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PRIVATIZATION'S PROGENY

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ABSTRACT

Privatization's proponents are branching out. They've traditionally relied on government contracting to boost efficiency, maximize budgetary savings, enhance unitary control over the administrative state, and reap political dividends. Now, however, these proponents are also blazing newer, bolder paths. They're experimenting with more powerful instruments that offer surer, quicker routes to promote privatization's aims.

This Article explores how these new instruments uniquely challenge the administrative state, reorienting public programs, reversing longstanding practices, and forcing courts to recalibrate core administrative law doctrines. Specifically, these new instruments enable school districts to "teach to the test," states to barter away sovereign authority, and presidents to politicize the bureaucracy. They also test the robustness of foundational legal precepts undergirding hard-look review, Chevron and Skidmore deference, and constitutional due process. Ultimately, the emergence of these new instruments reflects the extent to which government today is commingling political and business-like agendas in ways both liberating and threatening.

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INTRODUCTION

These ought to be heady times for government contracting.¹ Once a controversial hobbyhorse of libertarian policy wonks and conservative ideologues, contracting is now mainstream, championed by leading officials across the political spectrum.² 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.³ And, once believed too dangerous to be introduced in contexts calling for the exercise of sovereign power, contracting is now ubiquitous in military combat,⁴ municipal policing,⁵ rule promulgation,⁶ environmental policymaking,⁷ prison administration,⁸ and public-benefits determinations.⁹

But times are changing. Privatization's proponents have always relied on government contracting¹⁰ to promote its four-fold agenda: boosting efficiency,

¹ For purposes of this Article, I take government contracting to mean the contracting out of government service responsibilities to private actors. See, e.g., Jody Freeman, *The Contracting State*, 28 FLA. ST. U. L. REV. 155, 161 (2000); Kevin Kosar, *Privatization and the Federal Government*, CONG. RES. SERV., at 4 (Dec. 28, 2009), <http://www.fas.org/sgp/crs/misc/RL33777.pdf>. This definition does not include procurement contracts for goods, such as military hardware or office supplies.

Though government contracting and privatization are often treated synonymously, see *infra* note 10, this Article treats government contracting as one specific instrument of privatization.

² See Jody Freeman & Martha Minow, *Reframing the Outsourcing Debates*, in GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 8 (Jody Freeman & Martha Minow eds., 2009) (finding bipartisan support for government contracting); see also *infra* notes 82-83 and accompanying text.

³ See *infra* Subsection I.D.2.

⁴ See, e.g., P.W. SINGER, CORPORATE WARRIORS (2003); Jon D. Michaels, *The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 WASH. U.L.Q. 1001 (2004) [hereinafter Michaels, *Privatizing War*]; Martha Minow, *Outsourcing Power* 46, B.C. L. REV. 989 (2005).

⁵ See David Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1183-87 (1999).

⁶ See Paul R. Verkuil, *The Wait Is Over: Chevron as the Stealth Vermont Yankee II*, 75 GEO. WASH. L. REV. 921, 928 (2007) (“[Contractors] summarize the comments submitted to agencies during rulemaking, write the agencies’ analyses and statements and purpose, and present complete rulemaking records to the agency officials.”); WILLIAM RODGERS, 4 ENVIRONMENTAL LAW § 8.9 & n 139 (2009) (describing EPA contractors “prepar[ing] options, draft[ing] rules, review[ing] public comments, prepar[ing] the final drafts... and provid[ing] interpretive guidance”).

⁷ Office of Technology Assessment, *Assessing Contractor Use in Superfund*, OTA-BP-ITE-51, 2 (Jan. 1989) (describing government contractors’ “major role in conceiving, analyzing, and structuring the policies and tasks which make up the Superfund program”).

⁸ See Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437 (2005).

⁹ See Matthew Diller, *The Revolution in Welfare Administration*, 75 N.Y.U. L. REV. 1121, 1166-72, 1182-83 (2000).

¹⁰ Gillian Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1369 (2003) (calling contracting a “national obsession”); John Donahue, *The Transformation of Government Work*, in GOVERNMENT BY CONTRACT, *supra* note 2, at 60 (describing contracting as now “enthroned as managerial orthodoxy”); Scott Shane, *In Washington, Contractors Take on Biggest Role Ever*, N.Y.

maximizing budgetary savings, enhancing unitary control over the administrative state, and reaping political dividends.¹¹ Now, however, these proponents are also branching out. They're experimenting with newer, more compelling instruments that provide surer, quicker routes to promote privatization's fiscal, political, and programmatic aims. In short, they're empowering a new generation poised to advance the privatization agenda in ways traditional contracting never could. They're empowering privatization's progeny.

The first of privatization's progeny is the *marketization of bureaucracy*. Much of traditional government contracting's payoff has come from the private sector's superior ability to discipline its workforce and to keep labor costs down.¹² Unlike most business executives, government agency heads have long been (as they see it) saddled with above-market labor costs, powerful collective-bargaining units, and civil-service laws that effectively tenure government employees.¹³ For decades, they've channeled their frustration with government labor policy into contracting initiatives. 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 important segments of the civil service are being converted into at-will employment positions, and—most importantly—that even more drastic changes are forthcoming.¹⁴

In short, we no longer need 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 contractors. Cutting out the contractor-middleman, they can instead funnel previously outsourced responsibilities into a "marketized"¹⁵ bureaucracy that provides new, in-house

TIMES, Feb. 4, 2007, at A1 (characterizing contracting as "the government's reflexive answer to almost every problem").

Indeed, in the United States, government contracting has been so closely associated with the privatization agenda, that leading authorities have long used the terms contracting and privatization interchangeably. See, e.g., Freeman, *supra* note 1, at 161; Kosar, *supra* note 1, at 4.

¹¹ See *infra* Part I.

¹² See *infra* note 24 and accompanying text.

¹³ See *infra* notes 28-30 and accompanying text.

¹⁴ See *infra* notes 94-136 and accompanying text.

¹⁵ Cf. Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285 (2003). Freeman argues that the best way to promote accountability among government contractors is to instill in them a commitment to public service. It is far from clear that Freeman's

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 contract isn't a perfect instrument. 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 how closely it now resembles government contracting. Instead, dissatisfaction with traditional contracts might lead policymakers even further 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.¹⁶ 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.

There are also non-technocratic reasons for jumping off the traditional contracting bandwagon (while remaining faithful to the privatization agenda). Reminiscent, perhaps, of Yogi Berra's famous quip, traditional contracting

proposal gained much traction. But, around the same time as she was proposing to acculturate contractors, the converse phenomenon—which I call marketization—was gaining momentum. Marketization makes government employees more like contractors. If the government workforce increasingly resembles what we'd encounter in the private sector, the need to circumvent the bureaucracy to achieve privatization's underlying goals is drastically reduced. *See infra* Section II.A.

¹⁶ Specifically, traditional government contracts are costly to monitor; and, poor performance is often difficult to sanction. *See infra* note 162 and accompanying text.

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 contracting promise greater efficiency gains and cost savings. Put simply, government by bounty is a *fee-for-success* relationship. The private provider gets paid only if it successfully carries out its assigned task. By contrast, traditional contracting is a *fee-for-service* relationship. The provider, by and large, gets paid regardless of its success in accomplishing its task. RALPH NASH, *THE GOVERNMENT CONTRACTS REFERENCE BOOK* 525 (2d. ed. 1998) (“[Government] contracts 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.”).

might be so popular today that no one does it anymore.¹⁷ Government contracting's overwhelming appeal is thus a double-edged sword. As much as it neutralizes political opposition, allowing contracting to proceed with fewer hiccups, this popularity also makes contracting less worthwhile to pursue. It is less politically remunerative to elected officials seeking to distinguish themselves as bold, iconoclastic reformers. And, it is less intoxicating to the ever-growing contingent of free-market stalwarts and Tea Party activists,¹⁸ who've become desensitized to the apparent ubiquity and ease of contracting and now crave more drastic reform. For these reasons, we'd also expect politically opportunistic proponents to seek new approaches to restructuring or downsizing government. That's exactly what government by bounty offers.

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 government contracting of its utility and luster. It explains the generational expansion from privatization being virtually coextensive with traditional contracting to privatization now beginning to operate across a range of platforms.¹⁹ And, it grapples with the institutional fragmentation and legal destabilization hastened by the emergence of privatization's progeny.

In the course of charting this terrain, big, important questions will invariably come up. They come up precisely because privatization's progeny operate on the frontlines of many of today's normative battlegrounds. Privatization's progeny influence (and are influenced by) our assessment of the proper size, scope, and orientation of the State vis-à-vis the market, our prioritization of politically accountable public administration, and our enthusiasm for distributive justice and participatory democracy.

I have a set of normative preferences that generally align with the State being a decidedly non-market sphere that functions best, and most legitimately,

¹⁷ See ALLEN BARRA, YOGI BERRA, at xxxiv (2009) (quoting the legendary Yankee as having said, with regard to a popular restaurant, "[i]t's so crowded. No one goes there anymore").

¹⁸ See, e.g., ARTHUR BROOKS, HOW THE FIGHT BETWEEN FREE ENTERPRISE AND BIG GOVERNMENT WILL SHAPE AMERICA'S FUTURE (2010); Richard Albert, *The Constitutional Politics of the Tea Party Movement*, 105 NW. U.L. REV. COL. 267, 267-68 (2011) (describing the anti-government Tea Party as having recently transformed itself from a "fleeting faction" into a "formidable force in American politics"); Amy Cohen & Michael Alberstein, *Progressive Constitutionalism and Alternative Movements in Law*, 72 OHIO ST. L.J. 1083, 1105 (2011) (noting the emergence of the Tea Party and its opposition to big government); *infra* note 86 and accompanying text.

¹⁹ This Article does not discuss developments prior to the advent of the modern administrative state in the Twentieth Century. In earlier times, various forms of bureaucratic marketization and government by bounty existed. See, e.g., NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE (forthcoming, Yale University Press, 2013); Arnold W. Knauth, *Prize Law Reconsidered*, 46 COLUM. L. REV. 69 (1946).

when politically insulated experts and politically responsive managers team up to carry out public policy. Those preferences inevitably inform parts of this Article. But propounding (or defending) those preferences is not—and cannot be—the central aim of this project. The task at hand is an agenda-setting one. That is to say, the positive account of the generational expansion we’re witnessing must come first. We must understand where we’ve been, where we are now, and where we’re going. We must understand this not only with respect to the privatization agenda but also with respect to the administrative state writ large. Doing so will only enrich the broader normative inquiries that I reserve for another day.

This Article proceeds in three parts. Part I describes the privatization agenda’s chief objectives—namely, to increase efficiency, save money, circumvent an obstinate bureaucracy, and score points with the electorate—and shows how traditional contracting promises to advance those objectives.

Part II then explains why, despite signs seemingly pointing in the direction of an even greater surge in traditional government contracting, we might expect contracting to decline in importance. Here I present my affirmative account of privatization’s generational expansion. Simply put, there is nothing talismanic about the traditional government contract per se. The contract has served as a convenient vehicle, advancing distinct, sometimes subversive, substantive, procedural, budgetary, political, and organizational objectives. Now, however, the nascent marketization of the bureaucracy and the newfound momentum driving bounty schemes lessen the need and enthusiasm for traditional contracting. Hardly a repudiation of that which motivates government contracting, these emergent alternatives serve as monuments to the very effectiveness of the privatization agenda—an agenda ably served by marketization’s dismantling of the civil service and government by bounty’s high-risk, high-reward market partnerships.

Whereas Part II plants the flag announcing the arrival of privatization’s progeny, Part III follows their development and discusses their impact. I consider these new offsprings’ growing pains, their sibling rivalries, and even their moments of adolescent rebellion. I explain how, in enhancing the privatization agenda, marketized bureaucracy and government by bounty challenge the administrative state, streamlining and reorienting public programs, reversing longstanding practices, and forcing courts to recalibrate core administrative law doctrines. It is in this last Part where we see privatization’s progeny implicating policy considerations as far reaching as school districts “teaching to the test,” states bartering away sovereign authority, and federal agencies using government employment as a stealth engine of socioeconomic empowerment. It is also in this last Part where we see privatization’s progeny test the robustness and durability of foundational legal precepts undergirding hard-look review, *Chevron* and *Skidmore* deference, state-action doctrine, and constitutional due process. Looking at marketization and government by bounty through these institutional, programmatic, and doctrinal lenses allows us

to appreciate their far-reaching effects, to gauge how these instruments are changing the administrative state, and to begin to write the post-mortem of the contracting-monopolized world we're leaving behind.

I. PRIVATIZATION'S PAST

Traditional government contracting is a versatile and powerful tool. For decades, privatization's proponents have harnessed this versatility and power to (1) boost government efficiency, (2) maximize budgetary savings, (3) enhance unitary control over the administrative state, and (4) score political points with the electorate.²⁰

This Part tells the story of where we've been—with privatization's proponents relying heavily on contracting to advance their four-fold agenda. It also sets the stage for the discussions that follow. It sets the stage, first, for understanding the generational expansion that is presently upon us—with privatization's proponents turning also to newer, bolder instruments to advance their agenda. And, it sets the stage, second, for understanding where these new instruments are poised to take us—with marketization and government by bounty challenging the administrative state in ways contracting never did.

A. Efficiency

1. Long-Standing Efficiency Rationale

Privatization's proponents consider government agencies and government workers insufficiently attentive to efficiency considerations. They believe bureaucracies lack the requisite incentives to provide the highest quality services at the lowest cost possible. By contrast, they view government contractors as possessing those incentives in spades.²¹

At the organizational level, contracting firms are moved by profits and by the threat of ouster—that is, of being replaced by a more responsive, responsible competitor. Simply stated, they want to win (and keep) contracts and thus are driven to perform exceptionally well.²²

²⁰ There are, of course, other reasons to contract out, including the desire to funnel sweetheart deals to cronies. For purposes of this discussion, I leave corruption considerations to the side.

²¹ For discussions of the efficiency argument in favor of contracting, see, for example, E.S. SAVAS, *PRIVATIZATION: THE KEY TO BETTER GOVERNMENT* 4–6, 119–230, 288 (1987); Ronald Cass, *Privatization: Politics, Law, and Theory*, 71 *MARQ. L. REV.* 449, 466–68 (1989); Kosar, *supra* note 1, at 4.

²² See A.A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 *AM. ECON. REV.* 777, 779–82 (1972). Specifically, they might be passed over for the initial contract or, if chosen, soon replaced by one of their rivals. John Donahue, *The Transformation of*

This drive trickles down to the employees of contracting firms. Corporate managers know that their firms' success pivots on the productivity and creativity of their workforce. Thus, they take steps to align corporate interests (e.g., profits, fear of being replaced) with employee interests. They do so by rewarding diligent work,²³ and by punishing unsatisfactory performance.²⁴

As suggested, privatization's proponents view government agencies as less motivated to "maximize value."²⁵ There are no profits for which to strive, and bureaucracies generally don't face the threat that poor performance will result in their being replaced. Unmoved by profits and possibly lulled into complacency by the absence of competitive rivals, government agencies might—so privatization's proponents fear—operate at a less dogged pace;²⁶ or, they might pursue objectives at odds with their legislative mandate.²⁷ In such instances, efficiency suffers.

Even if we were to assume that government managers were as driven to perform as their corporate counterparts, they historically haven't been equipped with the necessary arsenal of carrots and sticks to ensure that their employees

Government Work, in GOVERNMENT BY CONTRACT, *supra* note 2, at 45 [hereinafter, Donahue, *Transformation*] ("[C]ompetition eliminates, or at least narrows, the opportunities to survive without being efficient. Competitive markets weed out the laggards and keep the winners in a state of healthy anxiety."); DAVID OSBORNE & TED GAEBLER, *REINVENTING GOVERNMENT* (1992) (noting that contractors who deliver high-quality, low-cost services thrive, while those who charge too much or perform poorly "are gradually eliminated").

Needless to add, where little competition exists and profit-seeking contractors are not subject to competitive pressures, the ostensible efficiency benefits of contracting diminish considerably. JOHN DONAHUE, *THE PRIVATIZATION DECISION* 147 (1989) [hereinafter DONAHUE, *DECISION*]; Donahue, *Transformation, supra* ("Without competition much of [contracting's] rationale collapses. When external providers are comfortable, not spurred on by rivals, privatization offers far fewer benefits and far greater hazards."); Jonas Prager, *Contracting Out Government Services: Lessons from the Private Sector*, 54 PUB. ADMIN. REV. 176, 186 (1994) (similar).

²³ Susan Rose-Ackerman, *Reforming Public Bureaucracy Through Economic Incentives*, 2 J.L. ECON. & ORG. 131, 132 (1986) (advocating for "direct financial incentives to induce good performance"); Saul Levmore, *Commissions and Conflicts in Agency Arrangements*, 36 J.L. & ECON. 503, 503 (1993) (indicating that performance-based "rewards are an important means of reducing agency costs").

²⁴ Daniel Guttman, *The Twentieth Century Culture of Contracting Out and the Evolving Law of Diffused Sovereignty*, 52 ADMIN. L. REV. 859, 917 (2000) (explaining that contractors are easier to fire than are government workers); Jon D. Michaels, *The (Willingly) Fettered Executive*, 97 VA. L. REV. 801, 837 (2011) [hereinafter Michaels, *Willingly Fettered*]; Katherine V.W. Stone, *Revisiting the At-Will Employment Doctrine*, 36 INDUS. L.J. 84, 84 (2007) ("In the United States, the dominant form of [private] employment contract is at-will.... [T]he employer can fire her without giving warning or incurring any post-employment obligations.").

²⁵ Cass, *supra* note 21, at 466–68; JOHN DONAHUE, *THE WARPING OF GOVERNMENT WORK* 31 (2008); Michael Trebilcock & Edward Iacobucci, *Privatization and Accountability*, 116 HARV. L. REV. 1422, 1426 (2003).

²⁶ Alchian & Demsetz, *supra* note 22, at 779–82; Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2263, (2000).

²⁷ WILLIAM NISKANEN, *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* 24–42 (1971); Michaels, *Willingly Fettered, supra* note at 24 (describing agencies as motivated to pursue their own institutional agendas, possibly at variance with the preferences of the Chief Executive).

also embrace the efficiency imperative. Civil-service laws sharply reduce at-will government employment—and, with it, the threat of termination.²⁸ The same civil-service safeguards, put in place principally to prevent the politicization of the bureaucracy,²⁹ also restrict opportunities for agency heads to reward industrious workers, through rapid advancement or monetary bonuses.³⁰

For these reasons, privatization's proponents view the administrative state's legal architecture as "weaken[ing] public-sector employees' extrinsic incentives to be responsive and energetic in pursuing their duties."³¹ Hence contracting's attractiveness.

2. Heightened Contemporary Rationale for Efficiency

From an efficiency standpoint, these ought to be bullish times to contract. This is so for two reasons. First, the market for would-be contractors vying to carry out government responsibilities is more robust—and competitive—than ever before.³² More competition (as greater numbers of firms battle for primacy) correlates intuitively and empirically with more efficient contracting. Intuitively, competition drives down prices, puts pressure on the chosen contractor to perform well, and gives the government viable alternatives should

²⁸ Gerald Frug, *Does the Constitution Prevent the Discharge of Civil Service Employees?*, 124 U. PA. L. REV. 942, 945 (1976) ("The civil service system has provided the equivalent of life tenure... absent what the government considers a serious act of misconduct."); Joseph Slater, *The American Rule that Swallows the Exceptions*, 11 EMP. RTS. & EMP. POL'Y J. 53, 89-90 (2007); Richard Rischl, *Running the Government Like a Business*, 121 YALE L.J. ONLINE 39, 49-50 (2011); see also Richard Merrill, *Procedures for Adverse Actions against Federal Employees*, 59 VA. L. REV. 196, 198 (1973) (finding that approximately 93% of the federal civilian workforce in the 1970s were entitled to procedural safeguards against any adverse action); STEVEN KELMAN, A STUDY OF ORGANIZATIONAL RENEWAL IN GOVERNMENT 28 (2005) ("Dismissing or reassigning recalcitrant employees is considerably more difficult in government than in most business firms.").

²⁹ See *infra* Section I.C.

³⁰ See SILVIA MONTOYA & JOHN GRAHAM, PAYING FOR PERFORMANCE, RAND OCCASIONAL PAPER, at xi, 14 (2007) (characterizing the current federal system as a "seniority-based civil-servant culture" and a "tenure-based civil service pay system"), www.dtic.mil/dtic/tr/fulltext/u2/a477613.pdf; Eric Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865, 880-81 (2007).

³¹ Sean Gailmard & John Patty, *Slackers and Zealots: Civil Service, Policy Discretion, and Bureaucratic Expertise*, 51 AM. J. POL. SCI. 873, 873 (2007); see also Steven Schooner & Daniel Greenspahn, *Too Dependent on Contractors?*, J. CONT. MGMT., Summer 2008, at 12 (describing the government's "heavily constrained promotion and bonus regime and an impenetrable *de facto* tenure system"); Richardson v. McKnight, 521 U.S. 399, 421 (1997) (Scalia, J., dissenting) ("[O]ne of the principal economic benefits of... 'out-sourcing' [is] the avoidance of civil-service salary and tenure encrustations"); Dru Stevenson, *Privatization of State Administrative Services*, 68 LA. L. REV. 1285, 1291 (2008).

³² Over the past few decades, opportunities to contract—and profit from contracting—have grown considerably. See, e.g., Metzger, *supra* note 10, at 1380-94. Quite naturally, those expanded opportunities have enticed additional firms to join the fray. See Shane, *supra* note 10, at A1; Donahue, *Transformation*, *supra* note 22, at 56.

that initially chosen contractor flop.³³ Empirically, studies show that governments do indeed contract out more frequently in “the presence of well-developed markets with large numbers of competent private providers.”³⁴

Second, government experience with administering contracts is at an all-time high. This is important because contracting isn’t easy. It requires careful drafting of the terms specifying the contractor’s responsibilities; selection of the “right” contractor; and, monitoring to ensure the contractor is satisfying the terms of the agreement.³⁵ But practice makes perfect—or, at least, better. With each subsequent round, those overseeing contracts gain experience. They learn what went right, and what went wrong.³⁶ And, they incorporate those lessons into the next round of contracts.³⁷ Greater contract-management experience lowers the marginal costs associated with future iterations of contracting—making those future contracts that much more efficient.

Though often overlooked, these government-side costs of contracting are critical in determining whether contracting out a particular responsibility makes economic sense.³⁸ It is therefore hardly surprising that those agencies possessing good contract-management resources are, as an empirical matter, more

³³ DONAHUE, DECISION, *supra* note 22; Donahue, *Transformation*, *supra* note 22, at 42, 45; Violeta Kavaliauskaite & Robertas Jucevičius, *Readiness of Public Institutions for Contracting*, 15 ECON. & MGMT. 587 (2010); Trevor Brown & Matthew Potoski, *Managing the Public Service Market*, 64 PUB. ADMIN. REV. 656 (2004); Sergio Fernandez, *Exploring Variations in Contracting for Services Among American Local Governments: Do Politics Still Matter?*, 38 AM. REV. PUB. ADMIN. 439, 447 (2008) [hereinafter Fernandez, *Exploring*] (“[C]ompetition among providers enhances efficiency by keeping bidders honest and compelling them to minimize their price; it also encourages providers to deliver the best quality of service possible.”).

