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State Regulation of Federal Contractors: Three Puzzles of Procurement Preemption

David S. Rubenstein*

This Article unpacks three doctrinal puzzles at the intersection of federalism and federal contracting, using student loan law as its anchoring case study. Currently, more than \$1 trillion of federal student loan debt is serviced by private financial institutions under contract with the Department of Education. These loan servicers have allegedly engaged in systemic consumer abuses but are seldom held accountable by the federal government. To bridge the accountability gap, several states have recently passed “Student Borrower Bills of Rights.” These state laws include provisions to regulate the student loan servicing industry, including the Department’s federal contractors. States undoubtedly have legitimate interests to protect their residents, communities, and local economies against industry malfeasance. The overarching question, however, is whether federal law prohibits states from performing this remedial function. This Article offers a fresh look at three doctrinal puzzles at the heart of that debate. The first puzzle is whether the federal government’s constitutional immunity extends to shield federal contractors from generally applicable state laws. The second puzzle is whether federal procurement laws preempt state licensing of federal contractors. The third puzzle is whether federal contracts that expressly incorporate state law can save state law from preemption. Individually and collectively, how these puzzles are resolved may have far-reaching implications—not only for the future of student loan law, but also for federalism and federal contracting more generally.

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INTRODUCTION

The Supremacy Clause is the Constitution’s primary mechanism for resolving conflicts of law between federal and state sovereigns.¹ It was not designed for triangulated clashes between states and private actors doing federal contractual work. This structural mismatch gives rise to knotty doctrinal questions at the intersection of federalism and federal contracting—a domain I have elsewhere described as “Supremacy, Inc.”² Expanding on that work, this Article examines three unresolved doctrinal puzzles in the undertheorized space where federalism

1. See U.S. CONST. art. VI, cl. 2 (establishing that “Laws of the United States” shall be the “supreme Law of the Land,” notwithstanding “[c]ontrary” state law); see also Bradford R. Clark, *Constitutional Compromise and the Supremacy Clause*, 83 NOTRE DAME L. REV. 1421 (2008) (providing a rich account of the drafting history and structural compromises forged around the Supremacy Clause).

2. See David S. Rubenstein, *Supremacy, Inc.*, 67 UCLA L. REV. 1108 (2020) [hereinafter Rubenstein, *Supremacy, Inc.*] (providing the first comprehensive account of federal contracting’s spillover effects on state autonomy and the federalist balance of power).

and federal contracting meet. The first puzzle is whether the federal government’s constitutional immunity extends to shield its contractors from generally applicable state laws.³ The second puzzle is whether federal procurement law preempts state licensing of federal contractors.⁴ The third puzzle is whether federal contracts can save state law from preemption.⁵ Individually and collectively, the resolution of these puzzles may have far-flung implications for federalism, federal contracting, and the operation of modern government.⁶ Nowhere is this more apparent than in the area of federal student loans, which this Article takes as its anchoring case study.⁷

Part I sets the foundation. Currently, the federal government owns more than \$1 trillion in outstanding student debt.⁸ Rather than manage this huge portfolio in-house, the Department of Education (ED) contracts with private loan servicing companies to collect borrower payments and perform other administrative tasks.⁹ According to ED’s internal watchdog, many of these contractors have engaged in systemic wrongdoing but are seldom sanctioned by the federal government.¹⁰ To

3. See *infra* Part II.

4. See *infra* Part III.

5. See *infra* Part IV.

6. This Article uses the terms “outsourcing” and “contracting” interchangeably to mean government acquisition of goods and services from private parties. The term “privatization” has a broader meaning, which can include any transfer of activity, goods, or functions from the public to the private sector. See KEVIN R. KOSAR, CONG. RSCH. SERV., RL33777, PRIVATIZATION AND THE FEDERAL GOVERNMENT: AN INTRODUCTION 2–3 (2006). In America, however, outsourcing is the most prevalent form of privatization. *Id.* at 12–20 (defining and describing various modes of privatization in the United States). For purposes of this Article, I use all three terms interchangeably.

7. This case study draws from my prior work in Rubenstein, *Supremacy, Inc.*, *supra* note 2, at 1138–42. There, I also provide a parallel case study for immigration detention, which raises many of the same doctrinal issues. *Id.* at 1132–38; see also David S. Rubenstein & Pratheepan Gulasekaram, *Privatized Detention & Immigration Federalism*, 71 STAN. L. REV. ONLINE 224 (2019).

8. See *Portfolio by Loan Status* (DL, FFEL, ED Held FFEL, ED-Owned), Report for *Federal Student Loan Portfolio*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/about/data-center/student/portfolio> [<https://perma.cc/9SCE-CB3Z>] (last visited Dec. 5, 2019) (reporting that the categories listed under “Federally Managed” total \$1.296 trillion at the end of the third quarter of 2019); Zach Friedman, *Student Loan Debt Statistics in 2020: A Record \$1.6 Trillion*, FORBES (Feb. 3, 2020, 6:51 PM), <https://www.forbes.com/sites/zackfriedman/2020/02/03/student-loan-debt-statistics/#2903c31c281f> [<https://perma.cc/9KTC-RKUS>] (providing a breakdown of outstanding federally and privately-owned student debt, most of which is federally owned).

9. See OFF. OF INSPECTOR GEN., U.S. DEP’T OF EDUC., ED-OIG/A05Q0008, FEDERAL STUDENT AID: ADDITIONAL ACTIONS NEEDED TO MITIGATE THE RISK OF SERVICER NONCOMPLIANCE WITH REQUIREMENTS FOR SERVICING FEDERALLY HELD STUDENT LOANS 5–6 (2019) [hereinafter DEP’T EDUC. OIG REPORT], <https://www2.ed.gov/about/offices/list/oig/auditreports/fy2019/a05q0008.pdf> [<https://perma.cc/L83R-LJPY>] (last visited Oct. 4, 2020); see also U.S. GOV’T ACCOUNTABILITY OFF., GAO-16-523, FEDERAL STUDENT LOANS: EDUCATION COULD IMPROVE DIRECT LOAN PROGRAM CUSTOMER SERVICE AND OVERSIGHT (2016), <https://www.gao.gov/assets/680/677159.pdf> [<https://perma.cc/3TBJ-LZNT>].

10. DEP’T EDUC. OIG REPORT, *supra* note 9, at 10–11. These allegations are corroborated by numerous internal and external watchdog reports. For a useful collection and summary of such reports, see BEN KAUFMAN, STUDENT BORROWER PROT. CTR., ASSESSMENTS OF THE DEPARTMENT OF EDUCATION’S HANDLING OF THE STUDENT LOAN PORTFOLIO: A REVIEW (2019), https://protectborrowers.org/wp-content/uploads/2019/11/SLLI_Assessments-of-ED_A-Review.pdf [<https://perma.cc/AD8B-VRHZ>].

bridge the accountability gap, several states have recently enacted laws to monitor and regulate the federal government's student loan servicers.¹¹ In response, the federal government and its contractors have moved to quash these state initiatives under the Supremacy Clause.¹²

These sovereign clashes have exposed a set of doctrinal puzzles of “procurement preemption” that have escaped academic scrutiny. While student loan litigation provides rich context for studying these puzzles in real time, the doctrinal issues scope well beyond this domain.¹³ Federal outsourcing is “ubiquitous.”¹⁴ In lieu of federal actors, contractors routinely deliver government services, interface with regulatory beneficiaries, and act as gatekeepers to statutory benefits under major federal programs.¹⁵ With no end in sight for federal outsourcing, or the demand for accountable governance, the courts' resolution of these puzzles of procurement preemption could mark a new chapter in American federalism.

Part II turns to the first puzzle, which interrogates a doctrinal boundary within Supremacy Clause jurisprudence. Under long standing precedent, state law may run afoul of the Supremacy Clause in two ways.¹⁶ First, validly enacted federal law

11. See, e.g., Assemb. B. 2251, 2015–2016 Leg., Reg. Sess. (Cal. 2016); Assemb. B. 376, 2019–2020 Leg., Reg. Sess. (Cal. 2020); H.B. 6915, 2015 Gen. Assemb., Reg. Sess. (Conn. 2015); S.B. 19-002, 72d Gen. Assemb., Reg. Sess. (Colo. 2019); D.C. Act 21-571, 2016 Council of D.C. (D.C. 2016); S.B. 1351, 100th Gen. Assemb., Reg. Sess. (Ill. 2017); Legis. Doc. 995, 129th Leg., Reg. Sess. (Me. 2019); Assemb. B. 455, 218th Leg., Reg. Sess. (N.J. 2019); H.B. 5936, 2019 Gen. Assemb., Reg. Sess. (R.I. 2019); S.B. 6029, 65th Leg., Reg. Sess. (Wash. 2018); S.B. 77, 2020 Gen. Assemb., Reg. Sess. (Va. 2020).

12. See, e.g., Statement of Interest of the United States, Pa. Higher Educ. Assistance Agency v. Perez, No. 3:18-cv-1114 (MPS) (D. Conn. Dec. 20, 2019); Federal Preemption and State Regulation of the Department of Education's Federal Student Loan Programs and Federal Student Loan Servicers, 83 Fed. Reg. 10619, 10620–21 (Mar. 12, 2018) (to be codified at 34 C.F.R. ch. VI).

13. See, e.g., Complaint, GEO Grp., Inc. v. Newsom, No. 3:19-cv-02491-JLS-WVG, 2019 WL 7373612 (S.D. Cal. Dec. 12, 2019) (alleging that California's legislation directed at private immigration detention facilities in the state violates intergovernmental immunity and preemption doctrines). For additional discussion of these issues, as pertains to immigration detention, see generally Rubenstein & Gulasekaram, *supra* note 7.

14. JON D. MICHAELS, CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO THE AMERICAN REPUBLIC 97 (2017) (“[O]utsourcing is completely and utterly ubiquitous—and still gaining speed.”).

15. PAUL C. LIGHT, THE GOVERNMENT-INDUSTRIAL COMPLEX: THE TRUE SIZE OF THE FEDERAL GOVERNMENT, 1984–2018, at 88 (2018) (“[M]illions of employees show up for work every day to do work once performed by federal employees.”); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 551–52 (2000) (discussing the pervasiveness of private actors in “regulation, service provision, policy design, and implementation”); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1398 (2003) (explaining that contractors “wield power over others” and “control third parties' access to government benefits and resources”); Sidney A. Shapiro, *Outsourcing Government Regulation*, 53 DUKE L.J. 389, 389 (2003) (“The government has increasingly relied on private means to achieve public ends, not only involving services to the public, but the origination and implementation of regulatory policy as well . . .”).

16. See *North Dakota v. United States*, 495 U.S. 423, 434–37 (1990).

preempts contrary state law.¹⁷ Second, under the intergovernmental immunity doctrine, states cannot directly regulate the federal government and cannot “discriminate” against the federal government or “those with whom it deals.”¹⁸ The boundary between preemption and intergovernmental immunity has always been fluid.¹⁹ And in some cases, the boundary is inconsequential because both doctrines lead to the same result. For example, a *discriminatory* state law directed at federal contractors that *conflicts* with federal statutes would be void under the intergovernmental immunity doctrine (by virtue of the discrimination) and preempted by federal law (by virtue of the conflict). But for a large category of *nondiscriminatory* state regulations—such as generally applicable consumer protection laws—the doctrinal lines can matter. Preemption doctrine indisputably applies to such laws. The puzzle, however, is whether nondiscriminatory state regulations must clear a second doctrinal hurdle of intergovernmental immunity. In *North Dakota v. United States*, the Supreme Court had a 4-4 split of opinion on this issue.²⁰ Thirty years later, and still unresolved, the issue has resurfaced with new hue. In statehouses and courthouses across the country, politicians and jurists are puzzling over whether generally applicable state regulations can apply to federal contractors.²¹ On doctrinal and normative grounds, this Article argues that nondiscriminatory state regulation of federal contractors may be preempted by federal law, but are beyond the remit of intergovernmental immunity doctrine.²²

Part III explores a second puzzle: namely, whether federal procurement law preempts state licensing laws. The current administration and its student loan servicers rely on *Leslie Miller, Inc. v. Arkansas*²³ (and progeny)²⁴ to argue that state licensing laws impermissibly second-guess and interfere with the government’s contracting decisions.²⁵ This Article disrupts that legal narrative. Like the schoolhouse game of telephone, the 1950s case of *Leslie Miller* has been lost in

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

18. See *North Dakota*, 495 U.S. at 434–37.

19. See *infra* Part II.A (discussing the permeability and fluidity of these doctrines across time).

20. 495 U.S. 423; see *infra* Part II.A (discussing *North Dakota* and the Justices’ competing viewpoints).

21. See *infra* Section III.C.2.

22. The approach urged here aligns with *North Dakota*’s four-Justice plurality opinion and fortifies it with historical, doctrinal, and theoretical support absent from that opinion. See *generally infra* Part II.

23. 352 U.S. 187 (1956).

24. See *Sperry v. Florida ex rel. Fla. Bar*, 373 U.S. 379, 385 (1963); see also *United States v. Virginia*, 139 F.3d 984, 987–89 (4th Cir. 1998) (holding that state licensing requirements were preempted under the auspice of *Leslie Miller*); *Gartrell Constr. Inc. v. Aubry*, 940 F.2d 437, 439–41 (9th Cir. 1991) (same).

25. See, e.g., *Federal Preemption and State Regulation of the Department of Education’s Federal Student Loan Programs and Federal Student Loan Servicers*, 83 Fed. Reg. 10619, 10620–21 (Mar. 12, 2018) (relying on *Leslie Miller* and progeny).

translation.²⁶ Properly understood, *Leslie Miller* does not create a categorical or free-floating prohibition on state licensing of federal contractors.²⁷ Rather, as always, preemption turns on a conflict, *vel non*, between federal and state law. Acontextual readings of *Leslie Miller* lose sight of that basic principle, blurring past important differences in federal procurement regimes across context and time. Modern federal procurement is variegated to accommodate a range of good-governance norms that state licensing laws may promote and cohere with.²⁸ Indeed, the federal government's student loan contracts anticipate, if not require, compliance with all federal and state law.²⁹

This leads to a third and final puzzle, teased out in Part IV. In *Boyle v. United Technologies Corporation*, the Supreme Court held that federal contracts can preempt state law in contexts where federal law itself does not.³⁰ The current administration and its contractors rely on *Boyle* to argue that their contracts preempt state law.³¹ Elsewhere, I have argued that *Boyle's* imprimatur of preemption by contract is constitutionally and normatively dubious.³² Here, I take *Boyle* as given, and zoom out to frame a new puzzle: Can federal contracts that explicitly incorporate or impose state law requirements *save* state law from preemption? According to the current administration and its contractors, the answer is no.³³ But if “preemption by contract” and “saving by contract” are two sides of the same coin, then the *heads-I-win, tails-you-lose* approach espoused by the government and its contractors demands an explanation.

26. Though incremental abstractions and extensions, the lore of *Leslie Miller* has seemingly morphed into a rule unto itself. See *infra* Section III.B.

27. See *id.*

28. See generally JAMES F. NAGLE, A HISTORY OF GOVERNMENT CONTRACTING (1992); KATE M. MANUEL, L. ELAINE HALCHIN, ERIKA K. LUNDER & MICHELLE D. CHRISTENSEN, CONG. RSCH. SERV., R42826, THE FEDERAL ACQUISITION REGULATION (FAR): ANSWERS TO FREQUENTLY ASKED QUESTIONS (2015) (providing a summary of major developments in federal procurement law beginning in the 1980s); see also *infra* Part III.A (discussing some key features of modern federal procurement).

29. See, e.g., Sample Contract add. § C.1.4.3 (on file with author) (providing that the servicers “will be responsible for maintaining a full understanding of all federal and state laws and regulations and FSA requirements and ensuring that all aspects of the service continue to remain in compliance as changes occur”) (emphasis added); *id.* at attach. A-3 (specifying that “[s]ervicers will be required to meet all statutory and legislative requirements”).

30. See *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988); see also Rubenstein, *Supremacy, Inc.*, *supra* note 2, at 1156–60 (discussing *Boyle* and characterizing the so-called government contractor defense as a form of preemption by contract).

31. See, e.g., Pa. Higher Educ. Assistance Agency v. Perez, No. 3:18-cv-1114 (MPS), 2020 WL 2079634, at *2 (D. Conn. Apr. 30, 2020) (holding that Connecticut's request for documents from federal student loan servicers violated the Privacy Act and federal contractual terms).

32. See Rubenstein, *Supremacy, Inc.*, *supra* note 2, at 1160–66.

33. See, e.g., Federal Preemption and State Regulation of the Department of Education's Federal Student Loan Programs and Federal Student Loan Servicers, 83 Fed. Reg. 10619, 10620–21 (Mar. 12, 2018) (arguing that state law is preempted by federal contracts and citing *Boyle*); see also Student Loan Servicing All. v. District of Columbia (*SLSA*), 351 F. Supp. 3d 26, 65 (D.D.C. 2018) (“If a state law is preempted under the Supremacy Clause, that state law is invalid, and state actors may not adhere to it whether directed to by a contract or not.”).

