



ARTICLE

## The Sovereign in Commerce

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**Abstract.** The federal government is increasingly a commercial actor, providing retail services directly through its own agencies and indirectly through private-sector contractors. Government involvement with and in the private sector is intended to capitalize on the expertise and efficiency of businesses, benefit taxpayers, and promote public ends. Yet this involvement also confers advantages that benefit the executive branch and its contractor allies at the expense of consumers and states. Our prior work in these pages examined how a muddle of doctrines that form a *sovereign shield* can be exploited by contractors and the executive branch to evade civil liability and regulatory oversight. It tied the expansion of this sovereign shield to the relative empowerment of the federal government at the expense of the states, the executive branch at the expense of the legislative branch, and the private sector at the expense of consumers. In developing a doctrinal response to the risks identified, this Article draws on the insights of scholars who have studied federal–state relations, contractor–agency relations, and business–consumer relations, and it bridges the gaps between these literatures into which the sovereign-shield phenomenon falls.

This Article argues that the solution to the sovereign-shield problem lies in redefining the question. In determining whether an actor enjoys the sovereign shield’s protection from liability and regulation, this Article proposes that the analysis should turn on the nature of the activity performed, not the identity of the actor performing it. If the activity is fundamentally commercial, the actor—whether a government agency acting on its own or through its contractor—should not be protected. This Article outlines a protocol for courts to implement such a proposal,

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drawing on well-established doctrines dating back to Supreme Court decisions from the early nineteenth century. Shifting to this activity-based approach would help preserve balances of power between states and the federal government, between the executive and legislative branches, and between businesses and consumers.

**Table of Contents**

Introduction .....	1104
I. Exploitation of the Sovereign Shield.....	1111
II. The Challenge of Tactics That Fall Through the Cracks.....	1114
A. Federalism: The Feds (and Contractors) Versus the States.....	1118
B. Separation of Powers: The Executive Versus the Legislature and Agencies Versus Oversight.....	1122
C. Democracy: Business Versus Accountability .....	1124
D. Winners and Losers: Cascading Effects of the Expanded Sovereign Shield....	1125
III. Brightening the Lines: Classifying Commercial Conduct .....	1126
A. Defining “Commercial” .....	1129
1. Sue-and-be-sued clauses .....	1133
2. The Foreign Sovereign Immunities Act .....	1136
3. The market-participant exception to the Dormant Commerce Clause ...	1139
B. A New Protocol.....	1142
1. Did Congress unambiguously preempt state law or provide immunity for the challenged conduct?.....	1143
2. Is the challenged conduct commercial?.....	1145
3. Who engaged in the challenged conduct?.....	1146
4. If the actor is not the government, who is liable under traditional agency law principles?.....	1147
C. Returning to First Principles .....	1152
D. Applying the Protocol: Bright Lines and Grey Areas.....	1155
1. <i>Student Loan Servicing Alliance v. District of Columbia</i> .....	1156
2. <i>Scott v. J.P. Morgan Chase &amp; Co.</i> .....	1158
3. <i>Lamb v. Martin Marietta Energy Systems, Inc.</i> .....	1159
Conclusion.....	1161

## Introduction

The federal government is a unique actor in the national economy. It performs an astonishingly diverse array of activities,<sup>1</sup> and at the same time it is protected from liability and oversight by potent legal doctrines.<sup>2</sup> This *sovereign shield*—comprising the doctrines of federal preemption, sovereign immunity, and intergovernmental immunity<sup>3</sup>—protects federal actors from civil liability for a range of harms they may have caused.<sup>4</sup>

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1. See Kate Sablosky Elengold & Jonathan D. Glater, *The Sovereign Shield*, 73 STAN. L. REV. 969, 974-975, 975 nn.12-18 (2021) (discussing federal government activities performed through contractors).
  2. These protections, discussed in Part I below, 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 . . .”). While the sovereign-shield doctrines are not explicitly enshrined in the Constitution, courts have traced the doctrines back to the Supremacy Clause. See *The Siren*, 74 U.S. (7 Wall.) 152, 154 (1869) (“The [sovereign-immunity] doctrine rests upon reasons 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.”); *Student Loan Servicing All. v. District of Columbia*, 351 F. Supp. 3d 26, 46 (D.D.C. 2018) (discussing intergovernmental immunity and preemption).
  3. There has been critique of, and pushback on, the application of each of these sovereign-shield doctrines. See, e.g., S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685, 714-18 (1991) (warning of the potential normative drawbacks of federal preemption); Daniel J. Meltzer, *Preemption and Textualism*, 112 MICH. L. REV. 1, 2 (2013) (describing criticisms of federal preemption); Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT’L L. REV. 521, 522 (2003) (describing the unclear origin of federal sovereign immunity and the “adverse effects of sovereign immunity on courts’ capacities to provide individual justice”); David S. Rubenstein, *Supremacy, Inc.*, 67 UCLA L. REV. 1130, 1197 (2020) (arguing that intergovernmental immunity for federal contractors constitutes an unjustifiable “constitutional windfall”). We take no position on the general need for governmental immunity. This Article instead seeks to identify a doctrinal fix to the exploitation and abuse of the sovereign shield at the expense of citizens in commercial contexts. Our proposal, in large part because it relies on precedent that categorizes and assigns liability based on commercial actions, is limited in scope and does not require wholesale abandonment of any of the sovereign-shield doctrines. We take up noncommercial activities in future work. See Kate Sablosky Elengold & Jonathan D. Glater, *Qualified Sovereignty* (May 22, 2021) (unpublished manuscript) (on file with authors).
  4. Some statutes explicitly waive sovereign immunity for certain actions. See, e.g., 28 U.S.C. §§ 1346, 1491, 2671-2680. Although some of the activities covered by express congressional sovereign-immunity waivers are commercial, statutory schemes create numerous, far-reaching waiver exceptions. See, e.g., 28 U.S.C. § 2680(a) (exempting from  
*footnote continued on next page*

The protection afforded by the sovereign shield extends beyond the federal government. As we have warned in our prior work, courts have extended sovereign-shield protections to a wide array of private actors under contract with the federal government. The result is that private actors receive protection from both potential liability and mechanisms of legislative oversight.<sup>5</sup>

Contractors have sought sovereign-shield protections in a wide array of cases. For example, student-loan servicers under contract with the Department of Education asserted preemption and intergovernmental-immunity defenses to avoid liability and regulation under a local law designed to protect borrowers from bad servicer behavior.<sup>6</sup> A bank under contract with the Department of the Treasury to issue cash cards to District of Columbia jurors relied on sovereign-shield defenses to avoid liability when it allegedly charged the jurors outrageous fees and failed to provide them full compensation.<sup>7</sup> And Department of Energy contractors asserted all three sovereign-shield theories to defend themselves against allegations including willful, wanton, and grossly negligent conduct in their management of enriched uranium.<sup>8</sup> In each of these cases, the court determined that, under certain factual conditions, the contractor could be protected from liability by the sovereign shield.<sup>9</sup>

Businesses performing the same activities on their own would enjoy no such privileged status. Further, as the federal government has increasingly

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waiver “[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused”). Therefore, while amending or expanding sovereign-immunity waivers could operate as a policy fix, doing so would require a significant legislative overhaul. Simply including additional activities in statutes waiving sovereign immunity would not by itself fix the problems we have identified.

5. See Elengold & Glater, *supra* note 1, at 1032-46.

6. *Student Loan Servicing All.*, 351 F. Supp. 3d at 36, 40-41, 46-47, 72-73.

7. *Scott v. J.P. Morgan Chase & Co.*, 296 F. Supp. 3d 98, 102-04, 106-07 (D.D.C. 2017).

8. *Lamb v. Martin Marietta Energy Sys., Inc.*, 835 F. Supp. 959, 960-62 (W.D. Ky. 1993). For additional examples beyond *Student Loan Servicing Alliance*, *Scott*, and *Lamb*, see Elengold & Glater, *supra* note 1, at 974-975, 975 nn.12-18.

9. *Student Loan Servicing All.*, 351 F. Supp. 3d at 65-66, 72 (finding that the District of Columbia’s regulatory scheme ran afoul of congressional purpose and so was preempted at least with respect to certain classes of federal student loans); *Scott*, 296 F. Supp. 3d at 107-08 (describing the circumstances under which derivative sovereign immunity would defeat the plaintiffs’ claims); *Lamb*, 835 F. Supp. at 965-68 (considering, but ultimately rejecting, the defendant corporations’ “argument] that nothing was done at the plant without [Department of Energy] consent or approval and, therefore, all activities at the plant would fall within the government’s discretionary function immunity”).

hired private businesses to fulfill its functions,<sup>10</sup> the executive branch of the federal government has developed closer relationships with those businesses. This “alliance of Goliaths” confers benefits on both sides.<sup>11</sup> Businesses get paid, and they get to leverage their association with the executive branch in legal conflicts with the legislative branch and state governments. Privatization and outsourcing also benefit the executive branch by permitting it to advance ideological aims<sup>12</sup> and evade certain forms of oversight.<sup>13</sup> In effect, private businesses, in collaboration with the federal executive, increase their ability to protect themselves from consumers both directly (by undermining civil liability) and indirectly (by disempowering elected representatives in the legislature).<sup>14</sup> The result is the encroachment of self-interested private business on our democracy and the expansion of federal executive authority at the expense of Congress and the states.

This is the diagnosis of the problem, which we extensively examined in a previous article published in these pages.<sup>15</sup> But what is the solution? In some instances, it makes sense to offer legal protection to government actors *and* their private contractors because the federal government is acting in a uniquely public fashion, providing a clear public good. In other cases, the government—directly or through private contractors—provides a commercial good or service. In these cases, it is less clear as a normative matter whether or to what extent the sovereign shield should protect the government contractor (or the government) from liability and oversight. This Article discusses both where and how those lines should be drawn.

Although constitutional, administrative, and consumer law scholars have all brought their expertise to bear on issues raised by privatization and outsourcing, this Article explains why the phenomenon we identify has fallen

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10. This phenomenon is well established. *See, e.g.,* Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397, 399 (2006) (describing the increasing prevalence of federal contracting in government work).

11. Elengold & Glater, *supra* note 1, at 1031-34.

12. Harvey B. Feigenbaum & Jeffrey R. Henig, *The Political Underpinnings of Privatization: A Typology*, 46 WORLD POL. 185, 192 (1994) (stating that “[t]actical privatizations” are undertaken to achieve the political goals of individuals or groups).

13. Craig D. Feiser, *Privatization and the Freedom of Information Act: An Analysis of Public Access to Private Entities Under Federal Law*, 52 FED. COMM’NS L.J. 21, 55 (1999) (noting that “the diversification of the operations of government in this century has made it harder for the public to find out what its government is doing”). In *The Sovereign Shield*, we also identify at least one instance in which a contractor defied a legislative attempt at oversight. *See* Elengold & Glater, *supra* note 1, at 1028.

14. Elengold & Glater, *supra* note 1, at 1032-46 (arguing that exploitation of the sovereign shield both limits remedies for injured consumers and undermines oversight by the states and the federal government).

15. *See id.*

through the cracks in these bodies of scholarship. Scholars writing about federalism have increasingly recognized the possibility for cooperation and competition between states and the federal government, but they have not delved deeply into the role that private businesses can have on the balance of power between state and federal actors.<sup>16</sup> Scholars analyzing relationships between federal agencies and the private sector have identified myriad ways that businesses and other federal agencies can affect federal regulatory policy, but they have largely ignored the role that the states play as regulators and policy drivers.<sup>17</sup> And consumer law scholars have recognized the harmful effects of businesses' attempts to foreclose remedies for victims of corporate wrongdoing, but they have not focused on this phenomenon's implications for federalism principles or democratic well-being.<sup>18</sup>

There is another problem. In determining whether to apply sovereign-shield doctrines, courts have generally focused on the actor rather than on the action taken.<sup>19</sup> Scholars have criticized courts' conventional focus on the nature of the actor,<sup>20</sup> writing that this approach is misguided because of the considerable degree of intermingling and the blurring of lines between government and business.<sup>21</sup> In developing a doctrinal response to the sovereign-shield problem, we draw on these scholars' work and take up their invitation to think in concrete terms about drawing a line between those activities that should result in liability and those that may be conducted with effective impunity. Like these scholars, we fear that the consequences of permitting existing doctrinal confusion to persist are profound. Our fear is especially pronounced given the staggering number and variety of services

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16. See *infra* Part II.A.

17. See *infra* Part II.B.

18. See *infra* Part II.C.

19. In the lawsuit over the regulatory regime established by the District of Columbia for student-loan servicers, for example, the trial judge focused on whether the government's protection from liability extended to student-loan servicers based on their status as federal contractors, not on whether the nature of the work performed should result in the grant of such protection. See, e.g., *Student Loan Servicing All. v. District of Columbia*, 351 F. Supp. 3d 26, 61-62, 73 (D.D.C. 2018).

20. See, e.g., Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1371 (2003) (criticizing the current doctrine's "emphasis on government involvement in the specific act at issue [as] a very poor basis on which to rest such a distinction" between acts that should be attributed to the government and those that should not).

21. *Id.* at 1370-71; see also PAUL R. VERKUIL, *OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT* 6 (2007) (warning of risks arising because "[t]he relationship of government to the private sector is very much in flux"); Jon D. Michaels, *Sovereigns, Shopkeepers, and the Separation of Powers*, 166 U. PA. L. REV. 861, 899-900 (2018) (discussing and critiquing direct government market participation).

that the federal government provides to the people of the United States, both directly and through hired contractors.<sup>22</sup>

We suggest, then, that a shift in thinking is necessary to move toward a resolution of the sovereign-shield problem. We argue that the problem does not arise because the federal government relies increasingly on contractors that assume a dual private–public character. Rather, we argue that the problem arises because the federal government *itself* has assumed a dual character: It is both a sovereign and a business. Put slightly differently, it is not about *who* is doing the government’s work, but about *what sort of work* the government is doing. Directly and indirectly the federal government is in the retail business. Many of its services, like running recruiting campaigns,<sup>23</sup> issuing loans,<sup>24</sup> and operating health care plans,<sup>25</sup> are commercial in nature—meaning that entities other than the federal government provide identical or very similar services directly to consumers.

Thus, this Article proposes that the focus of judicial analysis of the sovereign shield should shift from the relationship between the sovereign and its contractor to the nature of the challenged action: If the action can be classified as commercial, then the provider should not be treated as a federal entity for liability purposes. While Congress could take up this shift through statutory changes, doing so is not necessary. As we set out below, there is an existing jurisprudential foundation that allows courts to make this doctrinal shift without congressional attention or significant intervention from the Supreme Court.

To be sure, changing the question does affect the answer. Accordingly, this Article argues that even if a federal entity itself performs a commercial activity, that entity should not benefit from anything less than express federal legislative preemption, a finding of federal field preemption,<sup>26</sup> or an explicit congressional grant of immunity. At first glance, this may appear to be a radical change from the current jurisprudence. Early Supreme Court cases from the 1800s, however, recognize that a sovereign entity or instrumentality *can* face different consequences when engaged in commercial activities.<sup>27</sup> In fact, in a string of cases, the Court recognized that a government entity could

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22. We take no position on the normative desirability of outsourcing governmental functions to private businesses. See *infra* Part I. This Article instead looks at the exploitation of doctrines that protect the federal government and its contractor allies and provides a protocol for reassessing liability for commercial harms.

23. *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 667 (2016).

24. *Nelson v. Great Lakes Educ. Loan Servs., Inc.*, 928 F.3d. 639, 643 (7th Cir. 2019).

25. *N. Mich. Hosps., Inc. v. Health Net Fed. Servs., LLC*, 344 F. App’x 731, 734 (3d Cir. 2009).

26. See *infra* note 212 and accompanying text.

27. See *infra* Part III.C.

not claim the special protections of the sovereign when it was engaged in commercial actions.<sup>28</sup> This thread has carried through various doctrinal contexts.<sup>29</sup> And it remains good law: In 2019, the Supreme Court recognized the difference between commercial and noncommercial activity in construing sovereign immunity's extension to a federal instrumentality.<sup>30</sup> Following our proposal, courts could shrink the reach and power of the sovereign shield. This would both preserve long-standing distributions of power and enable consumers to obtain remedies for harms caused by the performance of a commercial activity, whether the actor is the sovereign or its agent.

And this is a commonsense solution.<sup>31</sup> When the government undertakes noncommercial activity, directly or indirectly, such activity should be presumptively entitled to relevant liability and regulatory immunity. Furthermore, if Congress expressly preempts regulation of a specific commercial activity or expressly affords the commercial actor immunity, such activity should be entitled to relevant liability and regulatory immunity. By contrast, when the government undertakes commercial activity—either directly or indirectly—it should *not* be entitled to such extraordinary protections. After all, even if the federal government itself performed all the services now provided on its behalf by contractors, the sovereign shield should not hamper or outright bar recovery by victims of nefarious or incompetent actions that violate the law. When sovereign immunity, intergovernmental immunity, or preemption has this preclusive effect, it matters little to the victim seeking redress whether the federal government caused harm directly or through a contractor. The result is the same: denial of a remedy.<sup>32</sup>

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28. *See infra* Part III.C.

29. *See infra* Part III.A.

30. *Thacker v. Tenn. Valley Auth.*, 139 S. Ct. 1435, 1443 (2019).

31. Jon Michaels has suggested a similar approach, calling for designation of a contractor as a “state actor . . . [based] on an actor’s tools, responsibilities, and outlook rather than on what uniform she wears or whether she happens to be closely supervised by a government official.” Michaels, *supra* note 21, at 899. We agree with Michaels insofar as he does not prioritize the status of the contractor as a private entity, and we further specify that what should be decisive is the nature of the service provided. We go on to describe how such a mode of analysis could be made doctrinally operational. *See infra* Part III.

32. In making these arguments we recognize that the viability of a public–private distinction has come under considerable judicial and scholarly criticism, with some suggesting that no line can consistently be drawn to divide these spheres of activity. *See, e.g.*, Alfred C. Aman, Jr., *Privatization and Democracy: Resources in Administrative Law*, in *GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY* 261, 263 (Jody Freeman & Martha Minow eds., 2009) (arguing that the “distinction between public and private . . . tends to conceal as much as it reveals of the complexities and stakes in contemporary governance”). There is merit to this argument, which is why we focus on the distinction between commercial and noncommercial, a distinction that has been successfully deployed in other doctrinal contexts. *See infra* Parts III.A, .B.2.