³⁴ Jeffrey Brudney, *Exploring and Explaining Contracting Out*, 15 J. PUB. ADM. RES. THEORY 393, 412 (2005) [hereinafter Brudney, *Exploring*]; Mildred Warner & Amir Hafetz, *Privatization and the Market Role of Local Government*, ECON POL’Y INST., 2001, at 4, 6, <http://www.epi.org/page/-/old/briefingpapers/112/bp112.pdf?nocdn=1> (finding less contracting in jurisdictions where government officials have identified insufficient contractor competition) [hereinafter Warner & Hafetz, 2001]; Margaret Warner, et al., *Contracting Back In: When Privatization Fails*, in MUNICIPAL YEAR BOOK 2003, at 30-36; Chung-An Chen, *Antecedents of Contracting-Back-In*, 41 ADMIN. & SOC. 101, 108 (2009).

³⁵ See, e.g., DONAHUE, DECISION, *supra* note 22; Kavaliauskaite & Jucevičius, *supra* note 33 (“Deciding whether contracting is needed and whether there is a market from which to buy requires the public institution to be a *smart buyer*, being able to make a successful bid, negotiate and conclude a contract requires the public institution to be a *smart manager*, and knowing how to monitor and control the service delivery process after the contract has been made requires the public institution to be a *comprehensive inspector*.”).

³⁶ DONAHUE, DECISION, *supra* note 22; NORMA RICCUCCI, PUBLIC PERSONNEL MANAGEMENT 206 (2006) (“[T]he chief irony of privatization is that proponents tout it as a cure for bad government, but it takes excellent government to make it work.”).

³⁷ Brudney, *Exploring*, *supra* note 34, at 411 (finding “[a]gencies that have experienced past success with contracting” are more eager and “better prepared to undertake additional and even larger privatization initiatives”).

³⁸ See, e.g., Steven Schooner, *Competitive Sourcing Policy*, 33 PUB. CONT. L.J. 263(2004).

apt to contract.³⁹ Accordingly, the passage of time plays into the hands of greater contracting. As agencies continue gaining expertise, they are likely to contract with greater frequency.⁴⁰

B. Budgetary Savings

1. Long-Standing Budgetary Savings Rationale

Another reason privatization's proponents have viewed government contracting as so attractive for so long is that hiring contractors can result in considerable budgetary savings. Rank-and-file government workers are viewed as receiving higher base pay and more generous benefits⁴¹ than their private-sector counterparts.⁴² Actually reducing public-sector wages and benefits—and bringing them in line with the going market rate—has historically been a political non-starter.⁴³ Thus, those looking to lower government expenditures (by slashing labor costs) have instead hired contractors.

Note that notwithstanding the rhetoric of the market being more efficient,⁴⁴ it might well be the case that much of the “value” from contracting derives

³⁹ Brudney, *Exploring*, *supra* note 34, at 410 (describing agencies that have had positive experiences managing contracts as more likely to contract more aggressively going forward); Fernandez, *Exploring*, *supra* note 33, at 452 (finding jurisdictions with strong contract-management “capacity” as engaging in more contracting); Donahue, *Transformation*, *supra* note 22, at 42, 45 (noting that effective contract-management resources makes contracting a more attractive choice); *see also* Jonathan Levin & Steven Tadelis, *Contracting for Government Services*, 58 J. INDUS. ECON. 507, 509 (2010) (reporting that governments that have difficulty administering contracts also contract less).

⁴⁰ By the same token, too much outsourcing might overwhelm staffs—and whatever advantage they obtain through experience is diminished by the fact they cannot properly attend to any one contract. *See* Schooner, *supra* note 38.

⁴¹ Measuring Differences Between Federal and Private Pay, Cong. Budget Off., Nov. 2002, <http://www.cbo.gov/ftpdocs/39xx/doc3992/11-22-PayDifferences.pdf>; Fischl, *supra* note 28, at 49-50; Dennis Cauchon, *Federal Workers Earning Double Their Private Counterparts*, USA TODAY, Aug. 10, 2010.

⁴² For challenges to this conventional wisdom, see, for example, Jeffrey Keefe, *Debunking the Myth of the Overcompensated Public Employee*, ECON. POL'Y INST. BR. PAPER NO. 276, Sept. 15, 2010; Annie Lowry, *Federal Pay Versus Private-Sector Compensation*, NYTIMES.COM, Jan. 30, 2012.

⁴³ *See, e.g., (Government) Workers of the World Unite!*, ECONOMIST, Jan. 6, 2011 (noting the historic power of government workers to resist efforts aimed at reducing their compensation); Michael Fletcher, *Government Workers' Pensions No Longer Sacred*, WASH. POST, Oct. 6, 2010 (“Mayors, governors and other political leaders have long avoided cutting the benefits of government workers, whom they often rely on for political support. But now the benefits are often seen as overly generous in a time of scarce resources.”); Peter Whoriskey & Amy Gardner, *As Unions' Dynamic Shifts, So Does Fight*, WASH. POST, Feb. 28, 2011 (“Many public-sector unions won compensation increases during the booming 1990s. These days, with the tea party movement and broader anti-tax sentiment, those pay packages have come under attack.”).

⁴⁴ *See supra* Subsection I.A.1. There is also the very real possibility that contracts *appear* more efficient than they actually are because of the ways contractor units are defined, or because of the time-horizons within which we measure contractor costs and performance.

from labor arbitrage—specifically, agencies’ exploiting the private-public wage differential.⁴⁵ If the goal is to reduce expenditures, the contractors need not perform better, faster, or even as well as government workers. They need only cost less.⁴⁶

2. Heightened Contemporary Rationale for Budget Savings

Cost savings aren’t just popular any more. They’re deemed imperative. This past decade has been marked by tough budgetary times. The costs imposed by the War on Terror, skyrocketing public-health expenditures, and, most recently, by the global economic recession have contributed to soaring federal deficits.⁴⁷ States, in turn, cannot run budgetary deficits,⁴⁸ and thus feel the fiscal effects of recessions even more acutely.⁴⁹ After all, states have to get by with lower tax revenues, greater demand on government services, and—new to this past decade—added homeland-security obligations.⁵⁰ As employers of large workforces, states also have to contend with the rising costs of employee health insurance as well as the looming crisis over the solvency of government pension funds.⁵¹

Studies show that governments are particularly aggressive contractors during times of fiscal duress.⁵² These accounts make sense, as contracting helps shed labor costs.⁵³ These accounts also suggest contracting ought to continue surging so long as we remain fiscally compromised.⁵⁴

⁴⁵ See Donahue, *Transformation*, *supra* note 22.

⁴⁶ See *id.*

⁴⁷ Throughout the 2000s, federal deficits (controlling for inflation) far outpaced anything the United States experienced since the early 1990s. See <http://home.adelphi.edu/sbloch/deficits.html>.

⁴⁸ David Super, *Fiscal Federalism*, 118 HARV. L. REV. 2544, 2592 (2005) (noting every state save Vermont requires its legislature to pass balanced budgets, and that even Vermont has an unwritten but dutifully followed practice of balancing its budget); *State Balanced Budget Provisions*, Nat’l Conf. State Legislatures, (NSCL Fiscal Brief, Oct. 2010), at 3-5, <http://www.ncsl.org/documents/fiscal/StateBalancedBudgetProvisions2010.pdf>.

⁴⁹ See, e.g., Nicholas Johnson, et al., *An Update on State Budget Cuts*, Ctr. Budget & Pol’y Priorities, Feb. 9, 2011, <http://www.cbpp.org/files/3-13-08sfp.pdf>.

⁵⁰ See Matthew Waxman, *American Local Law Enforcement and Counterterrorism After 9/11*, 3 J. NAT’L SEC. L. & POL’Y 377 (2009).

⁵¹ See Steven Schwarcz, *A Minimalist Approach to State “Bankruptcy,”* 59 UCLA L. REV. 322, 343 (2011); Steven Malanga, *How Retirement Benefits May Sink the States*, WALL ST. J., Apr. 28, 2012, at A13.

⁵² See Brudney, *Exploring*, *supra* note 34, at 408, 412 (noting that times of fiscal duress are correlated with greater privatization at the state level); Fernandez, *Exploring*, *supra* note 33, at 447 (same); see also Warner & Hefetz, 2001, *supra* note 34, at 4 (observing the same correlation at the local level); Y.K. Kodrzycki, *Privatization of Local Public Services*, NEW ENG. ECON. REV. 31 (1994).

⁵³ This apparent enthusiasm doesn’t seem to require actual cost savings. Many governments report that although they haven’t found privatization to save money, they nevertheless remain devoted to contracting, optimistic of its cost-savings *potential*. Keon Chi, *Privatization in State Government*,

C. Unitary Control over the Administrative State

1. Long-Standing Unitary Control Rationale

Civil-service laws have long been bulwarks against efforts to politicize the bureaucracy. These laws effectively tenure government workers,⁵⁵ enabling them to speak truth to power—that is, to provide expert, unfiltered advice without fear of being fired for doing so.⁵⁶

Political insulation of this sort has, however, its drawbacks.⁵⁷ It limits the degree to which the Chief Executive has complete control over the Executive Branch.⁵⁸ Secure in their jobs, civil servants may obstruct the Administration's policy aims.⁵⁹ Their reasons for obstructing might be noble: civil servants resisting political pressure when the public is ill-informed or demands action that contravenes agencies' statutory mandates.⁶⁰ Or their reasons might be base: civil servants pushing their own policy priorities over those of the duly

J. STATE GOV'T, 12, 13, 21 (Fall 2003) at 13, 21, http://www.csg.org/knowledgecenter/docs/spec_fa03Privatization.pdf [hereinafter Chi, 2003]; see also Brudney, *Exploring*, *supra* note 34, at 412 (concluding that governments continue to contract in times of fiscal difficulties notwithstanding the "rather sober empirical evidence" attesting to a lack of cost savings in many instances).

⁵⁴ To the extent the currently popular anti-tax movements continue influencing legislative agendas across the country, jurisdictions might find themselves perpetually in states of fiscal crisis.

⁵⁵ See *supra* note 28 and accompanying text.

⁵⁶ See 5 U.S.C. §2301(8)(A) (2006) ("Employees should be protected against arbitrary action, personal favoritism, or coercion for partisan political purposes."); *Bush v. Lucas*, 462 U.S. 367, 381-84 & n.18 (1983) (describing federal law as protecting civil servants from being subjected to overly politicized work responsibilities); Patricia Ingraham, *Building Bridges over Troubled Waters: Merit as a Guide*, 66 PUB. ADMIN. REV. 486, 490 (2006) [hereinafter Ingraham, *Building*] ("The career civil service, whose legitimacy hinges on its members' competence and expertise... permits questioning political directives if they are questionable or unsound."); Donald Kettl, *Bureaucracy*, in UNDERSTANDING AMERICA 27, 36-38 (Peter Schuck & James Wilson, eds. 2008).

⁵⁷ As discussed, *supra* Subsection I.A.1, insulation also raises efficiency concerns.

⁵⁸ STEVEN CALABRESI & CHRISTOPHER YOO, *THE UNITARY EXECUTIVE* 3-20 (2008); Steven Calabresi & Saikrishna Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 546 (1994); 1 Op Off Legal Counsel 16, 17 (1977) ("The president's power of control extends to the entire executive branch.").

⁵⁹ Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1037-38 (2011) ("The conflicts between political appointees and the 'bureaucracy'—usually taken to refer to well-insulated-from termination members of the professional civil service—are legion."); Ronald Johnson & Gary Libecap, *Courts, a Protected Bureaucracy, and Reinventing Government*, 37 ARIZ. L. REV. 791, 820-81 (1995) ("Highly protected career bureaucrats, who have strong ideological attachments to political causes or policies may also be motivated by partisan objectives, and these objectives can be inconsistent with the goals of elected officials."); Nina Mendelson, *Agency Burrowing*, 78 N.Y.U. L. REV. 557, 612-14 (2003) (describing ways in which civil servants can obstruct presidential policy agendas); *Carver v. Foster*, 102 F.3d 96, 108 (3d Cir. 1996) ("Anyone with experience in government knows that officials of lower rank can undermine the policies of an administration just as effectively as higher ranking persons.").

⁶⁰ See, e.g., Richard Simon & Janet Wilson, *EPA Staff Turned to Former Chief on Warming*, L.A. TIMES, Feb. 27, 2008, at A11 (describing EPA career staff's resistance after the Administrator "acted against the advice of his legal and scientific advisors" regarding global warming).

elected Administration.⁶¹ Either way, those who prize political accountability and organizational hierarchy might well lament the ways in which the hard-to-fire civil service can frustrate government policy.

Contractors do not have such job security.⁶² They are, as discussed, motivated to perform diligently.⁶³ But they also have strong reasons for towing the Administration's party line.⁶⁴ After all, agencies dissatisfied with a contractor's independent streak can deny that firm future work; and, firms, intent on remaining in an agency's good graces, can readily fire individual employees who rock the boat. Accordingly, for those seeking to maximize political control over career civil servants, contractors are the way to go.⁶⁵

2. Heightened Imperative to Maximize Unitary Control Today

For decades, presidents have labored to maximize unitary control over the administrative state.⁶⁶ Of late, they've been redoubling their efforts.⁶⁷ We find ourselves today in an increasingly partisan and dysfunctional political climate.⁶⁸

⁶¹ See *infra* notes 164-165 and accompanying text.

⁶² See *supra* notes 28-29 and accompanying text.

⁶³ See *supra* Subsection I.A.1.

⁶⁴ See Jon D. Michaels, *Privatization's Pretensions*, 77 U. CHI. L. REV. 717, 748-50 (2010) [hereinafter Michaels, *Pretensions*].

⁶⁵ *Id.* As in the case of contracting to exploit wage differentials, it isn't obvious that contracting to circumvent the civil service's political insularity is efficiency promoting. After all, agencies might prefer contractors because of their expected docility, rather than their expertise or technical sophistication. Indeed, if the political administration cares principally about adherence to the party line, such unwavering fidelity might come at the expense of competence or thoughtfulness. See Canice Prendergast, *A Theory of "Yes Men,"* 83 AM. ECON. REV. 757, 759 (1993) (discussing the pressure placed on subordinates to embrace their bosses' positions); *infra* Subsection III.A.3.

⁶⁶ See DAVID LEWIS, *PRESIDENTS AND THE POLITICS OF AGENCY DESIGN* 24-29 (2003); Magill & Vermeule, *supra* note 59, at 1057-58; Richard Pildes & Cass Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 11 (1995). Among other things, presidents have increased political "layering" atop each agency. See PAUL LIGHT, *THICKENING GOVERNMENT* 7-13 (1995); Mariano-Florentino Cuéllar, *Securing the Nation*, 76 U. CHI. L. REV. 587, 595, 661-62 (2009). And, they've enlarged and enhanced the Office of Management and Budget, which among other things, aligns agency priorities with those of the White House. See Exec. Order 12,291, 3 C.F.R. 127 (1981) (revised Exec. Order. 12,866); Terry Moe & Scott Wilson, *Presidents and the Politics of Structure*, 57 L. & CONTEMP. PROBS. 1, 18, 34-38 (1994); DAVID LEWIS, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS* 31, 34-35 (2008).

⁶⁷ See Aaron Saiger, *Obama's "Czars" for Domestic Policy and the Law of the White House Staff*, 79 FORDHAM L. REV. 2577 (2011); David Barron, *Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095, 1128 (2008); Ex. Order 13,579 (Jul. 11, 2011) (directing independent agencies to follow OMB protocols).

⁶⁸ Richard Pildes, *The Causes of Hyperpolarized Democracy in America*, 99 CAL. L. REV. 273, 276 (2011); Mark Brewer, *The Rise of Partisanship and the Expansion of Partisan Conflict Within the American Electorate*, 58 POL. RES. Q. 219 (2005); William Galston & Pietro Nivola, *Delineating the Problem*, in 1 RED AND BLUE NATION? 1, 1-8 (Pietro Nivola, ed., 2006).

Because passing legislation is especially arduous,⁶⁹ administrative policymaking takes on heightened importance.⁷⁰ Naturally, so does unitary control—which ensures that the agencies fully embrace the Administration's priorities.⁷¹ Accordingly, we might well expect political administrations today to take aggressive steps to promote bureaucratic loyalty by, among other means, contracting out to sideline independent-minded civil servants.⁷²

D. Political Dividends

1. Long-Standing Political-Dividends Rationale

Last but not least: championing contracting is smart politics.⁷³ Those who've long promoted privatization have successfully tapped into a powerful political subculture that prizes free enterprise,⁷⁴ is leery of big government,⁷⁵ and—in a brash display of cognitive dissonance—demands leaner public administration while simultaneously resisting any reductions in *its* services, benefits, or entitlements.⁷⁶ Contracting out has pitch-perfect resonance with this influential constituency.

⁶⁹ Tom Udall, *The Constitutional Option*, 5 HARV. L. & POL'Y REV. 115 (2011) (describing contemporary legislative gridlock).

⁷⁰ See Kagan, *supra* note 26 (illustrating how and why presidents seize control over regulatory policymaking); WILLIAM HOWELL, *THE POLITICS OF DIRECTION PRESIDENTIAL ACTION* (2003); Gillian Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1322-23 (2012) (describing legislative gridlock as resulting in the delegation of broader policymaking authority to administrative agencies).

⁷¹ Neal Devens & David Lewis, *Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 485 (2008) (“When the parties are polarized and the White House and Congress are divided, Presidents have strong incentives to pursue unilateral policymaking through loyal appointees.”); Kagan, *supra* note 26, at 2248 (describing the benefits of regulatory policymaking particularly in times of divided, obstructionist government).

⁷² See PAUL VERKUIL, *OUTSOURCING SOVEREIGNTY* 166–67 (2007) [hereinafter VERKUIL, *SOVEREIGNTY*] (“[Political appointees] are often selected to challenge the bureaucracy, especially when a change in administration occurs. In this situation, the temptation is to rely on outsiders, not insiders.”); Kagan, *supra* note 26; Michaels, *Pretensions*, *supra* note 64, at 745-49; Michaels, *Willingly Fettered*, *supra* note 24, at 859-60.

⁷³ See Alfred Aman, *The Globalizing State*, 31 VAND. J. TRANSNAT'L L. 769, 847 (1998).

⁷⁴ See, e.g., BROOKS, *supra* note 18, at 1-2 (claiming that “free enterprise is an expression of the core values of a large majority of Americans”).

⁷⁵ See Jeffrey Henig, *Privatization in the United States*, 104 POL. SCI. Q. 649, 653 (1989-1990) (noting the connection between the privatization and anti-big-government agendas).

⁷⁶ See DONAHUE, *DECISION*, *supra* note 22; Schooner, *supra* note 38, at 311-12; General Accounting Office, *Improving the Credibility and Management of the Federal Workforce*, FPCD-81-54, 5 (Jul. 17, 1981) (“The use of personnel ceilings reinforces the misconception that containing the staffing level of the direct Federal work force controls the cost of Government.”); Dan Guttman, *Inherently Governmental Functions and the New Millennium*, *MAKING GOVERNMENT MANAGEABLE* 40, 41 (Thomas Stanton, ed. 2004); Michaels, *Pretensions*, *supra* note 64, at 752-53.

2. Heightened Political Rationale Today

Government contracting has, by now, won the war of attrition. It has outlasted its opponents, both legal and political. But its victory wasn't foreordained. In earlier decades, uncertainty existed over whether contracting would survive court challenges or spell electoral doom for those who endorsed it. Given the air of uncertainty, contracting proceeded somewhat tentatively.

With the benefit of hindsight, the obstacles placed in the way of government contracting now seem glaringly inadequate. They proved to be nothing more than Maginot Lines, painstakingly constructed but easily sidestepped. As those obstacles have been bypassed, so should any hesitance to contract out.

First, legal challenges alleging that contracting threatens constitutional values⁷⁷ have failed to make a dent in the Federal Reporters.⁷⁸ If anything, the judiciary's rejection of these challenges seems to confer greater legitimacy on the privatization agenda. No longer hedging against the possibility that courts might invalidate contractual arrangements, proponents increasingly have the green light to surge forward.

Second, politically speaking, we are all privatizers now. But this too hasn't always been the case. Contracting used to be much more ideologically divisive. While conservatives and libertarians touted contracting from the very beginning,⁷⁹ liberals and progressives opposed the turn to the marketplace.⁸⁰ With passions running high on both sides, supporters of contracting encountered resistance on the hustings. The expected political backlash no doubt limited the size and scope of early initiatives. More recently, however, contracting has become "less ideological, less partisan[,]""⁸¹ and "less controversial."⁸² It now commands bipartisan support, with centrists and traditional

⁷⁷ For due process challenges, see VERKUIL, SOVEREIGNTY, *supra* note 72, at 102–14; Paul Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397, 449–54 (2006) [hereinafter Verkuil, *Government Functions*]. For Non-Delegation challenges, see Metzger, *supra* note 10, at 1400–06; Kenneth Bamberger, *Regulation as Delegation*, 56 DUKE L.J. 377 (2007). And, for Appointments Clause challenges, see VERKUIL, SOVEREIGNTY, *supra* note 72, at 106–09; Michaels, *Privatizing War*, *supra* note 4, at 1070–73; Jack Beermann, *Privatization and Political Accountability*, 28 FORDHAM URB. L.J. 1507, 1511 (2001).

⁷⁸ *E.g.* *Cospito v. Heckler*, 742 F.2d 72, 90–94 (3d Cir. 1984) (Becker, J., dissenting). For discussions characterizing the widespread practice of ignoring the prohibition on personal-services contracting, see Michael Grimaldi, *Abolishing the Prohibition on Personal Service Contracts*, 38 J. LEGIS. 71 (2012).

⁷⁹ See Fernandez, *Exploring*, *supra* note 33, at 440; Sergio Fernandez, *Employment, Privatization, and Managerial Choice*, 26 J. POL'Y ANALYSIS & MGMT 57, 59 (2006) [hereinafter Fernandez, *Employment*] (noting that political arguments supporting privatization have traditionally included statements to the effect that contracting is "a means for countering the power of the encroaching state, protecting individual rights, and unleashing human enterprise").

⁸⁰ *See, e.g.*, Deborah Auger, *Privatization, Contracting, and the States*, 22 PUB. PRODUCTIVITY & MGMT REV. 435, 435 (1999).

⁸¹ Chi, 2003, *supra* note 53, at 21.

⁸² *See* Brudney, *Exploring*, *supra* note 34, at 414.

Democrats counting themselves among the politicians most closely associated with contracting.⁸³

Given these changed legal and political circumstances, those who champion greater government contracting are no longer taking risks. They're simply spouting what's become conventional wisdom.⁸⁴

II. PRIVATIZATION'S GENERATIONAL EXPANSION

Based on the preceding analysis, government contracting should continue surging forward. For privatization's proponents, opportunities and imperatives to contract are seemingly greater today than ever before. Yet, at the very moment that contracting appears poised to gain even greater momentum, one must appreciate that other, more subtle forces are also at work. These forces reduce, if not altogether negate, the impulse to contract.⁸⁵

Simply put, privatization's popularity enables it to branch out from 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).

In effect, we're witnessing a generational expansion. Though government contracting remains a staple feature of contemporary public administration, new

⁸³ See JACK GODWIN, CLINTONOMICS: HOW BILL CLINTON REENGINEERED THE REAGAN REVOLUTION 137-41 (2009); see also E.S. SAVAS, PRIVATIZATION IN THE CITY (2005) (describing the centrist Giuliani Administration's contracting efforts). Jon Michaels, *Deforming Welfare*, 34 SETON HALL L. REV. 573, 589 & n.42, 640 (2003) (describing Democrat Al Gore's support for government contracting); The New Jersey Privatization Task Force, May 31, 2010, at 3, http://slic.njstatelib.org/slic_files/digidocs/r424/r4242010t.pdf (describing Democrats Ed Rendell and Richard Daley as leading champions of government contracting).