I. FEDERAL CONTRACTING AND FEDERALISM

Private entities have always supplied the federal government with goods and services (e.g., laundry service, milk, helicopters, construction, and so on).³⁴ Today, however, federal contractors routinely stand in for federal employees to do important government work.³⁵ For better and worse, the marbling of public and private enterprise has transfigured how government operates, if not also what government is.³⁶ While some commentators hail federal outsourcing as a key innovation of modern government,³⁷ others decry its distorting effects on constitutional rights, separation of powers, and administrative law.³⁸ But federalism

34. See MICHAELS, *supra* note 14, at 21–117 (2017) (discussing the evolution of federal outsourcing through American history); Daniel Guttman, *Public Purpose and Private Service: The Twentieth Century Culture of Contracting Out and the Evolving Law of Diffused Sovereignty*, 52 ADMIN. L. REV. 859, 881–90 (2000) (discussing the ideological and political shift toward federal outsourcing in the mid-to-late twentieth century).

35. PAUL C. LIGHT, THE VOLCKER ALLIANCE, THE TRUE SIZE OF GOVERNMENT: TRACKING WASHINGTON’S BLENDED WORKFORCE, 1984–2015, at 3 (2017), https://www.volckeralliance.org/sites/default/files/attachments/Issue%20Paper_True%20Size%20of%20Government.pdf [<https://perma.cc/R6UD-Y5AN>] (reporting that in 2015, the federal government’s “blended workforce” included approximately two million federal employees, and more than 3.5 million contract employees).

36. See Alfred C. Aman, Jr. & Landyn Wm. Rookard, *Private Government and the Transparency Deficit*, 71 ADMIN. L. REV. 437, 440 (2019) (“The ‘government’ with which the average citizen interacts is a complex admixture of private and public actors, empowered by an intricate web of statutes, regulations, contracts, and less formal partnerships.”); Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397, 402–21 (2006) (describing the erosion of the public-private dichotomy occasioned by rampant government outsourcing).

37. See, e.g., E.S. SAVAS, PRIVATIZATION: THE KEY TO BETTER GOVERNMENT 4–6, 119–230 (1987) (noting “that privatization, properly carried out, generally leads to large increases in efficiency while improving or at least maintaining the level and quality of public services”). See generally AL GORE, NAT’L PERFORMANCE REV., FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS (1993); DAVID OSBORNE & TED GAEBLER, REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR FROM SCHOOLHOUSE TO STATEHOUSE, CITY HALL TO THE PENTAGON (1992).

38. For discussion pertaining to constitutional rights, see generally Metzger, *supra* note 15; PAUL R. VERKUIL, OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT 166–67 (2007) [hereinafter OUTSOURCING SOVEREIGNTY]. For discussion pertaining to separation of powers, see Paul R. Verkuil, *Outsourcing and the Duty to Govern*, in GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 310 (Jody Freeman & Martha Minow eds., 2009); Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. REV. 62, 72–73 (1990); Kenneth A. Bamberger, *Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State*, 56 DUKE L.J. 377 (2006); MICHAELS, *supra* note 14, at 18 (characterizing privatization as perhaps the “greatest threat” to separation of powers because it usurps the checks and balances forged around administrative governance—what he calls “administrative separation of powers”). For discussion pertaining to administrative law, see generally *id.*; Alfred C. Aman, Jr., *Privatization and Democracy: Resources in Administrative Law*, in GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 261 (Jody Freeman & Martha Minow eds., 2009); Jeffrey A. Pojanowski, *Reconstructing an Administrative Republic*, 116 MICH. L. REV. 959 (2018) (reviewing MICHAELS, *supra* note 14).

is where much of the action is today.³⁹ Across the regulatory spectrum, state officials and advocacy groups are mobilizing to hold federal contractors accountable to state law. Meanwhile, the federal government and its contractors are hoping to find refuge in the Supremacy Clause.

The student loan case study below provides easy access to these federalism clashes and illustrates the stakes. On one hand, state law offers a reservoir of possibility to close the accountability and transparency gaps in federal contracting. On the other, however, state regulation may disrupt or detract from the putative benefits of federal contracting.

A. Case Study: Student Loan Servicing

Before 2010, the federal student loan program was dominated by private loans that were financially guaranteed by the United States.⁴⁰ Beginning in 2010, the federal government transitioned to a “Direct Loan” program, under which the federal government is the student lender.⁴¹ Moreover, as part of a financial bailout for the student loan industry, the federal government purchased almost all of the outstanding privately owned student debt.⁴² Today, the federal government’s assets include upwards of \$1 trillion in collectable student loans.⁴³ In theory, this mammoth portfolio could be serviced by federal employees. Instead, Congress explicitly authorized ED to outsource the work to private financial institutions.⁴⁴

Pursuant to this authority, ED has contracted with student loan servicers who collect student payments, advise borrowers on available resources and repayment options, respond to borrower inquiries, and perform other administrative tasks.⁴⁵ Congress’s decision to outsource this work was the obvious choice, if not the only choice. ED has nowhere near the capacity to service its student loan portfolio, and the financial industry offers economies of scale that might reduce programmatic

39. See Rubenstein, *Supremacy, Inc.*, *supra* note 2, at 1121–30 (offering an original account of how modern federal contracting distorts the federal-state balance of power); see also Kate Elengold & Jonathan Glater, *The Sovereign Shield*, 73 STAN. L. REV. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3539622 [<https://perma.cc/ZW3V-QRKS>]; Craig Konnoth, *Preemption Through Privatization*, 134 HARV. L. REV. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3572777 [<https://perma.cc/S77R-873M>].

40. See JULIE MARGETTA MORGAN, ROOSEVELT INST., WHO PAYS? HOW INDUSTRY INSIDERS RIG THE STUDENT LOAN SYSTEM—AND HOW TO STOP IT 2 (2018), <https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI-Who-Pays-Insiders-Rig-Student-Loan-System-201806.pdf> [<https://perma.cc/Y2Z6-PSPJ>].

41. See Ensuring Continued Access to Student Loans Act of 2008, Pub. L. No. 110-227, 122 Stat. 740 (codified as amended in scattered sections of 20 U.S.C.); MORGAN, *supra* note 40, at 5.

42. See 20 U.S.C. §§ 1087a, 1087i (granting broad authority to the Department of Education to purchase student loans from private student lenders); MORGAN, *supra* note 40, at 2–3.

43. See *supra* note 8 and accompanying text.

44. See 20 U.S.C. § 1087f.

45. See *Loan Servicing Contracts*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/about/data-center/business-info/contracts/loan-servicing> [<https://perma.cc/9TRV-SHMV>] (last visited Feb. 9, 2020).

costs. Too often overlooked, however, are the value judgments—and tradeoffs—embedded in the outsourcing choice.

Most pertinent here, the accountability structures around federal procurement are notoriously porous.⁴⁶ By dint of their private status, federal contractors operate beyond public-law constraints that would apply to federal actors doing identical work. For example, federal student loan servicers are not subject to the Constitution,⁴⁷ Administrative Procedure Act,⁴⁸ Freedom of Information Act,⁴⁹ or other public laws that define and limit government authority.⁵⁰ Thus, when Congress authorized ED to outsource federal loan servicing to private financial institutions, some of the most vital accountability structures in our legal system were rendered inoperative. Presumably, Congress hoped that ED’s contractors would be held accountable by other means, yet in ways that would not undercut the fiscal and programmatic efficiencies that private institutions offer. Toward those ends, the Higher Education Act and federal procurement regulations require ED to award contracts to “qualified” and “responsible” student loan servicers.⁵¹ Moreover, ED is responsible for monitoring its loan servicers’ compliance with federal law and

46. See Nina A. Mendelson, *Six Simple Steps to Increase Contractor Accountability*, in GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 241, 243 & n.14 (Jody Freeman & Martha Minow eds., 2009) (lamenting that “federal agency supervision of contract performance is widely recognized as inadequate,” and collecting citations to “countless reports documenting inadequate contract supervision by agencies” by the U.S. Government Accountability Office); OUTSOURCING SOVEREIGNTY, *supra* note 38, at 148–52 (lamenting that contractor monitoring is quantitatively and qualitatively inadequate).

47. Generally speaking, the Constitution applies only to public actors. On rare occasions, private actors are treated as federal actors under the “state action” doctrine, which is a judicial determination that private action should be treated as public action for constitutional purposes. See Metzger, *supra* note 15, at 1373. Absent exceptional circumstances, however, federal contractors do not generally qualify as public actors. *Id.* at 1369–70, 1403–06 (explaining how and why federal contractors are generally immune from constitutional strictures under the state action doctrine); see also Lillian BeVier & John Harrison, *The State Action Principle and Its Critics*, 96 VA. L. REV. 1767, 1786 (2010) (“Constitutional rules are almost all addressed to the government.”).

48. See 5 U.S.C. §§ 500–504, 551–559, 561–584, 591–596. Broadly speaking, the Administrative Procedure Act (APA) provides a general statutory framework of procedures agencies must follow and the availability and scope of judicial review of agency decisions. *Id.* But federal contractors are not “agencies” for purposes of the Act. *Id.* § 551 (defining “agencies”).

49. *Id.* § 552; Aman & Rookard, *supra* note 36, at 446 (“Private providers almost always fall outside of the scope of [the Freedom of Information Act], even when they provide public services pursuant to contracts with public agencies.”).

50. See Kimberly N. Brown, “*We the People*,” *Constitutional Accountability, and Outsourcing Government*, 88 IND. L.J. 1347, 1361–63 (2013) (discussing the asymmetrical legal rules that apply to federal and private actors); Guttman, *supra* note 34, at 862, 881–90 (explaining that “in practice, two different sets of regulations have come to govern those doing the basic work of government”; those that apply to federal officials, on the one hand, and those that apply to federal contractors, on the other).

51. 20 U.S.C. § 1087f(a)(2); 48 C.F.R. subpt. 9.1 (2019).

contractual obligations.⁵² The current administration and its contractors portray these procurement laws as reasons to quash or quell state law accountability.⁵³

Too much accountability—especially the wrong kind—could be unnecessary, costly, and counterproductive.⁵⁴ A decade of experience, however, demonstrates that the federal controls in place are not working.⁵⁵ Indeed, ED’s spotty oversight of its contractor workforce is a contributing, if not exacerbating, cause of the student loan crisis gripping the nation.⁵⁶ According to a 2019 report from ED’s internal watchdog, the agency has insufficient procedures and policies to detect patterns of industry maladministration.⁵⁷ Even when ED detected wrongdoing, the agency rarely used available contract provisions to hold the offending loan servicers accountable.⁵⁸ Consequently, the report concludes, ED removed important incentives that were included in the contracts to protect student borrowers, their families, and taxpayer dollars.⁵⁹ Exacerbating these concerns, ED has repeatedly and proactively shielded its student loan servicers from public transparency and accountability.⁶⁰

52. See 48 C.F.R. § 37.114 (2019) (requiring agency oversight, control, and monitoring of federal service contracts); H.R. 2740, 116th Cong., 1st Sess. (2020) (conditioning funds on agency oversight of federal student loan servicers).

53. See, e.g., Federal Preemption and State Regulation of the Department of Education’s Federal Student Loan Programs and Federal Student Loan Servicers, 83 Fed. Reg. 10619, 10619 (Mar. 12, 2018) (“[T]he servicing of Direct Loans is an area ‘involving uniquely Federal interests’ that must be ‘governed exclusively by Federal law.’”); see also Letter from Kathleen Smith, Acting Assistant Sec’y, Off. of Postsecondary Educ., U.S. Dep’t of Educ., and Dr. A. Wayne Johnson, Chief Operating Officer, Fed. Student Aid, U.S. Dep’t of Educ., to Richard Cordray, Dir., Consumer Fin. Prot. Bureau (Aug. 31, 2017) (rescinding ED’s information-sharing agreement with CFPB on the putative grounds that ED “has full oversight responsibility for federal student loans.”).

54. See 48 C.F.R. § 37.114 (2019) (requiring agency oversight, control, and monitoring of federal service contracts); see also Stan Soloway & Alan Chvotkin, *Federal Contracting in Context: What Drives It, How to Improve It*, in GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 204 (Jody Freeman & Martha Minow eds., 2009) (“[T]here is no evidence that substantial overhauls of procurement law, or the addition of new regulatory or statutory requirements, will meaningfully improve the process.”). For useful summaries of federal procurement, see generally Mathew Blum, *The Federal Framework for Competing Commercial Work Between the Public and Private Sectors*, in GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 63 (Jody Freeman & Martha Minow eds., 2009); MANUEL ET AL., *supra* note 28.

55. For an excellent collection and summary of such reports, see KAUFMAN, *supra* note 10.

56. See Seth Frotman, *Broken Promises: How Debt-Financed Higher Education Rewrote America’s Social Contract and Fueled a Quiet Crisis*, 2018 UTAH L. REV. 811, 822–31 (2018) (“It is increasingly clear that the student debt crisis is much broader than a series of individual student loan defaults. As more Americans pursue higher education, only to be weighed down by unaffordable student debt, this supposed equalizer is quickly turning into one of the greatest forces cementing economic inequality in this nation.”); Judith Scott-Clayton, Brookings Inst., *The Looming Student Loan Default Crisis Is Worse than We Thought*, 2 EVIDENCE SPEAKS REPS., no. 34, Jan. 10, 2018, <https://www.brookings.edu/wp-content/uploads/2018/01/scott-clayton-report.pdf> [<https://perma.cc/QU94-YK8V>] (discussing the socioeconomic domino effects of student loan defaults).

57. See DEP’T EDUC. OIG REPORT, *supra* note 9.

58. *Id.* at 2.

59. *Id.*

60. See MORGAN, *supra* note 40, at 2, 5–6.

To help bridge these gaps, several states have recently passed “Student Borrower Bills of Rights.” Although the details vary, these state initiatives contain provisions to monitor, license, and regulate the student loan industry—including federal contractors.⁶¹ States undoubtedly have legitimate interests to protect their residents, communities, and local economies against loan servicing abuses.⁶² Apart from protecting the rights of student borrowers, these state-centric initiatives have the potential to make federal student loan servicing more accountable and transparent on a systemic level. The overarching question, however, is whether states may *lawfully* pursue these objectives through state regulation. According to the current administration and its student loan servicers, many of the recently enacted state regulations run afoul of the Supremacy Clause.⁶³

B. The Supremacy Clause’s Sibling Doctrines

The Supremacy Clause provides, in relevant part, that federal “Laws . . . made in Pursuance [of the Constitution]” shall be “supreme Law of the Land,” notwithstanding any state law to the “[c]ontrary.”⁶⁴ As earlier noted, this clause is the progenitor of two sibling doctrines: preemption and intergovernmental immunity. The boundary between these doctrines has always been fluid, but they cover different ground, stand on different constitutional footing, and are implemented through different tests.⁶⁵

1. Preemption

Under the Court’s familiar taxonomy, Congress may statutorily preempt state law expressly or impliedly.⁶⁶ Congress does so expressly when it enacts a statute that

61. See, e.g., Assemb. B. 2251, 2015–2016 Leg., Reg. Sess. (Cal. 2016); Assemb. B. 376, 2019–2020 Leg., Reg. Sess. (Cal. 2020); H.B. 6915, 2015 Gen. Assemb., Reg. Sess. (Conn. 2015); S.B. 19-002, 72d Gen. Assemb., Reg. Sess. (Colo. 2019); D.C. Act 21-571, 2016 Council of D.C. (D.C. 2016); S.B. 1351, 100th Gen. Assemb., Reg. Sess. (Ill. 2017); Legis. Doc. 995, 129th Leg., Reg. Sess. (Me. 2019); Assemb. B. 455, 218th Leg., Reg. Sess. (N.J. 2019); H.B. 5936, 2019 Gen. Assemb., Reg. Sess. (R.I. 2019); S.B. 6029, 65th Leg., Reg. Sess. (Wash. 2018); S.B. 77, 2020 Gen. Assemb., Reg. Sess. (Va. 2020).

62. See, e.g., *Gen. Motors Corp. v. Abrams*, 897 F.2d 34, 41–42 (2d Cir. 1990) (“Because consumer protection law is a field traditionally regulated by the states, compelling evidence of an intention to preempt is required in this area.”).

63. See Federal Preemption and State Regulation of the Department of Education’s Federal Student Loan Programs and Federal Student Loan Servicers, 83 Fed. Reg. 10619 (Mar. 12, 2018) (proffering a mix of preemption and intergovernmental immunity defenses); Statement of Interest of the United States at 24, *Pa. Higher Educ. Assistance Agency v. Perez*, No. 3:18-cv-1114 (MPS) (D. Conn. Dec. 20, 2019).

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

65. Compare *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (concluding that state taxation of National Bank was void under a theory of intergovernmental immunity), with *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738 (1824) (suggesting that, in *McCulloch*, the state tax was void because it conflicted with the federal statute that established the National Bank).

66. See *Arizona v. United States*, 567 U.S. 387, 399–401 (2012).

explicitly withdraws state jurisdiction over a subject.⁶⁷ Congress impliedly preempts state law in three ways. First, Congress impliedly preempts a regulatory field when it enacts sufficiently pervasive and detailed legislation targeting a certain industry or type of conduct (i.e., field preemption).⁶⁸ Second, Congress impliedly preempts state law that frustrates or poses an obstacle to the accomplishment of lawful federal objectives (i.e., obstacle preemption).⁶⁹ Third, Congress impliedly preempts state law when it would be impossible for a party to comply with both federal and state law (i.e., impossibility preemption).⁷⁰

Moreover, the Supreme Court has long held that federal agencies can preempt state law in the same ways as Congress.⁷¹ For example, an agency can pass a binding regulation that expressly displaces state law.⁷² Alternatively, state law may be impliedly preempted if it directly conflicts with or frustrates the purposes of an agency's regulatory scheme.⁷³

Rounding out the federal branches, state law may also be preempted by "federal common law."⁷⁴ The modern Court is generally loathe to fashion new federal common law rules or extend old ones.⁷⁵ Thus, the cases in which federal courts "may engage in common lawmaking are few and far between."⁷⁶ One such case, however, is directly pertinent here.⁷⁷ In *Boyle v. United Technologies Corp.*, the

67. *Id.* at 399 (citing *Chamber of Com. v. Whiting*, 563 U.S. 582, 590 (2011)).

