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Federalism by Contract

ABSTRACT. Just as private parties use contracts to facilitate joint projects and nation-states use treaties to organize joint undertakings, domestic governments use a breathtaking array of written instruments to coauthor legal rules and coordinate public programs. But we lack a vocabulary—literal and conceptual—to describe these agreements.

Our meager vocabulary does not reflect a meager practice. Intergovernmental agreements define the contours of public-benefits programs, cross-deputize police and immigration officers, facilitate the exchange of land and jurisdiction, manage vast flows of information, and more generally allow our levels of government to coauthor legal rules in a wide range of policy areas.

Nor is our impoverished vocabulary an indication of neglect from our judicial institutions. The Supreme Court, lower federal courts, and state courts routinely address disputes that arise from the distinctive multilateral nature of intergovernmental agreements. The central framework courts use to resolve such disputes is the private law of contract, yet they also adjust those contractual principles—often in an ad hoc way—to accommodate their public parties and public purposes.

By drawing these cases together across contexts, we can see doctrinal patterns, jurisprudential puzzles, and theoretical implications that stem from this dual character as both contract and public law. We can begin, for the first time, to build a treaty law for American federalism.

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INTRODUCTION

Just as private parties use contracts to facilitate joint projects and nation-states use treaties to organize joint undertakings, domestic governments use a breathtaking array of written instruments to formally coordinate their governing activities. But we lack a vocabulary—literal and conceptual—to describe these agreements. We have no treaty law for American federalism. We do not even have a generally recognized word for the devices that play the role in domestic intergovernmental relations that treaties serve in international relations and contracts serve in private relations.

But our meager vocabulary does not reflect a meager practice. At the center of American federalism are thousands of written agreements that facilitate shared governance among levels of government. These agreements are predictably used to memorialize the legal terms of major federal grant programs—Medicaid, highway aid, disaster relief, and education funding among them. But written agreements are also used to facilitate the exchange of other governmental goods. Congress exercises its power over immigration not exclusively, as is sometimes suggested, but in conjunction with states and cities through written agreements that deputize local officers to enforce federal immigration law and allow federal agents to access local information and resources. Intergovernmental agreements likewise facilitate criminal-law enforcement across levels of government, structuring joint policing task forces and managing vast information flows between federal, state, and local officials. Written agreements between governments authorize state prisons to hold federal offenders and federal prisons to hold state offenders—quite literally exchanging the right to exercise coercive force against individuals. Intergovernmental agreements serve coordinating functions where governments collaborate on complex housing, infrastructure, and emergency-management projects. Pursuant to the Compacts Clause, states enter into written agreements with one another to oversee shared resources, police areas of mutual interest, and negotiate territorial boundaries. Pursuant to the Enclaves Clause, the federal government and the states have long traded land and jurisdiction by written agreement. The Supreme Court has even viewed the admissions compacts that have allowed new states to enter the union as discrete written agreements. We may not have a common term for these intergovernmental agreements, but our governments have a long and sustained practice of forming them.¹

1. My focus here is agreements between the federal government and states or localities and agreements among states. I exclude *intrastate* agreements—between states and their localities, and among localities within states. Those agreements are governed by fifty different bodies of state law that I cannot adequately address here, but for a general overview, see Clayton P.

Our impoverished vocabulary for intergovernmental agreement-making likewise does not reflect neglect from our judicial institutions. The Supreme Court, lower federal courts, and state courts routinely address disputes that arise from the distinctive multilateral nature of intergovernmental agreements. But neither courts nor scholars have viewed the doctrines that courts have crafted to resolve those disputes in one place as a coherent body of law. Indeed, the Supreme Court appears not to recognize that it has confronted a wide range of disputes arising out of intergovernmental agreements and devised a correspondingly broad set of doctrines to address them. This failure of cross-pollination has seriously stunted the Court's efforts to grapple with the deep jurisprudential problems that stem from these agreements.

This Article is the first to collect the practices, case law, and jurisprudential dilemmas of domestic intergovernmental agreement-making. My descriptive goal is to demonstrate the pervasiveness of these agreements and judicial mediation of the disputes they create. My analytical goal is to illustrate the stakes of treating intergovernmental agreements as a distinct type of legal device. By analyzing intergovernmental agreements together, we can see doctrinal patterns, theoretical problems, and potential normative implications that are not apparent when these agreements are viewed in isolation. The most striking pattern is that courts routinely and often reflexively draw on the private law of contracts to resolve disputes that arise under intergovernmental agreements. This is obviously sensible in some respects. The promissory, reliance, and collaborative interests that are familiar to contracting play a role in many disputes over intergovernmental agreements. One governmental party contests the other's interpretation. One attempts to amend over the other's objection. One accuses the other of breach and seeks remedies. But these agreements do not just reflect promises between the governmental parties. They also articulate legal rules that confer benefits and burdens on the polities those governments jointly govern in the ways more familiar to ordinary public law. The distinctiveness of their legal form, then, stems from their dual character as both contract-like instruments and public lawmaking instruments.

I begin by documenting when and where intergovernmental agreements have arisen. Just as federal-state coordination traces its roots to the infancy of

Gillette, *Regionalization and Interlocal Bargains*, 76 N.Y.U. L. REV. 190 (2001). I also exclude agreements between Native Nations and federal, state, and local governments. Those agreements have important intersections with the agreements I discuss here, but they have a distinctive history that deserves its own focused treatment. See *infra* notes 360-362 and accompanying text. I finally omit from this initial effort agreements between the federal government and territories, which likewise have a distinct legal and historical context, but very much belong in future conversations about intergovernmental agreements.

our federalist system, so too does the tradition of understanding intergovernmental coordination in contractual terms.² Today, intergovernmental agreements are used in a broad array of policy areas, including education, disaster relief, immigration, policing, health care, infrastructure, and more. This documentary effort also establishes an important analytical point: these agreements are, in many instances, the only articulation of government-created legal rules that are not otherwise contained in federal statutes, state laws, or city ordinances. They are, in short, an independent way of producing public law.

In Part II, I consider how courts have treated these agreements. In some cases, courts understand the agreements to be *literal* contracts. In others, they veer analogical, concluding that intergovernmental agreements are “in the nature of a contract,”³ reflect “a contractual relationship,”⁴ or have a “contractual aspect.”⁵ However they are characterized, the contract rules that courts have applied to these agreements are as breathtaking in scope and variety as the agreements themselves. Some of those rules have gained a degree of salience. The Supreme Court has repeatedly characterized federal grants made pursuant to Congress’s Spending Clause authority as “much in the nature of a contract.”⁶

Recently, in the closely watched challenge to the Affordable Care Act, the Supreme Court applied that framework to the Medicaid grant program, which the Act sought to expand, and found it unconstitutional because of the “coercive nature” of the “offer” the federal government made to the states.⁷ That holding

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2. See, e.g., *infra* Section I.D. For a broader discussion of early federal-state interactions, see DANIEL J. ELAZAR, *THE AMERICAN PARTNERSHIP: INTERGOVERNMENTAL CO-OPERATION IN THE NINETEENTH-CENTURY UNITED STATES* 11–116 (1962); and Gregory Ablavsky, *The Rise of Federal Title*, 106 CALIF. L. REV. 631, 690 (2018), which describes the then “dominant contractual model of negotiated federalism” as reflected in the state admissions compacts of Tennessee and Ohio.
 3. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).
 4. *Nat’l Fed’n of Indep. Bus. v. Sebelius (NFIB)*, 567 U.S. 519, 676 (2012) (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).
 5. *Bennett v. Ky. Dep’t of Educ.*, 470 U.S. 656, 669 (1985).
 6. See, e.g., *Pennhurst*, 451 U.S. at 17 (“[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.”); see also Abbe R. Gluck, *Our [National] Federalism*, 123 YALE L.J. 1996, 2030–31 (2014) (“[T]he idea that [Spending Clause] legislation is essentially a ‘contract’ has provided at least the rhetorical grounding for some of the highest profile federalism decisions . . .”).
 7. See *NFIB*, 567 U.S. at 681 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting); *id.* at 676–81; *id.* at 577–582 (opinion of Roberts, C.J.).

has been the subject of substantial and sustained scholarly commentary.⁸ But the case concerned just one kind of intergovernmental agreement, just one category of dispute that can arise pursuant to such agreements, and just one contract-law rule that courts have crafted to resolve them. The headline-grabbing Spending Clause cases and the contract principles that courts have applied to adjudicate them are a part of this Article. But they are just the tip of the iceberg.

This Article looks beyond the salient spending-power cases, analyzing the cases in the Supreme Court, lower federal courts, and state courts that address and resolve contract-like disputes, both mundane and profound, across contexts. I show that virtually every kind of question that arises in the private law of contracts arises in this context, too – from formation and interpretation to breach, remedies, and defenses.

Drawing this body of law together both clarifies and complicates it. In addition to revealing a pattern of reliance on contract law, it discloses a range of ad hoc adjustments courts have used to accommodate the governmental parties and the public-law functions of the rules intergovernmental agreements establish. Courts trying to locate a “meeting of the minds” in a contract between governments have to consider the democratic institutions through which governments form “intentions.”⁹ Courts considering whether an intergovernmental contract was properly amended have to consider whether each party’s consent to amend

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8. See Gluck, *supra* note 6, at 2030 (placing the question whether “Spending Clause Legislation is ‘Legislation,’ ‘Contract,’ or Both” among federalism’s most pressing yet unresolved doctrinal questions); see also Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause After NFIB*, 101 GEO. L.J. 861, 916–20 (2013); Mitchell N. Berman, *Coercion, Compulsion, and the Medicaid Expansion: A Study in the Doctrine of Unconstitutional Conditions*, 91 TEX. L. REV. 1283, 1284 (2013). A voluminous literature predating *NFIB* discusses the “contract analogy” used by the Court to characterize Congress’s Spending Clause authority – often in the context of assessing whether that analogy can justify the Court’s seemingly capacious reading of the Spending Clause. See, e.g., Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345, 384–85 (2008) [hereinafter Bagenstos, *Spending Clause Litigation*]; Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 MICH. L. REV. 813, 861–62 (1998). Writing in this vein, David Engdahl has argued that we should treat federal law enacted pursuant to Congress’s Spending Clause authority *only* as contracts, and not as law at all. See David E. Engdahl, *The Contract Thesis of the Federal Spending Power*, 52 S.D. L. REV. 496, 500 (2007); David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 62–63 (1994). The focus of this Article, by contrast, is not contract as an abstract metaphor for Congress’s authority in a particular constitutional context; it is the *actual* agreements – signed, written agreements – that the federal government and states enter into pursuant to a broad range of constitutional powers on a routine basis.
9. See *infra* notes 119–135 and accompanying text. I have previously discussed this problem at some length. See Bridget A. Fahey, *Consent Procedures and American Federalism*, 128 HARV. L. REV. 1561 (2015).

also satisfied its own internal lawmaking requirements.¹⁰ Courts applying the parol evidence rule have to consider the propriety of peering into the political processes through which intergovernmental agreements are negotiated.¹¹

Part III considers in greater depth three particularly thorny issues that force courts to draw upon both contractual and public-law doctrines and principles. I first discuss the puzzle of how to interpret intergovernmental agreements. Contractual canons of construction can come into tension or even outright conflict with statutory canons of construction. For instance, a state party to a contract with a federal agency might argue that contracts are construed against the drafter, while the federal agency that drafted the agreement claims, to the contrary, that its construction is entitled to deference under *Chevron*. The Supreme Court has addressed this precise conflict in a rarely cited case.¹² Courts have used other strategies to interpret intergovernmental agreements. These range from treating them as pure contracts, to pure statutes, with hybrids between the two. I next turn to the question of how to enforce intergovernmental agreements, drawing together a robust body of case law—in lower federal courts and in controlling, but often overlooked, precedent in the Supreme Court—addressing whether individuals can enforce intergovernmental agreements as “third-party beneficiaries,” as they can contracts, or whether they must find a cause of action in the underlying statutes, as if they were statutes alone. I finally address the puzzle of whether these agreements can be unilaterally amended by each government’s legislative body, as can statutes, or whether they bind the parties unless there is mutual consent to amend, as do contracts.

Courts have engaged with each of these puzzles at some length, but one would not know this from the case law. Because we lack a vocabulary for classifying intergovernmental agreements, courts addressing these issues—most importantly, the Supreme Court itself—fail to cite other decisions that have previously addressed similar questions.¹³

In Part IV, I explore the theoretical significance of intergovernmental agreements. The practices of intergovernmental agreement-making both reinforce

10. See *infra* notes 146-152 and accompanying text.

11. See *infra* notes 138-144 and accompanying text.

12. See *infra* notes 217-227 and accompanying text (discussing *Bennett v. Ky. Dep’t of Educ.*, 470 U.S. 656, 669 (1985)).

13. Indeed, what I see as some of the most interesting and important cases about intergovernmental agreements are sparsely cited. See, e.g., *Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41 (1986) (cited by federal and state courts—according to Westlaw—339 times since 1986, mostly outside the intergovernmental agreement context (last checked April 23, 2020)); *Bennett*, 470 U.S. 656 (cited 99 times since 1985); *Searight v. Stokes*, 44 U.S. 151 (1845) (cited 41 times since 1845).

and challenge influential accounts of American federalism. One of the disruptive contributions of recent federalism scholarship is its reorientation away from drawing boundaries between domestic governments and toward thinking about federalism as a system of integrated governance. Ours, in short, is a porous federalism. Its potential and its puzzle are not in keeping our domestic governments separate but in guiding how they act together.¹⁴

Intergovernmental agreement-making lends support to this reorientation by revealing an important legal instantiation of this integrated governance. But the form of intergovernmental engagement that these agreements reflect is also new and distinctive. Much literature on integration among levels of government probes the political, institutional, and policy dynamics that create and are created by federalism's porousness.¹⁵ But we do not know nearly enough about what happens next—about the brass-tacks legal instruments that operationalize intergovernmental projects and how they are viewed by courts. It is akin to discussing international relations in terms of diplomacy, geopolitics, and global institutions, but overlooking treaties—the formal legal devices nation-states use to bring legal certainty to those forces of complexity. Intergovernmental agreements are those devices for the domestic sphere.

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14. See, e.g., Jessica Bulman-Pozen, *From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism*, 123 YALE L.J. 1920, 1923 (2014); Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889, 1890 (2014); Gluck, *supra* note 66, at 1998; Cristina M. Rodríguez, *Negotiating Conflict Through Federalism: Institutional and Popular Perspectives*, 123 YALE L.J. 2094, 2097 (2014); see also ERIN RYAN, FEDERALISM AND THE TUG OF WAR WITHIN 1–68 (2011); Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619, 620 (2001); Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1581 (2006).
 15. For a small sampling of this considerable body of work, see Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077 (2014), which complicates our understanding of intergovernmental politics; Heather K. Gerken, *The Supreme Court 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 9, 11 (2010), which exposes the influence of substate governments on federalism dynamics; Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 582 (2011), which describes “five different visions of the role of the states and their relationship to the federal government” in the context of the Affordable Care Act); and Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 616 (2008), which refutes the idea that local governments are disengaged from national issues. Erin Ryan and Aziz Z. Huq have focused specifically on intergovernmental negotiations, uncovering powerful evidence that our domestic governments bargain over authority, resources, and institutional entitlements. Aziz Z. Huq, *The Negotiated Structural Constitution*, 114 COLUM. L. REV. 1595, 1632–44, 1646–64 (2014) (describing bargaining between the states and federal government and arguing against its prohibition); Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1, 28–36 (2011). This Article moves from the fact of intergovernmental bargaining to the legal instruments that memorialize those bargains.

Understanding the legal instruments that facilitate joint governmental projects can enhance a range of federalism conversations. First, debates about the continued vitality of state sovereignty – the age-old orienting principle for federalism doctrines – have reached a fever pitch, as many prominent commentators argue that sovereignty is incompatible with our highly integrated federalism and should thus be abandoned once and for all. But cases on intergovernmental agreements suggest an alternative conception of sovereignty, rooted in the insights of contract law, which the Supreme Court has portrayed as not only compatible with integration but constitutive of it.¹⁶

Second, many scholars have lamented that we lack judicially crafted “rules of engagement” to organize the increasingly innovative forms of interaction between levels of government.¹⁷ But in the less notorious cases I document, the Court has already grappled in deep ways with the consequences of integration.¹⁸ Welcoming these cases more explicitly into the federalism fold offers courts and scholars a body of existing federalism rules of engagement. It also supplies rich source material to mine for ideas about how to accommodate the interactive features of contemporary federalism. Most immediately, scholars have debated for decades what role, if any, judges should play in mediating federalism disputes. But those conversations have focused on more conventional federalism questions and a more traditional judicial role, in which judges are asked to craft blunt constitutional rules preventing one government from intervening in areas ostensibly reserved for another. How judges enforce agreements between governments is distinct and has the potential to reshape our thinking about the judicial role in federalism cases.

Finally, intergovernmental agreements raise new and broader questions about how federalism shapes American public law. These agreements have all of the basic features of public law in substance: they define rights, entitlements, and obligations between citizens and their governing institutions. But introductory civics teaches that public law in the United States is made *within* each government: Congress assembles the U.S. Code, federal agencies make the Code of

16. See *infra* Section IV.B.

17. Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 285 (2005); see also Gerken, *supra* note 14, at 1916 (“[T]here’s a case to be made that identifying ‘rules of engagement’ is the most pronounced weakness of [scholarship focusing on federalism as an integrated system].”). Abbe R. Gluck has been forceful on this point, arguing that “ours is a sorry state of affairs” when it comes to the “legal doctrines” governing federalism. Gluck, *supra* note 6, at 1997.

18. Indeed, much of this body of law appears where one would not expect to find it – in Supreme Court cases outside the federalism canon and in less conventional forums, like the Court of Federal Claims, which has jurisdiction over contract suits for money damages involving the federal government. See 28 U.S.C. § 1491(a)(1) (2018).

Federal Regulations, states craft their revised statutes, and cities pass ordinances. While some terms of intergovernmental agreements are guided by, or even incorporate, federal, state, or city laws, many do not. A citizen wondering what her Medicaid entitlements are must consult her state's Medicaid agreement with the federal government, not just her state's revised statutes or the U.S. Code. These agreements are thus a species of public law, but an unusual one. They are crafted not through the regularized *unilateral* procedures of legislative enactment and administrative promulgation but through the irregular *multilateral* process of intergovernmental agreement-making.¹⁹ And they are memorialized in freestanding documents, which are neither codified nor formally collected—and sometimes not made public at all.

The rules courts apply to these agreements are likewise an unusual genre of public law. When searching for the relevant contract principles, courts most frequently draw on a kind of “freestanding” contract law, comprised of the Restatements of Contracts and contract treatises (Corbin, Williston, and the like), but courts also cite state law. Whatever the source of legal ideas, the status of the resulting doctrine remains unclear. Is it state law, federal common law, constitutional law, or something else?²⁰ The practice of intergovernmental agreement-making—of *federalism by contract*—thus raises questions new and old about the nature of American federalism.²¹

I. WHERE FEDERALISM BY CONTRACT OCCURS

Intergovernmental agreements are pervasive because our federalism is porous: our many levels of government coordinate their activities across a wide range of areas and in a wide range of ways.²² And for as long as our domestic

19. See Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685, 698 (1925) (describing compacting as a type of “law-making through rigid contracts between States”).

20. It can also have both constitutional and common-law inflection, as David A. Strauss has argued. When judges “interpret the Constitution, they rely not just on the text but also on the elaborate body of law that has developed, mostly through judicial decisions, over the years.” David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 877 (1996).

21. See *infra* Section IV.C.

22. In this Article, I characterize policy-making by multiple levels of government as *coordination* rather than the more familiar *cooperative federalism* because contract-like instruments appear not only in areas ripe for intergovernmental collaboration but also in areas characterized primarily by intergovernmental strife. These instruments are used to lay out joint visions, to avert intergovernmental mischief, and to memorialize *détentes*. Their terms can allow for

governments have coordinated their activities, they have reduced their coordination to written agreements. These agreements bring certainty and precision to their joint efforts by defining jurisdiction, allocating resources, deputizing governmental agents, and establishing governing roles. But they also do something more profound: they articulate legal rules that regard and bind citizens. They speak not just inwardly to their governmental counterparties but also outwardly to the shared constituents of those governments. They allow our governments to coauthor legal rules that confer rights and benefits on the polities they jointly govern. They serve, in short, the conventional functions of domestic public law.

The most recognizable context in which intergovernmental agreements are formed is in the cooperative social-welfare and public-benefits programs funded by Congress pursuant to its Spending Clause power. The Supreme Court has many times characterized these agreements as “in the nature of a contract.”²³

But written intergovernmental agreements are not exclusively – or even primarily – a creature of the Spending Clause, nor even of twenty-first-century “cooperative federalism.” As I describe below, contract-like agreements between domestic governments appear in nearly every policy area. They arise in many historical moments, and they trade in diverse governmental goods – jurisdiction, policing authority, governmental services, and more. Like contracts, they are flexible and take many forms. Some are styled expressly as “contracts.”²⁴ Others

both cooperative and “uncooperative federalism.” See Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 *YALE L.J.* 1256, 1258 (2009).

23. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981); see U.S. CONST. art. I, § 8, cl. 1.
24. See, e.g., *Annual Contributions Contract*, DEP’T HOUSING & URB. DEV. (Apr. 2018), <https://www.hud.gov/sites/dfiles/PIH/documents/HUD-53012ACC.pdf> [<https://perma.cc/DQ7Z-8EJU>].

are called “compacts”²⁵ or “agreements.”²⁶ Still others are called “Intergovernmental Service Agreements,”²⁷ “Memorandums of Agreement,”²⁸ “Project Agreements,”²⁹ “Assignment Agreements,”³⁰ “state plans,”³¹ “grants,”³² or simply “written instruments.”³³ These terms are often used interchangeably.³⁴

What follows cannot convey the full breadth and texture of these practices. My goal is to provide a bird’s-eye view of the intergovernmental agreements that constitute our federalism: to document their long lineage and wide reach, demonstrate that they draw on many constitutional sources of authority, and

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25. See, e.g., Act of May 4, 1942, Pub. L. No. 77-539, 56 Stat. 267 (creating the Atlantic States Marine Fisheries Commission); Woodrow Wilson Bridge and Tunnel Compact, D.C. CODE § 9-1115.03 (2019).
 26. E.g., *Data Use Agreement Between Kentucky Department for Public Health and U.S. Centers for Disease Control and Prevention, National Healthcare Safety Network*, CTRS. FOR DISEASE CONTROL & PREVENTION (2011) https://www.cdc.gov/hai/pdfs/stateplans/kentucky_dua.pdf [<https://perma.cc/ZHR8-ZAFQ>].
 27. E.g., *Intergovernmental Service Agreement Between County of Hudson and U.S. Department of Justice Immigration and Naturalization Service*, U.S. DEP’T JUST. (2005) (on file with author).
 28. E.g., Memorandum of Agreement Between U.S. Immigration and Customs Enforcement and the Etowah County Sheriff’s Office (2016) (on file with author).
 29. Dep’t of Nat. Res. & Conservation v. United States, 1 Cl. Ct. 727, 730 (1983) (describing “‘Project Agreement,’ or contract” between the Montana Department of Natural Resources and Conservation and the United States Soil Conservation Service).
 30. E.g., *Assignment Agreement, Title IV of the Intergovernmental Personnel Act of 1970* (5 U.S.C. 3371-3376), U.S. OFF. PERSONNEL MGMT. (on file with author).
 31. E.g., *State Plan Under Title XIX of the Social Security Act Medical Assistance Program*, TEXAS (May 22, 1980), <https://hhs.texas.gov/sites/default/files/documents/services/health/medicaid-chip/state-plan/basic-state-plan.pdf> [<https://perma.cc/8FSF-B7QB>] (agreement); *State Plan Attachments*, TEXAS (July 31, 2019), <https://apps.hhs.texas.gov/documents/medicaid-chip-state-plan-attachments.pdf> [<https://perma.cc/AG5G-PJUV>] (attachments and amendments).
 32. Federal law authorizes agreements that it refers to as both “grants” and “contracts” in the same breath. See, e.g., 42 U.S.C. § 1437c(a)(2) (2018) (authorizing “contributions (*in the form of grants*) to public housing agencies” and providing that the “terms and conditions of such *contract* shall remain in effect for a 40-year period”) (emphasis added).
 33. *Town of North Bonneville v. United States*, 11 Cl. Ct. 694, 703 (1987) (describing “written instruments” between the Town of North Bonneville and the Army Corps of Engineers).
 34. This is true for the Supreme Court, see, e.g., *Searight v. Stokes*, 44 U.S. 151 (1845) (describing a federal-state land agreement as a *contract* and *compact* interchangeably); for Congress, see *infra* note 32; and even for the Constitution, see U.S. CONST. art. I, § 10, cl. 3 (prohibiting states from making “Compacts” and “Agreements” without Congress’s consent). See also *Virginia v. Tennessee*, 148 U.S. 503 (1893) (adding to the linguistic play by using the word “contract” interchangeably with “compact” and “agreement”).

suggest the immensity of their use across policy areas and types of governmental action.

A. *Spending Clause Programs*

It will come as no surprise that intergovernmental agreements are common in the context of federal programs enacted pursuant to Congress's Spending Clause power. The Supreme Court has described these programs as "much in the nature of a contract."³⁵ But the concrete ways in which these agreements reflect that nature have attracted less attention.

Where Congress lacks the authority to enact a policy program, or where it simply does not want to implement that program alone, it may use federal grants to engage the assistance of the states. As Justice O'Connor has explained, although the federal government may not "force[]" the states to participate in these programs, it may invite the states to voluntarily participate "on a contractual basis."³⁶ The typical Spending Clause "contract" offers federal funds in exchange for a state's administrative implementation: "in return for federal funds, the States agree to comply with federally imposed conditions."³⁷ There must also be something of a meeting of the minds: the "legitimacy of Congress' power to legislate under the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'"³⁸

The reach of the federal programs established pursuant to the Spending Clause is vast. Recent estimates put the annual total of federal grants to states and local governments at \$750 billion.³⁹ Some of these federal programs are both mammoth and familiar. The federal Medicaid program, which is implemented by the states but funded substantially by the federal government, accounts for over \$400 billion of that total and has given rise to countless pages of written terms.⁴⁰ Texas's basic Medicaid agreement is 176 pages, with 1,374 pages of supplemental attachments and amendments.⁴¹

35. *Pennhurst St. Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

36. *Printz v. United States*, 521 U.S. 898, 936 (1997) (O'Connor, J., concurring).

37. *Pennhurst St. Sch. & Hosp.*, 451 U.S. at 17.