It is worth underscoring that today's bipartisan support ought not to be understood as reflecting a change in the practice of contracting. Contracting hasn't been defanged. Rather, the political tides have simply shifted in a pro-market direction—meaning larger segments of the political spectrum are embracing this still-sharply fanged instrument.

⁸⁴ Donahue, *Transformation*, *supra* note 22, at 62; Steven Kelman, *Contracting*, THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE, 282, 315 (Lester Salamon, ed. 2002).

⁸⁵ Some studies gesture at (though don't explain) a recent decline in traditional contracting. For a survey of local dynamics, see Mildred Warner & Amir Hefetz, *Trends in Public and Contracted Government Services: 2002-2007*, REASON FOUND. POL'Y BR. 80, at 1-2 (2009), http://reason.org/files/pb80_privatization_trends.pdf. For state trends, see Chi, 2003, *supra* note 53, at 12, 13. For federal, non-defense, trends, see Paul Light, *Updates to The True Size of Government*, Aug. 2007, pp 1-7.

upstarts are poised to advance the privatization agenda in a way that contracting never has.

The first upstart is the newly *marketized bureaucracy*. For decades, the government offered its employees generous base compensation and considerable job security. During that time, privatization's proponents found these public-sector arrangements anathema. But rather than tear down the still-prized civil-service framework, they simply circumvented it—replacing what they viewed as costly and insufficiently motivated government workers with contractors.

Of late, however, the tide has turned against the civil service.⁸⁶ We are on the cusp of an all-out assault on the bureaucracy, as evidenced by efforts across the country to reduce wages and benefits, reclassify tenured civil servants as at-will employees, and introduce performance-based bonuses to better motivate government workers. These efforts have made government bureaucracy far more like the private sector, thus reducing the need to contract out. Hardly a rejection of the privatization agenda, the marketization of bureaucracy reflects privatization's evangelical success.

The second upstart is *government by bounty*. Government by bounty stands on the shoulders of traditional contracting. Whereas traditional contracting gives pre-selected private actors a foot-in-the-door, government by bounty kicks that door wide open. Exemplified by such diverse arrangements as regulatory vouchers, prediction markets, R&D prizes, and social-impact bonds, bounty initiatives abandon the conventional contractual form. In its stead are high-risk, high-reward bets that shift financial and programmatic responsibility onto bounty seekers. Unlike traditional, fee-for-service contractors, bounty seekers get paid only if they win the bet—that is, only if they successfully carry

⁸⁶ Michael Powell, *Public Workers Facing Outrage in Budget Crisis*, N.Y. TIMES, Jan. 2, 2011, at A1; Karen Tumulty, *Public Servants Feeling Sting of Budget Rancor*, WASH. POST, Dec. 21, 2010, at A1 (suggesting that “politicians talk about government employees... with the kind of umbrage ordinarily aimed at Wall St. financiers and convenience store bandits”); Editorial, *Going Postal on Public Workers*, BOS. GLOBE, Feb. 19, 2011, at 15; Stephen Goldsmith, *Progressive Government Is Obsolete*, WALL ST. J., Mar. 18, 2011, at A19; Lisa Rein, *Federal Workers Becoming a Flash Point in Midterm Vote*, WASH. POST, Sept. 25, 2010, at A1; Baird Helgeson, *Public Pay, Benefits Set off New “Civil War,”* STAR TRIB. (MN), Feb. 13, 2011, at 1A; Lisa Colangelo, *In Search of Civil Service Givebacks*, DAILY NEWS (NY), Jan. 13, 2010, at 29 (“Hardly a week passes without an angry screed by an editorial board, think tank, or business-backed organization about the ‘oversized’ pension and health care benefits provided to city workers.”); Craig Harris, *Public Pensions: A Soaring Burden*, AZ. REP., Nov. 14, 2010, at A1; Editorial, *Pension Reform Goes to Washington*, WALL ST. J., Jun. 6, 2011, at A18; Dennis Byrne, *Chop the Salaries of “Public Servants,”* CHI. TRI., Apr. 6, 2010, at C15. Cf. Joe Davidson, *Flag Salute for Federal Workers Doesn’t Fly in House*, WASH. POST, Sept. 14, 2011, at B4 (noting strong opposition to honoring federal civilian workers killed in the line of duty, in part because the honor “becomes just another trapping of power from the federal government available to all those people in the ever expanding federal bureaucracy”) (quoting critic of the legislation).

out their given tasks. As a result, the bounty seekers are, in theory, highly motivated and far less susceptible to slack, abuse, and fraud.⁸⁷

Moreover, traditional contracts are old news. They are old news precisely because they have become increasingly commonplace. For political entrepreneurs seeking to garner media attention and to play to an electoral base hungry for the next big thing, the enthusiasm surrounding government by bounty might provide the same boost that traditional contracting once gave to those championing that then-novel cause in the 1970s and early 1980s.

This Part sizes up privatization's progeny. In doing so, it examines the centripetal and centrifugal forces likely to funnel responsibilities inward—into the bureaucracy—and further outward—into unchartered and seemingly less regulated frontiers of commercial enterprise.⁸⁸

A. Marketization of the Bureaucracy

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 whether their underlying frustration with bureaucracy sounded in efficiency, budgetary constraints, or political control.

Recently, however, opportunities presented themselves to attack bureaucracy head-on.⁸⁹ Across the nation, governments began revising their employment policies, chipping away both at the compensation and legal protections government workers long enjoyed.⁹⁰ 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),

⁸⁷ See *supra* notes 36-38 and accompanying text. See *infra* note 154 and accompanying text.

⁸⁸ This Part does not focus on how effective these new instruments will be. Because this Article documents the rise of privatization's progeny and examines how these new instruments uniquely challenge the administrative state, this Part simply emphasizes (a) what these new instruments look like and (b) why privatization's proponents *view* them as more effective than government contracting in promoting their agenda.

⁸⁹ See DONALD KETTL, *THE GLOBAL PUBLIC MANAGEMENT REVOLUTION* 19-40 (2005) (describing increasing receptivity to the rhetoric and practice of market-based governance); James Pfiffner, *The First MBA President: George W. Bush as Public Administrator*, PUB. ADMIN. REV. 6 (2007); John Solomon, *Bush, Harvard Business School, and the Makings of a President*, N.Y. TIMES, Jun. 18, 2000; Richard Box, *Running Government Like a Business*, 29 AM. REV. PUB. ADMIN. 19 (1999).

⁹⁰ Lloyd Nigro & Edward Kellough, *Personnel Reform in the States*, 68 PUB. ADMIN. REV. (Supplement s1) s50, s53, s55 (Dec. 2008); Stephen Condrey, *Reinventing State Civil Service Systems*, 22 REV. PUB. PERSONNEL ADMIN. 114 (2002); James Bowman, *Ending Civil Service Protections in Florida Government Experiences in State Agencies*, 26 REV. PUB. PERSONNEL ADMIN. 139, 141-42 (2006) (describing political leaders' attacks on the bureaucracy).

marketization is poised to make even greater inroads going forward.⁹¹ 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’d encounter in the private sector.⁹²

This Section captures the nascent marketization of the bureaucracy, as evidenced by unprecedented revisions to civil servants’ (1) collective-bargaining rights, (2) wages and benefits, (3) promotion protocols, and (4) 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 the bureaucracy into a near-facsimile of a private workforce—and, with it, lessening the need to contract.⁹³

1. Diminution of Collective-Bargaining Rights

It is open season on government workers.⁹⁴ It has been so even before Governor Scott Walker captured the nation’s attention by taking aim at Wisconsin’s public employees.⁹⁵ 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.⁹⁶

⁹¹ See *supra* note 86 and accompanying text.

⁹² Elizabeth Fredericksen, *Succession Is More Than Filling Seats*, 42 STATE AND LOCAL GOVERNMENT REVIEW 50, 52 (2010), Stephen Hays & Jessica Sowa, *A Broader Look at the Accountability Movement*, 26 REV. PUB. PERSONNEL ADMIN. 102, 111 (2006) (“[M]any public servants today work in settings that are not too different from their private sector counterparts.”); Sally Selden & Gene Brewer, *Rolling Back State Civil Service Systems*, at 7, <http://ssrn.com/abstract=1919624> (“The public sector is conforming more and more to the normal disciplines of the private sector.”); James Thompson, *The Federal Civil Service: The Demise of an Institution*, 66 PUB. ADMIN. REV. 496, 499 (2006) (noting that the logic of the market is “increasingly supplant[ing] notions of citizenship and civic duty in society at large”); Stephen Condrey & Paul Battalio, *A Return to Spoils? Revisiting Radical Civil Service Reform in the United States*, 67 PUB. ADMIN. REV. 424, 431 (2007) (describing the “blurring of public and private sector employment”).

⁹³ See *supra* notes 15 and 92 and accompanying text.

⁹⁴ Powell, *supra* note 86; Selden & Brewer, *supra* note 92, at 3; Rein, *supra* note 86; Hegelson, *supra* note 86; Tumulty, *supra* note 86; Bill Steiden, *Debate Over Unions Hits Fever Pitch Across Nation*, ATL. J.-CONST. Feb. 27, 2011, at 4A; Richard Simon, *Union Battles Spread*, CHI. TRIB., Apr. 2, 2011 at C1 (noting “an explosion of 744 bills that largely target public-sector unions, introduced in virtually every state”).

⁹⁵ Monica Davey & Steven Greenhouse, *Wisconsin May Take an Axe to State Workers’ Benefits and their Unions*, N.Y. TIMES, Feb. 12, 2011, at A11; Steven Greenhouse, *A Watershed Moment for Public-Sector Unions*, N.Y. TIMES, Feb. 19, 2011, at A14; Karen Tumulty, *Wisconsin Governor Wins His Battle with Unions on Collective Bargaining*, WASH. POST, Mar. 11, 2011.

⁹⁶ See, e.g., Donald Wasserman, *Collective Bargaining Rights in the Public Sector*, in JUSTICE ON THE JOB 57-59, 77 (Richard Block, ed. 2006) (describing Kentucky, Indiana, and Missouri restricting government employees’ collective-bargaining rights in the early and mid-2000s); Governor Daniels

Widespread hostility to public-sector unions is a relatively new phenomenon. During much of the post-WWII era, collective-bargaining rights of government workers commanded broad support.⁹⁷ Only today, amid this wholesale refashioning of government labor policy, are we having “the first serious debates about the appropriateness of collective bargaining in the public sector since the Depression.”⁹⁸

Government employees have fared far better than their counterparts in the private-sector, where effective unionization has long been in a state of freefall.⁹⁹ But the gap between the two sectors is shrinking. Labor scholars urge observers not to be misled by the comparatively rosy picture that stable public-sector union membership seems to paint. They tell us that the stable headcount “masks a very narrow scope of bargaining and collective bargaining ‘rights’ that, increasingly may be exercised only at the discretion of the employer.”¹⁰⁰

Some predict that the nascent efforts to curtail public-sector employees’ collective-bargaining rights will serve as the “prototype for the rest of government in the coming years.”¹⁰¹ But the realization of that prediction, however

Signs Executive Orders to create Dep’t of Child Services, Rescind Collective Bargaining Agreements, Office of the Governor, Jan. 11, 2005, <http://www.in.gov/apps/utills/calendar/presscal?PF%2520=gov2&Clist=196&Elist=82563> (describing the rescission of Indiana state employees’ rights); Ind. Exec. Order 05-14 (Jan. 11, 2005); Donald Moynihan, *The New Architecture of State Government Administration*, PAQ Summer 2009, at 181-82, http://priyosudibyoo.staff.fisip.uns.ac.id/files/2010/06/2009-AdmRef_new-architecture-Moynihan.pdf [hereinafter Moynihan, *Architecture*].

Federal reforms picked up steam in the early 2000s. See Donald Moynihan, *Homeland Security and the U.S. Public Management Policy Agenda*, 18 GOVERNANCE 171, 172 (Apr. 2005) [hereinafter Moynihan, *Homeland Security*]; Wasserman, *supra* at 57, 60; see also Joseph Slater, *Homeland Security vs. Workers’ Rights?*, 6 U. PA. J. LAB. & EMP. L. 295, 297, 316 (2004) (describing restrictions placed on collective bargaining in, among other agencies, the Department of Homeland Security, the Justice Department, and the Social Security Administration). See generally JACK RABIN, HANDBOOK OF PUBLIC ADMINISTRATION 396 (2007) (“The future of unions in the public sector has become even more uncertain in the wake of the September 2001 terrorist attacks.”).

⁹⁷ Even conservative presidents such as Richard Nixon and Ronald Reagan contributed to this bipartisan consensus, supporting not only the maintenance but also the expansion of bureaucrats’ bargaining rights. JOSEPH MCCARTIN, RONALD REAGAN, THE AIR TRAFFIC CONTROLLERS, AND THE STRIKE THAT CHANGED AMERICA (2011) (suggesting Reagan was generally supportive of government unions notwithstanding the dramatic termination of the striking air-traffic controllers); Joseph McCartin, *What’s Really Going on in Wisconsin?*, NEW REPUBLIC, Feb. 19, 2011; Wasserman, *supra* note 96, at 58; (*Government Workers of the World Unite!*, *supra* note 43).

⁹⁸ Maria Hylton, *The Case for Rationalizing Public Employee Benefits*, 45 IND. L. REV. 413, 442 (2012); Gary Chaison, *A Turning Point in Labor History*, NYTIMES.COM, Feb. 19, 2011, <http://www.nytimes.com/roomfordebate/2011/02/18/the-first-blow-against-public-employees/a-turning-point-in-labor-history>.

⁹⁹ Wasserman, *supra* note 96, at 62-63.

¹⁰⁰ *Id.*, at 63.

¹⁰¹ See Moynihan, *Homeland Security*, *supra* note 96, at 172.

likely,¹⁰² is of little moment. Those employees who retain collective-bargaining rights will nonetheless be reluctant to assert them.¹⁰³ Doing so might prompt a more aggressive scaling back of those rights¹⁰⁴ (if not altogether spur agency heads to outsource their jobs¹⁰⁵).

The weakened bargaining units are especially susceptible to being steam-rolled by the forces of marketization.¹⁰⁶ These employees cannot effectively oppose wage and benefit reductions. Nor can they successfully resist efforts to convert civil-service jobs into at-will employment positions.¹⁰⁷

2. Base Pay and Benefit Reductions

Government jobs, even low-skilled ones, have long served as a gateway to the middle class.¹⁰⁸ Above-market wages and benefits have been hallmark features of public-sector employment.¹⁰⁹ Similar opportunities for socio-economic advancement were once a reality within the private sector too.¹¹⁰

¹⁰² David Lieb, *GOP Taking on Labor Unions*, DET. FREE PRESS, Feb 20, 2011, at A12; Joe Davidson, *Wis. Move on Collective Bargaining Jars Federal Unions*, WASH. POST, Mar. 15, 2011, at B4.

¹⁰³ See, e.g., MICHAEL GOLDFIELD, *THE DECLINE OF ORGANIZED LABOR IN THE UNITED STATES* 43-36 (1987) (discussing “concession bargaining”); Thomas Miner, *Concession Bargaining*, 59 CHI.-KENT L. REV. 981 (1983).

¹⁰⁴ Cf. *Mitchell v. Robert DeMario Jewelry*, 361 U.S. 288, 292 (1960) (acknowledging as self-evident that the “fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions”).

¹⁰⁵ Cf. Cynthia Estlund, *Economic Rationality and Union Avoidance*, 71 TEX. L. REV. 921, 931-33 (1993) (noting that employers’ ability to avoid unionized workplaces gives credence to managerial threats that worker-unionization efforts might result in job losses); Steven Greenhouse, *Labor Board Tells Boeing New Factory Breaks Law*, N.Y. TIMES, Apr. 21, 2011, at B1 (describing retaliation complaint filed against Boeing for relocating a plant from a unionized state to a nonunion state).

¹⁰⁶ Keith Snaveley & Uday Desai, *Competitive Sourcing in the Federal Civil Service*, 40 AM. REV. PUB. ADMIN. 83, 85 (2010); see also Fischl, *supra* note 28, at 55 (describing federal workers as increasingly disempowered).

¹⁰⁷ GOV’T ACCOUNTABILITY OFF., GAO-05-398R, *STATUTORY AUTHORITIES COULD OFFER OPTIONS IN DEVELOPING A FRAMEWORK FOR GOVERNMENTWIDE REFORM* (2005) (describing recent wave of agency exemptions from civil-service laws relating to hiring and firing authority, employment reclassification, and pay adjustments); David Leonhardt, *Union Contracts, Not Pay, Are States’ Problem*, N.Y. TIMES, Mar. 2, 2011, at B1. Leonhardt connects the weakening of public-sector unions to the success of elected leaders in forcing government workers to accept market-based reforms. *Id.*

¹⁰⁸ See *infra* notes 236-240 and accompanying text.

¹⁰⁹ See John Donahue, *The Ideological Romance of Privatization*, in *MORALITY, RATIONALITY, AND EFFICIENCY* 133, 137 (Richard Coughlin ed., 1991).

¹¹⁰ See, e.g., HEBERT APPLEBAUM, *THE AMERICAN WORK ETHIC AND THE CHANGING WORKFORCE* 202 (1998); ROBERT REICH, *SUPERCAPITALISM* (2007) (comparing solidly middle-class, blue-collar jobs of the 1950s and 1960s with far less remunerative employment today for private-sector, blue-collar workers).

Over the past few decades, however, private-sector base compensation has lagged behind government pay for all but the most highly skilled.¹¹¹

Of late, popular opinion has turned against government workers' apparent above-market base pay. Politicians across the ideological spectrum have taken steps to limit or reduce government workers' salaries and benefits.¹¹² At least forty-four states and countless cities and counties have, in just the past few years, slashed government wages.¹¹³ Perhaps most dramatically, the State of California and cities in Pennsylvania have sought to lower government pay to the minimum wage.¹¹⁴

¹¹¹ See *supra* note 41 and accompanying text; see also *Sinkhole!*, BLOOMBERG BUSINESSWEEK, June 13, 2005. When it comes to highly skilled jobs, private-sector pay typically exceeds government pay. See Richard Pierce, *Outsourcing Is Not Our Only Problem*, 76 GEO. WASH. L. REV. 1216, 1225 (2008). That differential is, however, mitigated by the fact that many high-skilled government workers ultimately decamp to the private-sector, where they are then well-compensated for their valuable experience in government. See James Q. Wilson, *The Politics of Regulation*, in THE POLITICS OF REGULATION 392 (Wilson, ed., 1980); Richard Painter, *President Obama's Progress in Government Ethics*, 26 CONST. COMM. 195, 204-05 (2010). Needless to add, investment banks, white-shoe law firms, or Silicon Valley start-ups are unlikely to poach most rank-and-file civil servants.

¹¹² For a broad survey of public-sector pension reform, see Sujit CanagaRetna, *America's Retirement Architecture: Strains in the System*, Council of State Governments, Southern Office, the Southern Legislative Conference, at 56 <http://www.sclatlanta.org/Publications/FAGO/stressweb/stressesinthetystemweb.pdf>. For discussions of public-sector wage, benefit, and pension cutbacks, see Michael Cooper & Mary Williams Walsh, *Leading Way, 2 Cities Pass Pension Cuts*, N.Y. TIMES, Jun. 7, 2012, at A1 (describing voter-driven efforts in San Diego and San Jose, as well as cuts sought in Chicago and Providence); Abby Goodnough, *Providence Mayor Moves Financial Woes to Fore*, N.Y. TIMES, May 1, 2012, at A15; Brady, *supra* note 114 (describing Scranton lowering city workers' salaries to the state minimum wage); Jay Miller, *Fitzgerald Likely To Cut County Employees Pay*, CRAIN'S CLEVELAND BUS., Sept. 19, 2011, at 1 (noting Cuyahoga (Cleveland, OH)'s efforts to slash county workers' pay); Steven Greenhouse, *More Workers Face Pay Cuts, Not Furloughs*, N.Y. TIMES, Aug. 4, 2010, at A1; *NJ Slashes Public Workers Benefits*, WALL ST. J., June 24, 2011 <http://online.wsj.com/article/SB10001424052702303339904576404492031170666.html>; Lisa Fleisher, *Political Allies Turn on Unions*, WALL ST. J., Jun. 25, 2011, at A5; Colangelo, *supra* note 86 (describing efforts to scale back benefits and pensions in New York City); Robert Holland & Don Soifer, *Public Pensions Under Water*, OKLAHOMAN, Jan. 2, 2011, at 13A (noting recent benefit and pension reductions in California and Illinois); John Fritze, *Federal Workers Afraid of Cuts*, BALT. SUN, Jun. 27, 2011, at 1A; Steiden, *supra* note 86 (reporting that "[e]ven Democratic governors such as Andrew Cuomo in liberal-leaning New York" are seeking to cut government wages); David Kocieniewski, *In Tax Deal, Many Public Employees To Pay More*, N.Y. TIMES, Dec. 9, 2010, at B3; Danny Hakim, *Cuomo Secures Big Givebacks in Union Deal*, N.Y. TIMES, Jun. 23, 2011, at A1 ("The state's largest public-employee union, acknowledging the pressures on government workers around the nation, agreed... to major wage and benefits concessions in a pact to avoid sweeping layoffs.").

¹¹³ Nicholas Johnson, et al., *An Update on State Budget Cuts*, Ctr. Budget & Pol'y Priorities, Feb. 9, 2011, at 1, <http://www.cbpp.org/files/3-13-08sfp.pdf>. And, 39 of the 50 states reduced civil-service pensions. Roads to Reform: Changes to Public Sector Retirement Benefits Across States, Pew Center, Nov. 2010, http://www.pewcenteronthestates.org/uploadedFiles/wwwpewcenteronthestatesorg/Initiatives/States_Fiscal_Health_Project/Pensions_Web%20Update_121710.pdf

¹¹⁴ Shane Goldmacher, *Gov. Urges Minimum Wage for California State Workers Until Budget Deal Is Reached*, L.A. TIMES, Jun. 24, 2010, at A1; Jeff Brady, *Scranton's Public Workers Now Paid*

Equally significant, a substantial number of civil-service jobs are being casualized—*i.e.*, converted from full-time to part-time employment.¹¹⁵ Long a reality in the private sector,¹¹⁶ casualization translates to less generous pay, fewer, if any, benefits, fewer opportunities to rise within the ranks, and greater job vulnerability.¹¹⁷

The fact that the government is increasingly mirroring private-sector employment practices supports the claim that, indeed, we're experiencing a marketization of the bureaucracy. More to the point, it suggests that the disparity between private and public-sector labor costs is shrinking. (Given the substantial transaction costs associated with traditional contracting,¹¹⁸ complete equalization is, of course, unnecessary for labor arbitrage.) With this narrowing gap,¹¹⁹ those elected officials and agency heads who've traditionally turned to contracting now have a more direct path to budgetary savings.¹²⁰

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.¹²¹ This perceived shortcoming is becoming less and less acute. Over the past few years, governments at every level have expanded eligibility for monetary performance bonuses¹²² and for off-scale, merit-based promotions.¹²³

Minimum Wage, NPR.org, Jul. 7, 2012, <http://www.npr.org/2012/07/07/156416876/scrantons-public-workers-pay-cut-to-minimum-wage>.

¹¹⁵ Hays & Sowa, *supra* note 92, at 103; Fernandez, *Employment*, *supra* note 79, at 67.

¹¹⁶ See Kathleen Barker & Kathleen Christensen, *Controversy and Challenges Raised by Contingent Work Arrangements*, in *AMERICAN EMPLOYMENT RELATIONS IN TRANSITION 1*, 1-10 (Kathleen Barker, ed. 1998).