68. *Id.* (first citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); and then citing *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990)).

69. *Id.* (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

70. *Id.* (citing *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963)).

71. See David S. Rubenstein, *Delegating Supremacy?*, 65 VAND. L. REV. 1125, 1137–38, 1147–52 (2012) (comparing and contextualizing the Supreme Court's statutory and administrative preemption doctrines); *City of New York v. FCC*, 486 U.S. 57, 63–64 (1988) (holding that a "federal agency acting within the scope of its congressionally delegated authority may preempt" state law); see also *Hillsborough Cnty. v. Automated Med. Lab'ys, Inc.*, 471 U.S. 707, 713 (1985) (explaining that "state laws can be pre-empted by federal regulations as well as by federal statutes").

72. See David S. Rubenstein, *The Paradox of Administrative Preemption*, 38 HARV. J.L. & PUB. POL'Y 267, 275–83 (2015) (providing a typology of the Court's administrative preemption doctrine).

73. See *id.* at 276; *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) (finding that state law was preempted because it frustrated the purpose of the agency's regulatory scheme).

74. See, e.g., *Clearfield Tr. Co. v. United States*, 318 U.S. 363, 367 (1943) (finding that where federal interests are sufficiently implicated and there is no applicable act of Congress, "it is for the federal courts to fashion the governing rule of law according to their own standards," which preempts conflicting state law); see also Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 890–91, 897 (1986) ("Although at one point there was some doubt, it is now established that a federal common law rule, once made, has precisely the same force and effect as any other federal rule. It is binding on state judges through the supremacy clause.").

75. See, e.g., *City of Milwaukee v. Illinois*, 451 U.S. 304, 312–13 (1981) ("The enactment of a federal rule in an area of national concern, and the decision whether to displace state law in doing so, is generally made . . . by the people through their elected representatives in Congress."); see also *Hernandez v. Mesa*, 140 S. Ct. 735, 742 (2020) (explaining the Court's general reluctance to create or extend federal common law); *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994) (declining the invitation to create federal common law).

76. *Rodriguez v. FDIC*, 140 S. Ct. 713, 716 (2020).

77. See *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988) ("[W]e have held that a few areas, involving 'uniquely federal interests,' . . . are so committed by the Constitution and laws of the

Court fashioned a common law rule, referred to as the “government contractor defense,”⁷⁸ by which federal contracts can preempt conflicting state law. Although *Boyle* involved a contract for military equipment, lower federal courts have since extended *Boyle*’s preemption defense to civilian contractors for goods⁷⁹ and services.⁸⁰

2. Intergovernmental Immunity

The origins of intergovernmental immunity trace to the foundational case *McCulloch v. Maryland*.⁸¹ There, Chief Justice Marshall held that Maryland could not tax the National Bank because “[s]tates have no power, by taxation or otherwise, to retard, impede, burden, in any manner control the operations . . . [of] the powers vested in the general government.”⁸² This immunity principle was derived from structural principles and lodged in the Supremacy Clause.⁸³ In *McCulloch*, and for the next century, the Court was unwilling to treat intergovernmental immunity as a matter of degree.⁸⁴ Thus, the Court routinely quashed state laws that interfered, even remotely, with the federal government or its instrumentalities.⁸⁵ For example,

United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed . . . by the courts—so-called ‘federal common law.’” (citations omitted)).

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

79. See, e.g., *Carley v. Wheeled Coach*, 991 F.2d 1117, 1118 (3d Cir. 1993).

80. See, e.g., *Hudgens v. Bell Helicopter/Textron*, 328 F.3d 1329, 1334–45 (11th Cir. 2003) (accepting government contractor defense of a company providing helicopter maintenance to the army); *Richland-Lexington Airport Dist. v. Atlas Props., Inc.*, 854 F. Supp. 400, 421–24 (D.S.C. 1994) (applying the defense to a company supplying decontamination services to the Environmental Protection Agency). In the context of a service contract, the *Boyle* test remains essentially the same: (1) the government must have approved reasonably precise procedures to be followed in providing the service, (2) the contractor’s performance must have conformed to those procedures, and (3) the contractor must have warned the government about dangers in those procedures that were known to it, but not to the government. See *Hudgens*, 328 F.3d at 1335.

81. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 425–37 (1819).

82. *Id.* at 317.

83. *Id.* at 396, 405, 432 (referring to federal supremacy); S. Candice Hoke, *Transcending Conventional Supremacy: A Reconstruction of the Supremacy Clause*, 24 CONN. L. REV. 829, 854 (1992) (arguing that the Supremacy Clause “does not explicitly support [Chief Justice] Marshall’s embroidery”).

84. *McCulloch*, 17 U.S. (4 Wheat.) at 430 (warning against enmeshing courts in the “perplexing” business, “so unfit for the judicial department,” of attempting to delineate “what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power”); see also *Dawson v. Steager*, 139 S. Ct. 698, 704 (2019) (eschewing de minimis exception to intergovernmental tax immunity doctrine).

85. See, e.g., *Johnson v. Maryland*, 254 U.S. 51, 57 (1920); *Ohio v. Thomas*, 173 U.S. 276, 283 (1899) (invalidating a state law that required the person in charge of an eating house at a federal home for disabled veterans to put out a small printed sign that would read “oleomargarine sold and used here”).

state laws stood no chance if they indirectly raised the federal government's cost of doing work.⁸⁶

Beginning in the New Deal era, however, the Court “decisively rejected” and “thoroughly repudiated” the notion that “any state regulation which indirectly regulates the Federal Government’s activity is unconstitutional.”⁸⁷ This doctrinal adjustment, the Court explained, was necessary to respect state sovereignty;⁸⁸ the indirect effects of state law on the federal government were “normal incidents” of “two governments” operating in the same territory.⁸⁹ So reconceived, the intergovernmental immunity doctrine was considerably milder than Chief Justice Marshall’s original formulation. Under the modern doctrine, states cannot (1) directly regulate the federal government or its instrumentalities; or (2) discriminate against the federal government or those with whom it deals.⁹⁰

Under the first prong, courts apply the “legal incidence” test,⁹¹ which focuses on where the legal incidence of state law falls.⁹² State laws that *directly* regulate the federal government or its instrumentalities are constitutionally prohibited.⁹³ Meanwhile, state laws that *indirectly* affect the federal government or its instrumentalities (economically or otherwise) clear this doctrinal hurdle.⁹⁴ By woodenly focusing on where the “legal incidence” directly falls, the Court avoids some difficult line-drawing problems that plagued its earlier approach.⁹⁵ Moreover, by judicial design, the legal incidence test provides states some leeway to regulate

86. See, e.g., *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218, 222 (1928) (state tax on military contractor); *Dobbins v. Comm’rs of Erie Cnty.*, 41 U.S. (16 Pet.) 435 (1842) (tax on federal employee).

87. *North Dakota v. United States*, 495 U.S. 423, 434–45 (1990) (explaining the shift); *James v. Dravo Contracting Co.*, 302 U.S. 134, 160–61 (1937) (providing a contemporary explanation).

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

89. *Id.*

90. See *North Dakota*, 495 U.S. at 436; *South Carolina v. Baker*, 485 U.S. 505, 516–23 (1988) (discussing evolution of the intergovernmental immunity doctrine). Worth noting is that the Supreme Court’s decisions do not draw discernable distinctions between state tax laws and state regulations; the Court cites the cases interchangeably. See, e.g., *North Dakota*, 495 U.S. at 454 n.36. There is an argument, however, that they *should* be treated differently. Cf. *Boeing Co. v. Movassaghi*, 768 F.3d 832 (9th Cir. 2014) (opining that state regulations affect federal programs in ways that state taxation does not).

91. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6–34 (3d ed. 1999) (discussing the legal incidence test).

92. *Id.*

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

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

95. See TRIBE, *supra* note 91, § 6–34, at 1059.

federal contractors, which generally do not qualify as federal instrumentalities for purposes of intergovernmental immunity.⁹⁶

Under the doctrine's second prong, state law must not "discriminate" against the federal government "or those with whom it deals."⁹⁷ Discrimination in this context has a special meaning: state law must not treat the federal government or its contractors *worse* than similarly situated constituents in the state.⁹⁸ Moreover, when testing for discrimination, courts assess the state regulatory scheme *as a whole*.⁹⁹ This functional approach can cut both ways. State laws that appear nondiscriminatory, when viewed in isolation, may be deemed discriminatory when considered alongside other provisions. Conversely, state laws that are discriminatory on their face may not, in fact, leave the federal government or its contractors worse off.¹⁰⁰

II. PUZZLE ONE—DOES THE INTERGOVERNMENTAL IMMUNITY DOCTRINE APPLY TO GENERALLY APPLICABLE (NONDISCRIMINATORY) STATE REGULATIONS?

There is no dispute that preemption doctrine applies to state laws directed at federal contractors. Nor is there any dispute that discriminatory state laws could run afoul of the intergovernmental immunity doctrine. From that starting position, the puzzle treated here is whether federal contractors should be constitutionally immune from *nondiscriminatory* state law under the auspices of intergovernmental immunity doctrine.

96. See Laurence H. Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682, 704 n.100 (1976) ("Instrumentalities" do not include independent contractors, employees, or others dealing for their own purposes with the federal government but only those entities 'so assimilated by the Government as to become one of its constituent parts.'" (quoting *United States v. Township of Muskegon*, 355 U.S. 484, 486 (1958))); *Penn Dairies v. Milk Control Comm'n*, 318 U.S. 261, 269–70 (1943) ("[T]hose who contract to furnish supplies or render services to the government are not [federal instrumentalities] and do not perform governmental functions . . ." (citations omitted)); *Alabama v. King & Boozer*, 314 U.S. 1, 9 (1941) (same).

97. See, e.g., *North Dakota*, 495 U.S. at 438; *South Carolina v. Baker*, 485 U.S. 505, 523 (1988).

98. See *Washington v. United States*, 460 U.S. 536, 544–45 (1983); see also *Dawson v. Steager*, 139 S. Ct. 698, 704–05 (2019) ("Whether a State treats similarly situated state and federal employees differently depends on how the State has defined the favored class." (citing *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 817 (1989))); *United States v. Cnty. of Fresno*, 429 U.S. 452, 462–64 (1977) (requiring that regulations be imposed equally on all similarly situated constituents of a state and not based on a constituent's status as a government contractor or supplier).

99. See *North Dakota*, 495 U.S. at 438 ("A state provision that appears to treat the Government differently on the most specific level of analysis may, in its broader regulatory context, not be discriminatory.").

100. See *id.*

A. Sibling Rivalry

In *North Dakota*, the Supreme Court vetted but did not fully resolve this puzzle.¹⁰¹ The case arose when the federal government sought declaratory and injunctive relief against North Dakota's regulation of liquor sold to army bases.¹⁰² More specifically, the state's regulations subjected out-of-state liquor suppliers to labeling and monthly reporting requirements.¹⁰³ The federal government argued that the state laws violated intergovernmental immunity and, alternatively, were preempted by federal procurement law.¹⁰⁴

In a plurality decision penned by Justice Stevens, the Court rejected both claims.¹⁰⁵ Regarding preemption, the plurality found no conflict between federal procurement laws and the state laws at issue.¹⁰⁶ Regarding intergovernmental immunity, the plurality held that North Dakota cleared the legal incidence test (prong one) because the labeling and reporting requirements fell directly on the government's contractors.¹⁰⁷ The plurality acknowledged that the government might be indirectly burdened with increased liquor costs, yet that was immaterial under the legal incidence test, which looks to where the legal burden directly falls.¹⁰⁸ Second, the plurality found that North Dakota cleared the antidiscrimination test (prong two).¹⁰⁹ Although the state laws at issue treated in-state and out-of-state suppliers differently, the regulatory regime as a whole did not leave the government worse off.¹¹⁰ Consequently, the plurality held that North Dakota's liquor laws did not discriminate against the federal government and thus did not violate intergovernmental immunity.¹¹¹

In so holding, the plurality expressly rejected the invitation to extend intergovernmental immunity to nondiscriminatory state regulations. According to the plurality, intergovernmental immunity was limited to (i) *direct* state regulation of the federal government, and (ii) *discriminatory* state regulation against the government or those with whom it deals.¹¹² By contrast, the validity of *indirect* and

101. See *infra* notes 118–124 and accompanying text.

102. *North Dakota*, 495 U.S. at 426, 428–30.

103. *Id.* at 429, 433.

104. *Id.* at 434, 440.

105. *Id.* at 436–39.

106. *Id.* at 439–44.

107. *Id.* at 436–37.

108. *Id.* at 437–38.

109. *Id.* at 437–39.

110. *Id.* at 438–39. According to the plurality, the comparative reference group was other liquor retailers in the state. Whereas those retailers could only purchase liquor from state-licensed wholesalers, the government had the additional option of purchasing from out-of-state wholesalers who complied with the state labeling and reporting requirements at issue. *Id.* Justice Scalia cast the deciding fifth vote. *See id.* at 445–48 (Scalia, J., concurring in the judgment) (lamenting the judicial mischief in the Court's holistic approach to the antidiscrimination test, but agreeing with the result reached in the case in light of special considerations under the Twenty-First Amendment of the U.S. Constitution).

111. *Id.* at 438–39.

112. *Id.*

nondiscriminatory state regulation “must be resolved” under preemption principles.¹¹³ In the plurality’s view, these parameters were forged in earlier cases to “accommodat[e] . . . the full range of each sovereign’s legislative authority and respect[] . . . the primary role of Congress in resolving conflicts between the National and State Governments.”¹¹⁴ Elaborating further, the plurality thought “it would be both an unwise and an unwarranted extension of the intergovernmental immunity doctrine for this Court to hold that the burdens associated with the labeling and reporting requirements—no matter how trivial they may prove to be—are sufficient to make them unconstitutional.”¹¹⁵

In a partially concurring and dissenting opinion, penned by Justice Brennan, four justices deemed the labeling requirement discriminatory.¹¹⁶ But, even if not discriminatory, Justice Brennan argued that the intergovernmental immunity doctrine should apply nonetheless.¹¹⁷ More specifically, he argued that the doctrine extends to state regulations that “substantially obstruct” or “actually and substantially interfere[] with specific federal programs.”¹¹⁸

Justice Brennan’s approach would erect two, substantially overlapping, doctrinal hurdles for nondiscriminatory state regulations to clear.¹¹⁹ First, to clear the preemption hurdle, state regulations must not “frustrate” or pose “an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹²⁰ Then, to clear intergovernmental immunity, state regulations must not “actually and substantially interfere with” (or “substantially obstruct”) federal programs.¹²¹ If these Supremacy Clause hurdles are formal and functional equivalents, then perhaps this doctrinal puzzle is much ado about nothing.

But *North Dakota’s* cantankerous 4-4 split suggests otherwise.¹²² Foremost, Justice Stevens and Justice Brennan drew support for their respective positions in

113. *Id.* at 435.

114. *Id.*

115. *Id.* at 444.

116. *Id.* at 451–52 (Brennan, J., concurring in part and dissenting in part) (disagreeing with conclusions reached by the plurality’s holistic approach with respect to North Dakota’s labeling requirement in light of the economic burdens imposed on the suppliers and passed on to the government).

117. *Id.* at 437–39.

118. *Id.* at 451–52. Justice Brennan offered no explanation for the difference, if any, between obstruction and interference. Perhaps he intended for the term obstruction to incorporate a requirement of “actual” interference. So construed, “substantial obstruction” may have been intended as a shorthand for “actual and substantial interference.” Elsewhere in the opinion, however, Justice Brennan muddied the waters on this point, using various phraseology seemingly interchangeably. *See, e.g., id.* at 467 (“actually obstructs” federal activity); *id.* (“burden” the federal government “in its conduct of governmental operations”); *id.* (“obstructs” federal operations); *id.* at 471 (“The operations of the Federal Government are constitutionally immune from such interference by the several States.”).

119. *Id.* at 470–71.

120. *See, e.g., Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372–73 (2000).

121. *North Dakota*, 495 U.S. at 452.

122. *Compare id.* at 435–38 nn.7–10, *with id.* at 452–59 nn.3–6 (Brennan, J., concurring in part and dissenting in part).

the Court's precedents. Whereas Justice Stevens read the precedents as resting on preemption grounds (rather than intergovernmental immunity), Justice Brennan thought that characterization was "at odds with the reasoning in the opinions themselves."¹²³ Moreover, Justice Brennan denounced the idea of "rigid demarcation between the two Supremacy Clause doctrines," which he said did not exist in prior cases.¹²⁴ For precisely those reasons, however, the Justices' battle for the precedential high ground in *North Dakota* left no clear victors.

Take, for example, *Leslie Miller, Inc. v. Arkansas*,¹²⁵ on which both Justices relied in support of their respective viewpoints. In *Leslie Miller*, the Court held that the federal government's building contractors were immune from an Arkansas regulation that required all building contractors to obtain a state license.¹²⁶ Whether *Leslie Miller* was decided on intergovernmental immunity or preemption grounds is far from clear.¹²⁷ The bulk of the Court's analysis in *Leslie Miller* focused on the "conflict[s]" between federal and state law, which is the vocabulary of preemption.¹²⁸ In its closing remarks, however, the Court cited and quoted from the pre-New Deal case of *Johnson v. State of Maryland*,¹²⁹ which invalidated a state licensing scheme on intergovernmental immunity grounds.¹³⁰

Similarly, in *Public Utilities Commission of California v. United States*,¹³¹ the Court invalidated a state law requiring common carriers to receive state approval before offering free or reduced rates to federal employees.¹³² The state law, according to the Court, was in plain "conflict" with the government's policy of negotiating rates.¹³³ Again, that bespeaks preemption, insofar as the conflict with federal policy animated the Court's holding. But, blurring doctrinal lines, the Court also quoted language from *McCulloch* with tones of intergovernmental immunity.¹³⁴

123. *Id.* at 452.

