# Neither State Nor Federal Law

**Author :** Lumen N. Mulligan

**Date :** March 23, 2020

David S. Rubenstein, *Supremacy, Inc*., 67 **UCLA L. Rev.** ___ (forthcoming 2020), available at SSRN.

Legal scholars have long noted that the federal government increasingly outsources once-deemed-core governmental services to private contractors. Similarly, scholars have often noted that the scope of government-contractor immunity under *Boyle v. United Technologies Corporation* and its progeny has metastasized. David Rubenstein's recent article pushes us to view with a critical eye how these two doctrines work in concert to preempt swaths of state law, all without congressional action.

Rubenstein begins with an overview of history of government outsourcing. While outsourcing of government functions is as old as the Republic itself, Rubenstein identifies the post-Watergate era as the inflection point for outsourcing, which exploded under both the Reagan and Clinton administrations. While this process has led to a well-recognized loss of congressional control over federal-government processes, Rubenstein argues that it has led to a "leveling down" of state authority as well by (1) occupying areas of traditional state regulation, (2) undercutting spaces for cooperative federalism actions, and (3) outright federal preemption.

Importantly for Rubenstein's account, Congress did not authorize this aggressive clearing of state law. Rather, the act of contracting triggers federal contractors' various supremacy claims. One might quibble as to whether the federal common law of contract is chosen by the contracting parties (as Rubenstein sees it) or acts as a background court-created doctrine that applies regards of the contracting parties choice (which I take to be the received view). But this peripheral skirmish does not alter Rubenstein's key insight that this explosive growth of federal contracting diminishes state authority without explicit congressional act. In his view, such supremacy claims for contractors require an act of Congress.

Rubenstein turns next to federal-contractor immunity and its under-studied interaction with federal preemption. He begins with the familiar history of contractor immunity's growth from older intergovernmental immunity doctrine. From this vantage, contractor immunity, at least as a starting point, forms a poor doctrinal fit as an outgrowth of intergovernmental immunity doctrine, because contractors lack the other electoral and institutional checks upon their conduct that limit governmental actors. Accepting, however, that the immunity ship has sailed, Rubenstein argues for less-than-full abolition of the doctrine in favor of flipping default rules for contractor immunity defenses. That is, contractor immunity should not apply by default but only by legislative action.

Pragmatically, Rubenstein paints an ugly picture of the current state of affairs. Because of immunity, those who interact with federal contractors lack state regulatory protections. At the same time, any surviving state-law causes of action for relief are subject to federal-contractor defenses. And, of course, there is no general federal common law creating federal avenues to pursue relief. Thus, federal contracts are subject to neither state nor federal law—only contract-review procedures. Government contractors benefit from acting as federal-government actors (being shielded from state law on supremacy grounds) and not acting as federal-government actors (being absolved from constitutional rules on non-public-action grounds). Rubenstein labels this state of affairs "Supremacy, Inc."

Rubenstein's piece, which reflects many of the hallmarks of his work, calls for us to look past formalistic mantras and examine how law impacts real people. He engages in a detailed discussion of how Supremacy, Inc. worsens both the student-loan crisis and immigration detention. And, again a hallmark of his work, he avoids dogmatic solutions in favor of a call for Congress to exercise control—either way—and to imbue our privatization moment with greater democratic

legitimacy. This nuanced and thoughtful piece is a “must read” for federal courts and constitutional law scholars.

Cite as: Lumen N. Mulligan, *Neither State Nor Federal Law*, JOTWELL (March 23, 2020) (reviewing David S. Rubenstein, *Supremacy, Inc*., 67 **UCLA L. Rev.** ___ (forthcoming 2020), available at SSRN), https://courtslaw.jotwell.com/neither-state-nor-federal-law/.