38. *Id.*

39. ROBERT JAY DILGER & MICHAEL H. CECIRE, CONG. RESEARCH SERV., R40638, FEDERAL GRANTS TO STATE AND LOCAL GOVERNMENTS: A HISTORICAL PERSPECTIVE ON CONTEMPORARY ISSUES 1 (2019), <https://fas.org/sgp/crs/misc/R40638.pdf> [<https://perma.cc/CAZ5-DJJ8>].

40. *See id.* at 6.

41. *Texas State Plan Under Title XIX of the Social Security Act Medical Assistance Program*, *supra* note 31; *State Plan Attachments*, *supra* note 31.

Some spending programs are structured explicitly as “contracts.”⁴² The Federal Housing Act, for instance, funds state and local housing agencies through “Annual Contribution Contracts” formed between the Department of Housing and Urban Development and state and local housing agencies.⁴³ The Highway Trust Fund likewise distributes funds to states and cities through agreements with the Department of Transportation that federal statutes deem “contractual obligation[s]” of the United States.⁴⁴ And the Clean Water Act authorizes the Environmental Protection Agency to form “project agreements” with local water treatment facilities and deems those agreements “contractual obligation[s].”⁴⁵

By contrast, Medicaid does not use the express language of contract but instead offers states a menu of options and requires them to submit “state plans” that memorialize their elections, describe how they will implement the program, and make assurances that they will comply with various conditions—a process

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42. The federal government attempted to clean up some of its linguistic variation in the Federal Grant and Cooperative Agreement Act of 1977, 31 U.S.C. §§ 6301–6308 (2018), but it is not clear that the Act has succeeded. The D.C. Circuit, for instance, has recognized that the Act’s typology of labels does not change the underlying contractual character of the instruments. *Henke v. U.S. Dep’t of Commerce*, 83 F.3d 1445, 1451 (D.C. Cir. 1996) (holding that a “grant” is a “contract” in the conventional sense, notwithstanding the Act’s distinction between grants and procurement contracts).
43. 42 U.S.C. § 1437f(b)(1) (2018) (“The Secretary is authorized to enter into annual contributions contracts with public housing agencies . . .”); *Annual Contributions Contract*, *supra* note 24.
44. *See, e.g.*, 23 U.S.C. § 106(a)(3) (2018) (“The execution of the project agreement shall be deemed a contractual obligation of the Federal Government for the payment of the Federal share of the cost of the project.”); 49 U.S.C. § 5338(g)(1) (2018) (“A grant or contract” funded by the Highway Trust Fund “is a contractual obligation of the Government to pay the Government share of the cost of the project”); *La. Dep’t of Highways v. United States*, 604 F.2d 1339, 1341 (Ct. Cl. 1979) (indicating that the Federal Highway Administration’s approval of a Louisiana project proposal “created a contractual obligation” pursuant to § 106(a)(3)); *Texas v. United States*, 537 F.2d 466, 470 (Ct. Cl. 1976) (contemplating federal disaster assistance as a contractual obligation).
45. 33 U.S.C. § 1283(a)(1) (2018) (“The Administrator shall act upon such plans, specifications, and estimates as soon as practicable after the same have been submitted, and his approval of any such plans, specifications, and estimates shall be deemed a contractual obligation of the United States for the payment of its proportional contribution to such project.”); *City of New York v. Train*, 494 F.2d 1033, 1038 (D.C. Cir. 1974), *aff’d*, 420 U.S. 35 (1975).

that Justice Scalia has described as a “unilateral offer for contract.”⁴⁶ The Supreme Court has called the approved plans “contracts” on many occasions.⁴⁷ Many other major and minor federal grants follow the “state plan” framework used by Medicaid.⁴⁸

Still other programs direct a federal agency to enter into an “agreement” with a state or city subject to certain conditions. Among other prominent examples, Congress amended the Social Security Act in 1950 to allow the Commissioner of Social Security to enter into an “agreement” “at the request of any State . . . for the purpose of extending [Social Security]” to state employees, who were not initially covered.⁴⁹ The statute specifically envisions that the Commissioner will negotiate individualized agreements with each state, directing that “[e]ach such agreement shall contain such provisions, not inconsistent with the provisions of this section, as the State may request.”⁵⁰ And courts have characterized these “§ 418 agreements” as contract-like instruments.⁵¹

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46. *Bowen v. Massachusetts*, 487 U.S. 879, 923 (1988) (Scalia, J., dissenting) (“The Medicaid Act itself can be analogized to a unilateral offer for contract—offering to pay specified sums in return for the performance of specified services and inviting the States to accept the offer by performance.”). For examples of state plans, see *Medicaid State Plan Amendments*, CTRS. FOR MEDICARE & MEDICAID SERVS., <https://www.medicaid.gov/state-resource-center/medicaid-state-plan-amendments/index.html> [<https://perma.cc/Y76W-BQUD>], which collects state plan agreements and amendments.
47. *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 328 (2015) (describing a state’s “failure to comply with Medicaid’s requirements” as a “breach’ of the Spending Clause contract”); *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 676 (2012) (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (characterizing Medicaid program as “contractual”); *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 683 (2003) (Thomas, J., concurring) (describing Maine’s “Medicaid contract”); *Bowen*, 487 U.S. at 923 (1988) (Scalia, J., dissenting).
48. The Aid for Families with Dependent Children program, the primary source of cash welfare for low-income people from 1935 to 1996, used a similar structure. See 42 U.S.C. § 602 (1994). Its replacement, the Temporary Assistance for Needy Families program, does as well. See 42 U.S.C. § 602 (2018). So too does the Elementary and Secondary Education Act of 1965, which was enacted by President Johnson as part of the War on Poverty and today serves (in a significantly amended form) as the framework for large sums of federal education funding. Current education law allows states to either submit individual “state plans” for each program or to submit a consolidated state plan. See 20 U.S.C. § 7842 (2018); see also *Bell v. New Jersey*, 461 U.S. 773, 794 (1983) (White, J., concurring) (describing education funding agreements as “contractual-type agreements”).
49. 42 U.S.C. § 418(a)(1) (2018).
50. *Id.*
51. *Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 55 (1986) (evaluating the boundaries of the states’ “contractual right” under § 418 agreements); *Minnesota v. Apfel*, 151 F.3d 742, 746 (8th Cir. 1998) (rejecting the argument that § 418 agreements are “not contracts at all but are instead merely written evidence that a state has exercised its statutory option to participate in the social security program”).

Spending programs also nest miniature (but mighty) contracts inside larger federal agreements and grants by mandating the inclusion of specific assurances in all federal spending programs. The most important of these is Title VI of the Civil Rights Act of 1964, which requires any federally funded program not to discriminate on the basis of race, color, or national origin.⁵² When states and cities sign contracts, submit state plans, or accept federal grants, they must certify that they will comply with Title VI. The Supreme Court has repeatedly characterized these assurances as contracts.⁵³ Title IX of the Education Amendments of 1972 borrows from Title VI, prohibiting discrimination on the basis of sex in any federally funded education program.⁵⁴ It, too, has been read to nest nondiscrimination contracts within federal funding programs.⁵⁵ Other mini-agreements operate similarly for discrimination on the basis of age and disability.⁵⁶

Looking beyond statutes, the bureaucracy that manages the federal government's expenditure of public funds reveals an even more entrenched understanding of contract-like instruments as tools of intergovernmental collaboration. Since at least the early 1960s, the Comptroller General, whose opinions offer the "primary source of guidance on permissible uses of appropriated funds,"⁵⁷ has held that grants from the federal government to states, cities, and special purpose

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52. 42 U.S.C. § 2000d (2018) ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").
53. See *Guardians Ass'n v. Civil Serv. Comm'n of N.Y.C.*, 463 U.S. 582, 599 (1983) ("Congress intended Title VI to be a typical 'contractual' spending-power provision."); *id.* at 630 (Marshall, J., dissenting) ("[A]pplicants for federal assistance literally sign contracts in which they agree to comply with Title VI and to 'immediately take any measures necessary' to do so."); *Lau v. Nichols*, 414 U.S. 563, 568 (1974) ("Respondent school district contractually agreed to 'comply with title VI of the Civil Rights Act of 1964.'"); see also *United States v. Marion Cty. Sch. Dist.*, 625 F.2d 607, 611 (5th Cir. 1980) (describing "contractual assurances of nondiscrimination" pursuant to Title VI).
54. 20 U.S.C. § 1681(a) (2018) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .").
55. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998) ("The two statutes [Title VI and Title IX] operate in the same manner, conditioning an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds.").
56. 29 U.S.C. § 794 (2018) (prohibiting disability discrimination); 42 U.S.C. § 6101-04 (2018) (prohibiting age discrimination).
57. John Cibinic, Jr. & Jesse E. Lasken, *The Comptroller General and Government Contracts*, 38 GEO. WASH. L. REV. 349, 350 (1970).

entities are contracts.⁵⁸ It would not be unreasonable, then, to infer that the contract framework has influenced the administration of Spending Clause programs in ways more quotidian and sweeping than the already significant number of spending-power cases that make their way into the courtroom.

B. Immigration

Although the federal government's immigration power has a different constitutional architecture than its spending power, intergovernmental agreements remain significant tools for setting and enforcing immigration policy. The Supreme Court has long held that the “[p]ower to regulate immigration is unquestionably exclusively a federal power.”⁵⁹ But legal formalism has not prevented cities and states from playing an influential role in immigration policy, deploying new “mechanisms . . . at every level of government . . . to respond to the ways in which immigration is reshaping American society.”⁶⁰ Some of these mechanisms—like sanctuary laws and in-state tuition for noncitizens—are unilateral efforts by subfederal entities that shape immigration policy. But the federal government also invites states and localities to enter into multilateral agreements to execute a range of immigration policies.⁶¹

Federal immigration law authorizes the Department of Homeland Security to enter into “formal agreement[s]” with state and local governments—often called 287(g) agreements after their place in the Immigration and Nationality Act—to deputize state and local officers to act as federal immigration agents.⁶² Although local police lack the inherent authority to perform many immigration

58. See, e.g., Dep't of Labor-Grant to N.Y. Workers' Comp. Bd., B-303927, 2005 WL 1339367, at *9 n.29 (Comp. Gen. June 7, 2005) (“[A]cceptance of a grant creates a contract between United States and grantee.”); Soil Conservation Serv. Termination of Collection Action, 68 Comp. Gen. 609, 611 (1989); To the N.Y. Med. Coll., 50 Comp. Gen. 470, 472 (1970); To the Sec'y of State, 42 Comp. Gen. 289, 294 (1962); To the Sec'y of Health, Educ., & Welfare, 41 Comp. Gen. 134, 137 (Aug. 23, 1961).

59. *De Canas v. Bica*, 424 U.S. 351, 354 (1976); see also *Arizona v. United States*, 567 U.S. 387, 395 (2012) (“The federal power to determine immigration policy is well settled.”).

60. Rodríguez, *supra* note 15, at 569-70.

61. See Adam B. Cox & Eric A. Posner, *Delegation in Immigration Law*, 79 U. CHI. L. REV. 1285, 1349 (2012) (noting that the American immigration system “relies heavily on delegated authority to various agents”). Outside of immigration and policing, the Intergovernmental Personnel Act authorizes the federal government to assign employees to, and accept assignments from, state and local governments by “agreement.” 5 U.S.C. § 3373(a) (2018).

62. 8 U.S.C. § 1357(g) (2018); *Arizona*, 567 U.S. at 408 (characterizing 287(g) agreements as “formal agreement[s] with a state or local government”).

enforcement functions, these agreements delegate functions that include arresting, interrogating, and processing individuals suspected of committing immigration violations.⁶³ 287(g) agreements are captioned “Memorandum of Agreement” (MOA) and contain language strongly evocative of contractual obligation, concluding, for example, that “each party . . . accepts the terms, responsibilities, obligations, and limitations of this MOA, and agrees to be bound thereto to the fullest extent allowed by law.”⁶⁴

The 287(g) program is longstanding, but in the last two years, the Trump Administration has used intergovernmental agreements made under it to accomplish new objectives. For instance, after a wave of lawsuits against local police departments alleged that officers had unconstitutionally detained individuals for immigration violations, the Trump Administration proposed agreements that characterized local police as “service providers” for the federal government when holding individuals at the federal government’s request.⁶⁵ The express goal was to build a legal case that immigration detainees in local custody are being “held under the color of federal authority” and to “thereby afford[] local law enforcement liability protection from potential litigation,” if the detentions prove unlawful.⁶⁶

The sweeping and much-criticized Secure Communities program introduced by President Obama in 2008, rolled back in 2014, and reinstated by President Trump in 2017, also relied – at least initially – on intergovernmental agreements.⁶⁷ The program allowed, among other things, fingerprints and other biometric data taken by local jurisdictions upon arrest, which are normally sent to the FBI pursuant to other intergovernmental agreements,⁶⁸ to be also forwarded to the Department of Homeland Security (DHS) and checked against its

63. See, e.g., Memorandum of Agreement Between U.S. Immigration and Customs Enforcement and the Etowah Cty. Sheriff’s Office 1, 17-19 (June 8, 2016), https://www.ice.gov/doclib/287gMOA/r_287getowah.pdf [<https://perma.cc/9J68-JMF4>]. For additional agreements, see *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (Oct. 4, 2019), <https://www.ice.gov/287g> [<https://perma.cc/Y9ZQ-EYHD>].

64. E.g., Memorandum of Agreement, *supra* note 63, at 11.

65. *ICE, 17 FL Sheriffs Announce New Enforcement Partnership*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (Jan. 17, 2018), <https://www.ice.gov/news/releases/ice-17-fl-sheriffs-announce-new-enforcement-partnership> [<https://perma.cc/42HA-RN8Q>] (describing Basic Ordering Agreements).

66. *Id.*

67. *Secure Communities*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (Mar. 20, 2018), <https://www.ice.gov/secure-communities> [<https://perma.cc/SX49-M7P6>].

68. See *infra* notes 83-85 and accompanying text.

immigration databases.⁶⁹ If it finds a match, DHS can request that local officers detain an arrestee to await transfer into ICE custody. After forming written agreements with hundreds of state and local governments, several states exercised the “termination” clauses in their agreements.⁷⁰ DHS then performed an about-face, insisting that jurisdictions could not in fact terminate their participation the program.⁷¹

Finally, the federal government also contracts with states and local governments to house and transport detainees held under federal immigration laws.⁷² Indeed, for reasons I discuss below, the legal architecture of federalism by contract may create incentives for the federal government to contract with states and localities, instead of using private detention contractors to house immigration detainees.⁷³

C. Law Enforcement

In contrast to immigration enforcement, “policing in the United States is overwhelmingly local.”⁷⁴ But just as state and local governments have become increasingly engaged in federal immigration policy, the federal government has increasingly engaged in state and local policing.⁷⁵ Some of that involvement is

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69. See Memorandum of Agreement Between U.S. Immigration and Customs Enf’t and the N.Y. State Div. of Criminal Justice Servs. 1-2 (Dec. 28, 2010) (on file with author).
70. For example, after concluding that there existed a “conflict between the MOA [Memorandum of Agreement] as signed by ISP [Illinois State Police] and ICE’s implementation of the program,” Illinois announced that it was opting out of the program. Letter from Pat Quinn, Governor of Ill., to Marc Rapp, Acting Assistant Dir., Secure Cmty, Immigration & Customs Enf’t 1 (May 4, 2011) <https://ccrjustice.org/sites/default/files/assets/files/2011-05ilterminate.pdf> [<https://perma.cc/FZ3Z-XCSU>]. For evidence of the program’s breadth before this about-face, see, e.g., *Secure Communities: Monthly Statistics Through August 31, 2014*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT 2 (2014), http://www.ice.gov/doclib/foia/sc-stats/nationwide_interop_stats-fy2014-to-date.pdf [<https://perma.cc/MS2E-5DWW>].
71. Letter from John Morton, Director, U.S. Immigration & Customs Enf’t, to Jack Markell, Governor of Del. 1 (Aug. 5, 2011) (on file with author).
72. See, e.g., *Detention Services Intergovernmental Agreement Between United States Marshals Service and Hughes County, South Dakota* (2010) (on file with author) (citing as federal authority to enter into the agreement Pub. L. No. 106-553, § 119 (2001)); *Intergovernmental Service Agreement for Housing Federal Detainees Between United States Department of Homeland Security and Escambia County Detention Center* (2003) (on file with author).
73. See *infra* Section IV.A.
74. Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870, 876 (2015).
75. *Id.* at 879 (cataloging “dozens of federal statutes that authorize federal agencies to give money, equipment, and power to local law enforcement agencies and officers”).

facilitated by the spending power. The Byrne Justice Assistance Grant, which is the subject of the ongoing sanctuary-cities litigation, distributes eighty million dollars in aid to local police departments each year.⁷⁶ But the federal government also uses intergovernmental agreements to provide “equipment and federal power to local law enforcement” in addition to money.⁷⁷

The many federal agencies that conduct law enforcement⁷⁸ use agreements both to obtain and provide policing assistance. Joint task forces organize investigative efforts, share expenses, and deputize city and state officers to enforce federal law.⁷⁹ The Drug Enforcement Agency (DEA) alone has 271 state and local task forces, each of which is “formalized by a signed cooperative agreement, prepared by DEA’s Office of the Chief Counsel and signed by state or local chief executives and DEA officials.”⁸⁰ The FBI has over one hundred Joint Terrorism Task Forces coordinating investigations into terrorism-related activities by a dizzying fifty-five federal departments and five hundred state and local agencies—each of which is also governed by a formal written agreement.⁸¹

Intergovernmental agreements are also used to advance smaller-scale, but no less significant, law-enforcement objectives that have garnered attention in recent years. The federal government, for instance, uses “memorandums of agreement” to transfer disused military equipment—like the armored vehicles that

76. See, e.g., *Philadelphia v. Att’y Gen.*, 916 F.3d 276, 280 (3d Cir. 2019).

77. Harmon, *supra* note 74, at 884; see also Michael M. O’Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783, 814 (2004); Daniel Richman, *The Past, Present, and Future of Violent Crime Federalism*, in 34 CRIME AND JUSTICE: A REVIEW OF RESEARCH 377, 385-88 (Michael Tonry ed., 2006).

78. These agencies include the Federal Bureau of Investigation, the Bureau of Alcohol, Tobacco, Firearms and Explosives, the Drug Enforcement Agency, the Bureau of Diplomatic Security, and the criminal investigative offices in the Departments of Defense and Agriculture, the U.S. Postal Service, and the Food and Drug Administration.

79. See, e.g., *Task Forces*, U.S. DRUG ENFORCEMENT AGENCY, <https://www.dea.gov/task-forces> [<https://perma.cc/3KUQ-69YB>] (“Participating state and local task force officers are deputized to perform the same functions as DEA special agents.”).

80. *Id.*; see also 21 U.S.C. § 873(a)(7) (2018) (“The Attorney General . . . is authorized to . . . enter into contractual agreements with State, tribal, and local law enforcement agencies to provide for cooperative enforcement and regulatory activities under this chapter.”).

81. *Terrorism*, FED. BUREAU INVESTIGATION, <https://www.fbi.gov/investigate/terrorism> [<https://perma.cc/3YHS-YKMD>] (“[T]he FBI-led Joint Terrorism Task Forces (JTTFs) across the country are essential to the nation’s success in combatting terrorism.”). The formal agreements for Joint Terrorism Task Forces are often kept confidential, but for an example that has been made public, see Standard Memorandum of Understanding Between the Fed. Bureau of Investigation and the S.F. Police Dep’t (Mar. 1, 2007), <https://www.brennancenter.org/sites/default/files/analysis/SFPD%20MOU-JTTF.pdf> [<https://perma.cc/KS45-JCZE>].

prompted concerns over the militarization of local police during protests in Ferguson, Missouri—to state and local governments through the Department of Defense’s “1033 program.”⁸²

Intergovernmental agreements also facilitate the collection and dissemination of extraordinary quantities of information that allow law enforcement at all levels of government to check criminal histories, search for warrants, identify stolen property, run fingerprints and other biometric data, and so on. The largest division in the FBI is dedicated not to direct law enforcement but to managing this trove of data.⁸³ To access these information stores, states must enter into a master agreement with the FBI, then individualized agreements with each of their own agencies, courts, and subdivisions that would like access.⁸⁴ Discrete specialized agreements also govern the exchange of specific categories of information. Just this summer, the Government Accountability Office reported that the FBI had “entered into agreements with state and federal partners to conduct face recognition searches using hundreds of millions of photos” contained in state driver’s license databases.⁸⁵ Contract-like agreements, in short, regulate a vast network of governmental entities and connect them to highly sensitive and important information about individuals.

Finally, intergovernmental agreements allow states to house their criminal offenders in federal prisons and the federal government to house its offenders in state prisons. Until the late nineteenth century, the federal government housed virtually all of its prisoners in state facilities if permission had been “allowed or

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82. Def. Logistics Agency, *1033 Program FAQs*, U.S. DEP’T DEF., <https://www.dla.mil/DispositionServices/Offers/Reutilization/LawEnforcement/ProgramFAQs.aspx> [<https://perma.cc/2HMR-7BRF>] (“For states to participate in the program, they must each set up a business relationship with DLA through a Memorandum of Agreement”); see Jon Swaine et al., *Ferguson Forced to Return Humvees as US Military Gear Still Flows to Local Police*, GUARDIAN (Aug. 11, 2015, 8:00 AM EDT), <https://www.theguardian.com/us-news/2015/aug/11/ferguson-protests-police-militarization-humvees> [<https://perma.cc/ME37-FEWF>].
83. *Criminal Justice Information Services (CJIS)*, FED. BUREAU INVESTIGATION, <https://www.fbi.gov/services/cjis> [<https://perma.cc/4WUS-2TNG>].
84. U.S. DEP’T. OF JUSTICE, CJISD-ITS-DOC-o8140-5.6, CRIMINAL JUSTICE INFORMATION SERVICES (CJIS) SECURITY POLICY § 5.1.1.2, https://www.fbi.gov/file-repository/cjis-security-policy-v5_6_20170605.pdf [<https://perma.cc/6J5R-QZ2C>] (governing the state coordinating agency and FBI); *id.* § 5.1.1.3 (governing access between the state coordinating agency and the state criminal justice agencies); *id.* § 5.1.1.4 (governing access between the state coordinating agency and state non-criminal-justice agencies).
85. *Face Recognition Technology: Hearing Before the H. Comm. on Oversight & Reform* 116th Cong. 18 (June 4, 2019) (statement of Gretta L. Goodwin, Director, Homeland Security and Justice), <https://www.gao.gov/assets/700/699489.pdf> [<https://perma.cc/QX6D-LHG6>].

granted by the legislature of such state for such purposes.”⁸⁶ Today, the Attorney General is authorized to “contract, for a period not exceeding three years, with the proper authorities of any State, Territory, or political subdivision thereof, for the imprisonment, subsistence, care, and proper employment of such persons.”⁸⁷ The federal government may likewise contract with states to house *state* inmates in federal prisons.⁸⁸ Our governments delegate to one another by written agreement the authority to exercise the ultimate coercive force over their constituents.

Among the states, interstate compacts likewise coordinate important policing efforts, including the movement of inmates among state prisons,⁸⁹ the supervision of parolees and probationers,⁹⁰ and joint law enforcement in areas in which states exercise concurrent jurisdiction.⁹¹

D. Land and Infrastructure

The practice of forming intergovernmental agreements to establish the rights and obligations of the federal government and the states is not just a feature of contemporary federalism. Although it is tempting to see territorial boundaries as the one fixed feature of federal-state relations, for centuries the federal and state governments have conveyed land and jurisdiction to one another, subject to ongoing terms and conditions, through written agreements. As the Supreme Court explained over eighty years ago, the “States of the Union and

86. Act of Mar. 3, 1825, ch. 65, § 15, 4 Stat. 115, 118; see PAUL W. KEVE, PRISONS AND THE AMERICAN CONSCIENCE: A HISTORY OF U.S. FEDERAL CORRECTIONS 1 (1991).

87. 18 U.S.C. § 4002 (2018); see also 18 U.S.C. § 3621(b) (2018) (“The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau, whether maintained by the Federal Government or otherwise.”).

88. 18 U.S.C. § 5003 (2018); see also *Olim v. Wakinekona*, 461 U.S. 238, 246 (1983) (cataloging the “[s]tatutes and interstate agreements” that enable the transfer of inmates). Two circuits have also addressed constitutional challenges to these arrangements on the grounds that they impinge state sovereignty and both have upheld them. *United States ex rel. Gereau v. Henderson*, 526 F.2d 889, 894 (5th Cir. 1976) (“Federalism does not preclude cooperative action between the two sovereigns when the interests of both state and nation are thereby served.”); *Duncan v. Madigan*, 278 F.2d 695, 696 (9th Cir. 1960) (“That under our dual form of government there may be a pooling of state and federal power for cooperative action, to the end that the public welfare of both state and nation may be simultaneously promoted, where both have a common concern, is now well settled.”).

89. See *Olim*, 461 U.S. at 246 (listing interstate corrections compacts).

90. *Aveline v. Pa. Bd. of Prob. & Parole*, 729 A.2d 1254, 1257 (Pa. Commw. Ct. 1999) (explaining that the Interstate Compact for the Supervision of Parolees and Probationers displaced an informal system based on “gentlemen’s agreements” between the states”).

91. See, e.g., CAL. PENAL CODE § 853.1 (West 2019); *id.* § 853.3.

the National Government may make mutually satisfactory arrangements as to jurisdiction of territory within their borders and thus in a most effective way, cooperatively adjust problems flowing from our dual system of government.”⁹² And one form these “arrangements” take is contractual—in the words of the Court, “by agreement or through offer and acceptance.”⁹³

Many federal programs have used agreements formed through offer, acceptance, terms, and conditions to transfer land between the federal government and the states.⁹⁴ The First Congress, for instance, offered funding to the states to sustain an existing system of lighthouses on the condition that the states transfer the lighthouse lands “together with the jurisdiction of the same” within a year pursuant to the Enclaves Clause, which authorizes Congress to “purchase[] by the Consent of the Legislature of the State” land for the construction of “Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings” and to exercise exclusive jurisdiction over the acquired parcels.⁹⁵ In this pre-administrative-state era, the states manifested their “Consent” by passing state statutes. This precipitated one of the earliest known disputes over intergovernmental agreement-making when several states accepted the federal offer *with conditions* that allowed the ceding states to retain certain jurisdictional rights over the ceded lands. Because these acceptances deviated from the federal offer, they necessitated another round of federal lawmaking in order to “produce the necessary concordance” – to signify congressional acceptance of the states’ apparent counteroffers.⁹⁶

92. *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518, 528 (1938) (addressing validity of contractual cession of portions of Yosemite National Park from California to the federal government between 1905 and 1919).

