Privatization’s Progeny

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Privatization’s proponents are branching out. They have traditionally relied on government service 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 are 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 underlying 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 businesslike agendas in ways both liberating and threatening.

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INTRODUCTION

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

2. See Jody Freeman & Martha Minow, Introduction: Reframing the Outsourcing Debates, in GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 1, 8 (Jody Freeman & Martha Minow eds., 2009) (finding bipartisan support for government service contracting); see also infra notes 82–84 and accompanying text.
3. See infra section I.D.2.
7. See, e.g., OFFICE OF TECH. ASSESSMENT, OTA-BP-ITE-51, ASSESSING CONTRACTOR USE IN SUPERFUND 2 (1989) (describing government contractors’ “major role in conceiving, analyzing, and structuring the policies and tasks which make up the Superfund program”).
But times are changing. Privatization’s proponents have always relied on government service contracting\(^{10}\) to promote its four-fold agenda: boosting efficiency, maximizing budgetary savings, enhancing unitary control over the administrative state, and reaping political dividends.\(^{11}\) Now, however, these proponents are also branching out. They are experimenting with newer, more compelling instruments that provide surer, quicker routes to promote privatization’s fiscal, political, and programmatic aims. In short, they are empowering a new generation poised to advance the privatization agenda in ways traditional service contracting never has. They are empowering privatization’s progeny.

The first of privatization’s progeny is the *marketization of bureaucracy*. Much of traditional service contracting’s perceived payoff has come from the private sector’s superior ability to discipline its workforce and to keep labor costs down.\(^{12}\) Unlike most business executives, government agency heads have long been (as some see it) saddled with above-market labor costs, powerful collective-bargaining units, and civil-service laws that effectively tenure government employees.\(^{13}\) For decades, those frustrated with government labor policy have turned instead to service contracting. Far easier to contract around the civil service than to uproot its legal foundation, contracting proved a palatable (if insidious) means of infusing market principles into government services without actually having to tear apart the bureaucracy.

Today, however, there is less of a need to conceal privatization’s true purposes. Across the United States, elected officials as conservative as Wisconsin’s Scott Walker and as liberal as California’s Jerry Brown are taking direct aim at the bureaucracy.\(^{14}\) We see evidence already that public-sector compensation is being slashed, that government workers’ collective-bargaining rights are being curtailed, that civil-service jobs are being converted into at-will employment positions, and—most importantly—that even more drastic changes are forthcoming.\(^{15}\)

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11. See infra Part I.

12. See infra section I.B.

13. See infra sections I.B; I.C.

14. See infra section II.B.

15. See infra notes 96–138 and accompanying text.
In short, we no longer need service contracts to mask the bitter taste of radical reform. Now that overhauling the civil service and refashioning the government workforce in the private-sector’s image is a much easier pill to swallow, privatization’s proponents need not rely as much on service contractors. By cutting out the contractor-middleman, they can instead funnel previously outsourced responsibilities into a “marketized” bureaucracy that provides new, in-house opportunities to reap efficiency and cost-savings gains, and to achieve greater unitary executive control over the administrative state.

The second of privatization’s progeny is government by bounty. Although privatization’s proponents hail the successes of government contracting, they also recognize that the traditional service contract is not a perfect instrument. 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 service 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. 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 service contracting bandwagon (while remaining faithful to the privatization agenda).

16. Among other things, traditional service contracts are costly to monitor; and, poor performance is often difficult to sanction. See infra notes 35–37, 164 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 service contracting promise greater efficiency gains and cost savings. Put simply, government by bounty is a fee-for-success relationship. Bounty seekers get paid only if they successfully carry out their assigned tasks. By contrast, traditional service contracting is a fee-for-service relationship. Contractors, by and large, get paid regardless of their success in accomplishing assigned tasks. RALPH C. NASH, JR., STEVEN L. SCHOOENER & KAREN R. O’BRIEN, THE GOVERNMENT CONTRACTS REFERENCE BOOK 525 (2d. ed. 1998) (“[G]overnment 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.”).
Reminiscent, perhaps, of Yogi Berra’s famous quip, traditional contracting might be so popular today that no one does it anymore. Government service contracting’s overwhelming appeal is 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 might be less intoxicating to the ever-growing contingent of free-market stalwarts and Tea Party activists, who have become desensitized to the apparent ubiquity and ease of contracting and now crave more drastic reform. For these reasons, we would 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 service government contracting of its unique utility and luster. It explains the generational expansion from privatization being virtually coextensive with service contracting to privatization now beginning to operate across a broader range of platforms. And, it grapples with the institutional fragmentation and legal 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 front lines 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, when politically insulated experts and politically responsive managers team up to

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17. See Allen Barra, Yogi Berra: Eternal Yankee, at xxxiv (2009) (quoting the legendary Yankee as reportedly having said, with regard to a popular restaurant, “[i]t’s so crowded. No one goes there anymore”).


19. This Article does not discuss developments prior to the advent of the modern administrative state. For discussions of various forms of bureaucratic marketization and government by bounty in earlier times, see, for example, Nicholas R. Parrillo, Against the Profit Motive (forthcoming Oct. 2013); Arnold W. Knauth, Prize Law Reconsidered, 46 COLUM. L. REV. 69 (1946).
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 nascent generational expansion we are witnessing must come first. We must understand where we have been, where we are now, and where we seem to be 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 service 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 service contracting, we might expect such 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 service 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 service contracting. Hardly a repudiation of that which motivates government service 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 long-standing 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 wide-ranging effects, to gauge how these instruments are changing the adminis-
trative state, and to begin to write the postmortem of the traditional, contracting-monopolized world we are slowly leaving behind.

I. PRIVATIZATION’S PAST

Much like a paper clip in the hands of MacGyver, traditional service contracting is a surprisingly 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 have been—with privatization’s proponents relying heavily on service 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 additionally 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 administrate state in ways service contracting never has.

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 service 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
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 (for example, profits and the 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 do not 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 contractor counterparts, they historically have not been equipped with the necessary arsenal of carrots and sticks to ensure that their employees also embrace the efficiency imperative. Civil-service laws sharply reduce at-will employment—and, with it, the threat of termination.28 The same without being efficient. Competitive markets weed out the laggards and keep the winners in a state of healthy anxiety.”).

 Needless to add, where little competition exists, the ostensible efficiency benefits of contracting diminish considerably. John D. Donahue, The Privatization Decision: Public Ends, Private Means 147 (1989); Donahue, supra note 10, at 45 (“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, 178 (1994) (similar).


27. William A. Niskanen, Jr., Bureaucracy and Representative Government 24–42 (1971); Michaels, supra note 24, at 865–66 (describing agencies as often motivated to pursue their own institutional agendas, possibly at variance with the preferences of the Chief Executive).

civil-service safeguards, put in place principally to prevent the politicization of the bureaucracy, also restrict opportunities for agency heads to reward industrious workers (through rapid advancement or monetary bonuses).

