserting a preemption defense); Commonwealth v. Pa. Higher Educ. Assistance Agency, No. 1784CV02682-BLS2, 2018 WL 1137520, at *1-2, *4-5, *8 (Mass. Super. Ct. Mar. 1, 2018) (rejecting PHEAA's state sovereign-immunity defense); Navient Defendants' Memorandum of Law in Support of Their Motion to Dismiss at 2, 5, 15-22, Pennsylvania v. Navient Corp., 354 F. Supp. 3d 529 (M.D. Pa. 2018) (No. 17-cv-01814), 2017 WL 8683601, ECF No. 24 (asserting a preemption defense); Defendants' Combined Memorandum in Support of Motion to Dismiss & Motion to Strike Class Allegations at 1, 8-11, *Travis*, 460 F. Supp. 3d 269 (No. 17-cv-04885), 2017 WL 7051496, ECF No. 43-1 (asserting a preemption defense); Defendant's Motion to Strike Class Allegations & to Dismiss & Incorporated Memorandum of Law at 14-17, *Daniel*, 328 F. Supp. 3d 1319 (No. 17-cv-02503), 2018 WL 11232857, ECF No. 28 (asserting a preemption defense); Memorandum of Points & Authorities in Support of Defendant's Motion to Dismiss at 12-16, *Genna*, 2012 WL 1339482 (No. 11-cv-07371), ECF No. 4 (asserting a preemption defense).

264. *See, e.g.*, Memorandum of Law in Support of Defendant's Motion to Dismiss Complaint at 1-3, New York *ex rel.* James v. Pa. Higher Educ. Assistance Agency, No. 19-cv-09155, 2020 WL 2097640 (S.D.N.Y. May 1, 2020), ECF No. 41 [hereinafter *James* Defendant's Memorandum of Law] (arguing that a lawsuit by New York's attorney general should be dismissed because: (1) PHEAA, by virtue of its relationship with the federal Department of Education, enjoyed derivative sovereign immunity and intergovernmental immunity; (2) the Higher Education Act expressly preempted state legislation; and (3) state legislation conflicted with the Higher Education Act).

265. *See, e.g.*, Brief of Appellee, *supra* note 230, at 11, 35 (asserting that the defendant was protected by the "federal-ness" of its mission to service federal student loans).

266. *See* sources cited *infra* note 271.

for an alleged agent's tortious conduct.[267] But it costs the *government* principal, protected by the sovereign shield, nothing to advocate for extension of its sovereign perquisites to a contractor. In fact, as described in this Subpart, it subtly serves to increase federal power. The Department of Education's conduct is less surprising when considered through the lens of this inverted agency analysis.[268]

In this Subpart, we first consider the ways in which servicers—individually and as a group—exploit sovereign-shield defenses to avoid liability under *state law*. Servicers have relied primarily, but not exclusively, on a preemption defense to argue that they cannot be liable for violations of state tort and consumer-protection laws. In each case, the servicers have argued that state law is preempted by the federal Higher Education Act.[269] They assert that, because federal contractors must comply with federal laws governing their conduct, they should enjoy protection from potentially applicable state laws.[270]

The Department of Education has expressly and repeatedly supported its contractors' sovereign-shield claims, seeking to expand the scope of doctrinal protection to benefit student-loan servicers. The Department's multiple federal statements of interest supporting preemption findings[271] indicate the close

267. The risk of vicarious liability is real. *See* Gary T. Schwartz, *The Hidden and Fundamental Issue of Employer Vicarious Liability*, 69 S. CAL. L. REV. 1739, 1752 (1996) ("[I]n huge numbers of decided cases non-negligent defendants are held liable only because they are the employers of the faulty employees.").

268. *See supra* notes 191-92 and accompanying text.

269. *See, e.g.*, Nelson v. Great Lakes Educ. Loan Servs., Inc., 928 F.3d 639, 650-52 (7th Cir. 2019); Hyland v. Navient Corp., No. 18-cv-09031, 2019 WL 2918238, at *5-8 (S.D.N.Y. July 8, 2019); Pennsylvania v. Navient Corp., 354 F. Supp. 3d 529, 547-52 (M.D. Pa. 2018), *aff'd*, 967 F.3d 273 (3d Cir. 2020); Daniel v. Navient Sols., LLC, 328 F. Supp. 3d 1319, 1323-24 (M.D. Fla. 2018); Genna v. Sallie Mae, Inc., No. 11-cv-07371, 2012 WL 1339482, at *7-9 (S.D.N.Y. Apr. 17, 2012).

270. *See, e.g.*, Pa. Higher Educ. Assistance Agency v. Perez, 457 F. Supp. 3d 112, 123-25 (D. Conn. 2020) (citing Leslie Miller, Inc. v. Arkansas, 352 U.S. 187 (1956)) (holding that a state's licensing regime impermissibly infringed upon the federal regulatory and legislative scheme to choose federal contractors).

271. For example, the federal government filed statements in *Student Loan Servicing Alliance v. District of Columbia*, 351 F. Supp. 3d 26, 36 (D.D.C. 2018), *Commonwealth v. Pennsylvania Higher Education Assistance Agency*, No. 1784CV02682-BLS2, 2018 WL 1137520, at *9 (Mass. Super. Ct. Mar. 1, 2018), and *Pennsylvania Higher Education Assistance Agency v. Perez*, 416 F. Supp. 3d 75, 93 (D. Conn. 2019). Although a slightly different context, the federal Department of Veterans Affairs, upset with the way that the State of California has been investigating for-profit colleges, has threatened to strip the state of its contract to regulate GI Bill benefits. *See* Adam Ashton, *Veterans Affairs Moves to Strip California's Power in Fight over For-Profit Schools*, SACRAMENTO BEE (updated Sept. 23, 2019, 5:35 AM), https://perma.cc/P2MW-QB4S. In both cases, the federal government is stepping in to support its corporate education "partners."

relationship between the agency and its contractors. Servicers have asserted preemption defenses in part by pointing to interpretive guidance issued by the Department of Education, which has asserted that contractor servicers should not be subject to state consumer-protection law.[272] This guidance came about because the servicers' trade group lobbied the Department of Education to intervene and declare that the Higher Education Act preempts state law and regulation.[273] In response, the Department "clarif[ied] its view that State regulation of the servicing of Direct Loans impedes uniquely Federal interests, and that State regulation of the servicing of the FFEL Program is preempted to the extent that it undermines uniform administration of the program."[274] The Department, in court filings, has urged a broad reading of its guidance to bar state actions against contractor servicers "whether they are enacted legislatively or implied judicially in the context of a tort suit."[275] This was not

272. *See, e.g.*, Brief of Appellee, *supra* note 230, at 20-24 (citing numerous Department of Education filings and interpretive statements supporting servicers' sovereign-shield defenses); *see also* 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. 12, 2018). The servicers did not tell courts that they themselves specifically asked the Department to issue this guidance, a disclosure they might have rightly feared would result in less deference to the Department's views. *See infra* note 273 and accompanying text.

273. Michael Stratford, *How the Student Loan Industry Lobbied DeVos to Fight State Regulations*, POLITICO (Aug. 15, 2019, 5:01 PM EDT), https://perma.cc/3KYM-VHB5.

274. Federal Preemption and State Regulation of the Department of Education's Federal Student Loan Programs and Federal Student Loan Servicers, 83 Fed. Reg. at 10,620. The Department in its notice drew on *Boyle* for the principle that an area "'involving uniquely Federal interests' . . . must be 'governed exclusively by Federal law.'" *Id.* at 10,619 (quoting Boyle v. United Techs. Corp., 487 U.S. 500, 504 (1988)). For a fulsome review of *Boyle* and its requirements, see notes 91-103 and the accompanying text above. It is also worth noting that courts assessing the Department's guidance have afforded it only *Skidmore* deference, concluding that the guidance was unpersuasive based on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); *see, e.g.*, Lawson-Ross v. Great Lakes Higher Educ. Corp., 955 F.3d 908, 921 n.13 (11th Cir. 2020) (applying *Skidmore* deference and finding the Department's notice unpersuasive); *see also Student Loan Servicing All.*, 351 F. Supp. 3d at 49-50 (concluding that although *Skidmore* deference provided the proper test for assessing the Department's notice, "no deference is owed to an 'agency's conclusion that state law is preempted'" (emphasis omitted) (quoting Wyeth v. Levine, 555 U.S. 555, 576 (2009))).