The discussion that follows has four Parts. Part I, which draws on materials described more fully in our companion article, *The Sovereign Shield*, defines the sovereign-shield phenomenon and delineates how federal contractors may evade liability and oversight by exploiting the doctrines of preemption, derivative sovereign immunity, and intergovernmental immunity. It then illustrates how these three potent doctrines enable a powerful alliance between the federal executive branch and its private contractors, an alliance that risks shifting long-standing balances of power between the states and the federal government, between the executive and the legislative branches, and between consumers and businesses.

Part II situates the sovereign-shield phenomenon in the context of legal scholarship that has explored agency–business relationships and federal–state contests over legislative authority. This Part explores the difficulty of placing sovereign-shield arguments into a single scholarly box. The assertion of immunity to state-law claims implicates traditional federalism concerns; the expansion of executive power through the use of contractors implicates separation-of-powers concerns; and the state-law claims at issue arise under consumer law, an area of law that the Constitution does not consider and which typically goes unaddressed in critiques of rising corporate power. To lay the groundwork for our proposal, then, we situate the sovereign-shield problem across and between constitutional law, administrative law, and consumer law and explain how the insights of scholars in each field aid in the development of a solution.

Finally, Part III outlines the solution: a jurisprudential protocol, rooted in existing law, for determining whether a challenged action should be entitled to sovereign-shield protections regardless of the actor. That protocol rests on the distinction between commercial and noncommercial conduct—a distinction that courts regularly rely on in other well-established doctrinal areas, including the assessment of the scope of sue-and-be-sued clauses, the application of the Foreign Sovereign Immunities Act, and the application of the market-participant exception to the Dormant Commerce Clause. Thus, we argue that such a distinction is possible. With that foundation, we set out a four-step decision tree that a reviewing court could use to evaluate whether an injured party has an avenue for redress or is barred by the sovereign shield. We further suggest that our protocol, and the theories on which it is based, is not radical; rather, it reinforces a mode of analysis from early constitutional cases recognizing that a single entity can perform different functions with different repercussions.<sup>33</sup> Revitalizing the analysis deployed in these early cases would preserve essential balances of power and strengthen the legal and regulatory mechanisms for holding federal contractors and the federal government alike

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33. See *infra* Part III.C.

liable for wrongful conduct. Part III offers three examples—taken from the case examples set forth above<sup>34</sup>—to show how our protocol could be implemented.

## I. Exploitation of the Sovereign Shield

Our prior article, *The Sovereign Shield*, identified and analyzed the doctrinal arguments that federal contractors have made in an attempt to evade liability and oversight under state and federal law. Contractors try to avail themselves of the sovereign shield, a barrier to liability and regulation based on one or more of the following assertions: (1) federal preemption of state law; (2) sovereign immunity derived from a contractual relationship with the federal government; and (3) intergovernmental immunity, also dependent on the relationship between the contractor and the federal government. For a contractor, the precise choice of doctrine is of little consequence; contractors simply seek to take advantage of the protection of “federal-ness.”<sup>35</sup>

Although the three sovereign-shield doctrines are ostensibly distinct, the same core factors have figured into judicial analyses of whether the sovereign’s protections flow to its contractor under each doctrine. Our prior work identified five factors that courts generally use to determine whether federal protections transfer to a nongovernmental actor. First, courts consider congressional intent, asking whether lawmakers intended federal law to displace state law or regulation in the context at issue.<sup>36</sup> Second, courts consider the character of the contracted institution, asking whether the entity asserting a defense to liability was created by the government to serve a national purpose and whether the entity is a federal instrumentality or agent.<sup>37</sup> Third, courts consider whether the challenged conduct was discretionary, asking whether the contractor had control over how a particular activity was performed.<sup>38</sup> Fourth, and relatedly, courts consider whether the contractor exceeded its authority and went beyond the terms of the contract in committing the harmful act.<sup>39</sup> Finally, courts ask whether the state adversely and impermissibly hampered a federal policy.<sup>40</sup> Using a case study of student-

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34. See *supra* notes 6-8 and accompanying text.

35. See Elengold & Glater, *supra* note 1, at 1013-14. Indeed, the contractor may be successful in the long run even if unsuccessful in blocking the claimant in a particular case. This is because of the value gained from time spent on litigation and because assertions of the sovereign shield can still be used in future cases to defeat claims. *Id.* at 1039-40.

36. *Id.* at 995-98.

37. *Id.* at 998-1001.

38. *Id.* at 1001-04.

39. *Id.* at 1004-07.

40. *Id.* at 1007-10.

loan servicers under contract with the Department of Education to manage a trillion-dollar loan portfolio, our previous article traced how federal contractors, with the support of their executive branch partners, can move in and between doctrinal defenses to expand the sovereign shield.<sup>41</sup>

Exploitation of the sovereign shield leads to previously unexplored normative consequences that might get lost in the doctrinal weeds. First, by limiting avenues of recovery, expansion of the sovereign shield tips the balance between private industry and consumers in industry's favor.<sup>42</sup> When contractors successfully use sovereign-shield doctrines to prevent or defeat claims by consumers (or states acting to protect their constituents), the courts deny consumers redress. The harms go unremedied. This is a profound consequence not only for the affected consumer but also for other consumers who remain vulnerable to the contractor's future harmful conduct. Unless the contracting entity chooses to exercise disciplinary power over the contractor, there is no incentive for the contractor to change its behavior.

Second, by undermining state legislatures and state attorneys general, sovereign-shield defenses shift the balance between states and the federal government, destabilizing traditional federalism principles.<sup>43</sup> If the sovereign shield trumps state laws protecting consumers, then the states themselves are effectively divested of their police power over that sector—a power that has long been recognized as core to a state's ability to protect its residents.<sup>44</sup> State attorneys general are effectively neutralized. So are state and local lawmakers, who may otherwise attempt to oversee federal contractors' conduct by imposing regulatory regimes or to protect consumers by rearming attorneys general with state-law causes of action.<sup>45</sup>

Third, by limiting accountability mechanisms to whatever happens to be in the terms of a business's contract with an executive agency, exploitation of the sovereign shield chips away at the separation of powers.<sup>46</sup> A private business may argue that it is not subject to federal legislative oversight or, as we have described, defy congressional demands entirely.<sup>47</sup> To the extent that the executive branch, by operating through private businesses, evades

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41. *Id.* at 1010-32.

42. *Id.* at 1038-41.

43. *Id.* at 1041-43.

44. *See, e.g.,* *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 35-36 (2007) (Stevens, J., dissenting) (observing that "[c]onsumer protection is quintessentially a 'field which the States have traditionally occupied'" (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947))).

45. *See, e.g.,* *Student Loan Servicing All. v. District of Columbia*, 351 F. Supp. 3d 26, 41, 75-76 (D.D.C. 2018).

46. *Elengold & Glater*, *supra* note 1, at 1043-46.

47. *See supra* note 13.

oversight by the legislature, that shift in power limits the accountability of both the federal principal and the contractor agent.<sup>48</sup> Without accountability to lawmakers or courts, there is no remedy for past misconduct or incentive to improve future behavior. Nongovernmental organizations, the institutions of civil society that often provide an important check on government action that might otherwise escape public notice, may similarly lack a means of information gathering when the government acts through a contractor. For example, the contractor might successfully assert that it is not subject to the demands of the Freedom of Information Act<sup>49</sup> or, if applicable, the procedural requirements of other laws. Thus the executive branch, by acting indirectly, may face fewer constraints than it would were its agencies to act directly. This quiet power grab undermines democratic accountability.

Taken together, the subtle and dangerous effect of the expansive sovereign shield is the corruption of democratic values, as the alliance between the executive branch and its contracting partner results in *de facto* policymaking without regard for other actors in civil society. When a private business successfully deploys the sovereign shield, it protects itself and its agency partner from consumers by both shutting down civil litigation and disempowering the consumers' elected representatives. And the greater the degree of industry impunity in the conduct of business, the more power and wealth private actors accumulate. The accumulation of power and wealth enables private contractors to influence federal policy; without avenues for private or legislative redress, this damages the well-being of the republic because it may impede the government's responsiveness to the needs of the people.<sup>50</sup>

We do not take a position on the virtues or costs of outsourcing government services to private businesses in general. We leave the debate about the substantive merits of outsourcing to other scholars,<sup>51</sup> and focus instead on the repercussions of exploiting the sovereign shield—to individuals in desperate need of a remedy, to the delicate balance between states and the federal government, and to the encroachment of self-interested private business on our democracy.

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48. If the executive exercises oversight, this might be less of a problem. But when the executive affirmatively advocates for insulation of the contractor, as in the case of student-loan servicing, *see* Elengold & Glater, *supra* note 1, at 1018-32, that should cause more concern.

49. 5 U.S.C. § 552.

50. This was the fear famously expressed by President Dwight D. Eisenhower speaking of the risk posed to democracy by the rise of businesses serving the military, the "military-industrial complex." President Dwight D. Eisenhower, Farewell Address 3 (Jan. 17, 1961), <https://perma.cc/7K9X-Y2H5>.

51. *See, e.g.*, VERKUIL, *supra* note 21, at 2-6 (describing the dangers of outsourcing taken too far).

## II. The Challenge of Tactics That Fall Through the Cracks

When federal contractors invoke the sovereign shield, they appeal to a muddle of different doctrines.<sup>52</sup> Because the sovereign shield implicates federalism, separation of powers, and relations between businesses and consumers, no extant body of literature addresses this phenomenon in all of its dimensions. The problem necessarily falls through the cracks. But the literatures on each aspect of the problem yield important insights that inform our development of a comprehensive doctrinal response. This Part situates the sovereign shield across these existing literatures, explains how the sovereign shield's implications can escape complete analysis within each body of scholarship, and distills lessons from across subfields to fashion a proposed solution.

Consider student-loan servicers, private companies hired by the Department of Education to help manage its portfolio of federal student loans. For several years, fourteen private companies collected and kept track of the payments and balances of 36 million Americans who owed federal student-loan debt.<sup>53</sup> Borrowers interacted primarily with those servicers.<sup>54</sup> Borrowers and state attorneys general have filed numerous lawsuits against servicers for violations of state and federal law,<sup>55</sup> and both state and federal lawmakers have attempted to assert authority to examine or regulate the servicers' conduct.<sup>56</sup> In their battle to (1) avoid potential liability to consumers under state and federal law; (2) undermine state regulatory efforts; and (3) forestall federal oversight, the servicers have pointed to their contractual relationships with the Department of Education.<sup>57</sup> This move implicates three areas of legal scholarship.

When the servicer asserts that it is insulated from civil liability under state law, it undermines the state's police powers and implicates core concerns of federalism: A federal actor, or an actor claiming to be federal, is challenging state authority. This threatens to shift the balance of power between states and the federal government, a phenomenon of great interest to federalism scholars.

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52. Elengold & Glater, *supra* note 1, at 974.

53. *See id.* at 1017-18 nn.257-59. The Department of Education announced a change to this structure in the summer of 2020. 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/T45P-L7KP>.

54. Elengold & Glater, *supra* note 1, at 1017-18.

55. *Id.* at 1011-13; *see also id.* at 1019 n.262 (listing sixteen complaints filed by individuals or state attorneys general against student-loan servicers).

56. *Id.* at 1013 n.223 (listing statutes in eleven states and the District of Columbia aimed at regulating student-loan servicers).

57. *Id.* at 1012-14.

When the servicer declines to produce documents to or submit to oversight by independent federal agencies or Congress, it also undermines the authority and power of the federal legislature. This implicates separation-of-powers concerns because the executive agency that hired the contractor may frustrate duly enacted federal law, hinder legislative oversight, and evade accountability. This phenomenon is of great interest to administrative law scholars, who have called attention to the complex interactions between the private sector and federal agencies.<sup>58</sup>

Finally, the servicer, a private company, is using its relationship with the federal government to block a consumer's effort to recover for an injury. As the government and its contractors increasingly provide retail services, this represents a shift in the power of the private sector relative to consumers. This phenomenon is of great concern to consumer law scholars focused on the foreclosure of redress to victims of harm caused by private actors.<sup>59</sup>

Multiple scholarly literatures, then, have touched on aspects of the phenomenon that animates this project. Each has a distinct perspective and offers rich insights on the consequences of federal contractors' tactics to undermine civil liability and regulation. Yet no literature addresses its concerns or critiques to *all* of the actors who effect the shifts in power we have identified—consumers, businesses, states, the federal executive branch, and Congress.<sup>60</sup> Consequently, the aggregate and system-wide effect of private businesses' doctrinal arguments has largely evaded analysis. To fill that scholarly gap, this Article connects scholarly insights to show how federal contractors' exploitation of the sovereign shield achieves a deep shift of power in favor of the federal government, and the executive branch in particular—a

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58. See, e.g., Jon D. Michaels, *Privatization's Pretensions*, 77 U. CHI. L. REV. 717, 719 (2010) (arguing that contracting enables agencies to “achiev[e] distinct public policy goals that—but for the pretext of technocratic outsourcing—would be impossible or much more difficult to attain”); see also VERKUIL, *supra* note 21, at 6, 159 (describing the changing “relationship of government to the private sector” and the greater responsibilities of agencies when they direct contractors doing the government's work).

59. See, e.g., Jeff Sovern, *Toward a New Model of Consumer Protection: The Problem of Inflated Transaction Costs*, 47 WM. & MARY L. REV. 1635, 1645-46, 1699 (2006) (describing the use of transaction costs by sellers to extract rents from consumers and suggesting regulation to address the tactic); see also Alexandra B. Klass, *Tort Experiments in the Laboratories of Democracy*, 50 WM. & MARY L. REV. 1501, 1504-05 (2009) (analyzing trends in the availability of remedies for consumers and noting that the Supreme Court has “limit[ed] significantly the ability of states to provide tort rights and remedies for [their] citizens by preempting common law and statutory claims”).

60. Even this list, of course, omits the role of the Supreme Court, which is neither absent nor neutral. See, e.g., Jeffrey Rosen, *Supreme Court Inc.*, N.Y. TIMES MAG. (Mar. 16, 2008), <https://perma.cc/2MHM-GMBG> (observing that “there are no economic populists on the court, even on the liberal wing,” and that “ever since John Roberts was appointed chief justice in 2005, the court has seemed only more receptive to business concerns”).

result that both denies remedies to consumers and illuminates the continued empowerment of business interests in and by our jurisprudence.<sup>61</sup>

This is not to claim that no aspect of the phenomenon analyzed in our prior work has received scholarly notice; individual aspects have.<sup>62</sup> After all, the areas of scholarship implicated here are both broad and deep. Nonetheless, the aggregate effects of the multiple trends enabling private business to deploy the sovereign shield—trends including increasing privatization<sup>63</sup> and rising levels of political polarization<sup>64</sup>—may have received less attention precisely because they do not fit neatly into a single scholarly category.

This conviction underlies the organization of this Part. A single law review article cannot possibly do justice to the volume of scholarship on federal–state relations, business–agency relations, or business–consumer relations, let alone all three. Rather, this Part considers how the arguments made by federal contractors cross boundaries within legal scholarship. The Subparts below illustrate how this happens in three different contexts: (1) federalism scholars’ understanding of the current state of federal–state relationships; (2) administrative law’s treatment of outsourcing and the separation of powers; and (3) consumer law’s analysis of the consequences of the rising power of business. To ensure that our proposal does not ignore any one set of risks created by the contractors’ arguments, we draw on the insights of these bodies of scholarship for essential guidance in developing a workable, doctrinal response to undesirable manipulation of the sovereign shield.

From this review, we distill a few lessons, which in turn contribute to and shape our proposal in the next Part. First, and not surprisingly, in the context of cooperative federalism, any reform must take into account the dynamics

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61. This larger trend, a hallmark of the Roberts Court, has been recognized for more than a decade, *see id.*, but it has not been tied to the specific set of corporate defendants’ underlying doctrinal arguments motivating this Article.

62. *See, e.g.*, Rubenstein, *supra* note 3, at 1136-38 (focusing on federalism and warning of the risk that, based on the Supremacy Clause, federal contracts may preempt state law and federal immunity may inappropriately protect contractors); Craig Konnoth, *Privatization’s Preemptive Effects*, 134 HARV. L. REV. 1937, 1943-44 (2021) (warning that the federal government has enabled private contractors and other entities to displace state law in ways that are the functional equivalents of preemption); Michaels, *supra* note 21, at 862-64 (describing the ways that the federal government and states engage in the commercial marketplace and identifying the difficult questions that arise as a result of such government activities); Jon D. Michaels, Essay, *We the Shareholders: Government Market Participation in the Postliberal U.S. Political Economy*, 120 COLUM. L. REV. 465, 470 (2020) (“Government is repositioning itself as a savvy market participant . . . using commercial rather than just sovereign levers to advance its various aims.”).

63. Verkuil, *supra* note 10, at 401 (writing in 2006 that “[p]rivatization has been part of government management since the post World War II period, but its acceleration to the limits of accountability is a relatively recent phenomenon” (footnote omitted)).

64. *See* Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1079-80 (2014).

between the federal government, private-sector actors, and state governments, and it should leverage rather than try to prevent conflicts between (or among) them. More concretely, we recognize that state governments and the federal government will continue to interact in different and likely novel ways, at times cooperatively and at times combatively, and that no reform should aim to prevent that outcome. Rather, any lasting reform must take advantage of change by setting the terms of cooperation or combat, so that either form of interaction does not result in an undesirable shift in the balance of power.

Second, and as a result, any reform must take into account its own potential effects on inter- and intraparty relationships, including shifts in the distribution of power *within* the federal sovereign as a result of changes in the balance of power between the federal government and the states. For example, relative empowerment of the federal government when it acts through or with a contractor that evades accountability under state law also specifically empowers the executive branch—the unit of the federal government that hires the contractor and thereby may undermine the authority of the states—and may insulate the contractor from federal oversight mechanisms like the Administrative Procedure Act (APA).

Third, and correspondingly, any reform should either restrict or eliminate the ability of the executive to evade accountability under federal or state law by using a private intermediary. If the federal government's conduct is subject to accountability regimes regardless of whether it is performed through a contractor, then Congress and courts retain the ability to monitor and rein in potential misconduct, preserving the balance of power both between the executive and legislative branches and between the federal government and the states.