¹¹⁷ Hays & Sowa, *supra* note 92, at 103; Fernandez, *Employment*, *supra* note 79, at 60.

¹¹⁸ DONAHUE, *DECISION*, *supra* note 22; Schooner, *supra* note 38; *see also supra* note 36 and accompanying text.

¹¹⁹ Needless to say, the 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.

¹²⁰ Slashing government salaries might also be more politically advantageous than continued government contracting. Subsection II.B.3, *infra*, addresses the diminishing political returns from continued contracting.

¹²¹ See *supra* Subsection I.A.1; MAXWELL STEARNS & TODD ZYWICKI, *PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW 341* (2009); Rose-Ackerman, *supra* note 23, at 132 (stating that workers not subject to performance incentives might not have adequate motivation to strive for excellence).

¹²² See Stephen Barr, *IG Finds TSA Very Generous With Executives' Bonuses*, WASH. POST, Oct. 15, 2004; Hays & Sowa, *supra* note 92, at 114; James Heckman, *Performance Standards and the Potential to Improve Government Performance*, *THE PERFORMANCE OF PERFORMANCE STANDARDS* (James Heckman, ed. 2011) (describing federal government workers' increased eligibility for performance-based bonuses); Ingraham, *Building*, *supra* note 56, at 489; Cortney Whalen & Mary Guy, *Broadbanding Trends in the States*, 28 REV. PUB. PERSONNEL ADMIN. 349, 350 (2008); EDWARD KELLOUGH & LLOYD NIGRO, *CIVIL SERVICE REFORM IN THE STATES* (2006) (chs. 10 & 12) [hereinafter *KELLOUGH & NIGRO, STATES*] (describing performance-based pay in Arizona and Wisconsin). See generally U.S. Merit Systems Protections Board, *Designing an Effective Pay-for-Performance*

Undoubtedly an effort to better align principal-agent interests,¹²⁴ in this respect too the public sector is embracing the logic and practice of the market.¹²⁵ Like the cutbacks to public-sector base compensation, these newly introduced market transformations lessen the imperative to contract out.

4. Job (In)security

The last piece to the marketization puzzle is job (in)security. Historically, government workers enjoyed for-cause protection against adverse employment actions.¹²⁶ A safeguard against efforts to overly politicize the bureaucracy,¹²⁷ for-cause protection nevertheless prompted greater contracting. Specifically, over the past few decades, those agencies frustrated with civil servants' tenure (which they viewed as enabling bureaucratic slack¹²⁸ and obstruction¹²⁹), would rely instead on government contractors.¹³⁰ They relied on contractors precisely because private-sector workers lacked such employment protections¹³¹—and thus had greater incentive to follow the administration's lead.

Compensation System, at ix. There has been some pushback to the merit-based system. See Wendy Ginsburg, *Pay-for-Performance: The National Security Personnel System*, CONG. RESEARCH SERV., Sept. 17, 2008, at 1-16.

¹²³ See Selden & Brewer, *supra* note 92, at 4; Stephen Condrey & Robert Maranto, RADICAL REFORM OF THE CIVIL SERVICE (2001); Condrey & Battalio, *supra* note 92, at 424; KELLOUGH & NIGRO, STATES, *supra* note 122.

¹²⁴ See James Bowman, *The Paradox of Performance Pay*, 30 REV. PUB. PERSONNEL ADMIN, 70, 70 (2010) (indicating that government supervisors “see performance [incentives] as a basis of control”); Moynihan, *Architecture*, *supra* note 96, at 167 (linking financial-performance incentives with employee control and motivation); Rose-Ackerman, *supra* note 23, at 132-33; Whalen & Guy, *supra* note 122, at 357.

¹²⁵ Thompson, *supra* note 92, at 499; Heckman, *supra* note 122, at 1 (“[By] developing explicit rewards for their attainment, these [governmental performance-based] systems have aimed to replicate, in a nonmarket setting, the incentive structures, competition, and resulting high performance and efficiency of private markets.”).

¹²⁶ Frug, *supra* note 28, at 945 (suggesting “for-cause” termination requires “serious act[s] of misconduct”). Concomitantly, to the extent government workers are no longer entitled to their jobs, they also are no longer afforded due process protections to challenge unjust or simply mistaken terminations. See *Bd. of Regents v. Roth*, 408 U.S. 564 (1972) (holding that a government employee without any expectation of continued employment is not entitled to due process); *Bishop v. Wood*, 426 U.S. 341 (1976) (holding that a terminated at-will government employee is not entitled to due process). See generally Hays & Sowa, *supra* note 92, at 106 (“Under the banners of decentralization, accountability, and flexibility, the due process rights of many civil servants are eroding.”); *id.* at 112 (noting government workers’ reduced opportunities to challenge adverse employment decisions).

¹²⁷ Patricia Ingraham, *Introduction to the Civil Service Reform Act*, THE PROMISE AND PARADOX OF CIVIL SERVICE REFORM 159, 160 (Patricia Ingraham & David Rosenbloom, eds. 1992); see also *supra* note 56 and accompanying text.

¹²⁸ See *supra* Subsection I.A.1.

¹²⁹ See *supra* notes 60-64 and accompanying text.

¹³⁰ See Michaels, *Pretensions*, *supra* note 64, at 748-50.

¹³¹ See KATHERINE STONE, FROM WIDGETS TO DIGITS 3-6 (2004); Stone, *supra* note 24.

This arbitraging opportunity is all but vanishing. Many states have reclassified substantial numbers of civil-service jobs as at-will employment¹³²—so much so that a majority of state employees across the country now report that their job security has lessened considerably.¹³³ Similar, though to date more modest, employment conversions are occurring at the federal level.¹³⁴ Scholars taking stock of these trends observe a “discernable drift (and in some cases a tidal wave) in the direction of at-will employment.”¹³⁵

As this marketization drift continues, government workers increasingly shorn of tenure protections will more closely resemble their private-sector counterparts.¹³⁶ And, the more they resemble their private-sector counterparts, the less the agencies will find reason to contract around them.

B. Government by Bounty

Privatization isn’t just converting the government workforce into a carbon copy of what we’d 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 don’t conform to the traditional government contract either in form or substance. Yet they are entirely faithful to the underlying principles that motivate traditional contracting. That is to say, they are borne out of the belief that

¹³² Hays & Sowa, *supra* note 92, at 106; Moynihan, *Architecture*, *supra* note 96, at 181 (noting that Florida, Georgia, and Texas “have essentially done away with their civil service systems, making most if not all of their employees ‘at will’”); Edward Kellough & Lloyd Nigro, *At-Will Employment and the Creation of a New Public Workforce*, 16 J. PUB. ADMIN. RES. & THEORY 447 (2006); Melissa Maynard *Civil Service Reform Passes in 3 States*, GOVERNING, Jun. 12, 2012, <http://www.governing.com/blogs/view/civil-service-reform-passes.html> (describing the wide-reaching reclassification in Arizona, Colorado, and Tennessee of current employees and most new hires as at-will employees); Heather Kerrigan, *Civil Service Reform: Lessons from Georgia and Indiana*, GOVERNING, Jun. 13, 2012, <http://www.governing.com/topics/public-workforce/col-civil-service-reform-lessons-from-georgia-indiana.html> (describing reclassification efforts in Georgia and Indiana); Jonathan Walters, *Life After Civil Service Reform: The Texas, Georgia, and Florida Experiences*, IBM’s Human Capital Series Report, Oct. 2002, <http://sites.duke.edu/niou/files/2011/05/Walters-Life-after-Civil-Service-Reform-The-Texas-Georgia-and-Florida-Experiences.pdf>.

¹³³ Hays & Sowa, *supra* note 92, at 115.

¹³⁴ Slater, *supra* note 28, at 297, 308, 313; Snively, *supra* note, at 85; Moynihan, *Homeland Security*, *supra* note 96, at 171.

¹³⁵ Hays & Sowa, *supra* note 92, at 106.

¹³⁶ See *supra* notes 24, 28 and accompanying text; see also Moynihan, *Architecture*, *supra* note 96, at 181 (noting that government workers newly declassified from the civil service “lack[] any protections beyond those afforded to private employees”).

though profits and competition encourage excellence in public administration, traditional contracts do not fully exploit these market advantages.¹³⁷

Bounty initiatives depart from traditional contracting in three significant ways. First, bounty initiatives are high-risk, high-reward. Unlike fee-for-service government contractors,¹³⁸ 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.¹³⁹ Second, bounty initiatives shift monitoring costs associated with deterring slacking from the government onto private participants.¹⁴⁰ 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.¹⁴¹ Third, bounty initiatives entail greater participatory independence. The government either (a) does not select the specific private participants to advance public aims;¹⁴² or, it (b) does not determine the actual payment or payment rate.¹⁴³ 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 big tent. As a matter of substance, bounty initiatives span the regulatory 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, most are newly conceived¹⁴⁴ but a few date back hundreds of years—and are now being revived after decades, if not centuries, of dormancy.¹⁴⁵

This subject-matter, structural, and historical diversity among bounty instruments is itself quite interesting. But any such inquiry that charts and classifies bounties must be put to the side. After all, dividing and subdividing bounties into separate categories (based on superficial differences among them)

¹³⁷ See David Chen, *Goldman To Invest in City Jail Program*, NYTIMES.COM, Aug. 2, 2012 (quoting one government official as saying “[t]he beauty of [bounties] is if they perform to get the results, then we pay. If they don’t, we don’t pay”); supra Subsection I.A.2.b; see also Michaels, *Pretensions*, supra note 64, at 729 n.40 (cataloguing reports of traditional government-contractor waste, fraud, and abuse).

¹³⁸ See NASH, supra note 16 at 525 (describing government-contracting payment arrangements).

¹³⁹ See infra note 153 and accompanying text.

¹⁴⁰ See infra notes 162-168 and accompanying text.

¹⁴¹ See supra notes 36-37 and accompanying text. There is no doubt a strong parallel here with performance-based government pay.

¹⁴² See infra note 150 and accompanying text.

¹⁴³ See infra Subsection III.B.1-2.

¹⁴⁴ See infra notes 196-200.

¹⁴⁵ See infra notes 201-202; see also supra note 19.

risks obscuring the fact that each and every one of these instruments is a government bet tethered to the private advancement of public responsibilities. Moreover, dividing and subdividing bounties into separate categories diminishes recognition of the way these instruments combine to mark a new, robust approach to privatization—an approach quite distinct from traditional contracting. Thus, for present purposes, it is enough to acknowledge bounties' breadth and focus instead on their points of convergence.

Using social-impact bonds as an illustrative case study, I examine the specific ways in which this government bet has the potential to outperform traditional contracting vis-à-vis efficiency, cost-savings, and political payout. Given how relatively poorly understood bounty initiatives are, drilling in on one case study permits me to combine structural analyses of how bounties generally work with more granular consideration of a specific bounty vehicle. Subsequent discussions of, among other things, FDA voucher programs and infrastructure-lease arrangements provide a fuller sense of the range of bounty initiatives.¹⁴⁶

* * *

Social-impact bonds¹⁴⁷ 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-

¹⁴⁶ See *infra* Subsections III.B.1-2.

It bears underscoring that many of the bounty schemes discussed in this Article are still in their infancy. Yet it is apparent that a contingent of academics, government officials, and business leaders who, in prior decades, passionately championed traditional contracting are now designing and promoting bounties. See *infra* notes 147, 196-202, 300, 315-318 and accompanying text. Given the enthusiasm surrounding these initiatives, we can easily envision a time in the near future when considerably more responsibilities will be administered through bounties.

¹⁴⁷ See Jeffrey Liebman, *Social Impact Bonds*, CENTER FOR AM. PROGRESS, Feb. 2011; David Leonhardt, *For Federal Programs, A Taste of Market Discipline*, N.Y. TIMES, Feb. 9, 2011, at B1; *Who Succeeds Gets Paid*, ECONOMIST, Feb. 17, 2011, <http://www.economist.com/node/18180436>.

impact bond programs of their own.¹⁴⁸ These programs combat, among other things homelessness and criminal recidivism.¹⁴⁹

Social-impact bonds work as follows: Government agencies enter into agreements with private, so-called “bond organizations.” Bond organizations in turn screen, select, and finance private providers to design and administer social-service programs.¹⁵⁰ With the bond organization serving as a go-between, the providers are further removed from government control than we’re accustomed to when either government workers or traditional government contractors carry out public responsibilities. Moreover, it is the private bond organization—not the government—that bears the start-up and operational costs.¹⁵¹ 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.¹⁵² 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 doesn’t subsidize the private provider’s lack of success, and that the onus is on the bond organization to police the provider’s progress.¹⁵³

In what follows, I describe how bounty initiatives are structured to advance three of privatization’s principal objectives—efficiency, cost savings, and political dividends to those who champion market-based public administration.

1. Efficiency

Social-impact bonds promise to be more efficient than both government contracting and marketized bureaucracy. The government does not pay most of

¹⁴⁸ See Chen, *supra* note 137; Leonhardt, *supra* note 147; *Who Succeeds Gets Paid*, *supra* note 147; Massachusetts Pursues Social Innovation Financing to Spur Innovation and Build on Program Success, Executive Office for Administration and Finance, May 6, 2011, http://www.mass.gov/?pageID=afpressrelease&L=1&L0=Home&sid=EOaf&b=pressrelease&f=social_innovation_financing&csid=EOaf. Minnesota’s legislature has already appropriated money for pilot programs. <https://www.revisor.mn.gov/bin/bldbill.php?bill=H0681.1.html&session=ls87>.

Social-impact bonds are more firmly established in the United Kingdom, John Loder, et al, *Financing Social Value: Implementing Social Impact Bonds*, Young Foundation, Jan. 2010; Alan Travis, *Will Social Impact Bonds Solve Society’s Most Intractable Problems?*, *GUARDIAN* (UK), Oct. 6, 2010; *Who Succeeds Gets Paid*, *supra* note 147; Emily Bolton, *Social Impact Bonds: Unlocking Investment in Rehabilitation*, *SOCIAL FIN.*, Sept. 2010, http://www.socialfinance.org.uk/sites/default/files/SF_CriminalJustice.pdf.

¹⁴⁹ See Chen, *supra* note 137; Loder, *supra* note 148; Travis, *supra* note 148.

¹⁵⁰ See Liebman, *supra* note 147; Loder, *supra* note 148.

¹⁵¹ See Liebman, *supra* note 147.

¹⁵² New York City promises a 21% return on its investment. Chen, *supra* note 137. The British anti-recidivism program promises a 13.5% annual rate of return, on top of expenditures. See *Who Succeeds Gets Paid*, *supra* note 147.

¹⁵³ Loder, *supra* note 148.

the expenses associated with sustaining the program unless and until that program is successfully completed.¹⁵⁴ This arrangement distinguishes government by bounty from traditional contracting and even from marketized bureaucratic governance. As a matter of efficiency, traditional contractors might well have the same “carrots”—namely, if they perform well they will profit.¹⁵⁵ But they aren’t subject to the same “sticks.” An unsuccessful bondholder loses much, if not all, of its investment. By contrast, a traditional contractor that doesn’t perform well is, at worst, less likely to have its contract renewed. That contractor nevertheless still gets paid for the work already completed.¹⁵⁶ It goes without saying that the contractor would like to have its contracts renewed and win additional contracts. But losing out on future assignments is hardly the same as losing one’s shirt—precisely the fate that awaits the unsuccessful social-impact bond organization.¹⁵⁷

This same reasoning applies with respect to marketized bureaucracy. The availability of performance-based bonuses for exceptional work gives now-marketized government employees some of the same incentives enjoyed by bounty seekers and traditional government contractors.¹⁵⁸ But, the government agency cannot, itself, reap profits. Thus, at the organizational level, there aren’t the same efficiency-promoting incentives.¹⁵⁹ Moreover, neither the agency nor its employees are threatened with the same sticks that discipline the social-impact bond organization and its chosen provider. Sure, under marketization, government workers are now more easily fired for dissatisfactory work.¹⁶⁰ But

¹⁵⁴ The government certainly incurs some costs. It must, after all, decide what bond proposal to endorse, draw up an agreement with the bond organization, and verify the provider’s results.

¹⁵⁵ This won’t always be the case. Many traditional government contracts are structured as “cost-reimbursement” or “cost-plus” contracts. *See supra* note 16 and accompanying text; Julie Roin, *Privatization and the Sale of Tax Revenues*, 95 MINN. L. REV. 1965, 2009 (2011); Michael Abromowitz, *Perfecting Patent Prizes*, 56 VAND. L. REV. 115, 131 n.50 (2003) (emphasizing that cost-plus contractors have little incentive to be efficient because they get paid a fixed-profit margin); Marjorie Kornhauser, *Choosing a Tax Rate Structure in the Face of Disagreement*, 52 UCLA L. REV. 1697, 1711-12 (2005) (noting that cost-plus government contracts transfer little, if any, risk to the private sector).

Of course, it is likely difficult to ascertain whether a social-impact program has been carried out successfully. But it is no less difficult to determine whether traditional contractors are performing successfully. Thus, ease of performance evaluation is not a *prima facie* reason for privatization’s proponents to prefer traditional contracts to bounty arrangements.

¹⁵⁶ *See* NASH, *supra* note 16, at 525.

¹⁵⁷ With social-impact bonds, the government is separating financial management (undertaken by the bond organization) from program management (undertaken by the provider). Because this is not a constitutive nor necessary feature of government by bounty, I don’t take up the admittedly interesting and important questions this structure invites.

¹⁵⁸ *See supra* Section II.A.

¹⁵⁹ *See supra* notes 26-27 and accompanying text.

¹⁶⁰ *See supra* Subsection II.A.3.

neither those workers nor the agency heads risk their own financial capital.¹⁶¹ They therefore have comparatively weaker incentives to avoid failure.

2. Budgetary Savings

Even if social-impact bonds were not viewed as especially efficient, privatization's proponents would still have reason to promote them. For those focused on budgetary savings, social-impact bonds seem highly attractive—certainly more attractive than traditional government contracts.

First, the government saves money by shifting oversight costs onto the private sector. Customarily, the government expends, or at least is expected to expend, significant resources on monitoring.¹⁶² This is true regardless whether traditional contractors or government employees administer public programs. In those cases, the political leadership (the “principal”) that runs the agency and sets the agency's substantive agenda needs also to oversee the personnel (the “agents”) tasked with carrying out that agenda. Oversight is necessary because conflicts invariably arise between principals and agents.¹⁶³ Sometimes the conflict is motivational. Government personnel or contractors might slack. Sometimes, the conflict is ideological. The agents might not share the current leadership's policy commitments;¹⁶⁴ if so, they would not be especially eager to advance those commitments.¹⁶⁵ For both of these reasons, the agency's principals (not to mention Congress¹⁶⁶ and the White House¹⁶⁷) invest in oversight to ensure agency personnel are doing their jobs.

The ability to offer performance-based bonuses and to readily terminate marketized workers (or to refuse to renew government contracts) undoubtedly helps align principal-agent interests. But that alignment depends critically on the government's effective use of carrots and sticks—which itself depends critically on the government's ability to monitor its agents and to know when

¹⁶¹ This assumes that reputational harm associated with failure is an insufficient deterrent.

¹⁶² See *supra* notes 36-38 and accompanying text.

¹⁶³ See Nicholas Bagley & Richard Revesz, *Centralized Oversight of the Administrative State*, 106 COLUM. L. REV. 1260, 1303 (2006) (discussing “principal-agent problem[s]” arising “between the heads of agencies and their employees”).

¹⁶⁴ JOEL ABERBACH & BERT ROCKMAN, *IN THE WEB OF POLITICS* 168 (2000) (describing civil servants as ideologically to the left of the political leadership of both major parties); RICHARD NATHAN, *THE ADMINISTRATIVE PRESIDENCY* 7-12 (1983) (describing ideological differences between civil servants and the political leadership).

¹⁶⁵ See Simon & Wilson, *supra* note 60 (describing civil-servants' objections to the appointed leadership's substantive agenda and procedural protocols).

¹⁶⁶ See Lisa Schultz Bressman, *Procedures and Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1767-68 (2007) (emphasizing principal-agent tensions between Congress and agencies).

¹⁶⁷ Moe & Wilson, *supra* note 66, at 18, 34-38 (describing presidential oversight efforts).

and how to dangle the carrots and brandish the sticks.¹⁶⁸ By contrast, one of the purported benefits of social-impact bonds is that oversight expenses are shifted onto the bond organization. That organization stands to lose big if its chosen provider fails in its assignment.¹⁶⁹ Accordingly, it takes the place of the government qua principal. Acting as the principal, the organization devotes resources to ensure its provider (its agent) strives to meet the agreed-upon benchmarks.¹⁷⁰

This is not, of course, to say that the government sheds all monitoring responsibilities;¹⁷¹ rather, just that it retains fewer. It is also not to say that displacing the monitoring costs onto the private sector is necessarily more efficient. The bond organization might be quite effective at oversight. But it need not be. The organization might have to expend more resources than the government would find necessary to do an equivalent amount of monitoring. Regardless, the government does not directly bear those costs, and the organization has incentive to improve its monitoring capabilities.

Second, with social-impact bonds, there can be temporal budgetary savings too. The shifting of expenses is not just from the government to the private sector, but also from the incumbent government onto future ones. In a world of budgetary constraints and frequent, contested elections, a deferral of payment into the perhaps-distant future serves as an important de-facto loan.¹⁷²

When the government proceeds via social-impact bonds, rather than through traditional government contracts or in-house resources, there are immediate and sizable (albeit temporary) budgetary savings.¹⁷³ The govern-

¹⁶⁸ For descriptions of the difficulties associated with government oversight of contractors, see DONAHUE, DECISION, *supra* note 22; Kavaliauskaite & Jucevičius, *supra* note 33.

¹⁶⁹ See *supra* notes 151-152 and accompanying text.

¹⁷⁰ Cf. Susan Rose-Ackerman, *Social Services and the Market*, 83 COLUM. L. REV. 1405 (1983). Rose-Ackerman describes the concept of “proxy shopping.” Proxy shopping involves a private provider receiving public funding to provide social services to needy populations only if that provider is able to attract unsubsidized customers who purchase the same services on the open market. The unsubsidized customers essentially validate the private provider and, by sending that signal, they lessen the government’s need to rigorously monitor the provider. If the customers take their business elsewhere, the provider knows it will also lose its public funding. See *id.* at 1412. An analogy can be drawn to social-impact bonds. Here, it isn’t private customers validating a private provider through market patronage. Rather, it is private bond organizations that validate a private provider by investing in it—and signal their lack of faith by withdrawing that investment.

¹⁷¹ The government still needs to verify that the benchmarks established are met, and that the provider didn’t abuse its authority.

¹⁷² Whether bounties are the most efficient lending markets is, of course, a questionable proposition.