275. Defendants-Appellants' Opening Brief at 16, Navient Corp. v. Pennsylvania, 967 F.3d 273 (3d Cir. 2020) (No. 19-2116), 2019 WL 3338049 (quoting Brief of Plaintiff-Intervenor-Appellee at 11, Chae v. SLM Corp., 593 F.3d 936 (9th Cir. 2010) (No. 08-56154), 2009 WL 2444650).

the view of the Obama Administration, which explicitly argued that the Higher Education Act did *not* preempt state law.[276]

Courts have had mixed reactions to servicers' preemption defenses to state law liability. For example, in *Chae v. SLM Corp.*, a Ninth Circuit panel concluded that one provision of the Higher Education Act preempted state consumer-protection law.[277] In *Chae*, the court relied primarily on congressional intent (factor one) to determine that the plaintiffs' claims were preempted by federal law.[278] The court rejected the plaintiffs' assertion that the contractor defendant engaged in "unfair and fraudulent business practices" in violation of California law, because the state's law did not prohibit the company's practices but instead addressed potential misrepresentations and disclosures, and a provision of the Higher Education Act preempted any state disclosure requirements.[279] The Seventh Circuit, the Eleventh Circuit, and the Third Circuit subsequently distinguished the facts of *Chae* to permit claimants to proceed in *Nelson v. Great Lakes Educational Loan Services, Inc.*,[280] *Lawson-Ross v. Great Lakes Higher Education Corp.*,[281] and *Pennsylvania v. Navient Corp.*,[282] respectively. The courts distinguished affirmative misrepresentations from state disclosure requirements, reading *Chae* as requiring preemption only of the latter.[283] In those cases, the circuit courts also looked primarily to congressional intent to evaluate the preemption claims.[284] In *Nelson*, the

276. *See, e.g.*, Sanchez v. ASA Coll., Inc., No. 14-cv-05006, 2015 WL 3540836, at *4 n.2 (S.D.N.Y. June 5, 2015). Indeed, a court in a different case later cited the change of position itself as a factor in assessing whether to show any deference to the Department of Education's interpretation. *Student Loan Servicing All.*, 351 F. Supp. 3d at 50 (holding that the Department's "Preemption Notice fails the *Skidmore* test most notably because the agency's view represents a stark, unexplained change in . . . position").

277. 593 F.3d at 942 (holding that 20 U.S.C. § 1098g, which states that "[l]oans made, insured, or guaranteed pursuant to a program authorized by Title IV of the Higher Education Act . . . shall not be subject to any disclosure requirements of any State law," preempted California consumer-protection law asserted by the plaintiffs as the basis of several of their claims (alteration in original) (quoting § 1098g)).

278. *Id.* at 942-45; *see also supra* Part I.B.1.

279. *Chae*, 593 F.3d at 942-43.

280. 928 F.3d 639, 642 (7th Cir. 2019) (holding that a borrower's claims were not preempted "to the extent she is alleging that Great Lakes made false or misleading affirmative representations to her in the counseling process").

281. 955 F.3d 908, 916-23 (11th Cir. 2020) (employing express, conflict, and field preemption analyses to conclude that the borrowers' claims were not preempted).

282. 967 F.3d 273, 277 (3d Cir. 2020) (holding that the Higher Education Act does not preempt "claims based on affirmative misrepresentations").

283. *See, e.g.*, *Nelson*, 928 F.3d at 649-50.

284. *See id.* at 648; *Lawson-Ross*, 955 F.3d at 916; Pennsylvania v. Navient Corp., 967 F.3d 273, 284-86 (3d Cir. 2020).

Seventh Circuit distinguished statements that the defendant made "voluntarily" from the "disclosure requirements" specifically preempted by federal law.[285] This exemplifies the analysis of a contractor's discretion (factors three and four): The court concluded that the plaintiffs' claims resting on conduct that was "not required by federal law" could proceed.[286] In yet another case, the Southern District of New York similarly distinguished "affirmative representations" from disclosures in order to find that some, but not all, of the state laws relied upon by the New York Attorney General were preempted.[287] Each case relied on the state law's specific language and implementation and the fact-specific allegations in the complaint.

The confusion with respect to preemption analysis is palpable. In *Reavis v. Pennsylvania Higher Education Assistance Agency,* Montana's highest court reversed a lower court's conclusion that the plaintiff's claims rested on state law that was preempted by the Higher Education Act after the plaintiff argued on appeal that the trial court judge erroneously relied on both *Chae* and the Department of Education's interpretive guidance.[288] The state supreme court expressly adopted a limited understanding of *Chae* and did not rely on the Department's statement.[289]

Consider next the ways in which servicers have sought to expand the sovereign shield as it relates to federal courts' jurisdiction. In *New York ex rel. James v. Pennsylvania Higher Education Assistance Agency,*[290] for example, PHEAA threw every possible defense against the wall to see what might stick.[291] In addition to asserting that the New York Attorney General's claims were preempted by federal law, PHEAA submitted a letter to the court arguing that PHEAA, as a government contractor, was entitled to derivative sovereign immunity (that is, *Yearsley* immunity), which deprived the court of subject-matter jurisdiction.[292] PHEAA also relied on its lack of discretion (factors three

285. 928 F.3d at 648-49 ("[Plaintiff] is complaining about at least some deceptive statements that Great Lakes chose to make voluntarily, not because federal law required them. Great Lakes could have avoided these claims by remaining silent. State law could impose liability on these affirmative misrepresentations without imposing additional disclosure requirements on Great Lakes, and thus avoid preemption under § 1098g.").

286. *Id.* at 648.

287. New York *ex rel.* James v. Pa. Higher Educ. Assistance Agency, No. 19-cv-09155, 2020 WL 2097640, at *15 (S.D.N.Y. May 1, 2020) (holding that certain claims were explicitly preempted by the Higher Education Act).

288. *See* Appellant's Opening Brief, Reavis v. Pa. Higher Educ. Assistance Agency, 467 P.3d 588 (Mont. 2020) (No. DA 19-0510), 2019 WL 7877836, at *9.

289. *Reavis*, 467 P.3d at 591, 593-94.

290. 2020 WL 2097640.

291. *See supra* note 264.

292. Letter from Marjorie J. Peerce to the Hon. Edgardo Ramos at 2, *James*, 2020 WL 2097640 (No. 19-cv-09155), ECF No. 15 [hereinafter *James* Dec. 2, 2019 Letter].

and four), asserting that "in servicing the loans, PHEAA complied with and did not exceed the terms of the contract with the Department or the Department's direction."[293] As of this writing, the Southern District of New York has not issued a final ruling on *Yearsley*'s application to PHEAA as a servicer of government-owned loans, but it has ruled that *Yearsley* immunity is not a jurisdictional bar.[294] Rather, the court held that *Yearsley* immunity must be assessed on the merits, and "the record at [the motion to dismiss] stage does not permit the Court to dismiss the Complaint under *Yearsley*."[295] In yet another filing, further collapsing the sovereign-shield defenses, PHEAA asked the court to permit additional briefing if the "Court believes that the *Boyle* immunity analysis may apply."[296]

The recent increase in derivative-immunity assertions is unsurprising. Lawyers representing government contractors have publicly asserted that the 2016 *Campbell-Ewald* opinion extended *Yearsley* immunity to all government contractors.[297] These lawyers have argued that "[a]fter *Campbell-Ewald*, there is no reason that the *Yearsley* derivative sovereign immunity defense should not be asserted by *all* Government service contractors, not just those working on public works projects, effectively making the three-prong *Boyle* analysis largely irrelevant, at least with respect to Government service contracts."[298] And SLSA joined with Navient, Nelnet, and PHEAA to lobby the Federal Communications Commission to offer supplemental agency instruction on *Campbell-Ewald* supporting their argument for a broad reading of the case to grant "immun[ity] from TCPA liability when [federal contractors] comply with the federal government's directions" regardless of agency status.[299] This assertion ignores the import of congressional intent, character of the contractor and its contract, and effect on policymaking and decisionmaking (factors one, two, and five), suggesting that the preemption analysis underlying *Boyle* has been subsumed by *Yearsley* immunity.

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293. *Id.*

294. *James*, 2020 WL 2097640, at *6-8 (recognizing that there is a circuit split on the issue of whether *Yearsley* is a jurisdictional question).

295. *Id.* at *7-8.

296. *James* Defendant's Memorandum of Law, *supra* note 264, at 14 n.2. However, PHEAA did not pursue the argument, and the court deemed it waived. *James*, 2020 WL 2097640, at *7 n.3.

297. *See* Sher & Vogel, *supra* note 7.

298. *Id.*

299. Student Loan Servicing All., Navient Corp., Nelnet Servicing, LLC & Pa. Higher Educ. Assistance Agency, Comment Letter on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit's *ACA International Decision*, at ii (June 13, 2018), https://perma.cc/TQR2-RFSZ.

Consider next the ways in which student-loan servicers use sovereign-shield principles to avoid *state regulation.* State legislatures, governors, and attorneys general have proposed legislation that seeks to regulate or oversee student-loan servicers operating in their state. As of this writing, at least eleven states and the District of Columbia have introduced "student loan borrower bills of rights."[300] Those bills create licensing schemes, set reporting requirements, establish new regulatory schemes, and allow for the creation of state student-loan ombudsmen.

Student-loan servicers, invoking the sovereign shield, are fighting this state regulation. SLSA sued to block the District of Columbia's student-borrower bill of rights, the Student Loan Ombudsman Establishment and Servicing Regulation Amendment Act of 2016.[301] The servicers argued that they were protected from regulation based on the doctrines of intergovernmental immunity and preemption.[302] The federal government filed a statement of interest supporting the servicers in that case,[303] and the Department of Education addressed the topic specifically in its March 2018 guidance.[304] Before the parties voluntarily dismissed the case while an appeal was pending,[305] the trial court issued an opinion that appears to have

300. *See supra* note 223. In several other states, bills have been proposed but not yet enacted. *See, e.g.*, H.R. 2922, 57th Leg., 2d Sess. (Okla. 2020); S. 2595, 191st Gen. Ct. (Mass. 2020).