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.” Hence service 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 service contractors vying to carry out government responsibilities is more robust—and competitive—than ever before. 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 that initially chosen contractor flop. Empirically, studies show that governments do

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29. See infra section LC.


32. Over the past few decades, opportunities to contract for government services—and profit from such 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 Donahue, supra note 10, at 56; Shane & Nixon, supra note 10.

33. DONAHEUE, supra note 22, at 147; Trevor L. Brown & Matthew Potoski, Managing the Public Service Market, 64 PUB. ADMIN. REV. 656, 658 (2004); Donahue, supra note 10, at 42, 45; Sergio Fernandez et al., Exploring Variations in Contracting for Services Among American Local Governments: Do Politics Still Matter?, 38 AM. REV. PUB. ADMIN. 439, 447 (2008) (“Competition 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.”); Violeta Kavaliauskaitė &
indeed contract out more frequently in “the presence of well-developed markets with large numbers of competent private providers.”

Second, government experience with administering contracts is at an all-time high. This is important because contracting is not easy. It requires careful drafting of the terms specifying the service contractor’s responsibilities, selection of the “right” contractor, and monitoring to ensure the contractor is satisfying the terms of the agreement. But practice should make perfect—or, at least, better. With each subsequent round, those overseeing contracts gain experience. They learn what went right, and what went wrong. And, they incorporate those lessons into the next round of contracts. Greater contract-management experience ought to lower 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

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Robertas Jucevičius, Readiness of Public Institutions for Contracting, 15 Econ. & Mgmt. 587, 587 (2010).


35. See, e.g., Donahue, supra note 22; Kavaliauskaite & Jucevičius, supra note 33, at 592 (“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.”) (citations omitted).

36. Donahue, supra note 22; Sergio Fernandez et al., Privatization and Its Implications for Human Resources Management, in Public Personnel Management: Current Concerns, Future Challenges 206 (Norma M. Riccucci ed., 4th ed. 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.”) (citation and internal quotation marks omitted).

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

38. By the same token, too much outsourcing might overwhelm staff. Insufficient resources to handle an increased number of contracts can negate whatever advantage contract-management personnel obtain through experience. See Steven L. Schooner, Competitive Sourcing Policy: More Sail Than Rudder?, 33 Pub. Cont. L.J. 263, 283, 287 (2004) [hereinafter Schooner, Competitive Sourcing Policy]; see also Steven L. Schooner, Contractor Atrocities at Abu Ghraiib: Compromised Accountability in a Streamlined, Outsourced Government, 16 Stan. L. & Pol’y Rev. 549, 558–59 (2005) [hereinafter Schooner, Contractor Atrocities] (“The federal government currently lacks sufficient numbers of qualified acquisition professionals to conduct appropriate market research, properly plan acquisitions, maximize competition, comply with a plethora of congressionally imposed social policies, administer contracts to assure quality control and guarantee contract compliance, resolve pending protests and disputes, and close out contracts.”).
economic sense.\(^{39}\) It is therefore hardly surprising that those agencies possessing good contract-management resources are, as an empirical matter, more apt to contract.\(^{40}\) 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.

**B. BUDGETARY SAVINGS**

1. Long-Standing Budgetary Savings Rationale

Another reason privatization’s proponents have viewed service 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 benefits\(^{41}\) than their private-sector counterparts.\(^{42}\) Actually reducing public-sector wages and benefits—and bringing them closer in line with the going market rate\(^{43}\)—has historically been a political non-starter.\(^{44}\) Thus, those looking to lower government expenditures (by slashing labor costs) have instead hired service contractors.

\(^{39}\) See, e.g., Schooner, *Competitive Sourcing Policy*, supra note 38, at 272.

\(^{40}\) Brudney et al., *supra* note 34, at 410–11 (describing agencies that have had positive experiences managing contracts as more likely to contract more aggressively going forward); Donahue, *supra* note 10, at 42, 45 (noting that having effective contract-management resources in place makes contracting a more attractive choice going forward); Fernandez et al., *supra* note 33, at 452 (finding jurisdictions with strong contract-management “capacity” as engaging in more contracting); see also Jonathan Levin & Steven Tadelis, *Contracting for Government Services: Theory and Evidence from U.S. Cities*, 58 J. INDUS. ECON. 507, 509 (2010) (reporting that governments that have difficulty administering contracts also contract less).


\(^{44}\) See, e.g., Michael A. Fletcher, Government Workers’ Pensions No Longer Sacred, WASH. POST (Oct. 6, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/10/05/AR2010100506640.html (“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.”); (Government) Workers of the World Unite!, ECONOMIST (Jan. 6, 2011), http://www.economist.com/node/17849199 (noting the power of government workers historically to resist efforts aimed at reducing their compensation); Peter Whoriskey & Amy Gardner, Ohio, Wisconsin Shine Spotlight on New Union Battle: Government Workers Versus Taxpayers, WASH. POST (Feb. 28, 2011), http://www.washingtonpost.com/wp-dyn/content/article/2011/02/27/AR2011022704038.html (“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.”).
Note that notwithstanding the rhetoric of the market being more efficient,\textsuperscript{45} it might well be the case that much of the “value” from service contracting derives from labor arbitrage—specifically, agencies exploiting the private–public wage differential.\textsuperscript{46} 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.\textsuperscript{47}

2. Heightened Contemporary Rationale for Budget Savings

Cost savings are not just popular any more. They are 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, the global economic recession have contributed to soaring federal deficits.\textsuperscript{48} States, in turn, cannot run budgetary deficits,\textsuperscript{49} and thus feel the fiscal effects of recessions even more acutely.\textsuperscript{50} 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.\textsuperscript{51} 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.\textsuperscript{52}

Studies show that governments are particularly aggressive service contractors during times of fiscal duress.\textsuperscript{53} These accounts make sense insofar as service

\textsuperscript{45}. See supra section 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.

\textsuperscript{46}. See DONAHUE, supra note 22, at 144 (describing studies suggesting that lower contractor wages constitute “a major part of the contractor cost edge”).

\textsuperscript{47}. See id.

\textsuperscript{48}. Throughout the 2000s, federal deficits (controlling for inflation) far outpaced anything the United States experienced since the early 1990s. See Stephen Bloch, U.S. Federal Deficits, Presidents, and Congress, Adelphi Univ., http://home.adelphi.edu/sbloch/deficits.html (last updated Nov. 12, 2012).