124. *Id.*

125. 352 U.S. 188 (1956).

126. *Id.* at 190.

127. As discussed in more detail in Part II, lower federal courts have generally adopted the plurality's view that *Leslie Miller* was decided on preemption grounds. *See, e.g.,* Gartrell Constr. Inc. v. Aubry, 940 F.2d 437, 439 (9th Cir. 1991) (treating *Leslie Miller* as a preemption case); *cf. United States v. Virginia*, 139 F.3d 984, 989 n.7 (4th Cir. 1998) (noting "disagreement over whether *Leslie Miller* was a preemption or an intergovernmental immunity case" between plurality and dissenters in *North Dakota*).

128. *Leslie Miller*, 352 U.S. at 190.

129. 254 U.S. 51 (1920).

130. *Leslie Miller*, 352 U.S. at 190 (discussing the "immunity of the instruments of the United States from state control in the performance of their [contractual] duties" (quoting *Johnson*, 254 U.S. at 57)).

131. 355 U.S. 534 (1958).

132. *Id.* at 545-46.

133. *Id.*

134. *Id.* at 544 ("It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence." (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819))).

Soon after, in *United States v. Georgia Public Service Commission*, the Court invalidated Georgia's attempt to revoke operating certificates of moving companies that provided discounted rates to the federal government.¹³⁵ The rates were negotiated with the federal government, pursuant to federal procurement regulations, but fell below the minimum rates required by state law.¹³⁶ Ruling for the federal government, the Court reasoned that Georgia's policy must "give way" to the federal government's "oppos[ing]" procurement policy.¹³⁷ In so holding, the Court explicitly invoked the Supremacy Clause and cited the reasoning of *Public Utilities Commission*.¹³⁸ Yet, for reasons already explained, these references shed no additional light: preemption and intergovernmental immunity both hail from the Supremacy Clause, and the *Public Utilities Commission* decision, itself, sent mixed doctrinal signals.¹³⁹

I could go on. But no amount of retrospective case crunching will resolve this doctrinal puzzle. Even if it could, old answers would not necessarily be satisfying. The Court's Supremacy Clause doctrines have dynamically evolved since the early republic.¹⁴⁰ Most notably, as the pre-New Deal model of "dual federalism" gave way to increasingly overlapping federal-state regulation, the Court reined in both Supremacy Clause doctrines to retain a semblance of the federalist structure.¹⁴¹ For present purposes, that historical context is important for two related reasons.

First, these doctrines are not static: they have changed in the past, and can change again, to accommodate and compensate for structural changes to our systems of government. Second, the Court's twentieth century precedents are inattentive to the transformative effects that modern federal outsourcing has had on the federalist structure and, more generally, on our constitutional democracy.¹⁴² It was not until the mid-1990s—after *North Dakota* was decided—that the "Reinventing Government" movement took hold of the political mainstream and fundamentally changed how government operates.¹⁴³ Thus, even if it were possible to construct a satisfying doctrinal portrait of the past, old answers would not necessarily be satisfying today.

135. 371 U.S. 285 (1963).

136. *Id.* at 286–87.

137. *Id.* at 292–93.

138. *Id.*

139. *See generally id.*

140. *See supra* Part I.B.1 (preemption), Part I.B.2 (intergovernmental immunity).

141. *See* Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 4 (1950); John David Ohlendorf, *Textualism and Obstacle Preemption*, 47 GA. L. REV. 369, 381–83 (2013).

142. *See* Rubenstein, *Supremacy, Inc.*, *supra* note 2, at 1127–30 (explaining the spillover effects of federal outsourcing on federalism); *see also supra* notes 34–38 and accompanying text (collecting sources about privatization's implications for constitutional rights, separation of powers, and administrative law).

143. *See generally* GORE, *supra* note 37; OSBORNE & GAEBLER, *supra* note 37. *See also* LIGHT, *supra* note 35, at 37–44 (describing a "shadow" government of millions of contractors and other private actors who more than offset the reductions in federal employees).

B. Preemption (Not Intergovernmental Immunity)

On institutional, doctrinal, and pragmatic grounds, the federal government's constitutional immunity from state law should not shield contractors from nondiscriminatory state law. Skeptics may reasonably worry that states will overcompensate, overregulate, and obstruct federal programs.¹⁴⁴ Moreover, excessive restrictions could hinder the government's ability to get its work done effectively and efficiently.¹⁴⁵ These are valid concerns, but much less so when properly contextualized.

In some scenarios, state interference can smoke out problems in outsourced federal programs and improve them. In other scenarios, nondiscriminatory state laws might undermine federal outsourcing goals. For that reason, intergovernmental immunity doctrine is arguably underinclusive. But doctrinal underinclusiveness is not inherently problematic; indeed, constitutional law brims with underinclusive (and overinclusive) doctrines.¹⁴⁶ The normative question, in this context as always, is whether doctrinal underinclusiveness is tolerable or preferable to overinclusiveness. Because preemption doctrine can pick up the slack of a suboptimal intergovernmental immunity doctrine, underinclusiveness seems the better choice. Specifically, nondiscriminatory state law that "obstructs" or "substantially interferes" with federal programs might be preempted under preexisting or responsively enacted federal law. And if not preempted, that is a very good indicator that state law is either not interfering with federal programs, or interfering in banal, benign, or beneficial ways.

An overinclusive intergovernmental immunity doctrine, by contrast, would aggrandize judicial power vis-à-vis Congress (a separation of powers concern) and aggrandize federal power vis-à-vis the states (a federalism concern). To be sure, preemption doctrine is not fully absolved of these structural tensions.¹⁴⁷ All else

144. Cf. Steven J. Kelman, *Achieving Contracting Goals and Recognizing Public Law Concerns: A Contracting Management Perspective*, in GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 153, 177–78 (Jody Freeman & Martha Minow eds., 2009) (voicing concern that if new legal regimes are brought to bear on federal outsourcing, such regimes could be "exploited by organizations seeking to use it for reasons unrelated to promotion of public law values—with major impacts on the ability of contracts to be expeditiously awarded and successfully administered"); Metzger, *supra* note 15, at 1454 (noting that Congress may not want to create federal causes of action against contractors because such exposure "increases the costs of privatized programs, undermines the flexibility and efficiency that governments hope to gain through privatization, and deters private participation").

145. See Jody Freeman & Martha Minow, *Introduction: Reframing the Outsourcing Debates*, in GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 13 (Jody Freeman & Martha Minow eds., 2009).

146. See Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 904 (1999) (discussing the inherent underinclusiveness and overinclusiveness in constitutional doctrine because of the Court's need to set rules); Metzger, *supra* note 15, at 1421–22, 1431 (identifying underinclusiveness and overinclusiveness of the state action doctrine).

147. Perhaps most notably, the Court's obstacle preemption doctrine has come under scrutiny as an untoward expansion of the Supremacy Clause. See, e.g., *Wyeth v. Levine*, 555 U.S. 555, 587 (2009) (Thomas, J., concurring) ("My review of this Court's broad implied pre-emption precedents, particularly

equal, however, concerns about judicial overreaching are mitigated as the center of decisional gravity shifts away from courts to Congress. On that score, preemption has intergovernmental immunity beat. In preemption analysis, Congress's statutory purpose is the "ultimate touchstone."¹⁴⁸ In theory, this oft repeated maxim provides a focal point for analysis rooted in statutory interpretation. Of course, statutory interpretation is notoriously fickle, in ways that muddy preemption analysis.¹⁴⁹ By comparison, however, intergovernmental immunity is arguably worse—and inherently so—because it is implied from the Supremacy Clause with no textual hook to guide the analysis.

Subjecting nondiscriminatory state laws to intergovernmental immunity doctrine not only shifts decisional power to the judiciary, it makes it considerably harder for the federal political branches to avoid or correct judicial misfires. Under current doctrine, Congress can save state law that would otherwise be displaced under intergovernmental immunity doctrine. By contrast, Congress *and* federal agencies can save state law from preemption. This difference—in who decides—can be quite significant, owing to political and procedural differentials in how such decisions are made. Whereas Congress can only pass laws pursuant to the finely wrought legislative process,¹⁵⁰ agencies can generally issue binding regulations much more efficiently and flexibly.¹⁵¹ Under Justice Brennan's approach, a state law would be null under intergovernmental immunity doctrine if a court determined that it actually obstructed or substantially interfered with federal policies.¹⁵² Congress could avoid that judicial result, *ex ante*, or overcome it *ex post*, by clearly and unambiguously expressing its intent to save state law.¹⁵³ Under current doctrine, however, federal agencies could not save state law in this scenario.¹⁵⁴

its 'purposes and objectives' pre-emption jurisprudence, has increased my concerns that implied pre-emption doctrines have not always been constitutionally applied."); 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 generally* Rubenstein, *supra* note 71 (arguing that administrative preemption is an affront to separation of powers and federalism). *See also infra* note 161 and accompanying text (noting debates around the "presumption against preemption," both in theory and practice).

148. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) ("[T]he purpose of Congress is the ultimate touchstone in every pre-emption case." (internal quotations omitted)).

149. *See, e.g.*, Daniel Meltzer, *Preemption and Textualism*, 112 MICH. L. REV. 1 (2013).

150. *See Immigr. & Naturalization Serv. v. Chadha*, 462 U.S. 919, 951 (1983) (discussing the "finely wrought" and cumbersome legislative requirements of bicameralism and presentment).

151. *See* 5 U.S.C. § 553(b)–(c) (notice-and-comment requirements). Under notice-and-comment rulemaking, the agency must provide advance notice of its proposed rulemaking in the Federal Register and offer interested parties the opportunity to submit written comments in response. *Id.*

152. *See North Dakota v. United States*, 495 U.S. 423, 467 (1990); *see also supra* notes 117–122 and accompanying text.

153. *See, e.g.*, *Hancock v. Train*, 426 U.S. 167, 179 (1976) (explaining that "where 'Congress does not affirmatively declare its instrumentalities or property subject to regulation,' 'the federal function must be left free'" of state regulation (quoting *Mayo v. United States*, 319 U.S. 441, 447–48 (1943))).

154. I am not aware of any case in which the Court has recognized an agency's authority to alter the constitutional default rules of intergovernmental immunity. The fact that intergovernmental

Relatedly, the burdens of proof differ between preemption and intergovernmental immunity. “In all preemption cases, and particularly in [fields] the States have traditionally occupied,” the Court has instructed that the historic police powers of the States are “not to be superseded . . . unless that was the clear and manifest purpose of Congress.”¹⁵⁵ At least in theory, this presumption against preemption is the Court’s way of avoiding unintended encroachments on state sovereignty.¹⁵⁶ By placing an interpretive thumb on the scale in favor of state interests, state law is not displaced merely because federal law happens to touch the same subjects. Indeed, concurrent federal and state regulation is the norm of modern federalism, unlike the rigid federal-state demarcations of the pre-New Deal era.¹⁵⁷

The presumption against preemption may be overcome by clear evidence of Congress’s express or implied intent to preempt state law.¹⁵⁸ By contrast, the presumption runs in the opposite direction in intergovernmental immunity cases.¹⁵⁹ Specifically, state law that directly regulates or discriminates against the federal government or those with whom it deals is presumptively invalid, unless Congress clearly and unambiguously specifies otherwise.¹⁶⁰ Taking these doctrinal canons at face value, and all else equal,¹⁶¹ the choice of doctrinal frame can thus be outcome

immunity is defeasible by Congress does not mean that it is defeasible by agencies pursuant to a general delegation of rulemaking authority. *Cf.* *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 180 (1988) (“It is well settled that the activities of federal installations are shielded by the Supremacy Clause from direct state regulation unless *Congress* provides ‘clear and unambiguous’ authorization for such regulation.” (emphasis added)).

155. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (internal marks and citations omitted).

156. *See* *Bates v. Dow Agrosciences, LLC*, 544 U.S. 431, 449 (2005) (“[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly preempt state-law causes of action.”); *see also* *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 663–64 (1993) (explaining the purpose behind the presumption against preemption).

157. *See* Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 783 (1994) (explaining that, in the pre–New Deal era, when Congress enacted laws in a field in which it was empowered to legislate, state law was deemed inoperative in the field without regard to whether particular state laws conflicted with the substance of the federal regime).

158. *See* *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992) (“Consideration of issues arising under the Supremacy Clause ‘starts with the assumption that historic police powers of the States [are] not to be superseded . . . by Federal Act unless that [is] the clear and manifest purpose of Congress.’” (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947))); *see also* *CSX Transp., Inc.*, 507 U.S. at 663–64 (“In the interest of avoiding unintended encroachment on the authority of the States . . . a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find pre-emption.”).

159. *Hancock v. Train*, 426 U.S. 167, 179 (1976).

160. *See, e.g., id.* at 179 (explaining that “where ‘Congress does not affirmatively declare its instrumentalities or property subject to regulation,’ ‘the federal function must be left free’” of state regulation (quoting *Mayo v. United States*, 319 U.S. 441, 447–48 (1943))).

161. There are, of course, reasons not to take these doctrinal formulations at face value. Some jurists and scholars view the presumption against preemption as analytically bankrupt. *See, e.g.,* Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. REV. 967, 968 (2002) (“There is no such presumption any longer, if, indeed, there ever really was one.”). The Court is hardly consistent in how and when it invokes the presumption. *See* S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685, 733 (1991) (“The Supreme Court’s devotion to its

determinative in a large category of cases: namely, where Congress’s intent to preempt state law or waive intergovernmental immunity is less than clear. Extending intergovernmental immunity doctrine to nondiscriminatory state law would, effectively, amount to a muscular form of “obstacle preemption”—free from the presumption against preemption, and without statutory guideposts.¹⁶²

III. PUZZLE TWO—ARE STATE LICENSING LAWS PREEMPTED BY FEDERAL PROCUREMENT LAW?

This Part turns to a second puzzle of procurement preemption: namely, whether state licensing laws are preempted by federal procurement law, including under the so-called “*Leslie Miller* rule.”¹⁶³ Federal contracting is a thickly regulated and complex regime. Mercifully, most of the details are beyond the scope of this Article. But some of the details matter. Indeed, a main objective here is to shine light on which details matter for preemption analysis and why. Before plunging in, three general features of federal procurement law will help to frame much of the discussion that follows.

presumptions [against preemption] . . . can only be described as fickle.”); Catherine M. Sharkey, *Against Freemeebling, Extratextual Obstacle Preemption: Is Justice Clarence Thomas the Lone Principled Federalist?*, 5 N.Y.U. J.L. & LIBERTY 63, 78 (2010) (“[T]he Court’s track record with respect to the presumption against preemption is murky.”). Even when employed, the Court generally does not signal how important the presumption is to the outcome of cases, in relation to other considerations and evidentiary inputs. The same can probably be said of the clear statement rule applied in intergovernmental immunity cases, but there are far fewer cases (and thus fewer data points) on which to base that assessment. Suffice to say, neither the presumption against preemption nor its mirror image in intergovernmental immunity cases are analytically precise. Still, that imprecision does not imply methodological equanimity.

162. See *supra* note 69 and accompanying text (describing obstacle preemption); *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372 (2000) (“What is a sufficient obstacle [for purposes of conflict preemption], is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects.”).

163. See, e.g., *Gartrell Constr. Inc. v. Aubry*, 940 F.2d 437, 441 (9th Cir. 1991) (invoking the “*Leslie Miller* rule” to invalidate a state licensing requirement as applied to a federal construction contractor); *Pa. Higher Educ. Assistance Agency v. Perez*, No. 3:18-CV-1114 (MPS), 2020 WL 2079634, at *9 (D. Conn. Apr. 30, 2020) (invoking “the rule of *Leslie Miller*” to invalidate state licensing requirements for federal student loan servicers). For purposes of this analysis, my focus is on nondiscriminatory state licensing laws, and I assume that discriminatory state licensing schemes would run afoul of intergovernmental immunity unless Congress has specified otherwise. See *supra* notes 91–94 and accompanying text. In regard to preemption, ED and its contractors argue that state regulations are displaced by a range of federal laws, some but not all of which are procurement laws. See, e.g., *Federal Preemption and State Regulation of the Department of Education’s Federal Student Loan Programs and Federal Student Loan Servicers*, 83 Fed. Reg. 10619 (Mar. 12, 2018); *Student Loan Servicing All. v. District of Columbia (SLSA)*, 351 F. Supp. 3d 26 (D.D.C. 2018). For this Article, I focus on *procurement law* preemption because it is more generally applicable, less understood, and, to my knowledge, has escaped academic scrutiny until now. Whether other federal law preempts state laws as applied to student loan servicers is an important question in its own right, but turns on the details of the various federal and state laws at issue. For judicial treatments of those preemption questions, see, for example, *Lawson-Ross v. Great Lakes Higher Educ. Corp.*, 955 F.3d 908 (11th Cir. 2020); *Nelson v. Great Lakes Educ. Loan Servs., Inc.*, 928 F.3d 639 (7th Cir. 2019); *Chae v. SLM Corp.*, 593 F.3d 936 (9th Cir. 2010).