301. *See* Student Loan Servicing All. v. District of Columbia, 351 F. Supp. 3d 26, 36 (D.D.C. 2018) (challenging D.C. Law 21-214).

302. *Id.* at 46.

303. Statement of Interest of the United States at 1-2, 22, *Student Loan Servicing All.*, 351 F. Supp. 3d 26 (No. 18-cv-00640), ECF No. 20; *see also* Brief of Amici Curiae States of New York et al. in Support of Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment at 2, *Student Loan Servicing All.*, 351 F. Supp. 3d 26 (No. 18-cv-00640), ECF No. 29 ("Indeed, [SLSA] seeks to oust States from the field of federal student loan servicing altogether; and the United States similarly seeks to exempt all servicers of federal-owned or -guaranteed student loans from state-law requirements, on the ground that these servicers' conduct should be governed exclusively by federal laws, regulations, and contracts.").

304. 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, 10,620 (Mar. 12, 2018); *see also* Statement of Interest of the United States, *supra* note 303, at 14 (arguing, based in part on the Department's March 2018 guidance, that "D.C.'s attempt to second guess through its licensing requirement Education's determination of which servicers to contract with 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' and is thus preempted by federal law" (quoting Arizona v. United States, 567 U.S. 387, 399 (2012))).

305. Although the case was originally appealed by both parties, in February 2019, the District of Columbia filed an unopposed motion to withdraw its appeal. *See* Consent Motion of the Appellants to Voluntarily Dismiss Their Appeal at 1, Student Loan Servicing All. v. Taylor, No. 19-7001, 2019 WL 2158372 (D.C. Cir. May 15, 2019). SLSA did the same in April of the same year. *See* Unopposed Motion of the Appellant to Voluntarily Dismiss Its Appeal at 1, *Taylor*, 2019 WL 2158372 (No. 19-7001).

attempted a compromise, but in practice handed servicers a significant victory. That court drew on *Boyle*-related preemption principles and intergovernmental immunity to conclude that: (1) federal legislation did not expressly preempt the regulations adopted by the District of Columbia;[306] and (2) the Higher Education Act similarly did not occupy the field of regulation to preclude state action;[307] but crucially, (3) the D.C. regulatory regime nevertheless constituted an "obstacle" to the federal legislative objective for certain classes of federal student loans[308] and so was preempted with respect to those loans.[309]

PHEAA made similar assertions in its fight with the New York Attorney General, first asserting defenses based on preemption and *Yearsley* immunity and requesting additional time to argue *Boyle* immunity.[310] PHEAA then made the additional argument that New York's state law claims were barred under the doctrine of intergovernmental immunity,[311] telling the court that "[t]he doctrine of intergovernmental immunity is thematically consistent with the preemption and derivative sovereign immunity arguments already articulated in PHEAA's [previous] letter."[312] With specific reference to the effect on "the federal services that the U.S. Department of Education . . . hired PHEAA to perform" (factor five), PHEAA essentially collapsed the three sovereign-shield doctrines' analyses.[313] Speaking only to New York's relevant laws, which address "affirmative disclosures that are false, misleading, or otherwise unlawful," the court ultimately held that applying the state law to a federal

306. *Student Loan Servicing All.*, 351 F. Supp. 3d at 53-55.

307. *Id.* at 59.

308. The court distinguished among loans made by the federal government, those held by the federal government, and those made and held by private lenders, such as banks, pursuant to the now-extinct federal guaranteed-student-loan program, the FFELP. *Id.* at 61 ("For purposes of this conflict analysis, the Court must compare the particular regulations that apply to each of the three types of loans at issue here: (1) the [direct] loans, which the federal government owns and are serviced pursuant to federal government contracts; (2) the Government-Owned FFELP loans, for which the federal government was originally the reinsurer or guarantee agency, but later purchased . . . ; and (3) the Commercial FFELP loans, the private loans that the government reinsures or guarantees.").

309. *See id.* at 72, 75-76. Having drawn distinctions among different classes of federal student loans, *see supra* note 308, the court concluded that the federal Higher Education Act did not preclude the District of Columbia's legislation insofar as it affected FFELP loans made by private, nongovernmental lenders. *Id.* at 66-73.

310. New York *ex rel.* James v. Pa. Higher Educ. Assistance Agency, No. 19-cv-09155, 2020 WL 2097640, at *1, *7 n.3 (S.D.N.Y. May 1, 2020) (summarizing PHEAA's claims); *James* Dec. 2, 2019 Letter, *supra* note 292, at 2-3.

311. *James* Defendant's Memorandum of Law, *supra* note 264, at 17-20.

312. Letter from Marjorie J. Peerce to the Hon. Edgardo Ramos at 1, *James*, 2020 WL 2097640 (No. 19-cv-09155), ECF No. 27 [hereinafter *James* Dec. 30, 2019 Letter].

313. *Id.*

contractor did "not transform an otherwise neutral law into a direct regulation of the federal government."[314] The court found that only the attorney general's claims based on "failure to disclose information" were preempted.[315]

Finally, servicers are using sovereign-shield arguments to avoid even *federal* oversight. With support from the Department of Education, the servicers have argued that by virtue of their contractual relationships with the federal government, they need not comply with requests for information from federal regulatory bodies and legislative oversight committees. In 2017, the Department of Education admonished its contracted servicers not to produce certain records to the CFPB for supervisory examinations.[316] And in 2018, when the CFPB sought to act in its supervisory role to inspect servicing companies running student-loan call centers, the Department of Education, citing privacy concerns, instructed contractors not to share information with the CFPB.[317]

In September 2019, the chairman of the House Education Committee, Representative Bobby Scott, sought testimony from the president and CEO of PHEAA about its management of the federal Public Service Loan Forgiveness Program.[318] The executive, James H. Steeley, refused the invitation,[319] hinting at sovereign-shield rationales without citing to any specific doctrine or relevant factor. Mr. Steeley wrote: "As a federal servicer, PHEAA is strictly bound by the laws, regulations and guidance of the programs put forward by Congress and the Department; therefore, I must respectfully decline your invitation."[320]

When one doctrinal track is blocked, servicers attempt another sovereign-shield defense, exploiting the confusion between doctrines and reaching across theories and principles to evade liability and oversight. Servicers boil the doctrines down to a simple assertion: *We are engaged in federal business—so it is none of yours.* Such a way of thinking underlies Steeley's response to the congressional request

314. *James*, 2020 WL 2097640, at *9 (explicitly noting that the New York Attorney General "does not seek to impose new disclosure requirements on PHEAA").

315. *Id.* at *15.

316. *See* Letter from Kathleen L. Kraninger, Dir., Consumer Fin. Prot. Bureau, to Sen. Elizabeth Warren (Apr. 23, 2019), https://perma.cc/ES3S-9EK7.

317. Chris Arnold, *Exclusive: Turf War Blocked CFPB From Helping Fix Student Loan Forgiveness Program*, NPR (Oct. 15, 2019, 10:52 AM ET), https://perma.cc/8CL2-RXCW.

318. Stratford, *supra* note 228.

319. *Id.* It is important to note that Mr. Steeley refused an invitation, not a congressional subpoena.

320. *Id.* (quoting Steeley's letter to Scott).

for information[321] and Great Lakes' argument that the "federal-ness" of the federal student-lending regime precluded the company's liability.[322]

Consider a few more examples of how servicers deploy these arguments. In multiple state and federal courts, the servicing giant PHEAA argued that it was immune to suit because of its relationship with the state of Pennsylvania.[323] When those arguments failed,[324] PHEAA argued to another court that it was immune from suit because of its relationship with the federal government.[325] Other servicers have attempted to use similar arguments, invoking *Boyle*'s language on conflict preemption to support their claims.[326]

In a different case filed by PHEAA, the Department of Education (itself a defendant in the action) argued that Connecticut's attempts to regulate PHEAA through licensing were preempted by federal law and constituted an illegal regulation of the federal government in violation of intergovernmental-immunity principles.[327] PHEAA's counsel subsequently filed a letter in the Southern District of New York seeking to "include the doctrine of intergovernmental immunity as a basis for dismissal" of a complaint brought by New York's Attorney General.[328] In that letter, PHEAA's counsel cited specifically to the federal government's statement of interest in the Connecticut case, seeking to expand the intergovernmental-immunity

321. *See supra* notes 319-20 and accompanying text.

322. *See supra* note 230 and accompanying text.

323. Commonwealth v. Pa. Higher Educ. Assistance Agency, No. 1784CV02682-BLS2, 2018 WL 1137520, at *2 (Mass. Super. Ct. Mar. 1, 2018); Pele v. Pa. Higher Educ. Assistance Agency, 628 F. App'x 870, 871 (4th Cir. 2015) (per curiam) (rejecting PHEAA's argument, at the summary-judgment stage, that it was entitled to summary judgment because it was an "arm of the [state]" and so protected by the Eleventh Amendment); Brief for Appellees Pennsylvania Higher Education Assistance Agency & Vermont Student Assistance Corp. at 17-44, United States *ex rel.* Oberg v. Pa. Higher Educ. Assistance Agency, 804 F.3d 646 (4th Cir. 2015) (No. 15-1093), 2015 WL 1306499, ECF No. 51 (arguing that PHEAA is an "arm of the State" and consequently protected from suit).