\textsuperscript{53}. See WARNER & HAFETZ, supra note 34, at 4 (observing that fiscal stress is correlated with greater local-level service contracting); Brudney et al., supra note 34, at 407–08 (noting that states contract out more aggressively during times of fiscal duress); see also Yolanda K. Kodrzycki, Privatization of Local Public Services: Lessons for New England, NEW ENGLAND ECON. REV., May/June 1994, at 40 (suggesting that the outsourcing of government services might be especially popular in communities where residents express an unwillingness to pay for government services).
contracting is believed to help shed labor costs. These accounts also suggest contracting ought to continue surging so long as we remain fiscally compromised.

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, enabling them to speak truth to power—that is, to provide expert, unfiltered advice without fear of being fired for doing so.

Political insulation of this sort limits the degree to which the Chief Executive has complete control over the Executive Branch. Secure in their jobs, civil servants may obstruct the Administration’s policy aims. Their reasons for

54. This apparent enthusiasm does not seem to depend upon service contracting actually delivering true cost savings. Many governments report that although they have not found contracting to save money, they nevertheless remain devoted to the practice and optimistic regarding its cost-savings potential. Keon S. Chi et al., Privatization in State Government: Trends and Issues, Spectrum: J. St. Gov’t, Fall 2003, at 13, 20, http://www.csg.org/knowledgecenter/docs/spec_fa03Privatization.pdf; see also Brudney et al., supra note 34, at 412 (concluding that governments continue to contract in times of fiscal difficulties notwithstanding the “sobering empirical evidence” attesting to a lack of cost savings in many instances).

55. 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.

56. See supra note 28 and accompanying text.


58. As discussed, insulation also raises efficiency concerns. See supra section I.A.1.


60. Carver v. Foerster, 102 F.3d 96, 108 (3d Cir. 1996) (Becker, J., concurring) (“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.”); Ronald N. Johnson & Gary D. Libecap, Courts, a Protected Bureaucracy, and Reinvesting Government, 37 Ariz. L. Rev. 791, 820–21 (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.”); 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.”); Nina A. Mendelson, Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives, 78 N.Y.U. L. Rev. 557, 612–14 (2003) (describing ways in which civil servants can obstruct presidential policy agendas).
obstructing might be noble: civil servants resisting political pressure when the public is ill-informed or demands action that contravenes agencies’ statutory mandates. Or their reasons might be base: civil servants pushing their own policy priorities over those of the duly elected Administration. Either way, those who prize political accountability and organizational hierarchy might well lament the ways in which hard-to-fire civil servants can frustrate government policy.

Service contractors do not have such job security. As such, they are motivated to perform diligently. They also have strong reasons for toeing the Administration’s party line. After all, agencies dissatisfied with a service 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, service contractors are the way to go.

2. Heightened Imperative to Maximize Unitary Control Today

For decades, presidents have labored to maximize unitary control over the administrative state. Of late, they’ve been redoubling their efforts. We find

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61. See, e.g., Gillian E. Metzger, The Interdependent Relationship Between Internal and External Separation of Powers, 59 EMORY L.J. 423, 445 (2009) (“[Civil servants] are committed to enforcing the governing statutory regime that sets out the parameters of their authority and regulatory responsibilities.”); Richard Simon & Janet Wilson, EPA Staff Turned to Former Chief on Warming, L.A. TIMES (Feb. 27, 2008), http://articles.latimes.com/2008/feb/27/nation/na-waiver27 (describing EPA career staff’s efforts to outflank the Administrator after the Administrator “acted against the advice of his legal and scientific advisors” regarding global warming).

62. See infra notes 166–67 and accompanying text.

63. See supra note 31 and accompanying text.

64. See supra section I.A.1.


66. Id. As in the case of contracting to exploit wage differentials, it is not 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 easily removable subordinates to embrace their bosses’ positions).


68. See Exec. Order No. 13,579, 3 C.F.R. 256 (2012) (directing independent agencies to follow OMB protocols); David J. Barron, From Takeover to Merger: Reforming Administrative Law in an
ourselves today in an increasingly partisan and dysfunctional political climate. Because passing legislation is especially arduous, administrative policymaking takes on heightened importance. Naturally, so does unitary control—which ensures that the agencies devising such policies fully embrace the Administration’s priorities. 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.

D. POLITICAL DIVIDENDS

1. Long-Standing Political-Dividends Rationale

Last but not least: championing service contracting is smart politics. Those who have long promoted privatization have successfully tapped into a powerful political subculture that prizes free enterprise, is leery of big government, and—in a brash display of cognitive dissonance—demands leaner public administration while simultaneously resisting any reductions in its services, benefits,

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73. See PAUL R. VERKUIL, O UTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT 166–67 (2007) (“[P]olitical 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, supra note 65, at 745–49; Michaels, supra note 24, at 858–60.


75. 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”).

or entitlements. Service contracting has pitch-perfect resonance with this influential constituency.

2. Heightened Political Rationale Today

Service contracting has, by now, won the war of attrition. It has outlasted its opponents, both legal and political. But its victory was not foreordained. In earlier decades, uncertainty existed over whether service contracting would survive court challenges or spell electoral doom for those who endorsed it. Given the air of uncertainty, such contracting had to proceed 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 service contracting threatens constitutional values have failed to gain much traction. If anything, the judiciary’s apparent indifference to 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 has not always been the case. Service contracting used to be much more ideologically divisive. While conservatives and libertarians touted contracting from the very beginning, liberals and progressives opposed the turn to the marketplace.

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77. See Donahue, supra note 22, at 32; U.S. Gen. Accounting Office, FPCD-81-54, Improving the Credibility and Management of the Federal Workforce Through Better Planning and Budgetary Controls 5 (1981) (“The use of personnel ceilings reinforces the misconception that containing the staffing level of the direct Federal workforce controls the cost of Government.”); Dan Guttman, Inherently Governmental Functions and the New Millennium, in Making Government Manageable 40, 41 (Thomas H. Stanton & Benjamin Ginsberg eds., 2004); Michaels, supra note 65, at 752–53; Schooner, Competitive Sourcing Policy, supra note 38, at 278.


80. See Sergio Fernandez et al., Employment, Privatization, and Managerial Choice: Does Contracting Out Reduce Public Sector Employment?, 26 J. Pol’Y Analysis & Mgmt. 57, 59 (2006) (noting that political arguments supporting privatization have traditionally included statements to the effect that service contracting is “a means for countering the power of the encroaching state, protecting individual
With passions running high on both sides, supporters 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,”82 and “less controversial.”83 It now commands bipartisan support, with centrists and Democrats counting themselves among the politicians most closely associated with service contracting.84

Given these changed legal and political circumstances, those who champion greater service contracting are no longer taking risks. They’re simply spouting what has become conventional wisdom.85

II. PRIVATIZATION’S GENERATIONAL EXPANSION

Based on the preceding analysis, service 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 service contracting appears poised to gain even greater momentum, one must appreciate that other, more subtle forces are also at work. These forces seemingly reduce, if not altogether negate, the impulse to contract.86

Simply put, privatization’s popularity enables it to branch out from service

rights, and unleashing human enterprise”); Fernandez et al., supra note 33, at 440 (describing government contracting in the 1970s and 1980s as driven by “conservative political movements”).