93. *Id.*

94. These agreements are not the kind of “wholly executed [property] transactions in which no promises are made” and which the Restatement of Contracts excludes from its subject matter. RESTATEMENT (SECOND) OF CONTRACTS § 1 cmt. a (AM. LAW INST. 1981). They are the “express and implied promises” that “are often made in connection with executed transfers of property,” which are “within the scope of” of contract law. *Id.* intro. Though there are (fascinating) cases that deal with the boundary between “wholly executed” intergovernmental land transfers and land transfers with attached promises, *see, e.g.*, *Burton v. Williams*, 16 U.S. 529, 538 (1818), I do not discuss those line-drawing cases here.

95. U.S. CONST. art. I, § 8, cl. 17; *see also* Act of Aug. 7, 1789, ch. 9, § 1, 1 Stat. 53 (offering funds in exchange for the transfer); Adam S. Grace, *Federal-State “Negotiations” over Federal Enclaves in the Early Republic: Finding Solutions to Constitutional Problems at the Birth of the Lighthouse System*, 75 MISS. L.J. 545, 549 (2006).

96. *See* Grace, *supra* note 95, at 562 (quoting Letter from Comm’r of Revenue Tench Coxe to Congressmen (Sept. 7, 1793)).

The early processes of state-federal bargaining and the striking practice of a purely legislative process of agreement-making is vividly illustrated by the fascinating saga of the Cumberland Road, also known as the National Road. The Road, the first large-scale federal roadway, was built by the federal government between 1811 and 1838; it would ultimately stretch from Maryland to Illinois. Heavily trafficked and expensive to maintain, it soon became mired in constitutional and practical difficulties when, in 1822, President Monroe vetoed an improvement bill that would have erected a system of tolls to support its maintenance.⁹⁷ In response, the states—led by Ohio in 1831—made formal offers to Congress, in the form of state statutes, to take over the maintenance of the road in exchange for the authority to collect tolls and exercise control over its use.⁹⁸ In return, the offers exempted military traffic and vehicles carrying United States mail from the tolls.⁹⁹ Two months later, Congress accepted Ohio's offer by passing a bill that declared: “[T]he consent of the United States shall be, and is hereby, given to [the] act of the General Assembly of the state of Ohio,” quoting the Ohio Act and its compendium of terms and conditions in full.¹⁰⁰ Other states soon followed suit, and by 1833 Congress had entered into contract-like, statute-embodied agreements with several other states with territorial jurisdiction over the road.¹⁰¹ When a case involving one of these intergovernmental agreements came before the Supreme Court, it had no difficulty seeing its contractual character: a state can unquestionably enter into a conditional land-transfer contract with a private party, so the Court saw “no reason why it may not deal in like manner with the United States, when the latter have the power to enter into the contract.”¹⁰²

The examples go on. In 1850, Congress passed the Swamp Land Act, which authorized the transfer of tens of millions of acres of federal swampland to the states, on the condition that they enact drainage programs to prepare the land for agricultural uses.¹⁰³ In the 1866 case *McGee v. Mathis*,¹⁰⁴ the Supreme Court

97. Alison L. LaCroix, *The Interbellum Constitution: Federalism in the Long Founding Moment*, 67 STAN. L. REV. 397, 420-24 (2015).

98. See Act of Mar. 2, 1831, ch. 97, 4 Stat. 483.

99. *Id.*

100. *Id.*

101. Act of July 3, 1832, ch. 153, 4 Stat. 551, 554; Act of Mar. 2, 1833, ch. 79, 4 Stat. 655.

102. *Searight v. Stokes*, 44 U.S. (3 How.) 151, 166 (1845). Other Cumberland Road cases with similar fact patterns in different states followed. For examples in Maryland and Ohio respectively, see *Achison v. Huddleson*, 53 U.S. 293 (1851); and *Neil, Moore & Co. v. Ohio*, 44 U.S. 720 (1845).

103. Act of Sept. 28, 1850, ch. 84, 9 Stat. 519, 519.

104. 71 U.S. 143 (1866).

explained that the grant had all of the features of the “classic concept of contract”¹⁰⁵:

It is not doubted that the grant by the United States to the State upon conditions, and the acceptance of the grant by the State, constituted a contract. All the elements of a contract met in the transaction—competent parties, proper subject-matter, sufficient consideration, and consent of minds. This contract was binding upon the State, and could not be violated by its legislation without infringement of the Constitution.¹⁰⁶

Later, Congress passed the famous Morrill Land-Grant Act of 1862, which established a network of agricultural colleges by authorizing “the grant of land and land scrip . . . on [specified] conditions” to which the “assent of the several States shall be signified by legislative acts.”¹⁰⁷ And, of course, it executed many conditional land grants to the states for the purpose of constructing railroads.¹⁰⁸

E. Interstate Compacts

Intergovernmental agreements are also a deeply entrenched feature of the interactions among states. Contract-like forms are so embedded in the construction of interstate compacts passed pursuant to the Compacts Clause that little excavation of these practices is necessary. The Supreme Court has said many times that “[i]nterstate compacts are construed as contracts under the principles of contract law.”¹⁰⁹ A “compact when approved by Congress becomes a law of the United States but a Compact is, after all, a contract. It remains a legal document

105. SAMUEL WILLISTON & RICHARD A. LORD, *WILLISTON ON CONTRACTS* § 1.1 (4th ed. 1990) (noting that the “classic concept of contract” requires “two or more parties with capacity, consideration, mutual assent, and a lawful subject matter”).

106. *McGee*, 71 U.S. at 155.

107. Morrill Land-Grant Act of 1862, ch. 130, § 5, 12 Stat. 503, 504; *id.* at 505 (“No State shall be entitled to the benefits of this act unless it shall express its acceptance thereof by its legislature within two years from the date of its approval by the President.”).

108. Addressing a grant to Minnesota “to aid in building a railroad” from St. Paul to Lake Superior, for instance, the Supreme Court explained that “Minnesota accepted the trust created by the act of Congress” and “[a]cceptance by a trustee of the obligations created by the donor of a trust completes a contract.” *Stearns v. Minnesota*, 179 U.S. 223, 224, 249 (1900). “Such contracts,” the Court explained, “have been frequent in the history of the nation, and their validity has not only never been questioned, but has been directly affirmed.” *Id.* at 249–50.

109. *Tarrant Reg’l Water Dist. v. Herrmann*, 569 U.S. 614, 628 (2013).

that must be construed and applied in accordance with its terms.”¹¹⁰ Today, there are over two hundred interstate compacts in effect, which have a range of functions including specifying state boundaries, governing interstate resources and infrastructure, establishing interstate regulatory entities, and facilitating interstate criminal law enforcement.¹¹¹ Many compacts include more than two states, and some involve the federal government—not just as congressional approver but as full compacting party, with ongoing rights and obligations.¹¹²

F. State Enabling Acts

Finally, and perhaps most unexpectedly, the modalities of intergovernmental agreement-making played an important conceptual role in the processes through which states entered the Union. These essential acts of public lawmaking have not generally been treated as literal contracts, but they have been analogized to contractual instruments in meaningful ways. Beginning with Ohio in 1803, state entry into the Union was facilitated by congressional offers of admission, or “enabling acts,” which outlined the terms and conditions of entry, and by acts of acceptance—and sometimes counteroffer—on the part of the prospective states.¹¹³ Thus, as historian Sally Fairfax explains, “the process of gaining statehood, which sometimes dragged on for decades, resulted in a literal contract, the terms of which the states had to accept in order to enter the Union.”¹¹⁴

But the contractual character of state admission exceeds simple metaphor. The admissions compacts, as duly enacted federal and state laws, had concrete

110. *Texas v. New Mexico*, 482 U.S. 124, 128 (1987) (internal alterations and citations omitted) (quoting *Petty v. Tenn.-Mo. Bridge Comm’n*, 359 U.S. 275, 285 (1959) (Frankfurter, J., dissenting)); see also Resnik, *supra* note 14, at 671 (“[T]he interstate compact . . . permits lawful means for joint ventures between contracting states.”).

111. See *National Center for Interstate Compacts Fact Sheet*, COUNCIL ST. GOV’T, <https://www.csg.org/knowledgecenter/docs/ncic/FactSheet.pdf> [<https://perma.cc/D79G-HKNE>].

112. See *State Search*, NAT’L CTR. FOR INTERSTATE COMPACTS (2019), <https://apps.csg.org/ncic> [<https://perma.cc/9KVN-JYRW>] (providing a searchable database of interstate compacts).

113. See Sally K. Fairfax et al., *The School Trust Lands: A Fresh Look at Conventional Wisdom*, 22 ENVTL. L. 797, 798, 808 (1992) (“States typically submitted offers and countered congressional offers, literally negotiating their way into the Union.” (citing Sally K. Fairfax, *Interstate Bargaining over Revenue Sharing and Payments in Lieu of Taxes: Federalism As If States Mattered*, in *FEDERAL LANDS POLICY* (Phillip O. Foss ed., 1987))); see also Ablavsky, *supra* note 2, at 672 (describing the acceptance by Ohio’s constitutional convention of the conditions on entry extended by Congress in the State’s enabling act of 1802 and Ohio’s “counterproposals,” which were subsequently accepted by Congress).

114. Fairfax et al., *supra* note 113, at 808; see also Ablavsky, *supra* note 2, at 690 (discussing “statutes imposing stringent conditions for state admission” in exchange for joining existing states in statehood).

legal consequences, and they remain significant in the construction of state constitutional provisions that stem from them. Ohio's admissions compact, for instance, reflected the federal government's promise to spend five percent of the proceeds from the sale of federal land in Ohio on roads for the benefit of the state.¹¹⁵ Alison L. LaCroix has documented how when the federal government's constitutional power to spend money on internal infrastructure became controversial in the decade after Ohio's admission, the federal road escaped scrutiny, for "[t]he road's origins in Ohio's admission compact led contemporaries to view it as a product of contract, rather than constitutional, law."¹¹⁶ The Supreme Court and lower courts continue to analogize state enabling acts to contract-like instruments in various ways — both to abstractly theorize the process of state formation and to resolve concrete legal disputes arising under the acts.¹¹⁷

Intergovernmental agreements form a sometimes veiled infrastructure for multilayered governance across virtually every policy area, reinforcing the now-dominant understanding of federalism as a complex system of governments working together instead of a limited-purpose partnership of fifty states and one federal government operating separately. But they also reveal the formal legal dimensions of this messy negotiated system. Federalism's porousness, they show, is not without legal dimension. Most importantly, though, the many uses to which they are put are the very same uses to which unilateral forms of law-making are directed. They are not only a less salient infrastructure for intergovernmental collaboration; they are a less salient form of legal regulation directed from those governments to the individuals they jointly govern.

115. JON A. SOUDER & SALLY K. FAIRFAX, *STATE TRUST LANDS: HISTORY, MANAGEMENT, & SUSTAINABLE USE* 24 (1996); LaCroix, *supra* note 97, at 420.

116. LaCroix, *supra* note 97, at 420.

117. *Andrus v. Utah*, 446 U.S. 500, 507 (1980) ("As Utah correctly emphasizes, the school land grant [contained in the enabling act] was a 'solemn agreement' which in some ways may be analogized to a contract between private parties."); *Branson Sch. Dist. RE-82 v. Romer*, 958 F. Supp. 1501, 1513 (D. Colo. 1997), *aff'd*, 161 F.3d 619 (10th Cir. 1998) (treating enabling act as if "the United States and the individual incoming state are the parties to the contract" and applying contract-derived third-party beneficiary principles); *Alaska v. United States*, 35 Fed. Cl. 685, 699 (1996), (noting that a "statehood compact can be binding" but declining to decide whether Alaska's "entire Statehood Act is a binding contract"); *State ex rel. Ledwith v. Brian*, 120 N.W. 916, 918 (Neb. 1909) ("The provision of the enabling act making the [land] grant, and of the Constitution of 1866 setting apart and pledging the principal and income from such grant 'to the specific object of the original grant or appropriation,' and the subsequent act admitting the state into the Union under such Constitution constituted a contract between the state and the national government relating to such grants.").

II. THE DOCTRINE OF FEDERALISM BY CONTRACT

Drawing intergovernmental agreements together across contexts allows a first glimpse at the collection of doctrines that apply to them.¹¹⁸ That courts routinely rely on contract-inspired principles to enforce these agreements will come as no surprise to scholars of Congress's spending power, who are accustomed to seeing the Court characterize spending programs in contractual terms. But just as those programs represent a fraction of intergovernmental agreements, the coercion-like doctrine that most famously stems from that analogy represents a small sliver of the issues that can arise from intergovernmental agreements.

In what follows, I begin by documenting the contract-like issues that arise in litigation over agreements between governments. Virtually every kind of dispute that could stem from any generic multilateral agreements also stems from multilateral *governmental* agreements, and more besides. These disputes could nearly track the topics in the table of contents of the Restatement of Contracts. In some of these cases, courts treat the intergovernmental agreement as a literal contract and apply the relevant contract rule without translation. But more often, courts recognize, either explicitly or implicitly, the distinctions between private contracts and intergovernmental agreements. They adjust the rule of law to accommodate the governmental character of the parties, the lawmaking processes involved in their creation, or their public subject matter. But they do so in ways that are largely unsystematic and without consistent principles.

By drawing this body of law together, I do not want to suggest that all intergovernmental agreements should be treated the same. Just as contracts and treaties have subvarieties, contextual rules, and exceptions, so too should the law of intergovernmental agreements account for context and variation. But, because intergovernmental agreements share important and distinctive similarities, as

118. One puzzle, of course, is why these doctrines have not organically coalesced into a body of law or given rise to a coherent vocabulary – or even, for the most part, been cognized by judges as federalism law proper. We could hypothesize many possible reasons. The paradigm of intergovernmental negotiation is at odds with the Court's understanding of the states and federal government as largely separate sovereigns, which it continues to propound. See *Printz v. United States*, 521 U.S. 898, 928 (1997) (“It is an essential attribute of the States’ retained sovereignty that they remain independent and autonomous within their proper sphere of authority.”). The underlying issues are often workaday problems that lack obvious constitutional inflection and so may be less likely to rise to the cognizance of the Supreme Court (and, perhaps, of scholars). Many of these disputes start in state courts and the court of claims – two places you would not be likely to look for the latest thinking about American federalism. Litigants rarely label their disputes *federalism* questions, more often characterizing them as basic contract issues. And the Supreme Court tends to view these disputes in silos – as environmental cases or health-law cases or the like. Courts, as a consequence, are not talking to one another across the category of intergovernmental agreements, even when they confront similar questions.

Part III develops, variation in the rules that apply to them should be forged in a reasoned way, aware of the standard treatment and its justifications.

The goal of this Part is not to provide an account of the current state of the law of intergovernmental agreements. It is instead more in the spirit of a case-book's project: to reveal the distinctive issues and forms of reasoning that courts—from the Supreme Court to the Court of Federal Claims, which hears contract disputes involving the federal government, to state courts—have applied to these agreements over time. My goal is to build a foundation from which we can begin to see the legal distinctiveness of these instruments in analytical terms.

A. *Manifestation of Assent*

It makes sense to begin with perhaps the most fundamental question of contract law: Has an agreement been formed? In contract, this question turns on whether both parties have manifested assent to be bound by the terms of the agreement—in old-school contract law, a “meeting of the minds.” These foundational concepts in the world of private contracting are likewise foundational in the world of intergovernmental agreement-making. And just as the process of offer and acceptance comes in many forms in the usual modes of private bargaining, so too governments can take many routes to “contract” formation.¹¹⁹ In some cases, courts look for the intent to form an intergovernmental contract in the language of the statute creating the policy program. For example, they note places where Congress explicitly anticipates the formation of a “contract” or creation of “contractual obligation” between governments.¹²⁰ More often, the statutes providing for these collaborations do not use such obvious vocabulary. In those cases, courts must peer into the agreements themselves—styled as “applications,” “memorandums of understanding,” “grant awards,” “assistance agreements,” and the like—in search of an offer and acceptance and a mutuality of

119. I have previously documented the factual predicates to these questions of contract formation: the ways the federal government makes offers to states and accepts their consent. *See generally* Fahey, *supra* note 9 (arguing that the federal government embeds “consent procedures” in intergovernmental offers, which specify how and through which officials the state must consent and raising constitutional concerns about these practices).

120. *See, e.g., Arizona ex rel. Ariz. Highway Dep't v. United States*, 494 F.2d 1285, 1288 (Ct. Cl. 1974) (citing 23 U.S.C. § 106(a), which provides that an agreement made thereunder “shall be deemed a contractual obligation of the Federal Government”); *cf. Cherokee Nation v. Leavitt*, 543 U.S. 631, 632 (2005) (noting that the Act in question “uses ‘contract’ 426 times to describe the nature of the Government’s promise”).

obligation.¹²¹ Where the agreement provides that the parties “hereby agree” to sets of mutual obligations, for instance, courts see contractual commitment.¹²² So, too, where the agreements specify that they reflect “an offer, an acceptance, and consideration passing between the parties.”¹²³ Consideration on the federal government’s side is often monetary, whereas consideration on a state or local government’s side is frequently in the form of nonmonetary services or simple promises.

But the task of finding “contract” formation is no simpler in the governmental context than in the private one. As in the private context, courts must sometimes navigate complex modes of offer and acceptance. Courts have allowed intergovernmental offers that invite acceptance “by performing . . . a specified act,”¹²⁴ that subject contract formation to “conditions precedent,”¹²⁵ and that are

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121. See, e.g., *Dep’t of Nat. Res. v. United States*, 227 Ct. Cl. 552, 553-54 (1981) (holding that a “project agreement” between the State of Montana and the Federal Department of Agriculture is a contract because “all the parties” have “assumed specified, detailed, mutual, and reciprocal obligations”); *Texas v. United States*, 537 F.2d 466, 468 (Ct. Cl. 1976) (“[D]efendant’s valid execution of a document, which it prepared and titled ‘Federal-State Disaster Assistance Agreement,’ specifying that ‘Federal assistance will be made available in accordance with [various specified laws, Executive Orders and regulations]’ obligates defendant to provide such assistance as called for by the parties’ Agreement.”); *Kentucky ex rel. Cabinet for Human Res. v. United States*, 16 Cl. Ct. 755, 762 (1989) (“HHS assistance in the preparation of the state Title IV-D plan, its approval of the state plan, and the elaborate administrative procedures developed to determine and implement FFP payments, creates a contractual relationship.”).
122. *Univ. of Tex. Sys. v. United States*, 759 F.3d 437, 441 (5th Cir. 2014) (“Texas’s § 418 agreement appears to be a contract. It states that the Social Security Administrator and the State of Texas ‘hereby agree . . . to extend . . . the insurance system established by title II of the Social Security Act’ to the employees performing those services listed in the agreement. It is signed by both the Commissioner of Social Security and the Executive Director of the Texas Department of Public Welfare. It obligates the SSA to extend Social Security coverage to the services encompassed by the agreement and obligates Texas to pay taxes on those services covered by the agreement.”).
123. *City of Suffolk v. United States*, 19 Cl. Ct. 295, 296 (1990) (“The 624 and 1036 grant agreements would appear to satisfy all of the traditional requirements for an enforceable contract—an offer, an acceptance, and consideration passing between the parties.”). The court in *City of Suffolk* also found significance in the agreement’s title: “Offer And Acceptance of Federal Grant for Sewage Treatment Works Under 33 U.S.C. § 466 et seq.” *Id.* (capitalization altered).
124. RESTATEMENT (SECOND) OF CONTRACTS § 30 (AM. LAW. INST. 1981). See, e.g., *United States v. Pruden*, 172 F.2d 503, 506 (10th Cir. 1949) (interpreting an Oklahoma law that grants irrigation rights-of-way to the United States over state lands, only after they have been “accepted by the United States either by an Act of Congress or by the construction of a ditch”).
125. See, e.g., *Town of North Bonneville v. United States*, 5 Cl. Ct. 312, 320 (1984) (finding a series of written instruments to be contractually enforceable notwithstanding “conditions precedent” requiring “adoption by Congress of certain clarifying language” contained in a specified House Report “by attachment to appropriate legislation”).

“implied-in-fact” instead of expressed formally.¹²⁶ For example, Utah entered into an agreement with the USDA, which gave the state the option to purchase low-cost dry milk and distribute it to drought-stricken farmers. When a farmer claimed that Utah was contractually obligated to obtain that federal assistance, the Court of Claims rejected the possibility that the agreement was a requirements contract or indefinite-quantity contract. The Court instead concluded that the agreement more closely mirrored an “offer by the USDA to sell under certain terms” or an agreement “conditioned on placement of an order.”¹²⁷

Today, legislative bodies that authorize intergovernmental agreements generally sit a step removed from the contract-formation process, directing administrative agencies to enter into such agreements in the first instance.¹²⁸ But this has not always been so. In the 1845 case of *Neil, Moore & Co. v. Ohio*, the Supreme Court identified an enforceable “contract” in an *offer* consisting of an Ohio state statute and an *acceptance* in a subsequently enacted federal statute – a statute that recited the full text of the Ohio act alongside Congress’s assent.¹²⁹ The Court thought that “this mode of proceeding was the natural and proper one, where two sovereignties were contracting with each other by means of legislative action.”¹³⁰ The Court added that “it was obviously adopted by the parties in this instance in order to show the terms proffered by Ohio, and assented to by Congress.”¹³¹ Consistent with this example, land contracts, state-admissions compacts, and interstate compacts have frequently been established by formal legislative act and embodied in no other documents than the laws of each counterparty.¹³²

126. See *Anchorage v. United States*, 119 Fed. Cl. 709, 716 (2015) (denying a Rule 12(b)(6) motion on the grounds that “it is at least plausible that . . . conduct [between the City of Anchorage and the United States Department of Transportation’s Maritime Administration] could lead to the creation of an implied-in-fact contract between the parties”).

127. *Carter v. United States*, 102 Fed. Cl. 61, 67, 69 (2011).

128. See, e.g., 18 U.S.C. § 5003(a) (2018) (authorizing the Director of the Bureau of Prisons to enter into contracts with the “proper officials of a State or territory”); 42 U.S.C. § 418(a)(1) (2018) (providing that the Commissioner of Social Security “shall, at the request of any State, enter into an agreement . . . for the purpose of extending” Social Security insurance benefits to “employees of such State or any political subdivision thereof”).

129. 44 U.S. (1 How.) 720, 740 (1845).

130. *Id.* at 742.

131. *Id.*

132. See PAUL T. HARDY, *INTERSTATE COMPACTS: THE TIES THAT BIND* 2 (1982) (“Interstate compacts come into existence when two or more states enact essentially identical statutes that establish and define the compact and what it is to do.”); see also *supra* note 95 and accompanying text (describing lighthouse contracts); *supra* note 115 and accompanying text (describing state-admissions compacts).

Of course, courts at times also find a failure to achieve a meeting of governmental “minds.” In *United States v. Parish of Saint Bernard*, the United States sued two Louisiana parishes in contract for failing to adopt proper flood-control measures under the National Flood Insurance Act of 1968.¹³³ The federal government argued that “the many letters exchanged between the communities and the agencies charged with implementing the [National Flood Insurance Program] establish an express contract.”¹³⁴ The court concluded that they did not because “Congress failed to make clear in either the statute or regulations that” the program “created a contract.”¹³⁵

B. Contract Construction

Courts also routinely confront questions about how to construe contracts between governments. As courts in many contexts have recognized, these contracts are unique because they are *both* law *and* contract. And courts that construe them must navigate a delicate balance between giving effect to their private character and respecting their status as public law.¹³⁶ But courts also face discrete interpretive questions when construing intergovernmental agreements.

For instance, they must ask familiar questions about when to supply implied terms to contracts. The Supreme Court in *Barnes v. Gorman* addressed whether a punitive-damages remedy could be implied in Title VI contracts. Noting two dominant rules governing when contractual terms can be implied—the would-be term is one “that the parties would have agreed to” and the would-be term “comport[s] with community standards of fairness”—the Court found that a punitive-damages term could not be implied under either theory.¹³⁷

Courts must also ask what evidence should be admitted to aid their construction efforts. The Supreme Court has both justified and rejected the parol evidence rule for intergovernmental agreements on grounds that look like proxies for conventional debates about statutory interpretation. In *Arlington Central*

133. 756 F.2d 1116, 1121 (5th Cir. 1985).

134. *Id.*

135. *Id.*; see also, e.g., *Kentucky v. United States*, 27 Fed. Cl. 173, 179 (1992) (finding no evidence to suggest that a Memorandum of Understanding between Kentucky and the Army Corps of Engineers “would be binding” or “provide[d] a remedy in case of breach” and that “it fails to contain the requisite elements of an express contract”).

136. See *infra* Section II.B.2 for an extended discussion of how courts navigate this task.

137. *Barnes v. Gorman*, 536 U.S. 181, 188 (2002) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 204 cmt. d).

School District Board of Education v. Murphy,¹³⁸ the Supreme Court, in an opinion written by Justice Alito, elaborated a kind of parol evidence rule, which bars consideration of precontractual negotiations when construing an unambiguous written instrument, rooted in textualist methodologies of statutory interpretation. The Court explained that the “key” to interpreting intergovernmental agreements was not “what a majority of the Members of both Houses intend but what the States are clearly told regarding the conditions that go along with the acceptance of . . . funds.”¹³⁹ To that end, it said, “[w]hatever weight . . . legislative history would merit in another context,” it is not appropriate in this context “in the face of the unambiguous text.”¹⁴⁰ By contrast, in *Oklahoma v. New Mexico*,¹⁴¹ the Supreme Court rejected the parol evidence rule and found it “appropriate to look to extrinsic evidence of the negotiation history of the Compact” precisely because “we repeatedly have looked to legislative history and other extrinsic material when required to interpret a statute which is ambiguous.”¹⁴²

The parol evidence rule in the intergovernmental context can thus easily collapse into debates about which indicators of intent judges believe are appropriate to consult in any other context. With respect to intergovernmental negotiation, the complexities associated with how and whether to use parol evidence can build quickly. In a lawsuit about the meaning of Alaska’s admissions compact, the state urged the court to interpret a critical oil-revenue provision in light of statements the Secretary of the Interior had made while promoting the compact before a voter referendum on statehood. Alaska argued that where, “as here, the State offers objective evidence of the intent of its voters – in this case analysis and explanations of the terms of statehood by the United States, furnished to (and presumptively relied upon) Alaskans prior to ratification – a court must consider that evidence in interpreting the Compact.”¹⁴³ Acknowledging that the “Act was not negotiated in the same way as a normal contract” and that the “plebiscite on statehood and the debate on the pros and cons of statehood concerned what was

138. 548 U.S. 291 (2006).

139. *Id.* at 304.

140. *Id.*

141. 501 U.S. 221 (1991).

142. *Id.* at 236 n.5.