This third observation leads to a fourth: Federal legislation alone may be inadequate to the task of reform, not least because states' police powers play a critical role in constraining both the private sector and the federal government. This in turn pushes us toward the doctrinal approach we adopt. It would be difficult (and likely politically fraught) to address contractor liability legislatively across the full range of activities that contractors perform and regardless of the federal entities that hire them. To preserve the power of the states, then, Congress would have to address the potential state-law liability of both contractors and agencies across multiple specific contexts.<sup>65</sup> This case-by-case approach is insufficient to effect broad change. Further, federal sovereign immunity itself has its roots in doctrine;<sup>66</sup> it is appropriate as well as pragmatic to effect a remedy in the same context.

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65. Perhaps excluding some, such as some forms of military contracting.

66. See Jackson, *supra* note 3, at 523 & n.5.

Fifth, reform should blunt the potential effects of executive agency capture by the private sector.

Finally, and fundamentally, because any effective reform must recognize all of the players with stakes in the issue, reform must consistently pursue consumer protection, recognizing the broader risk to the health of democracy posed by the accumulation of private-sector power and influence.

#### A. Federalism: The Feds (and Contractors) Versus the States

The arguments made by federal contractors seeking to evade civil liability implicate federal–state relations because the defendant contractors claim protection based on their relationship with the federal government. That relationship operates at the subconstitutional level: The Constitution scarcely touches on the possible federal use of private contractors<sup>67</sup> or the regulation of the private sector more generally.<sup>68</sup> In recent years, scholars have moved well beyond early judicial analyses that viewed states and the federal government in a binary relationship, assuming that each player clearly stood on opposite sides of a conflict,<sup>69</sup> and instead have offered a far more nuanced view of federal–state relations.<sup>70</sup> Scholars have identified federal–state partnerships that achieve policy objectives in some contexts,<sup>71</sup> analyzed the ways that states may provide an arena for partisan conflict,<sup>72</sup> and recognized that states may

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67. VERKUIL, *supra* note 21, at 103 (observing that the “only reference in the Constitution arguably relevant to delegation to private parties is the Marq and Reprisal Clause,” which “contemplated using ‘privateers’ to act for the government”).

68. The Supreme Court has addressed due process limits on the delegation of federal authority. In *Carter v. Carter Coal Co.*, 298 U.S. 238, 310-11 (1936), the Court found that federal legislation “delegat[ing] the power to fix maximum hours of labor” essentially to large coal producers violated the Fifth Amendment. (The allocation calculation was more complicated than this and rested on production and employment.) The effect was to give “power to regulate the affairs of an unwilling minority” to the legislatively empowered majority, and the Court found this to be “legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business.” *Id.* at 311. The Court concluded that the delegation was “clearly arbitrary, and . . . clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment.” *Id.*

69. *See, e.g.*, *Nat’l Bank v. Kentucky*, 76 U.S. (9 Wall.) 353, 361-62 (1870).

70. *See, e.g.*, Heather K. Gerken, *Federalism 3.0*, 105 CALIF. L. REV. 1695, 1700 (2017) (“These days, neither the state nor the federal government presides over its own empire. Instead, they govern shoulder-to-shoulder in a tight regulatory space, sometimes leaning on one another and sometimes deliberately jostling each other.”).

71. Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 668-70 (2001) (describing the “rise of cooperative federalism” and specifically identifying as examples of the phenomenon federal initiatives including Aid to Families with Dependent Children and environmental protection).

72. Gerken, *supra* note 70, at 1696.

themselves oppose or reinforce federal policy.<sup>73</sup> Federal and state (and local) actors engage in an elaborate dance, collaborating and challenging, endorsing and subverting each other.<sup>74</sup> These shifting relationships have consequences for understanding traditional constitutional challenges such as the rights of minority groups: The story is not simply one of a federal champion battling states determined to engage in wrongdoing,<sup>75</sup> or the other way around.<sup>76</sup>

From this more sophisticated understanding of how federal initiatives work on the ground, we glean that asserting control over the expanding

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73. Bulman-Pozen, *supra* note 64, at 1079-80 (describing the role of political partisanship in driving states to challenge or support federal policy); *see also* Gerken, *supra* note 70, at 1712 (describing how the federal structure provides “different platforms and different forms of advocacy for would-be dissenters”); Cristina M. Rodríguez, Feature, *Negotiating Conflict Through Federalism: Institutional and Popular Perspectives*, 123 YALE L.J. 2094, 2104 (2014) (describing a lawsuit by the federal government against the State of Arizona attacking the State for “having made itself a ‘rival decisionmaker[] based on disagreement with the focus and scope of federal enforcement’” (alteration in original) (quoting Brief for the United States at 22, *Arizona v. United States*, 567 U.S. 387 (2012) (No. 11-182), 2012 WL 939048)).
74. Gillian E. Metzger, Essay, *Agencies, Polarization, and the States*, 115 COLUM. L. REV. 1739, 1743-44 (2015); *see also* Heather K. Gerken, *The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 22 (2010) (“Scholars have moved beyond states, but stopped with cities. They have thus neglected the special purpose institutions (juries, school committees, zoning boards, local prosecutors’ offices, state administrative agencies) that constitute states and cities.”).
75. Gerken, *supra* note 70, at 1708-12 (arguing that a contemporary theory of federalism must incorporate the recognition that states and the federal government have an intricate and dynamic relationship).
76. For example, in enforcing federal statutes, the Environmental Protection Agency (EPA) works closely with its state counterparts, engaging in “[c]opious negotiation . . . during individual enforcement cases that arise within complex programs of cooperative federalism.” Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1, 33-34 (2011). Ryan notes that federal-state interactions around environmental protection take other forms too, including state participation in negotiated rulemaking under the APA and cooperative programs like the Coastal Zone Management Act. *Id.* at 54, 59. In the case of health care, scholars convincingly illustrate how “modern federalism” involves federal law that “set[s] national baselines in the face of state regulatory failures but still preserve[s] key roles for states as thought leaders.” Abbe R. Gluck & Nicole Huberfeld, *What Is Federalism in Healthcare For?*, 70 STAN. L. REV. 1689, 1722 (2018). And even in the context of immigration regulation, which the Supreme Court has emphasized is a particularly federal undertaking, state and local governments are critical, if doctrinally underappreciated, players. *See Arizona*, 567 U.S. at 397, 415-16 (finding state laws preempted by the “pervasive[]” federal legislative regime governing immigration); Jennifer M. Chacón, *Immigration Federalism in the Weeds*, 66 UCLA L. REV. 1330, 1333-34 (2019) (observing that “states and localities play an increasingly important role in shaping immigration policy” based in part on decentralized enforcement discretion).

sovereign shield requires recognizing that states and the federal government do not always operate in clear opposition to, or as checks on, one another.<sup>77</sup>

A few scholars have pointed out a further complication: the power of the terms of contracts themselves. David Rubenstein<sup>78</sup> and Craig Konnoth<sup>79</sup> have warned that a contractor's success in avoiding accountability may rest on contractual terms, not solely on preemptive language in federal law. Rubenstein describes how agencies can "preempt state law by incorporating contractual terms by reference into binding regulations and orders."<sup>80</sup> When a private business successfully relies on its contract to block the application of state law, that means that an administrative agency, the federal entity that hired the private business, may have on its own curtailed the power of the states.<sup>81</sup> Konnoth, meanwhile, warns that private actors may enjoy the power

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77. See, e.g., Dave Owen, *Cooperative Subfederalism*, 9 U.C. IRVINE L. REV. 177, 178-79 (2018) (identifying the core idea of cooperative federalism as "overlap" between state and federal authority and noting that this regulatory approach "has become an integral part of American governance"). However, in an era of what seems to be ever more vitriolic political partisanship, state governments have also become avatars of whatever ideological group dominates within their borders, mounting challenges to federal laws and policies pursued by the opposing party that dominates in Washington. See Bulman-Pozen, *supra* note 64, at 1078-79. It may be tempting to tie these federal-state challenges to the 2016 election and to think of states as the inevitable antagonists of a federal behemoth, but that would be erroneous—although some news outlets have reported that the Trump Administration faced more lawsuits brought by states than any other administration in decades. See Natasha Bach, *The Trump Administration Has Been Sued More than Any Other Since 1982*, FORTUNE (Aug. 30, 2019, 4:00 AM PDT), <https://perma.cc/V68B-DGLY> (to locate, click "View the live page"). The Trump Administration's effort to restrict entry into the United States from several predominantly Muslim countries certainly drew legal challenges by the states, see *Trump v. Hawaii*, 138 S. Ct. 2392, 2403-06 (2018), but so did the Obama-era Affordable Care Act, see *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 538-40 (2012). Before that, so did the action of the Bush Administration's EPA to avoid regulating emissions that contribute to global warming. *Massachusetts v. EPA*, 549 U.S. 497, 510-11, 514 (2007). Conflicts may also run in the other direction when the federal government uses litigation to attack state action. The Obama Administration, for example, sued to block Arizona legislation that in part required state law-enforcement officers to investigate the immigration status of a person stopped, detained, or arrested. *Arizona*, 567 U.S. at 393-94.

78. See Rubenstein, *supra* note 3.

79. See Konnoth, *supra* note 62.

80. Rubenstein, *supra* note 3, at 1167-68, 1176.

81. *Id.* at 1182 (explaining how state law may be blocked "because it conflict[s] with contractual specifications agreed upon in an arms-length proprietary deal" between the federal government and its contractor). This is the converse of the situation described by scholars who believe that administrative agencies can aid the states in preserving their spheres of authority. See, e.g., Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 1985 (2008) ("In some cases . . . federal agency action is consistent with, rather than  
*footnote continued on next page*

to preempt state law based on judicial interpretation of their contracts.<sup>82</sup> These scholars have helped illuminate additional risks posed by the empowerment of contractors, focusing primarily on cases of preemption attempted by the government.

From this brief study of federal–state scholarship, two important guiding principles emerge. First, it is a mistake to conceive of states and the federal government as inevitable antagonists locked in an interminable, two-party battle. This insight is critical in developing a solution to the sovereign-shield problem: The challenge cannot be addressed by a simple reallocation of responsibility to the states or to the federal government because the lines between the two are blurred. Second, in many legal scholars’ explorations of federal–state relations, other actors—like the private sector—operate like black holes, invisible themselves but exerting force on the players whose behavior is the subject of study. Accordingly, any solution to the sovereign-shield problem must also account for and anticipate the effects of responses by these other institutions. Business interests will exploit whatever opportunities a reallocation of regulatory authority creates. Essential to this Article’s proposal, then, is the recognition of the role of the private sector as an institution that can affect the balance of power between the federal government and the states.

Just as the balance of power between the federal government and the states may be affected by the private sector, the balance of power between the executive and legislative branches may be affected by the states, because the potential accretion of power to the executive occurs by means of weakening the states. Thus “contests about the federal separation of powers are at the same time cases about state power”<sup>83</sup> and contests about state power are also cases about the separation of powers.<sup>84</sup> Any solution to the sovereign-shield problem must be informed by the recognition of multiple interacting parties with distinct and potentially overlapping roles. The next Subpart draws on administrative law scholarship to develop this idea further and to draw insights on the relationships between federal contractors and the agencies they serve.

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at odds with, federalism values—for example, where the agency is a better arena for state influence than Congress alone.”).

82. Konnoth, *supra* note 62, at 1965-66 (noting that, in the context of the Federal Arbitration Act, private firms “can choose . . . whether or not to include language in the contract that displaces state law”).

83. Jessica Bulman-Pozen, *Federalism All the Way Up: State Standing and “The New Process Federalism,”* 105 CALIF. L. REV. 1739, 1744 (2017).

84. *See infra* Part II.B.

B. Separation of Powers: The Executive Versus the Legislature and Agencies Versus Oversight

When a contractor invokes the sovereign shield to avoid oversight by federal entities, including independent agencies<sup>85</sup> and Congress,<sup>86</sup> its actions increase the relative power of its employer—an agency of the federal executive branch. By acting through a contractor, the executive branch can hamper oversight by its ostensibly coequal branch,<sup>87</sup> the legislature. This is so because the contractor can resist legislative oversight to which executive agencies would have been subject had a private intermediary not been involved.<sup>88</sup> In this way, as the expanding sovereign shield confers benefits on a private actor, it also implicates the separation of powers between two branches of the federal government.<sup>89</sup>

The executive's indirect conduct through private contractors evades critique because the effect does not manifest in easily observable metrics such as the cost, success, or failure of the program or activity that the contractor performs. Such indirect conduct may have a significant impact on the relative power of the federal executive. For example, Congress passed the APA<sup>90</sup> to control the processes by which agencies operate.<sup>91</sup> If agencies can undermine the APA by delegating their authority to private contractors, they can increase the power of the executive relative to the legislature. It is that potential that threatens the operation of the system of checks and balances intended by the federal separation of powers.

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85. As we described in *The Sovereign Shield*, the Department of Education instructed its contractors not to comply with requests for information from the Consumer Financial Protection Bureau, an independent agency with oversight authority over student loans. Elengold & Glater, *supra* note 1, at 1028.

86. Also discussed in *The Sovereign Shield*, the chief executive of the Pennsylvania Higher Education Assistance Agency declined an invitation to testify at a congressional hearing, citing the organization's contractual relationship with the Department of Education to avoid congressional oversight. *Id.* at 1028.

87. *Id.* at 1043-46; see also David A. Super, *Privatization, Policy Paralysis, and the Poor*, 96 CALIF. L. REV. 393, 457 (2008) (describing how reliance on contractors can reduce the effectiveness of transparency measures like those created by the Freedom of Information Act).

88. See *supra* notes 49, 87 and accompanying text.

89. See *supra* Part I. Further, because the application of the shield would lead a court to decline further proceedings, both the court—the third branch—and, of course, the plaintiff would be unable to hold the contractor accountable.

90. Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

91. Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux—The Administrative State Under Siege*, 131 HARV. L. REV. 1, 59 (2017) (describing the origins of the APA).

The prospect of an alliance between regulator and regulated grows more likely when their respective leaders share common values, a possibility that administrative law scholars have also explored. While “capture” is traditionally and narrowly understood to occur when a regulator favors industry out of “material self-interest,”<sup>92</sup> industry preferences may affect agency conduct in different ways. Some ties are more obvious, such as when an agency depends on fees paid by its regulated industry or when agency employees anticipate future jobs in the private sector, while others are subtle, such as when regulators and industry actors share “ideological beliefs.”<sup>93</sup> Businesses may influence regulators’ perspectives and thereby shape their values and goals, a process that James Kwak has called “cultural capture.”<sup>94</sup>

But there’s more. While administrative law scholars offer critical insights on how privatization can enable the expansion of executive power, thereby threatening the separation of powers, few have looked at the potential ability of *state* law and regulation to act as counterweights to executive action.<sup>95</sup> In addition to recognizing the compound risk of executive aggrandizement at the expense of the legislature and at the expense of the states, analyzing privatization and outsourcing from a multifaceted, separation-of-powers perspective yields three lessons critical to effective doctrinal reform.

First, the potential influence of informal relationships between agency and contractor suggests that blunt prohibitions on ties between the regulator and the regulated are unlikely in themselves to protect the public interest. Some other mechanism—one that does not turn on separating agency officials from

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92. James Kwak, *Cultural Capture and the Financial Crisis*, in PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 71, 75 (Daniel Carpenter & David A. Moss eds., 2014).

93. *Id.* at 75-76.

94. *Id.* at 78-79. Kwak describes, for example, an event as seemingly innocuous as an informal briefing where Department of the Treasury officials offered chocolate chip cookies to outside bloggers. At least one person described the event as leading to more sympathy for the Department’s position. Kwak uses the vignette to illustrate a broader phenomenon: how even modest industry events can affect agency employees’ sympathies. *Id.* at 89.

95. *But see* Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459, 461 (2012) (observing that although “commentators have advanced proposals to check executive power and restore competition, they have largely overlooked one powerful actor: the states”). Bulman-Pozen goes on to analyze the ways in which state action can affect (and enforce) the separation of powers. *Id.* at 492-93 (explaining how “[c]oncurrent delegation to state and federal agents . . . may safeguard the separation of powers not only by pushing states and their federal executive counterparts to focus attention on Congress, but also by making it more likely that the other two branches of the federal government will check the federal executive” (emphasis added)).

business executives or on general good intentions within the agency—is needed.

Second, although subjecting federal contractors to the requirements of the APA would help rebalance power between the executive and Congress, it would not comprehensively engage with the full range of ways in which businesses and the executive exploit the sovereign shield. Contractors would still point to their relationship with the federal sovereign to avoid liability under *state* law.

These two observations suggest a third: Attempting to rein in contractors through federal legislation may be inadequate to preserve the balance of power between the branches and between the federal government and the states. Rather, the ideal response should ensure both accountability of the executive to the legislature and accountability of the private sector to the federal government *and* the states—all of which are goals of our proposal.

### C. Democracy: Business Versus Accountability

Consumer law scholars have long studied efforts by businesses to evade mechanisms that enable those harmed by their conduct to recover. One prime example is the now-ubiquitous mandatory arbitration clause, which attaches terms to the sale of a product or service that preclude customers from recovery through litigation.<sup>96</sup> Consumer law scholars have analyzed the phenomenon of mandatory arbitration clauses as one piece of a larger movement by businesses to prevent civil litigation and access to civil justice.<sup>97</sup> This recognition of businesses' efforts to sidetrack, undermine, or prohibit redress for injured consumers has focused on the same concern that animates our work: the denial of a remedy to victims who deserve compensation.<sup>98</sup>

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96. This is achieved through the imposition of mandatory arbitration clauses in sales agreements for ubiquitous products, such as mobile-phone services, with conditions that undermine the availability of a civil remedy. For example, in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011), a majority of the Supreme Court held that a California state law preserving class-action lawsuits by mobile-phone-service customers was preempted by the Federal Arbitration Act, a ruling that effectively precluded recovery because an individual action was not financially viable, *see id.* at 365 (Breyer, J., dissenting).

97. *See, e.g.*, Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 323 (2013) (criticizing the judicial endorsement of arguments in favor of arbitration that have the effect of leaving “people . . . remediless, [and] leaving the challenged conduct undeterred”).