¹⁷³ Typically, when social services are provided in-house, the government expends resources in real time to carry out those social services. Rent, heat, electricity, office supplies, and employee salaries are paid as they come due as are the tangible expenses associated with the program itself. See Alejandro Camacho, *Can Regulation Evolve?*, 55 UCLA L. REV. 293, 347 (2007). Traditional contractors are, likewise, typically paid in regular, routine increments. See also *supra* note 154.

ment can reduce the total amount of current expenditures or reallocate those funds elsewhere, effectively leveraging present-day resources to provide additional services. Assuming the social-impact program succeeds, payment of the providers' expenses (plus the performance bonuses) won't be due for some time. And, responsibility for those payments is likely to fall on a successor administration.¹⁷⁴

For example, in Britain, where social-impact bonds have a longer track record than in the United States,¹⁷⁵ the government's signature social-impact program targeting criminal recidivism runs for seven years.¹⁷⁶ Seven years—the time from commencement of the program until any government payment is due—represents a political lifetime for most high-ranking U.S. Executive officials. Because these officials overwhelmingly serve short tenures,¹⁷⁷ they are unlikely to be in office when it comes time for the bond organization to collect.¹⁷⁸

Legislators have similar incentives to defer payments. Term-limited state and local representatives are unlikely to be in office when payments are due. Thus they enjoy all the benefits while bearing none of the subsequent pain. But even in jurisdictions where term limits do not apply,¹⁷⁹ legislators enjoy the present value associated with being able to deliver similar or expanded services while keeping the budget in check *today*. By the time the payments are due, these legislators will have survived one, if not more, reelection campaigns. Given the electoral advantages associated with the accrual of seniority,¹⁸⁰ having to cut services or raise taxes in year eight—to make the deferred payment—will be less politically costly than if these legislators cut services or raised taxes in year one.¹⁸¹

Due to differences in budgeting between the federal and state levels, bounty vehicles are apt to provide greater payment-deferring benefits to states.

¹⁷⁴ For discussions connecting budgetary issues, timing, and political decisionmaking, see Super, *supra* note 48, at 2624-26; Michaels, *Willingly Fettered*, *supra* note 24, at 848, 891.

¹⁷⁵ See *supra* note 148 and accompanying text.

¹⁷⁶ See Travis, *supra* note 148; Bolton, *supra* note 148.

¹⁷⁷ See, e.g., Lisa Schultz Bressman & Robert P. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 613-14 (2010) (acknowledging that cabinet-level appointments usually serve short tenures); David Fontana, *Government in Opposition*, 119 YALE L.J. 548, 610 (2009) (concluding that the average tenure of political appointees is approximately two years).

¹⁷⁸ See Michaels, *Willingly Fettered*, *supra* note 24, at 850-51 (describing elected officials' present-mindedness and corresponding predisposition to devalue long-term goals).

¹⁷⁹ Matthew Glassman, et al., *Congressional Careers: Service Tenure and Patterns of Member Service, 1789-2011*, CONG. RESEARCH SERV., Jan. 7, 2011, at 2-3 (estimating that the average member of Congress serves for over ten years).

¹⁸⁰ See GARY COX & MATHEW MCCUBBINS, *LEGISLATIVE LEVIATHAN* (1991); Richard McKelvey & Raymond Riezman, *Seniority in Legislatures*, 80 AM. POL. SCI. REV. 951 (1992); Nelson Polsby, et al., *The Growth of the Seniority System in the U.S. House of Representatives*, 63 AM. REV. POL. SCI. 787 (1969).

¹⁸¹ See, e.g., Stephen Ansolabehere & James Snyder, *The Incumbency Advantage in U.S. Elections, 1942-2000*, 1 ELEC. L.J. 315 (2002).

The choice of proceeding via social-impact bonds therefore offers a budgetary boon to political incumbents, irrespective of the arrangement's overall efficiency or ultimate price tag.

3. Political Windfalls

Bounties speak to audiences broader than those animated by efficiency gains or budgetary savings. They speak also to political entrepreneurs. Those looking to make political hay by railing against the State and by promoting market-based agendas might find that contracting isn't packing the political punch it once did.¹⁸²

If familiarity doesn't breed outright contempt, it at the very least has a desensitizing effect. This is often true with respect, say, to a painkiller taken for years but that's no longer working its magic. It is also true with a once-taboo vulgarity, now repeated so frequently that its shock value has all but worn off. This desensitizing effect drives the long-suffering to seek out more powerful narcotics, and the racy comedian to employ even more colorful language.

The same seemingly applies to voters. Today's electorate looking to rally behind a visionary leader is apt to have a tepid response to someone simply advocating more of the same.¹⁸³ *More of the same*, at this late date, includes contracting.¹⁸⁴ What might get voters more excited—and inclined to open their checkbooks—would be a leader pushing the envelope: championing initiatives newer and bolder than traditional contracting.

The incentive to adopt increasingly innovative or extreme policy positions is a staple feature of contemporary electoral politics.¹⁸⁵ It no doubt is consistent with the strategic calculations made in the 1970s and 1980s by the original proponents of contracting. At that time, little controversy existed over the professional bureaucracy and its dominant role in public administration.¹⁸⁶ Calls for government contracting therefore seemed radical and exciting.¹⁸⁷ These calls constituted a brash form of political “product differentiation,”¹⁸⁸

¹⁸² See *supra* Section I.D; Donahue, *Transformation*, *supra* note 22, at 62; Kelman, *supra* note 84, at 315; Auger, *supra* note 80, at 435.

¹⁸³ See Michael Kang, *Sore Loser Laws and Democratic Contestation*, 99 GEO. L.J. 1013, 1019-21 (2011).

¹⁸⁴ See *supra* notes 79-84 and accompanying text.

¹⁸⁵ See ALAN ABRAMOWITZ, *THE DISAPPEARING CENTER* 41-43 (2010) BARBARA SINCLAIR, *PARTY WARS: POLARIZATION AND THE POLITICS OF NATIONAL POLICY MAKING* 3-36 (2006); Pildes, *supra* note 68, at 277-80.

¹⁸⁶ See *supra* Subsection I.D.2.

¹⁸⁷ E.g., Leonard Gilroy, *Local Privatization 101*, REASON POLICY BR., Mar. 16, 2010; *supra* notes 79-81 and accompanying text.

¹⁸⁸ HERBERT KITSCHOLT, *THE TRANSFORMATION OF EUROPEAN SOCIAL DEMOCRACY* 118 (1994).

likely to endear oneself to critical constituencies of party activists¹⁸⁹ and primary voters.¹⁹⁰ In many jurisdictions and in many races, these constituencies swing the outcome of elections.¹⁹¹

To the extent government contracting became so popular that, now, politicians of all stripes endorse it,¹⁹² the Twenty-First Century descendants of privatization's pioneers have reason to branch out to the next big thing.¹⁹³ Still committed to market approaches to public administration, yet unwilling to be lumped alongside more moderate electoral rivals who've jumped on the contracting bandwagon,¹⁹⁴ these descendants are now more likely to invoke novel schemes. They highlight not just nuanced proposals like social-impact bonds but also more sound-bite friendly and politically salient bounty-like initiatives such as dismantling Social Security, marketizing Medicare, and deputizing "citizen-posses."¹⁹⁵ At this early stage, political sloganeering has yet to fully develop around bounties. But given bounties' emphasis on market freedom and on the government paying only for successful private engagements, the potential is clearly there.

¹⁸⁹ John Aldrich, *A Downsian Spatial Model with Party Activism*, 7 AM. POL. SCI. REV. 974 (1983); John Petroci, *Issue Ownership and Presidential Campaigns, 1952-2000*, 118 POL. SCI. Q. 599 (2003).

¹⁹⁰ Bernard Grofman, *Downs and Two-Party Convergence*, 7 ANN. REV. POL. SCI. 25, 28-30 (2004); Gary Cox, *Centripetal and Centrifugal Incentives in Electoral Systems*, 34 AM. J. POL. SCI. 903 (1990).

¹⁹¹ ABRAMOWITZ, *supra* note 185, at 104 ("The primary emphasis in most political campaigns today is not on persuading swing voters but on mobilizing core party supporters."); Pildes, *supra* note 68, at 298 & n.89 ("[P]rimaries tend to be dominated by the most committed and active party members, who tend to be more ideologically extreme than the average party member."); Elisabeth Gerber & Rebecca Morton, *Primary Election Systems and Representation*, 14 J.L. ECON. & ORG. 304, 322 (1998) (describing factions of mobilized citizens—whose preferences differ from those of the median voter—as having disproportionate influence in closed primaries).

¹⁹² See Subsection I.D.2. Issue convergence is also a staple feature of political competition, see ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957), that seemingly precedes efforts at political product differentiation.

¹⁹³ See *supra* note 17 and accompanying text.

¹⁹⁴ See *supra* notes 81-83 and accompanying text.

¹⁹⁵ Among the most heavily publicized of these proposals are initiatives to dismantle Social Security, see Text of President Bush's 2005 State of the Union Address, WASHINGTONPOST.COM, Feb. 2, 2005, http://www.washingtonpost.com/wp-srv/politics/transcripts/bushtext_020205.html; RICK PERRY, *FED UP! OUR FIGHT TO SAVE AMERICA FROM WASHINGTON* 50, 61-62 (2010); Peter Wallsten, *McCain Takes a Risk on Social Security*, L.A. TIMES, Jul. 14, 2008, at A1; to dismantle Medicare, see Dan Balz, *Medicare, Mandates and Miscalculation*, WASH. POST, May 26, 2011, at A4; and, to encourage non-governmental policing by citizen "posses" and border vigilantism by militia groups. For posses, see Randal Archibold, *Arizona County Uses New Law to Look for Illegal Immigrants*, N.Y. TIMES, May 10, 2006, at A19; Danny Yadron, *High Noon on Immigration*, WALL ST. J., Dec. 3, 2011, at A6. For border vigilantes, see Jon D. Michaels, *Deputizing Homeland Security*, 88 TEX. L. REV. 1435, 1461 & n.141 (2010) [hereinafter Michaels, *Deputizing*]; Anna Gorman, *Volunteers To Patrol Border Near San Diego*, L.A. TIMES, May 5, 2005, at B1; Solomon Moore, *Immigration Official Praises Citizen Patrols*, L.A. TIMES, July 21, 2005, at B6.

* * *

Social-impact bonds are hardly alone. Government by bounty initiatives are surfacing across the administrative state. They include regulatory vouchers,¹⁹⁶ prediction markets,¹⁹⁷ homeland-security information-sharing arrangements,¹⁹⁸ private attorneys hired by state and local governments on contingency-fee bases,¹⁹⁹ and the leasing of fee-generating public transportation conduits.²⁰⁰ Moreover, vintage bounty initiatives, including qui-tam suits²⁰¹

¹⁹⁶ See *infra* Subsection III.B.1.

¹⁹⁷ Prediction (or public-futures) markets encourage private parties to place money on the likelihood of certain events (e.g., outbreak of war; energy crises) occurring. Government agencies study public betting patterns to gain insight into what will happen—and apply that insight to prepare for (or prevent) that occurrence. See MICHAEL ABRAMOWICZ, *PREDICTOCRACY* (2007); CASS SUNSTEIN, *INFOTOPIA* (2006); Tom Bell, *Government Prediction Markets*, 116 PENN. ST. L. REV. 403 (2012); Robert Hahn & Paul Tetlock, *Using Information Markets To Improve Decision Making*, 29 HARV. J. L. & PUB. POL'Y 213 (2006); Saul Levmore, *Simply Efficient Markets and the Role of Regulation*, 28 J. CORP. L. 589 (2003).

Government prediction markets operate as bounties. Participants in prediction markets must invest their own resources, which they lose if their predictions don't come true. For this reason, participants have strong incentive to do their homework before wagering. For this reason, too, the information generated by the market is expected to be highly accurate. See Robin Hanson, *Decision Markets for Policy Advice*, in *PROMOTING THE GENERAL WELFARE* 6 (Alan Gerber, ed. 2006) (describing the highly accurate results of prediction markets on questions of public consequence). Those who have the most knowledge will wager large sums. And, those with just a passing interest or uninformed opinion will bet far more modestly (if they bet at all). By contrast, unlike those placing bets, government employees and traditional contractors do not lose money when they supply inaccurate predictions.

¹⁹⁸ See *infra* note 307.

¹⁹⁹ Since the late 1990s, governments have shown increased receptivity to hiring private lawyers on contingency-fee bases. Just this past decade, attorneys general in thirty-six states secured legal services on a contingency basis to sue gun manufacturers, lead paint producers, HMOs, fast-food chains, mortgage lenders, and polluters. Victor Schwartz, *The "No-Fault" Theories Behind Today's High-Stakes Government Recoupment Suits*, 44 WAKE FOREST L. REV. 923, 932 (2009); David Wilkins, *The Case of "Substitute" Attorneys General*, 2010 MICH. ST. L. REV. 423, 430-31 (2010). Contingency-fee arrangements work the same way for the government as they do for private clients. Lawyers bear the costs of investigating and trying a case. When the lawyers win a damages judgment, they take home their bounty, namely a percentage of that award. If not, they receive nothing (and are not compensated for the costs incurred). Schwartz, *supra*, at 931; John C. Coffee, Jr., *Myth and Reality About the Synthesis of Private Counsel and Public Client*, 51 DEPAUL L. REV. 241, 251 (2001) (“[Contingency-fee arrangements] provide[] the elected official with a no-risk gamble.”).

²⁰⁰ See *infra* Subsection III.B.2.

²⁰¹ Qui-tam laws authorize private individuals (“relators”) to prosecute claims alleging fraud against the State. Successful relators receive a bounty—up to 30% of the judgment or settlement plus legal fees. See 31 U.S.C. §3730. Like social-impact bond organizations, relators must ante up, expending time and resources to uncover and prosecute claims, fully aware that there is no guarantee of a recovery, or even an assurance that their legal fees will be recouped.

By giving individuals opportunity and motive to help combat fraud, the government recovers most of the judgment or settlement, while conserving its in-house resources. See 31 U.S.C. §§3730(b)(2),(d)(2); Charles Doyle, *Qui Tam*, CONG. RESEARCH SERV., Aug. 6, 2009, at 1, 5, 7 <http://www.fas.org/sgp/crs/misc/R40785.pdf>. For a discussion of the modern-day resurgence in qui-

and government-sponsored prizes,²⁰² are experiencing a contemporary renaissance.

III. PRIVATIZATION'S FUTURE

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 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

tam suits, see VERKUIL, SOVEREIGNTY, *supra* note 72, at 179, 186. Verkuil finds that although the size of the Justice Department's false-claims unit has remained stable since the late 1980s, the number of suits prosecuted has increased six-fold.

²⁰² There is likewise renewed enthusiasm for prize competitions. See America COMPETES Reauthorization Act of 2010, P.L. 111-358 (authorizing agencies to initiate prize competitions); OMB, MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES (Mar. 8, 2010) (describing President Obama's promotion of prizes), http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-11.pdf; Thomas Kalil, *Prizes for Technological Innovation* 5 (Hamilton Project Discussion Paper 2006-08, Dec. 2006), <http://www.brookings.edu/views/papers/200612kalil.pdf>; Liam Brunt, et al., *Inducement Prizes and Innovation* (Harv. Bus. Sch. Working Paper 11-118 2011), http://www.prizecapital.net/Prize_Capital/Prizes_files/11-118_1.pdf. In the past few years, the federal government has sponsored prizes to encourage private parties to support NASA projects, energy initiatives, public-health innovation, military needs, and social-service programs. See, e.g., Kalil, *supra*; Holly Doremus, *Constitutive Law and Environmental Policy*, 22 STAN. ENVTL. L.J. 295, 378 (2003); Fuel Scrubber, CHALLENGE.GOV, <http://challenge.gov/AirForce/291-fuel-scrubber>; Badges for Vets, CHALLENGE.GOV <http://challenge.gov/VAi2/262-badges-for-vets>; Bela Dhamankar, *Using Prizes and Challenges as a Policy Tool to Stimulate Innovation in Healthcare*, Dep't of Health & Human Servs., Jul. 22, 2011, at App. B., http://www.sts.virginia.edu/pip/research_papers/2011/Dhamankar.pdf.

Prizes differ from traditional government contracts in three ways. First, the government pays for success, awarding bounties only to those participants who meet the stated goals. Jonathan Adler, *Rewarding Energy Innovation to Achieve Climate Stabilization*, 35 HARV. ENVTL. L. REV. 1, 29 (2011). Second, it encourages greater entrepreneurial ingenuity. Unlike with government contracts, government-sponsored prizes encourage market actors to chart their own courses as they strive to meet the stated goals. See Abramowicz, *supra* note 155, at 131. Third, the government is relieved of the costs and risks associated with choosing ex ante which private party will be most capable of meeting the stated goals—and those associated with monitoring that firm's progress. Adler, *supra*, at 29; Kalil, *supra*.

(populated primarily by civil servants and traditional 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. To be sure, these are significant and relevant questions. They highlight the salience of this inquiry. And, they add texture to the illustrations and case studies.

But most importantly, they raise the stakes of the project. With so much riding on this generational expansion, we must make sure we truly understand the forces propelling privatization's progeny, the topography of the new terrain, and the rules by which marketized bureaucracy and government by bounty seem to play. It is for this very reason that I avoid venturing too far into the normative briar patch. To be sure, I harbor reservations about the politicization of the administrative state and about market principles crowding-out consideration of civic values and welfarist goals. While those reservations cannot help but inform these discussions, I nevertheless do not allow them to hijack this project. Accordingly, this project remains principally a positive account that conceptualizes privatization's progeny as instruments critical not just to the future of the privatization agenda but also to the future of the administrative state writ large. Cementing this strong positive account provides a foundation upon which to develop the corresponding normative theory (which I reserve for another day).

A. Marketized Bureaucracy's Privatization Agenda—and Beyond

Marketized bureaucracy is not a cloned offspring. It differs from its contracting forbearer in important ways. As will be shown, these challenges and complications are a function of two sets of differences between marketization and government contracting.

First, marketization represents a wholesale restructuring of government labor policy.²⁰³ Contracting, by contrast, is a piecemeal process. Contracting might be ubiquitous, but still must be performed surgically, one discrete responsibility at a time.²⁰⁴ This distinction proves crucial in marketization influencing administrative law and policy in ways contracting simply hasn't.

²⁰³ See *supra* notes 89-136 and accompanying text.

²⁰⁴ See, e.g., OMB Circular No. A-76 (Rev.) (May 29, 2003); Mathew Blum, *The Federal Framework for Competing Commercial Work Between the Public and Private Sectors*, in GOVERNMENT BY CONTRACT, *supra* note 2, at 63.

Second, marketization represents privatization's conversion of the bureaucracy. Market values are imposed on the administrative state, thereby crowding-out public-sector norms. Contracting, by contrast, involves the market annexing a jettisoned government responsibility. By allowing the market to annex discrete responsibilities, the government is able to ensure its internal, public norms remain unrivaled. Indeed, if anything, because contracts are often conditioned on government-mandated fair-wage and preferential-hiring requirements,²⁰⁵ contracting acculturates the market—exporting public-sector values and imposing them on contractors.²⁰⁶ This distinction, too, proves crucial in marketization influencing legal doctrines and institutional practices in ways contracting never has.

1. Marketization's Wholesale Restructuring of Government Labor Policy

One of the signature features of marketization is its promotion of business-like performance evaluations for government employees.²⁰⁷ At first blush, this feature appears to do little to distinguish marketization from government contracting. Contracts, after all, popularized incentive-based pay in modern public administration.

But marketization, unlike contracting, is no sniper's bullet. Contracting hits one target, thus minimizing collateral effects. Precise targeting enables contracting agencies to distinguish between commercial and inherently governmental responsibilities. By law, inherently governmental responsibilities, which constitute 40% of all federal tasks,²⁰⁸ must be kept in-house.²⁰⁹ They include jobs held by, among others, policymakers, investigators, and prosecutors whose work is not only central to an agency's mission but also difficult to evaluate and “price” based on weekly, quarterly, or yearly performance.²¹⁰

Responsibilities deemed commercial may be contracted out. Such responsibilities include custodial, clerical, and maintenance work. Each commercial responsibility is assessed individually to determine whether it is suitable for

²⁰⁵ See *infra* notes 233-234 and accompanying text.

²⁰⁶ Cf. Freeman, *supra* note 15 (describing efforts to acculturate government contractors to make them more like public servants).

²⁰⁷ See *supra* Subsection II.A.3.

²⁰⁸ Blum, in GOVERNMENT BY CONTRACT, *supra* note 2, at 63, 83.

²⁰⁹ See Federal Activities Inventory Reform (FAIR) Act, PL. 105-270, § 5, 112 Stat. 2382, 2384-85 (1998) (defining inherently governmental activities as those so intimately related to the public interest that they must be performed by federal employees); DANIEL GORDON, POL'Y LETTER 11-01: PERFORMANCE OF INHERENTLY GOVERNMENTAL AND CRITICAL FUNCTIONS, 76 FR 56227, 56236 (Sept. 12, 2011), www.gpo.gov/fdsys/pkg/FR-2011-09-12/pdf/2011-23165.pdf. Federal agencies follow the FAIR Act's statutory definition. See also OMB Circular No. A-76, *supra* note 204, at (B)(2).

²¹⁰ See Federal Acquisition Regulation Subpart 7.5; L. Elaine Halchin, *et al.*, *Inherently Government Functions*, CONG. RESEARCH SERV., Oct. 1, 2010; Guttman, *supra* note 76, at 41.

contracting.²¹¹ A recent study suggests that federal agencies are actually highly selective contractors. They put up only 13% of all commercially designated activities for private-public competition.²¹²

Marketization eviscerates that commercial-noncommercial distinction, eliminating opportunities for such individual assessment. If contracting is a sniper's bullet, marketization is grapeshot, indiscriminately blanketing everything in sight. What that means is that where marketization has taken root both commercial and inherently governmental work responsibilities are automatically subject to the similar job insecurities and performance-based incentives.²¹³

Given the complexity and sensitivity of inherently governmental responsibilities, it is likely that marketization's indiscriminate imposition of performance-based rewards and sanctions on government employees will not accurately track effort. Indeed, that's the primary reason why, even in the absence of legal prohibitions, careful agencies would not contract out inherently governmental responsibilities.²¹⁴ Those agencies recognize that contracting's effectiveness isn't just a function of competition among bidding contractors; it also turns critically on whether the government can evaluate—and put a price tag on—how well the contractor is performing.²¹⁵ (Moreover, when governments do contract out inherently governmental work, it is often only because they are promoting other ends unrelated to efficiency or cost-savings.²¹⁶)

Accordingly, many marketized personnel subject to performance-based incentives might become frustrated by the potentially tenuous relationship between effort and compensation.²¹⁷ These personnel might refocus their mission (or be directed to refocus their mission), reframing their tasks around

²¹¹ See OMB Circular No. A-76, *supra* note 204.

²¹² See Competitive Sourcing Report, FY 2007, OMB, May 2008, at 5.

²¹³ See *supra* notes 132-136 and accompanying text (describing the wholesale conversion of civil-servants into at-will employees).

²¹⁴ See Competitive Sourcing Report, *supra* note 212, at 5.

²¹⁵ See Donahue, *Transformation*, *supra* note 22, at 44-45 (characterizing the benefits of contracting turning on the government's capacity to define the tasks capable of being outsourced and to measure the contractor's performance in carrying out those tasks); DONAHUE, *DECISION* *supra* note 22; Levmore, *supra* note 23, at 521 (noting that flat-fee payment to agents is appropriate where "the marginal and comparative value of work is difficult for the [principal] to assess").

²¹⁶ See Michaels, *Pretensions*, *supra* note 64 (describing how contracts can be used to evade constitutional and statutory restrictions on government activity and to sideline civil servants).

²¹⁷ *But see* Rose-Ackerman, *supra* note 23, at 143-44. Susan Rose-Ackerman favors incentive-based pay for government officials, a scheme that, she argues, "need not be incompatible with a civil service system which attempts to isolate officials from political pressures." *Id.*, at 132-33. Given some of the qualifying language (e.g., "[s]o long as there is little or no uncertainty about the relationship between effort and performance" *id.* at 134; "professional norms might break down if the agency rewards many lucky but unprofessional officials and penalizes conscientious but unlucky ones," *id.* at 143-44), it isn't apparent that Rose-Ackerman would endorse wholesale marketization over surgical interventions in cases where "there is little or no uncertainty about the relationship between effort and performance," *id.* at 134.

the 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.

