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PRIVATIZATION'S PROGENY*

Jon D. Michaels

These ought to be heady times for government service contracting. Once a controversial hobbyhorse of libertarian policy wonks and conservative ideologues, service contracting is now mainstream, championed by leading officials across the political spectrum. Once the target of serious legal challenges, contracting emerged from those early courtroom battles not only unscathed, but also emboldened by the judiciary's tacit endorsement. And, once believed too dangerous to be introduced in contexts calling for the exercise of sovereign power, service contracting is now ubiquitous in military combat, municipal policing, rule promulgation, environmental policymaking, prison administration, and public-benefits determinations.

I. INTRODUCTION

But times are changing. Privatization's proponents have always relied on government service contracting¹ to promote its four-fold agenda: boosting efficiency, maximizing budgetary savings, enhancing unitary control over the administrative state, and reaping political dividends. Now, however, these proponents are also branching out. They are experimenting with newer, more compelling instruments that provide surer, quicker routes to promote privatization's fiscal, political, and programmatic aims. In short, they are empowering a new generation poised to advance the privatization agenda in ways traditional service contracting never has. They are empowering privatization's progeny.

The first of privatization's progeny is the *marketization of bureaucracy*. Much of traditional service contracting's perceived payoff has come from the private sector's superior ability to discipline its workforce and to keep labor costs down. Unlike most business executives, government agency heads have long been (as some see it) saddled with above-market labor costs, powerful collective-bargaining units, and civil-service laws that effectively tenure government employees. For decades, those frustrated with government labor policy have turned instead to service contracting. Far easier to contract around the civil service than to uproot its legal foundation, contracting proved a palatable (if insidious) means of infusing market principles into government services without actually having to tear apart the bureaucracy.

Today, however, there is less of a need to conceal privatization's true purposes. Across the United States, elected officials as conservative as Wisconsin's Scott Walker and

as liberal as California's Jerry Brown are taking direct aim at the bureaucracy. We see evidence already that public-sector compensation is being slashed, that government workers' collective-bargaining rights are being curtailed, that civil-service jobs are being converted into at-will employment positions, and—most importantly—that even more drastic changes are forthcoming.

In short, we no longer need service contracts to mask the bitter taste of radical reform. Now that overhauling the civil service and refashioning the government workforce in the private-sector's image is a much easier pill to swallow, privatization's proponents need not rely as much on service contractors. By cutting out the contractor-middleman, they can instead funnel previously outsourced responsibilities into a "marketized" bureaucracy that provides new, in-house opportunities to reap efficiency and cost-savings gains, and to achieve greater unitary executive control over the administrative state.

The second of privatization's progeny is *government by bounty*. Although privatization's proponents hail the successes of government contracting, they also recognize that the traditional service contract is not a perfect instrument.² Their disillusionment with the traditional contractual form does not, however, imply wholesale disillusionment with privatization's core objectives. Rather, it simply means that those proponents might well be seeking surer ways to align principal-agent incentives, spur innovation in public administration, save money, and drum up political support. In these respects, even a purely marketized bureaucracy might not be the answer, regardless of how closely it now resembles service contracting. Instead, dissatisfaction with traditional contracts might lead policymakers even farther away, as it were, from government control, toward bounties that accord greater autonomy and assign greater risk to private actors.

In effect, bounties are government-sponsored bets or prizes. Unlike traditional contractors, bounty seekers invest their own resources to advance public aims. And, unlike traditional contractors, bounty seekers get reimbursed and rewarded only if they successfully carry out their specified tasks. Thus, the thinking goes, bounty seekers will be highly motivated to serve the government well. Innovations such as social-impact bonds, FDA priority-review vouchers, R&D prize competitions, prediction markets, and the leasing of toll roads to the private sector exemplify the breadth and depth of bounty arrangements starting to crop up across the administrative state.

Accordingly, with privatization converting government bureaucracies and colonizing new markets, we find ourselves on the brink of a great expansion, an expansion both faithful to the principles underlying the push to privatize and apostatic to its conventional form. This Article marks this important moment. It identifies the forces beginning to sap (still-popular) traditional service government contracting of its unique utility

and luster. It explains the generational expansion from privatization being virtually coextensive with service contracting to privatization now beginning to operate across a broader range of platforms. And, it grapples with the institutional fragmentation and legal de-stabilization hastened by the emergence of privatization's progeny.