98. *See, e.g.*, Judith Resnik, Comment, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 133 (2011) (criticizing the development of doctrine that gives businesses “the power to impose a mandatory, no-opt-out system in their own private ‘courts’ designed to preclude aggregate litigation”).

The implications of increasing business impunity through expansion of the sovereign shield, however, extend much further. Indeed, to fully develop a doctrinal fix to the sovereign-shield problem, we cannot stop with the insights of consumer law scholars interested in the relationship between businesses and consumers. We must also draw on insights from those scholars concerned with the threat posed to broader democratic values by the private sector's accumulation of power. Legal scholars writing on diverse doctrines, from freedom of speech to voting rights, have warned of the risks that increasing inequality and private wealth in general, and increasing business wealth and influence in particular, pose to the health of democracy.<sup>99</sup> The private sector's invocation of the sovereign shield enables businesses to avoid liability and increase profits—profits they may then use to influence law, regulation, and policy in their favor. Thus, successful exploitation of the sovereign shield further reinforces the private sector's existing wealth and influence.<sup>100</sup>

#### D. Winners and Losers: Cascading Effects of the Expanded Sovereign Shield

The distinct dangers of an overexpansive sovereign shield identified by scholars in each of these areas of law do not manifest in isolation but in concert. The relative empowerment of the federal government at the expense of the states simultaneously empowers the executive branch relative to the legislature by enabling agencies that act through contractor proxies to evade congressional oversight. At the same time, the protection obtained by the private sector stymies the states—and individual consumers—seeking to use state law to protect themselves and to hold either the contractor or the federal government accountable. Increased power and influence of private-sector actors in turn bolsters the power of their agency allies—a phenomenon that Jon Michaels has recognized as a “constitutional challenge[.]” of privatization.<sup>101</sup> This combination of effects makes clear the compound risk:

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99. See, e.g., RICHARD L. HASEN, *PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN ELECTIONS* 5 (2016) (warning that the “central problem of money in politics is . . . a system in which economic inequalities, inevitable in a free market economy, are transformed into political inequalities that affect both electoral and legislative outcomes”).

100. In this vein, it is worth recalling the oft-quoted speech of President Dwight D. Eisenhower, see Eisenhower, *supra* note 50, at 3, in which he warned of the threat to democracy posed by a “military-industrial complex.” Eisenhower warned of the risk posed by a large and growing arms-manufacturing industry, but any federal government contractor may present a similar threat, with industry sectors wielding “economic, political, even spiritual” power. *Id.*

101. Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 572 (2015) (situating privatization in the context of ongoing battles between “power and constraint,” and warning of the constitutional risk of the “fusion of state and  
*footnote continued on next page*

that the executive might elect to use a contractor to perform a service precisely *because* doing so enables an end run around oversight by Congress and by the states. And the private businesses accumulating wealth and influence can in turn wield their increasing power to shape substantive law and regulation in their favor, at the expense of the public interest and democracy itself.

None of this is to argue that federal outsourcing is *per se* normatively undesirable, or to suggest that doctrinally limiting the scope of the sovereign shield will solve the problem of money in politics. But consideration of these larger concerns about national democratic health does make clear what is at stake when attributes of the federal government benefit private businesses.

Taken together, the diverse and complex bodies of legal scholarship above offer insights and lessons necessary to devise a doctrinal response to exploitation of the sovereign shield. Not only do these conflicts—federal–state, executive–legislative, business–consumer, and business–democracy—undercut access to justice through individual and collective action, but they also undercut principles of federalism and separation of powers. But even *that* is not the end. Scholars interested in democratic health implore us to understand the ways in which businesses’ accumulation of financial power enables corrosion of politics. We draw inspiration from each of these subdisciplines as we develop a proposed doctrinal fix.

### III. Brightening the Lines: Classifying Commercial Conduct

We have already shown the difficulty and danger in persisting with the current sovereign-shield doctrinal morass.<sup>102</sup> There are some seemingly obvious doctrinal reform proposals.

One might suggest, for example, that the sovereign shield should stop at the government’s door. In other words, private entities, regardless of their relationship with the sovereign, should *never* be entitled to sovereign shield protections. But that is too blunt a tool; contractors may perform functions on behalf of the sovereign that merit protection.

Or one might think that sovereign-shield defenses should not apply at all, to either private businesses or the federal government. Federal sovereign immunity, for example, has a questionable constitutional origin,<sup>103</sup> is hotly

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commercial power”); *id.* at 582 (describing the incentive for federal contractors to “support . . . agency leaders”).

102. See Elengold & Glater, *supra* note 1, at 1032–46.

103. Jackson, *supra* note 3, at 522 (“[T]he constitutional provenance of federal ‘sovereign immunity’ is obscure, and was a matter of genuine uncertainty in early years.”). Federal sovereign immunity was not explicitly recognized by the Supreme Court until 1821. See Katherine Florey, *Sovereign Immunity’s Penumbra: Common Law, “Accident,” and footnote continued on next page*

contested,<sup>104</sup> and has been studied far less than other forms of sovereign immunity.<sup>105</sup> But eliminating federal sovereign immunity is at once an overbroad and underinclusive response to abuse of the sovereign shield. Doing so responds only to derivative immunity, leaving preemption as a possible mechanism to forestall liability and oversight. Further, because Congress retains the right to explicitly immunize government agencies and their corporate agents,<sup>106</sup> it could easily legislate federal sovereign immunity back into existence.<sup>107</sup> Abolition of federal sovereign immunity also runs counter to the Supremacy Clause.<sup>108</sup>

Yet another possibility is—in an effort to increase efficiency and take advantage of the innovations of the private sector—extending the sovereign shield to protect *all* government contractors and agents simply because of their relationship with the sovereign.<sup>109</sup> However, this would leave consumers and

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*Policy in the Development of Sovereign Immunity Doctrine*, 43 WAKE FOREST L. REV. 765, 776-77 (2008).

104. See Jackson, *supra* note 3, at 538 n.73.

105. See Florey, *supra* note 103, at 776 (noting that federal sovereign immunity “has been described as a ‘ghost[] . . . haunt[ing] the early Republic’ and one of ‘the greatest mysteries’ in American law” (second and third alteration in original) (footnote omitted) (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))).

106. Currently, federal agencies and their instrumentalities enjoy sovereign immunity in the absence of congressional action to waive that immunity. See, e.g., *Lane v. Pena*, 518 U.S. 187, 192 (1996) (noting that a “waiver of the Federal Government’s sovereign immunity must be unequivocally expressed in statutory text”). Accordingly, Congress also has the power to recognize or grant such immunity expressly by statute.

107. Although our protocol, see *infra* Part III.B, is also subject to this criticism—that Congress could legislate away a commercial–noncommercial line by explicitly immunizing or preempting commercial conduct—such conduct would need to be undertaken out in the open. Part of our concern about the sovereign shield is that it usurps power in quiet and sly ways. We suspect that the political will and drive to immunize federal actors generally would be stronger than the political will and drive to exempt commercial conduct from liability and oversight.

108. See Florey, *supra* note 103, at 771-73 (describing the history and purpose of sovereign immunity); Jack M. Sabatino, *Privatization and Punitives: Should Government Contractors Share the Sovereign’s Immunities from Exemplary Damages?*, 58 OHIO ST. L.J. 175, 197-201 (1997) (defining sovereign immunity’s objectives and rationales).

109. See, e.g., Paul Taylor, *We’re All in This Together: Extending Sovereign Immunity to Encourage Private Parties to Reduce Public Risk*, 75 U. CIN. L. REV. 1595, 1646-47 (2007).

states without any recourse for harmful or illegal activity<sup>110</sup> and incentivize potentially dangerous risk-taking by the contractor.<sup>111</sup>

This Article suggests that the solution lies in a new—or, really, an old—frame.<sup>112</sup> Rather than placing the identity of the actor at the center of the inquiry, asking whether that actor is effectively the federal government, courts should focus on the nature of the activity to determine the appropriate degree (if any) of insulation from liability and oversight. If the challenged conduct is commercial, it should not be covered by sovereign-shield defenses regardless of the actor. If the challenged conduct is not commercial, government-directed conduct should be presumptively covered by sovereign-shield defenses. In both cases, traditional agency principles are sufficient to allocate liability between the government/principal and the contractor/agent.<sup>113</sup> This is not to say that the analysis will be easy or straightforward; it is simply to assert that agency law, which is well-developed and familiar to courts, provides a consistent framework for analysis. One implication of this proposal is that the federal government itself, when acting in a commercial capacity, would be subject to suit, unprotected by the sovereign shield.<sup>114</sup>

This Part proceeds as follows. It first identifies other doctrinal areas in which Congress and the courts have separated commercial conduct from noncommercial conduct in assessing jurisdiction or liability.<sup>115</sup> It does so for two reasons: (1) to show that drawing such a distinction is, in fact, possible; and

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110. Elengold & Glater, *supra* note 1, at 973.

111. See Verkuil, *supra* note 10, at 399-402, 466-67 (arguing that the risk of unaccountable contractors means that to protect public values, “some functions” must be put “beyond the reach of privatization”).

112. See *infra* Part III.C.

113. For a full explanation, see Part III.B below.

114. This implication is not as audacious as it might first appear. In fact, both Congress and the courts have recognized this possibility in other areas and in early constitutional analysis. See *infra* Parts III.A, .C; see also *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 691-92 (1999) (Stevens, J., dissenting) (suggesting that sovereign immunity may need to be scaled back because historically “[s]overeigns did not . . . play the kind of role in the commercial marketplace that they do today”).

115. There is a significant debate over whether the sovereign-shield defenses are jurisdictional defenses. Compare *Cunningham v. Gen. Dynamics Info. Tech., Inc.*, 888 F.3d 640, 650 (4th Cir. 2018) (noting that the *Yearsley* doctrine, which recognizes limited immunity when the government validly authorizes a contractor’s conduct, “operates as a jurisdictional bar to suit and not as a merits defense to liability”), with *Adkisson v. Jacobs Eng’g Grp., Inc.*, 790 F.3d 641, 646-47 (6th Cir. 2015) (finding that a *Yearsley* defense would not be a jurisdictional question). This, of course, affects the moment in the litigation when the defense can be offered, the amount of information available to rebut the defense, and general access-to-justice concerns. We recognize the debate but need not enter this specific fray. In fact, under this Article’s proposal, the commercial nature of the challenged activity is a first-cut question and would resolve the access-to-justice issue for many consumers.

(2) to identify factors that the legislature and the judiciary have used to distinguish commercial and noncommercial activity in contexts that do not involve the doctrines that make up the sovereign shield. We then turn to this Article's proposed protocol, a method for determining the availability of sovereign-shield doctrines. Next, we situate our proposal in historical context to address the critique that adopting the proposal would constitute too extreme a break with precedent. We show that holding actors—government or private—accountable for commercial actions that violate state or federal law is, in fact, a return to first principles expressed by the Supreme Court nearly two centuries ago. Finally, this Part outlines how the proposal could be implemented, sketching three case studies for drawing the lines between commercial and noncommercial activity and operationalizing our protocol.

We do not suggest that application of the protocol would always be clear or well-defined; complex legal analysis never is. There will be tough cases and hard-fought litigation battles. But we offer some examples to make the proposal concrete and to illustrate the advantages of our approach relative to current practice.

#### A. Defining “Commercial”

The government has a long and storied history of working with and in the private sector.<sup>116</sup> Obvious early examples include the First and Second Banks of the United States, in which the federal government was a shareholder.<sup>117</sup> The government later purchased corporate assets necessary to facilitate construction of the Panama Canal in 1902.<sup>118</sup> Government involvement in business swelled during World War I and the Great Depression, with the advent of, among others, the United States Grain Corporation, the Reconstruction Finance Corporation, and the Federal Deposit Insurance Corporation.<sup>119</sup> Indeed, “a few corporations, such as the Tennessee Valley Authority (TVA), brought the Government into the commercial sale of goods

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116. *See, e.g.*, *Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 506 (1950) (describing 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”), *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); *Keifer & Keifer v. Reconstruction Fin. Corp.*, 306 U.S. 381, 389 (1939) (“For more than a hundred years corporations have been used as agencies for doing work of the government.”).

117. *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 386-87 (1995).

118. *Id.* at 387.

119. *Id.* at 388.

and services.”<sup>120</sup> In the 1960s the government adopted a new approach, “sponsoring corporations that it specifically designated *not* to be agencies or establishments of the United States Government . . . with the purpose of entering the private sector, but doing so with Government-conferred advantages.”<sup>121</sup>

Questions inevitably arose about the potential liability of public–private entities, forcing courts to engage in precisely the kind of analysis that we describe in more detail below. Anne Joseph O’Connell explores these hybrid “boundary organizations”—organizations that exist at the border between the federal government and the private sector,<sup>122</sup> between the federal government and another sovereign entity (such as a state, foreign government, or tribal government),<sup>123</sup> or between the branches of the federal government.<sup>124</sup> O’Connell divides such organizations into purely governmental organizations—including federal corporations—and quasi-governmental agencies.<sup>125</sup> Quasi-government boundary organizations include the United States Postal Service (USPS), Amtrak, the Smithsonian, the Federal National Mortgage Association (Fannie Mae), the National Park Foundation, and the National Academy of Sciences.<sup>126</sup> Although O’Connell recognizes both potential benefits and drawbacks of boundary organizations, she unequivocally finds inconsistency and lack of clarity in defining them, their power and authority, and the legal doctrines surrounding them.<sup>127</sup> She joins other administrative law scholars in acknowledging the difficulty for courts in distinguishing what is public from what is private.<sup>128</sup>

This scholarly debate over traditional governmental (or public) actions and nontraditional governmental (or private) actions continues to rage.<sup>129</sup>

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120. *Id.*

121. *Id.* at 390.

122. Anne Joseph O’Connell, *Bureaucracy at the Boundary*, 162 U. PA. L. REV. 841, 855-61 (2014).

123. *Id.* at 861-65.

124. *Id.* at 865-70.

125. *Id.* at 855.

126. *Id.* at 856-60.

127. *Id.* at 849-51 (explaining the lack of definition and categorization for, and the underestimation of the powers of, boundary organizations); *id.* at 888-92 (discussing benefits and drawbacks); *id.* at 894-96 (explaining the lack of clarity in applying legal definitions and obligations); *see also* *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 378 (1995) (recognizing that the Court’s cases “deciding when private action might be deemed that of the state have not been a model of consistency” (quoting *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 632 (1991) (O’Connor, J., dissenting))).

128. O’Connell, *supra* note 122, at 906-10; *see also supra* note 32.

129. *See supra* note 32.

Some scholars have argued that the public–private distinction has collapsed altogether,<sup>130</sup> and at least some Supreme Court Justices agree.<sup>131</sup> So do we. We suggest, however, that the difficulty arises not in the analysis phase, but in the framing of the issue to be resolved. The lack of clarity reflects not the impossibility of determining when the special attributes of the sovereign should attach in general, but only the impossibility of doing so when the identity of the actor is viewed as the dispositive element of the doctrinal test. Whether a particular activity is quintessentially (or traditionally, or inherently) public or governmental may be intractable, but whether that activity is *commercial* in nature—even if performed for a public purpose—is more easily answered within our doctrinal tradition.<sup>132</sup>

Although the relationship between the public and the private sector is complex and has changed over the course of our nation’s history, the legislature and the judiciary have long distinguished commercial from noncommercial activities. One might imagine that the most obvious place to begin this discussion is with the constraints on what the federal government can truly privatize: the nondelegation doctrine<sup>133</sup> and the state-action doctrine.<sup>134</sup> Although these doctrines are helpful in that they reinforce the

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130. See *supra* note 32.

131. See *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 358 (2007) (Alito, J., dissenting) (“The public-private distinction drawn by the Court is both illusory and without precedent.”); *Richardson v. McKnight*, 521 U.S. 399, 422 (1997) (Scalia, J., dissenting) (“Since . . . I see no sense in the public-private distinction, neither do I see what precisely it consists of.”); see also *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1373 (2018) (acknowledging that the Supreme Court has not “definitively explained” the difference between public rights and private rights (quoting *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69 (1982) (plurality opinion))).

132. See *infra* Part III.C.

133. The nondelegation doctrine recognizes that there are certain activities that are uniquely within the domain of the state or a particular branch of government and cannot be delegated. The Constitution’s structure imposes this requirement by allocating distinct responsibilities to each branch. See U.S. CONST. art. I, § 1; *id.* art. II, § 1, cl. 1; *id.* art. III, § 1. Federal law imposes limits on subdelegation by the executive, see 3 U.S.C. §§ 301-302, and Supreme Court decisions have recognized the principle. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936); *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 135 S. Ct. 1225, 1231-34 (2015) (finding that because Amtrak was a governmental entity—notwithstanding Congress’s language to the contrary—its federally delegated regulatory authority did not necessarily violate nondelegation principles).

134. The state-action doctrine considers whether the conduct of a nongovernmental entity constitutes state action for the purpose of constitutional rights and responsibilities—for example, the First Amendment, see *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926 (2019), or the Fourteenth Amendment, see *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349-50 (1974). The Court asks whether the defendant entity exercises a function “traditionally exclusively reserved to the State.” *Jackson*, 419 U.S. at 352. If a  
*footnote continued on next page*

notion that the Court has the capacity to examine and classify the conduct of private businesses, both the nondelegation and state-action doctrines hew closely to the public–private line, relying on a distinction that has proved unstable, and thus less useful, in the assessment of particular contractor conduct.<sup>135</sup>

Rather, it is in other contexts—analyzing sue-and-be-sued clauses, applying the Foreign Sovereign Immunities Act, and distilling the boundaries of the market-participant exception to the Dormant Commerce Clause—that Congress and courts have successfully grappled with the distinction between commercial and noncommercial activity. Although each of these doctrines offers slightly different contours, together they teach us that (1) drawing a distinction along a commercial–noncommercial axis is possible; and (2) there are factors that we can borrow to identify commercial conduct, which we build directly into our protocol. We do not fully adopt any doctrinal analysis into our proposal, but instead we look to these doctrinal areas for both evidence and guidance. Collectively, these doctrines emphasize five factors that distinguish an activity as essentially commercial: (1) the existence of private competition; (2) direct interaction with the public; (3) any history of public performance of the activity; (4) the possibility of undertaking the activity in an individual’s name; and (5) the entity’s susceptibility to market pressures and conditions. It is those factors, and the analysis and theories that underlie them, that offer a scaffolding for developing the definition of commercial activity in our protocol.