First, federal procurement law is not geared toward federalism or questions of preemption.¹⁶⁴ The exceptions to this general rule are limited and domain specific. For example, in some contexts, Congress has expressly immunized federal contractors from state law.¹⁶⁵ In other contexts, Congress has expressly made state law applicable to federal contractors.¹⁶⁶ In most contexts—including student loan servicing—Congress has not decided one way or the other. Thus, the puzzle is how to deal with that ambivalence as it pertains to state licensing regimes.

Second, federal procurement law aspires toward myriad goals and values.¹⁶⁷ As summarized by Steven Schooner, those objectives include competition, integrity, transparency, efficiency, customer satisfaction, best value, wealth distribution, risk avoidance, and uniformity.¹⁶⁸ These pluralistic values do not always align; trade-offs among them are necessary and inevitable. Federal procurement law makes those trade-offs through a range of procurement processes, contractual provisions, performance incentives, accountability mechanisms, and a mix of delegated discretion and nonnegotiable mandates.¹⁶⁹ The important takeaway, for present

164. To be clear, federal contracting and federalism are inextricably linked in our era of contractual governance—the student loan imbroglio is a headline example. *See* Rubenstein, *Supremacy, Inc.*, *supra* note 2, at 1121–30 (providing a theoretical account of the relationship between federal contracting and federalism).

165. Examples of immunity statutes include 6 U.S.C. § 442(d) (creating the rebuttable presumption that the government contractor defense shall apply to the seller of qualified antiterrorism technologies in lawsuits related to the deployment of such technologies), and 42 U.S.C. § 247d-6d (allowing immunity for “covered person[s]”—in the event of a public health emergency declaration—from liability relating to certain countermeasures against disease). In other contexts, however, Congress has rejected bills to immunize federal contractors from state law. *See, e.g.*, Gulf Coast Recovery Act (GCRA), S.B. 1761, 109th Cong., 1st Sess. § 5 (2005). If enacted, the GCRA would have established immunity for contractors performing post-disaster recovery work, through a rebuttable presumption of the government contractor defense. *Id.*; *see also* Steven L. Schooner & Erin Siuda-Pfeffer, *Post-Katrina Reconstruction Liability: Exposing the Inferior Risk-Bearer*, 43 HARV. J. ON LEGIS. 287, 291–97 (2006) (comparing and contrasting federal contractor indemnity and immunity statutes, and arguing against passage of the GCRA on normative grounds); *Boyle v. United Techs. Corp.*, 487 U.S. 500, 515 n.1 (1988) (Brennan, J., dissenting) (listing six proposed bills concerning limits on government contractor liability that were defeated in Congress).

166. *See, e.g.*, *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 182–83 (1988) (holding that 40 U.S.C. § 290 provided clear congressional authorization for application of state workmen’s compensation law to contractors operating a federal nuclear facility).

167. Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 AM. U. L. REV. 627, 634–37 (2001) (“The laws, regulations, and policies controlling the award and performance of government contracts present a dense thicket reflective of a large, complex bureaucracy.”).

168. *See* Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 PUB. PROCUREMENT L. REV. 103 (2002).

169. *See* Schooner, *Fear of Oversight*, *supra* note 167, at 635. *See generally* 48 C.F.R. §§ 5.000–5.705 (2019) (discussing publicizing requirements for contract actions); *id.* §§ 6.000–6.502 (detailing competition requirements); *id.* §§ 13.000–15.609 (detailing simplified acquisitions, sealed bidding, and contracting by negotiation); *id.* §§ 16.000–16.703 (describing types of contracts); *id.* §§ 52.000–52.301 (containing standard and optional provisions and clauses); *id.* §§ 19.000–19.1508 (addressing small business programs); *id.* §§ 22.000–22.2110 (outlining labor law compliance); *id.* §§ 23.000–23.1105 (explaining environment, conservation, occupational safety, and drug-free workplace requirements); *id.* §§ 25.000–25.1103 (highlighting domestic preferences); *id.* §§ 37.000–37.604 (service contracts).

purposes, is that federal contracting is not one-size-fits-all. The procurement laws and contractual terms that pertain to federal student loan servicing, for example, differ in key respects from other types of federal procurement (such as for pencils, construction, military operations, and so on). This variability matters for preemption because the procurement laws that apply in one context may not apply, or may apply differently, in other contexts.

Third, the procurement system is not static. Indeed, a reason why federal contracting is not homogenous is because federal procurement laws have evolved throughout history to emphasize and deemphasize certain values over others.¹⁷⁰ In prior eras, for example, the government was generally required to award contracts to the lowest-cost, technically acceptable offeror.¹⁷¹ Today, however, the lodestar for federal procurement is “best-value,” which is determined by a range of considerations, including cost, performance, quality, and reliability.¹⁷² The pendulum shifts in federal procurement law matter for preemption because judicial decisions from prior eras may be distinguishable or outmoded by subsequent procurement regimes. Most pertinent here, the mid-twentieth-century case of *Leslie Miller v. Arkansas*,¹⁷³ upon which ED and its contractors rely,¹⁷⁴ is such a case. Properly understood, *Leslie Miller* does not categorically shield federal contractors from state licensing requirements.

A. Federal Procurement Law: Then and Now

Throughout most of the twentieth century, federal contracting law was an uncoordinated maze of agency-specific standards and practices.¹⁷⁵ During that time,

170. See generally NAGLE, *supra* note 28 (discussing the evolution of federal outsourcing through American history). See also Guttman, *supra* note 34, at 881–90 (discussing the ideological and political shift toward federal outsourcing in the mid-to-late twentieth century); Dan Guttman, *Government by Contract: The White House Needs Capacity to Account for the Legacy of 20th Century Reform*, 4 EMORY CORP. GOVERNANCE & ACCOUNTABILITY REV. 115 (2017) (providing an account of federal outsourcing through the twentieth century); JOHN T. JONES, JR., GOVERNMENT CONTRACT LAW: THE DESKBOOK FOR PROCUREMENT PROFESSIONALS (4th ed. 2017) (noting that Congress has revisited issues relating to federal procurement procedures to strike different balances between contracting efficiency and other system goals); Schooner, *Fear of Oversight*, *supra* note 167, at 636 (“The mid-1990s witnessed a tsunami of procurement reforms heralded as the most successful aspect of [Vice President] Gore’s reinventing government initiative, which were intended to make the procurement system less bureaucratic and more businesslike.”).

171. See *infra* notes 176–178 and accompanying text.

172. See 48 C.F.R. § 1.102(a) (2019) (defining and describing best-value contracting); see also *supra* notes 145–150 and accompanying text.

173. 352 U.S. 187 (1956).

174. See, e.g., Pa. Higher Educ. Assistance Agency v. Perez, No. 3:18-CV-1114 (MPS), 2020 WL 2079634, at *9 (D. Conn. Apr. 30, 2020) (invoking “the rule of *Leslie Miller*” to invalidate state licensing requirements for federal student loan servicers).

175. See 1 COMM’N ON GOV’T PROCUREMENT, REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT 31–33 (1972) (reporting on “a burdensome mass and maze of procurement and procurement-related regulations” within the federal government, and “no effective overall system for coordinating, controlling, and standardizing regulations”); see also NAGLE, *supra* note 28, at 504–05.

most federal contracting was conducted through a sealed bidding process.¹⁷⁶ Contracting officials would publicly unseal the bids, determine whether the lowest priced bid was responsive to the government's solicitation, and award the contract to the lowest priced "responsible" bidder—i.e., those who met financial, ethical, and other background requirements.¹⁷⁷ This process prioritized fairness and integrity by limiting the range of considerations, and thus discretion, available to contracting officials in source selection.¹⁷⁸ Today, sealed bidding is much less common, and only used in very limited contexts.

In 1984, Congress passed the Competition in Contracting Act (CICA).¹⁷⁹ Among other things, CICA introduced new requirements for conducting "full and open" competitions, eliminated the statutory preference for sealed bidding, and encouraged agencies to award contracts through negotiated processes.¹⁸⁰ To implement CICA, the Federal Acquisition Regulation (FAR) system was established to codify a set of uniform policies and procedures for acquisition by all executive agencies.¹⁸¹ FAR, as amended, is the backbone of modern federal procurement of goods and services.¹⁸²

The express and overarching purpose of FAR is to "deliver . . . the best value product or service to the customer, while maintaining the public's trust and fulfilling

176. See Gary L. Hopkins, *Bidding Federal Contracts*, 23 A.F. L. REV. 73–74 (1982–1983) ("Formal advertising is a competitive sealed bid method of contracting and is the statutorily preferred method of acquisition."); RICHARD A. SMITH, THE PROCUREMENT REFORMS OF 1984, BRIEFING PAPERS NO. 85-6, at 6–7 (1985) (discussing the pre-1984 bias toward "formal advertising" bidding, which is now referred to as "sealed bidding"); see also 48 C.F.R. § 14.101(e) ("After bids are publicly opened, an award will be made with reasonable promptness to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, considering only price and the price-related factors included in the invitation.")

177. SMITH, *supra* note 176, at 6–7; see also 48 C.F.R. § 14.101(e) ("After bids are publicly opened, an award will be made with reasonable promptness to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, considering only price and the price-related factors included in the invitation."); *Afro-American Datanamics, Inc.*, B-190703, 77-2 CPD ¶ 448 (Comp. Gen. Dec. 8, 1977) (ruling that the phrase "other factors considered" cannot be used to justify an award to other than the low responsible bidder whose bid conforms to the solicitation").

178. See, e.g., *United States v. Brookridge Farm, Inc.*, 111 F.2d 461, 463 (10th Cir. 1940); see also SMITH, *supra* note 176, at 6–7.

179. 41 U.S.C. § 253.

180. *Id.*

181. See generally NAGLE, *supra* note 28, at 503–17 (discussing the evolution of the uniform regulation system, culminating with the Federal Acquisition Regulation (FAR), which first became effective on April 1, 1984). For a highly accessible and informative summary of FAR, see MANUEL ET AL., *supra* note 28.

182. See MANUEL ET AL., *supra* note 28, at 11–14 (discussing the amendment process and a range of amendments made in response to legislation, executive orders, litigation, and policy considerations). While the FAR contains the principal rules of the federal acquisition system, it is not the only authority governing acquisitions of goods and services by executive branch agencies. Statutes, agency FAR supplements, other agency regulations, and guidance documents may also apply. See *id.* at 14–16, 19–20; see also *infra* notes 267–269 and accompanying text (discussing statutory acquisition requirements for federal student loan servicers).

public policy objectives.”¹⁸³ Toward achieving best value, FAR instructs agencies to examine the strengths and weaknesses of all relevant factors (such as cost, performance, quality, and schedule) and to make trade-offs between cost and noncost factors.¹⁸⁴ As these and other FAR provisions make clear, price is not the only consideration, or even the most important. For example, 48 C.F.R. § 15.101 instructs that “the relative importance of cost or price may vary” for different types of acquisitions.¹⁸⁵ Generally, for example, “cost or price may play a dominant role in source selection” where the requirements for performance are “clearly definable” and the “risk of unsuccessful contract performance is minimal.”¹⁸⁶ By contrast, nonprice considerations—such as “technical or past performance”—may “play a dominant role in source selection” when the performance requirements are less specified and the risk of unsuccessful performance is greater.¹⁸⁷ FAR cautions that “[t]he award of a contract . . . based on lowest evaluated price alone can be false economy if there is subsequent default, late deliveries, or other unsatisfactory performance resulting in additional contractual or administrative costs.”¹⁸⁸ Moreover, FAR promotes a number of social policies that are collateral to contractual performance (such as minimum wage requirements, workplace diversity, and small business set-asides),¹⁸⁹ which can increase costs and decrease competition relative to free-market baselines.¹⁹⁰

In these and other ways, FAR balances a range of values. Cost and efficiency matter but are not the only things that matter. Any suggestions to the contrary by the government and its contractors should be greeted with suspicion.

B. Procurement ≠ Preemption

Nothing in FAR expressly preempts state licensing laws and regulations. Nevertheless, it has been argued—successfully in some cases—that certain FAR provisions impliedly preempt state law.¹⁹¹ The FAR provisions most directly at issue pertain to a contracting officer’s “responsibility” determination, which is a condition precedent for all government procurement contracts.¹⁹² Specifically, FAR provides

183. 48 C.F.R. § 1.102(a) (2019).

184. *Id.*

185. *Id.* § 15.101.

186. *Id.*

187. *Id.*

188. *Id.* § 9.103(c).

189. *See, e.g.*, 48 C.F.R. §§ 19.000–19.1508 (2019) (addressing small business programs); *id.* §§ 22.000–22.2110 (outlining labor law compliance); *id.* §§ 23.000–23.1105 (explaining environment, conservation, occupational safety, and drug-free workplace requirements); *id.* §§ 25.000–25.1103 (highlighting domestic preferences).

190. *See* Dan Guttman, *Governance by Contract: Constitutional Visions; Time for Reflection and Choice*, 33 PUB. CONT. L.J. 321, 344 (2004) (observing that socioeconomic preferences limit competition because they limit contractual opportunities to members of a designated class).

191. *See infra* Part II.C.

192. 48 C.F.R. § 9.103(a) (“Purchases shall be made from, and contracts shall be awarded to, responsible prospective contractors only.”).

that “[n]o purchase or award shall be made unless the contracting officer makes an affirmative determination of responsibility.”¹⁹³ Among other things, the responsibility standards require that contract awardees have “adequate financial resources”; a “satisfactory past performance record”; “the necessary organization, experience, facilities” and “technical skills” to perform the contract; and a satisfactory record of integrity and business ethics.¹⁹⁴ These standards aim to protect the integrity of the contracting process and to mitigate the risk of contractual nonperformance.¹⁹⁵

As relates to preemption, three additional points about FAR’s responsibility requirement will help to prime the discussion below. First, contracting officials make this determination *prior* to the award of federal contracts.¹⁹⁶ Once the contract is awarded, the responsibility determination has no bearing on monitoring, performance, or sanctions during the contract’s lifecycle. Rather, those matters are governed by other federal laws and contractual terms.¹⁹⁷

Second, the practical significance of a responsibility determination is contextually contingent. In sealed bidding competitions, for example, the contracting official generally must award contracts to the lowest-priced responsible bidder.¹⁹⁸ In that context, responsibility determinations, as well as price, take on added significance because those considerations are generally determinative.¹⁹⁹ By contrast, in negotiated competitions, responsibility determinations are less consequential because contract awards are based on a wider mix of considerations.²⁰⁰ To be clear, a responsibility determination is required for all

193. *Id.* § 9.103(b). The government had a practice of avoiding awards to non-responsible contractors prior to CICA. *See, e.g., O’Brien v. Carney*, 6 F. Supp. 761 (D. Mass. 1934). However, the concept of responsibility was not expressly adopted in federal procurement statutes until the mid-twentieth century, when the Armed Services Procurement Act and the Federal Property and Administrative Services Act were enacted. *See* 10 U.S.C. § 2305(b) (1948); 41 U.S.C. § 253 (1950).

194. 48 C.F.R. § 9.104–1; *see also* KATE M. MANUEL, CONG. RSCH. SERV., R40633, RESPONSIBILITY DETERMINATIONS UNDER THE FEDERAL ACQUISITION REGULATION: LEGAL STANDARDS AND PROCEDURES (2013) (providing explanations of FAR’s responsibility standards and processes); *Orca Nw. Real Est. Servs. v. United States*, 65 Fed. Cl. 1 (2005) (discussing criteria for responsibility), *on reconsideration*, 65 Fed. Cl. 419 (2005).

195. 48 C.F.R. § 9.103; *Ryan Co. v. United States*, 43 Fed. Cl. 646 (1999).

196. *See* 48 C.F.R. § 9.103; *Orca Nw. Real Est. Servs.*, 65 Fed. Cl. 1.

197. *See, e.g.,* 31 U.S.C. § 3729 (penalties for false claims); 48 C.F.R. § 37.114 (requiring agency oversight, control, and monitoring of federal service contracts); *id.* §§ 49.000–49.607 (termination of contracts).

198. 48 C.F.R. § 14.101(e) (“Contract award. After bids are publicly opened, an award will be made with reasonable promptness to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, considering only price and the price-related factors included in the invitation.”).

199. *Id.*; *see also* SMITH, *supra* note 176, at 7 (explaining that, under the pre-CICA sealed bidding regime, “[t]he standard solicitation ‘boilerplate’ usually stated that the most advantageous bid would be accepted, ‘price and other factors considered.’ However, in practice this meant that only cost-related factors were considered, as long as the bidder could demonstrate that he could perform the contract”).

200. *See* 48 C.F.R. § 15.302 (“The objective of source selection is to select the proposal that represents the best value.”); *see also* *Latecoere Int’l, Inc. v. U.S. Dep’t of Navy*, 19 F.3d 1342 (11th Cir.) (explaining that in negotiated procurement, contracting officials have broad discretion to determine

federal contracts awarded under FAR.²⁰¹ But, in negotiated procurements, responsibility determinations are often pro forma and pale in comparison to other determinants of source selection.²⁰² A contracting officer's signature on a contract suffices to indicate contractor responsibility; no other written explanation is required.²⁰³

Third, a responsibility determination is not designed to, and does not as a matter of law, insulate federal contractors from post-award obligations and requirements. For example, other federal statutes, FAR provisions, and mandatory contractual terms create penalties for a contractor's misfeasance and malfeasance.²⁰⁴ Nor does a responsibility determination under FAR foreclose third-party causes of action under federal or state law. For example, the False Claims Act creates a liability scheme for contractors who knowingly make false claims for payment and allows private persons to file suit on the government's behalf.²⁰⁵ Meanwhile, the Federal Tort Claims Act expressly does *not* exempt federal contractors from state tort liability.²⁰⁶ Such immunity may attach through other means.²⁰⁷ The point here is that FAR's responsibility requirement is silent on that question.

manner in which they will make use of technical and cost evaluation results), *amended by* 19 F.3d 1342 (1994).