324. *Oberg*, 804 F.3d at 650 (concluding that PHEAA did not enjoy Pennsylvania's status as a state and thus was subject to suit under the False Claims Act).

325. *James* Dec. 2, 2019 Letter, *supra* note 292, at 1-2.

326. *See, e.g.*, Nelson v. Great Lakes Educ. Loan Servs., Inc., 928 F.3d 639, 650-51, 651 n.3 (7th Cir. 2019); Brief of Appellee, *supra* note 230, at 28.

327. *See* Statement of Interest of the United States at 8-14, Pa. Higher Educ. Assistance Agency v. Perez, 457 F. Supp. 3d 112 (D. Conn. 2020) (No. 18-cv-01114), ECF No. 70 (arguing that Connecticut's regulatory scheme is preempted by the Higher Education Act and the Privacy Act); *id.* at 14-17 (arguing that Connecticut's licensing scheme improperly regulates and discriminates against the federal government).

328. *James* Dec. 30, 2019 Letter, *supra* note 312, at 1.

argument beyond licensing and block the traditional consumer-protection complaints asserted by New York.[329]

Servicers like PHEAA are using arguments based on the principles underlying federal preemption, sovereign immunity, and intergovernmental immunity ambiguously and interchangeably to evade state and federal law, regulation, and oversight. They are doing so with the support of their agency partner, the Department of Education. And they are fighting these fights at the expense of those seeking to hold them accountable for their conduct: consumers, states, and federal oversight bodies.

This phenomenon is not limited to student-loan servicers.[330] The servicers' arguments have been and likely will continue to be used by other nongovernmental actors seeking to further the size and impermeability of the sovereign shield.[331]

C. Beyond Capture: The Alliance of Goliaths

As shown above, the student-loan servicers are not operating alone; they have the full backing of their agency partner, the Department of Education. The Department has filed court papers supporting servicers' attempts to dismiss state law claims against them.[332] The Department directed its contracted servicers to ignore requests from the CFPB.[333] And Jack Remondi, the CEO of Navient, along with servicer trade groups, expressly lobbied the Department to issue guidance that states lacked the authority to police servicing activities.[334] Over the objection of state attorneys general, state

329. *Id.*

330. *See supra* notes 12-18 and accompanying text.

331. *See, e.g.*, Defendants' Reply in Support of Their Motion to Dismiss Complaint at 1-4, Rose v. Bank of Am. Corp., No. 10-cv-5067, 2010 WL 8435397 (C.D. Cal. Nov. 5, 2010), 2010 WL 4776960, ECF No. 33 (relying on *Chae* in seeking to dismiss the plaintiffs' state law claims related to the defendant's debt-cancellation contracts); Notice of Motion & Motion of Chase Bank USA, N.A. to Dismiss for Failure to State a Claim; Memorandum of Points & Authorities in Support Thereof at 2, 19, Milgram v. Chase Bank USA, N.A., No. 10-cv-00336 (C.D. Cal. Mar. 17, 2010), 2010 WL 2219307, ECF No. 14 (discussing *Chae* in support of the defendant's preemption arguments pursuant to the National Bank Act).

332. *See supra* note 303; *see also* Commonwealth v. Pa. Higher Educ. Assistance Agency, No. 1784CV02682-BLS2, 2018 WL 1137520, at *9 (Mass. Super. Ct. Mar. 1, 2018) (describing a filing by the Department of Education in favor of the defendant servicer); Student Loan Servicing All. v. District of Columbia, 351 F. Supp. 3d 26, 36, 50 (D.D.C. 2018) (same).

333. *See supra* notes 316-17 and accompanying text.

334. *See* Stratford, *supra* note 273.

banking regulators, and the National Governors Association, then-Secretary of Education Betsy DeVos issued guidance in line with those requests.[335]

As we have argued in this Article, expanding the sovereign shield enables and fosters a mutually beneficial alliance between these entities. Such an alliance is related to, but broader than, the traditional notion of capture.[336] But like capture, the alliance of Goliaths shifts policy "away from the public interest and toward industry interest."[337] This alliance is both created and reinforced by a "revolving door" between government agencies and their contractors.[338] Sally Stroup, for example, spent more than ten years on the staff of PHEAA,[339] worked as a staffer for the House Committee on Education and the Workforce, had a brief stopover as a lobbyist for Apollo Education Group,[340] which owns the for-profit entity, the University of Phoenix,[341] and then was named the Assistant Secretary of Postsecondary Education in President George W. Bush's Department of Education.[342] One of President

335. *See* 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, 10,620 (Mar. 12, 2018); Stratford, *supra* note 273.

336. "Capture" is "shorthand for the phenomenon whereby regulated entities wield their superior organizational capacities to secure favorable agency outcomes at the expense of the diffuse public." Nicholas Bagley, Response, *Agency Hygiene*, 89 TEX. L. REV. *SEE ALSO* 1, 2 (2010). For further discussion of regulatory capture, see David Thaw, *Enlightened Regulatory Capture*, 89 WASH. L. REV. 329, 333 (2014) ("The term 'regulatory capture' traditionally evokes negative connotations of backroom dealing, placement of industry-friendly individuals in key regulatory positions, and the breakdown of the regulatory process that grinds it to a proverbial halt."). We take up capture further in *The Sovereign in Commerce*. *See* Elengold & Glater, *supra* note 6 (manuscript at Part III.B).

337. Daniel Carpenter, *Detecting and Measuring Capture*, *in* PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 57, 63 (Daniel Carpenter & David A. Moss eds., 2014).

338. *See* VERKUIL, *supra* note 1, at 5 ("Outsourcing can lead to corruption of our bureaucracy, at least of its politically appointed members. Political officials, who are appointed for short periods and enter service through the famous revolving door, sometimes utilize outsourcing both as a means of getting results and as a way of preserving later career opportunities." (footnote omitted)).

339. Ryann Liebenthal, *The Incredible, Rage-Inducing Inside Story of America's Student Debt Machine*, MOTHER JONES (Sept./Oct. 2018), https://perma.cc/3ZZY-DQT3.

340. *See Sally L. Stroup—Assistant Secretary of Postsecondary Education*, U.S. DEP'T EDUC., https://perma.cc/4C9E-B5VD (last updated Apr. 17, 2006); *see also* Doug Lederman, *New (But Familiar) Face at Career College Group*, INSIDE HIGHER ED (July 6, 2012), https://perma.cc/PA6V-PY7C.

341. Patricia Cohen & Chad Bray, *University of Phoenix Owner, Apollo Education Group, Will Be Taken Private*, N.Y. TIMES (Feb. 8, 2016), https://perma.cc/B469-YLSG.

342. *Stroup, Sally*, CTR. FOR RESPONSIVE POL., https://perma.cc/8KRG-Q5X9 (archived Feb. 9, 2021). Others have followed similar trajectories. *See, e.g.*, David Halperin, *For-Profit College Where Top DeVos Aide Worked Is Paying $30 Million to Settle FTC Deception Probe*, REPUBLIC REP. (Aug. 2, 2019, 12:47 PM), https://perma.cc/9ZXU-2C26 (recognizing that Diane Auer Jones, a top Department of Education official, came from top positions at

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Donald Trump's most trusted campaign advisors, David Urban, leads the lobbying firm representing PHEAA, and Kathleen Smith, a former high-level aide to Secretary DeVos, was hired by PHEAA as senior vice president and director of federal relations.[343] A former PHEAA executive, Robert Cameron, was named the CFPB's private student-loan ombudsman, a job that has been called "the federal government's top [student-loan] watchdog."[344] While a sociological study of the ways that personnel and personal relationships may enable industry to wield influence is beyond the scope of this Article, we note that these sorts of ties both facilitate and contribute to government adoption of positions and policies favorable to private businesses.

III. Normative Analysis

This Part develops a normative critique of the expansion of the sovereign shield to private government contractors. It argues that such expansion reinforces an alliance between the executive branch and its corporate contractors.[345] We fear that the creation and perpetuation of this alliance represent a shift in the delicate balance among the executive branch, the legislative branch, states, corporations, and consumers. Private companies and the executive branch work together to avoid liability and beat back state and

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the for-profit company Career Education Corporation, which was under investigation by the Federal Trade Commission for predatory tactics).

343. Michael Stratford, *Student-Loan Behemoth Tightens Its Ties to Trump and DeVos*, POLITICO (Sept. 9, 2019, 5:03 AM EDT), https://perma.cc/NY9G-RBWH.

344. Ken Sweet, *Trump Appoints Student Loan Industry Exec to Watchdog Job*, ASSOCIATED PRESS (Aug. 16, 2019), https://perma.cc/8LYE-K8AU.