82. Chi et al., supra note 54, at 20.

83. Brudney et al., supra note 34, at 414.


It is worth underscoring that today’s bipartisan support ought not to be understood as reflecting a change in the practice of service contracting. Service contracting has not 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.


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 service contracting remains a staple feature of contemporary public administration, new upstarts are poised to supplement traditional contracting, advancing the privatization agenda in ways that contracting never has.

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, many of 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 service contractors.

Of late, however, the tide has turned against the civil service. 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

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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 service contracting. Whereas traditional contracting gives preselected 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, qui tam suits, R&D prizes, and social-impact bonds, bounty initiatives abandon the conventional contractual form.88 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 out their given tasks. As a result, the bounty seekers are, in theory, highly motivated and far less susceptible to slack, abuse, and fraud.89

Moreover, traditional service 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, government by bounty might provide the same boost that traditional service 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 capable of funneling responsibilities inward, into the bureaucracy, and further outward, into unchartered and seemingly less regulated frontiers of commercial enterprise.90

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

88. See infra notes 195–98 and accompanying text.
89. See supra notes 36–39 and accompanying text; see infra note 156 and accompanying text.
90. This Part does not focus on how effective these new instruments will be. Instead, because this Article’s chief aims are to mark the rise of privatization’s progeny and examine how these new instruments uniquely challenge the administrative state, this Part simply emphasizes what these new instruments look like and why privatization’s proponents might view them as potentially more effective than government service contracting in promoting their agenda.
Across the nation, governments began revising their employment policies, chipping away at both the compensation and legal protections government workers long enjoyed. Given today’s efforts to dismantle the civil service (led by, among others, libertarians, Tea Party activists, and even politically moderate elected officials hamstrung by spiraling budget deficits), marketization is poised to make even greater inroads going forward. Thus, what once was done through circumventing the civil service one contract at a time can now be achieved not only more directly, but also more comprehensively—as the government workforce increasingly is made to resemble what we would encounter in the private sector.

This section captures the nascent marketization of the bureaucracy, as evidenced by unprecedented revisions to civil servants’ collective-bargaining rights, wages and benefits, and job security. These revisions speak precisely to how successful the privatization movement has been. The quest for greater efficiencies, budgetary savings, and more complete unitary control over the administrative state has become so strong that it is converting parts of the bureaucracy into


93. See supra note 87 and accompanying text.


95. To be sure, the creation of, among other things, a Senior Executive Service, see Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, and the insertion of additional layers of political appointees on top of the rank-and-file civil servants, see supra note 67, serve as forerunners to the current marketization movement. Though still in its infancy, the current marketization movement has the potential to sweep in (and politicize) much broader swaths of government employees.
a near-facsimile of a private workforce—and, with it, lessening the need to contract.

1. Diminution of Collective-Bargaining Rights

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

Widespread hostility to public-sector unions is a relatively new phenomenon. During much of the post-WWII era, collective-bargaining rights of government workers enjoyed broad support. Only today, amid this wholesale refashioning

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99 Even conservative presidents such as Richard Nixon and Ronald Reagan contributed to this bipartisan consensus. Joseph A. McCARTIN, Collision Course: Ronald Reagan, the Air Traffic Controllers, and the Strike That Changed America (2011) (suggesting that President Reagan was generally supportive of government unions notwithstanding the dramatic termination of striking
of government labor policy, are we having “the first serious debates about the appropriateness of collective bargaining in the public sector since the Depression.”

Government employees have fared far better than their counterparts in the private sector, where effective unionization has long been in a state of free fall. But the gap between the two workforces 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 [s]cope of bargaining and collective bargaining ‘rights’ that, increasingly, may be exercised only at the discretion of the employer.”

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.’” But the realization of that prediction, however likely, is of little moment. Those employees who retain collective-bargaining rights will nonetheless be reluctant to assert them. Doing so might prompt a more aggressive scaling back of those rights (if not altogether spur agency heads to outsource their jobs).


101. Wasserman, supra note 98, at 58; (Government) Workers of the World Unite!, supra note 44.

102. Id. at 63.


The weakened bargaining units are especially susceptible to being steam-rolled by the forces of marketization. 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.

2. Base Pay and Benefit Reductions

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

Of late, 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. At least

108. Keith Snavely & 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 (“We’re the black sheep of the federal government. There are no work floor regulations for us so when there’s an issue, management’s attitude is: ‘It’s our way or the highway.’”) (quoting a Transportation Security Administration employee discussing the agency’s lack of collective-bargaining rights).


110. See infra notes 239–43 and accompanying text.


forty-four states and countless cities and counties have, in just the past few years, slashed government wages.115 Perhaps most dramatically, the State of California and cities in Pennsylvania have sought to lower government pay to the minimum wage.116

Equally significant, a substantial number of civil-service jobs are being casualized—that is, converted from full-time to part-time employment.117 Long a reality in the private sector,118 casualization translates to less generous pay, fewer, if any, benefits, fewer opportunities to rise within the ranks, and greater job vulnerability.119

The fact that the government is increasingly mirroring private-sector employment practices supports the claim that, indeed, we are experiencing a marketization of the bureaucracy. More to the point, it suggests that the gap between


117. Fernandez et al., supra note 80, at 67; Hays & Sowa, supra note 94, at 104.

118. See Kathleen Barker & Kathleen Christensen, Controversy and Challenges Raised by Contingent Work Arrangements, in CONTINGENT WORK: AMERICAN EMPLOYMENT RELATIONS IN TRANSITION 1–10 (Kathleen Barker & Kathleen Christensen eds., 1998).

119. Fernandez et al., supra note 80, at 60; Hays & Sowa, supra note 94, at 103.
private- and public-sector labor costs is shrinking. (Given the substantial transaction costs associated with service contracting, complete equalization is, of course, unnecessary for labor arbitrage.) With this narrowing gap, those elected officials and agency heads who have traditionally turned to service contracting now have a more direct path to budgetary savings.

3. Incentive-Based Compensation

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

Undoubtedly an effort to better align principal–agent interests, in this respect too the public sector is embracing the logic and custom of the market.

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120. DONAHUE, supra note 22; Schooner, Competitive Sourcing Policy, supra note 38; see also supra note 36 and accompanying text.