201. 48 C.F.R. § 9.103(b) (“No purchase or award shall be made unless the contracting officer makes an affirmative determination of responsibility.”).

202. *Cf.* Ralph C. Nash, *Challenging an Affirmative Responsibility Determination: Once in a Month of Sundays*, 28 NASH & CIBINIC REP. ¶ 65 (2014) (explaining that contractor officers, in practice, “generally perceive[] the responsibility determination of the offeror that has proposed the best value as a pro forma exercise”); Anthony H. Anikeeff, *Avoiding the “Blacklisting” Minefield*, FED. LAW., Mar./Apr. 2001, at 42 (“Burdened by the lack of regulatory guidance about what constitutes a ‘satisfactory record’ [of past performance] . . . [T]his aspect of the responsibility determination has come to be perceived as often constituting a mere pro forma stamp of approval for the successful prospective contractor.”).

203. *See* 48 C.F.R. § 9.105-2(a)(1). Moreover, affirmative responsibility determinations are generally beyond judicial reproach. *See, e.g.*, Peter Kiewit Sons’ Co. v. U.S. Army Corps of Eng’rs, 714 F.2d 163, 167 n.18 (D.C. Cir. 1983) (describing responsibility determination as a “practical, . . . not legal determination”); YRT Servs. Corp. v. United States, 28 Fed. Cl. 366, 394 (1993). Only in rare circumstances do courts overturn responsibility determinations. *See* Impresa Construzioni Geom. Domenico Garufi v. United States, 52 Fed. Cl. 421 (2002) (finding that contracting officer failed to conduct an independent and informed responsibility determination); *see also* 4 C.F.R. § 21.5(c) (2020) (explaining that “[b]ecause the determination that a bidder or offeror is capable of performing a contract is largely committed to the contracting officer’s discretion, [the Government Accountability Office] will generally not consider a protest challenging such a determination,” subject to narrow exceptions).

204. *See, e.g.*, 31 U.S.C. § 3729 (penalties for false claims); 48 C.F.R. § 49 (termination of contracts).

205. *See* 31 U.S.C. §§ 3729–3730. A suit filed by an individual on behalf of the government is known as a “*qui tam*” action. *Id.* § 3730; *see also* CHARLES DOYLE, CONG. RSCH. SERV., R40785, QUI TAM: THE FALSE CLAIMS ACT AND RELATED FEDERAL STATUTES (2009).

206. 28 U.S.C. § 2671 (“[T]he term ‘Federal agency’ includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.”).

207. *See supra* note 165 and accompanying text (discussing statutory immunity and indemnity provisions for federal contractors); *see also* Boyle v. United Techs. Corp., 487 U.S. 500, 504–06, 512

Thus, if state licensing laws are preempted by FAR's responsibility requirements, then it must be on account of an implied preemption. As earlier explained, state law will be impliedly preempted when compliance is "impossible" without violating federal law, when federal regulation is "so pervasive" that it leaves no room for state law in the same "field," or when state law "stands as an obstacle" to the "accomplishment and execution of the full purpose and objectives" of federal law.²⁰⁸ These preemption strands have important commonalities. As the Supreme Court recently explained, each requires a type of conflict between federal law and state law.²⁰⁹ That analysis, in turn, requires an examination of the particular federal and state laws at issue. Lastly, whether a preemptive conflict exists requires judgment: namely, whether the putative conflict is of a type or degree to warrant the displacement of state law.²¹⁰ Because some amount of friction is inevitable (if not desirable) in our federalist system, not all conflicts are deemed by the Court to be *preemptive* conflicts.²¹¹

These rudiments of preemption doctrine generally go unstated because there is often no need to express them. Here, however, a sturdy grasp of preemption and procurement law will help to dispel the myth that federal contractors are categorically immune from state licensing requirements under the so-called "*Leslie Miller* rule."

C. *Leslie Miller (and Progeny)*

Leslie Miller is a four-page per curiam opinion from a bygone era of federal procurement.²¹² The Court held that an Arkansas licensing law conflicted with the Armed Services Procurement Act of 1947 and the army's implementing regulations.²¹³ Those procurement laws required the army to award construction contracts to the lowest-priced responsible bidder.²¹⁴ Arkansas law, however,

(1988) (providing tort law immunity under the auspice of federal common law when, inter alia, state law conflicts with federal contractual specifications).

208. See *supra* notes 66–70 and accompanying text.

209. See *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1479 (2018) (explaining that a conflict between federal and state law is the preemption doctrine's *sine qua non*).

210. Cf. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000) ("What is a sufficient obstacle [for purposes of conflict preemption], is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects.").

211. See, e.g., *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984) (holding that state tort liability against federally licensed nuclear operator was not preempted despite the "tension between the conclusion that safety regulation is the exclusive concern of the federal law and conclusion that a state may nevertheless award damages based on its own law of liability"); *Hillsborough Cnty. v. Automated Med. Lab's, Inc.*, 471 U.S. 707, 719 (1985) ("Undoubtedly, every subject that merits congressional legislation is, by definition, a subject of national concern. That cannot mean, however, that every federal statute ousts all related state law Instead, we must look for special features warranting pre-emption.").

212. *Leslie Miller v. Arkansas*, 352 U.S. 187 (1956).

213. *Id.* at 188–89 (citing Armed Services Procurement Act of 1947, Pub. L. No. 413, 62 Stat. 21, 23 (1948)).

214. *Id.* at 190.

precluded contractors from even bidding on federal contracts unless they first obtained a state license.²¹⁵ To obtain a state license, construction firms had to meet a set of qualifications that significantly overlapped with the army's pre-award responsibility determination.²¹⁶ The Court struck down the Arkansas requirements because, otherwise, "the State's licensing board [would have] a virtual power of review over the federal determination of 'responsibility' and would thus frustrate the expressed federal policy of selecting the lowest responsible bidder."²¹⁷ *Leslie Miller* was decided under the applicable federal procurement laws at the time; it did not create a categorical rule against state licensing of federal contractors.

A few years later, the Supreme Court cited and quoted *Leslie Miller* approvingly in *Sperry v. State of Florida ex rel. Florida Bar*.²¹⁸ Yet *Sperry* did not establish a categorical rule against state licensing of federal contractors; indeed, *Sperry* did not even involve a federal contractor or procurement law. Rather, the state licensing law at issue prohibited non-attorneys from practicing law in the state.²¹⁹ The Court deemed this law preempted as applied to practitioners authorized by federal regulation to represent clients in connection with certain patent proceedings.²²⁰ In this non-procurement context, the Court quoted *Leslie Miller*'s dictum that a "[s]tate may not enforce licensing requirements which . . . give 'the State's licensing board a virtual power of review over the federal determination' that a person or agency is qualified and entitled to perform certain functions."²²¹ Yet the type of preemptive conflict, and the federal laws at issue, were quite different in *Leslie Miller* and *Sperry*. The *Sperry* Court devoted several pages to the legislative intent and history of the federal licensing scheme—which has no direct bearing on the purpose or history of federal procurement in general, much less a contractor responsibility determination under FAR.

Apart from *Leslie Miller*, the Court has never opined on the preemptive effect of federal procurement laws vis-à-vis state licensing of federal contractors. The Court's most recent foray on the subject, in *North Dakota v. United States*, arguably comes closest.²²² After determining that the state liquor regulations were not barred by intergovernmental immunity,²²³ the plurality turned to the federal government's alternative claim: namely, that the liquor regulations were preempted by federal procurement law.²²⁴ The applicable federal statute provided that purchases of alcoholic beverages for resale on military installations "shall be made from the most

215. *Id.* at 188.

216. *Id.* at 189.

217. *Id.*

218. 373 U.S. 379, 385 (1963).

219. *Id.* at 381.

220. *Id.* at 384–85, 404.

221. *Id.*

222. *See* *North Dakota v. United States*, 495 U.S. 423, 439–42 (1990).

223. *See supra* notes 107–111 and accompanying text.

224. *North Dakota*, 495 U.S. at 439–42.

competitive source, price and other factors considered.”²²⁵ Interpreting this language, the plurality held that Congress “has not . . . spoken with sufficient clarity to preempt” the state liquor regulations at issue.²²⁶ The plurality acknowledged that the state regulations had the effect of increasing the costs for out-of-state liquor suppliers, which in turn could increase the government’s purchasing price from those sources.²²⁷ The plurality explained, however, that increased costs did not prevent the federal government from engaging in competitive bidding or obtaining liquor at the most competitive price.²²⁸ Rather, the increased cost of compliance with the state regulations would, at most, upwardly adjust the most competitive price available to the government.²²⁹

The plurality then turned to the Department of Defense regulation, which directed army procurement officials to “consider various factors in determining ‘the most advantageous contract, price and other considered factors.’”²³⁰ Again, however, this regulatory command could not “be understood to pre-empt state laws that merely have the incidental effect of raising costs for the military.”²³¹ Justice Scalia, who cast the deciding vote in the case, concurred in the result and took no issue with the plurality’s preemption analysis.²³²

Although the state laws at issue were not licensing laws, the preemption holding in *North Dakota* dispels any notion that a responsibility determination—which is a prerequisite to all federal contracts—creates a per se bar against state regulations of federal contractors. If anything, *North Dakota* makes clear that a responsibility determination does not preempt state regulations, even when such regulations may have collateral effects on contract pricing and competition.²³³

1. Abstractions and Extensions

Unfortunately, some lower courts have abstracted away from *Leslie Miller*’s core holding by decontextualizing the nature of the preemptive conflict in that case. This has resulted in unnecessary and precarious intrusions on state sovereignty.

The Ninth Circuit stumbled down this path in *Gartrell Construction Inc. v. Aubry*.²³⁴ The case arose when California imposed labor law penalties on a federal contractor that was operating in the state without a construction license.²³⁵ The contractor argued that the state licensing law was preempted by the federal

225. *Id.* at 440 (quoting 10 U.S.C. § 2488(a)(1)).

226. *Id.* at 439–41.

227. *Id.* at 431.

228. *Id.* at 443–44.

229. *Id.*

230. *Id.* at 442 (quoting 32 C.F.R. § 261.4 (1986) (repealed Mar. 10, 2006)).

231. *Id.* at 442.

232. *See id.* at 444–48 (Scalia, J., concurring).

233. *Id.* at 423.

234. 940 F.2d 437 (9th Cir. 1991).

235. *Id.* at 438.

contracting official's responsibility determination under FAR.²³⁶ The Ninth Circuit agreed that California was "effectively attempting to review the federal government's responsibility determination," which was "prohibited" by *Leslie Miller*.²³⁷ In so holding, the court rejected California's attempt to distinguish the state licensing law at issue in *Leslie Miller*, which placed a condition precedent on a contractor's right to bid, and the California statute, which required licensing prior to Gartrell's performance of the contract.²³⁸ According to the Ninth Circuit, "[t]he concern in *Leslie Miller* was that a state was asserting a right or power of review over the federal government's determination of 'responsibility.'"²³⁹ Under this broad reading of *Leslie Miller*, it was inconsequential that the federal government was free to shop for the most favorable bidder.²⁴⁰

Before turning to *Gartrell*'s analytical flaws, it is worth highlighting two things the court got right: first, it conducted a preemption analysis (not an intergovernmental immunity analysis);²⁴¹ second, the court looked for conflicts between federal and state law. The Ninth Circuit erred, however, because it elided important distinctions between the federal and state laws at issue in *Leslie Miller* and *Gartrell*, which, in turn, tainted the court's preemption analysis.

Here is where attention to detail matters. Under FAR, construction contractors are generally required to obtain state licenses at no government expense.²⁴² *Gartrell* gave short shrift to this expressed federal policy, on the theory that FAR's responsibility determination took priority over FAR's state licensing requirement.²⁴³ But nothing in *Leslie Miller* (or progeny) compelled that result. Unlike Alabama's law, which prohibited unlicensed contractors from even submitting a bid, California's labor law only penalized unlicensed contractors who performed construction work.²⁴⁴ Moreover, when federal contracting officials make pre-award responsibility determinations, they generally are not required to verify that a contract awardee has the necessary state and local construction licenses.²⁴⁵ Thus, it is hard to see how a FAR responsibility determination (which occurs pre-award and does not inquire into state licensing) conflicts with a state licensing

236. *Id.* at 438.

237. *Id.* at 439.

238. *Id.* at 439–40.

239. *Id.* at 440.

240. *Id.* at 439.

241. *See generally supra* Part II.

242. *See* 48 C.F.R. § 52.236–7 (2019) (“The Contractor shall, without additional expense to the Government, be responsible for obtaining any necessary licenses and permits, and for complying with any Federal, State, and municipal laws, codes, and regulations applicable to the performance of the work.”).

243. *See generally Gartrell*, 940 F.2d 437.

244. *Id.* at 438.

245. *See* James C. Bateman Petroleum Servs., Inc., 67 Comp. Gen. 591 (1988) (“[W]here a solicitation merely contains a more general requirement that the contractor comply with state and local licensing requirements, a contracting officer is not expected to inquire into what such licensing requirements may be or whether a bidder will comply; instead, the matter is one to be resolved between the contractor and the licensing authorities.” (citations omitted)).

requirement (which FAR itself contemplates for construction contracts, and which was included in the federal contract at issue).²⁴⁶

Subsequently, the Fourth Circuit made similar mistakes in *United States v. Virginia*.²⁴⁷ The Virginia laws at issue required licensing and registration of private investigators operating in the state.²⁴⁸ The United States argued that the state requirements could not be applied to federal contractors hired by the Federal Bureau of Investigation (FBI) to perform federal background checks.²⁴⁹ Like the Ninth Circuit in *Gartrell*, the Fourth Circuit in *Virginia* held that the state requirements were preempted by federal procurement law²⁵⁰ and that *Leslie Miller* “compelled” this result.²⁵¹

The Fourth Circuit’s misstep traced, in part, to its threshold finding that the “federal regulatory schemes at issue” in *Virginia* and *Leslie Miller* were “virtually identical in every important respect.”²⁵² In this regard, the *Virginia* court found that “the FBI, like the armed services in *Leslie Miller*, is obliged to select the lowest-priced ‘responsible bidder.’”²⁵³ But that was not so. Unlike the *construction* procurement regime at issue in *Leslie Miller*, the FBI’s acquisition of services did not require the agency to select the lowest-priced responsible bidder. Indeed, by limiting the solicitation to former FBI agents, the agency reduced market competition and almost certainly paid a premium on contractual awards.

Moreover, quoting *Leslie Miller*, the Fourth Circuit found that Virginia’s regulatory scheme frustrated the objectives of FAR by allowing the state to “second-guess” the FBI’s responsibility determination and by giving the state licensing board “a virtual power of review over the federal determination of ‘responsibility.’”²⁵⁴ Again, however, this misunderstands FAR’s responsibility requirement and decontextualizes the nature of the regulatory conflict in *Leslie Miller*. Contrary to the Fourth Circuit’s abstractions in *Virginia*, the Supreme Court has never held that federal contractors are categorically immune from state “qualifications in addition to those that the [Federal] Government has pronounced sufficient.”²⁵⁵ Rather, preemption depends—as always—on the specifics of the federal and state laws at issue, and the degree and types of putative conflicts involved.

246. I return to this issue in the context of puzzle three, *infra* Section IV.B.

247. 139 F.3d 984 (4th Cir. 1998).

248. *Id.* at 985.

249. *Id.* at 986.

250. *Id.* at 989–90.

251. *Cf. id.* at 987.

252. *Id.* at 987–88.

253. *Id.* at 989.

254. *Id.* at 989.

255. *Id.* at 990 (quoting *Leslie Miller v. Arkansas*, 352 U.S. 187, 190 (1956)).

2. State Licensing of Federal Loan Servicers

Little by little, the Court's context-specific holding in *Leslie Miller* seems to have morphed, in the lower courts, into a generalized presumption or proscription against state licensing laws. This entropic and acontextual reading of *Leslie Miller* has infected the domain of student loan law, leaving state legislatures quite unsure about whether, and to what extent, they may require federal student loan servicers to comply with state licensing and registration laws. This uncertainly is reflected in a range of state Student Borrower Bills of Rights, which take different approaches to the question.²⁵⁶ In lieu of licensing standards, for example, some states have established registration and reporting requirements.²⁵⁷

Two jurisdictions, which tried to impose licensing requirements on federal loan services, were turned back in the lower courts on the basis of *Leslie Miller* and progeny.²⁵⁸ The first case was *Student Loan Servicing Alliance v. D.C. (SLSA)*, which held that federal law preempted a set of D.C. licensing and reporting requirements as applied to federal student loan servicers.²⁵⁹ Citing *Virginia*²⁶⁰ and *Gartrell*,²⁶¹ the district court found that “[c]ourts have consistently held that any state law that impedes the federal government’s ability to contract . . . [is] preempted.”²⁶² The district court traced this lineage to “the seminal case” of *Leslie Miller*, and found it “difficult to see any light between the facts of [that case] . . . and the [federal] loan servicers here.”²⁶³ Ultimately, the district court was concerned with the “risk that the federal government will contract with a servicer after evaluating its qualifications under federal law and regulations, and that servicers nevertheless will be determined to be unqualified by the Commissioner and barred from operating in the District of Columbia under the D.C. Law and Final Rules.”²⁶⁴ That “threat of . . . second-guessing,” according to court, was “sufficient under *Leslie Miller* to invalidate the state licensing scheme” as applied to federally serviced loans.²⁶⁵ Moreover, the district court found that “[e]ven if the [D.C. licensing] assessment mirrored the federal government’s,” it would “not only thwart the federal government’s general contracting discretion protected under *Leslie Miller*,” but also

256. See *supra* note 11 and accompanying text.

257. Compare, e.g., CAL. FIN. CODE § 28102(a) (West 2019) (“No person shall engage in the business of servicing a student loan in [California] without first obtaining a license . . .”), with COLO. REV. STAT. § 5-20-106(1) (2019) (deeming federal student loan servicers automatically licensed).