345. This argument is slightly different from, but analogous to, that made by Jon Michaels in analyzing the risks of privatization "workarounds." We argue that the partnership between for-profit contractors and the executive branch not only enables the expansion of federal authority, but also affirmatively (1) undermines state legislative and regulatory power; and (2) shifts the balance of power between the private sector and consumers. We see a multidimensional power grab consistent with Michaels' analysis, which identified the ways in which the executive can: (1) expand its powers by turning to private contractors to bypass laws that apply only to the government; (2) bind future successors through long-term contracts; (3) sideline civil servants by turning to private contractors to build an administrative record; and (4) expand the government's footprint without expanding the civil service or military workforce. *See generally* Michaels, *supra* note 6. Michaels argues that workarounds

> are executive aggrandizing. Specifically, workarounds . . . provide the outsourcing agency with the means of achieving distinct public policy goals that—but for the pretext of technocratic outsourcing—would be impossible or much more difficult to attain in the ordinary course of nonprivatized public administration. In short, workarounds enable the executive to exercise greater unilateral discretion—at the expense of the legislature, the judiciary, the people, and successor administrations.

Id. at 719.

federal legislative and regulatory efforts. The federal government benefits at the expense of the states; the executive branch benefits at the expense of the legislative branch; and corporate interests benefit at the expense of consumers. This is a symbiotic relationship, in that both the private contractors and the executive branch benefit by avoiding legal exposure based on contract implementation and by preferencing federal, specifically executive, interests over state interests.

The analysis of the phenomenon we identify draws on accounts from constitutional law scholars, administrative law scholars, and consumer law scholars. But in its entirety, it falls through doctrinal cracks.[346] It is not only a story about contractors taking advantage of the executive branch.[347] Nor is it only a story of a power-hungry executive branch taking advantage of the self-interest of contractors.[348] Nor is it a story about unilateral capture, where industry hijacks an agency for personal, professional, and typically pecuniary gain.[349] Rather, this is a story of an alliance of Goliaths: the federal administration and its contractors working together to expand their collective power. The benefits to the contractors—less accountability and more money—seem obvious. But consider also the benefits to the federal executive branch: By using a private contractor to complete a task, the federal executive can sidestep accountability regimes, because the private actor may not be subject to public-records requests or other oversight mechanisms that apply to federal

346. For a more detailed literature review and analysis, see Elengold & Glater, *supra* note 6 (manuscript at Part III).

347. Many scholars who have taken an interest in government contractors have raised concerns about a lack of constitutional and structural accountability, which permits contractors to engage in questionable behavior. *See e.g.*, Freeman & Minnow, *supra* note 1, at 2 ("The primary concern, voiced in recent years by critics in public policy circles and in academia, is that the ubiquity of governance-by-private-contractors strikingly outstrips our legal and political capacities of oversight meant to ensure that the contractors' execution of these governmental functions complies with democratic norms."). As a result, improper behavior by contractors evades regulatory oversight. *See, e.g.*, Natalie Kitroeff, *Boeing Employees Mocked F.A.A. and 'Clowns' Who Designed 737 Max*, N.Y. TIMES (updated Jan. 29, 2020), https://perma.cc/HP4J-JSMF (describing Boeing employees' efforts to conceal airplane problems, which contributed to two accidents that killed 346 people, from the Federal Aviation Administration).

348. *Cf.* Michaels, *supra* note 6, at 719 (describing privatization as a "powerful, potentially transformative phenomenon [that] (1) raises novel questions that sound in separation of powers, intergenerational sovereignty, and democratic theory, and (2) has been overshadowed by the dominant, but analytically orthogonal, efficiency versus accountability debate").

349. *See* William J. Novak, *A Revisionist History of Regulatory Capture*, *in* PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT, *supra* note 337, at 25, 45 (arguing that viewed in a historical context, regulatory change and innovation did not occur against the backdrop of a "simple binary of public interest and private capture").

agencies,[350] or to the demands of a coequal branch of the federal government.[351] This explains why we do not see the federal government, as principal, trying to distance itself from potential misconduct by its contractors (its agents), as is typical in cases involving misconduct by agents.[352] Instead, when the contractors assert the sovereign shield, the executive backs them up.[353] At the same time, when it uses a contractor, the federal government disempowers the states, which by virtue of their traditional police powers have a strong claim to authority over the kinds of conduct engaged in by the private-sector actors hired by the sovereign.

This Part traces the consequences of this alliance, returning to student-loan servicing to provide one concrete account; it is surely not the only one. We first distinguish our concerns from those animating many debates over the desirability of federal outsourcing, which often involve disagreements over efficiency. By contrast, our subject is the effect of the expansion of the sovereign shield through doctrine: the reduction of avenues for consumer recovery. If consumers cannot hold contractors liable for harms they cause, accountability depends on the very federal agency that acts in concert with the contractor. Lastly, we identify a consequence of the allocation of authority to the executive to hold a contractor accountable: a shift in the distribution of power that affects the structural constitutional principles of federalism and separation of powers.[354]

A. The Scope of Our Claim

Debates over federal reliance on contractors often center on the financial benefits to the government. Many have argued that outsourcing government services is less expensive, more efficient, and results in higher-quality outcomes than retaining the work within the government. Consequently, the argument goes, outsourcing is better for citizens, both as consumers and taxpayers.[355] Stan Soloway and Alan Chvotkin, both of whom have significant

350. *See* Kelman, *supra* note 255, at 185; *see also* VERKUIL, *supra* note 1, at 13 (warning that the "contractor approach to executive authority hides decisions from public view").

351. *See supra* notes 292, 316-20 and accompanying text.

352. *See supra* note 267 and accompanying text.

353. *See supra* note 271 (demonstrating that the Department of Education regularly files statements of interest and otherwise supports its contractors' utilization of sovereign-shield defenses).

354. *See* Brown, *supra* note 1, at 533-34 (arguing that the "principle of democratic accountability that springs from the structural Constitution" could be a theoretical basis to analyze, assess, and curb problems associated with outsourcing government work to private contractors).

355. *See generally* Stan Soloway & Alan Chvotkin, *Federal Contracting in Context: What Drives It, How to Improve It*, *in* GOVERNMENT BY CONTRACT, *supra* note 1, at 192, 199 (arguing

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experience with government contracting, argue that "[m]ost experts agree that when properly managed, outsourcing, and perhaps more specifically the competitive marketplace that underpins it, can and generally does drive higher performance and improve service delivery."[356] It is expensive and time-consuming to hire, train, and fire civil servants as compared to contractors.[357] And a "graying" civil-service workforce is untrained to deal with technological and business advances.[358]

Debates among scholars of public law have focused on a different set of issues, unrelated to tangible costs, involving various institutional players—the federal government, states, the branches of government, consumers, the businesses that serve as contractors—depending on disciplinary orientation. Constitutional scholars have focused their attention on the complex and changing relationship between the states and the federal government.[359] Administrative law scholars have focused attention on the ways in which the "American 'rule of law' tradition, which provides that special laws apply to government and officials to define their authority and protect citizens against abuse," does not apply to government contractors, undermining government-accountability measures.[360] And consumer law scholars focus their attention on the harms of businesses' successful efforts to foreclose remedies for injured

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that government use of private contractors can confer benefits in terms of quality on both the government as a hiring entity and on taxpayers); *id.* at 194.

356. *Id.* at 194.

357. *See, e.g.*, *id.* at 197.

358. *See id.* at 199.

359. For examples of this approach, see Heather K. Gerken, *Federalism 3.0*, 105 CALIF. L. REV. 1695, 1700 (2017) ("[N]either the state nor the federal government presides over its own empire. Instead, they govern shoulder-to-shoulder in a tight regulatory space . . . ."); Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1258 (2009) (analyzing "[u]ncooperative federalism," which occurs, for example, "when states carrying out the Patriot Act refuse to enforce the portions they deem unconstitutional"); and Gillian E. Metzger, *Agencies, Polarization and the States*, 115 COLUM. L. REV. 1739, 1744 (2015) (analyzing "the relationship between [federal] administrative agencies and political polarization" given the ability of states to advance or hinder the goals of the federal executive).

360. *See* Dan Guttman, *Government by Contract: Considering a Public Service Ethics to Match the Reality of the "Blended" Public Work Force*, EMORY CORP. GOVERNANCE & ACCOUNTABILITY REV. (2015), https://perma.cc/U8T2-H5R4 (arguing that two premises have long provided the "framework" of federal contracting: first, that "fundamentally different rules can and should govern officials and contractors," and second, that "the application of differing rules to public officials and contractors is acceptable because officials will in fact have the capacity to account for contractors"). This framework can have deleterious outcomes. *See, e.g.*, MICHAELS, *supra* note 24, at 36; VERKUIL, *supra* note 1, at 105 (warning that "privatized actions are often nontransparent," not least because they may not be subject to the Freedom of Information Act).

consumers.[361] Impunity for federal contractors not only risks harm to consumers, but also contributes to what Paul Verkuil calls a "democracy deficit" by undermining other accountability structures and weakening the government's ability to perform important functions on its own, should the need arise.[362] But no one group of scholars has focused on the implications of the sovereign-shield phenomenon for each set of relevant players: the federal executive, the federal legislature, states, businesses, and consumers.[363]

Extension of the sovereign shield may indirectly impose tangible costs, too. The ability of federal contractors to evade oversight correspondingly increases their ability to bilk the taxpayer, undermining the very cost and efficiency rationales invoked to justify outsourcing in the first place.[364] The allure of lucrative jobs in the private sector may lead government officials to put the good of a contractor ahead of the good of the public. The availability of the sovereign shield mitigates the efficiency-enhancing effect of the market because, for market participants in other contexts, there is no comparable defense to liability, and contractors have a powerful incentive to invest resources in obtaining sovereign-shield benefits—resources that otherwise could be allocated to a safer and possibly less costly product or service.