Privatization's popularity [today] enables it to branch out from service contracting—to convert and colonize previously inhospitable realms, refashioning them as better, more potent versions of government contracting. The forces fueling this conversion and colonization funnel some government responsibilities centripetally inward, that is, into the bureaucracy. Other responsibilities are pushed centrifugally outward, deeper into the private sector, where the government encourages the market to decide which private actors will advance public programs (and in what ways).

II. PRIVATIZATION'S GENERATIONAL EXPANSION

In effect, we're witnessing a generational expansion. Though service contracting remains a staple feature of contemporary public administration, new upstarts are poised to supplement traditional contracting, advancing the privatization agenda in ways that contracting never has.

Among those frustrated by what they see as costly, unresponsive bureaucracy, it has long been apparent that the civil service needed to be transformed. Because overhauling the civil service would be time-consuming and politically treacherous, these critics quickly realized that the better way to restructure the civil service was to bypass it. This was true regardless of whether their underlying frustration with bureaucracy sounded in efficiency, budgetary constraints, or political control.

A. Marketization of the Bureaucracy

Recently, however, opportunities presented themselves to attack bureaucracy head-on. Across the nation, governments began revising their employment policies, chipping away at both the compensation and legal protections government workers long enjoyed. Given today's efforts to dismantle the civil service (led by, among others, libertarians, Tea Party activists, and even politically moderate elected officials hamstrung by spiraling budget deficits), marketization is poised to make even greater inroads going forward. Thus, what once was done through circumventing the civil service one contract at a time can now be achieved not only more directly, but also more comprehensively—as the government workforce increasingly is made to resemble what we would encounter in the private sector.

This section captures the nascent marketization of the bureaucracy, as evidenced by unprecedented revisions to civil servants' collective-bargaining rights, wages and benefits, and job security. These revisions speak precisely to how successful the privatization movement has been. The quest for greater efficiencies, budgetary savings, and more

complete unitary control over the administrative state has become so strong that it is converting parts of the bureaucracy into a near-facsimile of a private workforce—and, with it, lessening the need to contract.

1. Diminution of Collective-Bargaining Rights

It is open season on government workers. It has been so even before Governor Scott Walker captured the nation's attention by taking aim at Wisconsin's public employees. The current movement to weaken public-sector collective-bargaining rights dates back nearly a decade and spans party lines. Those early reductions in bargaining rights were modest, but paved the way for more drastic cutbacks today.

2. Base Pay and Benefit Reductions

Government jobs, even low-skilled ones, have long served as a gateway to the middle class. Similar opportunities for socioeconomic advancement were once a reality within the private sector too. Over the past few decades, however, private-sector base compensation has lagged behind government pay for all but the most highly skilled.

Of late, [p]oliticians across the ideological spectrum have taken steps to limit or reduce government workers' salaries and benefits. At least forty-four states and countless cities and counties have, in just the past few years, slashed government wages. Perhaps most dramatically, the State of California and cities in Pennsylvania have sought to lower government pay to the minimum wage.

Equally significant, a substantial number of civil-service jobs are being casualized—that is, converted from full-time to part-time employment. Long a reality in the private sector, casualization translates to less generous pay, fewer, if any, benefits, fewer opportunities to rise within the ranks, and greater job vulnerability.

The fact that the government is increasingly mirroring private-sector employment practices supports the claim that, indeed, we are experiencing a marketization of the bureaucracy. More to the point, it suggests that the gap between private- and public-sector labor costs is shrinking. (Given the substantial transaction costs associated with service contracting, complete equalization is, of course, unnecessary for labor arbitrage.) With this narrowing gap,³ those elected officials and agency heads who have traditionally turned to service contracting now have a more direct path to budgetary savings.

3. Incentive-Based Compensation

Another long-standing, efficiency-based critique of public-sector labor policy zeroes in on government's inability to provide civil servants with the requisite incentives to perform exceptionally. This perceived shortcoming is becoming less and less acute. Over the past few years, governments at every level have expanded eligibility for monetary performance bonuses and for off-scale, merit-based promotions.

[I]n this respect too the public sector is embracing the logic and custom of the market. Like the cutbacks to public-sector base compensation, these newly introduced market practices lessen the imperative to contract out.