121. Needless to add, 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.

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

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


125. See RADICAL REFORM OF THE CIVIL SERVICE (Stephen E. Condrey & Robert Maranto eds., 2001); James S. Bowman et al., Florida’s Service First: Radical Reform in the Sunshine State, in CIVIL SERVICE REFORM IN THE STATES, supra note 124, at 146; Condrey & Battaglio, supra note 94, at 425; Selden & Brewer, supra note 94, at 4, 7.

126. See James S. Bowman, The Success of Failure: Paradox of Performance Pay, 30 REV. PUB. PERSONNEL ADMIN. 70, 70 (2010) (indicating that government supervisors “see pay for performance [incentives] as a basis of control”); Moynihan, Architecture, supra note 98, at 167 (linking financial-performance incentives with employee control and motivation); Rose-Ackerman, supra note 23, at 132–33; Whalen & Guy, supra note 124, at 357.

127. Heckman et al., supra note 124, at 1 (“By . . . developing explicit rewards for their attainment, these [governmental performance-based pay] systems have aimed to replicate, in a non-market setting,
Like the cutbacks to public-sector base compensation, these newly introduced market practices 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 protection against adverse employment actions absent cause. A safeguard against efforts to overly politicize the bureaucracy, for-cause protection nevertheless encouraged greater service contracting. Specifically, over the past few decades, some of those agencies frustrated with civil servants’ employment protections (which they viewed as enabling bureaucratic slack and obstruction) preferred to hire service contractors. They hired contractors precisely because private-sector workers lacked the civil servants’ employment protections—and thus had greater incentive to follow the Administration’s lead.

Today, this arbitraging opportunity is all but vanishing. Many states have reclassified substantial numbers of civil-service jobs as at-will employment—so
much so that a majority of state employees across the country now report that their job security has lessened considerably. 135 Similar, though to date more modest, employment conversions are occurring at the federal level. 136 Scholars taking stock of these trends observe a “discernable drift (and in some cases a tidal wave) in the direction of at-will employment.” 137

As this marketization drift continues, government workers increasingly shorn of tenure protections will more closely resemble their private-sector counterparts. 138 And, the more these workers resemble their private-sector counterparts, the less the agencies will find reason to contract around them.

B. GOVERNMENT BY BOUNTY

Privatization is not just converting the government workforce into a carbon copy of what we would find in the private sector. It is also opening new frontiers, pushing public responsibilities further and deeper into the marketplace. Policy entrepreneurs have, of late, experimented more aggressively with what I call government by bounty. Championed by those who prize efficiency, who want to cut costs, and who seek to score political points, these government gambles do not conform to the traditional government service contract either in form or substance. Yet they are entirely faithful to the underlying principles that motivate such contracting. That is to say, they are borne out of the belief that though profits and competition encourage excellence in public administration, traditional service contracts do not fully exploit these market advantages. 139

Bounty initiatives depart from traditional service contracting in three significant ways. First, bounty initiatives are high-risk, high-reward. Unlike fee-for-service government contractors, 140 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.\footnote{See infra note 155 and accompanying text.} Second, bounty initiatives shift monitoring costs from the government to private participants.\footnote{See infra notes 164–70 and accompanying text.} 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.\footnote{See infra notes 157–60 and accompanying text.} Hence agent slacking becomes a problem for the private provider, not the government. Third, bounty initiatives entail greater participatory independence. The government either does not select the specific private participants to advance public aims\footnote{See infra note 152 and accompanying text.}—or, it does not determine the actual payment or payment rate.\footnote{See infra sections III.B.1–2.} Rather, market forces and sometimes government-appointed third parties determine which individuals and firms participate—or, they determine the payment amount or rate.

Appreciating government by bounty requires envisioning a very big tent. As a matter of substance, bounty initiatives span the administrative horizon. As a matter of structure, some bounty arrangements take the form of quasi-options, others are open offers, and still others resemble standard contracts, albeit with forms of consideration largely foreign to traditional contracting. And, as a matter of vintage, many are newly conceived;\footnote{See infra notes 198–202 and accompanying text.} but some date back hundreds of years—and are now being revived after decades, if not centuries, of relative dormancy.\footnote{See infra notes 203–04; see also supra note 19.}

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 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 robust, alternative approach to privatization—an approach quite distinct from traditional service 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 service contracting vis-à-vis efficiency, cost savings, and political payout. Given how relatively poorly understood bounty initiatives are, drilling down 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 transportation-lease arrangements provide a fuller sense of the range of bounty initiatives.148

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Social-impact bonds149 are one of the newest bounty initiatives. Largely unheard of just a few years ago, today these bonds are sparking interest and programming across the United States. In addition to projects in the works at the federal level, New York (City and State), Massachusetts, Minnesota, Connecticut, and Cuyahoga County (Cleveland) are currently designing social-impact bond programs of their own.150 These programs combat, among other things, homelessness and criminal recidivism.151

Social-impact bonds work as follows: Government agencies enter into agreements with private “bond organizations.” Bond organizations in turn screen, select, and finance private providers to design and administer social-service programs.152 With the bond organization serving as a go-between, the providers are further removed from government control than we are accustomed to when either government workers or traditional service contractors carry out public responsibilities. Moreover, it is the private bond organization—not the government—that bears most of the start-up and operational costs.153 If, after a

148. See infra sections III.B.1–2.


151. See Chen, supra note 139; Travis, supra note 150; Loder et al., supra note 150, at 16.

152. See Liebman, supra note 149, at 2; Loder et al., supra note 150, at 7.

153. See Liebman, supra note 149, at 2.
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.154 But, if the program does not meet the
benchmarks, the bond organization recoups either none of its expenditures or
only a fraction of what it initially invested. This means that the government
does not subsidize the private provider’s lack of success, and that the onus is on
the bond organization to police the provider’s progress.155

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

1. Efficiency

Social-impact bonds promise to be more efficient than both government
service contracting and marketized bureaucracy. The government does not pay
most of the expenses associated with sustaining the program unless and until
that program is successfully completed.156 This arrangement distinguishes gov-
ernment by bounty from traditional service contracting and even from market-
etized bureaucratic governance. As a matter of efficiency, service contractors
might well have the same “carrots” as bondholders—namely, if they perform
well they will profit.157 But they are not subject to the same “sticks.” An
unsuccessful bondholder loses much, if not all, of its investment. By contrast, a
traditional service contractor that doesn’t perform well is, at worst, less likely to
have its contract renewed. Absent serious malfeasance, that contractor still gets
paid for the work already completed.158 It goes without saying that the contrac-
tor 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 organiza-

154. New York City promises a 21% return on its investment. Chen, supra note 139. The British
anti-recidivism program promises a 13.5% annual rate of return. See Performance Bonds, supra
note 149.

155. Loder et al., supra note 150.

156. 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.