Focusing on commercial activities will not solve all potential abuses of the sovereign shield. It will do nothing about privately operated immigration detention centers or private prisons, for example, because these activities are unlikely to be deemed commercial.<sup>136</sup> Our motivating concern here, however, is the phenomenon we named and identified—the use and abuse of the sovereign shield in commercial contexts. This phenomenon profoundly threatens consumers. We accordingly direct our attention to exempting commercial activity from the sovereign shield regardless of the actor. Doing so will go a long way toward preserving a fairer balance of power between the federal government and the states, the executive and the legislative branches, and consumers and corporations.

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private actor engages in state action, it may be subject to limitations that would apply were the government to engage in the action itself.

135. See Verkuil, *supra* note 10, at 415 (arguing that the Court “seems to have abandoned the quest for an adequate definition of public function”).

136. See *infra* note 222.

## 1. Sue-and-be-sued clauses

Sue-and-be-sued clauses, and the doctrine surrounding them, provide a useful starting point for drawing a viable distinction between commercial and noncommercial activity.

The doctrine of sovereign immunity protects the United States government from suit without its affirmative consent.<sup>137</sup> This general protection also applies to units of the United States government, including federal administrative agencies<sup>138</sup> and government-owned corporations.<sup>139</sup> When providing affirmative consent to suit, lawmakers set the extent and circumstances of consent via statute.<sup>140</sup> Legislation can broadly waive the United States' sovereign immunity with regard to a specific subject matter or may apply to a number of federal agencies and entities.<sup>141</sup>

Congress can also include a provision waiving sovereign immunity for an individual federal agency or government-owned corporation in the statute that creates the entity.<sup>142</sup> This statutory provision—known as a sue-and-be-sued clause—governs the extent to which a particular entity may be subject to suit.<sup>143</sup> Unlike the narrow construction applied to legislative waivers of sovereign immunity for specific subjects,<sup>144</sup> courts liberally construe sue-and-be-sued clauses.<sup>145</sup>

In the absence of express restrictions, sue-and-be-sued clauses are generally taken to “embrace all civil process incident to the commencement or continuance of legal proceedings.”<sup>146</sup> In *Federal Housing Administration v. Burr*,

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

138. *Fed. Hous. Admin. v. Burr*, 309 U.S. 242, 244 (1940).

139. *Meyer*, 510 U.S. at 473-75; *Loeffler*, 486 U.S. at 554-56.

140. *See, e.g., Honda v. Clark*, 386 U.S. 484, 501 (1967).

141. For example, the Federal Tort Claims Act (FTCA) waives the United States' sovereign immunity with respect to certain types of tort claims. *See* 28 U.S.C. § 2674 (“The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.”).

142. *See, e.g.,* 16 U.S.C. § 831c(b) (stating that the TVA “[m]ay sue and be sued in its corporate name”); 39 U.S.C. § 401(1) (authorizing the USPS “to sue and be sued in its official name”).

143. *Burr*, 309 U.S. at 245.

144. *See Irwin v. Dep't of Veterans Affs.*, 498 U.S. 89, 94 (1990).

145. *See Thacker v. Tenn. Valley Auth.*, 139 S. Ct. 1435, 1441 (2019); *Burr*, 309 U.S. at 245 (“[W]aivers by Congress of governmental immunity in [the] case of such federal instrumentalities should be liberally construed. This policy is in line with the current disfavor of the doctrine of governmental immunity from suit . . .”).

146. *Franchise Tax Bd. v. U.S. Postal Serv.*, 467 U.S. 512, 518 (1984) (quoting *Burr*, 309 U.S. at 245).

the Court identified implied restrictions that can also bar suit. The Court held that an entity cannot be sued upon a clear showing that (1) the specific type of suit is inconsistent with the statutory scheme or the Constitution; (2) the suit would cause “grave interference” with the performance of a governmental function; or (3) Congress plainly intended a narrow application of the particular sue-and-be-sued clause.<sup>147</sup> Without a sufficient showing of an express or implied restriction, sue-and-be-sued clauses are presumed to waive sovereign immunity.<sup>148</sup>

In *Thacker v. Tennessee Valley Authority*, the Supreme Court had to determine the implications of the TVA’s sue-and-be-sued clause.<sup>149</sup> In doing so it distinguished between “commercial” activities and “governmental functions,”<sup>150</sup> suggesting that this conceptual distinction is both viable and productive.

In *Thacker*, a boater was injured and his passenger killed when the boat struck a downed power line in the Tennessee River.<sup>151</sup> The boater-petitioner sued the TVA, whose employees had been in the process of raising the downed line after it fell into the water.<sup>152</sup> The TVA moved to dismiss the petitioner’s claim of negligence, asserting sovereign immunity.<sup>153</sup> The Eleventh Circuit found that the TVA was entitled to immunity from suit for discretionary functions that were part of *either* its commercial or its governmental activities.<sup>154</sup> The Supreme Court reversed, separating commercial activities from governmental functions.<sup>155</sup> The Court held that, in the absence of special constitutional or statutory prohibitions, governmental entities whose enabling legislation includes a sue-and-be-sued clause are subject to suit to the same extent as their private competitors, provided that such governmental entities are engaged in commercial activities.<sup>156</sup>

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147. *Burr*, 309 U.S. at 245.

148. *See* *FDIC v. Meyer*, 510 U.S. 471, 480-81 (1994); *Loeffler v. Frank*, 486 U.S. 549, 554-55 (1988).

149. 139 S. Ct. at 1438-40.

150. *Id.* at 1439 (recognizing that “the TVA is something of a hybrid, combining traditionally governmental functions with typically commercial ones”).

151. *Id.* at 1440.

152. *Id.*

153. *Id.*

154. *See id.* Although the TVA is explicitly exempt from the FTCA, *see* 28 U.S.C. § 2680(l), the Eleventh Circuit referred to the FTCA’s discretionary-function exception in analyzing the case. *See Thacker v. Tenn. Valley Auth.*, 868 F.3d 979, 981-82 (11th Cir. 2017) (*per curiam*), *rev’d*, 139 S. Ct. 1435.

155. *Thacker*, 139 S. Ct. at 1443-44.

156. *Id.* at 1443.

The Court in *Thacker* rejected the TVA's assertion that it should not distinguish between commercial and governmental actions<sup>157</sup>:

[T]he Government overreaches when it says that all suits based on the TVA's discretionary conduct will "grave[ly] interfere[]" with "governmental function[s]."

That is so, at the least, because the discretionary acts of hybrid entities like the TVA may be not governmental but commercial in nature. And a suit challenging a commercial act will not "grave[ly]"—or, indeed, at all—interfere with the "governmental functions" *Burr* cared about protecting.<sup>158</sup>

In defining commercial activities, the Court focused on activities that were also performed by private corporations.<sup>159</sup> The Court cited the TVA's production and sale of electricity, noting that Con Edison and Dominion Energy performed the same activities.<sup>160</sup> The Court stated that "[w]hatever their ownership structures, the [TVA and the private utilities] do basically the same things to deliver power to customers."<sup>161</sup> The Court went on to characterize the TVA's commercial conduct as "the kind of thing any power company might do."<sup>162</sup> In contrast, the Court noted that the TVA's power of eminent domain is not a commercial activity because that power is "reserved to sovereign actors."<sup>163</sup>

The jurisprudence around sue-and-be-sued clauses thus both recognizes a distinction between commercial and noncommercial activities and identifies factors (such as private competition, business transactions with the public, and matters covered by local policies) that aid in recognizing commercial activities.

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157. *Id.* at 1441-42 (citing *Fed. Hous. Admin. v. Burr*, 309 U.S. 242, 245 (1940); and *FDIC v. Meyer*, 510 U.S. 471, 482 (1994)).

158. *Id.* at 1442 (alterations in original) (citation omitted) (quoting *Burr*, 309 U.S. at 245).

159. *Id.* at 1442-43; *see also Burr*, 309 U.S. at 244-47 (recognizing that Congress intended the Federal Housing Administration to "engage in commercial and business transactions with the public" and noting that activities "reflect[ing] purely local policies" should not generally fall within the exceptions to a sue-and-be-sued clause); *Franchise Tax Bd. v. U.S. Postal Serv.*, 467 U.S. 512, 518, 524-25 (1984) (recognizing that because Congress had "launched" the USPS "into the commercial world," it should "be treated similarly to other self-sustaining commercial ventures" (quoting *Burr*, 309 U.S. at 245)); *Reconstruction Fin. Corp. v. J.G. Menihan Corp.*, 312 U.S. 81, 83 (1941) ("While [the Reconstruction Finance Corporation] acts as a governmental agency in performing its functions, still its transactions are akin to those of private enterprises and the mere fact that it is an agency of the government does not extend to it the immunity of the sovereign." (citation omitted)).

160. *Thacker*, 139 S. Ct. at 1439.

161. *Id.* at 1443-44.

162. *Id.* at 1444.

163. *Id.* at 1439, 1444.

## 2. The Foreign Sovereign Immunities Act

The Foreign Sovereign Immunities Act of 1976 (FSIA) provides foreign governments and their instrumentalities a general grant of immunity from the jurisdiction of both federal and state courts in the United States,<sup>164</sup> with a limited number of express exceptions.<sup>165</sup> When an exception applies, a foreign government may be sued in a United States court and be held “liable in the same manner and to the same extent as a private individual under like circumstances.”<sup>166</sup> Immunity is tied to the type of activity in which the foreign entity engages: The FSIA provides immunity to foreign governments only for their sovereign acts, not for their commercial activities.<sup>167</sup>

The FSIA permits suits “based upon” (1) a foreign government’s commercial activities that occurred in the United States; (2) “an act performed in the United States in connection with” a foreign government’s commercial activities abroad; or (3) an act carried out abroad in connection to a foreign government’s commercial activity outside the United States, provided that the act has a “direct effect in the United States.”<sup>168</sup> Collectively, these bases for denying immunity are known as the “commercial” exception and have been deemed the “most significant of the FSIA’s exceptions” by the Supreme Court.<sup>169</sup> Indeed, the main rationale behind the exception was that the increasing prevalence of foreign governments’ commercial activities required

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164. Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended in scattered sections of 28 U.S.C.); 28 U.S.C. § 1604. Foreign sovereign immunity has deep common law roots. *See, e.g.,* *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 117 (1812) (statement of the case); *id.* at 146-47 (majority opinion) (holding that the *Exchange*, a formerly American-flagged ship seized on the orders of Napoleon, was an instrumentality of the French Empire and exempt from the jurisdiction of United States courts). Initially the United States followed the “classical theory” and granted foreign governments “‘virtually absolute’ immunity as a matter of international grace and comity.” *Jam v. Int’l Fin. Corp.*, 139 S. Ct. 759, 766 (2019); *see also* *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983) (discussing the United States’ long-standing adherence to the classical theory).

165. *See* 28 U.S.C. § 1605; *see also* *Jam*, 139 S. Ct. at 766. The FSIA exceptions provide the sole basis to subject a foreign government to the jurisdiction of a United States court. *See* *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-35 (1989).

166. 28 U.S.C. § 1606. While the FSIA provides that a foreign government subject to an exception is liable to the same extent as a similarly situated private party, different standards apply for wrongful-death and punitive-damage claims. *Id.*; *see also* *Verlinden*, 461 U.S. at 488-89, 489 n.12.

167. *See* *Jam*, 139 S. Ct. at 766.

168. 28 U.S.C. § 1605(a)(2).

169. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 611 (1992).

“persons doing business with [foreign governments] to have their rights determined in the courts.”<sup>170</sup>

The definition of “commercial” in the FSIA statute provides little specific guidance.<sup>171</sup> But we know that a commercial activity can consist of a series of acts or an individual act, and that “[t]he commercial character of an activity shall be determined by reference to the nature [of the activity] . . . rather than by reference to its purpose.”<sup>172</sup> In other words, courts should ignore the *motive* or objective of a foreign government’s actions, focusing instead on the *nature* of the actions.

To determine whether a foreign government’s activity is commercial, courts examine “whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in ‘trade and traffic or commerce.’”<sup>173</sup> In *Saudi Arabia v. Nelson*, for example, a U.S. couple sued the Kingdom of Saudi Arabia, a Saudi hospital, and the hospital’s purchasing agent in the United States for injuries that Scott Nelson sustained during detention by the Saudi government.<sup>174</sup> The Nelsons alleged that Scott was recruited in the United States to be an engineer in the Saudi hospital.<sup>175</sup> According to the complaint, Nelson was arrested for raising safety concerns at the hospital and was subsequently beaten and tortured by the Saudi government.<sup>176</sup> The Supreme Court found that the challenged act, the detention, was not “based upon” the commercial activity as required by the FSIA.<sup>177</sup> Importantly, although the Court noted that the recruitment and

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170. *Jam*, 139 S. Ct. at 766 (quoting Letter from Jack B. Tate, Acting Legal Adviser, Dep’t of State, to Philip B. Perlman, Acting Att’y Gen. (May 19, 1952), *reprinted in* DEP’T ST. BULL., June 1952, at 984, 985).

171. *See* 28 U.S.C. § 1603(d) (“A ‘commercial activity’ means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.”); *see also* *Saudi Arabia v. Nelson*, 507 U.S. 349, 358-59 (1993) (“If this is a definition, it is one distinguished only by its diffidence; . . . it ‘leaves the critical term “commercial” largely undefined.’” (quoting *Weltover*, 504 U.S. at 612)).

172. 28 U.S.C. § 1603(d).

173. *Weltover*, 504 U.S. at 614 (quoting *Commercial*, BLACK’S LAW DICTIONARY (6th ed. 1990)); *see also* *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 704 (1976) (plurality opinion) (noting that when a state engages in commercial activity it “exercise[s] only those powers that can also be exercised by private citizens”).

174. *See* 507 U.S. at 351-54.

175. *Id.* at 351-52.

176. *Id.* at 352-53.

177. *Id.* at 356-58 (“The only reasonable reading of the [phrase ‘based upon a commercial activity’] calls for something more than a mere connection with, or relation to, commercial activity.”).

employment activities were “arguably commercial,” it found that those activities did not form the basis of the suit.<sup>178</sup>

As part of its discussion, the Court in *Nelson* endeavored to define “commercial” and focused on activities that “can also be exercised by private citizens.”<sup>179</sup> It clarified that a commercial activity is one that the sovereign undertakes “‘in the manner of a private player within’ the market.”<sup>180</sup> The Court distinguished commercial activity from the “[e]xercise of the powers of police and penal officers,” the latter of which can be performed only by a sovereign.<sup>181</sup>

The Court’s analysis in *Republic of Argentina v. Weltover, Inc.*, is also instructive. There, the Court found that Argentina’s default on bonds issued to stabilize its currency was subject to the commercial exception of the FSIA.<sup>182</sup> The Court classified as commercial “a foreign government [that] acts, not as regulator of a market, but in the manner of a private player within it.”<sup>183</sup> The goal of the activity was not dispositive: “[T]he question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives.”<sup>184</sup> Instead, the Court drew a distinction between Argentina’s regulatory authority—which was not a commercial activity because it could not be undertaken by a private party—and a “contract to buy army boots or even bullets,” which it categorized as “a ‘commercial’ activity, because private companies can similarly use sales contracts to acquire goods.”<sup>185</sup> The Court found that the issuance of bonds constituted a commercial activity, asserting that the bonds were “in almost all respects garden-variety debt instruments” that offered a future income stream and could be held by private parties and traded on international markets.<sup>186</sup>

Taken together, the jurisprudence around the FSIA both recognizes a distinction between commercial and noncommercial activities and defines “commercial” to include actions that could be and are undertaken by a private entity or corporation.

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178. *Id.* at 358.

179. *Id.* at 358-61 (quoting *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992)).

180. *Id.* at 360 (quoting *Weltover*, 504 U.S. at 614).

181. *Id.* at 361-62.

182. *Weltover*, 504 U.S. at 609, 620.

183. *Id.* at 614.

184. *Id.*

185. *Id.* at 614-15.

186. *Id.* at 615. The Court noted further that “[e]ngaging in a commercial act does not require the receipt of fair value, or even compliance with the common-law requirements of consideration.” *Id.* at 616.

3. The market-participant exception to the Dormant Commerce Clause

The Commerce Clause vests in Congress the authority to regulate interstate commerce.<sup>187</sup> But Congress does not regulate every aspect of interstate commerce, and in many instances state and municipal actions that affect interstate commerce are not directly prohibited by federal regulation.<sup>188</sup> The Commerce Clause, however, has long been held to limit the power of states and municipalities to prevent them from discriminating against interstate commerce.<sup>189</sup> This extension of the Commerce Clause, known as the Dormant Commerce Clause, works to prevent states and municipalities from taking regulatory action that aids in-state commercial participants and burdens out-of-state competitors.<sup>190</sup> A state or municipal action can be challenged on the basis that it either discriminates against interstate commerce<sup>191</sup> or imposes a burden on interstate commerce out of proportion to the benefits intended by the locality.<sup>192</sup>

Dormant Commerce Clause challenges, however, are limited to the *regulatory* actions of states and municipalities.<sup>193</sup> State and municipal actions may favor in-state commercial participants over out-of-state competition—despite affecting interstate commerce—when the state or municipality acts as a market participant rather than as a regulator.<sup>194</sup> The Court has noted that

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187. U.S. CONST. art. I, § 8, cls. 1, 3 (“The Congress shall have Power . . . To regulate Commerce . . . among the several States.”).

188. *See, e.g.,* *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 803-04, 809-10 (1976) (stating that Maryland’s scrap program had an effect on interstate commerce but was not barred by federal law).

189. *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988); *Welton v. Missouri*, 91 U.S. 275, 282 (1876) (stating that congressional inaction on interstate commerce is “equivalent to a declaration that inter-State commerce shall be free and untrammelled”).

190. *Dep’t of Revenue v. Davis*, 553 U.S. 328, 337-38 (2008); *New Energy*, 486 U.S. at 273-74.

191. *See* *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2461 (2019); *Or. Waste Sys., Inc. v. Dep’t of Env’t Quality*, 511 U.S. 93, 99 (1994) (“[D]iscrimination’ simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.”).

192. *Davis*, 553 U.S. at 338-39.