143. Brief for Plaintiff-Appellant Alaska at 19, *Alaska v. United States*, No. 96-5124, 1997 WL 382032 (Fed. Cir. July 8, 1997); *id.* at 20 (“When Alaskans went to the polls to vote for statehood, they can only have believed that a vote for statehood was, among other things, a vote for a 90 percent share of mineral leasing revenues that was as permanent as the financial obligations they were being asked to assume in return.”).

fundamentally a political issue,” the judge nonetheless agreed to admit the political dialogue that preceded its enactment into evidence alongside the text of the provision.¹⁴⁴

Courts also cite other ancillary rules about contract construction that can be important in individual cases. In a recent dispute between Texas and the United States over the meaning of a Social Security contract, the Fifth Circuit cited Section 202 of the Restatement (Second) of Contracts, which provides that the “course of performance . . . without objection is given great weight in the interpretation of the agreement,” to hold Texas to an interpretation in which it acquiesced for nine years without filing suit.¹⁴⁵

C. Amendment and Novation

If intergovernmental agreements are contractual in nature, how can they be altered? Is legislation passed by one of the contracting parties sufficient? One important line of case law, which I discuss further below, considers the question of whether one party, generally the United States, can unilaterally amend the agreement.¹⁴⁶

But questions related to amendment arise in other forms as well. Efforts to alter the terms of state admissions compacts provide a vivid example of the everyday challenges of amending laws made by the agreement of two governments. In *United States v. 111.2 Acres of Land, More or Less, in Ferry County*, for instance, the district court considered whether the State of Washington and the United States had validly amended a term in Washington’s admissions compact involving the grant of federal lands to the State.¹⁴⁷ The court first established that admissions compacts can only be amended through procedures that respect their dual character as “both compact (or contract) and law.”¹⁴⁸ While both forms of

144. *Alaska v. United States*, 35 Fed. Cl. 685, 702 (1996) (ultimately concluding that the statements “amounted to salesmanship” and were mere “enthusiastic projections” that could not transform a contractual promise). This is not to say that courts never apply the parol evidence rule to its usual effect. In more workaday intergovernmental agreement cases, it can serve its standard functions. See, e.g., *Dep’t of Nat. Res. & Conservation v. United States*, 1 Cl. Ct. 727, 735 (1983) (“Having concluded that the . . . clause is ambiguous, the court must now ascertain, if it can, the intent of the parties from outside sources.”).

145. *Univ. of Texas Sys. v. United States*, 759 F.3d 437, 445 (5th Cir. 2014) (first citing RESTATEMENT (SECOND) OF CONTRACTS § 202(4); then citing 5 MARGARET N. KAFFIN, CORBIN ON CONTRACTS § 24.16 (Joseph M. Perillo ed., 2014)).

146. See *infra* Section III.C.

147. 293 F. Supp. 1042 (E.D. Wash. 1968), *aff’d*, 435 F.2d 561 (9th Cir. 1970).

148. *Id.* at 1048.

lawmaking are amenable to change—“contracts are subject to novation, laws to amendment”—any amendment to the compact, the court explained, must satisfy both forms.¹⁴⁹ The parties must “consent” to the change (the contractual requirement) and their consent must be embodied in an act with the force of law (the legal requirement). Here, however, the “consent of the United States ha[d] not been manifested by amendment of the Enabling Act or by legislation” but was instead allegedly embodied in mere “[a]dministrative practice,” which lacked the “force of law.”¹⁵⁰ The court thus found the attempted amendment unsuccessful. By contrast, where Congress passed a statute offering a “construction” of a disputed provision of Nevada’s enabling act, and the “State, by its legislative act . . . ratified that construction,” that Act was properly amended.¹⁵¹ In a variation on that theme, courts in the interstate-compacting context have held that compacts cannot be amended “simply by each state’s passing similar legislation” departing from the compact unless there is “language in the Compact authorizing” amendment by simultaneous act.¹⁵²

D. Contract Beneficiaries

An important question in American contract law is whether, by manifested intent, the contracting parties have conferred rights on third-party beneficiaries to enforce the contract terms. Many litigants have attempted to assert rights as third-party beneficiaries to intergovernmental agreements, and many courts, including the Supreme Court on repeated occasions, have addressed those claims. I discuss the twists and turns of that body of case law in depth in the next Part, using it as a case study for the ways that applying contract law to intergovernmental agreements presents novel legal challenges.¹⁵³

149. *Id.*

150. *Id.*

151. *Heydenfeldt v. Daney Gold & Silver Mining Co.*, 93 U.S. 634, 641 (1876).

152. *Int’l Union of Operating Eng’rs, Local 542 v. Del. River Joint Toll Bridge Comm’n*, 311 F.3d 273, 280 (3d Cir. 2002); *see also Chafin v. Del. River & Bay Auth.*, Civ. No. 06-836 (RMB), 2006 WL 3780765, at *4 (D.N.J. Dec. 20, 2006) (citing the same principle but reaching the opposite result because the instrument at issue *did* provide that “additional powers may be granted to the [compact-created] authority by legislation of either State without the concurrence of the other”).

153. *See infra* Section III.B.

E. Formation and Performance Defenses

The Spending Clause cases announcing the anticoercion rule present the most sustained discussion of a doctrine akin to a formation defense – namely, the defense of duress. Where an “improper threat . . . leaves the victim no reasonable alternative” but to enter into the contract, the contract can be voided by that party.¹⁵⁴ As Justice Scalia wrote in his opinion in *NFIB*, “just as a contract is voidable if coerced,” when “a federal spending program coerces participation the States have not ‘exercised their choice’ – let alone made an ‘informed choice.’”¹⁵⁵ This rule is a model example of the difficulties of appropriating contract law for the intergovernmental context, as many insightful scholarly analyses of *NFIB* have pointed out, and I will not retread here.¹⁵⁶

But litigants have also asked courts to entertain other claims that can make contracts voidable or provide defenses to nonperformance. And those claims both draw on and develop contract-law concepts for this distinctive context. Like many rules, the implied duty of good faith and fair dealing can take a distinctive form in intergovernmental agreements.¹⁵⁷ Addressing negotiations between the Town of Bonneville and the Army Corps of Engineers over an effort to relocate the town and expand a nearby dam, the Court of Claims found the *political* tactics used by the parties so “extreme” that they “poisoned the negotiating process” and raised “questions of good faith.”¹⁵⁸ The “Town council . . . employed its municipal powers to harass the Corps,” including by passing a “noise control ordinance” and denying permits to undermine the Corps’ work, passing an emergency ordinance declaring that “any breach of contract by any public agency that materially [a]ffects the Town’s ability to conduct good government would constitute an emergency,” and repeatedly altering the “negotiating authority of its

154. RESTATEMENT (SECOND) CONTRACTS § 175(1) (AM. LAW. INST. 1981).

155. Nat’l Fed’n of Indep. Bus. v. Sebelius (*NFIB*), 567 U.S. 519, 676–77 (2012) (Scalia, J., dissenting) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17, 25 (1981)).

156. See sources cited *supra* note 8. Mitchell Berman’s careful analysis, for instance, shows that analytical clarity escapes the Court’s contract-inspired “anti-coercion” principle under which it invalidated the ACA’s Medicaid expansion. He shows as a general matter that the court confuses the analytically distinct concepts of “coercion” and “compulsion” and, as a specific matter, that “[c]ontract law, on which the Chief Justice and the joint opinion both rely, does not offer the support they claim” for their preferred rule. See Berman, *supra* note 8, at 1287, 1298–99.

157. See, e.g., *Anchorage v. United States*, 119 Fed. Cl. 709, 716 (2015) (denying a motion to dismiss on Anchorage’s allegation that the United States breached its duty of “good faith and fair dealing” in its execution of two contracts to jointly rebuild Anchorage’s port).

158. *Town of N. Bonneville v. United States*, 11 Cl. Ct. 694, 706 (1987).

representatives.”¹⁵⁹ The Corps also employed “political pressure” that the court thought a bridge too far, involving county, state, and federal officials in the bargaining process and even inducing the county to file suit against the town as apparent negotiating leverage.¹⁶⁰

In a Supreme Court case between the City of San Francisco and the United States, the City raised numerous equitable defenses to breach, including impossibility, estoppel, and conditions against public policy.¹⁶¹ The federal government had granted land and rights of way in Yosemite for the City to draw hydroelectric power, but had prohibited the City from using private corporations to distribute the power to consumers. The City’s impossibility defense was the most striking. The City argued that “performance . . . is impossible” because developing internal distribution capabilities required the “consent of [the City’s] electors who have many times refused to give that consent.”¹⁶² The Court did not address each defense piecemeal, instead finding them together insufficient to excuse the City’s breach, but it did hint at its skepticism of the City’s voters-will-not-let-me excuse. The City, it noted, had accepted the contract “by formal ordinance” and “assented to all the conditions,” including the one it failed to perform.¹⁶³ Now it was “availing itself of valuable rights and privileges granted by the Government and yet persists in violating the very conditions upon which those benefits were granted.”¹⁶⁴

F. Remedies

In a lesser-known line of Spending Clause cases, the Supreme Court has developed a complex set of contract-inspired doctrines to decide when “a damages remedy [is] available” and the “scope of damages” available pursuant to such a remedy for a state’s breach of a funding condition.¹⁶⁵ Specifically, the Court has explained, a “funding recipient is generally on notice that it is subject not only to those remedies explicitly provided in the relevant legislation” but also to

159. *Id.* at 706–07.

160. *Id.* at 705–06.

161. *United States v. City of San Francisco*, 310 U.S. 16 (1940).

162. Brief for Respondent at 187, *San Francisco*, 310 U.S. 16 (No. 39–587); *see also San Francisco*, 310 U.S. at 31 (summarizing the City’s arguments).

163. *San Francisco*, 310 U.S. at 29.

164. *Id.* at 30.

165. *Barnes v. Gorman*, 536 U.S. 181, 187 (2002); *see also Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998) (“Title IX’s contractual nature has implications for the construction of the scope of available remedies.”).

“those remedies traditionally available in suits for breach of contract.”¹⁶⁶ The Court has slowly clarified what those remedies are in specific contexts.

In *Guardians Association v. Civil Service Commission*, a sharply divided Court deliberated on how to compute money damages in a case brought by private parties alleging that a city had breached its Title VI contract with the federal government, through which it agreed not to discriminate in its use of the federal funds at issue.¹⁶⁷ Justice White, announcing the judgment of the Court but joined in his reasoning by only one other Justice, proposed that compensatory contractual damages were inappropriate in the Spending Clause context. He argued that where “it is determined, contrary to the State’s position, that the conditions attached to the funds are not being complied with, it may be that the recipient would rather terminate its receipt of federal money than assume the unanticipated burdens.”¹⁶⁸ Respecting the “*privilege* of the recipient of federal funds to *withdraw* . . . rather than assume the further obligations and duties that a court has declared are necessary to compliance” was, he suggested, essential to the “consensual” nature of the program.¹⁶⁹

Justice Marshall, writing in dissent, found Justice White’s reasoning a “bizarre view of contract law.”¹⁷⁰ The obligations contained in Title VI contracts, explained Justice Marshall, “attach[] at the time respondents agree[] to take federal money.”¹⁷¹ That being so, basic principles of contract law ought to require that “[h]aving benefitted from federal financial assistance conditioned on an obligation not to discriminate, recipients of federal aid must be held to their part of the bargain.”¹⁷² Citing the Restatement of Contracts, Justice Marshall thus urged a straightforward compensatory damages approach:

When a court concludes that a recipient has breached its contract, it should enforce the broken promise by protecting the expectation that the recipient would not discriminate. The obvious way to do this is to put

166. *Barnes*, 536 U.S. at 187 (first citing RESTATEMENT (SECOND) OF CONTRACTS § 357 (AM. LAW INST.1981); then citing 3 S. WILLISTON, LAW OF CONTRACTS §§ 1445–50 (1920); and then citing J. POMEROY, A TREATISE ON THE SPECIFIC PERFORMANCE OF CONTRACTS 1-5 (1879)).

167. 463 U.S. 582 (1983).

168. *Id.* at 596.

169. *Id.* at 597 (emphasis added).

170. *Id.* at 632 (Marshall, J., dissenting).

171. *Id.*

172. *Id.*

private parties in as good a position as they would have been had the contract been performed.¹⁷³

The Court would make Justice Marshall's hornbook view of contractual damages the majority view twenty years later in *Barnes v. Gorman*,¹⁷⁴ but contract-law fidelity would this time be used to narrow rather than expand the ability of individuals to hold cities to their promises. In *Barnes*, a jury had awarded plaintiff Jeffrey Gorman both punitive and compensatory damages for the police department's egregious violations of its agreement not to discriminate against individuals with disabilities — as required by a close analogue of Title VI, Section 504 of the Rehabilitation Act.¹⁷⁵ The question on appeal was whether Gorman was entitled to retain the punitive portion of his awarded damages.¹⁷⁶ Favorably quoting Justice Marshall's dissent in *Guardians Association*, Justice Scalia established that compensatory damages are, indeed, the usual remedy when a governmental entity violates a Spending Clause contract with the federal government.¹⁷⁷ The “wrong done” in such cases is “the failure to provide what the contractual obligation requires,” and “that wrong is ‘made good’ when the recipient *compensates* the Federal Government or a third-party beneficiary (as in this case) for the loss caused by that failure.”¹⁷⁸ In his view, that principle, however, also required the court to reject the claim for punitive damages. For “punitive damages, unlike compensatory damages and injunction, are generally not available for breach of contract.”¹⁷⁹

Remedial questions arise outside the Spending Clause context as well. In *Andrus v. Utah*, a dispute about the grant of certain federal lands to Utah upon its admission to the Union, the Supreme Court used the framework of compensatory damages to decode the meaning of a grant provision that allowed Utah to select “indemnity lands” in place of granted plots that turned out to have certain defects.¹⁸⁰ Utah argued that it could select highly valuable lands within federal grazing districts that had a “gross disparity” in value from the original lands.¹⁸¹

173. *Id.* at 633 (citing RESTATEMENT (SECOND) OF CONTRACTS § 344 cmt. a (AM. LAW INST. 1981)).

174. 536 U.S. 181, 187 (2002).

175. *Id.* at 184.

176. *Id.* at 185.

177. *Id.* at 189 (quoting *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 633 (1983) (Marshall, J., dissenting)).

178. *Id.*

179. *Id.* at 187. Justice Scalia also analyzed whether the agreement contained an implied term authorizing a case-specific punitive damages remedy and concluded it did not. *Id.* at 188.

180. 446 U.S. 500 (1980).

181. *Id.* at 502.

The Court disagreed, invoking contract-law doctrine: the “indemnity lands” provision, it explained, should be viewed “as [a] remedy stipulated by the parties for the Federal Government’s failure to perform entirely its promise” and should thus be construed to “provide the State with roughly the same resources” it had before, “as is typical of private contract remedies” that would “give the State the benefit of the bargain.”¹⁸²

Courts also order remedies other than compensatory damages for breach of agreements between governments. Contract law recognizes the possibility that a breach can be far more valuable to the promisor than it is costly to the promisee, thus leaving the breaching party with a windfall even after it pays compensatory damages.¹⁸³ In *Kansas v. Nebraska*, the Supreme Court found just that contractual difficulty: “[A]n acre-foot of water is substantially more valuable on farmland in Nebraska than in Kansas,” giving Nebraska an incentive to take more than its share of water and compensate Kansas for the value of its loss.¹⁸⁴ In addition to relying on basic principles of contractual restitution – centered on the profits from and motivations for the breach – the Court added a public-focused reason for embracing the unusual remedy of disgorgement: given the Court’s longstanding role in “guarding against upstream States’ inequitable takings of water,” “whatever is true of a private contract action, the case for disgorgement becomes still stronger when one State gambles with another State’s rights to a scarce natural resource.”¹⁸⁵

A final remedial question is whether one government can seek specific performance of an agreement with another. That question is interesting because it again pits *contract* norms, where damages are the usual remedy and injunctions to specific performance the more exceptional one, against *public-law* norms, where injunctions are the usual remedy and damages the more exceptional one. In some early civil-rights-era decisions, predominately issued by the district courts on the front lines of desegregation efforts, the U.S. Attorney General successfully obtained specific performance of agreements with school districts not to discriminate on the basis of race in exchange for federal funds.¹⁸⁶ These cases

182. *Id.* at 500-02, 507-08.

183. See RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 39 (AM. LAW INST. 2011).

184. 574 U.S. 445, 461 (2015).

185. *Id.* at 462.

186. The predicate question of whether the United States had standing to sue in the first place has its own interesting contract dimensions. The district court in *United States v. Cty. Sch. Bd.*, 221 F. Supp. 93, 105 (E.D. Va. 1963), for instance, held that the United States lacked standing to enforce the Fourteenth-Amendment right to attend desegregated schools on behalf of state schoolchildren, but that it *had* standing to enforce its *own* contractual funding agreement with

are notable because the courts couch the federal government's claims in the framework of contractual specific performance but also make quicker work of the finding that specific performance is available than would be expected in an ordinary contract suit.

In *United States v. Sumter County School District Number 2*, the district court used a broad-strokes analysis to grant specific performance, noting simply that “[f]ederal grants authorized by Congress create binding contracts,” that the “remedies available to the United States are the same as those available to a private party,” that “[o]ne of such remedies is of course that of specific performance,” and that cutting off funds “provides no remedy at all in the circumstances.”¹⁸⁷ In *United States v. County School Board*, a different district court likewise granted the United States its requested injunction.¹⁸⁸ Two decades later, the Fourth Circuit confronted a similar federal-funding statute and reiterated that the school district’s “assurances are contractual in nature, and the United States is entitled to sue for specific performance of that contract, by way of injunctive relief.”¹⁸⁹ Similar cases in the period exist outside the education context.¹⁹⁰

the school district to provide nondiscriminatory schooling to children residing on federal property. *Id.* at 103. For related examples, see *United States v. Frazer*, 297 F. Supp. 319, 323 (M.D. Ala. 1968); and *United States v. Sumter Cty. Sch. Dist. No. 2*, 232 F. Supp. 945, 950 (E.D.S.C. 1964).

187. 232 F. Supp. at 950-51.

188. 221 F. Supp. at 103.

189. *United States v. Onslow Cty. Bd. of Educ.*, 728 F.2d 628, 633 (4th Cir. 1984); see also *United States v. Marion Cty. Sch. Dist.*, 625 F.2d 607, 617 (5th Cir. 1980) (“[T]he United States is entitled to sue to enforce contractual assurances of compliance with Title VI’s prohibition against discrimination in the operation of federally-funded schools, and that the United States is entitled to whatever relief is necessary to enforce such assurances, including ‘transportation relief.’”).

190. The United States successfully sued Harrison County, Mississippi for specific performance of contractual assurances that it would not discriminate in access to a public beach, created with the help of a federal grant. *United States v. Harrison Cty.*, 399 F.2d 485, 486-87 (5th Cir. 1968). These suits may have been part of a concerted strategy. In 1966, shortly after the enactment of Title VI of the Civil Rights Act, the Justice Department issued Guidelines for Enforcement of Title VI, which provided that “[p]ossibilities of judicial enforcement include . . . a suit to obtain specific enforcement of assurances.” 31 Fed. Reg. 5292 (Apr. 2, 1966). Those guidelines may, in turn, have brought to life the intentions of at least some in the enacting Congress. For instance, Senator Abraham Ribicoff, a former director of the Department of Health, Education, and Welfare, cited the federal government’s ability to contractually enforce Title VI as one of its advantages. By treating “the nondiscrimination requirement” of Title VI as “a contractual obligation on the part of the recipient,” Senator Ribicoff explained, the federal government would have “the right to bring a lawsuit to enforce its own contract” and

Finally, courts have applied remedy-adjacent contract-law principles to agreements between governments.¹⁹¹ One fascinating (if idiosyncratic) example is the Supreme Court's century-long vacillation over whether the United States is entitled to prejudgment interest in contract disputes with other domestic governments. This line of cases exemplifies the Court's struggle to decide whether contracts between governments are subject to the usual rules of contract or require rules tailored to also accommodate principles of intergovernmental engagement. In contract, the default is that an injured party can recover interest from the time performance was due, as long as the contract has a clear monetary value.¹⁹² The United States had long asserted that right against private contractors, but an 1890 case, *United States v. North Carolina*, established that the "United States is *not* entitled to recover interest from a State unless the State's consent to pay such interest has been expressed in a statute or binding contract."¹⁹³ The Court's justification for that exception appears to be the "venerable presumption that a sovereign State is always ready, willing, and able to discharge its obligations promptly," in contrast to the ordinary contract litigant, who cannot be presumed to pay in the event of an adverse judgment and must have the mounting pressure of prejudgment interest as inducement.¹⁹⁴

Reflecting the Court's uncertainty about how exceptional intergovernmental agreements are, however, it reversed course in the late 1980s, awarding the United States prejudgment interest against West Virginia in a contract suit for the reimbursement of rebuilding services performed by the Army Corps of Engineers after flooding in the state.¹⁹⁵ The "federal interest in complete compensation" — the Court explained in an about-face characteristic of the intergovernmental agreement context — "is likely to be present in any ordinary commercial contractual arrangement between a State and the Federal Government."¹⁹⁶

thus "end the discrimination, rather than . . . end the assistance." 110 CONG. REC. 13,130 (1964) (statement of Sen. Ribicoff).

191. See, e.g., *Lemon v. Bossier Par. Sch. Bd.*, 240 F. Supp. 709, 714 (W.D. La. 1965), *aff'd*, 370 F.2d 847 (5th Cir. 1967) (applying the principle of ratification to stop a school district from avoiding damages based on its professed misunderstanding of a nondiscrimination provision in a federal funding contract).

192. RESTATEMENT (SECOND) OF CONTRACTS § 354 (AM. LAW INST. 1981).

193. *United States v. Texas*, 507 U.S. 529, 539 (1993) (Stevens, J., dissenting) (emphasis added) (describing the rule established in *United States v. North Carolina*, 136 U.S. 211, 216 (1890)).

194. *Id.*

195. See *West Virginia v. United States*, 479 U.S. 305, 312 (1987).

196. *Id.* at 311.

The goal of this Part has been threefold: to demonstrate that written, intergovernmental agreements give rise to a wide variety of disputes familiar to private projects; to show that courts frequently seek the aid of contract law when resolving those disputes; and to illustrate how government parties, federalism, and public purposes have inspired ad hoc adjustments to doctrinal contract rules in this context.¹⁹⁷ In the next Part, I probe three puzzles that emerge from this doctrine in greater depth.

III. PROBLEMS IN THE DOCTRINE OF FEDERALISM BY CONTRACT: THREE EXAMPLES

As should be apparent, the effort to understand what kind of legal instrument intergovernmental agreements are raises difficult conceptual questions. Because many disputes from these agreements stem from their multilateral character, courts have reasonably drawn on contract principles as an orienting frame. But, as the repeated adjustments to those rules illustrate, private contractual principles are frequently inadequate to address the *public* parties and functions of these agreements. The conceptual challenge of intergovernmental agreements, then, is to accommodate their unusual combination of equities: equities that stem from the promissory, reliance, and collaborative interests between their governmental parties; those that stem from what party governments are jointly doing on the people they are jointly governing – that is, producing and applying legal rules to individuals; and those that stem from the fact that those governmental parties are pursuing this shared project within a particular organizing system – not a market, or a global order, but within a constitutionally structured federalism.

Our failure to see these agreements as an internally coherent set has stunted efforts to thoughtfully balance those equities and express them in the doctrine

197. There are, of course, many other disputes that arise under intergovernmental agreements which this initial overview cannot fully capture. My focus has been on the most foundational issues: whether an agreement exists, how it can be altered, what happens if it is breached, and the like. But there are also other more technical consequences of characterizing intergovernmental agreements as contracts. If an intergovernmental agreement is a “contract,” for instance, litigants against the federal government can obtain jurisdiction to seek damages in the Court of Claims. See 28 U.S.C. § 1492(a)(1) (2018). Sometimes, by contrast, legal consequences flow from characterizing intergovernmental agreements as law instead of contract. For instance, all “Laws of the United States” are the “supreme Law of the Land” under the Supremacy Clause. U.S. CONST. art. VI, cl. 2. One court of appeals has emphasized that intergovernmental agreements are not just contract but also “Laws” for purposes of the Supremacy Clause. See *Westside Mothers v. Haveman*, 289 F.3d 852, 858 (6th Cir. 2002) (reversing the district court for concluding that a Medicaid agreement was a contract *alone* and not also a law subject to the Supremacy Clause).

of intergovernmental agreements. Each of the doctrines I discussed in the last Part deserves that kind of careful analysis across the full set of relevant cases. In this Part, I begin that project with deep dives into three conceptual problems that find regular expression in the doctrine of intergovernmental agreements.

First, I consider whether intergovernmental agreements should be interpreted as if they were contracts, statutes, or some form of hybrid, assembling a diverse set of interpretive strategies used by the Supreme Court and lower federal courts dating back to the nineteenth century. Second, I consider whether individuals should be able to enforce intergovernmental agreements as “third-party beneficiaries,” as if they were contracts, or must find a cause of action in an underlying statute, as if they were ordinary legislative enactments, collecting a range of cases that address this question. Finally, I consider whether governmental parties should be able to unilaterally amend intergovernmental agreements, as if they were ordinary pieces of legislation, or whether they must obtain the consent of both parties to amend, as if they were contracts, a question that has found subtle but important expression within other thorny doctrinal areas.

Courts have returned over and over to these persistent and vexing issues, testing different rules and rationales. Remarkably, however, they have generally failed to draw even on their *own* breadth of experience when reconfronting these challenges. The Supreme Court has itself addressed each question multiple times, yet I find little acknowledgement that each case is participating in a broader conversation.

A. *Contract Construction*

As with ordinary contracts, determining the meaning of the terms in an agreement is often the most important task courts perform. The usual approach to contract construction is “to give effect to the mutual intentions of the parties.”¹⁹⁸ But when the contracting parties are governments and the contract creates public policy, the search for mutual intent is more complicated. Governments make law through sophisticated multiactor procedures. On the federal side, intergovernmental agreements are typically authorized first by statute, then formulated by at least one and often many levels of administrative action.¹⁹⁹

198. *Mesa Air Grp., Inc. v. Dep’t of Transp.*, 87 F.3d 498, 503 (D.C. Cir. 1996) (quoting *NRM Corp. v. Hercules Inc.*, 758 F.2d 676, 681 (D.C. Cir. 1985)).

199. But not always. See, for instance, the cases described *supra* notes 98-101, in which Congress “accepted” state consent by passing its own statute.