The last piece to the marketization puzzle is job (in)security. Historically, government workers enjoyed protection against adverse employment actions absent cause. A safeguard against efforts to overly politicize the bureaucracy, for-cause protection nevertheless encouraged greater service contracting. Specifically, over the past few decades, some of those agencies frustrated with civil servants' employment protections (which they viewed as enabling bureaucratic slack and obstruction) preferred to hire service contractors. They hired contractors precisely because private-sector workers lacked the civil servants' employment protections—and thus had greater incentive to follow the Administration's lead.

4. Job (In)security

Today, this arbitraging opportunity is all but vanishing. Many states have reclassified substantial numbers of civil-service jobs as at-will employment—so much so that a majority of state employees across the country now report that their job security has lessened considerably. Similar, though to date more modest, employment conversions are occurring at the federal level.

As this marketization drift continues, government workers increasingly shorn of tenure protections will more closely resemble their private-sector counterparts. And, the more these workers resemble their private-sector counterparts, the less the agencies will find reason to contract around them.

Privatization is not just converting the government workforce into a carbon copy of what we would find in the private sector. It is also opening new frontiers, pushing public responsibilities further and deeper into the marketplace. Policy entrepreneurs have, of late, experimented more aggressively with what I call government by bounty. Championed by those who prize efficiency, who want to cut costs, and who seek to score political points, these government gambles do not conform to the traditional government service contract either in form or substance. Yet they are entirely faithful to the underlying principles that motivate such contracting. That is to say, they are borne out of the belief that though profits and competition encourage excellence in public administration, traditional service contracts do not fully exploit these market advantages.

B. Government by Bounty

Bounty initiatives depart from traditional service contracting in three significant ways. First, bounty initiatives are high-risk, high-reward. Unlike fee-for-service government contractors, bounty participants receive valuable awards only if they carry out government programs successfully; where they fail, bounty participants are on the hook for most, if not all, of their expenditures. Second, bounty initiatives shift monitoring costs from the government to private participants. They do so precisely because, unlike

traditional contracting, the high-risk, high-reward schemes place the onus on private participants to strive for success and, at the same time, limit the government's financial responsibility for programmatic failure. Hence agent slacking becomes a problem for the private provider, not the government. Third, bounty initiatives entail greater participatory independence. The government either does not select the specific private participants to advance public aims—or, it does not determine the actual payment or payment rate. Rather, market forces and sometimes government-appointed third parties determine which individuals and firms participate—or, they determine the payment amount or rate.

Appreciating government by bounty requires envisioning a very big tent. As a matter of substance, bounty initiatives span the administrative horizon. As a matter of structure, some bounty arrangements take the form of quasi-options, others are open offers, and still others resemble standard contracts, albeit with forms of consideration largely foreign to traditional contracting. And, as a matter of vintage, many are newly conceived; but some date back hundreds of years—and are now being revived after decades, if not centuries, of relative dormancy.

Social-impact bonds are one of the newest bounty initiatives. Largely unheard of just a few years ago, today these bonds are sparking interest and programming across the United States. In addition to projects in the works at the federal level, New York (City and State), Massachusetts, Minnesota, Connecticut, and Cuyahoga County (Cleveland) are currently designing social-impact bond programs of their own.⁴ These programs combat, among other things, homelessness and criminal recidivism.

Social-impact bonds work as follows: Government agencies enter into agreements with private “bond organizations.” Bond organizations in turn screen, select, and finance private providers to design and administer social-service programs. With the bond organization serving as a go-between, the providers are further removed from government control than we are accustomed to when either government workers or traditional service contractors carry out public responsibilities. Moreover, it is the private bond organization—not the government—that bears most of the start-up and operational costs. If, after a predetermined number of years, the program achieves agreed-upon benchmarks of success, the government reimburses the organization for the costs incurred—and awards additional bonuses too. But, if the program does not meet the benchmarks, the bond organization recoups either none of its expenditures or only a fraction of what it initially invested. This means that the government does not subsidize the private provider's lack of success, and that the onus is on the bond organization to police the provider's progress.

Like a game of telephone, where the conveyors of the original message embellish its content and heighten its tonal inflections, the transmission of privatization's agenda from one vessel to others leaves us with a similarly transformed end product. Coming to terms with this transformed end product clues us in to the ambition, the reach, and the broader impact privatization's progeny are likely to have on the administrative state.