193. *Id.* at 337-39.

194. *See* *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 808-10 (1976) (holding that a Maryland state scrap program that favored domestic participants was not barred by the Dormant Commerce Clause where Maryland participated in the market as a buyer). As Jon Michaels put it, “restructuring a program or initiative as commercial may . . . allow states and localities to skirt the Dormant Commerce Clause.” Michaels, *supra* note 62, at 533-34. This exception exists because the purpose of the Dormant Commerce Clause is to prohibit state and municipal actions that restrain interstate

*footnote continued on next page*

“[n]othing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others.”<sup>195</sup> This market-participant exception dictates that where a state or municipality engages in the same types of activities as a private market participant, it is free from scrutiny under the Dormant Commerce Clause.<sup>196</sup>

The Court announced the market-participant doctrine in *Hughes v. Alexandria Scrap Corp.*, in which it determined that the State of Maryland was acting as a market participant when it created a program that subsidized local scrap processors by paying for Maryland-titled junk cars that were converted into scrap.<sup>197</sup> The Court explained that Maryland had not “sought to prohibit the flow of [junk cars], or to regulate the conditions under which [that flow] may occur.”<sup>198</sup> Such action would be market regulation. Rather, Maryland had

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commerce, not to prohibit states and municipalities from engaging in interstate commerce themselves. *Reeves, Inc. v. Stake*, 447 U.S. 429, 436-37 (1980).

195. *Hughes*, 426 U.S. at 810 (footnote omitted).

196. *Reeves*, 447 U.S. at 439. Similarly, in the application of state tort law, many jurisdictions have adopted the public-duty doctrine, which protects states and municipalities from individual tort liability where the duty is owed to the public rather than to specific individuals. *See, e.g.*, *McGaughey v. District of Columbia*, 734 F. Supp. 2d 14, 18 (D.D.C. 2010) (interpreting District of Columbia law), *aff'd*, 684 F.3d 1355 (D.C. Cir. 2012); *Ostwalt v. Charlotte-Mecklenburg Bd. of Educ.*, 614 F. Supp. 2d 603, 607 (W.D.N.C. 2008) (interpreting North Carolina law); *Bassett v. Lamantia*, 858 F.3d 1201, 1203 (9th Cir. 2017) (interpreting Montana law), *certifying questions to 417 P.3d 299* (Mont. 2018). The origin of the public-duty doctrine can be traced to the Supreme Court’s ruling in *South v. Maryland ex rel. Pottle*, 59 U.S. (18 How.) 396, 401, 403 (1856), where the Court held that state officials may not be held liable for failure to protect individual citizens from criminal conduct. Certain jurisdictions have explicitly excepted government conduct from the public-duty doctrine’s liability refuge where similar conduct undertaken by a private person would result in liability. *See, e.g.*, *Kent v. City of Columbia Falls*, 350 P.3d 9, 16-17 (Mont. 2015) (discussing Montana law); *Catone v. Medberry*, 555 A.2d 328, 333 (R.I. 1989) (applying Rhode Island law). In the State of Washington, courts have held that “[t]he public duty doctrine does not apply where the government is performing a proprietary function.” *Dorsch v. City of Tacoma*, 960 P.2d 489, 491 (Wash. Ct. App. 1998). Other jurisdictions, however, have eschewed the public-duty doctrine, finding that its application has “resulted in an artificial distinction between so-called ‘public’ and ‘private’ duties.” *Beaudrie v. Henderson*, 631 N.W.2d 308, 314 (Mich. 2001) (recognizing that both the Florida and Arizona Supreme Courts have rejected the public-duty doctrine). This exposition of the public-duty doctrine both supports the logic underlying the market-participant exception to the Dormant Commerce Clause and reveals the practical difficulty in distinguishing between public and private actors. It is partly for this reason that our proposed solution offers courts a totality-of-the-circumstances test for the commercial–noncommercial distinction rather than relying on a single criterion.

197. 426 U.S. at 796-97, 806-10. Maryland created this program in an effort to solve its abandoned-automobile problem; the program aimed to raise scrapping profits and speed up the “scrap cycle.” *Id.* at 796-97.

198. *Id.* at 806.

entered the market itself to bid up the cars' prices "as a purchaser, in effect, of a potential article of interstate commerce."<sup>199</sup> Thus, Maryland was acting as a market participant and its program was not subject to the limitations of the Dormant Commerce Clause.<sup>200</sup> Another example can be drawn from two Supreme Court cases: Where a state creates a public monopoly for trash processing it is acting as a market participant exempt from the Dormant Commerce Clause,<sup>201</sup> but where a state regulates to create a private monopoly for trash processing, it is acting as a market regulator subject to the Dormant Commerce Clause.<sup>202</sup>

Although the Dormant Commerce Clause cases use the term "market participant" rather than "commercial participant," the contours are similar, and therefore useful, for our purposes.<sup>203</sup> To determine whether a state or municipality is acting as a regulator—a state actor—or as a market participant, courts consider whether the activity is the kind of activity that private market participants undertake.<sup>204</sup> The Ninth Circuit recently specified some, though not all, of the questions it used to identify conduct constituting market

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199. *Id.* at 806, 808.

200. *Id.*; see also *Reeves*, 447 U.S. at 440 (holding that South Dakota was acting as a "market participant" in selling cement).

201. *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 334-36, 345 (2007).

202. *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 387, 392-95 (1994).

203. The Court previously attempted to grapple with the significance of a state engaging in commercial conduct, but the effort foundered. In 1964, a majority of the Court determined that Alabama, acting as a railroad operator, had waived its sovereign immunity under a federal law providing for liability to employees injured while working for a railroad. *Parden v. Terminal Ry. of the Ala. State Docks Dep't*, 377 U.S. 184, 184-86, 194, 196 (1964) *overruled by* *Welch v. Tex. Dep't of Highways & Pub. Transp.*, 483 U.S. 468 (1987), and *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999). The Court reasoned that the state had implicitly consented to the application of this federal law when it chose to enter the railroad business and that providing for immunity would undermine congressional power to regulate an important industry. *Id.* at 196. But little more than two decades later, the Court overruled *Parden* "to the extent that [it] is inconsistent with the requirement that an abrogation of Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language." *Welch*, 483 U.S. at 478 (plurality opinion). And little more than a decade after that, the Court demolished whatever might have been left of *Parden's* reasoning, overruling the remainder of the case and stating that "a State's express waiver of sovereign immunity [must] be unequivocal." *Coll. Sav. Bank*, 527 U.S. at 680. Because of this vociferous repudiation of *Parden* we address the case only in this footnote, but it is worth noting for two reasons. First, the line of decisions addressed states' Eleventh Amendment immunity, not federal sovereign immunity, which is our primary focus. Second, the analysis in *Parden* offers an example of the Court's capacity to distinguish between governmental actions that are sovereign or commercial in character.

204. See *Reeves*, 447 U.S. at 439.

participation: whether the activity is proprietary, whether the activity can be “analogized” to that of a private entity, whether the activity does not impose restrictions that “reach beyond the immediate parties with which the government transacts business,” and whether the government entity “is subject to market pressures and conditions.”<sup>205</sup> Therefore, when California acted in a manner similar to a private insurer, and when no one was required to insure themselves or seek reimbursement from the state, the state acted as a market participant, not as a regulator.<sup>206</sup>

Dormant Commerce Clause jurisprudence thus recognizes that a government entity—a state—may have dual roles: as a commercial actor and as a government regulator. A state is treated differently when it acts in a commercial manner than when it acts in a regulatory manner. The Dormant Commerce Clause applies only in the latter case.

## B. A New Protocol

Recognizing that courts *can* distinguish between commercial and noncommercial activities and borrowing from the factors courts previously have used to identify commercial conduct, this Subpart sets out the Article’s primary contribution: the theory and protocol for applying our doctrinal proposal. We begin not with an abstract definition of “commercial,” but instead with the factors used by courts in other contexts to identify the contours of commercial conduct. Thus, our protocol offers a series of factors that courts can consider in determining whether a particular activity is commercial, but it does not impose a rigid, bright-line test.

Finding a path out of the sovereign-shield morass requires correcting the underlying question: Rather than focusing on *who* the actor is, courts should focus on the *nature* of the action. If the challenged conduct is commercial, it should not be covered by sovereign-shield defenses regardless of the actor. If, by contrast, the challenged conduct is not commercial, there should be a presumption that sovereign-shield defenses are available for government-directed conduct. In both cases, traditional agency principles remain sufficient to allocate liability between the government and the contractor. Therefore, we propose that courts use our recommended protocol to limit the application of sovereign-shield defenses for commercial conduct.

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205. *Asante v. Cal. Dep’t of Health Care Servs.*, 886 F.3d 795, 800-01 (9th Cir. 2018) (first quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988); and then quoting *Big Country Foods, Inc. v. Bd of Educ.*, 952 F.2d 1173, 1178 (9th Cir. 1992)).

206. *Id.* at 801-02; *see also* *Mason & Dixon Lines Inc. v. Steudle*, 683 F.3d 289, 294 (6th Cir. 2012) (discussing the market-participant exception in the context of a road-construction program).

Our protocol poses four basic questions; it can easily be visualized as a decision tree. And it answers a singular, all-important question: Does an injured party have an avenue for redress?

1. Did Congress unambiguously preempt state law or provide immunity for the challenged conduct?

Congress can preempt state law or provide immunity to a federal agency, to a federal instrumentality, or for specific conduct.<sup>207</sup> Our proposal does not alter that right; it only requires that lawmakers state their intentions clearly.<sup>208</sup> Therefore, the first question is whether Congress unambiguously preempted state law or provided immunity for the challenged conduct. To meet that burden, the party asserting the sovereign shield would need to clearly establish express preemption, field preemption, the impossibility of compliance with both federal and state law, or an explicit congressional grant of immunity. If Congress explicitly and expressly defined the bounds of preemption or immunity in a given area by statute, the sovereign shield should apply regardless of whether the government is acting directly or through a contractor.<sup>209</sup> Otherwise, the sovereign shield ought not apply at this stage of the protocol.

Preemption doctrine has multiple branches, some more compelling than others.<sup>210</sup> Implicit preemption, for example, takes two forms: field preemption,

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207. See, e.g., *Mason v. SmithKline Beecham Corp.*, 596 F.3d 387, 390 (7th Cir. 2010) (describing federal preemption); *Keifer & Keifer v. Reconstruction Fin. Corp.*, 306 U.S. 381, 388-89 (1939) (discussing express grants of immunity).

208. Cf. Ernest A. Young, *"The Ordinary Diet of the Law": The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 265 ("By requiring Congress to speak clearly in order to preempt state law, [the presumption against preemption] ensures notice to legislative advocates of state interest that preemption is contemplated in proposed legislation, and it imposes an additional procedural hurdle to legislation that undermines state prerogatives. Like other 'clear statement rules' disfavoring legislation that alters the federal-state balance, the . . . presumption operationalizes the political and procedural safeguards of federalism." (footnotes omitted)).

209. There is always the risk that the legislature could act to protect contractors by statute, but this risk persists, in light of the Supremacy Clause, regardless of the doctrinal reforms we propose. For further discussion of this risk, see note 107 above.

210. See Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 231 (2000) (arguing that "constitutional law has no place for the Court's fuzziest notions of 'obstacle' preemption, under which state law is preempted whenever its practical effects would stand in the way of accomplishing the full purposes behind a valid federal statute"); see also *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25, 31 (1996) ("More often, explicit pre-emption language does not appear, or does not directly answer the question. In that event, courts must consider whether the federal statute's 'structure and purpose,' or nonspecific statutory language, nonetheless reveal a clear, but implicit, pre-emptive intent." (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977))).

where federal law so dominates an area that it precludes state action, as in the context of immigration law,<sup>211</sup> and conflict preemption, where state law and federal law are in tension.<sup>212</sup> Conflict preemption occurs when either (1) a party can show that simultaneous compliance with both state law and federal law is impossible, or (2) a reviewing court concludes that a “challenged state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’”<sup>213</sup> Conflict preemption can thus alternatively be impossibility or obstacle preemption. The latter, obstacle preemption, permits what we and others view as problematically subjective assessments of whether state law hinders federal policy.<sup>214</sup> Consequently, the murky notion of obstacle preemption would be unavailable as an answer to our first question. Accordingly, only a showing of express preemption, field preemption, or impossibility preemption would afford congressionally created preemptive effect under our protocol.

The Higher Education Act of 1965 (HEA) provides a concrete example for analysis of the first question in our protocol. Federal law expressly preempts state disclosure requirements that might otherwise apply to “[l]oans made, insured, or guaranteed pursuant to a program authorized by title IV” of the HEA.<sup>215</sup> Adopting our protocol, nothing changes in the analysis of express preemption; Congress retains the authority to expressly and explicitly preempt state law or regulation. Accordingly, if conduct is challenged as a violation of a state-mandated disclosure requirement, that requirement would be preempted by federal law. Suits under state law could not continue.<sup>216</sup> In turn, if the challenged conduct is not related to a state-mandated disclosure requirement, then a reviewing court would continue through the protocol to assess whether the conduct is commercial, the question that we turn to next.<sup>217</sup>

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211. *Arizona v. United States*, 567 U.S. 387, 401 (2012) (finding that Congress has “occupied the field of alien registration”).

212. *Elengold & Glater*, *supra* note 1, at 981-82.

213. *Arizona*, 567 U.S. at 399 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

214. *See, e.g.*, *Meltzer*, *supra* note 3, at 35-43.

215. 20 U.S.C. § 1098g.

216. Of course, there will be disputes about what is covered even by express preemptive language. *Compare, e.g.*, *Chae v. SLM Corp.*, 593 F.3d 936, 942-43 (9th Cir. 2010) (holding that the plaintiffs’ misrepresentation claims were expressly preempted by federal law), *with* *Nelson v. Great Lakes Educ. Loan Servs., Inc.*, 928 F.3d 639, 647-50 (7th Cir. 2019) (distinguishing *Chae* and finding that similar claims were not entirely preempted). Such diversity is to be expected in any legal scheme, and it also provides an incentive for Congress to be more explicit in its preemption and immunity preferences.

217. It bears emphasis that this treatment of explicit preemption would in some cases leave the outcome substantively unchanged. Consider *Chae v. SLM Corp.*, 593 F.3d 936, a case that we explored in our prior work. *See* *Elengold & Glater*, *supra* note 1, at 1023-24, 1023 nn.277-79. The case involved a claim by student-loan borrowers arguing, among other things, that a federal contractor managing their loans used “statements and  
*footnote continued on next page*

2. Is the challenged conduct commercial?

The second question in the protocol asks whether the challenged conduct is commercial. Although “commercial” has not been explicitly defined in the context of preemption and immunity, it has been explored in other areas, as discussed above.<sup>218</sup> To identify factors indicating that an activity is commercial, we draw on doctrines interpreting sue-and-be-sued-clauses, the scope of immunity afforded to foreign governments under the FSIA, and the market-participant exception to the Dormant Commerce Clause.<sup>219</sup> From these sources we distill four inquiries that courts should consider when determining whether challenged conduct is commercial:

- (1) Do private-sector actors offer the service or product in competition with the federal government or its contractor?
- (2) Do individual consumers engage in direct transactions with the provider of the relevant service or product?<sup>220</sup>
- (3) Does a state or federal consumer-protection regulatory regime apply to similar transactions not involving the government?
- (4) Would the good or service be provided but for federal intervention?

We do not suggest that these inquiries make up a rigid test, nor that every factor need be present to render conduct commercial. Rather, we think courts should consider these factors together and holistically; the more of these questions are answered in the affirmative, the stronger the case that the activity should be classified as commercial. Further, and borrowing from the FSIA, our definition of “commercial” should be “determined by reference to the nature of the course of conduct or particular transaction or act, rather than by

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coupon books that trick[ed] borrowers” into believing that interest did not vary based on the date of payment, in violation of California consumer-protection laws. *Chae*, 593 F.3d at 940-942. The trial court granted summary judgment to Sallie Mae, the defendant, and on appeal a Ninth Circuit panel concluded that the plaintiffs’ claims were preempted by the HEA. *Id.* at 938. The panel considered the following language: “Loans 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.” *Id.* at 942 (alteration in original) (quoting 20 U.S.C. § 1098g). The panel concluded that the plaintiffs’ misrepresentation claims actually alleged improper disclosures (as opposed to, for example, affirmative misrepresentations) and were consequently preempted. *Id.* at 942-43. Because the panel’s reasoning turned on explicit statutory language, application of our protocol would likely not change the result.

218. See *supra* Part III.A.

219. See *supra* Part III.A.

220. When we say consumers here, we refer specifically to end-use consumers. So while uranium-enrichment facilities might sell to power plants, for example, those facilities do not engage directly with consumers for our purposes. See *infra* Part III.D.3.

reference to its purpose.”<sup>221</sup> A decisionmaker should ask whether the challenged conduct is commercial with reference to the four questions identified above, not whether the *motivation* for the conduct was commercial, in determining how to treat the conduct under our protocol.<sup>222</sup>

If a court determines that the challenged conduct is commercial, then the sovereign shield should not attach regardless of whether the government is providing the service or product directly or through an instrumentality or contractor. If, however, a court determines that the challenged conduct is *not* commercial in nature, then the government actor is entitled to a presumption that the sovereign shield protects it from liability to the extent that federal law otherwise permits.<sup>223</sup> If the government is acting indirectly through a contractor, the contractor would likewise enjoy a presumption that the sovereign shield protects it as an agent of the government, again to the extent that the law permits<sup>224</sup> and provided that the contractor has acted in accordance with the government’s instructions and guidance.

### 3. Who engaged in the challenged conduct?

Question three is whether the federal actor directly engaged in the challenged conduct or acted indirectly through a contractor or instrumentality.

If the federal government acted by itself and not through an intermediary, then the response to question two (whether the challenged conduct was commercial) remains dispositive in assigning liability. If the federal government acted by itself and the conduct was *not* commercial, the plaintiff’s suit is subject to sovereign-shield defenses. If, by contrast, the federal

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221. 28 U.S.C. § 1603(d).