157. This will not always be the case. Many traditional government contracts are structured as
“cost-reimbursement” or “cost-plus” contracts. See Michael Abramowicz, 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 E. Kornhauser, Choosing a Tax Rate
government contracts transfer little, if any, risk to the private sector); Julie A. Roin, Privatization and
the Sale of Tax Revenues, 95 Minn. L. Rev. 1965, 2009 (2011) (characterizing cost-plus contracting as
“the government promises to reimburse the contractors’ costs with a guaranteed profit margin”);
supra note 16 and accompanying text.

158. See Nash et al., supra note 16, at 525.
Thus, on paper, we should expect bounty arrangements to offer greater efficiencies than traditional service contracting affords.

Similar comparative-efficiency 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 service contractors. But, the government agency cannot, itself, reap profits. Thus, at the organizational level, there aren’t the same efficiency-promoting incentives. 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. But neither those workers nor the agency heads risk their own financial capital. 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 service contracts.

First, the government saves money by shifting oversight costs to the private sector. Customarily, the government expends, or at least is expected to expend, significant resources on monitoring. This is true regardless whether traditional service 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. 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. If so, they would not be especially eager to

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159. 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 neither a constitutive nor necessary feature of government by bounty, I do not take up the admittedly interesting and important questions this structure invites.

160. See supra section II.A.

161. See supra notes 26–27 and accompanying text.

162. See supra section II.A.4.

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

164. See supra notes 36–39 and accompanying text.


166. Joel D. Aberbach & Bert A. Rockman, In the Web of Politics: Three Decades of the U.S. Federal Executive 168 (2000) (describing civil servants as ideologically to the left of the political
advance those commitments. For both of these reasons, the agency’s principals (not to mention Congress and the White House) 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 and how to dangle the carrots and brandish the sticks. With high-risk, high-reward social-impact bonds, many monitoring responsibilities shift to the bond organization. That organization stands to lose big if its chosen provider fails in its assignment. 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.

This is not, of course, to say that the government sheds all monitoring responsibilities, 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 to future ones. In a world of budgetary constraints and frequent, contested elections, a deferral of payment into the perhaps-distant future serves as a valuable de facto loan.\textsuperscript{174}

When the government proceeds via social-impact bonds, rather than through traditional service contracts or in-house resources, there are immediate and sizable (albeit temporary) budgetary savings.\textsuperscript{175} Assuming the social-impact program succeeds, payment of the provider’s expenses (plus the performance bonuses) will not be due for some time. And, responsibility for those payments is likely to fall on a successor government.\textsuperscript{176} In the meantime, the current Administration receives the provider’s services at little or no cost. The Administration can thus either reduce the total amount of current expenditures (while not cutting services) or reallocate those funds elsewhere, effectively leveraging present-day resources to provide additional services.

For example, in Britain, where social-impact bonds have a longer track record than in the United States,\textsuperscript{177} the government’s signature social-impact program targeting criminal recidivism runs for seven years.\textsuperscript{178} 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 Branch officials. Because these officials overwhelmingly serve short tenures,\textsuperscript{179} they are unlikely to be in office when it comes time for the bond organization to collect (which would, of course, cut into their departmental budgets).\textsuperscript{180}

Legislators have similar incentives to defer payments. Term-limited state and local representatives are unlikely to be in office when payments are due.\textsuperscript{181} Thus they enjoy all the benefits while bearing none of the subsequent fiscal

\textsuperscript{174} Whether bounties create efficient lending markets is, of course, a questionable proposition.

\textsuperscript{175} 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 E. Camacho, \textit{Can Regulation Evolve? Lessons from a Study in Maladaptive Management}, 55 UCLA L. Rev. 293, 347–48 (2007).

\textsuperscript{176} For discussions connecting budgetary issues, timing, and political decision making, see Michaels, \textit{supra} note 24, at 848–49, 891; Super, \textit{supra} note 49, at 2624–26.

\textsuperscript{177} See \textit{Bolton, supra} note 150; Travis, \textit{supra} note 150.


\textsuperscript{180} See Michaels, \textit{supra} note 24, at 850–51 (describing elected officials’ present-mindedness and corresponding predisposition to devalue long-term goals).

pain. But even in jurisdictions where term limits do not apply, 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, having to cut services or raise taxes many years out—to make the deferred payment—will be less politically costly than if these legislators cut services or raised taxes right now.

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 does not pack the political punch it once did.

If familiarity does not 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. More of the same, at this late date, includes service contracting. What might get voters more excited would be a leader pushing the envelope: championing initiatives newer and bolder than traditional service contracting.

The incentive to adopt increasingly innovative or extreme policy positions is

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185. See Auger, supra note 81, at 435; Donahue, supra note 10, at 62; Kelman, supra note 85, at 315; supra section I.D.
187. See supra notes 80–85 and accompanying text.
a standard feature of contemporary electoral politics.\textsuperscript{188} It no doubt is consistent with the strategic calculations made in the 1970s and 1980s by early proponents of modern service contracting. At that time, relatively little controversy existed over the professional bureaucracy and its dominant role in public administration.\textsuperscript{189} Calls for service contracting therefore seemed radical and exciting.\textsuperscript{190} These calls constituted an unmistakable form of political “product differentiation”\textsuperscript{191} likely to endear contracting’s proponents to critical constituencies of party activists\textsuperscript{192} and primary voters.\textsuperscript{193} In many jurisdictions and in many races, these constituencies swing the outcome of elections.\textsuperscript{194}

To the extent service contracting became so popular that, now, politicians of all stripes endorse it,\textsuperscript{195} the twenty-first century descendants of privatization’s pioneers have reason to branch out to the next big thing.\textsuperscript{196} Still committed to market approaches to public administration, yet unwilling to be lumped along-
side more moderate electoral rivals who have since jumped on the service contracting bandwagon,\textsuperscript{197} these descendants are now more likely to invoke novel schemes. At this early stage, political sloganizing 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.

* * *

Social-impact bonds are hardly alone. Government-by-bounty initiatives are surfacing across the administrative state. They include regulatory vouchers,\textsuperscript{198} prediction markets,\textsuperscript{199} homeland-security information-sharing arrange-

\begin{itemize}
  \item \textsuperscript{189} See supra section I.D.2.
  \item \textsuperscript{190} E.g., Leonard C. Gilroy, Reason Found., Policy Brief No. 86, Local Government Privatiza-
  \item \textsuperscript{191} Herbert Kitschelt, The Transformation of European Social Democracy 119 (1994).
  \item \textsuperscript{194} Abramowitz, supra note 188, 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 69, 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.”).
  \item \textsuperscript{195} See supra section I.D.2. Issue convergence is also common among political rivals. See Anthony Downs, An Economic Theory of Democracy 140 (1957). Convergence often precedes (and prompts) efforts at political product differentiation.
  \item \textsuperscript{196} See supra note 17 and accompanying text.
  \item \textsuperscript{197} See supra notes 82–84 and accompanying text.
  \item \textsuperscript{198} See infra section III.B.1.
  \item \textsuperscript{199} Prediction (or public-futures) markets encourage private parties to place money on the likelihood of certain events (such as the outbreak of war or energy crises) occurring. Government agencies
ments, private attorneys hired by state and local governments on contingency-fee bases, and the leasing of fee-generating public transportation conduits. Moreover, vintage bounty initiatives, including qui tam suits and government-sponsored prizes, are experiencing a contemporary renaissance.