States and cities may follow a similar course or use different models for authorizing officials to enter into these agreements.²⁰⁰ Many states, for instance, elect important administrative posts, introducing an extra level of electoral exchange into the process of forming intergovernmental agreements.²⁰¹ Each government, moreover, will have its own modalities for discerning the intent of its various policy-makers: canons of statutory construction, lawmaking rules and procedures, theories of administrative delegation and constraint.²⁰² The difficult question in this context is how to combine these many potential indicators of intent across governments into one meaning—how to honor both the individual processes of each government and the “mutuality” of their joint action. In grappling with that question, moreover, courts have struggled with the fundamental question of what these agreements *are*.

Notwithstanding the many Supreme Court cases that have attempted to address such questions on a case-by-case basis, there is no generally applicable set of rules for construing intergovernmental agreements. Indeed, courts have identified and applied a startling array of strategies. I first describe a set of cases in which courts reflexively treat these agreements as solely *federal* statutes or regulations, beginning and ending the search for meaning with the relevant federal text. I next outline doctrinal rules that stop short of giving effect to the intentions of both parties but use rules of federal statutory construction that are designed to incorporate the viewpoint of the federal government’s state or local counterparty. I then describe two innovative models the Supreme Court has used to identify joint governmental intent as a distinctive category of legal meaning: one treating intergovernmental agreements as “hybrids” between statutes and contracts, and one treating such agreements as proper contracts but assuming that *governmental* contracting parties have different default intentions than private contracting parties. Finally, I identify cases in which courts fully embrace the contractual character of these agreements and apply hornbook canons of contract construction for discovering mutual intent.

200. Fahey, *supra* note 9, at 1603-08 (recounting various state-level processes and institutions for entering into intergovernmental contracts).

201. COUNCIL OF STATE GOV'TS, BOOK OF THE STATES 2018, at 124 (2018), <http://knowledgecenter.csg.org/kc/system/files/4.10.2018.pdf> [<https://perma.cc/5BH2-4JYW>].

202. For recent work illustrating these differences among states, see Miriam Seifter, *Gubernatorial Administration*, 131 HARV. L. REV. 483 (2017); and Miriam Seifter, *Understanding State Agency Independence*, 117 MICH. L. REV. 1537 (2019). See also Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology As “Law” and the Erie Doctrine*, 120 YALE L.J. 1898, 1994 (2011); Gluck, *supra* note 6, at 2024-25, 2032, 2036.

1. *Federal Statutory Canons Only*

When construing intergovernmental agreements, it is common for courts to emphasize, rightly, that these agreements “originate in and remain governed by statutory provisions.”²⁰³ For many courts, the interpretive task focuses not on the statute that authorized the agreement but the text of the agreement itself. In most cases, “originating in” means just that: the relevant statutes serve as a starting point, not an ending point. But not all cases proceed on this premise. There remain cases where the statute authorizing the agreement, generally the *federal* statute, is treated as the only legal document and the only memorialization of intent that matters.²⁰⁴ In these cases, the Court never consults the further document—a grant application, state plan, formal contract, or memorandum of understanding—that embodies the individualized intergovernmental agreement.

This approach overlooks important facets of the analysis—most notably, the process by which the legal document that actually governs the program is created. When governments enter into formal agreements with one another, the authorizing statutes passed by each party dictate only the possible scope of the program. It is the negotiation between governments that supplies the particulars of the ultimate agreement, which can depart from the statute in significant ways—memorializing negotiations, making discretionary choices, adding specificity, and the like. But even where the agreement incorporates word-for-word language from a federal statute, that language invariably appears in a different context, alongside other provisions not drawn from the statute, which may provide important indicators of meaning for the federal government’s counterparty. Most importantly, because these agreements only come into force once both parties have given their consent, excluding the state’s or local government’s view of the text of the agreement denies a meaning-creating role to one of the but-for authors of the law.²⁰⁵

One would, of course, expect courts to frequently consult the statute and regulations that authorize intergovernmental agreements—on both the federal and the state or local sides—even where the court’s goal is to give effect to the

203. *Bennett v. Ky. Dep’t of Educ.*, 470 U.S. 656, 669 (1985).

204. *See, e.g., Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) (“The judicial task is to interpret the statute Congress has passed . . .”); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 688 (1979) (“The Court of Appeals quite properly devoted careful attention to this question of statutory construction.”).

205. *Cf. Curtis A. Bradley & Eric A. Posner, Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 346 (2006) (arguing that because “for most legislation the President is a necessary partner with Congress in the enactment process,” presidential signing statements can provide evidence of statutory meaning).

intent of both parties in forming the agreement itself. Agents that form intergovernmental agreements can only act within their scope of authority, so the scope of possibilities each agent is authorized to pursue is a useful input.

But in these cases, that kind of threshold analysis is absent. If the statutory text carries a particular meaning as evidenced by the standard tools for discerning congressional intent, these courts reason, that is also what any agreement it authorizes means.²⁰⁶ The inquiry these courts engage in, in other words, is unilateral, not multilateral.

Why some courts overlook the *agreement itself* as evidence of the parties' intent is not clear. In most cases, there is no indication of judges deliberately rejecting a multilateral approach. It appears more likely that the parties simply brief the case as one about federal statutory interpretation, and the courts fail to recognize that something more complicated might be going on. These cases, in other words, may be causalities of one of the central pathologies this Article suggests: because we lack a conceptual framework for identifying the distinctive character of intergovernmental agreements, courts ignore their text without being any the wiser.

2. *Federal Statutory Canons that Incorporate Some State Interests*

The most limited tactic that the Supreme Court has used to incorporate the intent of the counterparties into intergovernmental agreements occupies the domain of *federal* statutory construction but uses canons of construction that only moderately gesture at generic state interests. The Supreme Court took this approach in *Pennhurst State School & Hospital v. Halderman*, which requires Congress to impose conditions on federal funding contracts “unambiguously.”²⁰⁷ The Supreme Court explained that the unambiguity requirement stems from the multilateral nature of the agreement: “[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.”²⁰⁸ But a state cannot “voluntarily and knowingly accept[] the terms of the ‘contract’” if it “is unaware of the conditions or is unable to ascertain what is expected of it.”²⁰⁹ Despite language that evokes the subjective understanding of the state or local counterparties — “know,” “unaware,” “ascertain” — the *Pennhurst* rule is typically under-

206. See, e.g., *Alexander*, 532 U.S. at 286 (“Statutory intent . . . is determinative.”).

207. 451 U.S. 1, 17 (1981).

208. *Id.*

209. *Id.*

stood as a *federal* tool of statutory construction requiring Congress to state conditions clearly, not an interdiction for courts to consider whether state decision-makers actually believed the terms were ambiguous or what they thought the terms meant.²¹⁰ It does not meaningfully invite the states to articulate their understanding of the program or even remotely approximate the range of interpretive tools that contract law uses to discern joint meaning.²¹¹ *Pennhurst* ambiguity is only a proxy, and a relatively weak one, for a hypothetical state's inability to have understood the conditions imposed upon it.

The *Pennhurst* rule does not have to be read so thinly. Twenty-five years after *Pennhurst*, the Supreme Court hinted that it wanted to push the rule toward a more robust application that could accommodate a deeper investigation into the intent of the state or local counterparty. *Arlington County School District Board of Education v. Murphy* concerned whether individuals who successfully sued school districts for accommodations under the Individuals with Disabilities in Education Act could recover litigation costs under the statute's fee-shifting provision.²¹² Justice Alito, writing for the Court, explained that the "key" to the analysis "is not what a majority of the Members of both Houses intend but what the States are clearly told regarding the conditions that go along with the acceptance of those funds."²¹³ And to understand what the states are "clearly told," he elaborated, the terms must be "view[ed] . . . from the perspective of a state official who is engaged in the process of deciding whether the State should accept [the relevant] funds and the obligations that go with those funds."²¹⁴ But *Arlington* would not afford the Court an opportunity to model what investigating the mind of a "state official" might look like. The Court was content to invoke the state's perspective only as extra ammunition for disregarding the interpretive aid of legislative history, to which the Court assumed a state decision-maker would not

210. See, e.g., *Henrietta D. v. Bloomberg*, 331 F.3d 261, 284-85 (2d Cir. 2003) (citing cases applying the "*Pennhurst* clear statement rule"); *United States ex rel. Long v. SCS Bus. & Tech. Inst., Inc.*, 173 F.3d 870, 888 n.21 (D.C. Cir. 1999) (describing the "clear statement rule of *Pennhurst State School and Hospital v. Halderman*").

211. See, e.g., RESTATEMENT (SECOND) CONTRACTS § 202 (AM. LAW INST. 1981) (noting that contracts should be interpreted in "light of all the circumstances" and the "principal purpose of the parties," consistent with "any relevant course of performance, course of dealing or usage of trade," and consistent with "any course of performance accepted or acquiesced in").

212. 548 U.S. 291 (2006).

213. *Id.* at 304.

214. *Id.* at 296.

have had access.²¹⁵ A more robust application of the *Arlington* rule could be operationalized in a range of ways, from considering the circumstances of the negotiations, to the course of dealings, to the disclosed understandings of the parties. Indeed, courts have put at least some of these approaches to use in the intergovernmental context, as I discuss below.²¹⁶

3. Contract-Statute Hybrids

The Supreme Court has elaborated two ways of giving effect to the intent of *both* contracting parties, but these cases are infrequently cited. The first such case reflects an effort to integrate contractual and statutory canons of construction. *Bennett v. Kentucky Department of Education* concerned Title I of the Elementary and Secondary Education Act of 1965, which authorizes the Secretary of Education to enter into funding agreements with states to support disadvantaged students subject to certain conditions.²¹⁷ Among the conditions is the requirement that Title I funds be additive; they cannot “supplant” existing state or local funding.²¹⁸ Kentucky had used Title I funds to offer “readiness classes” in lieu of standard first- and second-grade courses; in *Bennett*, the Department of Education had tried to recoup these funds, arguing that the state was engaged in impermissible supplanting.²¹⁹

Before the Supreme Court, Kentucky argued that the agreement should be construed as a contract.²²⁰ To that end, amicus briefs submitted by a group of states and advocacy organizations urged that the agreement be interpreted using the ordinary contract canon of *contra proferentem*: ambiguities are construed against the drafter (in this case, the Department).²²¹ The federal government,

215. *Id.* at 304. The assumption that state officials do not have access to legislative history may not be warranted. State officials routinely participate in the federal legislative and regulatory processes. See, e.g., *New York v. United States*, 505 U.S. 144, 181 (1992) (describing the lobbying and testimony of state officials during the enactment of the Low-Level Radioactive Waste Policy Act).

216. See discussion *infra* Section III.A.5.

217. 470 U.S. 656 (1985).

218. *Id.* at 658.

219. *Id.* at 660–61.

220. Brief for the Respondent at 24–27, *Bennett*, 470 U.S. 656 (No. 83-1798), 1984 WL 565692, at *24–27.

221. See Brief Amicus Curiae of the National Association of Counties et al. at 25, *Bennett*, 470 U.S. 656 (No. 83-1798), 1984 WL 565696, at *25 (“The Department can hardly argue that grant conditions may be retroactively changed or clarified only in the Department’s favor. Sauce and geese aside, when a federal grant is ‘viewed as a contract,’ it must be construed against its

by contrast, urged the Court to adhere to the standard canons of statutory interpretation, including the *Chevron* canon, which would defer to the agency's reasonable interpretation of the supplanting requirement.

Setting aside *Pennhurst* because “[t]here was no ambiguity” that funds were conditioned on a state's commitment not to supplant, the Court proceeded to arbitrate the battle of the canons. “[W]e do not believe,” it said, “that ambiguities . . . should invariably be resolved against the Federal Government as the drafter of the grant agreement.”²²² But, referring to the canon of agency deference articulated in *Chevron*, the Court was also “reluctant to conclude that the States guaranteed that their performance under the grant agreements would satisfy whatever interpretation of the terms might later be adopted by the Secretary, so long as that interpretation is not ‘arbitrary, capricious, or manifestly contrary to [Title I].’”²²³

Bennett represents one of the more thoughtful attempts to grapple with the tensions that arise when courts are called on to interpret multilateral agreements. The “hybrid” nature of these agreements, in the Court's view, required the reconciliation of contract-law doctrine and the canons of statutory construction—and so required the Court to refrain from applying the strongest interpretive rules set out in each. Although the Court agreed with Kentucky that “Title I grant agreements had a contractual aspect,” it cautioned against viewing those agreements “in the same manner as a bilateral contract governing a discrete transaction.”²²⁴ The Court offered two reasons why. First, “[u]nlike normal contractual undertakings, federal grant programs originate in and remain governed by statutory provisions expressing the judgment of Congress concerning desirable public policy.”²²⁵ Second, given the ongoing administrative character of the program governed by the agreement, “the Federal Government simply could not

writer. This principle has been applied to contracts involving the federal government for more than a century.”); Brief Amici Curiae of the States of Texas et al. at 12-14, *Bennett*, 470 U.S. 656 (No. 83-1798), 1984 WL 565699, at *12-14 (arguing that the “rule of *contra preferent[e]m* could hardly find more suitable lodging” where, as here, the federal government's own studies indicate that “the failure of Title I's legal framework to provide clear guidance has in some cases led to State practices that *may* not be in compliance” (citing H.R. REP. NO. 95-1137, at 41 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4971, 5011)).

222. *Bennett*, 470 U.S. at 669.

223. *Id.* at 670 (alteration in original) (citing *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)).

224. *Id.* at 669.

225. *Id.*

prospectively resolve every possible ambiguity concerning particular applications of the requirements of Title I” and must rely to some extent on “grant recipients . . . to seek clarification of the program requirements.”²²⁶

Still this reasoning is unsatisfying. It does not meaningfully clarify the ways these agreements are contractual, nor does it canvas the full set of ways they are not. And using these reasons simply to cancel out statutory and contractual canons seems like a blunt approach. But if courts and scholars were to take the doctrine that applies to intergovernmental agreements as a coherent body of law, *Bennett* could be one of its (starting) cornerstones. The case represents a good-faith, if not highly sophisticated, attempt to reconcile the competing considerations that attend treating these agreements as public in character and private in form. Since *Bennett* was decided in 1985, however, it has been cited only a handful of times each year, nowhere near the number of times that courts must construe intergovernmental agreements.²²⁷

4. *Contracts Without Adversarial Intent*

The *Bennett* approach is not the only strategy the Supreme Court has used to consider the intent of both parties to intergovernmental agreements. In another almost-never-cited case decided nearly 175 years ago, the Court made a novel attempt to grapple with the public nature of these contract-like agreements.

The 1845 case *Searight v. Stokes* was the first in a series of cases involving the Cumberland Road contracts, in which the legislatures of Ohio, Pennsylvania, Maryland, and Virginia offered to maintain the then-federal road if the federal government ceded control, and ultimately the underlying land, to each state.²²⁸ The contract between Pennsylvania and Congress—enacted as a Pennsylvania law offering to take over the road and then reenacted by Congress in an Act “accepting” Pennsylvania’s offer—allowed Pennsylvania to impose tolls on the road to fund its upkeep but provided “[t]hat no toll shall be received or collected for

226. *Id.*

227. According to a Westlaw search for citing references conducted on May 3, 2019, it has been cited eighty-nine times in federal court since 1985, including seven times by the Supreme Court, and five times in state court. *Bennett* has been discussed in some detail in one of the hidden spigots of federalism doctrine: the Court of Claims, which hears most contract disputes with the federal government. See, e.g., *Town of Fallsburg v. United States*, 22 Ct. Cl. 633, 641 (1991) (applying *Bennett*’s “hybrid” framework to grants under the Clean Water Act).

228. 44 U.S. (3 How.) 151 (1845). For background on the Cumberland Road contracts, see *supra* text accompanying notes 97–102.

the passage of any wagon or carriage laden with the property of the United States.”²²⁹

In 1836, Pennsylvania resolved to increase its toll revenues by trying to eke a profit out of some of the contractors who carried the United States mail. Using a standard safety precaution at the time, the contractors operated dual-use carriages, which transported both mail and private passengers.²³⁰ Pennsylvania decided to impose a half-rate toll on those carriages, reasoning that the private passengers would have been subjected to tolls had they been traveling in coaches without mail. When the contractors refused to pay, the state sued and the case made its way to the Supreme Court. The question was whether the toll exemption for coaches “laden with the property of the United States” meant laden *only* with such property or encompassed dual-use carriages as well.²³¹

The Court quickly concluded that the agreement was a contract, then turned its attention to its meaning.²³² The Court stated that, “in interpreting these contracts, the character of the parties, the relation in which they stand to one another, and the objects they evidently had in view, must all be considered.”²³³ The Court concluded that standard contractual rules – rooted in a model of *adversarial* bargaining – would dishonor the unique relationship between two domestic governments. The passage deserves quotation at length:

[W]e should hardly carry out their true meaning and intention if we treated the contract as one between individuals, bargaining with each other with adverse interests, and should apply to it the same strict and technical rules of construction that are appropriate to cases of that description. This, on the contrary, is a contract between two governments deeply concerned in the welfare of each other; whose dearest interests and happiness are closely and inseparably bound up together, and where an injury to one cannot fail to be felt by the other. Pennsylvania, most undoubtedly, was anxious to give to the general government every aid

229. *Id.* at 164-65.

230. See *Neil, Moore & Co. v. Ohio*, 44 U.S. (3 How.) 720, 741 (1845) (noting that “the postmaster-general, in his contracts [related to the Cumberland Road], uniformly required that the mail should be carried in a stage or coach capable of accommodating a certain number of passengers, the presence of the passengers being regarded as adding to the safety of the mail, and superseding the necessity of any other guard”); see also *Searight*, 44 U.S. (3 How.) at 158 (“Unless passengers were to go in the coaches, there would have to be a guard; but they are the best guard.”).

231. *Neil, Moore & Co.*, 44 U.S. (3 How.) at 741.

232. *Searight*, 44 U.S. (3 How.) at 166.

233. *Id.* at 167.

and facility in its power, consistent with justice to its own citizens, and the government of the United States was actuated by a like spirit.²³⁴

Put another way, our domestic governments are repeat players in an *integrated* project of governance, not discrete players in *separated* ones.²³⁵ What each government does inevitably impacts the other, and both parties know this.

5. *Contract-Construction Rules*

There is one final strategy that courts use to construe intergovernmental agreements. Outside of high-profile statutory cases, courts sometimes take the path of least resistance and apply purely contract rules for discovering mutual intent.²³⁶ The recent Fifth Circuit case *University of Texas System v. United States* exemplifies this approach.²³⁷ The University of Texas sued the federal government to recover Social Security taxes that it had paid on the salaries of medical residents who performed services in university hospitals. The terms and conditions of Social Security coverage for state employees are governed by contracts between each state and the Social Security Commissioner,²³⁸ and Texas's agreement exempted "students" from Social Security coverage. The University of Texas argued that its medical residents were "students," and so exempt from Social Security taxes. The United States argued that they were not, citing the Social

234. *Id.*

235. *See id.* at 167–68. Applied to the dispute before it, the Court pointed out that it was "well known to the parties" that "the only value of this road to the general government worth considering" was the "daily and necessary use of the road by the United States . . . as a post-road, forming an almost indispensable link in the chain of communication from the seat of government to its western borders." *Id.*

236. *See, e.g.,* Tarrant Reg'l Water Dist. v. Herrmann, 569 U.S. 614, 628 (2013) ("Interstate compacts are construed as contracts under the principles of contract law." (citing *Texas v. New Mexico*, 482 U.S. 124, 128 (1987))); *United States v. Onslow Cty. Bd. of Educ.*, 728 F.2d 628, 634 (4th Cir. 1984) ("Before us, then, is a familiar problem in contract interpretation of trying to discern the intent of the parties at the time the contract was made . . ."); *United States v. Cty. Sch. Bd.*, 221 F. Supp. 93, 100 (E.D. Va. 1963) ("We are bound to adhere to . . . the authentic expression of the intention of the parties." (quoting *Carter v. Carter*, 121 S.E.2d 482, 485 (Va. 1961))).

237. 759 F.3d 437 (5th Cir. 2014).

238. *Id.* at 441 ("The applicable statutory text, Texas's § 418 agreement and the case law indicate that Texas's § 418 agreement is contractual in nature."). So-called "Section 418 agreements" are named after the relevant section of the Social Security Act. *See Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 55 (1986) (discussing the contractual nature of these agreements).

Security Administration's "longstanding position, as expressed in two [administrative] rulings" that "medical residents are not students."²³⁹

Explaining that its job was to "giv[e] effect to the intent of the parties," the Fifth Circuit declined to accept the Social Security Administration's own understanding as dispositive. The court instead asked whether the Administration had "clearly disclosed its understanding" about medical residents when the student exemption "was added to Texas's § 418 agreement in 1999."²⁴⁰ The court concluded that it had, citing the Administration's advocacy in support of that position in high-profile litigation in 1998 and its subsequent rearticulation of that position in the Federal Register just before the parties had amended the Texas agreement to add the "student" exemption. Turning to Texas's understanding, the court noted that the University failed to "point to any evidence that Texas understood the student exclusion to carry a different meaning . . . at the time the agreement was amended" and failed to "disclose any such contrary meaning" to the Social Security Administration if it did have one.²⁴¹ Thus, because "it is hornbook contract law that the well-disclosed meaning of the SSA governs as opposed to any undisclosed meaning that Texas might have held," the court held in favor of the Social Security Administration.²⁴²

* * *

This Section charted five strategies for construing intergovernmental agreements, but there are many more variations on these themes. Each deserves future analysis. But it is also worth dwelling on the deep differences these cases reveal about how the Supreme Court understands what intergovernmental agreements are. *Pennhurst* sees them as federal statutes, which must be construed to accommodate certain generic state interests. *Bennett* suggests that they may be hybrids between statutes and contracts, which should be construed with both their contractual and statutory features in mind. *Searight* has no trouble calling them contracts proper but adjusts the construction rules to accommodate the public nature of their subject matter. And cases like *University of Texas System* (albeit not at the Supreme Court) view them as fairly standard contracts. The task, then, is not just to consider how to read intergovernmental agreements but to ask what kind of legal device they are.

239. Brief for Appellee at 17, *Univ. of Tex. Sys.*, 759 F.3d 437 (No. 13-50739), 2013 WL 6824025, at *17.

240. *Univ. of Tex. Sys.*, 759 F.3d at 444.

241. *Id.*

242. *Id.* at 444-45.

B. *Third-Party Beneficiaries*

As I describe above, courts have adopted a variety of approaches to answer the thorny questions that arise from the interpretation of intergovernmental agreements. The same is true of the questions that arise from the *enforcement* of those agreements—specifically, the vexing question of whether and under what circumstances such agreements can be enforced by the people who must live under the legal rules they establish.

Courts have understandably approached this issue through the lens of whether citizens can enforce those agreements as “third-party beneficiaries.” The private law of contracts differentiates between the *promisee* and *promisor*—the classic contractual parties who make the promises that produce legal obligations—and *third-party beneficiaries*, “third person[s] who will benefit from performance” but do not themselves participate in the contractual promise.²⁴³ Mere beneficiaries are ordinarily strangers to the contract. An instrument owner’s promise to rent his Stradivarius to Yo-Yo Ma for a local performance will certainly create many concert-going beneficiaries, but if the Strad’s owner reneges, the audience (though harmed) will not have contractual recourse to enforce this promise. But since the pathmarking 1859 New York Court of Appeals case *Lawrence v. Fox*, American common-law courts have increasingly permitted certain third-party beneficiaries to enforce contracts under certain circumstances.²⁴⁴ The general rule is that the parties’ intended beneficiaries may enforce contracts, but mere incidental beneficiaries may not. In the Second Restatement, a beneficiary is intended if allowing her to enforce someone else’s promise would “effectuate the intention of the parties,” and “the circumstances indicate that the promisee intends to give [her] the benefit of the promised performance.”²⁴⁵

It is easy to see why third-party beneficiary doctrine would be a tempting analogy for courts trying to decide whether citizens can obtain judicial enforcement of intergovernmental agreements. It raises a familiar type of question—whether a private cause of action exists to enforce the agreement—while also reflecting an intuition that how we answer that question may differ in the context of intergovernmental agreements. But even though the rule is frequently invoked, courts have generally failed to grapple with the more profound questions that arise when citizens attempt to enforce the law that is produced by multiple domestic governments acting together. In this Section, I first provide a brief chronological overview of the large set of cases in the last fifty years that have

243. RESTATEMENT (SECOND) OF CONTRACTS § 2 cmt. g (AM. LAW. INST. 1981).

244. 20 N.Y. 268 (1859).

245. RESTATEMENT (SECOND) OF CONTRACTS § 302 (AM. LAW. INST. 1981).

invoked third-party beneficiary doctrine in the context of multilateral agreements. I then identify several of the deeper questions that the use of this doctrine raises in this context.

1. *Cases and Doctrines*

In the first set of cases calling on the private third-party beneficiary rule, courts reached for the relatively uncomplicated intuition that when intergovernmental agreements establish rights for private citizens, those citizens' status as beneficiaries entitles them to enforce those contracts in courts. Litigation in the immediate aftermath of the Civil Rights Act of 1964 gave that intuition expression. Title VI of the Act prohibited discrimination on the basis of race in all federally funded programs.²⁴⁶ In *Lemon v. Bossier Parish School Board*, African American schoolchildren sued their school board for failing to provide integrated schooling in violation of the Fourteenth Amendment, grant agreements for school construction prohibiting discrimination against students residing on federal military bases, and Title VI nondiscrimination agreements.²⁴⁷ In a brisk single sentence affirming their standing to bring the Title VI claim, the district court cited the third-party beneficiary provisions of the Louisiana Civil Code and a contract-law treatise to hold that the school board and superintendent "by their contractual assurances" to refrain from discriminating "have afforded rights to these federal children as third-party beneficiaries concerning the availability of public schools."²⁴⁸ The district court's conclusion was affirmed by a prominent panel of the Fifth Circuit, which included Judge Minor Wisdom and then-Judge Warren Burger sitting by designation from the D.C. Circuit.²⁴⁹ One notable aspect of the case is simply how effortless the "third-party beneficiary" analysis was.

The years that followed saw a flurry of cases in which courts let the beneficiaries of intergovernmental agreements sue in other areas as well. In 1971, in *City of Inglewood v. City of Los Angeles*, the Ninth Circuit found that the City of Inglewood had standing as a third-party beneficiary of commitments that the City of Los Angeles made in a grant agreement with the Federal Aviation Administration to ensure the "welfare of persons living close by airports."²⁵⁰ As a

246. 42 U.S.C. § 2000d (2018).

247. 240 F. Supp. 709 (W.D. La. 1965), *aff'd*, 370 F.2d 847 (5th Cir. 1967).

248. *Lemon*, 240 F. Supp. at 713 (footnote omitted).

249. *Lemon v. Bossier Par. Sch. Bd.*, 370 F.2d at 849, 852 (5th Cir. 1967).