This Part explores the collateral effects of the shift from service contracting to bureaucratic marketization and government by bounty. It shows how privatization's progeny are poised to reverse longstanding public priorities, renegotiate the relationship between the Market and the State, and dictate changes to how the government allocates political and fiscal risk. Moreover, this Part forces us to take stock of the underappreciated virtues and vices of both the old regime (populated primarily by civil servants and traditional service contractors) and the new one (inhabited also by marketized government workers and bounty seekers).

Invariably, these explorations invite us to wrestle with some of the key legal, political, and normative debates of our time: how we balance political responsiveness and independent expertise in public administration; how we assign tangible value to abstract concepts such as participatory democracy, intergenerational sovereignty, and distributive justice; and, how we respond to the synthesis of Market and State practices. These are, of course, significant and relevant questions. They highlight the salience of this inquiry. And, they add texture to the illustrations and case studies.

Marketized bureaucracy is not a cloned offspring. It differs from its service-contracting forebearer in important ways. In what follows, I discuss how marketization's wholesale restructuring of government labor policy threatens to, among other things, normalize a "teach-to-the-test" mentality among government workers [increasingly compensated on the basis of often-hard-to-measure performance metrics]. I [next] consider how marketization's conversion of the bureaucracy—that is, the market's refashioning the government workforce in its own image—threatens to crowd out redistributive government employment practices.

A. Marketized
Bureaucracy's
Privatization
Agenda—And
Beyond

One of the signature features of marketization is its promotion of businesslike performance evaluations for government employees.

1. Marketization's
Wholesale
Restructuring of
Government Labor
Policy

Given the complexity and sensitivity of [many] governmental responsibilities, it is likely that [the] imposition of performance-based rewards and sanctions on government employees will not accurately track effort. [Those] marketized personnel might become frustrated by the potentially tenuous relationship between effort and compensation [and] refocus their mission (or be directed to refocus their mission) [in] pursuit of goals that are readily obtainable and easily measured. This response to marketization might

rationalize their work and pay—albeit at the risk of contravening the agency’s best practices, if not its legislative mandate.

Imagine, for instance, environmental or workplace-safety investigators who have always emphasized preventative measures, working (in hard-to-measure ways) with regulated firms to help them comply with the relevant laws and regulations. Now, post-marketization, those investigators might focus instead on meeting enforcement-sanction quotas. Workers’ emphasis on fines might introduce objective evaluation standards, but lying in wait for finable violations to occur is not necessarily the best (or even a better) approach to public regulation.

2. Marketization’s Conversion of the Bureaucracy

Marketization’s overhaul of government labor policy also seemingly crowds out opportunities to route ancillary, socioeconomic[ally redistributive] programs through government labor policy.

Consider the U.S. Postal Service. The Postal Service is not just about delivering mail. In the post-WWII era, it, like most conventional government agencies, has served also as an implicit anti-poverty and affirmative-action program. It is doubtful that the Postal Service would have been successful in advancing civil rights or elevating families if—as many today are advocating—we treated the Service as nothing more than a quasi-commercial enterprise expected to operate in the black. For many Americans, and particularly for Americans of color with limited educational and private-sector opportunities, a job with the Postal Service served as their ticket into the middle class and as a springboard for their kids to go to college.

Indeed, an argument could be made that the Postal Service has been a more successful anti-poverty program than the landmark, but much maligned, AFDC/TANF programs. Daniel Patrick Moynihan suggested as much. In the 1960s, Moynihan argued that for less than the price of federal subsistence programs, the Postal Service could hire a person “who raises a family, pays his taxes, . . . and delivers the mail.” Moynihan indicated that we should not hold it against the Postal Service that its labor costs are high. Rather, he urged, we should recognize the positive externalities (which aren’t readily credited to the Postal Service) generated by helping employees ascend into the middle class.

Moynihan’s view is, of course, a selective one. Others might look at the exact same program through the lens of special-interest set-asides. For starters, the comparatively generous pay awarded to government workers raises the price of mail delivery. It also engenders inequalities between federal postal workers and similarly situated private-sector workers. Ought, for example, FedEx and UPS employees with similar training and similar work responsibilities lag so far behind? Where is their entree to the middle class? What about their kids’ education? These disparities between federal employees and everyone else are made worse if the inflated government labor costs divert funds away from means-tested, anti-poverty programs.