Government prediction markets operate as bounties. Participants in prediction markets must invest their own resources, which they lose if their predictions do not 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: New Perspectives on Government Performance 151, 151 (Alan S. Gerber & Eric M. Patashnik eds., 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.

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. See Victor E. Schwartz et al., Can Governments Impose a New Tort Duty to Prevent External Risks?: The “No-Fault” Theories Behind Today’s High-Stakes Government Recoupment Suits, 44 Wake Forest L. Rev. 923, 932 (2009); David B. Wilkins, Re-thinking the Public–Private Distinction in Legal Ethics: The Case of “Substitute” Attorneys General, 2010 Mich. St. L. Rev. 423, 430–31. 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 they do not win, they receive nothing (and are not compensated for the costs incurred). See John C. Coffee, Jr., “When Smoke Gets in Your Eyes”: 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 . . . .”); Schwartz et al., supra, at 931.

Qui tam laws authorize private individuals (“relators”) to prosecute claims alleging fraud against the government. Successful relators receive a bounty—up to thirty percent of the judgment or settlement plus legal fees. See 31 U.S.C. § 3730(d)(2) (2006). 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) (2006); Charles Doyle, Cong. Research Serv., R40785, Qui Tam: The False Claims Act and Related Federal Statutes 1, 5, 7 (2009); William E. Kovacic, Whistleblower Bounty Lawsuits as Monitoring Devices in Government Contracts, 29 Loy. L.A. L. Rev. 1799 (1996). For a discussion of the modern-day resurgence in qui tam suits, see Verkuil, supra note 73, at 179 & n.136. 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.

There is likewise renewed enthusiasm for prize competitions. See America COMPETES Reauthorization Act of 2010, Pub. L. No. 111-358, 124 Stat. 3982 (2011) (authorizing agencies to initiate prize competitions); Office of Mgmt. & Budget, Exec. Office of the President, M-10-11,
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 service contracting to bureaucratic marketization and government by bounty. It shows how privatization’s progeny are poised to reverse longstanding public priorities, renegotiate the relationship between the Market and the State, and dictate changes to how the government allocates political and fiscal risk. Moreover, this Part forces us to take stock of the underappreciated virtues and vices of both the old regime (populated primarily by civil servants and traditional service contractors) and the new one (inhabited also by marketized government workers and bounty seekers).

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

But most importantly, they raise the stakes of the project. With so much riding on this nascent 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 and commodification 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 administrate 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 service-contracting forebearer in important ways. First, marketization represents a wholesale restructuring of government labor policy. Service contracting, by contrast, is a piecemeal process. Contracting might be ubiquitous, but still must be performed surgically, one discrete responsibility at a time. This distinction proves crucial in marketization influencing administrative law and policy in ways service contracting simply has not.

Second, marketization represents privatization’s conversion of the bureaucracy. Market values are imposed on the administrative state, thereby crowding out public-sector norms. Service contracting, by contrast, involves the market annexing a jettisoned government responsibility. By allowing the market to annex discrete responsibilities, the outsourcing 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, contracting acculturates the market—exporting public-sector values and imposing them on service contractors. This distinction, too, proves crucial in marketization influencing legal doctrines and institutional


Prizes, a type of bounty, differ from traditional service contracts in what should by now be familiar ways. The government pays for success, awarding bounties only to those participants who meet the stated goals. Jonathan H. Adler, Eyes on a Climate Prize: Rewarding Energy Innovation to Achieve Climate Stabilization, 35 HARV. ENVTL. L. REV. 1, 29 (2011). Prizes encourage greater entrepreneurial ingenuity. Unlike with government service contracts, government-sponsored prizes encourage market actors to chart their own courses as they strive to meet the stated goals. See Abramowicz, supra note 157, at 131–32. And, 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 4–5, 29 (suggesting that awarding prizes ex post for already completed, successful innovations can be superior to funding ex ante a potentially successful project proposal); Kalil, supra, at 6–7 (similar).

205. See supra section II.A.


207. See infra notes 235–36 and accompanying text.
practices in ways service contracting never has.208

These differences matter. In what follows, I discuss how marketization’s wholesale restructuring of government labor policy threatens to, among other things, normalize a “teach-to-the-test” mentality among government workers. I consider how marketization’s conversion of the bureaucracy—that is, the market’s refashioning the government workforce in its own image—threatens to crowd out redistributive government employment practices. Finally, I explore how a marketized bureaucracy threatens to unsettle canonical legal doctrines.

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.209 At first blush, this feature appears to do little to distinguish marketization from service contracting. Service 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 forty percent of all federal tasks,210 must be kept in-house.211 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.212

Responsibilities deemed commercial may be contracted out.213 Such responsibilities include custodial, clerical, and maintenance work. Each commercial responsibility is assessed individually to determine whether it is suitable for

208. Cf. Jody Freeman, Extending Public Law Norms Through Privatization, 116 Harv. L. Rev. 1285 (2003) (describing efforts to acculturate service contractors to make them more like public servants). Rather than making service contractors more like public servants (which is what Freeman suggests), marketization makes public servants more like contractors.


210. Blum, supra note 206, at 83.


212. See Federal Acquisition Regulation 7.503(c) (2012) (providing examples of inherently governmental functions); L. Elaine Halchin et al., Cong. Research Serv., R41209, Inherently Governmental Functions and Other Work Reserved for Performance by Federal Government Employees: The Obama Administration’s Proposed Policy Letter (2010) (explaining guidelines for determining when governmental functions should be performed in-house); Guttmann, supra note 77, at 41.

213. E.g., Blum, supra note 206, at 68.
contracting.  A recent study suggests that federal agencies are actually highly selective contractors. They put up only thirteen percent of all commercially designated activities for private–public competition.

Marketization eviscerates that commercial-noncommercial distinction, eliminating opportunities for such individual assessment. If service 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 similar job insecurities and performance-based incentives.

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. Those agencies recognize that service contracting’s effectiveness is not 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. (Importantly, when governments do contract out inherently governmental work, it might be because they are promoting ends unrelated to efficiency or cost savings and thus do not care about such evaluations.)