Contemporary debates surrounding public education come immediately to mind. A recent trend in education policy is to evaluate teacher and school quality—and to reward or punish employees and districts accordingly.²¹⁸ Many experts concede that it is exceedingly difficult to measure educational quality.²¹⁹ But what’s really easy to measure is student performance on standardized tests.²²⁰ These tests offer precise, objective data, which can be used to rank students and teachers alike.

Perhaps not surprisingly, many school districts around the country have effectively reoriented their educational missions around “teaching to the test.”²²¹ While some celebrate this approach, others voice skepticism. Critics contend that test scores are a poor proxy for measuring educational quality (and for assessing teachers and schools).²²² If their concern holds true, then performance metrics neither reward the right teachers nor promote educational goals.

In light of the marketization movement, perhaps the reformulation of educational missions is just the tip of the iceberg. It might be entirely rational for environmental agencies, occupational safety and health divisions, and perhaps even prosecutorial offices to follow suit²²³—taking adaptive measures to avoid being at the mercy of otherwise-arbitrary performance evaluations. Imagine, for instance, environmental or workplace-safety investigators who

²¹⁸ See, e.g., SARA HEYBURN, ET AL., COMPENSATION REFORM DESIGN PREFERENCES OF TEACHER INCENTIVE FUND GUARANTEES 1 (2010) (“[I]ncentive pay for educators... has [recently] secured itself firmly at the top of the education policy agenda and in the public eye.”), http://www.performanceincentives.org/data/files/news/PapersNews/2010_Heyburn_etAl_TeacherIncentiveGrantees1.pdf

²¹⁹ JOHN CHUBB & TERRY MOE, POLITICS, MARKETS, AND AMERICA’S SCHOOLS 36 (1990) (“[G]ood education and the behaviors conducive to it are inherently difficult to measure in an objective, quantifiable, formal manner.”).

²²⁰ Monica Teixeira de Sousa, *How President Obama’s Education Reforms Threaten the Working Class*, 50 LOUISVILLE L. REV. 201, 204 (2011) (noting efforts to evaluate teacher performance based on “their students’ performance on standardized assessments”); Benjamin Lindy, Note, *The Impact of Teacher Collective Bargaining Laws on Student Achievement*, 120 YALE L.J. 1130, 1132-33 (2011) (describing incentives to tie teacher evaluations to “student performance on standardized tests”).

²²¹ See James E. Ryan, *Standards, Testing, and School Finance Litigation*, 86 TEX. L. REV. 1223, 1243 (2008) (“[F]or accountability purposes, test scores are the primary if not sole measurement of success... [S]chools teach to the tests and ignore standards (and entire subjects) that are not tested.”).

²²² Marilyn Cochran-Smith, *No Child Left Behind: 3 Years and Counting*, 56 J. TCHR. EDUC., 99, 101 (2005) (characterizing efforts to evaluate teacher quality based on student performance on standardized tests as the “worst trend of the current accountability movement”); Andrew Spitzer, Comment, *School Reconstitution Under No Child Left Behind*, 54 UCLA L. Rev. 1339, 1373-78 (2007) (exploring the weak links between standardized test scores and teacher quality).

²²³ E.g., Jessica Fender, *DA Chambers Offers Bonuses for Prosecutors Who Hit Conviction Targets*, DENVER POST, Mar. 23, 2011, http://www.denverpost.com/search/ci_17686874; Stephanos Bibas, *Rewarding Prosecutors for Performance*, 6 OHIO ST. J. CRIM. L. 441 (2009).

have always emphasized preventative measures, working with regulated firms to help them comply with the relevant laws and regulations.²²⁴ Now, post-marketization, those investigators might focus instead on meeting an enforcement-sanction quota. The emphasis on fines might objectively demonstrate worker diligence, but lying in wait for violations to occur is not necessarily the best (or even a better) approach to public regulation.

* * *

There are virtues and dangers inherent in marketization's encouraging government units to teach-to-the-test. Such pressures might well distort agency practices, if not entire missions. But there is another side to this debate. For those frustrated with what they see as otherwise hard-to-motivate or politically obstinate (pre-marketized) government bureaucracies, marketization's potential performance-mismatch and its potential to engender policy distortions in some, discrete sectors might be a small price to pay to keep every government worker on her toes.

That is why, in essence, this aspect of marketization raises important normative and policy questions. What do we want from our government workforce? What do we fear? And, what costs are we willing to bear both to promote those values we want to encourage and to stamp out those practices that alarm us? Traditionally, we've been more afraid of potentially misaligned performance incentives than we have been about employee slack and bureaucratic obstructionism. Perhaps we have overestimated those traditional fears. Perhaps larger concerns have now risen to the fore. Or, possibly, we simply haven't given these questions enough thought. In any event, marketization—for good or ill—switches the default. And, we're now left to sort out the practical effects and normative implications of this new administrative orientation.

2. Marketization's Colonization of the Bureaucracy

Marketization's overhaul of government labor policy doesn't just switch the default in favor of greater emphasis on performance-based incentives. It also seemingly crowds out opportunities to route ancillary, socioeconomic programs through government labor policy. Perhaps the most famous example of socioeconomic goals being channeled through government personnel practices involves President Truman's Executive Order 9,981 desegregating the military.²²⁵ Truman's order constituted a groundbreaking social-justice precedent that helped spur desegregation efforts in other pockets of our civil, social,

²²⁴ ALBERT GORE, *BUSINESSLIKE GOVERNMENT* 80 (1997) ("The best way to protect the public is by *preventing* violations, not just punishing them.").

²²⁵ See Exec. Order 9981, 3 C.F.R. §722 (1948).

and political economy.²²⁶ It also played a role in helping to neutralize Soviet propaganda casting the United States as a racist nation.²²⁷

That said, Truman's order, at least initially, complicated defense planning and budgeting in profound ways. Critics believed that interracial distrust and prejudice would jeopardize military efficiency²²⁸ and undermine our warfighting capacity.²²⁹ They argued that the American military was not an appropriate venue for social experimentation.

Truman's desegregation order cut against the dominant practices of the day, which were largely inimical to the active promotion of racial integration.²³⁰ In many respects, the desegregation order served as a forerunner to modern-day uses of government labor policies to promote socioeconomic empowerment—policies that now seem inimical to the marketization movement. Because marketization involves wage cuts and other personnel actions making government service more like private-sector employment, it invariably marginalizes labor policies that strive to do more than simply promote maximum output at minimum cost.²³¹ That is to say, marketization does more than negate longstanding features of public-employment law. It also negates the substantive (redistributive) vision of the State reflected in those features.²³²

This is in keeping with marketization's conversion of the bureaucracy. Traditional contracting involves the government exporting public services for the market to annex. By allowing outsourced responsibilities to be annexed, the government ensures its internal, nonmarket norms remain unchallenged. And,

²²⁶ Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 7-8 (1996) (arguing that Truman's military desegregation order paved the way for *Brown v. Bd. of Education*); JACK GREENBERG, RACE RELATIONS AND THE AMERICAN LAW 369 (1950).

²²⁷ MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS 87 (describing "safeguarding the nation's overseas image" as "a critical factor" in "Truman's decision to desegregate the military"); PHILIP A. KLINKNER with ROGERS M. SMITH, THE UNSTEADY MARCH 237 (1999).

²²⁸ Cf. JAMES Q. WILSON, BUREAUCRACY 17 (1989) (attributing the effectiveness of the German military in part to its demographic homogeneity within each unit).

²²⁹ MORRIS MACGREGOR, INTEGRATION OF THE ARMED FORCES, 18, 317 (1981) (documenting opposition within the military on the ground that integration would be difficult so long as the nation remained otherwise racially segregated).

²³⁰ See, e.g., MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS (2004) (describing cultural and legal hostility to racial integration).

²³¹ See *supra* Section II.A.

²³² See PETER EISINGER, BLACK EMPLOYMENT IN CITY GOVERNMENT, 1973-1980, at 3 (1983) ("The opportunities for socioeconomic advancement and administrative power through civil service employment are important to both individual workers and the minority group as a whole."); John Donahue, *The Ideological Romance of Privatization*, in *Morality, RATIONALITY, AND EFFICIENCY* 133, 137 (Richard Coughlin, ed. 1991) ("[P]ublic jobs have been the gateway to the middle class for millions of disadvantaged Americans."); see *infra* notes 239-240 and accompanying text. Cf. *Bd. of Regents v. Roth*, 408 U.S. 564, 589 (1972) (Marshall, J., dissenting) ("Employment is one of the greatest, if not the greatest, benefits that governments offer in modern-day life.").

by insisting contractors pay prevailing wages²³³ and hire from underrepresented or disadvantaged communities,²³⁴ the government actually extends its nonmarket norms into the marketplace.

Marketization involves the converse dynamic. It forces the government sector to adopt and embrace market values. Thus, instead of the government telling contractors how to act, the market tells the government how to act.²³⁵ In this case, the market tells the government to abandon policies that artificially inflate labor costs. This puts marketization at odds with government labor policies that promote the socioeconomic welfare of its employees.

We might lament marketization's hostility to these embedded socioeconomic programs. Or, we might celebrate marketization's elimination of thinly veiled, special-interest set-asides. Either way, the shift to marketization brings to the fore questions whether ancillary policy aims can—and should—perdure notwithstanding the civil-service overhaul.

Consider the U.S. Postal Service. The Postal Service isn't just about delivering mail. In the post-WWII era, it, like most other government agencies, has served also as an implicit antipoverty and affirmative-action program.²³⁶ 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 it as nothing more than a quasi-commercial enterprise expected to operate in the black.²³⁷ For many Americans, and particularly for Americans of color with

²³³ See 48 C.F.R. Subpart 22.4 (requiring that contractors pay prevailing wages).

²³⁴ See FAR §§19.1405-1406 (recognizing disabled service veterans as a preferred class of contractors); 13 C.F.R. §§121, 124-27, 134 (codifying the government's preference for women-owned, small-business government contractors).

²³⁵ Cf. MARY DOUGLAS, *HOW INSTITUTIONS THINK* (1986) (characterizing the ways in which institutions acculturate themselves to one another); Sharon Dolovich, *How Privatization Thinks*, in *GOVERNMENT BY CONTRACT*, *supra* note 2, at 128 (applying a similar approach in the context of private and state prisons).

²³⁶ See, e.g., PHILIP RUBIO, *THERE'S ALWAYS WORK AT THE POST OFFICE* (2010); LINDA BENBOW, *DELIVERING DIVERSITY IN THE US POSTAL SERVICE* (2011). In an earlier era, we could also speak of the Postal Service serving as “the chief means by which intellectual light irradiates to the extremes of the republic.” George Will, *Post-Postal Service*, *WASH. POST*, Nov. 27, 2011, at A23 (quoting Jacksonian-era congressional leader). Given the rise of global telecommunications, which today makes “snail-mail” seem quaint and perhaps unnecessary, democratic-enlightenment arguments in defense of the Postal Service carry little weight. Were that not the case, calls to charge premiums for certain, costly routes—or to abandon those routes altogether—would themselves butt up against important social and political goals.

²³⁷ Gary MacDougal, Op-ed, *Junking the Junk Mail Office*, *WALL ST. J.*, Oct. 5, 2011, at A17; Maurice McTigue, *Can the Postal Service Be Saved?*, *CHI. TRI.*, Oct. 19, 2011, at C27; Lisa Rein, *Issa Bill Would Overhaul U.S. Postal Service*, *WASH. POST*, Jun. 24, 2011, at A14 (describing proposed legislation that would result in weaker collective-bargaining arrangements and reduced wages and benefits). By and large, private parcel companies are concerned about shareholder value, not their employees' financial security. See Bob Sechler, *FedEx Begins Campaign Against Labor Bill*, *WALL ST. J.*, Jun. 9, 2009, at B5 (noting FedEx's opposition to legislation that would make it easier for its workers to unionize).

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 antipoverty program than the landmark, but much maligned, AFDC/TANF programs.²³⁸ 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.”²³⁹ Moynihan indicated that we shouldn’t 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.²⁴⁰

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 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.²⁴¹ Ought, for example, FedEx and UPS employees with similar training and similar work responsibilities lag so far behind? Where is their entrée 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, antipoverty programs.

Calls for cutting wages, benefits, and the overall number of letter carriers are now ubiquitous in our highly marketized political climate.²⁴² Excoriated for awarding high salaries and generous pensions to low-skilled workers, the Postal Service is starting to heed these calls.²⁴³ (By contrast, Moynihan once recommended that the Postal Service provide twice-daily mail service—seemingly

²³⁸ See David A. Super, *The Rise of the Personal Choice Model for Rationing Public Benefits*, 113 YALE L.J. 815 (2004) (describing federal, means-tested welfare programs).

²³⁹ Thomas Meegan, *Moynihan of the Moynihan Report*, N.Y. TIMES, Jul. 31, 1966 <https://www.nytimes.com/books/98/10/04/specials/moynihan-report.html>. I invoke Moynihan solely for his influential role in shaping social-welfare debates and policies. I take no position on the controversy surrounding his theories on the causes of poverty. Compare Herbert Gans, *The Negro Family: Reflections on the Moynihan Report*, in THE MOYNIHAN REPORT AND THE POLITICS OF CONTROVERSY 450 (Lee Rainwater & William Yancey, eds. 1967) with WILLIAM JULIUS WILSON, MORE THAN JUST RACE: BEING BLACK AND POOR IN THE INNER CITY (2010).

²⁴⁰ Meegan, *supra* note 239. But see Ross Douthat, *What Tax Dollars Can’t Buy*, N.Y. TIMES, Oct. 30, 2011, at SR11 (characterizing above-market government pay as a redistribution program).

²⁴¹ See Donahue, *supra* note 232, at 237.

²⁴² See *supra* note 237 and accompanying text.

²⁴³ See Steven Greenhouse, *Postal Chief Seeks Ability To Cut Costs To Stem Loss*, N.Y. TIMES, Nov. 22, 2011, at B6.

inefficient as a purely commercial consideration but perhaps an effective means of employing and empowering many more, otherwise-struggling families.²⁴⁴)

While it is certainly clear that the “mission” of private competitors UPS and FedEx is to turn a profit,²⁴⁵ the Postal Service has traditionally had a broader set of objectives.²⁴⁶ For better or worse, the forces of marketization are seemingly and summarily changing that—not just within the Postal Service but all across the administrative state.²⁴⁷

3. Marketization’s Doctrinal Feedback Loops

The above two discussions emphasized the ways in which marketization affects public policy, distributive-justice considerations, and how we evaluate and reward government workers. But just as importantly, marketization’s civil-service overhaul might well force courts to recalibrate core constitutional and administrative law doctrines. Any such recalibration would principally be in response to marketization’s politicization of the bureaucracy.

This Subsection addresses how courts, based on their current doctrinal positions and the reasoning that underlie them, might well respond to marketization. Of course, the fact that courts can respond to marketization doesn’t mean that they should, that doing so won’t prompt the political branches to counter in unanticipated ways, or that the costs of responding to these recalibrations are worth the candle.

a. Judicial Review of Questions of Fact and Policy

Courts have been especially sensitive to the ways in which political considerations can unduly influence an agency’s finding of fact or an agency’s policy determination. Working to ensure agencies are rigorous and comprehensive in their fact-finding and policy determinations, the Supreme Court requires reasoned analysis rather than politics to guide agency decisionmaking.²⁴⁸

²⁴⁴ Meegan, *supra* note 239; *see also* JAMES PATTERSON, *THE MOYNIHAN REPORT AND AMERICA’S STRUGGLE OVER BLACK FAMILY LIFE FROM LBJ TO OBAMA* 15 (2010).

²⁴⁵ *But see* Jon D. Michaels, *All the President’s Spies*, 96 CAL. L. REV. 901, 914-16 (2008) (describing FedEx’s corporate managers as engaging—for reasons of national security and personal prestige—in activities that potentially jeopardize shareholder value).

²⁴⁶ *See generally* Megan Woolhouse, *Now Hiring: Your Uncle Sam*, BOS. GLOBE, May, 30, 2009, at A1 (describing agencies as recruiting employees “who desire to be in public service versus kneeling at the altar of the bottom line”). Delivering first-class mail for the same price regardless of distance or ease of access is yet another difference between government and private provision. *See supra* note 236.

²⁴⁷ *See* MICHAEL J. SANDEL, *WHAT MONEY CAN’T BUY: THE MORAL LIMITS OF MARKETS* (2012).

²⁴⁸ *See* *Massachusetts v. EPA*, 549 U.S. 497, 533-34 (2007) (requiring an agency to provide reasoned justifications for its decision to reject a petition for proposed rulemaking); *Motor Vehicle Mfrs. Ass’n v. State Farm*, 463 U.S. 29, 48-51 (1983) (requiring expert consideration and analysis as a basis for upholding a challenged agency rule); *Ethyl Corp. v. EPA*, 541 F.2d 1, 68-69 (D.C. Cir.

Scholars characterize this scrutiny (which they call hard-look review) as “expertise-forcing”²⁴⁹ and as hostile to “political considerations [serving] as rational justifications for agency action.”²⁵⁰

To the extent courts insist that agencies provide detailed explanations justifying their actions,²⁵¹ invariably it falls upon career personnel to generate much of the supporting documentation.²⁵² Historically, these career personnel have been members of the politically insulated civil service.²⁵³ Thus they’ve served as an important check on political excesses. When the political leadership discounts, distorts, or disregards the civil-servants’ findings, it does so at its own peril.²⁵⁴

So long as it is implicitly understood that the independent bureaucracy plays a critical role within the black box of administrative agencies,²⁵⁵ hard-look review need not be more demanding than it currently is. But, by removing government workers’ civil-service protections, marketization politicizes the bureaucracy.²⁵⁶ Courts now concerned that the underlying support for agency action is itself politicized (by the at-will employees staffing marketized

1976) (en banc) (Leventhal, J., concurring). Then-Justice Rehnquist urged the *State Farm* court to accord greater deference to a new political administration’s desire to act upon its elected mandate. *State Farm*, 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part) (“A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency’s reappraisal of the costs and benefits of its programs and regulations.”).

²⁴⁹ Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 52 (2007); *id.* (describing a series of cases, including *Massachusetts v. EPA*, *Gonzales v. Oregon*, and *Hamdan v. Rumsfeld*, as all “overrid[ing] executive positions [the Court] found untrustworthy, in the sense that executive expertise had been subordinated to politics”).

²⁵⁰ Magill & Vermuele, *supra* note 59 at 1053; *id.* at 1078 (suggesting judicial scrutiny focused on expertise “reduce[s] the political responsiveness of agency decisionmaking”).

²⁵¹ *State Farm*, 463 U.S. at 48-51; *SEC v. Chenery*, 318 U.S. 80, 87 (1943) (insisting that agency actions be upheld only for the reasons the agency gave at the time it made its decision).

²⁵² Cary Coglianese, *The Internet and Citizen Participation in Rulemaking*, 1 J.L. & POL’Y FOR INFO. SOC’Y 33, 36 (2005) (noting that agency heads “delegate the drafting, analysis, and policy design [of rules] to career civil servants”); *see also* Magill & Vermeule, *supra* note 66, at 1037-38 (describing as “significant” the input of civil servants, lawyers, scientists, and economists in rulemaking and adjudicatory proceedings); Jeffrey Rachlinski & Cynthia Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549, 579 (2002) (emphasizing the critical role played by career civil servants whose expertise informs regulatory decisions).

²⁵³ *See supra* note 28 and accompanying text.

²⁵⁴ *See* *Tummino v. VonEschenbach*, 427 F. Supp. 2d 212, 233 (E.D.N.Y. 2006) (considering the resignation of top senior career employee “in protest over the decisionmaking process” as supporting plaintiff’s allegation that the FDA acted improperly). There are also non-judicially mediated ways for politically insulated government workers to let it be known that politics supplanted their work. *See supra* notes 60-65 and accompanying text.

²⁵⁵ *See* Magill & Vermeule, *supra* note 59, at 1053 (suggesting the hard-look review “forces agencies to ensure . . . that their decisions are scientifically and technocratically defensible” and has the effect of shifting intra-agency power “from political appointees at the top of the agency to technocrats and lawyers at lower levels of the agency”).

²⁵⁶ *See supra* Section I.C.

administrative agencies)²⁵⁷ might become more skeptical of agency justifications.²⁵⁸ That is, they might make hard-look review even harder, specifically requiring agencies to more thoroughly consider alternatives and otherwise justify their ultimate choices.²⁵⁹

That kind of judicial response makes sense if courts are right to be wary of—if not hostile to—politicized fact-finding. But perhaps courts should tack in the opposite direction—because harder-look review discounts (and seemingly penalizes) political accountability,²⁶⁰ because it raises the costs of adminis-

²⁵⁷ Of course, if contractors effectively subordinate non-marketized civil servants, similar politicization concerns would arise. See *supra* note 6 and accompanying text.

Furthermore, marketization's effects on compensation and job security might precipitate a brain-drain. See Joe Davidson, *Report Shows Fed Workers Have the Pay Blues*, WASH. POST, Nov. 17, 2011, at B4 (“[P]ay freezes and reductions in benefits will only exacerbate the coming brain drain. . . . Competitive pay and benefits are major factors in attracting the best and brightest to public service.”); Hays & Sowa, *supra* note at 115; Dan Eggen, *Civil Rights Focus Shift Roils Staff at Justice*, WASH. POST, Nov. 13, 2005, at A1 (reporting that the politicization of the Civil Rights Division's personnel damaged morale and prompted career lawyers to leave the government). If so, lower-quality analysis—because of the brain-drain—is yet another reason (distinct from politicization) for courts to be skeptical of post-marketization agency actions. See Gailmard & Patty, *supra* note 31.

²⁵⁸ See, e.g., Barron, *supra* note 67, at 1140-41 (noting hard-look review works to limit the effects of agency politicization); Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L. REV. 423, 445 (2009) (“Evidence that [agency] decisions were made over the objections of career staff and agency professionals often triggers more rigorous review.”); see also STEPHEN BREYER, TOWARD EFFECTIVE RISK REGULATION 55-63 (1993) (emphasizing the important role played by expert, politically insulated government officials in improving the quality and legitimacy of agency action).

²⁵⁹ See Matthew Stephenson, *A Costly Signaling Theory of Hard Look Judicial Review*, 58 ADMIN. L. REV. 753, 755 (2006) (arguing that hard-look review forces the government to produce high-quality explanations and that high-quality explanations are themselves indicative of the substantive merits of the policies being challenged).

Note that hard-look review refers primarily to whether an agency took a hard look at the evidence, see *Greater Boston Tel. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), but at times has been invoked to describe the courts themselves taking a hard look at the agency's reasoning, see *Nat'l Lime Ass'n v. EPA*, 627 F.2d 416, 451 n. 126 (D.C. Cir. 1980). For these purposes, either use would produce a substantially similar effect.

Note, too, that some suggest *FCC v. Fox Television*, 129 S. Ct. 1800 (2009), chips away at hard-look review by not requiring agencies that change from, say, policy A to policy B, always to explain why B is better than A. See Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 22-23 (2009) (suggesting Fox doesn't “neatly fit within Massachusetts's and State Farm's technocratic lenses”). Without engaging the merits of that contention, even assuming that Fox does undermine hard-look review, agencies would still have to justify that policy B is a reasoned one. Courts worried that fact-finding and policy analysis underlying the reasoning for policy B is itself politicized would still have cause to more aggressively scrutinize that reasoning in a marketized world than in a world in which the civil service is insulated from politics.