250. 451 F.2d 948, 955 (9th Cir. 1971). As the Court in *Inglewood* noted, there had been several earlier attempts to challenge FAA regulations by purported third-party beneficiaries, but those

neighboring area, the court found that “Inglewood must certainly be included within the category of intended beneficiaries of those assurances,” especially in light of the minimal stake Los Angeles and the federal government, as the parties to the contract, had in those assurances.²⁵¹ The same year, the D.C. Circuit agreed that a group of D.C. public-housing tenants could enforce as third-party beneficiaries the “Annual Contributions Contract” – the agreement by which the Department of Housing and Urban Development (HUD) funds the National Capital Housing Authority, D.C.’s public-housing agency.²⁵² That contract required the Authority to provide housing that was “decent, safe, and sanitary” and maintained “in good repair, order, and condition.”²⁵³ The concurring judge was skeptical that Congress intended to allow tenants to obtain judicial review of the underlying statute and regulations proper.²⁵⁴ But he saw no issue allowing the tenants’ *contract* claim to proceed under a third-party beneficiary theory, explaining that that claim stood “on a different footing” because it presented the kind of contractual “issues traditionally resolved by the courts,” rather than the administrative review issues that were, at the time, less well entrenched.²⁵⁵

Indeed, the D.C. Circuit would later affirm, even more forcefully, the proposition that tenants could sue to enforce an Annual Contribution Contract as third-party beneficiaries. In *Ashton v. Pierce*,²⁵⁶ a group of tenants sued to enforce lead-based paint restrictions in federal housing law and the Annual Contribution Contract between HUD and the District’s housing authority.²⁵⁷ The court reacted with incredulity to HUD’s attempt to deny that the contract benefited the tenants, finding it “difficult to imagine any purpose for the Contract other than

cases involved challenges by corporations who stood to benefit from the contracts, not from citizens. See, e.g., *Port of N.Y. Auth. v. E. Air Lines, Inc.*, 259 F. Supp. 745 (E.D.N.Y. 1966); *City of San Francisco v. W. Air Lines, Inc.*, 22 Cal. Rptr. 216 (Dist. Ct. App. 1962).

251. *Inglewood*, 451 F.2d at 956. The court went on: “It is not to Los Angeles’s benefit to be required to give the Secretary those assurances; nor are the assurances of any independent benefit to the Secretary. The Secretary merely receives them for the benefit of, and in the place of, the surrounding communities and residents of the area.” *Id.*

252. *Knox Hill Tenant Council v. Washington*, 448 F.2d 1045, 1057 (D.C. Cir. 1971).

253. *Id.*

254. *Id.* at 1066 (MacKinnon, J., concurring).

255. *Id.*

256. 716 F.2d 56 (D.C. Cir. 1983).

257. The requirements stemmed from the Lead Based Paint Poisoning Prevention Act, as amended, Pub. L. No. 93-151, § 302, 87 Stat. 565, 566 (1973) (codified at 63 U.S.C. § 4822 (2018)), and regulations enacted pursuant to it, 24 C.F.R. § 35.24(b)(3)(i) (2019).

to benefit the tenants of public housing.”²⁵⁸ It then distinguished away a boilerplate provision of the agreement specifying that “[n]othing in this contract contained shall be construed as creating or justifying any claim against the Government by any third party.”²⁵⁹ The court assumed without deciding that “the parties can contract away the third-party beneficiary’s right to enforce the contract,” but held, at a minimum, that “the intention to do so” with respect to the citizens at the center of the program, “must be more clearly expressed” than it was in that provision.²⁶⁰

In the 1974 case *Lau v. Nichols*, the Supreme Court permitted a group of schoolchildren to bring suit as beneficiaries of Title VI contracts between the federal government and the San Francisco Unified School District with little fanfare.²⁶¹ Their status as contract beneficiaries was mentioned just once, with Justice Stewart in concurrence explaining that “respondents do not contest the standing of the petitioners to sue as beneficiaries of the federal funding contract between the Department of Health, Education, and Welfare and the San Francisco Unified School District.”²⁶²

It is thus no surprise that by 1977, a unanimous Supreme Court in *Miree v. DeKalb County* would accept that contracts between governments can vest enforcement rights in third-party beneficiaries where the appropriate contract rules are satisfied.²⁶³ In *Miree*, survivors of a plane that crashed on takeoff from a Georgia airport sued DeKalb County, Georgia, for breaching an agreement the

258. *Ashton*, 716 F.2d at 66.

259. *Id.*

260. *Id.* A Seventh Circuit case concerning a third-party beneficiary challenge to a HUD contract with a *private* housing developer echoed the *Ashton* court’s understanding of the purpose of federal housing programs. HUD had argued that the primary purpose of the contracts was not to benefit low-income families but to “benefit financially troubled HUD-insured projects.” *Holbrook v. Pitt*, 643 F.2d 1261, 1271 (7th Cir. 1981). The court found this assertion to “display[] an astonishing lack of perspective about government social welfare programs. If the tenants are not the primary beneficiaries of a program designed to provide housing assistance payments to low income families, the legitimacy of the multi-billion dollar Section 8 program is placed in grave doubt.” *Id.*

261. 414 U.S. 563 (1974). In subsequent decades, as the third-party beneficiary analysis began to dovetail (and eventually merge) with the inquiry into whether a private right of action exists, *Lau*’s substantive analysis would be called into question and, in part, overruled. See *Alexander v. Sandoval*, 532 U.S. 275, 285 (2001).

262. *Lau*, 414 U.S. at 571 n.2 (Stewart, J., concurring).

263. 433 U.S. 25 (1977).

County made with the federal government under the Airport and Airway Development Act of 1970.²⁶⁴ In exchange for airport-development funds from the Federal Aviation Administration, the County had agreed to protect “aerial approaches to the airport” by preventing and mitigating various hazards.²⁶⁵ The suit alleged that the County breached that commitment by maintaining a garbage dump next to the airport, which attracted birds and, in turn, caused the plane crash. The question before the Court was not *whether* intergovernmental agreements could create enforcement rights in third parties; that was assumed. The question was *which* third-party-beneficiary rules – federal or state – should apply.²⁶⁶ The Court held that state law was appropriate because, notwithstanding the federal government’s participation in the contract, the “resolution of petitioners’ breach-of-contract claim against [DeKalb County] will have no direct effect upon the United States or its Treasury.”²⁶⁷

What is significant about *Miree* is its apparent acceptance of the proposition that the rights to enforce an intergovernmental agreement can stem from the agreement itself, rather than the state and federal statutes that authorized it. The question in *Miree* was not whether the Airport and Airway Development Act of 1970 created a private cause of action for plaintiffs to enforce rights expressed in the statute. It was whether the FAA–DeKalb County agreement created a contractual cause of action for plaintiffs to enforce rights articulated in the funding agreement.

That proposition would be extended in *Miree*’s immediate aftermath but would ultimately lose its firm footing, if indirectly, in the subsequent decade. Two years after *Miree* was decided, for instance, the Second Circuit relied on it in *Owens v. Hass* to allow a federal offender held in a Nassau County jail to sue the County as a third-party beneficiary of a contract, in which the County agreed to house certain federal prisoners in its system.²⁶⁸ The federal statute authorizing the Bureau of Prisons to contract with state and local jails for those purposes did not have an express private cause of action and the court held that one could not be implied.²⁶⁹ But seizing on *Miree*’s proposition that intergovernmental agreements can create enforcement rights not present in the federal or state laws that authorize those agreement, the court then held that the inmate *could* enforce the

264. Pub. L. No. 91-258, § 18(3), 84 Stat. 219, 229 (1970).

265. Brief of Petitioner on the Merits, *Miree v. Dekalb County*, 433 U.S. 25 (1977) (No. 76-722), 1977 WL 189812, at *5.

266. *Miree*, 433 U.S. at 27.

267. *Id.* at 29.

268. 601 F.2d 1242, 1248 (2d Cir. 1979).

269. *Id.*; see 18 U.S.C. § 4002 (2018).

agreement “not specifically through an implied right of action under [the federal statute], but under general principles of contract law as they relate to this particular contract.”²⁷⁰ Noting that the contract included “numerous clauses which provide for the safekeeping and protection of federal prisoners,” it concluded that such prisoners are intended third-party beneficiaries of those clauses.²⁷¹ Cases like this one led to a general sense of optimism among academic observers that third-party-beneficiary rights could be used to expand the remedies available to the civil-rights claimants and recipients of public benefits—many of which, as discussed in Part I, are facilitated through intergovernmental agreement.²⁷²

But the central analytical proposition in *Miree* and *Owens*—that the rules negotiated in intergovernmental agreements can create third-party enforcement rights, which are separate from those expressed or implied in statutes—did not receive further attention from the Court. The question soon faded from the Court’s radar, eclipsed by a broader effort to narrow the private enforcement of federal statutes.²⁷³ However, the Court did continue to confront, if confusedly, a question at one step of remove.

In several cases, the beneficiaries of programs implemented through intergovernmental agreements argued that the Court should analogize them to third-party beneficiaries when deciding whether the *federal statute* that authorized the program contained a private implied cause of action or created a right “secured

270. *Owens*, 601 F.2d at 1249.

271. *Id.*

272. See, e.g., Anthony Jon Waters, *The Property in the Promise: A Study of the Third Party Beneficiary Rule*, 98 Harv. L. Rev. 1109, 1175 (1985) (“[B]ecause of the frequency with which the government employs contracts as instruments of federal policy, the third party beneficiary rule has begun to play an increasingly important role on the fringes of public law.”); *id.* at 1176 (“[C]laimants are increasingly using the third-party beneficiary rule as an alternative to an implied private right of action claim.”); see also Arthur R. Block, *Enforcement of Title VI Compliance Agreements by Third Party Beneficiaries*, 18 HARV. C.R.-C.L. L. REV. 1 (1983); Kenneth J. Foster, *Public Housing Tenants As Third-Party Beneficiaries: Considering Ayala v. Boston Housing Authority*, 27 NEW ENG. L. REV. 85, 98 (1992); Robert S. Adelson, Note, *Third Party Beneficiary and Implied Right of Action Analysis: The Fiction of One Governmental Intent*, 94 YALE L.J. 875 (1985).

273. For an overview of these efforts, see STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION 217 (2017) (“The Court’s posture toward private enforcement underwent a transformation from highly supportive in the early 1970s to antagonistic today.”); SARAH STASZAK, NO DAY IN COURT: ACCESS TO JUSTICE AND THE POLITICS OF JUDICIAL RETRENCHMENT (2015); Samuel R. Bagenstos, *Who Is Responsible for the Stealth Assault on Civil Rights?*, 114 MICH. L. REV. 893, 895 (2016); and Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 197-98 (2003) (reviewing doctrinal developments).

by the . . . laws” of the United States sufficient to trigger a cause of action under 42 U.S.C. § 1983. In those cases, in other words, third-party beneficiary reasoning entered the picture as a mere analogy to understand the scope of the federal statute, not as a framework for understanding the scope of, or rights created by, the subsequent intergovernmental agreement.²⁷⁴ That’s significant because, as the *Owens* court identified, federal statutes sometimes authorize agencies to enter into contracts with states or cities at such a broad level of generality that the text of the federal statute itself would almost certainly be insufficient to imply a private right of action. But the rules contained in the subsequent negotiated agreements can be substantially more precise – precise enough to vest enforcement powers in third-party beneficiaries under ordinary contract doctrine.

In the end, the Court’s use of third-party-beneficiary analogies in the federal statutory context has left the current state of the law deeply confused.²⁷⁵ What is clear is that the Court’s muddle cut short an emerging investigation into the deeper jurisprudential questions about the enforcement of intergovernmental agreements. Notwithstanding the Supreme Court’s failure to confront these issues directly, the lower federal courts and state courts continue to entertain third-party-beneficiary claims.²⁷⁶ The doctrine thus remains tangled and important questions remain unanswered.

274. The Court’s effort to grapple with that question has also been uneven. Compare *Blessing v. Freestone*, 520 U.S. 329, 349–50 (1997) (Scalia, J., concurring) (using the concept of contractual enforcement by “third-party beneficiaries” as an analogy to assess whether Title IV–D of the Social Security Act, which authorizes federal grants to assist states in obtaining child support payments, secures a “right” for purposes of a cause of action under § 1983), with *Barnes v. Gorman*, 536 U.S. 181, 186–87 (2002) (majority opinion of Scalia, J.) (characterizing individuals who exercise an implied right of action under Title VI funding contracts as akin to third-party beneficiaries, noting that “a recipient may be held liable to third-party beneficiaries for intentional conduct that violates the clear terms of the relevant statute”).

275. In its most recent attempt, the Court failed altogether to indicate whether it was using third-party-beneficiary analysis *analogically* to understand the scope of an implied statutory cause of action or *literally* to understand the scope of a contractual enforcement right stemming from the intergovernmental agreement itself. See *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 332 (2015) (explaining that the “notion that [plaintiffs] have a right to sue [under “the Medicaid Act”] derives, perhaps, from the fact that they are beneficiaries of the federal-state Medicaid agreement, and that intended beneficiaries, in modern times at least, can sue to enforce the obligations of private contracting parties” but going on to note that “[m]ore fundamentally, however, the modern jurisprudence permitting intended beneficiaries to sue does not generally apply to contracts between a private party and the government—much less to contracts between two governments”).

276. See, e.g., *Montana v. United States*, 124 F.3d 1269 (Fed. Cir. 1997); *Branson Sch. Dist. RE-82 v. Romer*, 958 F. Supp. 1501, 1516 (D. Colo. 1997), *aff’d*, 161 F.3d 619 (10th Cir. 1998); *Campbell v. Bos. Hous. Auth.*, 823 N.E.2d 363 (Mass. 2005); *Ayala v. Bos. Hous. Auth.*, 536 N.E.2d 1082 (Mass. 1989).

2. *Deeper Questions*

Are members of the public “strangers” to the contract? Third-party-beneficiary doctrine relies on the assumption that the would-be beneficiary is an outsider to the contract. But applying the straightforward principal-agent framework that grounds theories of representative government, a governmental promisee acts *on behalf* of its constituents, conceivably making those constituents real parties in interest, not strangers, to the agreements made by their agent-governments. Against that background, the very invocation of third-party-beneficiary doctrine could demean the status of constituent-beneficiaries by assuming that they begin as strangers rather than as primary parties to an intergovernmental agreement. On the other hand, third-party-beneficiary doctrine could help draw boundaries around the constituents who have a sufficiently strong interest in the contract to step into the government’s shoes and enforce it in court. As the early third-party-beneficiary cases suggest, enforcement rights are easier to find with respect to the class of individuals who directly benefit from a program, an inquiry not dissimilar from the “zone of interest” test for finding standing under a statutory cause of action.²⁷⁷

Do enforcement rights stem from the agreement itself or from an underlying statute? The cases culminating in *Miree* suggest that enforcement rights stem from the contract itself, not the underlying statute. For instance, in *Owens*, the Nassau County prison contract case, the contract itself contained substantially more detail than the federal statute authorizing it. The statute reads like a general grant of negotiating power: “For the purpose of providing suitable quarters for the safekeeping, care, and subsistence of all persons held under authority of any enactment of Congress, the Attorney General may contract . . . for the imprisonment, subsistence, care, and proper employment of such persons.”²⁷⁸ The resulting contract is one where the parties agreed to specific rules and standards for sanitation, safety, corporal punishment, and disciplinary action.²⁷⁹ In a sense, of

277. *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014) (“[W]e presume that a statutory cause of action extends only to plaintiffs whose interests ‘fall within the zone of interests protected by the law invoked.’” (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984))); *cf.* *Cort v. Ash*, 422 U.S. 66, 78 (1975) (articulating a now-abandoned test for finding implied statutory rights of action where, inter alia, the plaintiff is “one of the class for whose especial benefit the statute was enacted” (internal quotation marks omitted)).

278. 18 U.S.C. § 4002 (2018).

279. *See Owens v. Haas*, 601 F.2d 1242, 1250 n.9 (2d Cir. 1979).

course, these contracts “originate in and remain governed by statutory provisions.”²⁸⁰ But they are also subject to additional lawmaking process: the negotiation process and the ultimate meeting of the minds. And what *Miree* suggests is that those processes are what yield the “law” from which third-party-beneficiary status derives.

If third-party rights do stem from the agreement, whose intent determines third-party-beneficiary status? The intent of the contracting parties is the touchstone of the common-law third-party-beneficiary inquiry. In ordinary contract disputes, some third-party-beneficiary cases consider the intention of both parties. Others consider only the intention of the promisee. If that party intends that its promise will benefit a third party, that is sufficient. Still others “take a middle position,” asking whether the promisee intended to benefit third parties and “whether the promisor knew or had reason to know of the promisee’s intention.”²⁸¹ The same set of options is available in the intergovernmental agreement-making context at a general level, but gets even more complicated in the granular detail. In addition to deciding which party’s intentions matter, courts must also decide who represents each party for purposes of forming such intent. Should they consult the acts of Congress and state legislatures? Or is the kind of contracting intent required for this inquiry the proper province of the administrative agents who overwhelmingly negotiate these agreements? And these questions only beget more. For instance, can an agency operating under the kind of general delegation of power described in the prison case include a contractual provision disclaiming third-party-beneficiary rights?²⁸²

If third-party rights stem from the contract itself, what body of law determines whether a claimant qualifies as a third-party beneficiary? Many courts have asked whether federal or state third-party-beneficiary rules should apply to intergovernmental agreements and have given a range of answers.²⁸³ *Miree* applied state common law, citing the standard rule for determining whether federal common

280. *Bennett v. Ky. Dep’t of Educ.*, 470 U.S. 656, 669 (1985).

281. BRIAN H. BIX, *CONTRACT LAW: RULES, THEORY, AND CONTEXT* 111 (2012).

282. *Compare Ayala v. Bos. Hous. Auth.*, 536 N.E.2d 1082, 1088-90 (Mass. 1989) (applying Massachusetts common law to hold that tenants in public housing are “third-party beneficiaries of [the Annual Contributions Contract]” between the Federal Department of Housing and Urban Development and the Boston Housing Authority), *with Barnes v. Metro. Hous. Assistance Program*, 679 N.E.2d 545, 547 & 547 n.3 (Mass. 1997) (finding that tenants were not third-party beneficiaries of annual contribution contract because, in contrast to the contracts in *Ayala*, these contracts had “clauses explicitly excluding . . . liability to third parties”).

283. *See, e.g., Miree v. DeKalb County*, 433 U.S. 25, 26 (1977) (applying state law); *Holbrook v. Pitt*, 643 F.2d 1261, 1270 n.16 (7th Cir. 1981) (applying federal common law, but noting that the resolution would be the same under Wisconsin law); *Owens*, 601 F.2d at 1250 (applying federal common law, but consulting principles of New York law).

law is appropriate in diversity actions (namely, “where a uniform national rule is necessary to further the interests of the Federal Government”) and relying on the Solicitor General’s representation that the interest in federal uniformity was minimal.²⁸⁴ At a deeper level, these discussions provide entry into a more existential set of questions about what these agreements are: whether they are creatures of federal law or state law; whether they are, and what it means to be, creatures of *both* federal and state law; and to what extent they have constitutional inflection because they configure structural constitutional powers.

Should more nuanced common-law rules for third-party beneficiaries apply to intergovernmental agreements? Common-law courts have developed several other rules for third-party beneficiaries that raise distinctive puzzles in the intergovernmental agreement-making context. For one, they have elaborated more restrictive third-party-beneficiary rules for contracts between governments and private contractors, requiring the contracting parties to articulate their intent to benefit third parties more clearly than in other contexts.²⁸⁵ Judge Cardozo explained the sensible rationale for this enhanced clarity requirement: “An intention to assume an obligation of indefinite extension to every member of the public is . . . improbable” in light of the “crushing burden that the obligation would impose.”²⁸⁶ (Think of a road maintenance contractor being subject to suit for breach of contract by any member of the public who uses the road.) In a recent case about whether health-care providers can enforce federal-state Medicaid agreements as something akin to third-party beneficiaries, Justice Scalia hinted in dicta that the same limitation might be appropriate to the intergovernmental context: “[T]he modern jurisprudence permitting intended beneficiaries to sue does not generally apply to contracts between a private party and the government—much less to contracts between two governments.”²⁸⁷ But perhaps he has it exactly backward. Whereas a road maintenance contractor should not be assumed to have undertaken the “crushing burden” of answering to all road users, unless he said so explicitly and negotiated appropriate compensation, it is much

284. *Miree*, 433 U.S. at 29–30 (citing *Clearfield Tr. Co. v. United States*, 318 U.S. 363 (1943)).

285. RESTATEMENT (SECOND) OF CONTRACTS § 313(2) (AM. LAW INST. 1981) (“[A] promisor who contracts with a government or governmental agency to do an act for or render a service to the public is not subject to contractual liability to a member of the public for consequential damages resulting from performance or failure to perform unless (a) the terms of the promise provide for such liability; or (b) the promisee is subject to liability to the member of the public for the damages and a direct action against the promisor is consistent with the terms of the contract and with the policy of the law authorizing the contract and prescribing remedies for its breach.”).

286. *H.R. Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160, 165 (1928).

287. *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 332 (2015) (internal citations omitted).

more intuitive to think that a state that agrees to implement a Medicaid program has also agreed to answer at least to its citizens who receive Medicaid. In “contracts between two governments,” in other words, public lawmaking norms may actually enhance the case for third-party enforcement rights.

Common-law third-party-beneficiary doctrine also terminates the power of the primary parties to amend their agreement “when the beneficiary . . . materially changes his position in justifiable reliance on the promise.”²⁸⁸ The rights, in other words, vest upon reliance and prevent future changes. As I discuss in the next Section, one of the unique challenges of intergovernmental agreements is how to balance their obvious purpose to bind governments to a future course of conduct with the long-standing intuition of democratic governance that one legislature should not be able to bind the next. That same issue arises here. Indeed, the Massachusetts Supreme Court has held that the Contracts Clause bars the retroactive application of amendments to the Massachusetts Tort Claims Act that interfere with a tenant’s vested rights as a third-party beneficiary of a housing contract between the Boston Housing Authority and the Department of Housing and Urban Development.²⁸⁹

C. *Unilateral Amendment*

The contours of a final puzzle are again tailored to the distinctive equities of intergovernmental agreements: whether one government can unilaterally amend an agreement into which it enters with another government, as if the agreement were an ordinary piece of legislation, or whether it must obtain its counterparty’s consent to amend, as if it were an ordinary contract.

This question lies at the intersection of two discordant ideas. The *first* is the idea, deeply rooted in our public law, that a current legislature may not bind a future legislature without infringing upon the successor’s democratic character.²⁹⁰ In contemporary scholarly discourse, this practice is called legislative entrenchment. The idea is this: if the Ninety-Second Congress entrenches a law by

²⁸⁸. RESTATEMENT (SECOND) OF CONTRACTS § 311(3) (AM. LAW INST. 1981).

²⁸⁹. *Campbell v. Bos. Hous. Auth.*, 823 N.E.2d 363, 368 (Mass. 2005).

²⁹⁰. See, e.g., *United States v. Winstar Corp.*, 518 U.S. 839, 872 (1996) (noting the “centuries-old concept that one legislature may not bind the legislative authority of its successors”); 1 WILLIAM BLACKSTONE, COMMENTARIES *90 (1765) (“Acts of parliament derogatory from the power of subsequent parliaments bind not.”); John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 CALIF. L. REV. 1773, 1775 (2003) (“[L]egislative entrenchment . . . is widely regarded as inconsistent with basic principles of democracy.”); Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 509 (1997). But see Eric A. Posner & Adrian Vermeule,

making it impossible to repeal, the Ninety-Third Congress cannot be democratically responsive to electors seeking repeal. The *second* is the purpose at the heart of a contractual enterprise. Contracts are commitment devices, designed precisely to bind a party to a course of future action. When the government is the contracting party, the tension between these two propositions is apparent. If the government could never unilaterally amend a contract, the current legislature could bind future legislatures into obsolescence. If the government could always unilaterally amend, contractual promises involving the government would always be illusory.²⁹¹

To help ease this tension in the context of contracts between the federal government and private parties, the Supreme Court has fashioned a set of default and altering rules to accommodate both interests.²⁹² The “unmistakability doctrine” provides, as a default, that the “contractual arrangements . . . to which a sovereign itself is a party, remain subject to subsequent legislation by the sovereign.”²⁹³ The default is that the government can always unilaterally amend its contracts by passing subsequent legislation. However, that default *may* be altered with some effort: the right to unilaterally amend through subsequent legislation can be “surrendered only in *unmistakable* terms.”²⁹⁴ It is what Ian Ayres has called a “sticky default”: “[a]ltering rules that artificially impede opt-out.”²⁹⁵

Intergovernmental agreements complicate this picture because there are governments on both sides, and one government’s right to unilaterally amend has consequences for the other government. Should *both* governments be able to unilaterally amend unless they unmistakably surrender that entitlement? Should neither? Should one and not the other? I want to suggest that in a pair of intergovernmental agreement cases, the Supreme Court has stumbled into some initial thinking and perhaps even worked a doctrinal shift regarding those questions.

Legislative Entrenchment: A Reappraisal, 111 YALE L.J. 1665, 1665 (2002) (arguing against “the academic literature” that “universally assum[es] that legislative entrenchment is constitutionally or normatively objectionable”).

291. RESTATEMENT (SECOND) OF CONTRACTS § 77 (AM. LAW INST. 1981) (“Words of promise which by their terms make performance entirely optional with the ‘promisor’ do not constitute a promise.”).

292. See *Winstar*, 518 U.S. at 874-78 (documenting the case-by-case evolution of the “unmistakability doctrine”).

293. *Id.* at 877 (quoting *Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 52 (1986)).

294. *Id.* at 878 (quoting *Bowen*, 477 U.S. at 52) (alterations omitted) (emphasis added).

295. Ian Ayres, *Regulating Opt-Out: An Economic Theory of Altering Rules*, 121 YALE L.J. 2032, 2045 (2012).

One is the landmark 2012 case *National Federation of Independent Business v. Sebelius* (*NFIB*), in an underappreciated part of the case’s much-analyzed Medicaid holding.²⁹⁶ But the story begins with another case, a 1986 Supreme Court decision about intergovernmental Social Security agreements, *Bowen v. Public Agencies Opposed to Social Security Entrapment*.²⁹⁷ The Social Security program, established in 1935, originally excluded state employees from its coverage.²⁹⁸ But a 1950 amendment authorized states and their political subdivisions to form voluntary agreements with the federal government to cover their employees.²⁹⁹ Both the 1950 statutory amendment and the agreements themselves allowed states to terminate their coverage for state employees with two years notice.³⁰⁰ But in 1983, however, the federal government repealed the termination provision, alarmed by an increasing rate of termination by states and localities.³⁰¹ Congress “thereby changed Social Security from a program voluntary for the States to one from which they could not escape.”³⁰² A group of California subdivisions with termination notices pending sued, arguing among other things that revoking the termination provision violated the Fifth Amendment by abridging their contractual property rights without just compensation.³⁰³ The federal government argued that a separate provision of the Social Security Act, reserving the “right to alter, amend, or repeal any provision of the Act,” precluded the states from asserting a property entitlement to the termination clause.³⁰⁴ If Congress

296. 567 U.S. 519 (2012).