222. We recognize that this protocol omits from oversight and liability conduct that may be particularly troubling, such as human and civil rights violations in private prisons and immigration detention centers operated by private contractors. One could imagine a range of abuses in these settings that would not be deemed commercial when assessed using our four questions. Consider, for example, the physical abuse of a prisoner. By definition, carceral services can be provided only by or on behalf of the government, so private-sector actors do not offer the service or product in competition with the government. For the same reason, there are no consumer-protection regimes for carceral services that do not involve the government. Nor would the good or service be provided but for government intervention. So even though the contractor interacts directly with the “consumer” (here a federal prisoner), on balance a court would likely find the conduct noncommercial. This is not to say that we condone such actions or that the perpetrators should not be brought to justice and the victims compensated. It is only to say that such activities fall outside the scope of this Article, which focuses on harms to consumers.

223. See *infra* Part III.B.4 (describing four different scenarios and their related liability under our proposal).

224. See *infra* Part III.B.4. We explore how this presumption might operate in the noncommercial context in another article. See Elengold & Glater, *supra* note 3.

government acted itself and the conduct *was* commercial, then the plaintiff's suit may proceed under relevant state or federal law.

If, however, the government acted indirectly, a court must proceed to the fourth and final question in order to properly distribute liability, regardless of whether or not the challenged conduct was deemed commercial.

4. If the actor is not the government, who is liable under traditional agency law principles?

In general, when an agent commits a tort, the agent is liable for the resulting harm.<sup>225</sup> A principal may also be vicariously liable for a tort caused by its agent, provided that the agent acted within the scope of the principal-agent relationship and the "principal control[led] or ha[d] the right to control the manner and means of the agent's performance of work."<sup>226</sup> If these conditions are met, both the agent and the principal may be subject to suit and liable for damages under the principle of *respondeat superior*.<sup>227</sup> This means, for example, that if a contractor follows its employer's lawful instructions and causes harm,<sup>228</sup> the employer is also properly a defendant in a lawsuit by a victim. Another way to think about this is that once agency is established, liability may flow *upstream* from the agent to the principal.<sup>229</sup>

This does not answer the question whether a government agent is protected by preemption, sovereign immunity, or intergovernmental immunity. Under our proposal, when faced with the question whether the

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225. RESTATEMENT (THIRD) OF AGENCY § 7.01 (AM. L. INST. 2006). Liability can be precluded by the operation of law. For example, the FTCA "bar[s] actions against governmental employees for acts within the scope of their employment or require[s] that the government be substituted as the defendant." *Id.* § 7.01 cmt. b.

226. *Id.* § 7.07.

227. *Id.* § 2.04.

228. This matters greatly in the apportionment of liability. It is long settled and well established that if a contractor deviates from the terms of a contract and causes harm, this militates in favor of finding the contractor alone liable. *See* *Mechs.' Bank of Alexandria v. Bank of Columbia*, 18 U.S. (5 Wheat.) 326, 337-38 (1820) (explaining that a principal's liability for acts undertaken by a general agent depends on whether the acts were done in the exercise of the agent's duties to the principal and within the limits of the powers delegated).

229. A principal generally has a duty to indemnify its agent "when the agent suffers a loss that fairly should be borne by the principal in light of their relationship." RESTATEMENT (THIRD) OF AGENCY § 8.14(2)(b). However, a "principal's duty to indemnify does not extend to losses that result from the agent's own negligence, illegal acts, or other wrongful conduct." *Id.* § 8.14 cmt. b. The fact that an agent followed its government principal's instructions in causing harm would strongly support an argument for indemnification. Of course, a duty to indemnify may also arise by contract. *Id.* We apply these principles in both downstream (inverted) agency analysis and upstream agency analysis.

sovereign shield should apply to a government agent, the analysis remains the same, but its effect is different. A court asks whether an agency relationship exists and, if so, whether the agent was acting within the scope of that relationship and under the direction of the principal.<sup>230</sup> But the result does not determine upstream liability. Instead, the result determines whether the benefits of sovereignty inherent in the principal—the sovereign shield—flow *downstream* to the agent.<sup>231</sup> We have previously termed this an “inverted agency analysis,”<sup>232</sup> where “[t]he court looks at the relationship to determine whether attributes of the principal extend *downward* to protect the agent that caused the harm.”<sup>233</sup>

Whether an agency relationship exists and whether the agent is appropriately acting within the scope of that relationship matter for two different reasons, one having to do with apportioning liability and the other having to do with the applicability of the sovereign shield. Under our protocol, if the challenged conduct is commercial, agency principles determine whether the government is *liable* alongside its contractor; neither principal nor agent enjoy protection. If the challenged conduct is *not* commercial and the principal is protected by the sovereign shield, agency principles determine whether the contractor/agent may be *protected* alongside the government/principal.<sup>234</sup>

Assume that a consumer brings a claim against both a government contractor and the federal government for violating a state consumer statute. The liability of the contractor/agent or the government/principal for the challenged conduct depends on two questions addressed as part of our protocol: Was the challenged conduct commercial? And would the application of traditional agency principles result in joint liability? We addressed the mechanism for determining the first question above.<sup>235</sup>

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230. See *supra* note 226 and accompanying text.

231. This is precisely the intuition drawn upon by the Court in *Boyle v. United Technologies Corp.*, 487 U.S. 500, 512 (1988), which recognized that “[i]t makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production.”

232. Elengold & Glater, *supra* note 1, at 1007.

233. *Id.*

234. We recognize, of course, that traditional principal–agent negotiations come along with this proposal. The government might propose a narrow agency agreement to reduce its liability risk, and the contractor will likely seek a broader agency relationship to compel the government to share liability (or protection). We expect that these dynamics might change the details of contracts, but they would presumably arise during negotiations between two sophisticated parties. Either way, if the conduct is commercial, an injured consumer will not be foreclosed from seeking a remedy from one (if not both) actors.

235. See *supra* Part III.B.2.

The second question—whether agency principles, when applied, would result in joint liability—is a well-trodden legal path<sup>236</sup> and depends on the facts of each case. A court must determine whether a principal–agent relationship existed between the government and the contractor. The contractor can be expected to argue that the alleged harm was caused by conduct undertaken within the scope of the agency relationship. In other words, the contractor will likely argue that it was following the direct and specific instructions of the principal when the called-for activity resulted in harm. The defendant contractor’s argument is stronger when it can marshal more evidence that the government both ordered the specific activity that caused the harm and specified in great detail how that activity should be conducted.<sup>237</sup> Conversely, if the contractor had discretion in deciding how to complete the challenged conduct, acted in an area not covered by the government’s specific instructions, or violated the government’s instructions, then the contractor is less likely to persuade a court that it acted as an agent.<sup>238</sup>

Our protocol for determining agency applies these principles of agency law in both downstream (inverted) agency analysis and upstream agency analysis. When we ask whether the conduct was commercial and whether traditional agency principles would result in joint liability, there are four possible outcomes:

- (1) The challenged action was commercial, and the application of agency principles would result in joint liability. In that scenario the sovereign shield would not be available, and both the contractor/agent and the government/principal may be found liable.
- (2) The challenged action was commercial, but the application of agency principles would not result in joint liability.<sup>239</sup> In that scenario only the contractor/agent may be found liable, and the government would not be liable.
- (3) The challenged action was not commercial, and the application of agency principles would result in joint liability. In that scenario both

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236. See RESTATEMENT (THIRD) OF AGENCY §§ 7.01, 7.07 (AM. L. INST. 2006).

237. This is so because the tighter the connection between the harm and the principal’s instruction to the agent, the stronger the argument becomes that the principal controlled the manner and means of the agent’s work. See *supra* notes 226-29 and accompanying text.

238. This was the analysis undertaken in *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940), the seminal case on derivative sovereign immunity. In its analysis of derivative sovereign immunity, *Yearsley* drew heavily on agency principles. See *id.* at 20-21 (explaining that agent liability had been found where the agent “exceeded his authority” or the authority “was not validly conferred”).

239. In other words, the plaintiff could not establish a principal–agent relationship or the agent was operating outside the scope of that relationship.

the contractor/agent and the government/principal enjoy a presumption that the sovereign shield provides protection. *This is the only scenario in which the sovereign shield could protect both the government and its contractor.*

- (4) The challenged action was not commercial, and the application of agency principles would not result in joint liability.<sup>240</sup> In that scenario the contractor/agent, but not the government/principal, may be found liable.

We represent this analysis below:

	<b>Joint liability under agency law</b>	<b>No joint liability under agency law</b>
<b>Commercial conduct</b>	Contractor agent may be liable Government principal may be liable	Contractor may be liable
<b>Noncommercial conduct</b>	Sovereign shield applies	Contractor may be liable

Under current doctrine, without a move to our protocol, the federal government enjoys sovereign-shield protection regardless of the facts, and contractors enjoy it whenever the application of a five-factor framework determines that outcome.<sup>241</sup> But, as we have shown, courts do not always apply all of the five factors and sometimes apply factors inconsistently.<sup>242</sup> We have also shown how contractors and their agency partners seek to manipulate doctrinal complexity to extend the sovereign shield and shrink available remedies for consumers.<sup>243</sup> As a result, consumers are often entirely precluded from recovery.

Our proposal may still result in the frustration of a plaintiff seeking to recover if the challenged action is not commercial *and* the actor is either the

240. In this situation the contractor may have, for example, deviated from instructions of the principal. *See Yearsley*, 309 U.S. at 21.

241. *See Elengold & Glater*, *supra* note 1, at 994-95 (identifying five factors—congressional intent, the character of the contracted institution and its contract, the discretion of the contractor, the contractor’s adherence to the precise terms of the contract, and the actual or potential impact of state regulation on federal policymaking and decisionmaking—that courts have used to analyze sovereign-shield defenses asserted by nongovernmental actors).

242. *See id.* at 994-1010.

243. *Id.* at 1032-34, 1038-41.

federal government or an agent acting on its behalf, following careful and lawful instructions. Our future work will explore this quadrant of the diagram in more detail.<sup>244</sup> But in the context of consumer protection, where a grant of immunity constitutes a potential federal trespass on traditional state police powers, we suggest that this proposal properly balances the need of the government to act as sovereign<sup>245</sup> with the need to afford injured consumers the possibility of redress when the government is not acting in its uniquely sovereign capacity.

In emphasizing the distinction between commercial and noncommercial conduct, we have drawn on lessons learned from scholars of federal–state relations, business–regulator relations, and business–consumer relations. Centering our protocol on whether an activity is commercial in nature avoids a murkier and less certain phenomenon: the potentially shifting relationships between states and the federal government that complicate efforts to draw a consistent line between state and federal authority.<sup>246</sup> Because both states and the federal government may engage in commercial conduct, this focus also ensures that the private sector—which plays a role in shaping and manipulating federal–state relationships—remains a visible subject of judicial analysis.<sup>247</sup> Our approach obviates the need to attempt, likely unsuccessfully, to address the wide range of ways in which businesses influence decisions, policymaking, and oversight at the federal agencies that employ and regulate them.<sup>248</sup> And by preserving the possibility of state-law liability for both contractors and the federal government when the government acts commercially, our protocol also preserves states’ traditional police powers and the role of states as checks not only on the federal government but also on the private sector.<sup>249</sup> Finally, as the concentration of private-sector power increases, our protocol creates pathways to accountability and liability and

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244. See Elengold & Glater, *supra* note 3.

245. This need is consistent with the purposes of immunity and preemption: to pursue public ends, avoid timidity in public service, recruit talented government employees, and prevent the distraction and cost of damages suits. See Sabatino, *supra* note 108, at 197–201 (describing sovereign immunity’s objectives and rationales); see also Florey, *supra* note 103, at 771–82 (describing the history and development of sovereign immunity).

246. See *supra* Part II.A (describing the intricacies of federal–state relationships).

247. See *supra* Part II.A (noting the private sector’s capacity to act like a black hole, invisibly affecting state and federal actions and interactions).

248. See *supra* Part II.B (describing the difficulty of preventing informal ties between regulators and their regulated entities that can inhibit regulation in the public interest).

249. See *supra* Part II.B (identifying the important role that states play in holding contractors and the federal government accountable).

preserves the possibility of redress for those harmed by contractor conduct.<sup>250</sup> Our protocol thus attempts to stabilize the balance between players in multiple dimensions of potential conflict—between states and the federal government, between the branches of the federal government, and between businesses and consumers.

### C. Returning to First Principles

As shown above, courts and Congress know how to differentiate between commercial and noncommercial activities, even when those activities involve government agents and instrumentalities.<sup>251</sup> Recognizing commercial activity is therefore possible. This Article's proposal is bold in that it extends a commercial analysis to federal actors themselves. But it is not as extreme as it may seem at first glance. In fact, this protocol returns to a principle from early constitutional cases that determined liability based on the nature of the activities an entity performed rather than the status of the entity itself.<sup>252</sup> In those early cases, the Supreme Court recognized, explicitly or implicitly, that the same entity—including federal instrumentalities and sovereign states—can perform different functions with different legal consequences. Our proposal would restore and extend that mode of analysis.

In *McCulloch v. Maryland*, which held that Congress has the power to incorporate a national bank and that states could not constitutionally tax its branches, the Supreme Court recognized that states cannot regulate or discriminate against the federal government.<sup>253</sup> About fifty years later, however, in *National Bank v. Kentucky*, the Court clarified that states *could* tax shares of the National Bank held by private persons, even when the tax was collected from the bank itself.<sup>254</sup> Although the lines between taxable and nontaxable items have since blurred, comparing *McCulloch* and *National Bank* offers a window into the possibility of assessing liability based on the action rather than the actor. In 1819, the Court in *McCulloch* recognized the difference later elaborated in *National Bank*:

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250. See *supra* Part II.C (describing the accumulation of wealth and power in the private sector and discussing the importance of accountability).

251. See *supra* Part III.A.

252. It also harkens back to the early understanding (or lack thereof) of federal sovereign immunity. See Jackson, *supra* note 3, at 524 (“[S]overeign immunity rules have never barred all suits against government officers, or all forms of relief that operate against the government. The doctrine of sovereign immunity as it initially developed in this country had a much more constrained meaning.”).

253. 17 U.S. (4 Wheat.) 316, 425, 436 (1819); see also *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 859-68 (1824) (reaffirming the holding of *McCulloch*).

254. 76 U.S. (9 Wall.) 353, 361-63 (1870).

This opinion . . . does not extend to a tax paid by the real property of the bank, in common with the other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the State.<sup>255</sup>

The Court's holding in *National Bank* accordingly acknowledged that when a federal instrumentality trades in the private economy, intergovernmental-immunity defenses might not apply.

In 1869, in *Thomson v. Pacific Railroad*, the Court rejected the Pacific Railroad's position that its road, which was "constructed under the direction and authority of Congress, for the uses and purposes of the United States," was exempt from state taxation pursuant to *McCulloch*.<sup>256</sup> Because Congress did not explicitly exempt the road from state taxation, the Court drew a line between the "means employed by the government," which could be exempt from state taxation under *McCulloch*, and the "property of agents employed by the government," which the Court held was presumably not exempt.<sup>257</sup> The Court was particularly concerned, from a federalism perspective, about a slippery slope:

[Exempting the road] would remove from the reach of State taxation all the property of every agent of the government. Every corporation engaged in the transportation of mails, or of government property of any description, by land or water, or in supplying materials for the use of the government, or in performing any service of whatever kind, might claim the benefit of the exemption. The amount of property now held by such corporations, and having relations more or less direct to the National government and its service, is very great. And this amount is continually increasing; so that it may admit of question whether the whole income of the property which will remain liable to State taxation, if the principle contended for is admitted and applied in its fullest extent, may not ultimately be found inadequate to the support of the State governments.<sup>258</sup>

Thus the Supreme Court distinguished commercial and noncommercial activity, even *within* government and government instrumentalities. In fact, five years after *McCulloch*, the Supreme Court decided in *Bank of the United States v. Planters' Bank of Georgia* that a state's ownership interest in a business did not confer special Eleventh Amendment protections.<sup>259</sup> Referring to federal sovereign immunity,<sup>260</sup> the Court in *Planters' Bank* stated:

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255. *McCulloch*, 17 U.S. (4 Wheat.) at 436.

256. *Thomson v. Pac. R.R.*, 76 U.S. (9 Wall.) 579, 587-88, 592 (1870).

257. *Id.* at 591.

258. *Id.* at 591-92.

259. *See Bank of the U.S. v. Planters' Bank of Ga.*, 22 U.S. (9 Wheat.) 904, 906-08 (1824); *see also* *Briscoe v. Bank of Ky.*, 36 U.S. (11 Pet.) 257, 325-26 (1837) (applying the same reasoning as *Planters' Bank*). *But see* *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 397-99 (1995) (considering the very different role of Amtrak, a corporation created by the government "for the furtherance of governmental objectives," where the  
*footnote continued on next page*

It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted.<sup>261</sup>

Chief Justice Marshall's reasoning in *Planters' Bank*—that the government qua government sits in a different position than the government qua corporation—affords yet another example of a court analyzing liability based on the activity of an entity rather than on the entity's general status.

The analysis in *Planters' Bank* is not an anomaly. The Supreme Court differentiated between the State of Georgia's power of eminent domain in its own state (an "attribute of sovereignty") and Georgia's land ownership in Tennessee (a commercial activity) in one case,<sup>262</sup> and between the sovereign's right to recover public money for public purposes (a governmental undertaking, like collecting taxes) and the sovereign's contract or tort rights as a corporate shareholder (a commercial action) in another.<sup>263</sup> As the Court explained in the context of taxation, the effect of the action, not the status of the actor, is dispositive:

[E]xemption of Federal agencies from state taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power.<sup>264</sup>

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government did "not merely hold[] some shares but control[led] the . . . corporation through its appointees").

260. See *Planters' Bank*, 22 U.S. (9 Wheat.) at 908.

261. *Id.* at 907.

262. *Georgia v. City of Chattanooga*, 264 U.S. 472, 480-81 (1924) (holding that the "sovereignty of Georgia was not extended into Tennessee," that Georgia's "enterprise in Tennessee is a private undertaking," and that because Georgia "occupies the same position [in Tennessee] as does a private corporation authorized to own and operate a railroad[,] . . . it cannot claim sovereign privilege or immunity").

263. *Chesapeake & Del. Canal Co. v. United States*, 250 U.S. 123, 126 (1919) (distinguishing instances in which the government acts in its "governmental capacity" from those instances in which it "assert[s] any rights with respect to the conduct of [a] corporation's affairs, its contracts or its torts").