258. Pa. Higher Educ. Assistance Agency v. Perez, No. 3:18-cv-1114 (MPS), 2020 WL 2079634 (D. Conn. Apr. 30, 2020); *Student Loan Servicing All. v. District of Columbia (SLSA)*, 351 F. Supp. 3d 26 (D.D.C. 2018).

259. *SLSA*, 351 F. Supp. 3d at 39–40, 62.

260. *United States v. Virginia*, 139 F.3d 984 (4th Cir. 1998).

261. *Gartrell Constr. Inc. v. Aubry*, 940 F.2d 437 (9th Cir. 1991).

262. *SLSA*, 351 F. Supp. 3d at 62.

263. *Id.*

264. *Id.* at 63.

265. *Id.* (citing *Virginia*, 139 F.3d at 987–90).

“directly conflict” with Congress’s “explicit delegation” to ED in the Higher Education Act (HEA) to make assessments of contractor suitability.²⁶⁶

Contrary to the court’s belief, however, there is quite a bit of daylight between the applicable federal and state laws in these cases. The HEA explicitly authorizes ED to enter contracts with loan servicers and instructs the agency to “ensure that such services and supplies are provided at competitive prices.”²⁶⁷ In addition, the HEA instructs ED to “enter into contracts only with entities that have extensive and relevant experience and demonstrated effectiveness,” obtain “competitive prices,” and select “only entities which the [agency] determines are qualified to provide such services and supplies.”²⁶⁸ Furthermore, the HEA encourages the agency to “maximize the use of performance-based servicing contracts . . . to achieve cost savings and improve service.”²⁶⁹

These HEA provisions overlap, in main respect, to provisions contained in FAR. By codifying them in statute, however, Congress signaled its intent to channel the agency’s discretion toward certain types of contracting processes and structures on FAR’s menu of options. For example, the HEA procurement provisions almost certainly rule out sealed bidding and contractual awards to the lowest-priced responsible bidder. Put otherwise, the contract award scheme at issue in *Leslie Miller*²⁷⁰ (and *Gartrell*)²⁷¹ is clearly *not* what Congress intended for federal student loan servicing contracts. Rather, Congress contemplated negotiated bidding and “best value” service contracts—which, as earlier explained, embed a range of nonprice considerations.²⁷² Moreover, the HEA’s mandate that ED select contractors with “extensive and relevant experience” simply limits the pool of potential awardees, presumably to mitigate downstream risks of contractual noncompliance or misfeasance.

In *SLSA*, the district court did not explain how exactly the D.C. laws would conflict with federal procurement requirements.²⁷³ At most, there was a “risk” that the D.C. laws would prevent a federal loan servicer from operating in the district.²⁷⁴ But that is a curious, if not spurious, basis for preemption. Conflict preemption

266. *Id.*

267. 20 U.S.C. § 1087f(a)(1).

268. *Id.*

269. *Id.* § 1018(a). Moreover, the HEA instructs the agency to “maximize the use of performance-based servicing contracts . . . to achieve cost savings and improve service.” *Id.* § 1087f(a)(1).

270. *Leslie Miller v. Arkansas*, 352 U.S. 187, 190 (1956).

271. *Gartrell Constr. Inc. v. Aubry*, 940 F.2d 437 (9th Cir. 1991).

272. *Leslie Miller*, 352 U.S. 187; *Gartrell*, 940 F.2d 437; *see also* 48 C.F.R. § 3415.302-70 (2020) (explaining that “[t]he contracting officer must conduct the second phase of the source selection consistent with FAR 15.2 and 15.3,” which pertain to negotiated purchasing).

273. *See generally* *Student Loan Servicing All. v. District of Columbia (SLSA)*, 351 F. Supp. 3d 26 (D.D.C. 2018).

274. *Id.* at 63.

requires “an actual conflict, not merely a hypothetical or potential conflict.”²⁷⁵ Even if the “risk” of an adverse D.C. licensing decision came to fruition, it would not amount to “second-guessing” ED’s affirmative responsibility determination. Most obviously, ED’s responsibility determination was made years earlier, based on information available to the contracting officer at the time of contractual award. By contrast, a hypothetical determination by D.C. licensing authorities would have been based on a different set of facts—including, most importantly, post-contractual award events. That is not second-guessing; that is a new assessment based on different facts.

To be sure, there is a risk that D.C.’s licensing requirements could affect post-award contractual performance, either by increasing costs, accountability, or both. These post-award concerns, however, were not at issue in *Leslie Miller*. Moreover, the HEA does not answer how trade-offs among pricing, service quality, and accountability should be made. If anything, Congress delegated those qualitative judgments to ED, which in turn exercised that discretion in ways that clearly prioritized quality and service capabilities in the awarded contracts at issue in *SLSA*. Most notably, ED’s request for proposals in 2009 specified that loan servicing contracts would be awarded based on two evaluation criteria—technical factors and price—and that the former was slightly more important.²⁷⁶ Thus, unlike the navy in *Leslie Miller*, ED was not bound to select the “lowest responsible bidder.”²⁷⁷ Quite the contrary, ED almost certainly would have violated federal law if it had awarded contracts on that basis, given the HEA’s prescriptions (for highly experienced vendors), FAR’s prescriptions (for best value), and the evaluative criteria specified in ED’s solicitation request (which prioritized technical factors over price considerations).²⁷⁸

The district court’s missteps in *SLSA* carried forth, by inertia, in the loan servicing case of *Pennsylvania Higher Education Assistance Agency v. Perez*.²⁷⁹ That

275. *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 863 (9th Cir. 2009), *aff’d*, *Chamber of Com. v. Whiting*, 563 U.S. 582 (2011); *accord* *English v. Gen. Elec. Co.*, 496 U.S. 72, 90 (1990) (“The Court has observed repeatedly that pre-emption is ordinarily not to be implied absent an ‘actual conflict.’” (citing *Savage v. Jones*, 225 U.S. 501, 533 (1912)); *Chamberlan v. Ford Motor Co.*, 314 F. Supp. 2d 953, 957 (N.D. Cal. 2014) (“Speculative or hypothetical conflict is not sufficient: only State law that ‘actually conflicts’ with federal law is preempted.”); *see also* *Hillsborough Cnty. v. Automated Med. Lab’ys*, 471 U.S. 707, 715 (1985) (explaining that preemption is not to be inferred lightly in view of the “presumption” that “the historic police powers of the States were not be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress.” (citations omitted)).

276. *See* U.S. DEP’T OF EDUC., SOLICITATION/CONTRACT/ORDER FOR COMMERCIAL ITEMS § D.4, at 22 add. 3 (2009).

277. *Cf.* *Leslie Miller v. Arkansas*, 352 U.S. 187, 190 (1956).

278. *See* 20 U.S.C. § 1087f(a)(1) (statutory criteria); 48 C.F.R. § 1.102(a) (2019) (best value); U.S. DEP’T OF EDUC., *supra* note 276, § D.4 (stating that three technical evaluation factors (proposed plan, solution benefits/risks, and past performance) were of equal importance relative to each other, and that these technical factors, combined, “[were] slightly more important than Price”).

279. *Pa. Higher Educ. Assistance Agency v. Perez*, No. 3:18-cv-1114 (MPS), 2020 WL 2079634, at *9 (D. Conn. Apr. 30, 2020) (“I join the reasoning and conclusion reached as to a similar District of

case arose from a Connecticut licensing requirement for all student loan servicers operating in the state.²⁸⁰ Under Connecticut law, licensees were required to “maintain adequate records of each student education loan transaction,” and to make those records available to the State Banking Commissioner (Commissioner).²⁸¹ Further, state law authorized the Commissioner “to conduct investigations and examinations” and to “access, receive and use” records, including, among others, those relating to “criminal, civil and administrative history.”²⁸²

Pursuant to this state regulatory scheme, the Commission requested documents from Pennsylvania Higher Education Assistance Agency (PHEAA), which was a federal student loan servicer operating in the state. PHEAA declined to produce the requested records, on the grounds that the state licensing and reporting laws were preempted, *inter alia*, by federal procurement law.²⁸³ Conjuring the “rule of *Leslie Miller*,” the district court in *Perez* held that Connecticut’s licensing scheme “presents an obstacle to the federal government’s ability to choose its contractors.”²⁸⁴

In so holding, *Perez* explicitly “join[ed] the reasoning and conclusion reached” by the district court in *SLSA*²⁸⁵ and missed the mark for all the same reasons. Like in *SLSA*, the *Perez* opinion did not explain how, in fact, the state licensing scheme conflicted with the federal procurement scheme. In lieu of an actual conflict, the district court noted the “prospect that the [state] *might* deny a license” to a federally selected student loan servicer, and that the state scheme “*potentially interferes*” with ED’s selection process.²⁸⁶ That was entirely speculative, for many reasons. Just to name a few: there may not even be a future service contract; current federal contractors may not wish to bid for that future work; a future Congress or administration might explicitly require federal loan servicers to obtain state law licensing.²⁸⁷ These contingencies suggest why the government and its contractors

Columbia licensing scheme in a thorough opinion by Judge Friedman of the U.S. District Court for the District of Columbia.”)

280. CONN. GEN. STAT. § 36a-847 (2019).

281. *Id.* § 36a-849(b).

282. *Id.* § 36a-851(a).

283. *Perez*, 2020 WL 2079634, at *4–5. PHEAA also successfully argued, in the alternative, that the record request was preempted by the federal Privacy Act, related agency regulations, and contractual terms. *Id.* at *11–13. Here, I focus solely on the preemption arguments tethered to federal procurement regulations.

284. *Perez*, 2020 WL 2079634, at *9.

285. *Id.*

286. *Id.* at *8–9.

287. Responsibility determinations are themselves based, in part, on consideration of contractors’ past performance, or factual information and qualitative judgments about contractors’ performance history. *See* 48 C.F.R. § 9.105-1(c) (2019) (“In making the determination of responsibility, the contracting officer shall consider information available through FAPIIS [the Federal Awardee Performance Integrity Information System] . . . , including information that is linked to FAPIIS such as from SAM, and CPARS, as well as any other relevant past performance information”); *see also*

want courts to speculate today about potential conflicts tomorrow. For reasons already explained, however, nothing in *Leslie Miller*, federal procurement law, or preemption doctrine more generally, countenances the displacement of state law by speculative conflicts with federal action.²⁸⁸ Even more to the point, the state licensing scheme at issue did not actually conflict with federal procurement law.

IV. PUZZLE THREE—CAN FEDERAL CONTRACTS “SAVE” STATE LAW FROM PREEMPTION?

It is well settled that federal law can save state law from preemption;²⁸⁹ generally, Congress and agencies do so through statutes and regulations.²⁹⁰ The puzzle taken up here, however, is whether *federal contracts* can save state law from preemption. This issue arises when federal contracts expressly contemplate or require that contractors comply with state law. For example, FAR directs contracting officials to include a Permits and Responsibilities Clause (P&R Clause) in construction contracts.²⁹¹ The P&R Clause provides, in relevant part, that the contractor “shall . . . be responsible for obtaining any necessary licenses and permits, and for complying with any Federal, State, and municipal laws, codes, and regulations applicable to the performance of the work.”²⁹² Along similar lines, the federal contracts at issue in *SLSA* and *Perez* provide that ED’s service contractors “will be responsible for maintaining a full understanding of all federal and state laws and regulations and FSA requirements and ensuring that all aspects of the service continue to remain in compliance as changes occur.”²⁹³

The Supreme Court has never directly addressed whether federal contractual terms may save state law from preemption, and lower courts have treated the question differently.²⁹⁴ To some extent, the dissensus may owe to how the question is framed.

Standard Tank Cleaning Corp., B-245364, 92-1 CPD ¶ 3 (Comp. Gen. Jan. 2, 1992) (finding that repeated violations of state law were a basis of an adverse responsibility determination).

288. See *supra* note 275 and accompanying text.

289. See, e.g., *Freightliner Corp. v. Myrick*, 514 U.S. 280, 284 (1995) (quoting a “savings clause” in the Safety Act, which provided: “Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law” (citation omitted)).

290. *Id.*

291. See 48 C.F.R. § 36.507 (“The contracting officer shall insert the clause at 52.236-7, Permits and Responsibilities, in solicitations and contracts when a fixed-price or cost-reimbursement construction contract or a fixed-price dismantling, demolition, or removal of improvements contract is contemplated.”).

292. *Id.* § 52.236-7.

293. See Sample Contract, *supra* note 29, at add. § C.1.4.3. Elsewhere, the contracts specify that “[s]ervicers will be required to meet *all* statutory and legislative requirement.” See *id.* at attach. A-3.

294. Compare *Menocal v. GEO Grp., Inc.*, 113 F. Supp. 3d 1125, 1135 (D. Colo. 2015) (rejecting preemption challenge, in part, because “the contract [for private immigration detention] specifically contemplates . . . perform[ance] under the contract in accordance with [a]pplicable federal, state and local labor laws and codes.”), and *United States v. California*, 314 F. Supp. 3d 1077, 1091 (E.D. Cal. 2018) (rejecting preemption challenge, in part, because the immigration detention contracts

The discussion below offers three alternative framings and explores how each might influence a court's analysis.²⁹⁵ This framing exercise is especially important because the interplay between federal contracts and preemption is highly undertheorized. Indeed, how the puzzle is framed can lead courts to very different analyses and results.

A. Framing the Question

To start, consider three alternative framings:

1. Can preempted state law be saved by federal contracts?
2. Can contractual references to state law undermine a preemption claim?
3. If federal contracts can preempt state law, then why can the contracts not save state law?

Of these, Framing 1 is the most biased against saving state law by contract.²⁹⁶ Methodologically, this framing's starting position is that state law is preempted, and asks whether contractual terms can overcome or reverse that displacement. Under certain circumstances, courts may defer to an agency's view about whether state law conflicts with federal law.²⁹⁷ But if a court has *already determined* that state law is preempted, then a court would be hard pressed to defer to an agency's contrary view expressed in a federal contract.²⁹⁸

A court might, however, reach a different conclusion under Framing 2. Methodologically, this framing takes the contractual terms into account *as part of* the preemption calculus and *prior to* reaching a conclusion. Essentially, Framing 2

"expressly contemplate compliance with state and local law," which "demonstrate[d] that California retains some authority over the detention facilities"), *aff'd in part, rev'd in part and remanded*, 921 F.3d 865 (9th Cir. 2019), *with Gartrell Constr. Inc. v. Aubry*, 940 F.3d 437, 440 (9th Cir. 1991) ("[S]tate licensing laws cannot be 'applicable', nor compliance with them 'necessary', where such laws are preempted by federal law."), *and Student Loan Servicing All. v. District of Columbia (SLSA)*, 351 F. Supp. 3d 26, 63 ("If a state law is preempted under the Supremacy Clause, that state law is invalid, and state actors may not adhere to it whether directed to by a contract or not.").

295. How information is packaged and presented has long been known to affect human decision-making. *See* Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 705 (1999) (discussing "the framing effect, whereby given data are evaluated differently depending on how they are framed").

296. In *Gartrell* and *SLSA*, the district courts' methodology tracked Framing 1. And in both cases, the courts held that federal contracts could not save the state licensing laws at issue. *See infra* Section IV.B.1 (discussing and critiquing the district courts' treatment of the issue).

297. *See Wyeth v. Levine*, 555 U.S. 555, 576–77 (2009) (stating that although the Court does not defer "to an agency's conclusion that state law is pre-empted," the Court does attend "to an agency's explanation of how state law affects the regulatory scheme" because agencies "do have a unique understanding of the statutes they administer and an attendant ability to make informed determinations about how state requirements may pose an 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress'" (citations omitted)); *id.* ("The weight we accord the agency's explanation of state law's impact on the federal scheme depends on its thoroughness, consistency, and persuasiveness." (first citing *United States v. Mead Corp.*, 533 U.S. 218, 234–35 (2001); and then citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944))).

298. I think it goes without saying that federal contracts cannot supersede federal law.

invites courts to consider why agencies would incorporate (preempted) state law requirements in federal contracts. One interpretive possibility is that the contracting parties were simply not attentive to the actual or potential conflict between procurement law and state law incorporated into the contracts. But another possibility is that federal procurement law does not, in fact, actually conflict with state law requirements. Either way, Framing 2 takes the contractual clauses into account as part of the analysis of whether procurement law actually conflicts with state law, and if so, whether state law may apply despite the conflict.

Framing 3 asks a different question: If contractual specifications can preempt conflicting state law, then why can't contractual terms save state law? This framing zooms out to capture *Boyle*, in which the Supreme Court held that "reasonably precise" contractual specifications can displace conflicting state law under certain conditions.²⁹⁹ The significance of *Boyle* is that state law may be displaced by contractual terms even when state law does not conflict with any federal statutes or regulations.³⁰⁰ In the student loan context, and elsewhere, the federal government and its contractors have relied on *Boyle* to argue that state law is preempted by their federal contracts.³⁰¹ Yet they have offered no reason why the same contracts cannot also save state law from preemption.