297. 477 U.S. 41 (1986).

298. *Id.* at 44.

299. 42 U.S.C. § 418 (a)(1) (2018) (“The Commissioner of Social Security shall, at the request of any State, enter into an agreement with such State for the purpose of extending the insurance system established by this subchapter to services performed by individuals as employees of such State or any political subdivision thereof. Each such agreement shall contain such provisions, not inconsistent with the provisions of this section, as the State may request.”); *Bowen*, 477 U.S. at 45.

300. *Bowen*, 477 U.S. at 45. For an example of similar termination language in an agreement itself, see *Agreement Between the Federal Security Administrator and the State of Texas* 3 (Nov. 30, 1951) (“The State, upon giving at least two years’ advance notice in writing to the Administrator may terminate this agreement.”) (on file with author).

301. *Id.* at 47-48.

302. *Nat’l Fed’n of Indep. Bus. v. Sebelius* (*NFIB*), 567 U.S. 519, 640 (2012) (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (describing *Bowen*).

303. *Bowen*, 477 U.S. at 49.

304. Brief for the Appellants, *Bowen*, 477 U.S. 41 (No. 85-521), 1986 WL 728088, at *12 (alteration omitted) (quoting 42 U.S.C. § 1304 (1982)).

could unilaterally amend the agreement, the government argued, the states had no property interest in the terms of the unamended agreement.³⁰⁵

A unanimous Court agreed, invoking the unmistakability rule as support. Here, the conclusion that the federal government had *not* unmistakably ceded its authority to change the Social Security program was obvious: it had, in fact, made an affirmative effort to safeguard that authority by expressly reserving the right to alter the program.³⁰⁶ In short, although *Bowen* addressed a contract between governments, rather than a government contract with a private entity, the case did not linger on that fact. It applied the conventional unmistakability rule to the contract, seeing no reason to adjust it for the intergovernmental context.³⁰⁷

Fast forward to *NFIB* – specifically, to the plaintiffs’ challenge to the changes the ACA made to the Medicaid program. Like Social Security coverage for state employees, the Medicaid program is a federal-state initiative facilitated by detailed intergovernmental agreements. In effect, the ACA amended the Medicaid program to require states to meaningfully expand their coverage. In contract terms, it added a new condition to the states’ existing Medicaid agreements.

The Medicaid program is housed within the Social Security Act and, in defense of the amendment, the government cited the *same* provision of the Social Security Act that the Court addressed in *Bowen*, which reserves the “‘right to alter, amend, or repeal any provision’ of that statute.”³⁰⁸ If the Court were to follow *Bowen*, a straightforward application of the unmistakability rule would conclude that the federal government retained its default prerogative to change the Medicaid program by declining to unambiguously surrender it (and, indeed, by protecting it with the reservation of the right to amend).

Here, however, the Chief Justice was unwilling to give that provision the same force it had in *Bowen*. He reasoned that a broad understanding of the reservation to unilaterally amend the Medicaid agreements would run headlong into the *Pennhurst* “unambiguity rule,” which provides that “if Congress intends

305. *Id.*

306. *Bowen*, 477 U.S. at 52; *id.* at 44 (“To ensure that this important program could evolve as economic and social conditions changed, Congress expressly reserved to itself ‘the right to alter, amend, or repeal any provision of’ the Act.” (alteration omitted) (citing 42 U.S.C. § 1304 (1982))).

307. Indeed, the Supreme Court has recited *Bowen*’s statement of the unmistakability doctrine as the usual formulation of the rule for the government-private contracting context. See *United States v. Winstar Corp.*, 518 U.S. 839, 871-72 (1996).

308. Brief for Respondents (Medicaid), *NFIB*, 567 U.S. 519 (Nos. 11-393 & 11-400), 2012 WL 441267, at *39 (quoting 42 U.S.C. § 1304 (2012)).

to impose a condition on the grant of federal moneys, it must do so unambiguously.”³⁰⁹ The Chief Justice continued:

A State confronted with statutory language reserving the right to “alter” or “amend” the pertinent provisions of the Social Security Act might reasonably assume that Congress was entitled to make adjustments to the Medicaid program as it developed The Medicaid expansion, however, accomplishes a shift in kind, not merely degree A State could hardly anticipate that Congress’s reservation of the right to “alter” or “amend” the Medicaid program included the power to transform it so dramatically.³¹⁰

The same language that the *Bowen* Court saw as obviously sufficient to preserve the federal government’s sovereign authority to unilaterally amend the agreements, the Chief Justice in *NFIB* saw as insufficient to accomplish the same objective. As Justice Ginsburg argued pointedly in her partial dissent, the Chief Justice would in effect “rewrite [the reservation] to countenance only the ‘right to alter *somewhat*,’ or ‘amend, *but not too much*.”³¹¹

What accounts for the broad reading of that provision in *Bowen* but the narrow reading in *NFIB*? It is not as if the *Bowen* amendment was any more predictable than the *NFIB* one – it converted that program from a voluntary one to an involuntary one, after all. In my view, the answer is that *Bowen*’s focus was on formulating contract rules to protect the sovereign prerogatives of the *federal* government alone, but the Chief Justice’s focus was on formulating contracting rules to protect the sovereign prerogatives of its *state* counterparties. Remember that *Bowen* treated the Social Security Agreement as a conventional government contract, no different than an agreement between the federal government and any service provider. The Chief Justice, by contrast, understood (although he did not frame his analysis this way) that there are distinctively governmental interests on both sides of the Medicaid contract. Indeed, *Pennhurst*’s solicitude for states agreeing to conditions that are articulated unambiguously is not conceptually dissimilar from the principles underpinning the “unmistakability doctrine” – it just protects a different party. States, the *Pennhurst* rule seems to say, should not be understood to have surrendered sovereign prerogatives by agreeing to a particular condition unless that condition was stated so obviously that the state must have clearly – *unmistakably*, even – intended to commit to it.

309. *NFIB*, 567 U.S. at 583 (plurality portion of majority opinion) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).

310. *Id.* at 583–84.

311. *Id.* at 640 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

Although he does not invoke the unmistakability doctrine by name, placing the language infused with that doctrine from *Bowen* in the company of the *Pennhurst* unambiguity rule in effect reverses the default that *Bowen*'s unmistakability rule establishes. Under the Chief Justice's reasoning, a reservation of the right to unilaterally amend can only be countenanced if a state counterparty has "unambiguous" notice that a particular amendment is forthcoming. By default, then, the federal government *cannot* unilaterally amend intergovernmental agreements unless it unambiguously reserves that right.

As with the two puzzles discussed above, putting *Bowen* and *NFIB* into conversation is only a first step in our thinking about these issues. By viewing intergovernmental agreements as a distinct category of legal instrument, we can appreciate the disjunction between the two cases and begin to think critically about the Chief Justice's apparent suggestion that intergovernmental agreements require a revision to the rule articulated in *Bowen*.

IV. EVALUATING FEDERALISM BY CONTRACT

The practice I have described in this Article—in which governments author legal rules by entering into multilateral agreements that are, in turn, enforced by courts as contract-like instruments—alters our understanding of how American federalism works. In this Part, I begin framing the normative stakes of federalism by contract, both as a way of producing public law and as a set of relationships between governments in a federalist regime.

There is an emerging consensus that cities and states regularly intervene in policy areas that were once thought to be entirely federal, that the federal government routinely acts in areas historically the province of the local, and that the federal government is deeply reliant on the administrative capacity of states and localities to achieve federal policy objectives.³¹² This understanding challenges the Supreme Court's oft-recited view of federalism as a collection of separate sovereigns connected only in discrete and carefully managed ways. In federalism's lived experience, our many governments have organically integrated and are always shifting power and jurisdiction. They are nested within one another,

312. Bulman-Pozen, *supra* note 14, at 1933-34; Gillian E. Metzger, *The States as National Agents*, 59 ST. LOUIS U. L.J. 1071, 1071 (2015). For an example within a specific policy area, see William W. Buzbee, *Federalism Hedging, Entrenchment, and the Climate Challenge*, 2017 WIS. L. REV. 1037, 1039.

step on each other's toes, and continuously take, surrender, and exchange authority. They shape one another's institutions.³¹³ They solicit each other's help. And they bring together their separate resources and political power to achieve joint ends. None "preside[s] over" its "own empire."³¹⁴ Federalism is not a static distribution of authority between the federal government and the fifty states. Federalism is a dynamic system of layered and permeable governments that constantly negotiate how and through what complex array of institutions they will pursue the work of their constituents.

Much contemporary federalism scholarship, to that end, trains its attention on interactions between levels of government—on how our many levels of government discuss, contest, and form joint policies. The practice of federalism by contract deepens these accounts by revealing the aftermath of those largely political decisions to collaborate. This Article describes the legal *ex post* to the current literature's political *ex ante*: how a complex web of institutional politics becomes capitalized into formal legal instruments.

Thus, although my account of federalism by contract is consistent with our growing appreciation of the nuances of American federalism, it also adds new dimensions to those accounts. I cannot do justice to all of the jurisprudential and intellectual questions raised by the practice of federalism by contract, but in what follows, I briefly set out three ways in which this practice alters our understanding of American federalism and American public law.

First, federalism by contract introduces a new and pressing set of federalism questions. Many intergovernmental agreements embody legal rules that are not contained in the laws of either party-government alone. They are the one and only articulation of rules that specify the rights and benefits of citizens and how their government will fulfill them. They represent their own species of public law—a law coauthored by two or more levels of governments. This new form of law raises federalism questions both abstract and concrete. What kind of law is this, and where does it obtain its legitimacy? What processes are used to enact it, how do we access it, and how does it intermingle with our discrete sets of federal, state, and city law? How do we know when it has been violated? Who gets to enforce it? I cannot answer these questions here, but I want to marshal evidence about how intergovernmental agreements operate that can begin to frame the important questions and the work a contemporary account of federalism must do to address them.

313. See generally KAREN TANI, *STATES OF DEPENDENCY: WELFARE, RIGHTS, AND AMERICAN GOVERNANCE, 1935-1972* (2016) (charting the institutional structures created, destroyed, and remolded by the cross-governmental implementation of New Deal Programs).

314. Gerken, *supra* note 15, at 15.

Second, federalism by contract intervenes in longstanding debates about the role of the judiciary in mediating federalism disputes. Those conversations have been dominated by the political process school—the theory, influential in both scholarship and doctrine, that states can adequately represent their interests in the federal political process itself, and that courts should largely stay their hand when those disputes spill over into judicial forums. Federalism by contract challenges the process school’s dominance by introducing a form of judicial involvement in intergovernmental relations for which this school does not and cannot account. It also intervenes in the related conversation about whether our system of federalism requires judicially enforceable “rules of engagement” by reimagining the role of judges in federalism disputes and illustrating that, at least in this important context, we have many more doctrinal rules than we realize.

Finally, at the center of nearly all federalism conversations is the concept of sovereignty. In the canonical federalism cases, the conventional account is that the “Framers split the atom of sovereignty,” giving a share to the federal government and a share to the states to ensure that each is “protected from incursion by the other.”³¹⁵ But as the thrust of contemporary federalism scholarship demonstrates, there are simply no separate “sovereign” spheres to protect from incursion anymore. One option then is to abandon sovereignty as an orienting principle for American federalism, as some scholars have advocated. But others, even those who celebrate the accounts of how federalism works in practice, have been more reluctant to set aside what they see as an essential safeguard of the independent representative relationship between subfederal governments and their constituents. I argue that the Supreme Court has itself offered a middle way in its cases on intergovernmental agreements, grounded in one of the core insights of contract law: that making and keeping promises expands, rather than contracts, autonomy. So, too, for governments, making promissory agreements has the potential to expand governmental possibilities and thereby protect governing capacity, rather than undermine it through integration. The practice of federalism by contract thus offers us a conception of sovereignty for an age of integration.

A. Federalism by Contract as Public Lawmaking

Conventionally, we imagine law being created *within* each level of government. Congress authors the U.S. Code, and federal agencies promulgate the

315. *NFIB*, 567 U.S. at 643 n.26 (2012) (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995)).

Code of Federal Regulations. States craft their revised statutes. Cities enact ordinances. And familiar federalism questions interrogate what happens when federal, state, and local laws cross paths using doctrines like preemption. But what happens when federal, state, and local paths cross inside the process of lawmaking itself—when governments collaborate to coauthor legal instruments by joint action? How do we understand the law that results? What are the benefits of the new form of public law created by the practice of intergovernmental agreement-making? What are the costs? These are the pressing questions that federalism by contract poses.

They stem from the premise that intergovernmental agreements contain rules that are as much public law as any federal statute, state regulation, or city ordinance: they establish policies, set regulatory frameworks, define rights and benefits, and articulate the obligations of, and restraints on, government. While some terms of these agreements flow directly from the text of federal or state statutes, most do not. Some are negotiated by authorized officials within broad boundaries during a process with meaningful opportunity for give-and-take.³¹⁶ Some are chosen by state officials from a “menu” of federally authorized options, which counterparties can include or exclude from the agreement in their discretion.³¹⁷ Still others consist of a state’s own proposals about how it will meet a series of policy objectives, which form the basis of the state’s obligations once they are approved by the federal government. The key point is that the agreements themselves generally include substantive terms as well as contextual signals—the groupings, orderings, and organization that assist in legal construction—that have not been proscribed by only one lawmaking body, but are the product of a multigovernmental-lawmaking practice.³¹⁸

This feature makes intergovernmental agreements, to say the least, an unusual species of public law. These agreements are unlike any other type of public law in that they are created not via *unilateral* procedures of legislative enactment or administrative promulgation but through a *multilateral* process of intergovernmental agreement-making. They gain their legal force through two governments’ mutual acceptance of negotiated obligations, rather than the more familiar and linear lawmaking processes of individual governments alone. And they produce a form of public law that looks little like the Schoolhouse Rock model—and, in many cases, can be found in none of the usual compilations of statutory

316. See, e.g., Ryan, *supra* note 15, at 24-69 (documenting the negotiations that precede a range of these programs).

317. See *supra* note 48 (describing the Medicaid program).

318. The blending of federal and state influences on legal rules has a long lineage, as historians of federalism have documented. See, e.g., TANI, *supra* note 313. But these instruments blend federal and state law in a distinct way.

and administrative rules. But they are nonetheless the law. A resident of Charleston who wants to know when and under what circumstances a Charleston police officer may enforce federal immigration law must consult Charleston's contract with ICE to learn the answer.³¹⁹

Needless to say, federalism by contract raises important questions about the nature of the law it produces. In what follows, I sketch just a few of the thorniest ones.

1. *Procedural Legitimacy*

It is a truism that laws gain their legitimacy, at least in part, from the structures that produce them. William Eskridge and the late Phil Frickey have attributed the continued relevance of the legal process school, which has dominated our understanding of American public law since the midcentury, to our "procedurally complex" and "interacting institutions" of government.³²⁰ The practices I have described in this paper further complicate that picture. Who should participate in the process of intergovernmental agreement-making, and exercising what kind of authority? What rules should govern the negotiations? When discretionary decisions must be made, what factors should enter into the decision? Whose decision is it to bind a federal, state, or city government—and the people those governments serve—to a contract with the status of law?³²¹

There are many concrete implications of this gap in understanding. To take one example, intergovernmental agreements today are (on the federal side) almost exclusively entered into by administrative agencies and so are within the scope of the procedural frameworks that govern the administrative process. A core procedural obligation that helps lend legitimacy to administrative rules is the Administrative Procedure Act (APA)'s requirement that rules be issued pur-

319. *E.g.*, Memorandum of Agreement Between Immigration and Customs Enforcement and the Charleston Cty. Sheriff's Office 2, 17-19 (June 23, 2016) (on file with author).

320. William N. Eskridge, Jr. & Philip P. Frickey, Commentary, *The Making of The Legal Process*, 107 HARV. L. REV. 2031, 2053 (1994).

321. Erin Ryan has uncovered many different forms of bargaining between the states and federal government—some that precede intergovernmental agreement-making and some that are directed toward other ends such as the content of unilateral state or federal laws. See Ryan, *supra* note 15, 24-73. Honing in on how intergovernmental agreements are created in particular and mapping their procedures, actors, influencers, norms, and the like, will be an important future step in our understanding of the coauthored law embedded in intergovernmental agreements.

suant to notice-and-comment rulemaking processes, which subject many administrative actions to a process of disclosure and public commentary.³²² But the APA exempts any “matter relating to . . . grants . . . or contracts” from its notice-and-comment rules.³²³ Absent a change in the governing law, this exemption appears to countenance the complete and total exclusion of policies made through intergovernmental “contract” from procedural rules that would otherwise apply to solely federal actions that do the same thing.³²⁴

To take another, it is a basic premise of public law that citizens should know what the law requires of them and to what it entitles them. To that end, federal, state, and local laws are codified—federal statutes in the U.S. Code, state statutes in state codes, federal and state regulations in the Federal Register and state equivalents, and so on. But intergovernmental agreements are not subject to any rules that ensure ease of access or access at all. Some are posted publicly on the websites of federal agencies. Others are published in the state regulatory compilation or made available on state websites.³²⁵ But many are not.³²⁶ There certainly exists no rule requiring that intergovernmental agreements be made available, and no general repository for such agreements at any level of government, hindering those they impact from learning of their content. Indeed, many such agreements are kept confidential. For instance, contracts between the Attorney General and states to house federal prisoners in state prisons or state prisoners in federal prisons are not normally made public. Nor are many agreements facilitating intergovernmental policing task forces.³²⁷ This lack of transparency both

322. 5 U.S.C. § 553 (2018). See, e.g., Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 546 (2003); John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 904 (2004) (describing the “familiar” claim that notice-and-comment procedures legitimate agency action).

323. 5 U.S.C. § 553(a)(2) (2018).

324. Some evidence suggests that those exceptions were intended to place “proprietary” governmental actions under the control of a vast web of government contracting rules rather than the APA, a logic not applicable to intergovernmental agreements that make public law of broad applicability. See *Nat’l Wildlife Fed’n v. Snow*, 561 F.2d 227, 231–32 (D.C. Cir. 1976).

325. A small number of federal statutes require that “state plans” be published in the state’s equivalent of the Federal Register or the like before being submitted. Fahey, *supra* note 9, at 1578.

326. Pennsylvania’s Medicaid state plan, for instance, is “not available online and the files are too large to email.” *Medicaid State Plan*, PA. DEP’T HUM. SERVS., <http://www.dhs.pa.gov/publications/medicaidstateplan/index.htm> [<https://perma.cc/L3WN-4E55>]. A citizen interested in obtaining a copy may write to the state agency, enclosing a check or money order for three dollars, and obtain a CD-ROM with an electronic copy of the plan. *Id.*

327. Susan N. Herman, *Collapsing Spheres: Joint Terrorism Task Forces, Federalism, and the War on Terror*, 41 WILLAMETTE L. REV. 941, 951 (2005) (“The terms governing each of these cooperative ventures are set forth in a Memorandum of Understanding [MOU] between the locality and the FBI, the terms of which are often kept secret from the public.”); *id.* at 968 (“[T]he

withholds legal rules from public (and lawyerly) consciousness and stunts our understanding of the legal forms these agreements take. Can such a fundamental lack of transparency be justified in light of the public character of these agreements? Can such agreements be understood as legitimate sources of public law if they are not available to the public?

2. *The Rule of Law*

However we characterize intergovernmental agreements, it seems clear that they must be assimilated in some way into our broader web of federal, state, and local laws. But they fit uneasily into this already dense tapestry. Indeed, there is a risk that these agreements will be used not to stitch together the details of policy programs but to evade legal constraints that would otherwise apply to one level of government or another.

To take a seemingly workaday example, there is at least some evidence that federal agencies are beginning to use intergovernmental agreements to evade not just the notice-and-comment requirements I describe above but also the federal procurement laws that would ordinarily govern contracts between agencies and private entities. A recent report from DHS's Office of the Inspector General concluded that DHS had improperly used an intergovernmental agreement with a city to circumvent procurement rules when obtaining space to house federal immigration detainees.³²⁸ Federal law authorizes DHS to house detainees in facilities run by private contractors *or* in facilities run by cities or states using what are called "intergovernmental service agreements," or IGSA's.³²⁹ The ordinary federal procurement statutes, which require, among other things, that agencies seek proposals and entertain bids from multiple prospective contractors, do not apply to such agreements. As the report explains, however, DHS in 2017 determined to leverage its existing IGSA with the city of Eloy, Arizona, to enter into a contract with a private company for detention space in Dilley, Texas — a contract that would (and should) have been subject to procurement rules, but for Eloy's preexisting relationship with the private contractor.³³⁰ Eloy was nothing more

fact that so many MOU's are not public and so contracts between the federal government and individual local governments cannot be compared means that there is little possibility of collective action having an impact.").

328. OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., *OIG-18-53, IMMIGRATION AND CUSTOMS ENFORCEMENT DID NOT FOLLOW FEDERAL PROCUREMENT GUIDELINES WHEN CONTRACTING FOR DETENTION SERVICES* (Feb. 21, 2018), <https://www.oig.dhs.gov/sites/default/files/assets/2018-02/OIG-18-53-Feb18.pdf> [<https://perma.cc/UL6M-DP52>].

329. See 8 U.S.C. § 1103(a)(11) (2018).

330. See OFFICE OF INSPECTOR GEN., *supra* note 328, at 3-5.

than a “middleman”,³³¹ it had no involvement in formulating the terms of DHS’s arrangement with the Dilley facility and was involved only to offer a repository for those terms within its intergovernmental agreement. ICE did not hide its purpose, telling investigators that “IGSAs offered them much greater flexibility than a traditional procurement agreement.”³³² ICE was exploiting the exception to procurement rules for agreements between governments to circumvent the usual controls that apply to its negotiations with private contractors.

Intergovernmental agreements may also aid federal, state, and local entities in skirting state and local regulations. Various aspects of policing are facilitated by intergovernmental agreement.³³³ And at least some of those intergovernmental agreements illustrate the ways in which federal, state, and local governments have attempted to contract around state and local laws. Take the high-profile example of asset forfeiture.³³⁴ Many states limit the share of forfeited property that a state or local police department may retain, generally in order to curb the incentive for such a department to engage in asset forfeiture in order to increase its operating budget.³³⁵ But when joint federal-state task forces engage in asset forfeiture pursuant to intergovernmental agreements, as scholars have documented, the terms of those agreements generally permit the state agencies to retain a higher share of the seized assets – as much as eighty percent of the proceeds.³³⁶

To similar effect, the City of San Francisco debated restructuring its participation in the FBI-led Joint Terrorism Task Force after a coalition of organizations

331. *Id.* at 4.

332. *Id.* at 5. ICE’s own lawyers had warned that using intergovernmental agreements in this way instead of “available procurement tools” was “not legally advisable.” *Id.* at 4. This kind of circumvention is not new. In its *Principles of Federal Appropriations Law*, the General Accounting Office foretold precisely this tactic: because “procurement contracts are subject to a variety of statutory and regulatory requirements which may not be generally applicable to assistance transactions . . . assistance arrangements could be used to evade otherwise applicable legal requirements.” 2 GEN. ACCOUNTING OFFICE, OFFICE OF GEN. COUNSEL, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 10-13 (2d ed. 1992). But it also recognized that “legitimate assistance awards should not be burdened by all of the formalities of procurement contracts.” *Id.*

333. See, e.g., sources cited *infra* notes 337-340.

334. Adam Liptak & Shaila Dewan, *Supreme Court Limits Police Powers to Seize Private Property*, N.Y. TIMES (Feb. 20, 2019), <https://www.nytimes.com/2019/02/20/us/politics/civil-asset-forfeiture-supreme-court.html> [<https://perma.cc/WHB9-J5FM>] (noting that asset forfeiture “has been the subject of widespread criticism across the political spectrum” and that “a significant portion comes from joint operations with federal law enforcement”).

335. See Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War’s Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 52 (1998).

336. *Id.*

expressed alarm over a task force agreement's inconsistency with local policing standards.³³⁷ The concerns stemmed from language in a 2007 agreement requiring city police officers participating in the task force to conduct "[a]ll operations . . . in conformance with FBI policy."³³⁸ After FOIA requests revealed that the FBI had conducted generalized intelligence gathering at San Francisco mosques, observers worried that "federal guidelines are significantly looser than the city's 'reasonable suspicion' requirement," which would have prohibited those intelligence efforts unless law enforcement had "an articulable basis for suspecting criminal activity."³³⁹ Those fears spurred a campaign to revise San Francisco city law to explicitly require officers to follow city rules and subject "any Memorandum of Understanding or other written agreement or arrangement" between the San Francisco Police Department and the FBI related to the Task Force "for discussion and public comment."³⁴⁰ Although the campaign succeeded in the city council, which passed the proposed changes, it was ultimately vetoed by the Mayor.³⁴¹

Such episodes raise serious questions about how intergovernmental agreements fit into our system of law. As the Eloy example reveals, some questions arise from the differential treatment (by some sources of law) of intergovernmental contracts and "ordinary" procurement contracts. Is such differential treatment merited? If there are salient differences, do they stem from the nature of the counterparty (public or private) or the nature of the "contract"? As the policing examples suggest, some questions about the relationship between intergovernmental agreements and other laws arise because our ordinary sources of law do not speak to intergovernmental agreements *at all*.

337. See Michael German & Emily Hockett, *San Francisco Sets an Example of How to Resist Surveillance in Trump Era*, BRENNAN CTR. FOR JUST. (Mar. 27, 2017), <https://www.brennancenter.org/blog/san-francisco-sets-example-how-resist-surveillance-trump-era> [https://perma.cc/9QYN-WUSE].

338. Standard Memorandum of Understanding Between the Federal Bureau of Investigation and the San Francisco Police Department § V.B.3 (Mar. 1, 2007), <https://www.brennancenter.org/sites/default/files/analysis/SFPD%20MOU-JTTF.pdf> [https://perma.cc/F2QS-M9LQ].

339. German & Hockett, *supra* note 337; Maria L. La Ganga, *FBI Documents Reveal Profiling of N. California Muslims*, L.A. TIMES (Mar. 28, 2012), <https://www.latimes.com/local/la-xpm-2012-mar-28-la-me-fbi-california-mosques-20120328-story.html> [https://perma.cc/3CS7-6NUB].