Support for outsourcing has become increasingly bipartisan,[365] so a change in administration does not necessarily portend stronger executive oversight of federal contractor conduct. Even if the federal executive branch holds a contractor to account in an individual instance, that does not change the doctrine, which leaves accountability in the future to the discretion of the executive, and therefore neither alleviates our concerns nor changes our analysis. Imagine that the federal Department of Education exercised closer oversight over its servicer contractors; that would simply mean that other entities, including state attorneys general and consumers, would not be forced to sue to obtain redress for negligence or misconduct. In other words, preserving the power of these other potential counterweights to the federal executive power in no way prevents the federal executive from imposing

361. *See, e.g.*, Lauren E. Willis, *Performance-Based Consumer Law*, 82 U. CHI. L. REV. 1309, 1317 (2015) ("[C]onsequential features of transactions are becoming too opaque and changeable for many consumers to shop well for themselves, and market structure renders consumers unable to benefit from other consumers' shopping. Consumer law currently facilitates rather than ameliorates the effects of these technological changes."); Adam J. Levitin, *The Fast and the Usurious: Putting the Brakes on Auto Lending Abuses*, 108 GEO. L.J. 1257, 1268 (2020) (describing the size of the auto-lending market and the lack of industry-specific consumer-protection legislation).

362. VERKUIL, *supra* note 1, at 2-4.

363. *See supra* note 346.

364. Verkuil offers some choice examples of contractors run amok. *See* VERKUIL, *supra* note 1, at 4-5.

365. *See* MICHAELS, *supra* note 24, at 99.

accountability on its hired agents. Our concern is relevant not only in the context of the Trump Administration, which scholars have noted was spectacularly corrupt and venal.[366] We suggest that fairness, accountability, and consumer protection may all be better served if the federal government and the states both have—and exercise—concurrent enforcement power. As it currently exists, the sovereign shield stands in the way of state attorneys general seeking to protect the people of their states.[367]

However, for this project, we need not delve deeply into the debate about whether privatization, outsourcing, or government contracting is normatively good or bad. The debate about whether the federal government should hire private contractors presents a distinct issue.[368] Instead, this Article queries whether and under what circumstances a contractor should be able to take advantage of its relationship with the executive branch to avoid liability or oversight. We also expose the ways in which that phenomenon benefits companies vis-à-vis consumers and the executive branch vis-à-vis other state and federal governmental actors. Our companion piece, which offers a doctrinal fix, further situates the phenomenon and analysis in the constitutional, administrative, and consumer law scholarship.[369] Gaining insight from these diverse lines of research, we suggest that the sovereign-shield phenomenon has been under-studied because it falls both within and between these broad bodies of scholarship.[370]

It is possible, of course, to argue that opening government contractors up to legal liability and oversight will undermine efficiency, increase cost, and lower productivity. Presumably, contractors will either raise their prices to account for liability risk and increased regulatory costs or exit the market

366. For a devastating analysis, see Jon D. Michaels, *We the Shareholders: Government Market Participation in the Postliberal U.S. Political Economy*, 120 COLUM. L. REV. 465, 487-88 (2020). Michaels describes a "historically unpopular and legally and morally compromised presidential Administration . . . [that] pushe[d] the concept of businesslike government down to the bottom of whatever slippery slope of corruption and ineptitude we previously thought unreachable." *Id.* (footnotes omitted).

367. We do not attempt to determine the optimal level of enforcement, but we note that the net effect of contractor impunity is a reduction in the degree of protection for consumers.

368. For example, Steven Kelman holds up the contract between the Department of Education and agencies that collect student-loan debt as a model of oversight and government control. *See* Kelman, *supra* note 255, at 184. He notes approvingly that the Department of Education has a number of accountability levers built into the contract. *Id.* Although such an argument speaks to the outsourcing critique that contractors take advantage of an agency "asleep at the wheel," it does not address the problem of the powerful alliance created between the executive branch and its contractors.

369. For a thorough literature review, incorporating constitutional scholarship, administrative law scholarship, consumer law scholarship, and First Amendment scholarship, see Elengold & Glater, *supra* note 6 (manuscript at Part II).

370. *Id.*

altogether.[371] We acknowledge that possibility.[372] We do not propose an ideal toward which courts, legislators, and regulators should strive in the future, nor do we claim to have unearthed a hitherto unrecognized baseline that could guide those institutions in determining the proper balance in a particular case. Those goals are beyond the scope of this Article. Rather, we identify the consequences of the expanding sovereign shield and its related alliance: injured consumers left with no legal redress and the destabilization of longstanding federalism and separation-of-powers principles.

B. Lack of Redress

When the sovereign shield expands, avenues for consumer redress shrink. As shown in the student-loan servicing context,[373] government contractors use the sovereign shield to evade state regulation, federal oversight, and liability under state and federal law. By exploiting preemption and immunity defenses, the servicers and their advocates seek to extend the sovereign shield to protect themselves from judicial and legislative review of their practices. When it works, consumers are left without redress, even when they have been victims of fraud, misrepresentation, or other illegal practices.[374] Borrowers cannot even rely on the traditional flexibility available to consumers in a free market: They cannot choose or change their assigned servicer.[375] This leads to

371. *Cf.* Kelman, *supra* note 255, at 185 (raising similar concerns with respect to applying the Freedom of Information Act to government contractors).

372. Such risks are clearly laid out in the scholarship on government contracting and accountability. *See, e.g.*, Ellen Dannin, *Red Tape or Accountability: Privatization, Publicization, and Public Values*, 15 CORNELL J.L. & PUB. POL'Y 111, 154 (2005) ("When regulation means prices rise to a level at which a contractor cannot make a profit and perform the work for less than government workers can, there is no point in privatizing.").

373. *See supra* Part II.B.

374. *See, e.g.*, Chae v. SLM Corp., 593 F.3d 936, 943 (9th Cir. 2010) (holding that the "plaintiffs' claims challenging the language in Sallie Mae's billing statements and coupon books are restyled improper-disclosure claims and are therefore subject to express preemption under" the federal Higher Education Act).

375. *Student Loan Borrower Assistance: Dealing with Servicers*, NAT'L CONSUMER L. CTR., https://perma.cc/HY3T-UC34 (archived Feb. 9, 2021). Student borrowers may, however, move to a different servicer if they consolidate federal student loans managed by multiple servicers or if they refinance with a private lender outside of the federal student-aid regime. *See Consolidating Your Federal Education Loans Can Simplify Your Payments, But It Also Can Result in the Loss of Some Benefits*, FED. STUDENT AID, https://perma.cc/3UC3-EWJR (archived Feb. 9, 2021) (noting that upon consolidation, a borrower may end up with a new servicer); Elyssa Kirkham, *Hate Your Federal Student Loan Servicer? Here's What You Can Do*, STUDENT LOAN HERO (updated Dec. 23, 2019), https://perma.cc/VB7X-NYCZ (recognizing that refinancing federal loans into a new private loan comes with a new servicer). In the former case, the borrower may not choose who the servicer is. *See Consolidating Your Federal Education Loans Can Simplify*

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a situation in which the only entity that can hold a government contractor accountable is the very agency with whom it has contracted[376]—and which in this context has supported contractors' assertions of invulnerability.

Even when contractors lose their individual battles,[377] confusion and conflation of the sovereign-shield doctrines benefit the government contractors and their agency partners to the detriment of consumers and their state advocates. This is the case for three reasons. First, no ruling precludes future application of these well-established and powerful doctrines, meaning that defendants can time and again argue that a state's law is preempted, for example, notwithstanding court decisions finding otherwise.[378] As a result, well-resourced servicers can repeatedly make the same arguments, emphasizing different facts,

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Your Payments, *supra*. In the latter, the borrower chooses the lender and could conceivably take into account who will actually service the loan when deciding whether to refinance. *See* Kirkham, *supra*.

376. Even then, agency accountability through contract is not a clear or easy path. *See* Brown, *supra* note 1, at 502 (explaining that an agency can sue its contractor for breach of contract under the Contract Disputes Act, "but successful litigation requires clear and enforceable contract terms and sufficient agency resources and motivation to monitor performance and pursue claims").