²⁶⁰ Kagan, *supra* note 26, at 2380 (suggesting hard-look should be relaxed when agencies are politically accountable—through the President—for its decisions); Watts, *supra* note 259, at 8.

trative action,²⁶¹ and because it might simply prompt marketized agencies to eschew rulemaking²⁶² in favor of information bulletins, voluntary safety recalls, and other informal approaches not subject to the same degree of judicial scrutiny.²⁶³

b. Judicial Review of Questions of Law

Turning to judicial review of questions of law, for the nearly two decades leading up to *United States v. Mead*,²⁶⁴ many scholars, judges, and agency officials treated the *Chevron* doctrine²⁶⁵ as the first, last, and only word.²⁶⁶ Under *Chevron*, where statutory language is ambiguous, courts uphold agencies' legal interpretations provided those interpretations are reasonable.²⁶⁷ But this reasonableness is very different from that employed vis-à-vis questions of fact and policy. Here politics may inform reasonableness. As *Chevron* states: "[A]n agency... may... properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch... to make such policy choices."²⁶⁸

Expertise, to be sure, is not banished from the *Chevron* calculus.²⁶⁹ But it plays only a supporting role on a stage where political control shines the brightest.²⁷⁰ Thus, the politicization associated with marketization would

²⁶¹ See, e.g., JERRY MASHAW & DAVID HAFST, *THE STRUGGLE FOR AUTO SAFETY* (1990) (suggesting aggressive judicial review pushed NHTSA to switch from promulgating rules to issuing safety recalls); Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 391-93 (1986); Thomas McGarrity, *Some Thoughts on Deossifying the Rulemaking Process*, 41 DUKE L.J. 1385, 1410-24 (1992).

²⁶² For discussions of the virtues of rulemaking, see *NLRB v. Wyman-Gordon*, 394 U.S. 759, 777-79 (1969) (Douglas, dissenting); *Nat'l Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672 (D.C. Cir. 1973).

²⁶³ See MASHAW & HAFST, *supra* note 261; McGarrity, *supra* note 261, at 1441-43 (describing alternative, less-formal vehicles through which agencies route policymaking in light of hard-look review).

²⁶⁴ *United States v. Mead*, 533 U.S. 218 (2001).

²⁶⁵ See *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

²⁶⁶ *Mead*, 533 U.S. at 239 (Scalia, J., dissenting) (calling *Mead*'s invigoration of *Skidmore* deference an "avulsive change" to the *Chevron* regime).

²⁶⁷ *Chevron*, 467 at 865-66 (explaining that courts will not overturn an agency's interpretation of an ambiguous statute provided that interpretation is reasonable).

²⁶⁸ *Id.* at 865.

²⁶⁹ The Court explicitly acknowledges as much in deferring to the agency not just because of the political accountability of the agency but also because "the regulatory scheme is technical and complex [and] the agency considered the matter in a detailed and reasonable fashion." *Id.*; see also Evan Criddle, *Chevron's Consensus*, 88 B.U. L. REV. 1271 (2008).

²⁷⁰ See *Mead*, 533 U.S. at 244-45 (Scalia, J., dissenting) (arguing that political accountability—rather than procedural rigor—is, per *Chevron*, the more valid basis for judicial deference to agencies' statutory interpretations); Bressman, *supra* note 166, at 1764-65; Watts, *supra* note, at 37.

seemingly only increase the degree to which courts defer on questions of law.²⁷¹

Mead, however, presents additional wrinkles.²⁷² *Mead* insists upon the limited reach of *Chevron*,²⁷³ underscoring that *Chevron* applies only in situations where agencies are authorized to act with the “force of law”—principally, where they “engage in the process of rulemaking or adjudication.”²⁷⁴ In contexts where *Chevron* does not apply, courts often employ *Skidmore* deference.²⁷⁵ *Skidmore* scrutiny, which is less deferential than *Chevron*, “depend[s] upon the thoroughness evident in [the agency’s] consideration, the validity of the reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”²⁷⁶

Thoroughness, strength of reasoning, and consistency over time all place an apparent premium on expert, rational, professional administration.²⁷⁷ *Skidmore* thus seems decidedly anti-political, and correspondingly favorably disposed to the efforts of politically insulated,²⁷⁸ professional civil servants.²⁷⁹

²⁷¹ To be sure, in a non-marketized administrative state, civil servants can be intimately involved in rendering legal interpretations. Administrative law judges, among others, regularly issue legal opinions. See *Mead*, 533 U.S. at 245 (Scalia, J., dissenting) (describing ALJs’ receiving *Chevron* deference when “presiding over adjudications”); see also *supra* note 252 and accompanying text.

²⁷² See, e.g., Lisa Schultz Bressman, *How Mead Has Muddied Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1445 (2005).

²⁷³ *Mead*, 533 U.S. at 228-31 (insisting that *Chevron* isn’t being circumscribed but rather that *Chevron* itself was a carve-out from so-called *Skidmore* deference).

²⁷⁴ *Id.* at 227, 229. It might reach further, see *id.* at 227, 231, 237 (noting that *Chevron* deference is not limited to adjudication and rulemaking). See also *Nat’l Cable v. Brand X*, 545 U.S. 967, 1003 (2005) (Breyer, J., concurring).

²⁷⁵ *Mead*, 533 U.S. 227-31; see *Skidmore v. Swift*, 323 U.S. 134 (1944). As William Eskridge and Lauren Baer show, the landscape is more complicated than the binary divide between *Chevron* and *Skidmore/Mead* might suggest. See William Eskridge & Lauren Baer, *The Continuum of Deference*, 96 GEO. L.J. 1083 (2008). Cf. Peter Strauss, *Deference Is Too Confusing—Let’s Call Them Chevron Space and Skidmore Weight*, 112 COLUM. L. REV. 1143 (2012). My stylized account would benefit little from the added granularity of a full deference continuum, and thus I work within the conventional, if oversimplified, binary world of *Chevron* and *Skidmore/Mead* deference.

²⁷⁶ *Skidmore*, 323 U.S. at 140.

²⁷⁷ See *Mead*, 533 U.S. at 228 (noting “relative expertness” among the factors relevant to how much deference to accord an agency’s interpretation); Kristin Hickman & Matthew Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1288-89, 1293-94 (2007); Eskridge & Baer, *supra* note 275, at 1168; Magill & Vermeule, *supra* note 59, at 1045.

²⁷⁸ Magill & Vermeule, *supra* note 59, at 1039, remind us that political insulation is not the same as expertise. While they’re of course right, political insulation enables the recruitment and retention of the most highly qualified (rather than politically loyal) employees, who develop considerable expertise as they serve across political administrations and whose counsel need not be shaded or distorted to fit the leadership’s political priorities. See also JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 111 (1938) (suggesting the view that independent agencies would “make for more professionalism than that which characterized the normal executive departments” and would generate policies “more permanent” and “fashioned with greater foresight” than those proffered by agencies “where the dominance of executive power was pronounced”). Though Landis was referring to independent agencies, it is hardly a stretch to apply similar analysis at the individual employee level,

To the extent this is true,²⁸⁰ then presumably courts applying *Skidmore* deference to marketized agencies would find themselves deferring to a lesser extent than they would pre-marketization.²⁸¹

* * *

Some have suggested *Mead* has had little practical effect.²⁸² They've argued that regardless whether courts apply *Skidmore* or *Chevron*, reversal rates don't differ substantially.²⁸³ If these scholars are correct, and if marketization produces the effects suggested above, we might finally see a sharper division between reversal rates under *Skidmore* and *Chevron*. This would be so because marketization ought to heighten courts' *Chevron* deference, and lessen *Skidmore* deference. That is to say, post-marketization reversal rates under *Chevron* should decline and rise under *Skidmore*.²⁸⁴

And, if we're inclined to agree with Justice Scalia, who predicted that *Mead* creates incentives for agencies to engage in more rulemaking—thereby securing refuge in *Chevron*'s highly deferential safe harbor²⁸⁵—marketization's widening the gap between *Chevron* and *Skidmore* deference would only intensify agencies' preference for rulemaking over less formal approaches. Whether that's good, bad, or simply an unanticipated cost that diminishes marketization's purported fiscal windfall will have to be sorted out as market-

when comparing insulated civil servants to those serving at the pleasure of the political administration.

²⁷⁹ For this reason, marketization's resulting "brain drain," *supra* note 257—apt to peel off some of the most highly skilled government workers—also counsels against deference.

²⁸⁰ See *Mead*, 533 U.S. 244, 245 (Scalia, J., dissenting) (labeling "absurd" *Mead*'s according greater deference to the legal determinations by career civil servants proceeding via adjudications than to those of Cabinet secretaries made personally and "without any prescribed procedures"); David Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 204 (criticizing *Mead* and *Skidmore* for giving more deference to lower-ranked civil servants engaging in rigorous administrative review than to top agency officials proceeding informally).

²⁸¹ See, e.g., David Zaring, *Reasonableness Review*, 96 VA. L. REV. 135, 146 (2010) (explaining that while a court "must defer" to a reasonable interpretation under *Chevron*, under *Skidmore* said court "may defer based on how persuasive it finds the agency interpretation").

²⁸² See, e.g., Adrian Vermeule, *Mead in the Trenches*, 71 GEO. WASH. L. REV. 347, 350-51 (2003); Zaring, *supra* note 281, at 159-61 (collecting scholarly and judicial statements to the effect that the doctrinal splintering between *Mead/Skidmore* and *Chevron* deference has little practical effect). Cf. RICHARD POSNER, *THE PROBLEMS OF JURISPRUDENCE* 26 (1993) (noting that standards of review—including "*Chevron* [and] *Skidmore*"—represent differences that "are finer than judges want, can discern, or need").

²⁸³ Eskridge & Baer, *supra* note 275; Richard Pierce, *What Do the Studies of Judicial Review of Agency Action Mean?* 63 ADMIN. L. REV. 77 (2011); Zaring, *supra* note 281, at 180-83. Of course, it could be that agencies are more diligent when they know they are subject to more rigorous scrutiny. See E. Donald Elliot, *Chevron Matters*, 16 VILL. ENVTL. L.J. 1, 3 (2005) (suggesting agencies "gradually internalized and adapted" to differing levels of judicial scrutiny); Matthew Stephenson, *The Strategic Substitution Effect*, 120 HARV. L. REV. 528, 550 (2006).

²⁸⁴ This of course assumes that marketization proceeds notwithstanding the altered doctrinal landscape.

²⁸⁵ *Mead*, 533 U.S. at 247 (Scalia, J., dissenting).

ization takes firmer root, as courts become more attuned to marketization's effects, and as we evaluate the post-marketization caselaw.

c. Due Process

Finally, and briefly, marketization might also implicate constitutional due process considerations. Over the years, the Supreme Court has expressed great unease when politicized decisionmakers act in adjudicatory capacities. This is especially true when politicized decisionmakers are tasked with assessing fines, and have a personal or institutional incentive to favor one adjudicatory outcome over another. For example, the Court has found it unconstitutional for an adjudicator to pocket (as compensation) a percentage of the fines, under the theory that she'll be tempted to favor guilty verdicts.²⁸⁶ The Court has found it similarly troubling when a statutory scheme directs a political decisionmaker to assess fines, if that decisionmaker then exercises some control over how her institution later spends that money.²⁸⁷

Courts usually do not worry about administrative assessments of fines, in part because the pre-marketized administrative state has largely insulated agency adjudicators from political control and performance-based pay incentives.²⁸⁸ To the extent marketization chips away at those forms of insulation, courts might look more skeptically at a larger percentage of agency adjudications. Conceivably, they might, for example, intensify their review of adjudications under the APA's substantial-evidence standard,²⁸⁹ or, they might even go so far as to invalidate those adjudicators' holdings on due-process grounds.²⁹⁰ Again, here too, we have to think about the interplay of marketization and the courts: will the courts respond—and, if so, will they impede the marketization

²⁸⁶ See *Tumey v. Ohio*, 273 U.S. 510, 532 (1927) (finding a due process constitutional violation where a decisionmaker has a financial incentive to decide an adjudication in a particular manner).

²⁸⁷ *Ward v. Village of Monroe*, 409 U.S. 57, 60 (1972) (invalidating fine assessments adjudicated by a mayor when those fines are deposited in the village's coffers).

²⁸⁸ *Marshall v. Jerrico*, 446 U.S. 238, 250-51 (1980) (upholding an administrative adjudicatory scheme in large part because the adjudicators were politically insulated from the agency decisionmakers who would directly benefit from the assessment of fines that the agency would then get to keep); *Wiener v. United States*, 357 U.S. 349 (1959) (insisting upon a for-cause removal limitation on an appointment to a war-claims adjudicatory commission, even though the statute did not expressly include one).

²⁸⁹ See 5 U.S.C. §706(2)(E).

²⁹⁰ Politically insulated administrative law judges, for instance, share many traits with federal judges. See *Butz v. Economou*, 438 U.S. 478, 513 (1978); see also *Wiener*, 357 U.S. at 351-53 (recognizing the inherent problems associated with adjudicators serving at the pleasure of elected officials). Cf. *Republic Party of Minn. v. White*, 536 U.S. 765, 803-04 (2002) (Ginsburg, J., dissenting) (questioning the legitimacy of elected jurists); John Ferejohn & Larry Kramer, *Independent Justices, Dependent Judiciary*, 77 N.Y.U. L. REV. 962, 969 (2002) (noting concerns surrounding politically responsive jurists); Samuel Siegel, *Citizens United, Caperton, and Form as Distinction*, 59 UCLA L. REV. 1076 (2012) (discussing concerns intrinsic to politicized adjudications).

movement, steer marketized agencies away from adjudication, or simply raise the costs of administrative practice?

B. Government by Bounty's Privatization Agenda—and Beyond

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. After all, there is a reason why pro-privatization governments might find bounties attractive. Unlike traditional contracts, bounties shift costs and responsibilities onto would-be bounty seekers. Those shifted costs and responsibilities are enough, however, to lead many private actors to prefer the financial security of fee-for-service contracts.²⁹¹

To overcome private actors' lack of enthusiasm,²⁹² the government can increase the bounty award, offset the shifting of risk over which the bounty seeker has control by removing risks that the bounty seeker cannot control, or permit greater bounty-seeker autonomy.²⁹³ These sweeteners do more, however, than simply encourage participation. They also introduce challenges to the theory and practice of administrative law. In what follows, I consider the ways in which these sweeteners transform government by bounty's ostensibly voluntary, open-market invitations into de facto compulsory mandates (Subsection 1); render participatory democracy and intergenerational sovereignty alienable assets over which the government may barter (Subsection 2); and, influence courts' decisions whether to ascribe civil and constitutional liability to bounty seekers furthering government aims (Subsection 3).

1. Coercive Bounties

Because of the risks incurred by bounty seekers, governments must offer sufficiently valuable bounties. Valuable bounties can take the form of monetary awards or in-kind benefits. For obvious reasons, legislatures and agencies might well prefer the latter kinds, particularly where such awards are relatively

²⁹¹ See *supra* Section II.B. Cf. Matt Bloom & George Milkovich, *Relationships Among Risk, Incentive Pay, and Organizational Performance*, 41 ACADEMY OF MANAGEMENT J. 283, 283 (1998) (noting that agents generally want to avoid "both work and risk").

²⁹² See, e.g., Levmore, *supra* note 23, at 503; Michael Jensen & Kevin Murphy, *Performance Pay and Top-management Incentives*, 98 J. POL. ECON. 225 (1990) (discussing need to encourage participation while also imposing risks, etc)

²⁹³ Susan Rose-Ackerman indicates that governments seeking principal-agent incentive-alignment and accurate, effective performance might be willing to pay dearly, above agents' "opportunity wage." Rose-Ackerman, *supra* note 23, at 131-38; see also William Baumol, *Payment by Performance in Rail Passenger Transportation*, 6 BELL J. ECON. 281, 287-88 (1975) (emphasizing that agents need to be generously rewarded for success when they are asked to take on considerable risk).

costless to the government but prized commercially.²⁹⁴ The government can be especially lavish with those in-kind enticements—ensuring highly motivated participation without having to raise taxes or cut spending elsewhere.²⁹⁵

Combining lavish bounties with risk shifting might be a win-win scenario for the government and the willing bounty seeker. But not for everyone. This potent combination threatens to give bounties a coercive quality—shattering the conventional understanding of market-oriented government as less intrusive on the private sector.²⁹⁶

Consider, as one such example, the FDA’s priority-review voucher program. Curing certain diseases, especially diseases disproportionately afflicting people in the developing world, is not necessarily beyond the technical capacity of drug manufacturers. The chief obstacle is financial. Most suffering from malaria, dengue fever, and other tropical diseases do not have the purchasing power to secure new, expensive treatments. Pharmaceutical manufacturers thus lack the requisite incentives to invest in research and clinical development.²⁹⁷

Given the apparent market vacuum, and in light of the fact that successful, accessible treatments would further U.S. foreign-policy and humanitarian aims,²⁹⁸ the federal government has reason to fill the void. The government could, of course, direct its own employees (or hire new ones) to design the medical treatments in-house. Or, it could enter into service contracts with private companies, paying those contractors (a flat-fee or on a cost-plus schedule) to develop the drugs.²⁹⁹

Instead, it announces a bounty. Pursuant to the FDA Amendments Act of 2007,³⁰⁰ the government awards a transferrable priority-review voucher to pharmaceutical companies that successfully bring to market new drugs target-

²⁹⁴ Of course not all in-kind benefits are costless. See, e.g., Martha Coven, *The Case for Cash-Based Public Assistance*, 86 MINN. L. REV. 847, 888 (2002). See generally MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 190-94 (1962) (describing the virtues of shifting away from a panoply of welfare services toward a “negative income tax” scheme).

²⁹⁵ See *supra* notes 47-54 and accompanying text.

²⁹⁶ For descriptions of market-based regulatory approaches as less intrusive than command-and-control approaches, see Rena Steinzor, *Reinventing Environmental Regulation*, 22 HARV. ENVTL L. REV. 103, 107-08 (1998); IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION* (1992); P.N. Grabosky, *Regulation by Reward*, 17 L. & POL’Y 257 (1995); Darren Sinclair, *Self-Regulation Versus Command and Control*, 19 L & Pol’y 529 (1997).

²⁹⁷ See David Ridley, et al., *Developing Drugs for Developing Countries*, 25 HEALTH AFFAIRS 313, 313 (2006).

²⁹⁸ See, e.g., Princeton Lyman, *U.S. Foreign Assistance and Trade Policies in Africa*, in U.S. AFRICA POLICY BEYOND THE BUSH YEARS 111, 111 (Jennifer Cooke ed., 2009) (describing President Bush’s landmark initiative channeling greater aid to combat HIV/AIDS in Africa).

²⁹⁹ See, e.g., David Willman, *Costly Drug for Smallpox Questioned*, L.A. TIMES, Nov. 13, 2011, at A1 (questioning U.S. government proposals to purchase experimental smallpox drugs).

³⁰⁰ §1102, P.L. No. 110-85.

ing tropical and other neglected diseases.³⁰¹ Priority review enables manufacturers seeking FDA approval for a new drug to have that regulatory process fast-tracked. Those receiving a voucher—estimated to be worth \$300 million³⁰²—may use it for any of the blockbuster drugs they're developing. Or, they may sell the voucher to another company that values priority review more highly.³⁰³

The government's bounty is likely to have its intended result: stimulating greater interest in bringing otherwise less-remunerative treatments to market.³⁰⁴ The program is practically costless to the government. With or without vouchers, FDA personnel spend their days reviewing manufacturers' requests to have their drugs approved. From the government's perspective, the voucher simply reorders the queue.

The program is ostensibly efficient, too. The \$300 million windfall serves as an incentive to develop a drug—and to develop it properly. Unlike traditional contractors, the voucher seeker bears considerable risk. If it does not secure FDA approval, it loses its entire investment.³⁰⁵

Finally, the program ought to be politically popular given the urge for the government to be a force for social good in the world—and to do so in a way that keeps the government's footprint small, market incentives in the foreground, and the government's wallet closed.³⁰⁶

So far, this discussion has emphasized the voucher program's cost and risk-shifting from the government to the bounty seeker. But those shifted costs and risks don't fall exclusively on the bounty seeker. Third-parties also bear them. In the FDA case, the voucher program affects rival, but non-participating, pharmaceutical companies.³⁰⁷

³⁰¹ See 21 U.S.C. § 360n.

³⁰² Ridley, et al., *supra* note 297; Waseem Noor, *Placing Value on FDA's Priority Review Vouchers*, IN VIVO, Sept. 2009, http://www.imshealth.com/imshealth/Global/Content/Document/Placing_Value_on_FDA_Priorities.pdf; BIO Ventures for Global Health, Statement on Priority Review Vouchers, http://www.bvgh.org/What-We-Do/R-D-Incentives/Priority-Review-Vouchers.aspx#Value_of_PRVs.

³⁰³ 21 U.S.C. §360n(b)(2).

³⁰⁴ As with all regulatory schemes, there is a debate whether the vouchers provide too little of an incentive or too great of a windfall. See, e.g., Aaron Kesselheim, *The Trouble with FDA Review Vouchers*, N.E. J. MED., Nov. 6, 2008, at 1981-82, http://ghtcoalition.org/files/NEJM_on_FDA_vouchers.pdf.

³⁰⁵ 21 U.S.C. §360n(b)(1).

³⁰⁶ See Jack Goldsmith, *Liberal Democracy and Cosmopolitan Duty*, 55 STAN. L. REV. 1667, 1683 (2003) (characterizing the "United States' paltry foreign aid as a percentage of GNP" as reflective of the American public's relative lack of interest in funding overseas humanitarian efforts); *supra* notes 18, 74, 86 and accompanying text.

³⁰⁷ Other bounty programs shift risk onto consumers and onto those in physical proximity to the bounty seekers. See Critical Infrastructure Information Act of 2002 ("CIIA"), P.L. 107-296, 116 Stat. 2135, §§ 211-215 (codified at 6 U.S.C. §§131-134). The CIIA offers a regulatory bounty—immunity from civil liability—to firms that disclose to the government information about their infrastructure

Pharmaceutical firms choosing not to pursue tropical-disease treatments (or incapable of pursuing them) risk being placed at a competitive disadvantage. A voucher-holding competitor will jump to the front of the FDA queue, bringing its drug to market first. In the struggle for pharmaceutical primacy, positioning matters greatly.³⁰⁸ Thus manufacturers bypassed in the queue can—and perhaps must—take steps to overcome that disadvantage. Specifically, if the loss associated with being bypassed is significant enough, firms will find themselves obligated to join the government’s efforts in combating diseases of the developing world.³⁰⁹ Otherwise, they will have to pay what amounts to a “tax,” namely the cost of purchasing a priority-review voucher on the open market.³¹⁰ When this happens, government by bounty no longer looks like the open, voluntary market exchange it purports to be. Rather, it takes the surprising form of a seemingly coercive, effectively mandatory program, penalizing those who cannot or will not participate.³¹¹

2. Bartering Sovereignty

For privatization’s proponents, the shifting of risks that are within a private actor’s control makes perfect sense. Such a shift promotes efficiency.³¹² But this risk-shifting isn’t necessarily a great deal for 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.³¹³ In so doing, governments sign away future policymaking discretion—discretion of the sort that might otherwise compromise the bounty seeker’s ability to secure its reward. Such risk-removing decisions are fraught

vulnerabilities. In the event of an attack on said infrastructure, the disclosing firms are not liable for injuries caused to their customers or neighbors. Sidney Shapiro & Rena Steinzor, *Executive Branch Secrecy and Accountability in an Age of Terrorism*, 69 L. & CONTEMP. PROBS 99, 126-27 (2006).