264. *Cent. Pac. R.R. Co. v. California*, 162 U.S. 91, 119-20 (1896) (quoting *R.R. Co. v. Peniston*, 85 U.S. (18 Wall.) 5, 36 (1873)). At some point, the task of separating commercial from governmental—at least in the federalism context—morphed into a debate around the difference between traditional and nontraditional governmental functions. In 1985, the Court found that "the attempt to draw the boundaries of state regulatory immunity in terms of 'traditional governmental function' is not only unworkable but is also inconsistent with established principles of federalism." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531 (1985) (overruling *National League of Cities v. Usery*, 426  
footnote continued on next page

The distinction between commercial and noncommercial government activities has received notice in more recent Supreme Court jurisprudence, too, though in the context of state-conferred sovereign immunity. In a dissent from a decision holding that the operator of a state's prepaid-tuition program enjoyed immunity from accusations that it had violated federal law by engaging in false and misleading advertising,<sup>265</sup> Justice Stevens suggested that it may be "appropriate to limit the coverage of state sovereign immunity by treating the commercial enterprises of the States like the commercial activities of foreign sovereigns under the Foreign Sovereign Immunities Act of 1976."<sup>266</sup> Indeed.

#### D. Applying the Protocol: Bright Lines and Grey Areas

In this Subpart, we offer brief illustrations of how this Article's proposed protocol might be applied, drawing on the primary facts of cases we discussed in *The Sovereign Shield* and referred to in this Article's Introduction. Each case involves federal contractors and instrumentalities because, as of this writing, those are the cases that have been litigated. In the first example, however, we show how our analytical protocol would apply if the government were offering services directly. In offering these illustrations, we emphasize that the questions we suggest are just guidance for the courts. We do not contend that one or more of these questions is dispositive; context matters. Some facts will create more difficulty for courts in determining whether a particular activity is commercial. But application of the protocol reduces the risk that a person harmed by the commercial conduct of a government actor or contractor will have no remedy.

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U.S. 833 (1976)). This unworkability problem is an issue that scholars have articulated forcefully. See, e.g., Michaels, *supra* note 21, at 899 (arguing that the "state actor designation [sh]ould . . . turn on an actor's tools, responsibilities, and outlook rather than on what uniform she wears or whether she happens to be closely supervised by a government official"); see also Kimberly N. Brown, *Government by Contract and the Structural Constitution*, 87 NOTRE DAME L. REV. 491, 507-12 (2011) (calling for recognition of a "constitutional continuum" along which an entity and its functions could be assessed from more governmental to more private). It is for this reason that a return to the principles of *National Bank* and *Planters' Bank*—tying liability to the activity rather than the type of entity—makes sense. See *supra* notes 254, 259 and accompanying text.

265. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 671, 691 (1999).

266. *Id.* at 692 (Stevens, J., dissenting).

1. *Student Loan Servicing Alliance v. District of Columbia*

Student-loan servicers challenged an effort by the District of Columbia to impose a licensing scheme on entities servicing federally owned and guaranteed loans held by District residents.<sup>267</sup> The servicers, supported by the federal government, argued that federal law preempted these regulatory efforts by the District.<sup>268</sup> They also asserted that the District's regulatory scheme violated intergovernmental-immunity principles.<sup>269</sup> The district court produced a confusing opinion that appears to have been an attempt to reach a practical compromise rather than an attempt to engage in reasoned analysis of the proper extent of the sovereign shield.<sup>270</sup>

Had our protocol been in place, the court first would have asked whether Congress expressly preempted the District's regulatory effort.<sup>271</sup> The parties focused on one provision of federal law, 20 U.S.C. § 1098g, which excludes "[l]oans made, insured, or guaranteed pursuant to a program authorized by Title IV of the [HEA] . . . [from] any disclosure requirements of any State law."<sup>272</sup> The trial court concluded that this language did not preclude state (here, District) regulation requiring servicers to submit information to obtain a license.<sup>273</sup> This satisfies the first question in the protocol: Congress did not unequivocally preempt the District's legislation.

The next question would be whether the activity engaged in by the servicer was commercial. Under our protocol, the court would ask a series of sub-questions. Do other private-sector actors offer the product or service? To answer that, a court would need to define the relevant product or service. Here, either party might argue that the relevant product is narrower or broader, adjusting their definition to increase their relative chance of success. The activity, though, is loan servicing,<sup>274</sup> and as a practical matter, other private-

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267. *Student Loan Servicing All. v. District of Columbia*, 351 F. Supp. 3d 26, 36 (D.D.C. 2018).

268. *Id.* at 36, 46.

269. *Id.* at 72-73.

270. *See id.* at 75-76. The trial court partially granted the plaintiff's motion for summary judgment on the ground that the District's licensing requirement posed an "obstacle" to the objective of federal legislation—but only with respect to two categories of federal student loans. *Id.* at 59, 61-72. Ultimately, the case was settled. *See Student Loan Servicing All. v. Taylor*, No. 19-7001, 2019 WL 2158372, \*1 (D.C. Cir. May 15, 2019) (dismissing the appeal based on an unopposed motion for voluntary dismissal).

271. *See supra* Part III.B.1.

272. *Student Loan Servicing All.*, 351 F. Supp. 3d at 51 (second alteration in original) (quoting 20 U.S.C. § 1098g).

273. *Id.* at 53-54.

274. What that means more specifically may be subject to dispute and would be up to the court to resolve. A plaintiff would have the initial opportunity to define the activity to be evaluated, a defendant could contest this definition, and the court would have to exercise some degree of judgment. Some cases would likely present close calls.

sector actors service loans (including student loans) and do compete with the federal government. Second, do individual consumers deal directly with the service provider? Yes, servicers deal directly with consumers—the borrowers.<sup>275</sup> Third, does a state or federal consumer-protection regulatory regime apply to similar transactions? On these facts the question is more slippery, because the District created a licensing program specifically for student-loan servicers. It is nevertheless clear that both the District and the federal government regulate the servicing of credit, at least under each government's laws prohibiting unfair and deceptive acts and practices.<sup>276</sup> Finally, would the good or service be provided in the absence of federal intervention? The answer is yes: Were federal student loans not available under the HEA, student loans would still be available and serviced by private companies. This combination of facts would lead the court to classify student-loan servicers as providing a commercial service.

Once the conduct is classified as commercial, the court would move to the third question in the protocol: Who engaged in the challenged conduct? The servicers, under contract with the Department of Education, engaged in the challenged conduct.

This would take the court to the final question, invoking agency law: How would liability be apportioned between government/principal and contractor/agent? Under traditional liability principles, the servicers would be liable for the harm they caused in violation of applicable law. Here, because the case involved servicers challenging the District and not a consumer attempting to sue the servicers, the question of vicarious liability for the Department of Education would not arise. But had a consumer sued the servicers, the protocol's implication would be clear: The Department of Education would be liable alongside its agent contractors, unless the Department could show that the contractors either violated the Department's instructions or acted beyond the scope of their contracts when they caused harm.

And what if the federal government itself serviced student loans? In late 2019, then-Secretary of Education Betsy DeVos proposed exactly that.<sup>277</sup>

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275. Indeed, evidence of misconduct by servicers in dealing with borrowers prompted the District of Columbia to implement its licensing regime. *Student Loan Servicing All.*, 351 F. Supp. 3d at 40-41.

276. *See, e.g.*, D.C. CODE § 28-3904(r) (2021); 15 U.S.C. § 45(a). As a peripheral matter that might be compelling to the court, federal legislation regulates servicing in the home-mortgage context under the Real Estate Settlement Procedures Act, 12 U.S.C. §§ 2601-2617. And federal laws and regulations do provide consumer protections in the specific context of student-loan servicing, as the *Student Loan Servicing Alliance* litigation itself showed. *See* 351 F. Supp. 3d at 39-40.

277. Press Release, U.S. Dep't of Educ., Secretary DeVos Shares Vision for a Better, Stronger Federal Student Aid at Annual Training Conference (Dec. 3, 2019), <https://perma.cc/Y888-DCGF>.

Applying our protocol, the analysis would be exactly the same if the government itself serviced the loans and violated either state or federal law. In that scenario, the injured borrower should be able to sue the new government entity without being blocked by sovereign-shield defenses because the conduct was commercial.

2. *Scott v. J.P. Morgan Chase & Co.*

In this case, the plaintiffs were jurors who claimed that the bank providing debit cards to compensate them for jury duty had “provided them with misleading information about those cards, structured the debit card program so as to prevent them from receiving their full compensation, and charged them outrageous fees for using that compensation.”<sup>278</sup> The bank, J.P. Morgan Chase & Co., argued that because it provided the debit cards pursuant to a contractual relationship with the Department of the Treasury, it enjoyed derivative sovereign immunity.<sup>279</sup> The court determined that the plaintiffs’ complaint did not advance “allegations that, on their own, at this juncture, would defeat Defendant’s claim of derivative sovereign immunity,”<sup>280</sup> but because factual questions remained, it did not grant the defendant’s motion to dismiss.<sup>281</sup>

Turning to our protocol, the first question does not apply because the defendant did not assert federal preemption or an express grant of immunity. Next, we ask if the provision of debit cards is a commercial activity. Consistent with our proposal, this question sidesteps the purpose or motive behind the provision of the cards: It does not matter that the debit cards were used to compensate jurors. Do other, private businesses offer debit cards? Certainly. Are these transactions conducted directly with individual consumers? Yes. Do existing consumer-protection legislative or regulatory regimes apply to provision of debit cards? Yes.<sup>282</sup> Further, debit cards would be provided by other private entities regardless (and independent) of the federal program used to facilitate compensation for jurors.<sup>283</sup> These facts suggest that the activity is commercial. J.P. Morgan Chase, a federal contractor, is the actor whose

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278. *Scott v. J.P. Morgan Chase & Co.*, 296 F. Supp. 3d 98, 101 (D.D.C. 2017).

279. *Id.* at 104-05. The bank made additional arguments in support of its motion to dismiss, including plaintiffs’ failure to join the Department of the Treasury as a necessary party, *id.* at 104, but those arguments are not relevant to our analysis.

280. *Id.* at 107.

281. *Id.* at 108.

282. *See, e.g.*, 12 C.F.R. pt. 235 (2020) (implementing standards for debit card transaction fees).

283. Although the trial court explicitly recognized J.P. Morgan Chase as the Department of the Treasury’s “financial agent” pursuant to the contract between the two, *id.* at 102, that does not change the nature of the service J.P. Morgan Chase was providing as described in the complaint, *see id.*

conduct allegedly caused harm. Applying basic agency principles, J.P. Morgan Chase would be liable, and so would the Department of the Treasury,<sup>284</sup> unless the Department could show that the bank either violated its instructions or caused harm in the exercise of its discretion.<sup>285</sup>

3. *Lamb v. Martin Marietta Energy Systems, Inc.*

Neighbors of a uranium-enrichment facility owned by the government and operated by a private management company filed suit after finding evidence of contamination on their property.<sup>286</sup> The defendants asserted all of the sovereign-shield defenses: derivative sovereign immunity, intergovernmental immunity, and preemption.<sup>287</sup> Martin Marietta Energy Systems, the company operating the facility, moved for summary judgment based on its identity as a government contractor.<sup>288</sup> The court determined that Martin Marietta could take advantage of the sovereign shield, but that it had not provided sufficient evidence in its summary judgment filing to establish, without factual dispute, that the Department of Energy gave specific instructions that the contractor followed.<sup>289</sup>

If analyzed under the protocol outlined above, the reviewing court would first investigate the possibility of unambiguous federal preemption or explicit immunization. In this case there are federal laws specific to the work performed by contractors,<sup>290</sup> but the court did not discuss any laws governing the question of liability.<sup>291</sup> Nor was there any indication of an explicit grant of immunity by Congress.

The next concern is immediately knotty: Is the production of enriched uranium a commercial activity? A court would turn to our proposed sub-

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284. Or, more precisely, the District of Columbia. The relationship is somewhat more complicated because the jurors were residents of and performed their service in the District of Columbia, and the Department of the Treasury had extended its debit card program (for federal agencies) to the District. *Id.*

285. The trial court concluded that it did not have the evidence necessary to resolve these issues. *Id.* at 108. But of course, the court raised the issues for purposes of an inverted agency analysis.

286. *Lamb v. Martin Marietta Energy Sys., Inc.*, 835 F. Supp. 959, 960-61 (W.D. Ky. 1993).

287. *Id.* at 962.

288. *Id.* at 961.

289. *Id.* at 966-68.

290. *See, e.g.*, 42 U.S.C. § 2061(b).

291. Instead, the trial court looked for implied preemption of state law by “federal common law.” *Lamb*, 835 F. Supp. at 965 (quoting *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988)). “Under this . . . theory, federal law pre-empts state law where (1) the action involves a uniquely federal interest; and (2) . . . a “significant conflict” exists between an identifiable “federal policy or interest and the [operation] of state law,” . . . or the application of state law would “frustrate specific objectives” of federal legislation.” *Id.* (third and fourth alterations in original) (quoting *Boyle*, 487 U.S. at 507).

questions for guidance. Do other private businesses operate nuclear production facilities? Yes, although it is possible that all do so on behalf of the federal government.<sup>292</sup> Do these facilities deal with consumers directly? No. Do existing state or federal legislative or regulatory regimes apply to the production of enriched uranium? The plaintiffs cited no such regimes in their claim.<sup>293</sup> In the absence of federal intervention, would the activity be performed? Management companies would still operate, but it is less clear that they would operate nuclear facilities like this one because these facilities are owned by the federal government. This presents a close call, but, on balance, producing enriched uranium is likely not a commercial activity. This is true even though, at a higher level of generality, operating a federal facility likely is a commercial activity.

The entity causing harm was the facility operator, which moves the analysis to the agency relationship between the government and the contractor. Because the challenged activity is likely noncommercial, the federal government, at least, may take advantage of the sovereign-shield doctrines. The contractor may also be able to call upon these doctrines in reliance on the inverted agency analysis discussed above. Therefore, provided that (1) the contractor complied with the terms of its contract; (2) those terms were lawful; and (3) the specific conduct causing harm was not undertaken by the contractor in the exercise of its discretion, the contractor would also be presumptively protected by the sovereign shield.

The court in this case denied summary judgment to the defendants because they failed to prove the above conditions in their motion.<sup>294</sup> Although the trial court viewed these facts as significant for purposes of implicit preemption via the government-contractor defense, similar facts would be relevant to the agency analysis in the final step of our protocol. The agent's compliance with the principal's orders matters in determining whether the contractor can be liable for harm caused in the course of noncommercial activity on behalf of the sovereign.

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Setting aside constitutional constraints on federal action, there is no way to predict what industry the national government may see fit to enter. Nor is there a way to predict, given the vagaries of national politics, whether the government would choose to operate at the retail level itself or through a

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292. *See id.* at 960.

293. Instead, the plaintiffs alleged ordinary negligence, strict liability based on the abnormally dangerous activities at the plant, private nuisance, and gross negligence. *Id.* at 961. Complicating matters, a state effort to protect the local environment around a federal facility might itself lead to a battle over preemption.

294. *Id.* at 966-68.

contractor. Either choice—whether to enter and how to enter—may affect the analysis above. This is also not an issue that is unique to a particular administration or political party. The issues raised with respect to student-loan servicers, for example, have occurred mainly during a Republican, ostensibly pro-small government administration. But one could imagine a Democratic administration expanding the federal government’s reach with respect to any number of industries (health care, transportation and infrastructure, energy, and so on). Scholars<sup>295</sup> and policymakers,<sup>296</sup> for example, have suggested that the USPS should offer banking services, which would increase the government’s share of a traditionally private market. The USPS is a boundary organization between public and private industry,<sup>297</sup> meaning that sovereign-shield defenses would likely be raised should patrons or consumers assert a violation of their rights. A court, taking a careful look at the facts of each case, should be able to apply our protocol in those situations to determine whether a consumer has access to a remedy and, if so, who is subject to liability.

### Conclusion

The ever-increasing quantity and variety of activities performed by the federal government, directly and indirectly, has enabled government contractors to exploit special privileges of the sovereign: They can evade oversight as well as accountability under state and federal law. Consequently, working for the federal government can present less litigation risk to a business than performing the same work independently or for a private entity. But this benefit to the private sector is only the narrowest conception of the consequences of greater outsourcing. The exploitation of the sovereign shield results in a shift in the balance of power between the federal government and the states at the expense of the latter; between the legislative branch and the executive branch in favor of the latter; and between business and consumers in favor of the former.

In this Article we have outlined a doctrinal response to private businesses’ exploitation of the sovereign shield. Our key proposal requires shifting courts’ attention away from the identity of the actor seeking sovereign-shield protections and its relationship with the federal government. Instead, we suggest that courts should center their inquiry on whether the challenged *activity* is commercial. We provide a set of questions that judges should

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295. See, e.g., MEHRSA BARADARAN, *HOW THE OTHER HALF BANKS: EXCLUSION, EXPLOITATION, AND THE THREAT TO DEMOCRACY* 200-03, 210-13 (2015) (proposing a return to postal banking).

296. See, e.g., Elizabeth Warren, *The Big Benefits of Postal Service Banking*, U.S. NEWS & WORLD REP. (July 7, 2014, 8:00 AM), <https://perma.cc/AQ4V-A3P9>.

297. See O’Connell, *supra* note 122, at 844-45.

consider in determining whether a particular activity is commercial. In developing our proposal, we have drawn on other doctrinal areas where courts have successfully separated commercial from noncommercial conduct and returned to early Supreme Court opinions for guidance. Importantly, we have also drawn on the insights of scholars in adjacent (but separate) areas of law, including constitutional law, administrative law, and consumer law. This multidisciplinary approach is essential to developing a solution to the sovereign-shield phenomenon, which in the past has slipped through the gaps between these areas of scholarship. This Article's proposal would clarify jurisprudence that is currently confused, allow more injured consumers to recover, and contribute to rebalancing the relationships between states and the federal government, among the branches of the federal government, and between businesses and consumers.

The doctrinal reform proposed in this Article does not eliminate reasons for concern about the pace, scale, and scope of federal outsourcing. But it does respond to the ways in which different doctrines interact to threaten both individual consumers and the states. Our solution draws on the conviction of a previous era that the sovereign may engage in commerce, but that when it does so it may lose the perquisites of sovereignty.