377. *See, e.g.*, Lawson-Ross v. Great Lakes Higher Educ. Corp., 955 F.3d 908, 911 (11th Cir. 2020); Nelson v. Great Lakes Educ. Loan Servs., Inc., 928 F.3d 639, 642 (7th Cir. 2019). As an analytical matter, we believe there is significant evidence that student-loan servicers would fail to meet the majority of the five factors identified in Part I. First, the Higher Education Act does expressly preempt disclosure notifications in 20 U.S.C. § 1098g. Under the canon of *expressio unius est exclusio alterius*, however, we would argue that Congress did not intend any other provisions to preempt state law. Second, student-loan servicers under contract with the federal government are not government-created entities; they are primarily profit-motivated companies with portfolios that go beyond their government contracts, presumably chosen because of their corporate structure and expertise. *See, e.g.*, Nelnet, Inc., *supra* note 260, item 1, at 3-5 (describing the diverse nature of this publicly traded company, including its federal servicing segment and the company's loan portfolio). Third, the Department of Education itself has noted the risk of variation when decisions are entrusted to the discretion of contractors. Press Release, U.S. Dep't of Educ., *supra* note 259 ("The current loan servicing environment, which Next Gen will replace, features nine different servicers operating on four different platforms, which can lead to customer confusion and inconsistent operations for the federal student loan programs. . . . Current loan servicing contracts also allow wide latitude in how servicers manage accounts, including staffing their own contact centers, crafting borrower outreach campaigns, and training customer service representatives.").

378. Issue preclusion does not necessarily prevent a defendant from recycling the same arguments in case after case. *See, e.g.*, Pennsylvania v. Navient Corp., 967 F.3d 273, 277, 293 (3d Cir. 2020) (rejecting the defendant servicer's argument, based on the Ninth Circuit's decision in *Chae v. SLM Corp.*, 593 F.3d 936 (9th Cir. 2010), that one provision of the federal Higher Education Act preempted state consumer-protection law on the specific facts of the case); *Lawson-Ross*, 955 F.3d at 919 (rejecting the same argument made by a different defendant).

in different tribunals.[379] Second, contractors are repeat players in this field. The great majority of federal student-loan dollars are serviced by three primary companies, and these three companies are joined with other servicers in a membership organization.[380] This market domination means that the servicers can take advantage of their collective experience to exploit the law to their benefit. Finally, because contractors are allied with the federal government, they can take advantage of the sovereign shield to evade liability in court while at the same time escaping accountability to state and federal lawmakers.[381] This lack of accountability leaves injured consumers without redress and also eliminates a lever to deter future bad conduct.

It is the inconsistency and incoherence of the doctrines—as set out in Part I—that permit the private servicers to march on, continue to fight, ignore distinctions among sovereign-shield defenses, claim the benefits of "federal-ness," and kick the can down the road. While each case is litigated, consumers lose and the balance of power shifts against them. Katharina Pistor has described a similar dynamic in a different context: how capital is created ("coded") in the law.[382] She uses Myriad Genetics' breast-cancer-susceptibility-gene (BRCA) patent as an example. Although the 1994 BRCA patent, as a DNA-only patent, was invalidated by the Supreme Court in 2013,[383] Pistor details how Myriad made $2 billion dollars selling its patented tests between 1997 and

379. *See supra* note 378. Further, a defendant may attempt to emphasize particular facts to argue, for example, that the state law basis of a claim constitutes a disclosure requirement, subject to preemption. *See, e.g.*, *Chae*, 593 F.3d at 942-43 (concluding that "[a]t bottom, the plaintiffs' misrepresentation claims are improper-disclosure claims" and noting that a disclosure that is proper under federal law "cannot simultaneously be misleading under state law, for state disclosure law is preempted by the federal statutory and regulatory scheme").

380. OFF. OF INSPECTOR GEN., *supra* note 260, at 6 (reporting that "[a]s of September 30, 2017, [the office of Federal Student Aid of the Department of Education] was responsible for about $1.147 trillion of federally held student loans," $950 billion of which "was assigned to four servicers—PHEAA ($319 billion), Great Lakes ($236 billion), Navient ($215 billion), and Nelnet ($180 billion)"). Great Lakes has since been acquired by Nelnet. *See* Press Release, Nelnet, *supra* note 260. The Student Loan Servicing Association claims all nine contractors servicing the "vast majority" of federal loans as members. *An Examination of State Efforts to Oversee the $1.5 Trillion Student Loan Servicing Market: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Fin. Servs.*, 116th Cong. (2019) (statement of C. Tapscott "Scott" Buchanan, Executive Director, Student Loan Servicing Alliance), https://perma.cc/UR9X-5ZRW ("The vast majority of . . . federal loans are currently serviced by nine contractors to the Department [of Education], all of whom are SLSA members.").

381. *See* Sabatino, *supra* note 1, at 187 ("Private companies are not chosen by voters to undertake public functions. They are hired, not elected.").

382. KATHARINA PISTOR, THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY 114, 126-31 (2019).

383. Ass'n for Molecular Pathology v. Myriad Genetics, Inc., 569 U.S. 576, 580 (2013).

2013, and how it capitalized on its market share and data generation to continue to generate profits even after its patent was invalidated.[384] Pistor's exposition of the benefits flowing to Myriad and its cohort can be applied to other consumer-law scenarios:

> Policing the boundaries of private law is a constant battle, and a costly one. The players with the best access to the code's masters push existing boundaries of the code's modules to bestow yet another claim of know-how with durable priority rights that are shielded against the world. They are betting that they will not be challenged, at least not too soon. Time works in their favor, because even if they fail to convince a future court that their specific coding strategy should be upheld, they have likely reaped a lot of wealth in the meantime. . . . In sum, the code of capital benefits from law's indeterminacy, from private autonomy that makes the modules of the code highly malleable devices in the hands of sophisticated lawyers, and from the fact that aggressive coders can play offense and exploit first-mover advantages.[385]

Like Myriad, the student-loan servicers are first-movers and repeat players that can force challengers to fight state statute by state statute. Costly fights and doctrinal incoherence operate to the benefit of the servicers and limit avenues of redress for injured consumers. In enabling these outcomes, the expansion of the sovereign shield tilts the balance of power away from states and consumers, on the one hand, and toward the federal government and its private contractors, on the other. And it reinforces the alliance between corporate America and the executive branch of the federal government. That alliance in turn has significant effects on the fragile balance of power between the federal government, states, corporations, and consumers.

C. Destabilization of Structural Principles

The sovereign shield arises from the Supremacy Clause.[386] Yet it is also in tension with two other, critical constitutional principles: federalism and the separation of powers. Expansion of the sovereign shield enables private actors to evade state law and regulation and undermine and destabilize the balance of power between states and the federal government. Similarly, expansion to evade federal law and oversight can undermine and destabilize the balance of power between the executive and legislative branches.

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384. PISTOR, *supra* note 382, at 114, 127. Pistor notes that Myriad attributed 74% of its 2017 earnings ($771 million) to hereditary-cancer testing. *Id.* at 114.

385. *Id.* at 215.

386. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . ."); *see also supra* note 3 and accompanying text.

1. Federalism

There is no generally accepted method to determine the proper balance of power between the states and the federal government[387] or between consumers and corporations.[388] Indeed, such questions are among the most fiercely debated in the legal academy, as well as in the courts.[389] We do not join the scholarly debate over the ideal allocation of power. Rather, we argue that a *shift* in the balance has dangerous consequences for consumers and individual citizens. And relatedly, we contend that the benefits of federalism are undermined by a broad application of the sovereign shield to government contractors.[390]

Federalism matters[391] in this context primarily because it protects individuals' private rights, specifically by combatting a self-interested federal government captured by a self-interested majority, and by pursuing the diffusion of power.[392] The alliance of government contractors and federal agencies increases the likelihood that the federal government will be co-opted

387. Federalism itself is "a system for allocation of democratic decision making power." Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1507 (1987) (book review); *see also* Aziz Z. Huq, Response, *Preemption Deals: Response to Robert Mikos*, 85 GEO. WASH. L. REV. 226, 227 (2017) ("[E]ven calculating the 'optimal' level of across-the-board preemption would entail daunting difficulties given the many domains across which the national and state governments interact.").

388. VERKUIL, *supra* note 1, at 8-9 ("[T]he goal is to balance the two positives of the private and public sectors—efficiency and accountability—in ways that confirm rather than threaten our legal and political traditions."). Not surprisingly, Verkuil does not specify what the proper balance might be and instead suggests that at least sometimes, the context should determine the outcome. *See, e.g.*, *id.* at 9.

389. *See, e.g.*, Ernest A. Young, *"The Ordinary Diet of the Law": The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 257-58 (analyzing the modern preemption doctrine within the context of federalism).

390. *See id.* at 263 (recognizing that preemption "has the potential to alter . . . vital dynamics," including the states' "important regulatory responsibilities and government functions that touch the daily lives of their citizens").

391. *See generally* McConnell, *supra* note 387, at 1492-512. McConnell reminds us that our federalist system originally sought to "promote three complementary objectives": to secure the public good, to protect private rights, and to preserve the spirit and form of popular government. *Id.* at 1492. He further identifies nine major themes of federalism: (1) responsiveness to diverse interests and preferences; (2) destructive competition for the benefits of government; (3) innovation and competition in government; (4) liberty through mobility; (5) self-interested government; (6) diffusion of power; (7) enforcement of laws; (8) nature of representation; and (9) public-spiritedness. *Id.* at 1493-510.