Calls for cutting wages, benefits, and the overall number of letter carriers are now ubiquitous in our highly marketized political climate. Excoriated for awarding high salaries and generous pensions to low-skilled workers, the Postal Service is starting to heed these calls.

While it is certainly clear that the “mission” of private competitors UPS and FedEx is to turn a profit, the Postal Service has traditionally had a broader set of objectives. For better or worse, the forces of marketization are seemingly and summarily changing that—not just within the Postal Service but also all across the administrative state.

Challenges seemingly arise, too, as we move outward from traditional contracting’s orbit. These challenges are, in large part, a function both of bounties’ defining characteristics and of the need to sweeten the bounty proposal to encourage private participation.

B. Government by
Bounty’s Privatization
Agenda—And
Beyond

For privatization’s proponents, the shifting of risks that are within a private actor’s control makes perfect sense. Such a shift promotes efficiency. But this risk shifting is not necessarily advantageous to private actors, many of whom prefer the financial security that fee-for-service contracting affords. To maximize the desirability of the bounty, governments might therefore work to ameliorate other types of risk, specifically those beyond the bounty seeker’s control. In so doing, governments might choose to sign away future policymaking discretion—discretion of the sort that, when left in public hands, could compromise the bounty seeker’s ability to secure its reward. Such risk-removing decisions are fraught ones, at least for those alarmed by a government’s willingness to enter into long-term political pre-commitments that bind—to the point of disenfranchising—future generations of citizens.

2. Bartering
Sovereignty

Consider, for example, the recent spate of transportation-infrastructure arrangements that operate as bounties. These arrangements involve states and cities transferring operational control over roads, bridges, and parking facilities to private firms.⁵ Firms lease the facilities, paying the government for the right to collect and keep user fees. Leases for the likes of the Chicago Skyway and the Indiana Toll Road (both entered into in the mid-2000s) run between seventy-five and ninety-nine years—and have already netted governments billions of dollars. By design, the lease payments are heavily front-loaded. Such payment structures provide an immediate windfall to fiscally beleaguered governments. For example, Chicago’s Skyway lease enabled the city to set up a \$500 million rainy-day fund, which “raised the city’s credit rating and lowered its borrowing costs.” (It is for this reason that many jurisdictions are attracted to such leases’ temporal cost savings, which take the form of *de facto* loans.⁶)

These transportation-infrastructure leases possess the telltale attributes of a high-risk, high-reward bounty. The private party antes up by committing to a long-term lease. It then works to ensure revenue collection (which it keeps) exceeds the combined costs of the lease payments, management, and maintenance.

But risks abound.

The value of the lease could be greatly diminished if the government later decides to mandate lower user-fee rates, to compete with the leased infrastructure by constructing new, alternative transportation options, or to increase the cost of continued maintenance by ratcheting up environmental regulations requiring leaseholder compliance. The more the government is willing to tie its own hands regarding incidentally related public policymaking, the less risky (*and more valuable*) the lease becomes to private bidders. Fiscally strapped governments thus have strong incentives to pre-commit to allowing the lessee to set parking and toll rates and refraining from subsequent policy interventions—such as building new roads, bridges, or parking structures—that lessen demand for the lessee’s infrastructure.⁷

All else being equal, governments might want to lower user fees during times of economic dislocation. Or, if traffic congestion or pollution becomes intractable, governments might want to charge particularly high rates, effectively (and purposely) discouraging car use. Finally, if changes in labor, housing, transportation, or environmental policy so demand, governments might want to respond by building new transportation conduits. But under what we might call “sovereignty-abdicating” provisions to bounty agreements, governments promise not to compete against the leaseholder’s services by offering new public transportation and parking options. They also promise not to adjust user fees, thus denying themselves—and successor governments—opportunities to subsidize or tax certain transportation choices.

Such sovereignty-abdicating provisions are already in operation. This is surprising if only because we traditionally have not treated sovereignty as just another bargaining chip. That might have been for good reason. After all, doing so systematically disenfranchises members of the public—both today and into the future. Once policy decisions are signed away, citizens are forced to use market power, rather than the political process, to voice concerns.