I am not aware of any court or commentator that has framed the problem in these terms,³⁰² and I make no claim of resolving it here. More modestly, the discussion below hopes to instigate fresh thinking about the formal and functional relationships between federal contracts, federal procurement law, and federalism. If nothing else, the alternative frames offer different prisms through which to understand, and test, judicial treatments of this puzzle of procurement preemption.

299. *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504–06, 512 (1988). More specifically, *Boyle's* government contractor defense precludes liability for state law tort claims regarding design defects where "(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." *Id.* at 512.

300. *Cf. id.* at 511 (acknowledging that the Federal Tort Claims Act did not directly apply to, and thus did not conflict with, state tort claims against federal contractors); Field, *supra* note 74, at 890–91 ("[F]ederal common law' . . . refer[s] to any rule of federal law created by a court (usually but not invariably a federal court) when the substance of that rule is not clearly suggested by federal enactments—constitutional or congressional." (footnotes omitted)); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 5 (1985) (describing federal common law as judicially crafted "rule of decision that is not mandated on the face of some authoritative federal text").

301. *See supra* note 12 and accompanying text; *see also infra* note 302.

302. The closest may be *Menocal v. GEO Grp., Inc.*, 113 F. Supp. 3d 1125, 1135 (D. Colo. 2015). In that case, immigrant detainees at a federally contracted detention facility alleged that the facility's "Voluntary Work Program" violated Colorado law. *Id.* at 1135. The district court rejected the federal contractor's preemption defense under *Boyle* on the grounds that the contracts did not conflict with the state law claim at issue. *Id.* In so holding, the court noted that the contracts explicitly contemplated compliance with state law, thus undermining the contractor's *Boyle* defense. *Id.* The court's analysis and holding in *Menocal* seems to align more with Framing 2 than Framing 3. In any event, the *Menocal* opinion does not address the doctrinal tension that Framing 3 brings to the fore.

B. Frames in Action

1. Framing 1—Gartrell and SLSA (Redux)

In *Gartrell*, the federal contract contained a P&R Clause,³⁰³ which provided that the contractor “shall . . . be responsible” for obtaining state and local licenses and permits.³⁰⁴ California pointed to this clause as evidence that the state’s licensing requirement was not preempted.³⁰⁵ Under the spell of *Leslie Miller*’s “strong mandate,” however, the Ninth Circuit viewed matters differently. The court reasoned that “state licensing laws cannot be ‘applicable’, nor compliance with them ‘necessary’, where such laws are preempted by federal law.”³⁰⁶

Take note of the court’s methodology. Having already determined that federal procurement law preempted state law, the Ninth Circuit paid little heed to FAR’s prescription for the P&R Clause in the contract at issue. For instance, the court did not explain why the contracting official’s *pre-award* “responsibility” determination (which makes *no* mention of state law) should be read to preempt the contractor’s *post-award* licensing “responsibility” (which *expressly* makes state law applicable). Moreover, the court’s interpretation rendered the P&R Clause’s reference to state law superfluous: federal contractors would never be responsible for obtaining applicable state construction licenses because, upon being awarded the federal contract, the pre-award responsibility determination would automatically trump the need for state licensing. A better interpretation, because it harmonizes FAR’s requirements, is that the agency’s pre-award responsibility determination and the contractor’s post-award responsibilities under state law are separate matters.³⁰⁷

If *Gartrell* missed the mark, then *SLSA* missed it by an even wider margin. To refute the existence of a preemptive conflict in *SLSA*, D.C. relied on the contractual provision requiring that “contractor(s) will be responsible for maintaining a full understanding of *all* federal and state laws and regulations . . . and ensuring that all

303. See *Gartrell Constr. Inc. v. Aubry*, 940 F.2d 437, 440 (9th Cir. 1991) (citing 48 C.F.R. § 52.236-7 (1990)).

304. The Permits and Responsibilities Clause is generally included for construction contracts, not service contracts. Along similar lines, however, the loan servicing contracts at issue provide that the servicers “will be *responsible* for maintaining a full understanding of *all* federal and *state laws* and regulations and FSA requirements *and ensuring that all aspects of the service continue to remain in compliance as changes occur*.” See Sample Contract, *supra* note 29, at add. § C.1.4.3 (emphasis added). Elsewhere, the contracts specify that “[s]ervicers will be required to meet *all* statutory and legislative requirements.” See *id.* at attach. A-3.

305. *Gartrell*, 940 F.2d at 440. In this regard, California’s argument aligns most closely with Framing 2.

306. *Gartrell*, 940 F.2d at 440. Nor was the Ninth Circuit persuaded that alternations to the P&R Clause in 1962 “alter[ed] the strong mandate of *Leslie Miller*.” *Id.* “The clause in effect when *Leslie Miller* was decided provided: ‘The Contractor shall, without additional expense to the government, obtain *all required* licenses and permits . . .’ (1951 revision) (emphasis added). The clause was revised in 1962 to read as it does today.” *Id.*

307. This interpretation also coheres with *Leslie Miller*, in which Arkansas law forbade non-licensed contractors from bidding on federal contracts in the pre-award stage. See *supra* notes 215–216 and accompanying text.

aspects of the service continue to remain in compliance.”³⁰⁸ Rejecting that argument, the district court held that “the existence of contractual provisions directing servicers to comply with state law [could] not save” D.C.’s licensing laws as applied to federal loan servicers.³⁰⁹ Relying on *Gartrell*, and employing Framing 1, the district court reasoned that “[i]f a state law is preempted under the Supremacy Clause, that state law is invalid, and state actors may not adhere to it whether directed to by a contract or not.”³¹⁰ The district court deemed the contracting parties’ intent irrelevant because “only Congress has the power to preempt state law.”³¹¹ Although the district court gave passing homage to the presumption against preemption, it found the presumption overcome in light of Congress’s “clear and manifest purpose” to preempt state law in the HEA.³¹² More specifically, the district court found that Congress had “deliberately delegated the authority” for ED to contract with loan servicers, and that “allowing a state to impose separate, and potentially conflicting, contracting requirements would nullify that provision.”³¹³

This analysis is deeply flawed, even on its own terms. To begin with, the district court repeated *Gartrell*’s mistake of overreading *Leslie Miller*, which does not establish a per se rule that state licensing laws are preempted.³¹⁴ Further, it is simply not true—despite the mantra—that “only Congress” has the power to preempt state law.³¹⁵ Agency regulations can also preempt state law.³¹⁶ Indeed, earlier in the *SLSA* opinion, the district court held that the D.C. licensing laws were preempted, at least in part, by FAR’s pre-award contractor responsibility determination.³¹⁷ Congress’s preemptive intent would trump a contrary intent by ED. But Congress’s choice to delegate contracting authority to the agency in the HEA says nothing about whether, or to what extent, state law might apply to contract awardees. If anything, Congress’s statutory mandate that ED select “responsible” and “experienced” contractors reflects a preference to minimize the risk of harm to student

308. *Student Loan Servicing All. v. District of Columbia (SLSA)*, 351 F. Supp. 3d 26, 63 (D.D.C. 2018). Bolstering its position, D.C. also referenced the Education Department’s 2016 Maryland letter, *id.* (explaining that if loan servicers were determined to be “collection agencies,” the Maryland Collection Agency Licensing Act “would not conflict with the Department’s contracts with [loan servicers], which provide generally that loan servicers . . . must comply with State and Federal law”), and 2017 Mitchell Memo, *id.* (explaining that “[s]ervicing contracts should comply with federal and state law, taking any necessary steps to support oversight by federal or state agencies, regulators, or law enforcement officials”).

309. *Id.*

310. *Id.*

311. *Id.* at 64 (citing *Arizona v. United States*, 567 U.S. 387, 399 (2012)).

312. *Id.*

313. *Id.* at 65.

314. *See supra* notes 212–233 and accompanying text.

315. *SLSA*, F. Supp. 3d at 63.

316. *See supra* notes 71–73 and accompanying text.

317. *See supra* notes 263–264 and accompanying text (discussing this portion of the *SLSA* decision).

borrowers.³¹⁸ In turn, ED exercised its delegated discretion with this very concern in mind, which D.C.'s licensing laws also hoped to further.

Moreover, the district court's assumption that contracting parties cannot save state law is hardly a forgone conclusion. First, the court offered no legal reason why the parties could not agree by contract to comply with otherwise inapplicable state law. Federal contracts routinely subject contractors to otherwise inapplicable federal standards as a price for doing business with the government.³¹⁹ That being so, what prohibits the federal government or its contractors from complying with otherwise inapplicable state laws? If this prohibition exists, it is nowhere found in the Supremacy Clause, applicable procurement law, or *Leslie Miller*. Indeed, as earlier explained, FAR explicitly contemplates that contractors will obtain state and local licensing and permissions in certain contexts.³²⁰

2. Framing 2—Making Contracts Part of the Preemption Calculus

Under Framing 2, courts are invited to take federal contracts into account as part of the preemption analysis. A recent case out of the Ninth Circuit, *United States v. California*, offers a useful illustration of this approach.³²¹

The *California* case arose when the government sought to enjoin enforcement of several provisions of California law as applied to federal contractors. Most pertinent here, California Assembly Bill 103 (AB 103) directed the state attorney general to review and report on private immigration detention centers.³²² In furtherance of this objective, AB 103 states that the attorney general “shall be provided all necessary access for the observations necessary to effectuate [these] reviews . . . , including, but not limited to, access to detainees, officials, personnel, and records.”³²³ The federal government argued that AB 103's “review and reporting requirement interfered with the Federal Government's exclusive authority in the area of immigrant detention” and posed an “obstacle . . . to administering the federal immigration scheme.”³²⁴ California countered by arguing, *inter alia*, that the review and reporting requirements fell comfortably within the attorney general's

318. See 20 U.S.C. § 1087f(a)(1); *id.* § 1087e(d)(1), (d)(4), (e), (m); see also U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-663, FEDERAL STUDENT LOANS: EDUCATION COULD DO MORE TO HELP ENSURE BORROWERS ARE AWARE OF REPAYMENT AND FORGIVENESS OPTIONS 4–12 (2015) (discussing a range of borrower protections and repayment options).

319. See generally, *e.g.*, 48 C.F.R. §§ 22.000–22.2110 (2019) (Application of Labor Laws to Government Acquisitions); *id.* §§ 23.000–23.1105 (Environment, Energy and Water Efficiency, Renewable Energy Technologies, Occupational Safety, and Drug-Free Workplace); *id.* § 52.203-13 (Contractor Code of Business Ethics and Conduct); 41 U.S.C. § 6703(2) (requiring certain service contracts to include a provision for fringe benefits “not otherwise required by Federal, State, or local law to be provided by the contractor or subcontractor”).

320. See *supra* note 304 and accompanying text.

321. *United States v. California*, 314 F. Supp. 3d 1077, 1085 (E.D. Cal. 2018), *aff'd in part, rev'd in part and remanded*, 921 F.3d 865 (9th Cir. 2019).

322. See CAL. GOV'T CODE § 12532 (West 2020).

323. *Id.* § 12532(c).

324. *California*, 314 F. Supp. 3d at 1090 (citations to the government's brief omitted).

constitutional authority “to enforce state laws and conduct investigations relating to subjects under his jurisdiction.”³²⁵ Moreover, California pointed to federal immigration detention contracts, which expressly reference state and local law.³²⁶ One provision, for example, required that “[a]ll services and programs shall comply with . . . all applicable federal, state and local laws and regulations.”³²⁷

Siding with California, the district court found nothing in the relevant immigration-detention procurement laws that preempted states from overseeing detention facilities operating within their borders.³²⁸ Indeed, the court explained, the federal contracts “demonstrate that California retains some authority over the detention facilities.”³²⁹ On appeal, the Ninth Circuit affirmed this point,³³⁰ and acknowledged that the contracts “require that immigration facilities conform to California’s authority.”³³¹

The Ninth Circuit’s analyses in *Gartrell* and *California* are arguably in tension. *Gartrell* approached the issue through Framing 1 and held that federal procurement law preempted the otherwise “applicable” state law contemplated in the federal contract at issue.³³² Subsequently, *California* approached the issue through Framing 2 and reasoned that the contractual requirement to comply with “applicable” state law undermined—and ultimately defeated—the government’s preemption claim.³³³ While the laws and contracts differed,³³⁴ the analytical frames differed too, in ways that seemed to affect the outcomes.

3. Framing 3—Dealing with Doctrinal Asymmetry

The third frame offers yet another approach to the puzzle of whether federal contracts can save state law from preemption. Recall that in *Boyle*, the Supreme Court imbued federal contracts with preemptive effect despite the fact that the

325. *Id.*

326. *Id.* at 1091.

327. *See id.*; *see also* United States v. California, 921 F.3d 865, 886 n.10 (9th Cir. 2019) (taking note of this provision).

328. *California*, 314 F. Supp. at 1091 (citing 8 U.S.C. §§ 1231(g)(1)–(2), 1103(a)(11)).

329. *Id.*

330. *California*, 921 F.3d at 886. Other aspects of the district court’s opinion relating to different California laws were reversed and remanded.

331. *Id.* at 886 n.10.

332. *Gartrell*, 940 F.2d at 440.

333. *California*, 921 F.3d at 886 n.10.

334. *Gartrell* involved a state licensing requirement and state sanctions for noncompliance; *California* involved a review and reporting scheme, and no sanctions had been issued. Still, that distinction only matters if *Leslie Miller* erects a special, per se rule against state licensing. Even then, *California* might be read as a rejection of the premises underlying the “*Leslie Miller* rule.” More specifically, *California* found no basis for deeming state law preempted, despite express congressional delegation of contracting authority to the agency, and despite the agency’s pre-award responsibility determination. Nor did the district or circuit courts think that the state attorney general’s review and reporting of the facilities amount to an impermissible “second-guessing” of the contracting agency. *See California*, 921 F.3d at 886 n.10.

contracts were not federal law.³³⁵ Elsewhere, I have argued that preemption by contract is constitutionally and normatively problematic, precisely because federal contracts are not law, and thus should not qualify as the “supreme Law of the Land.”³³⁶ Yet, so long as federal contracts can preempt state law, then why can they not save state law? This puzzle does not admit of any obvious or easy solutions. Any theory that supports preemption by contract might also support saving by contract. Conversely, any theory that rejects saving state law by contract might antagonize the legitimacy of preemption by contract.

For instance, one possible theory in support of preemption by contract is that state law should not apply to contractors who are merely following agency instructions.³³⁷ By the same logic, however, perhaps state law should apply to contractors when agencies so instruct. Or, consider the theory gestured to in *Gartrell* and *SLSA*: namely, that because federal contracts are not law, they cannot overcome the preemptive effects of federal law. That theory looks right, in isolation, but runs headlong into *Boyle*. After all, if federal contracts do not qualify as federal law, then why should they be treated as “supreme Law of the Land”?³³⁸

Until a satisfying reason is offered for this doctrinal asymmetry, the default should be toward doctrinal symmetry. That can take one of two possible forms. First, under a formalist theory that federal contracts are not law, such contracts could not preempt or save state law. Alternatively, under a functionalist theory, federal contracts could preempt and save state law.

I do not rule out the possibility of a theory that could justly treat federal contracts as law, and nonlaw, simultaneously. The government and its contractors, however, have yet to air one. In the meantime, the Supreme Court (1) has ruled that federal contracts can preempt state law,³³⁹ and (2) has never addressed whether federal contracts can save state law. Unless and until the Court provides additional guidance, jurists and scholars should not blithely assume that federal contracts can preempt, but not save, state law.

CONCLUSION

This Article has explored three doctrinal puzzles of procurement preemption that may have wide ranging implications for the futures of federalism and federal contracting.

The first puzzle is whether the federal government’s constitutional immunity extends to shield its contractors from nondiscriminatory state laws. This Article argued that such laws are the purview of preemption doctrine, not

335. *See Boyle v. United Techs. Corp.*, 487 U.S. 500, 504–06, 512 (1988).

336. *See Rubenstein, Supremacy, Inc.*, *supra* note 2, at 1160–66.

337. *Cf. Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 n.6 (2001) (noting that *Boyle*’s government contractor defense is a “special circumstance” in which the “government has directed a contractor to do the very thing that is the subject of the claim”).

338. U.S. CONST. art VI, cl. 2 (Supremacy Clause).

339. *Boyle*, 487 U.S. at 504–06, 512.

intergovernmental immunity. This approach does not deny the possibility of immunizing federal contractors from state law. Such immunity, however, would have to come from proper lawmaking channels rather than by constitutional default.

The second puzzle is whether federal procurement law preempts state licensing of federal contractors. This Article argued that it depends, as always, on whether a preemptive conflict exists between federal and state law. This return to first principles bucks the conventional but mistaken view that state licensing laws are categorically preempted under the “*Leslie Miller* rule.” No such rule exists. Arguments to the contrary overlook basic precepts of preemption doctrine and modern procurement law.

The third puzzle is whether federal contracts can save state law from preemption. Here again, the answer depends. This Article offered three conceptual frames, each of which might lead to a different answer because they capture more (or less) information and contextual clues. Framing 3 is perhaps the most intriguing, as it puts pressure on *Boyle*'s government contractor defense. If nothing else, courts should insist on an explanation from the government and its contractors for why federal contracts can only preempt, and not save, state law.