392. *See id.* at 1501 (recognizing that the civil rights acts, the criminal-procedure revolution, the federal standardization of liberties under the Bill of Rights, and statutorily created rights in the welfare-regulatory state have thrust the federal government into the role of the "primary protector of individual liberties"). It is also why we would argue that federal regulation and oversight should be a floor of protection, but that states should be permitted to act further in consumers' interests.

and influenced by private industry.[393] Because states are ostensibly more responsive to direct popular control,[394] a key tenet of federalism is threatened by the alignment of the executive branch and private industry behind an expanded sovereign shield.

The extension of the sovereign shield to federal contractors achieves a shift in the balance of power between the federal government and the states, but it does so neither directly (through explicit congressional effort to command or curtail state action) nor consistently (because not all contractors assert the shield in order to protect themselves from state law). Rather, it does so in individual lawsuits against private actors, brought by private citizens or state attorneys general. When PHEAA argues that states' efforts to use their traditional consumer-protection powers are preempted by the Higher Education Act,[395] for example, the action quietly undermines traditional police powers.[396] And when student-loan servicers assert immunity against state borrower bills of rights, they further chip away at state authority.

2. Separation of powers

While limiting states' abilities to enact and enforce laws and regulations raises federalism concerns, exploitation of the sovereign shield to escape federal law and oversight raises a separation-of-powers concern.[397]

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393. *See supra* Part II.C; *see also* JOHN J. CORSON, BUSINESS IN THE HUMANE SOCIETY 73-74 (1971) ("[Post-war contracting] has been described as 'the greatest desocialization that this country has experienced.' It has established a 'new form of Federalism,' i.e., a 'federation' through which the federal government gets work done in association with private enterprise.").

394. *See, e.g.*, McConnell, *supra* note 387, at 1509 ("One of the principal arguments for substantial state autonomy was that representatives in a smaller unit of government will be closer to the people."). Some scholars argue that this is not necessarily the case. *See, e.g.*, Seifter, *supra* note 23, at 110 (arguing that state government is not actually closer to the people). However, in the case of student-loan servicers, the attorneys general in some states have asserted state law claims in an effort to protect their consumers. *See supra* notes 262-63 (listing lawsuits against servicers, including suits brought by state attorneys general).

395. *See, e.g.*, California *ex rel.* Comm'r of Bus. Oversight v. Pa. Higher Educ. Assistance Agency, No. 20-cv-03150, 2020 WL 5877669, at *2-4 (N.D. Cal. Oct. 2, 2020) (holding California's Student Loan Servicing Act preempted by the federal Higher Education Act), *appeal filed*, No. 20-17266 (9th Cir. Nov. 18, 2020).

396. Consumer protection is traditionally considered part of the state police power. *See supra* note 53 and accompanying text; *see also* Greenwood Tr. Co. v. Massachusetts, 971 F.2d 818, 828 (1st Cir. 1992) (describing "consumer protection" as a "subject[] over which the states have traditionally exercised their police powers"); Gen. Motors Corp. v. Abrams, 897 F.2d 34, 36 (2d Cir. 1990) (recognizing that "the protection of consumers from unfair practices is a traditional state police power function").

397. *See* Michaels, *supra* note 6, at 731-33 (explaining how privatization workarounds raise separation-of-powers concerns).

Government contractors' attempts to use their relationship with the sovereign to avoid liability under federal law and oversight by federal agencies and congressional committees raise serious concerns about the allocation of power between the executive and legislative branches.[398]

While a critical principle for our constitutional government, separation of powers is "neither doctrinaire nor rigid."[399] As a Ninth Circuit panel has identified, there are two primary separation-of-powers purposes: (1) to "prevent . . . [a] dangerous concentration of power in one branch";[400] and (2) "as a practical measure to facilitate administration of a large nation by the assignment of numerous labors to designated authorities."[401] Courts have further recognized the importance of the separation of powers to constrain government actors.[402]

Because the sovereign shield enables an alliance between the executive branch and corporations to the detriment of individual rights and liberties, we are particularly concerned with the concentration of power in one branch.[403] And because executive agencies may enter into government contracts and support their contractors in the effort to escape oversight and liability,[404] we focus our attention on the executive branch. If a federal statute sets out restrictions on telephone solicitations, a contractor's ability to use the sovereign shield to avoid liability for violating that statute would undermine congressional intent. If a congressional oversight committee seeks to call a government-contractor witness to understand potential problems with the contractor's actions, the contractor's ability to borrow the protection of the

398. *See* Brown, *supra* note 1, at 519 (noting that it is appropriate, after a "fair reading of the constitutional text," to "consider whether, in assigning federal powers to nonfederal actors, Congress is handicapping another branch from performing its respective constitutional role").

399. Chadha v. INS, 634 F.2d 408, 421 (9th Cir. 1980), *aff'd*, 462 U.S. 919 (1983).

400. *Id.* at 422.

401. *Id.* at 423. Yet some scholars have found that the application of separation-of-powers principles over time has not been so consistent or clear. *See, e.g.*, Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L.J. 346, 352, 408 (2016) (describing judicial sensitivity to what the authors call a "thick political surround," a "jostling array of lobbyists, political party structures, media actors, and domestic and foreign interest groups" affecting the conduct of each branch of government (emphasis omitted)).

402. *See, e.g.*, *Chadha*, 634 F.2d at 433-34 (citing THE FEDERALIST No. 47 (James Madison)) ("[T]he framers deemed it necessary not only to design checks on [legislative] power by means of the other branches, but also to use the internal check of bicameralism.").

403. *See* Michaels, *supra* note 6, at 766 ("The executive stands to benefit vis-à-vis the other principals from outsourcing arrangements that expand executive authority and enhance unilateral policy discretion.").

404. For examples of such collaboration, see notes 271, 334 and the accompanying text above.

sovereign shield to avoid answering such questions undermines congressional power and authority.[405]

Further, if a federal statute authorizes one federal agency to regulate or supervise certain conduct, there is a potential separation-of-powers problem when another agency affirmatively directs its contractors to evade such oversight and supervision.[406] Jason Marisam's work on the interagency marketplace suggests that this a very real concern.[407] Marisam considers whether executive agencies should be permitted to redelegate authority amongst themselves to promote efficiency.[408] While arguing for increased authority for such interagency redelegation, Marisam recognizes certain risks affecting the separation of powers. Specifically, he calls attention to a risk of redelegation during times of divided government and when redelegation effects a transfer of authority from an independent agency to a dependent agency.[409] In the context of student-loan servicers, there was an effort to reduce or eliminate the regulatory authority of an independent agency (the CFPB) in favor of a dependent agency (the Department of Education) in a time of divided government.[410]

The expansion of the sovereign shield also undermines the separation-of-powers goal of preventing a dangerous concentration of power.[411] As Justice Brandeis put it:

> The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction

405. *See supra* notes 318-20 and accompanying text (discussing the use of the sovereign-shield rationale by PHEEA's CEO to avoid appearing before the House Education Committee).

406. *See, e.g., supra* notes 316-17, 333 and accompanying text (discussing how the Secretary of Education directed student-loan servicers to evade oversight and supervision by the CFPB).

407. *See* Jason Marisam, *The Interagency Marketplace*, 96 MINN. L. REV. 886, 929 (2012).

408. *Id.* at 927-29.

409. *Id.* at 928-29.

410. The Supreme Court has limited the independence of the CFPB on separation-of-powers grounds. *See* Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2192 (2020) ("[T]he structure of the CFPB violates the separation of powers . . . [but] the CFPB Director's removal protection is severable from the other statutory provisions bearing on the CFPB's authority. The agency may therefore continue to operate, but its Director, in light of our decision, must be removable by the President at will.").

411. *See* Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 MINN. L. REV. 1454, 1474-75 (2009) (arguing that executive agencies' overlapping responsibilities and independent agencies' "insulation from presidential (and hence democratic) control" raise separation-of-powers problems and deserve scrutiny).

> incident to the distribution of the governmental powers among three departments, to save the people from autocracy.[412]

In the absence of federal oversight and supervision, we are left, again, with a single, potentially interested entity able to hold private entities accountable for performance of a public service they have been contracted to provide. That entity, of course, is the very agency in contract, partnership, and alliance with the contractor.

Conclusion

In this Article, we have raised serious concerns about the extent to which private companies may shield themselves from liability, regulation, and oversight because of their contractual relationship with the federal government. Using student-loan servicers as a case study, this Article has identified the ways that contractors have exploited three doctrines—federal preemption, derivative sovereign immunity, and intergovernmental immunity—that form what we label a sovereign shield to liability and oversight. And the Article has warned that the successful deployment of this shield to immunize private contractors enables an alliance between private industry and the executive branch of the federal government. That alliance simultaneously effects a shift in the balance of power between states and the federal government, between the executive and legislative branches, and between consumers and businesses.

These shifts may have profound consequences given the extent to which the federal government relies on private companies to perform essential functions, from compensating jurors to servicing student loans. Consumers may be left with no remedy for harms if executive agencies choose not to exercise their authority, the executive may operate under reduced legislative oversight, and private businesses may operate without fear of state consumer-protection laws. Yet all of this happens quietly and slowly, with little fanfare. For this reason, the doctrines that constitute the sovereign shield demand scrutiny and aggressive limits, to prevent fundamental shifts in balances of power that threaten the public good.

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412. Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).