But perhaps the historical reluctance to barter sovereignty has greater rhetorical purchase than real-world utility. For all we know, citizens might well prefer a money-for-sovereignty tradeoff. Citizens might arrive at that preference because of their own financial troubles, because they do not especially value (or even engage in) democratic exercises, or because even if they do prize such participation, they have come to doubt

whether their input registers. [Nevertheless, these pre-commitments incident to bounties raise] normative and legal questions about whether sovereignty should be alienable—and more practical ones such as whether bartering governments are properly pricing it.

This Article has identified dramatic changes currently transforming our bureaucracies, markets, and contemporary political culture; and, it suggested that these changes are opening new pathways that offer surer, quicker routes to promote the very objectives that have long-motivated service contracting. [Additionally, it has] addressed challenges we are likely to encounter as these new pathways become more heavily trafficked.

IV. CONCLUSION

While monumental in their own right, marketization and government by bounty bespeak something potentially even bigger. They bespeak yet more evidence that this century's administrative state will be increasingly guided by very different principles from those that long drove the modern welfare state. They bespeak the fact that government today really is commingling political and businesslike agendas in ways both liberating and threatening.

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1. Though government contracting and privatization are often treated synonymously . . . this Article treats government contracting as one specific instrument that advances the privatization agenda. See . . . Daphne Barak-Erez, *Three Questions of Privatization*, in *COMPARATIVE ADMINISTRATIVE LAW* 493, 495-97 (Susan Rose-Ackerman & Peter L. Lindseth eds., 2010) (describing nine forms of privatization, only one of which is government service contracting).
2. Among other things, traditional service contracts are costly to monitor; and, poor performance is often difficult to sanction.

Because of the unique risk-shifting arrangements associated with government by bounty (where the private partner assumes the financial risks associated with programmatic failures), these turns away from traditional service contracting promise greater efficiency gains and cost savings. Put simply, government by bounty is a *fee-for-service* relationship. Contractors, by and large, get paid regardless of their success in accomplishing assigned tasks. RALPH C. NASH, JR., STEVEN L. SCHOONER & KAREN R. O'BRIEN, *THE GOVERNMENT CONTRACTS REFERENCE BOOK* 525 (2d ed. 1998) (“[Government] [c]ontracts are of two basic types: fixed-price contracts and cost-reimbursement contracts. . . . Under a fixed-price contract, the contractor agrees to perform the work called for by the contract for the firm-fixed-price stated in the contract. . . . Under a cost-reimbursement contract, the Government agrees to reimburse the contractor for the costs it incurs in performing the contract and, usually, to pay a fee representing the contractor’s profit for performing the contract.”).

3. [T]he private labor market is also a dynamic one. Thus, there is always the possibility that changes in the private workforce affect marketization’s arbitraging opportunities.
4. Social-impact bonds are more firmly established in the United Kingdom. EMILY BOLTON, SOC. FIN., *SOCIAL IMPACT BONDS: UNLOCKING INVESTMENT IN REHABILITATION* (2010), available at http://www.socialfinance.org.uk/sites/default/files/SF_CriminalJustice.pdf; *Performance Bonds: Who Succeeds Gets Paid*, *ECONOMIST* (Feb. 17, 2011), <http://www.economist.com/node/18180436>; Alan Travis, *Will Social Impact Bonds Solve Society’s Most Intractable Problems?*, *GUARDIAN* (U.K.) (Oct. 5, 2010), <http://www.guardian.co.uk/society/2010/oct/06/social-impact-bonds-intractable-societal-problems>; John Loder et al., *Financing Social Value: Implementing Social Impact Bonds 1* (Jan. 2010) (unpublished manuscript), available at http://archive.youngfoundation.org/files/images/SIB_paper_Jan_10_final.pdf.
5. These leases are more akin to service than construction contracts, BOT (Build-Operate-Transfer) arrangements or BOOT (Build-Own-Operate-Transfer) arrangements. For discussions of these contracts and other private-public arrangements, see E. R. YESCOMBE, *PRINCIPLES OF PROJECT FINANCE* 10-11 (2002). There is no building or construction component to the transportation-infrastructure leases discussed in this section—just private responsibility for management and maintaining existing public resources.

6. The government's "repayment" of these effective loans takes the form of foregone government-revenue generation over the life of the lease.
7. Needless to add, governments cannot make assurances about policy decisions outside of their legal authority. A city or state has little influence over federal environmental or transportation policy. The risk that another political jurisdiction will interfere with the terms of a lease thus falls into the category of risks outside the control of both parties to the lease.