340. S.F., Cal., Ordinance No. 120046, Establish Policy Regarding Participation in Federal Counterterrorism Activities (Jan. 9, 2012), <https://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/committees/materials/ps120046tdr.pdf> [https://perma.cc/B2M9-CPSB].

341. *Administrative Code — Establish Policy Regarding Participation in Federal Counterterrorism Activities*, S.F. BOARD SUPERVISORS (2012), <https://sfgov.legistar.com/LegislationDetail.aspx?ID=1045933&GUID=C73F779D-57E5-48F3-B63A-05BCA281F50F&Options=ID%7CText%7C&Search=120046> [https://perma.cc/G4GU-R5SN].

3. *Legal Character*

Finally, how courts treat these agreements raises questions about their legal character, questions not readily answered by the case law. By and large, the body of interpretive rules that courts have applied to these agreements is a kind of freestanding contract law reflecting a mix of federal and state common-law rules, sometimes inflected with constitutional concepts but just as often not explicitly billed as constitutional law, and adjusted in ad hoc and reflexive ways to accommodate the oddities of the governmental counterparties. There is nothing inherently problematic about the mixing of public and private law. But as Part III illustrates, rules developed over centuries of private transactions in goods and services may not optimally allocate among governments the right to exercise coercive force against citizens or define the content of individual rights and benefits.

Even if intergovernmental agreements are understood to share key characteristics with private contracts, from what source do we derive the rules used to interpret them? Courts considering these agreements have often drawn on the rules set out in classic treatises and the Restatement of Contracts. But the Restatement expressly disclaims any intent to apply “when a governmental agency is a party to a contract,” much less when *both* counterparties are governments.³⁴² And the use of such sources appears to rest on a degree of underlying uncertainty about whether the law that governs these contracts is state contract law, federal common law, or something else entirely. Even if judges must simply derive the law that governs intergovernmental agreements, where should they look? What methods and principles should tell us how to evaluate potential analogues for their appropriateness?

And what is the role of the Constitution in all of this? Each governmental party to an intergovernmental contract must, of course, act within its own authority when entering into that contract. But what about the rules that govern the practices of agreement-making itself? We know that some of them – such as the anticoercion rule – have constitutional inflection. But do all of them? Some federalism scholars have set aside the project of looking for federalism rules-of-the-road in our Constitution. Federalism’s lived experience is just too complex, and the issues attending it too divergent from times past, to find clear directives at the ready. The doctrine of intergovernmental contracting, at least viewed on a *rule-by-rule* level, can only affirm that view. It is hard to fathom a court of claims

342. RESTATEMENT (SECOND) OF CONTRACTS 2 (AM. LAW. INST. 1981); *see also* *Kansas v. Nebraska*, 574 U.S. 445, 475 (2015) (Scalia, J., concurring in part and dissenting in part) (arguing that “modern Restatements . . . are of questionable value, and must be used with caution”).

judge combing our constitutional blueprint for guidance on when the parole evidence rule applies to intergovernmental agreements. And it is harder still to imagine that judge finding anything terribly helpful if she does. But as we start to think about intergovernmental agreements as a set, we can look for backgrounding constitutional principles—whether states possess “sovereignty” and what form that sovereignty might take, for instance—which could play a role across the doctrines for intergovernmental agreements. Likewise, theories of constitutional meaning that rely, at least in part, on the evolution of institutional and judicial practice over time will find a rich corpus of iterations and adaptations to plumb for potential federalism rules and principles.

B. The Judicial Role and “Rules of Engagement”

Intergovernmental agreements also cast judicial involvement in federalism disputes in a new light. Scholars have long clashed about the competency of judges to mediate intergovernmental disagreements and enforce federalism values. Federalism by contract reframes those debates by introducing them to a new body of judicially crafted rules and a new kind of judicial role.

1. Reframing the Judicial Role

In 1954, Herbert Wechsler urged the courts to stay out of federalism clashes altogether, arguing that state interests are adequately safeguarded by the structure of our federalist system, including in their ability to advocate for themselves in the federal political process.³⁴³ The Supreme Court adopted Wechsler’s “process” school by name in the 1984 case *Garcia v. San Antonio Metropolitan Transit Authority*, concluding that “the structure of the Federal Government itself” protected “the interests of the States” and judges were largely ill-equipped to intervene in intergovernmental disputes.³⁴⁴ Several years later, it added the proviso that courts must ensure that the political process *itself* allows states to advocate their interests by requiring Congress to make its intention to upset the “usual constitutional balance between the States and the Federal Government” “unmistakably clear.”³⁴⁵ The process school has occupied a central place in federalism conversations since.

343. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

344. 469 U.S. 528, 551 (1985); see also *id.* at 551 n.11 (citing Wechsler, *supra* note 343).

345. *Gregory v. Ashcroft*, 501 U.S. 452, 460, 464 (1991) (describing the plain-statement rule).

Federalism by contract complicates those conversations. Most basically, it provides descriptive evidence that the process school has not been as widely accepted by courts as we might think. As interpreters and enforcers of intergovernmental agreements, judges are playing a forceful role in mediating American federalism. It also reveals a mode of federal-state interaction, one that invites a different kind of judicial role. The classic example animating debates over the process school is a federal rule that *directly* regulates a traditional area of state authority, forcing the state to yield to the federal government.³⁴⁶ The question is whether a court should intervene to shield the state from federal intervention or stay its hand and assume that the states could have secured a less intrusive policy in the federal political process if they had wanted to.

The role of the courts in resolving disputes that arise under intergovernmental agreements is wholly different. Whereas the process debates ask whether judges should enforce fixed allocations of *substantive* authority between the states and federal government, federalism by contract asks judges to ensure *procedural* regularity in consensual, negotiated domains. At a minimum, then, the process school should take account of the significant variations in what judges are called upon to do. Courts could stay out of disputes about what authorities the Constitution commits to each level of government but take an active role in ensuring fair negotiations and enforcing commitments made by all parties.

Indeed, some scholars have advocated precisely for judicial rules to manage our evolving practices of intergovernmental interaction. Robert Schapiro called for federalism “rules of engagement” over fifteen years ago and has been echoed many times since.³⁴⁷ Gerken, who has urged a new “intellectual frame” for American federalism that views our levels of government in “relational terms,”³⁴⁸ has called the lack of “rules of engagement” a “pronounced weakness” of the scholars advocating for a nationalist school of federalism.³⁴⁹ And Erin Ryan has argued

346. *Garcia*, 469 U.S. at 551.

347. Schapiro, *supra* note 17, at 285; *see, e.g.*, Gluck, *supra* note 15, at 550. In the Spending Clause context, Samuel Bagenstos has a different formulation of what is essentially the same idea, calling these rules “indirect limitations” on Congress’s spending power. Bagenstos, *Spending Clause Litigation*, *supra* note 8, at 384.

348. Heather K. Gerken, *Federalism 3.0*, 105 CALIF. L. REV. 1695, 1696, 1706 (2017).

349. Gerken, *supra* note 14, at 1916 (“[I]dentifying ‘rules of engagement’” may be “the most pronounced weakness of th[e] [new nationalist] school” of federalism).

specifically for the benefits of judicial oversight of intergovernmental bargaining.³⁵⁰

But despite the growing chorus favoring their development, efforts to suggest rules of engagement have been either overwhelmed by the enormity of the task or, as in the case of the Supreme Court, unaware they are engaged in the task at all.³⁵¹ Federalism by contract suggests that we *already have* rules of engagement for at least one significant form of intergovernmental interaction. But it also suggests that some of our stagnation may be methodological. Perhaps rather than imagining rules for complex and rapidly evolving intergovernmental interaction from the top down, we can mine an iterative common-law-style doctrine for normative principles from the bottom up.

2. *Improving the “Rules of Engagement” We Already Have*

This Article has focused on the rules of engagement for intergovernmental agreement-making as they stand now, but each rule deserves careful attention to determine whether the contract principle is suitable without adjustment, suitable with adjustment, or not suitable at all to American federalism and the production of public law.³⁵² So, too, must rules be adjusted to different types of intergovernmental agreements, in much the same way that contract law accommodates contextual variation.

When we evaluate these rules of engagement going forward, courts and scholars could draw on a broader range of analogic frames. Many other bodies of law navigate relationships between political institutions and could help courts sharpen their understanding of how domestic governments ought to coordinate their activities.

350. Ryan, *supra* note 15, at 115 (“Just as parties to a contract bargain more efficiently when secure in the knowledge that fair bargaining norms are protected by contract law, so too will federalism bargaining parties negotiate more productively when secure that the process must be consistent with constitutional and fairness norms.”).

351. Even when the Court announces rules that look like rules of engagement—I have previously argued that the anticommandeering and anticoercion rules play that role—it explains them using the kind of rhetoric that tends to deny that real engagement is occurring. And where it announces the rules discussed in this paper, it rarely calls them federalism rules at all. See Fahey, *supra* note 9, at 1582–83 (arguing that the anticommandeering rule *is* a rule of engagement); see also Hills, *supra* note 8, at 872 (arguing that the anticommandeering rule stimulates intergovernmental negotiation); Huq, *supra* note 15, at 1635–36 (same).

352. Many scholars have already tackled that kind of analysis for the high-profile Spending Clause rules that have roots in contract law. See sources cited *supra* note 8.

Treaty law is an obvious potential analogue for understanding intergovernmental agreements.³⁵³ But the law that applies to treaties is not a monolith. Many different judicial bodies, both international and domestic, interpret and enforce treaties. And treaties, like intergovernmental agreements, are an evolving form of legal instrument that reproduce some of the same puzzles that I have described here. Commenting on the Supreme Court's interpretation of treaties, David Bederman has attributed the "confusion over essential principles in treaty interpretation" to uncertainty over "whether international agreements are more like contracts than legislation, or whether they are something altogether *sui generis*."³⁵⁴ Treaty law, thus, does not represent a wholesale alternative to contract law. It is itself a hybrid body of law that confronts the same hard questions as intergovernmental agreements.

The law of intergovernmental agreements would thus be aided by a form of intellectual dialogue with the evolving law of treaties. To take just one example, it is notable that the 1969 Vienna Convention on the Law of Treaties, the treaty that elaborates the basic rules of treaty-making, prohibits unilateral amendments, contrary to the *Bowen* Court's rule for intergovernmental agreements.³⁵⁵ A nation may breach, but it cannot unilaterally amend the treaty to make its breach lawful. Nor can it force its counterparty to comply with a text it did not sign. Beyond the benefits of a rule-by-rule comparison, the law of federalism by contract would be served, in the least, by a domestic variant on the Vienna Convention prescribing, by consent, the rules that ought to apply to intergovernmental agreements.³⁵⁶

353. See, e.g., *supra* Section IV.A. The treaty analogy has played an at least atmospheric role in understanding the Compacts Clause. Although the Supreme Court applies "the principles of contract law" to interstate compacts, *Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. 614, 628 (2013), it has noted that the Clause "adapts to our Union of sovereign States the age-old treaty-making power of independent sovereign nations," *Dyer v. Sims*, 341 U.S. 22, 31 (1951). Likewise, in an apparent homage to treaty law, the Supreme Court in some intergovernmental agreement cases has referred to the governmental parties as "high contracting parties," the usual way of styling signatories to treaties between nation-states. E.g., *Neil, Moore & Co. v. Ohio*, 44 U.S. (3 How.) 720, 742 (1845). But neither of those invocations of treaty law appears to be doing real analytical work.

354. David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. REV. 953, 963 (1994); see also *id.* at 964 ("[T]he confusion in the American doctrine of treaty interpretation arises from uncertainty about the place of treaties within the matrix of American public law.").

355. See *supra* Section III.C.; see also Vienna Convention on the Law of Treaties arts. 39-40, May 23, 1969, 1980 U.N.T.S. 331.

356. See Vienna Convention on the Law of Treaties, *supra* note 355.

Future analysis of intergovernmental agreements should also draw lessons from the other domestic legal instruments that sit at the boundary between contract and public law. Although they exist within state legal structures that vary substantially, horizontal agreements among cities—to jointly supply public goods and conduct cooperative projects—are worth setting beside the intergovernmental agreements discussed here.³⁵⁷ At the federal level, as Jody Freeman and Jim Rossi have shown, federal agencies use a wide variety of “Memorandums of Understanding” (MOU) to coordinate their activities in “shared regulatory space.”³⁵⁸ These MOUs “resemble contracts” in some ways, but “are generally unenforceable and unreviewable by courts.”³⁵⁹ Collective-bargaining agreements between unions and employers likewise have both contractual and public law elements. Cynthia Estlund has noted that they have “long been understood as a well-developed form of private ordering through contract” but are also “ensconced within an elaborate public law framework.”³⁶⁰ The same dual characteristics are present in consent decrees, or negotiated settlements between parties to a lawsuit, often used by the federal government to reform patterns of illegal behavior by states and localities. As the Supreme Court has pointed out, “[c]onsent decrees . . . have attributes both of contracts and of judicial decrees or . . . administrative orders. While they are arrived at by negotiation between the parties and often admit no violation of law, they are motivated by threatened or pending litigation and must be approved by the court or administrative agency.”³⁶¹ And plea bargains too “rest on contractual principles . . . [y]et, the analysis of the plea agreement must be conducted at a more stringent level than in a commercial contract because the rights involved are generally fundamental and constitutionally based.”³⁶²

357. See generally Gillette, *supra* note 1 (describing interlocal agreements within states).

358. Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1136 (2012).

359. *Id.* at 1161.

360. Cynthia Estlund, *Something Old, Something New: Governing the Workplace by Contract Again*, 28 COMP. LAB. L. & POL'Y J. 351, 364-65 (2007). For a concrete example, see Aditi Bagchi, Note, *Unions and the Duty of Good Faith in Employment Contracts*, 112 YALE L.J. 1881, 1899 (2003) (arguing that governmental regulation of collective bargaining changes how the duty of good faith protects collective bargaining agreements relative to ordinary contracts).

361. *United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 236 (1975); see *id.* at 233 (discussing whether courts construing consent decrees can consult the underlying statute or must hew to the “four corners” of the agreement).

362. *United States v. Ringling*, 988 F.2d 504, 506 (4th Cir. 1993); see *Puckett v. United States*, 556 U.S. 129, 137 (2009) (“Although the analogy may not hold in all respects, plea bargains are essentially contracts.”).

Federal Indian law also offers an important point of entry into thinking about domestic intergovernmental interaction.³⁶³ Federal, state, and local relations with Native Nations have become increasingly characterized by contract-like instruments. And although the federal government has a long history of breaching treaties with Native governments, Maggie Blackhawk has suggested that the contemporary practice of “[t]ribal governments deal[ing] directly with state and federal governments through compacts and agreements” can be a source of power for Native Nations.³⁶⁴ Indeed, an ongoing dispute in the Supreme Court over whether a significant portion of eastern Oklahoma, which is currently under the state’s jurisdiction, is an “Indian reservation” under the control of the Creek Nation, has included significant debate about whether recognizing so sweeping a change in jurisdiction would be too practically disruptive. The proponents of such recognition have argued that the ubiquitous practice of agreement-making between cities, states, and Native Nations in Oklahoma should mitigate concerns about major disruption, pointing to the 654 compacts between the Oklahoma and tribal governments that already navigate jurisdictional overlap in the state.³⁶⁵ The present and past of intergovernmental agreement-making in America cannot be fully understood without reference to this history and its present outgrowths.

Setting aside the question whether contract-inspired principles are an appropriate model for intergovernmental relations, the cases formulating those rules spot issue after issue that any set of rules of engagement would need to address. And a better understanding of why contract law has proven such an accessible starting point for judges to think about what are exquisitely complex legal problems can only improve the formulation of broader rules of engagement.

C. *Sovereignty for an Age of Integration*

Even scholars who have embraced the “modern day reality” of “nation and state acting together, cheek by jowl” have puzzled over what to do with the fix-

363. Judith Resnik has made important contributions in this respect. *E.g.*, Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671 (1989); Judith Resnik, *Multiple Sovereignties: Indian Tribes, States, and the Federal Government*, 79 JUDICATURE 118, 118-19 (1995). Maggie Blackhawk has continued that work. *See* Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787 (2019).

364. Blackhawk, *supra* note 363, at 1862.

365. Brief of Respondent at 57, *Sharp v. Murphy*, No. 17-1107 (U.S. Sep. 19, 2018).

tures of traditional federalism, especially the idea that our nonfederal governments possess something like “sovereignty,” which is worthy of judicial protection.³⁶⁶

Some have argued that a federalism characterized by integration is incompatible with sovereignty. Noting that efforts to safeguard a conventional understanding of “dual sovereigns confined to their own regulatory empires” are a futile struggle against the tides of integration, Gerken has advocated a federalism “sheared of sovereignty.”³⁶⁷ By contrast, Gillian Metzger has embraced the modern accounts of federalism’s interdependence but suggested that states are able to play a valued role *within* our integrated federalist system “because, critically, they are formally independent levels of government: they have distinct electoral bases and a claim to representative legitimacy.”³⁶⁸ As I have likewise argued, certain “attributes of state governance must be protected in order for the states to continue serving” their “nationalist functions.”³⁶⁹ Whether sovereignty, or any part of it, is compatible with such a federalism turns, of course, on what sovereignty consists of.

In some of the cases I document in this Article, the Supreme Court has described attributes of something it calls “sovereignty” that are not just compatible with integration but enhanced by it. This is a way of thinking about sovereignty that is rooted in the insight that forming agreements *expands* rather than *contracts* freedom. As Charles Fried explains in his canonical *Contract As Promise*, “In order that I be as free as possible, that my will have the greatest possible range consistent with the similar will of others, it is necessary that there be a way in which I may commit myself.”³⁷⁰ Just as contract law embodies a form of interpersonal integration that is not only compatible with but reinforces the freedom of the parties, so too can the law of intergovernmental agreements suggest a form of

366. Metzger, *supra* note 312, at 1071-72.

367. Gerken, *supra* note 348, at 1698, 1714.

368. Metzger, *supra* note 312, at 1071-72; Rodríguez, *supra* note 14, at 2127 (“The clearer value of federalism from the popular point of view stems precisely from its creation of multiple electorates . . .”); see also *Printz v. United States*, 521 U.S. 898, 920 (1997) (calling ours “a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it” (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring))). Honing in on specific dynamics, David Schleicher has argued that too much interdependency in state and federal voting behaviors—so-called “second-order elections”—have yielded democratic deficits. See David Schleicher, *Federalism and State Democracy*, 95 TEX. L. REV. 763, 763 (2017).

369. Fahey, *supra* note 9, at 1571.

370. CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 13 (2d ed. 2015).

governmental integration compatible with the freedom of each constitutive governmental unit. And just as the freedom to contract cannot exist in an unregulated space, neither should the freedom of governments to form agreements. But it is the rules that supervise this space of integration, not the rules that prevent it, that safeguard this form of governmental autonomy.

My goal here is not to give a full-throated defense of this alternative conception of “sovereignty,” or even to embrace the Court’s characterization of this idea as “sovereignty” proper. My more modest goal is to show that there is nothing inherently contradictory—at least for the Court—about having a deeply integrated federalist regime on the one hand, and protecting certain autonomous entitlements for cities and states on the other.

The Supreme Court’s idea of “sovereignty” for an age of integration was developed most robustly in a series of cases upholding New Deal programs against federalism challenges rooted in the conventional notions of sovereignty. President Roosevelt wanted the first national unemployment insurance program, enacted as part of the Social Security Act of 1935, to achieve a “maximum of cooperation between States and the federal government.”³⁷¹ Under the program, the federal government imposed an unemployment tax on most employers, but if a state enacted its own tax, and agreed to forward the taxes collected under its program to the federal government for distribution, employers in that state could credit the amount paid in state taxes against their federal payments. In a pair of cases, two companies sued the state of Alabama, arguing that by participating in the program, the state had ceded sovereign “governmental functions which they are not permitted to surrender.”³⁷² Rejecting this argument, the Court emphasized that the states had not been forced to participate, but had joined voluntarily. And the ability to pursue projects of voluntary collaboration, the Supreme Court explained, is not only compatible with sovereignty, but an element of it.

The Court’s language is worth pausing on. The “power to contract,” the Court explained, is an “attribute[] of state sovereignty” and is “not lost by [its] exercise.”³⁷³ Contracting, the Court explained, allows states to “assent[] to conditions that will assure a fair and just requital for benefits received.”³⁷⁴ Thus,

371. MARTHA DERTHICK, *KEEPING THE COMPOUND REPUBLIC: ESSAYS ON FEDERALISM* 125 (quoting Franklin D. Roosevelt’s Message to Congress, June 8, 1934, in 3 *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT: THE ADVANCE OF RECOVERY AND REFORM*, 1934, at 291-92 (1938)).

372. *Steward Mach. Co. v. Davis* (*Steward Machine*), 301 U.S. 548, 578 (1937).

373. *Carmichael v. S. Coal & Coke Co.*, 301 U.S. 495, 526 (1937).

374. *Steward Machine*, 301 U.S. at 598.

“[e]ven sovereigns,” the Court said, “may contract without derogating from their sovereignty.”³⁷⁵ Noting that the Constitution expressly allows states “to make agreements with one another,” the Court found “no room for doubt that they may do the like with Congress if the essence of their statehood is maintained without impairment.”³⁷⁶ The Court expanded on this argument in a case the following term, *United States v. Bekins*, which considered the states’ capacity to voluntarily surrender certain state powers and authorize cities to take advantage of the federal bankruptcy code.³⁷⁷ The Court found no constitutional issue with such an arrangement: “It is of the essence of sovereignty,” it explained, “to be able to make contracts and give consents bearing upon the exertion of governmental power.”³⁷⁸ Echoing the contractual insight that collaboration need not constrain autonomy in federalist terms, the Court explained that the “formation of an indestructible Union of indestructible States” did not “make impossible cooperation between the Nation and the States through the exercise of the power of each to the advantage of the people who are citizens of both.”³⁷⁹ In short, when domestic governments surrender control over their own empires in exchange for benefits that realize the interests of their constituents, they are not acting in derogation of their “sovereignty.” Rather, they are tapping into the kind of expanded freedom that reliance on other governments (indeed, per Fried, on other contracting parties) enables.

The intellectual origins of the Supreme Court’s view of sovereignty deserve a deeper account than I can provide here.³⁸⁰ It is noteworthy, though, that both *Steward Machine* and *Bekins*—almost alone among the cases I have described in this Article—cite international law to substantiate the point that consensual

375. *Id.* at 597.

376. *Id.* (citing the Morrill Land Grant College Act discussed *supra* notes 107-108 as evidence of state contracting with the federal government).

377. 304 U.S. 27 (1938).

378. *Id.* at 51-52.

379. *Id.* at 53.

380. While *Bekins* and *Steward Machine* elaborate this understanding of sovereignty most lucidly, it may have much deeper historical roots. As I noted in Part I, Gregory Ablavsky has characterized the entrance of Ohio and Tennessee into the Union this way, noting that the “reliance on conditions ‘freely’ offered to would-be states, and the bargaining that accompanied . . . statehood, were rooted in the dominant contractual model of negotiated federalism.” Ablavsky, *supra* note 2, at 690. Alison L. LaCroix has likewise described the view in antebellum America that admissions compacts were understood by some contemporaries as contractual. See LaCroix, *supra* note 97, at 420 (explaining that an internal improvement project’s “origins in Ohio’s admission compact led contemporaries to view it as a product of contract, rather than constitutional, law”).

agreements are not only compatible with sovereignty, but essential to it.³⁸¹ As the *Bekins* Court explained, the sovereignty interest in “giving consents” is “constantly illustrated in treaties and conventions in the international field by which governments yield their freedom of action in particular matters in order to gain the benefits which accrue from international accord.”³⁸² To support the point, the Court cites three of the most influential international law treatises of the time (sources it had previously cited in *Steward Machine*). Those cited portions provide a kind of road map for a conception of sovereignty rooted in intergovernmental agreement-making.

The first treatise declares that the “right of making treaties” is a “competence attaching to sovereignty” and that a state possesses “treaty-making power only so far as it is sovereign.”³⁸³ The next provides that agreement-making is an expression of freedom, not a condition of constraint: “It follows from the position of the state as a moral being, at liberty to be guided by the dictates of its own will, that it has the power of contracting with another state.”³⁸⁴ And the final explains that the more integrated states are, the more expressed this form of associative sovereignty can become: “Agreements between States . . . reflect[] the extent of the progress of individual States on the pathway from isolation to intimacy of association with other nations.”³⁸⁵

Here, again, is confirmation that integration supports, rather than undermines, the sovereignty interest in contracting and “giv[ing] consents.” Further, in light of recent scholarly concerns about abandoning sovereignty – that doing so will undermine the relationship between constituents and their state and local governments – it is worth appreciating the democratic interests in this form of sovereignty. Multiplying opportunities for subfederal governments to express their interests through contract is a democratic good because it multiplies opportunities for subfederal governments to express *the interests of their constituents* through the contracted-for policy. It creates democratic possibilities, just as contracting creates individual possibilities.

This concept of sovereignty cannot do the work that sovereignty does now. But nor would we want it to. There are good reasons to “shear” federalism of the

381. *Bekins*, 304 U.S. at 52 (first citing 1 LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE §§ 493, 494 (Arnold D. McNair ed., 4th ed. 1928); and then citing 2 CHARLES CHENEY HYDE, INTERNATIONAL LAW: CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES § 489 (1922)); Charles C. Steward Mach. Co. v. Davis, 301 U.S. 548, 597 (1937) (first citing OPPENHEIM, *supra*, §§ 493, 494; then citing WILLIAM EDWARD HALL, A TREATISE ON INTERNATIONAL LAW § 107 (A. Pearce Higgins ed., 8th ed. 1924); and then citing HYDE, *supra*, § 489).

382. *Bekins*, 304 U.S. at 52.

383. OPPENHEIM, *supra* note 381, § 494.

384. HALL, *supra* note 381, § 107.

385. HYDE, *supra* note 381, § 489.

reflexive sovereignty-as-separation recited over and over again in Supreme Court cases. The value here is in finding a starting point for thinking about the entitlements of cities and states in interactions *with* the federal government, rather than thinking about the rights of subfederal governments only as shields *from* the federal government.

CONCLUSION

We know more than we ever have about the evolving ways our many domestic governments interact. But we know far less than we should about the formal legal instruments those interactions produce – the agreements that tie our governments to one another, create the infrastructure for their shared projects, memorialize their promises, and express the legal rules they author together. There is much more to learn about the legal, institutional, and judicial patterns these instruments create and those they reveal. There are likewise many more intersections to investigate, from the discrete state and federal constitutional provisions that shape the legal terrain against which different agreements are formed, to the central role of federal, state, and local administrators in crafting them, to how their provisions substantively interweave with other statutes and regulations. This Article's effort to bring the practices and doctrines of intergovernmental agreement-making together is only the first step forward.