³⁰⁸ RALPH STAIRS & GEORGE REYNOLDS, *PRINCIPLES OF INFORMATION SYSTEMS* 411 (2009) (describing the high-stakes race among pharmaceutical manufacturers to get their respective drugs approved first); Tom Blackett, *Branding and Its Potential Within the Pharmaceutical Industry*, in *BRAND MEDICINE* 9, 42-43 (Tom Blackett & Rebecca Robins, eds. 2001).

³⁰⁹ See Michaels, *Deputizing*, *supra* note 195, at 1454 & n.100 (describing the pressure felt by firms to cooperate with the government—so long as its competitors are doing so).

³¹⁰ See 21 U.S.C. §360n(b)(2).

³¹¹ Cf. Neil Siegel, *Commandeering and Its Alternatives*, 59 VAND. L. REV. 1629, 1655-57 (2006) (describing the fine line between acceptable federal conditional spending programs and those that are coercive on the states).

Note too the potential for bounties cancelling each other out in a competitive market. If all manufacturers succeeded in scoring a priority-review voucher, those vouchers would lose their value. This happens only when bounties have a zero-sum quality to them—unlike, say, qui-tam bounties.

³¹² Cf. GUIDO CALABRESI, *THE COST OF ACCIDENTS* 26-31, 309-18 (1970) (discussing the cheapest cost-avoider as the one best positioned to minimize tort damages).

³¹³ Precisely because traditional contracts are fee-for-service arrangements—and contractors usually are paid regardless what happens beyond their control, see NASH, *supra* note 16, privatization scholars haven’t given much thought to such questions.

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.³¹⁴

Consider, for example, the recent spate of transportation-infrastructure leases that operate as bounties. These leases involve states and cities transferring operational control over roads, bridges, and parking facilities to private firms. Firms pay the governments 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 75 and 99 years—and have already netted governments billions of dollars.³¹⁵ By design, these lease payments are heavily frontloaded.³¹⁶ Such arrangements provide an immediate windfall to fiscally beleaguered governments.³¹⁷ 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.”³¹⁸ (It is for this reason that jurisdictions are attracted to such leases' temporal cost-savings, which take the form of de-facto loans.³¹⁹)

These lease arrangements depart from traditional practices. Usually governments direct their civil servants to collect tolls or parking fees and to perform whatever repairs and maintenance are necessary. Alternatively, they hire contractors to perform maintenance and collect fees—fees that are then turned over to the government.³²⁰

³¹⁴ To treat the trading away of long-term political sovereignty as distinct from long-term fiscal pre-commitments (which are often a necessary part of government contracting), one must, of course, value political participation in substantive policymaking over political participation in budgetary decisionmaking. See *infra* notes 334-335 and accompanying text.

³¹⁵ See, e.g., INSPECTOR GENERAL, CITY OF CHICAGO, AN ANALYSIS OF THE LEASE OF THE CITY'S PARKING METERS 1, 9 (June 2, 2009), <http://chicagoinspectorgeneral.org/wp-content/uploads/2011/03/Parking-Meter-Report.pdf>; [hereinafter OIG REPORT] Theodore Kim, *Toll Road Lease Is a Go—Barely*, INDIANAPOLIS STAR, Mar. 15, 2006, at A1. Perhaps the biggest deal of all, a \$12.8 billion deal to lease the Pennsylvania Turnpike, fell through at the last minute. See Press Release, State of Pennsylvania, Pennsylvania Turnpike Lease Would Boost Funding for Roads, Bridges, Transit (May 19, 2008) [hereinafter Pennsylvania Turnpike], <http://www.pnewsire.com/news-releases/pennsylvania-turnpike-lease-would-boost-funding-for-roads-bridges-transit-57265842.html>; Tom Barnes, *Group Withdraws Turnpike Lease Bid*, PITTSBURGH POST-GAZETTE, Oct. 1, 2008.

For broader descriptions of these practices, see Roin, *supra* note 155, at 2013; Ellen Dannin, *Infrastructure Privatization Contracts and Their Effects on State and Local Governance*, 6 NW. J.L. & SOC. POL'Y 47, 64 (2011).

³¹⁶ Kim, *supra* note 315.

³¹⁷ See, e.g., David Zahniser, *L.A. Financial Crisis Deepens as Bidders Shun Proposed Parking Garage Deal*, L.A. NOW (Feb. 1, 2011), <http://latimesblogs.latimes.com/lanow/2011/02/la-financial-crisis-deepens-as-bidders-shun-proposed-parking-garage-deal.html>.

³¹⁸ Editorial, *Landing \$2.5 Billion*, CHI. TRIB., Oct. 2, 2008, at 40.

³¹⁹ The government repayments take the form of foregone government revenue generation over the life of the lease.

³²⁰ See NASH, *supra* note 16, at (describing traditional contracting's payment arrangements).

With transportation-infrastructure leases, though they are superficially structured differently from the social-impact bonds and FDA vouchers, they nevertheless 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 and maintenance. Unlike social-impact bonds but like FDA vouchers, it is not the government but rather the market that determines the value of the leaseholder's bounty. Successful—and lucky—leaseholders will profit handsomely.³²¹

But risks abound. First, some risks are within the control of the leaseholder. Leaseholders must invest in infrastructure maintenance and improvement. Otherwise, drivers will favor alternative roads and parking facilities. If close substitutes aren't readily available, would-be users might, over the course of the lease, switch to mass transit, walking, or bicycling.³²²

Second, some risks are beyond the control of the leaseholder and the government. Environmental upheaval from, among other things, earthquakes or floods, could damage the infrastructure, lowering the value of the lease. Moreover, given the lengths of these leases, technological breakthroughs could conceivably render these roadways and parking lots obsolete. (Imagine if, in the year 1900, one were to enter into a 99-year lease for a government-owned stagecoach line. That lease would have become worthless in a matter of decades. A toll-road lease of comparable duration signed today might suffer a similar fate, if by 2062 we're all traveling around like the Jetsons.)

The third set of risks is within the government's control. 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 offering new, alternative transportation options, or to increase the cost of continued maintenance by ratcheting up environmental regulations requiring leaseholder compliance.³²³

Whereas prospective leaseholders can negotiate with the government over what risk-premium is warranted given the possibility of environmental upheaval or technological breakthrough, at the end of the day neither party can actually diminish that risk.³²⁴ This is not true with respect to those risks within the

³²¹ See, e.g., Roin, *supra* note 155, at 2004, 2007. A study by Chicago's Inspector General estimated that the city, in leasing control over municipal parking meters, received less than half of the estimated value of future parking-meter revenue. OIG REPORT, *supra* note 315, at 24.

³²² It is for this reason that jurisdictions suggest these leases are efficiency-promoting. See Pennsylvania Turnpike, *supra* note 315.

³²³ See Roin, *supra* note 155.

³²⁴ The government may financially indemnify the bounty seeker. But there are fiscal and perhaps philosophical reasons why doing so wouldn't be a bounty-promoting government's preferred choice.

government's control.³²⁵ 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 (1) allowing the lessee to set parking and toll rates and (2) refraining from subsequent policy interventions—such as building new roads, bridges, or parking structures—that lessen demand for the lessee's infrastructure.³²⁶

All else being equal, governments might want to lower user-rates during times of economic dislocation.³²⁷ Or, if traffic congestion or pollution becomes intractable, governments might want to charge particularly high rates, effectively (and purposely) discouraging car use.³²⁸ 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.³²⁹ They also promise not to adjust user-rates, thus denying themselves—and successor governments—opportunities to subsidize or tax certain transportation choices.³³⁰

Such sovereignty-abdicating provisions are already in operation.³³¹ This is surprising if only because we traditionally haven't treated sovereignty as just

³²⁵ Baumol, *supra* note 293, at 289 (discussing performance-based incentives and the need to avoid penalizing agents for events or circumstances that are outside of those agents' control).

³²⁶ See Roin, *supra* note 155, at 2010-11 ("[D]ecreasing the riskiness of the enterprise increases the price the investor will pay for it up front. Investors will not pay much for an enterprise that may be taxed or regulated out of existence in short order, nor for one that is likely to face competition sponsored by its contractual partner.").

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 interferes with the terms of a lease thus falls into the category of risks outside the control of both parties to the lease.

³²⁷ See Celeste Pagano, *Avoiding Hazards in Toll Road Privatizations*, 83 ST. JOHN'S L. REV. 351, 370-72 (2009) (discussing potential conflicts between a leaseholder's profit-motive and various government goals—including congestion relief, safety, economic development).

³²⁸ *E.g.*, Nicholas Confessore, *\$8 Traffic Fee for Manhattan Gets Nowhere*, N.Y. TIMES, Apr. 8, 2008.

³²⁹ See Roin, *supra* note 155 (describing "non-compete" clauses).

³³⁰ Governments choosing to reassert sovereign authority will incur steep penalties for violating the lease agreements. See Private Lease of Virginia's Pocahontas Parkway <http://www.virginiadot.org/business/resources/Amended%20and%20Restated%20comprehensive%20Agreement.pdf> (article 12.01(a)); Dannin, *supra* note 315, at 61-62 (describing a government forced to buy back its lease because the non-compete clause was so restrictive).

Note that traditional contracts can bind future governments and polities too. But when those contracts bind future administrations, it is typically a decision driven by politics—specifically, by the incumbent administration's desire to lock-in its policy preferences and impose them on successor governments—rather than economics. See Michaels, *Pretensions*, *supra* note 64, at 739-44.

³³¹ See *supra* note 330.

another bargaining chip.³³² 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.³³³

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 don't especially value (or even engage in) democratic exercises, or because even if they do prize such participation, they've come to doubt whether their input registers.

Justice Scalia makes a not-dissimilar point in an otherwise unrelated case. His *Webster v. Doe* dissent criticizes the Court's apparent prioritization of constitutional rights above all others.³³⁴ He offers the simple hypothetical of a plaintiff suing the government for \$100,000 based on a contractual violation, and \$100 based on the denial of constitutional equal protection. Scalia thinks that prevailing on the contract is "much more important to [the plaintiff]—both financially and, I suspect, in the sense of injustice that he feels—than any constitutional vindication."³³⁵ Scalia's argument might sound jarring to those schooled to revere the Constitution and cherish democratic engagement. But governments that offer bounties containing sovereignty-abdicating provisions seemingly confirm Scalia's intuition. More to the point, they put a price tag on that reverence, raising normative and legal questions about whether sovereignty should be alienable—and more practical ones such as whether bartering governments are properly pricing it.

3. Government by Bounty's Doctrinal Feedback Loops

Lastly, autonomy from government micromanagement is another deal sweetener to entice bounty-seeker participation. But this autonomy raises important administrative law questions. Among them, we want to know how heightened autonomy factors into bounty-seeker liability for civil and constitutional violations. This Subsection examines the government-contractor defense and the state-action doctrine. The former pertains to suits alleging civil damages. The latter, in turn, pertains to alleged constitutional violations. Seemingly, at least based on current doctrinal practices and judicial reasoning, courts will distinguish bounty seekers from traditional contractors as well as from government employees. In drawing these distinctions, the courts will be

³³² See *supra* note 314 and accompanying text.

³³³ Whether the market is a normatively or pragmatically attractive alternative venue for influencing public policy is beyond the scope of this project.

³³⁴ 486 U.S. 592 (1988).

³³⁵ *Id.* at 616 (Scalia, dissenting).

more likely to subject bounty seekers to civil liability—but less likely to ascribe constitutional liability.

a. The Government-Contractor Defense

The government-contractor defense immunizes closely supervised contractors from civil liability. In *Boyle v. United Technologies*,³³⁶ the Supreme Court held that military contractors are immune from civil lawsuits alleging damages provided those contractors produce goods pursuant to (and in conformance with) government specifications.³³⁷ Federal courts have since extended *Boyle* along two dimensions. First, the government-contractor defense now generally applies to manufacturers of civilian goods.³³⁸ And, second—and more relevant to this inquiry—the defense now also covers service contractors, civilian and military alike.³³⁹

In crafting the government-contractor defense, the Supreme Court equalized conditions between private contractors and government officials.³⁴⁰ The Federal Tort Claims Act,³⁴¹ though generally subjecting government workers to civil liability, expressly exempts personnel carrying out “discretionary functions”³⁴² similar to those undertaken by contractors. The government-contractor defense simply levels the playing field.³⁴³

But the emergence of bounty arrangements introduces a new measure of doctrinal uncertainty. Given the courts’ apparent dedication to equalizing

³³⁶ 487 U.S. 500 (1988).

³³⁷ *Id.* at 511-12. Where contractors are aware of any dangers associated with the manufactured product, they must also disclose those to the government. *Id.*

³³⁸ See *Carley v. Wheeled Coach*, 991 F.2d 1117 (3d Cir. 1993).

³³⁹ *E.g.*, In re Katrina Canal Breaches v. Washington Group Int’l 620 F.3d 455 (5th Cir. 2010); *Hudgens v. Bell Helicopters*, 328 F.3d 1329, 1334 (11th Cir. 2003); *Richland Lexington Airport v. Atlas*, 854 F. Supp 400 (D.S.C. 1994); see also Vivian Chu & Kate Manuel, *Tort Suits Against Federal Contractors*, CONG. RES. SERV., Apr. 7, 2011, at 15 (documenting the federal judiciary’s extension of *Boyle*).

Many states have adopted their own versions of the government-contractor defense. See, e.g., Ind. Code § 34-20-5-1(2); Kan. Stat. Ann. § 60-3304(c); Wash. Rev. Code § 7.72.050(2); Mich. Comp. Laws Ann. § 600.2946(4); see also *Burgess v. Colorado Serum*, 772 F.2d 844 (11th Cir. 1985) (recognizing Alabama’s government-contractor defense); *McDermott v. TENDUM Construction*, 211 N.J. Super. 196 (1986) (recognizing New Jersey’s government-contractor defense).

³⁴⁰ See Steven Schooner, *Post-Katrina Reconstruction Liability*, 43 HARV. J. LEGIS. 287, 298 (2006); Ronald Cass & Clayton Gillette, *The Government Contractor Defense*, 77 VA. L. REV. 257, 259 (1991).

³⁴¹ 28 U.S.C §§1346(b), 2671-80.

³⁴² 28 U.S.C § 2680(a). This exemption applies regardless whether the officials are negligent in their duties. See *id.*; *United States v. Varig Airlines*, 467 U.S. 797, 813-14, 820 (1984); Vicki Jackson, *Suing the Federal Government*, 35 GEO. WASH. INT’L L. REV. 521, 563-64 (2003).

³⁴³ Schooner, *supra* note 340, at 298 n.62 (“[T]he government-contractor defense ensures that contractors are afforded liability protection only in those cases where the government itself would receive such protection under the FTCA’s discretionary function exemption.”).

immunity between contractors and government workers for damages inflicted, it is an open question whether the government-contractor defense also covers—or will be extended to cover—bounty seekers.

As it is currently constituted, the government-contractor defense does not protect bounty seekers. Unlike with contractors, the government does not prescribe how bounty seekers should proceed, a necessarily condition for immunity.³⁴⁴ It appears unlikely, too, that courts would extend the doctrine to cover an analogous bounty defense. Confining the immunity doctrine to its present boundaries (namely, only where contractors are given direct orders and are themselves closely monitored) preserves an important check on bounty seekers and contractors alike. The “price” traditional contractors pay for civil immunity cashes out in terms of their ceding autonomy and submitting to close supervision. The “price” bounty seekers pay to enjoy broad programmatic discretion is exacted in terms of their remaining liable for civil damages.³⁴⁵

The courts’ likely refusal to immunize bounty seekers poses challenges for the government and bounty seekers alike. Consistent with government by bounty’s commitment to risk-shifting, bounty seekers should be expected to bear these liability risks. But not all would-be bounty seekers are equally sensitive to liability risks. The best-case scenario for the government involves the threat of lawsuits deterring irresponsible aspirants, skewing the composition of the pool of bounty seekers in favor of those who are careful (and thus unlikely to engage in tortious activities).³⁴⁶ More plausibly, however, self-selection will run in the opposite direction. Cautious, would-be bounty seekers will opt out, leaving only risk-seeking, perhaps judgment-proof, parties vying for bounties.³⁴⁷ These risk-seeking parties are not only less deterred by the threat of suit, but also far more likely to prize the autonomy the government gives to bounty seekers. Presumably, the government could, again, simply raise the value of the bounty award, thus blunting the effect of this doctrine. But where the bounty cannot be made sufficiently high to offset the risk of future lawsuits,³⁴⁸ we’ll likely see fewer—or simply riskier—bounty arrangements than government agencies might otherwise prefer.

³⁴⁴ See *supra* notes 337, 339 and accompanying text.

³⁴⁵ See Cass & Gillette, *supra* note 340, at 287 (suggesting liability ought to be placed on those who have enough discretion that the “threat of liability” can help guide their choices and actions); Rose-Ackerman, *supra* note 23, at 147 (recognizing that immunizing or insuring actors from liability “reduces the positive incentives to avoid error”). This differential treatment could be seen as its own form of parity: a private actor submits either to close supervision *ex ante* or to lawsuits *ex post*.

³⁴⁶ Cf. *McKnight v. Richardson*, 521 U.S. 399, 409 (1997) (justifying the refusal to extend qualified immunity to profit-seeking government contractors on the ground that market pressures will ensure good behavior).

³⁴⁷ See Michaels, *Deputizing*, *supra* note 195, at 1460-62; see also Cass & Gillette, *supra* note 340, at 279; Steven Shavell, *The Judgment Proof Problem*, 6 INT’L L. & ECON. 45 (1986).

³⁴⁸ Cf. 50 U.S.C. 1805(i) (immunizing from civil liability telecom firms that provide the government with electronic surveillance assistance); Public Readiness and Emergency Preparedness Act, 28

b. State-Action Doctrine

State-action doctrine ascribes liability to those who commit constitutional violations while acting under color of State law.³⁴⁹ Because government agencies delegate so many public responsibilities to private actors, state-action doctrine is messy at the margins. As the Supreme Court concedes: “It is fair to say that our cases deciding when private action might be deemed that of the state have not been a model of consistency.”³⁵⁰

To determine whether state action applies,³⁵¹ courts functionally assess the relationship between the government and a private actor.³⁵² They focus on, among other things, how closely the government directs and controls the private actor,³⁵³ and how closely the private actor is entwined with the government.³⁵⁴ Bounty seekers generally operate with greater autonomy than traditional government contractors. Bounty seekers are therefore less likely to be deemed state actors. What this means is that bounty seekers have the capacity to invade constitutional rights, certainly with far greater impunity than government personnel—and likely with greater impunity than at least some, if not many, government contractors.³⁵⁵ For a political administration finding itself

U.S.C. §2671, 2679 (immunizing from civil liability manufactures of emergency medical counter-measures).

³⁴⁹ See *NCAA v. Tarkanian*, 488 U.S. 171, 191 (1988); *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976).

³⁵⁰ *Lebron v. Nat'l R.R.* 513, U.S. 374, 378 (1995).

³⁵¹ Compare *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982); *Wade v. Byles*, 83 F.3d 902 (7th Cir. 1996) with *West v. Atkins*, 487 U.S. 42, 53-57 (1988); *Rosborough v. Mgmt. & Training Cor.*, 330 F.3d 459, 461 (5th Cir. 2003).

³⁵² See Alexander Volokh, *The Constitutional Possibilities of Prison Vouchers*, 72 OHIO ST. L.J. 983, 1006-07 (2011). Volokh notes that courts consider whether “a private party exercises powers traditionally exclusively reserved to the State[.]. . . whether that action must in law be deemed to be that of the State[.] . . . whether the action may be fairly treated as that of the State itself[.]. . . whether the challenged action is fairly attributable to the State[, and] whether the state is responsible for the specific conduct of which the plaintiff complains.” *Id.*

³⁵³ See *Rendell-Baker*, 457 U.S. at 841. The Fourth Amendment context is, perhaps, most revealing. See *United States v. Momoh*, 427 F.3d 137, 141 (1st Cir. 2005); *United States v. Robinson*, 390 F.3d 853, 872 (6th Cir. 2004); *United States v. Lambert*, 771 F.2d 83, 89 (6th Cir. 1985); *United States v. Smith*, 383 F.3d 700, 705 (8th Cir. 2004); see also *United States v. Walther*, 652 F.2d 788, 793 (9th Cir. 1981) (finding state action in an airline-carrier search where the government “had knowledge of a particular pattern of search activity... and had acquiesced in such activity”); *United States v. Hall*, 142 F.3d 988, 995 (7th Cir. 1988) (rejecting a state-action claim alleging warrantless search by a computer maintenance firm on the grounds that though the firm ultimately contacted the police the search was independent of any law-enforcement objective). *United States v. Hall*, 142 F.3d 988, 995 (7th Cir. 1988). See generally Michaels, *Deputizing*, *supra* note 195, at 1465 (discussing state action in contexts related to the government informally deputizing private actors to facilitate counterterrorism operations).

³⁵⁴ See *Brentwood Academy v. Tennessee Secondary Sch. Ass'n*, 531 U.S. 288, 296 (2001).

³⁵⁵ See Volokh, *supra* note 352, at 1006-07 (describing contexts where private contractors and other private actors closely connected to the government, or otherwise carrying out specific government requirements, are deemed state actors).

constrained by constitutional strictures, the use of bounty seekers might be especially enticing.³⁵⁶ They might enable, for example, more intrusive law-enforcement searches than the Fourth Amendment permits government personnel and many contractors to conduct.³⁵⁷ They might also enable governments to more thoroughly infuse religious programming into social-welfare programs.³⁵⁸

* * *

Two conclusions follow from this initial consideration of how courts might apply civil and constitutional immunity to bounty seekers. First, the doctrinal distinctions likely to be drawn among government employees, contractors, and bounty seekers mark the otherness of bounties. Marketization, as discussed, pushes courts to adjust preexisting doctrines to reflect the nascent changes to bureaucratic governance. With bounties, courts are apt to hold the line, preserving—but not expanding—preexisting doctrines. This makes sense: whereas marketization transforms an existing institution around which caselaw has already developed, government by bounty introduces something relatively new and largely external to the judicial ken. Second, just because courts do not seem likely to refashion preexisting doctrines in light of bounties nor to treat bounty arrangements as covered by those preexisting doctrines, it does not necessarily follow that those decisions are correct, as a normative or legal matter. Nor does it mean that this predicted judicial approach won't trigger responses from the political branches—responses the likes of which pose even greater challenges to the administrative state. Indeed, if it is the case that bounty seekers will be subject to greater civil liability but lesser constitutional liability, one possible response is that bounties will be disproportionately used as a tool of Executive aggrandizement and constitutional subversion.

CONCLUSION

This Article has advanced three aims. First, it affirmed that, among privatization's proponents, government contracting seemingly remains an especially viable approach for boosting efficiency, conserving budgetary resources, maximizing unitary executive control, and scoring political points

³⁵⁶ Elsewhere, I've made this argument about contractors and homeland-security deputies. See Michaels, *Pretensions*, *supra* note 64, at 735-38 (describing the use of contractors to carry out "constitutional workarounds"); Michaels, *Deputizing*, *supra* note 195. For the reasons described above relating to bounty-seeker autonomy, the claims I've made in previous works about contractors having greater leeway than government personnel to act outside the color of state law apply *a fortiori* to bounty seekers.

³⁵⁷ See *supra* note 353.

³⁵⁸ Cf. Michaels, *Pretensions*, *supra* note 64, at 735-38 (discussing religiously infused social-welfare programs carried out by government contractors).

with the electorate. Second, it 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 government contracting. Third, it addressed challenges we're likely to encounter as these new pathways—marketization and government by bounty—become more heavily trafficked.

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 business-like agendas in ways both liberating and threatening.