Accordingly, many marketized personnel subject to performance-based incentives might become frustrated by the potentially tenuous relationship between

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214. See Office of Mgmt. & Budget, supra note 206.
216. See supra notes 134–38 and accompanying text (describing the wholesale reclassification of civil-service jobs as at-will positions).
217. See Donahue, supra note 22, at 147 (arguing that “carefully structured competition with for-profit rivals can dramatically boost the efficiency of public organizations,” but that “the absence of competition can just as dramatically stifle any benefits that privatization would otherwise offer”); Donahue, supra note 10, at 44–45 (characterizing the benefits of service 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); 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”).
218. See Michaels, supra note 65 (describing the use of service contractors as enabling the Executive to more easily evade constitutional and statutory restrictions on its activities, to sideline politically obstinate civil servants, and to conceal the true costs of government initiatives).
effort and compensation. 219 These personnel might refocus their mission (or be directed to refocus their mission), reframing their tasks around 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. 220 Many experts concede that it is exceedingly difficult to measure educational quality. 221 But what’s really easy to measure is student performance on standardized tests. 222 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.” 223 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). 224 If their concern holds true, then performance metrics neither reward the right teachers nor promote educational goals.

219. But see Rose-Ackerman, supra note 23, at 143–44. Susan Rose-Ackerman supports incentive-based pay for some 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 her qualifying language (for example, “[s]o long as there is little or no uncertainty about the relationship between effort and performance,” id. at 134; “[p]rofessional norms might break down if the agency rewards many lucky but unprofessional officials and penalizes conscientious but unlucky ones,” id. at 143–44), it is far from 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.


221. See, e.g., JOHN E. CHUBB & TERRY M. MOE, POLITICS,(10,798),(991,993) 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.”).


223. 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.”).

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

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 inadequately motivated 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 have 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 have not given these questions enough thought. In any event, marketization—for good or ill—switches the default, leaving us to sort out the practical effects and normative implications of this new administrative orientation.

2. Marketization’s Conversion of the Bureaucracy

Marketization’s overhaul of government labor policy does not just switch the default in favor of greater emphasis on performance-based incentives. It also

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226. Al Gore, Businesslike Government: Lessons Learned from America’s Best Companies 80 (1997) (“The best way to protect the public is by preventing violations, not just punishing them.”).
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.227 Truman’s order constituted a groundbreaking social-justice precedent that helped spur desegregation efforts in other pockets of our civil, social, and political economy.228 It also played a role in helping to neutralize Soviet propaganda casting the United States as a racist nation.229

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 efficiency230 and undermine the United States’ war-fighting capacity.231 They argued that the 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.232 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.233 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.234

228. See, e.g., 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 helped pave the way for Brown v. Board of Education); see also Jack Greenberg, Race Relations and American Law 369 (1959) (“Integration of the armed forces shows the potential of law for achieving changes in race relations.”).
231. Morris J. MacGregor, Jr., Integration of the Armed Forces 1940–1965, at 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).
233. See supra section II.A.
234. See Peter K. 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 for both individual workers and the minority group as a whole.”); Donahue, supra note 111, at 137 (“[P]ublic jobs have been the gateway to the middle class for millions of disadvantaged
This is in keeping with marketization’s conversion of the bureaucracy. Traditional service contracting involves the government exporting public services for the market to annex. By allowing outsourced responsibilities to be annexed, the government ensures its internal, non-market norms remain unchallenged. And, by insisting contractors pay prevailing wages\(^{235}\) and hire from underrepresented or disadvantaged communities,\(^{236}\) the government actually extends its non-market 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.\(^{237}\) 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 is not just about delivering mail. In the post-WWII era, it, like most conventional government agencies,\(^{238}\) has served also as an implicit anti-poverty and affirmative-action program.\(^{239}\) It is doubtful that the Postal Service would have been successful in

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\(^{235}\) See supra note 43 and accompanying text (describing requirements that federal service contractors pay their employees prevailing wages).


\(^{237}\) Cf. Mary Douglas, How Institutions Think (1986) (characterizing the ways in which institutions acculturate themselves to one another); Sharon Dolovich, How Privatization Thinks: The Case of Prisons, in Government by Contract, supra note 2, at 128 (applying a similar approach in the context of private and state prisons).

\(^{238}\) Until the early 1970s, the Post Office Department was organized as a conventional government agency. See Postal Reorganization Act of 1970, Pub. L. No. 91-375, 84 Stat. 719 (1970) (codified in scattered sections of 39 U.S.C.) (abolishing the Post Office Department, an Executive agency, and replacing it with the Postal Service, a government corporation). For convenience, I will refer both to the current Postal Service and to its predecessor, the Post Office Department, as the “Postal Service” or the “Service.”

\(^{239}\) See, e.g., Linda B. Menzow, Sorting Letters, Sorting Lives: Delivering Diversity in the United States Postal Service (2011); Philip F. Rubio, There’s Always Work at the Post Office: African American Postal Workers and the Fight for Jobs, Justice, and Equality (2010). 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, Op-Ed, Privatize the Nation’s Mail Delivery, Wash. Post (Nov. 25, 2011), http://www.washingtonpost.com/opinions/privatize-the-nations-mail-delivery/2011/11/23/gIQAe2J7wN_print.html (quoting Jacksonian-era congressional leader). Given the
advancing civil rights or elevating families if—as many today are advocating—we treated the Service as nothing more than a quasi-commercial enterprise expected to operate in the black. 240 For many Americans, and particularly for Americans of color with limited educational and private-sector opportunities, a job with the Postal Service served as their ticket into the middle, class and as a springboard for their kids to go to college.

Indeed, an argument could be made that the Postal Service has been a more successful anti-poverty program than the landmark, but much maligned, AFDC/TANF programs. 241 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.” 242 Moynihan indicated that we should not hold it against the Postal Service that its labor costs are high. Rather, he urged, we should recognize the positive externalities (which aren’t readily credited to the Postal Service) generated by helping employees ascend into the middle class. 243

Moynihan’s view is, of course, a selective one. Others might look at the exact same program through the lens of special-interest set-asides. For starters, the comparatively generous pay awarded to government workers raises the price of mail delivery. It also engenders inequalities between federal postal workers and

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 a premium for deliveries to remote locations—or to abandon costly routes altogether—would themselves butt up more forcefully against important social and political goals.


241. AFDC is the commonly used acronym for the Aid to Families with Dependent Children program. TANF is the commonly used acronym for the Temporary Assistance to Needy Families program. See David A. Super, Offering an Invisible Hand: The Rise of the Personal Choice Model for Rationing Public Benefits, 113 YALE L.J. 815, 817 (2004) (describing federal, means-tested welfare programs).


similarly situated private-sector workers.\textsuperscript{244} 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, anti-poverty programs.

Calls for cutting wages, benefits, and the overall number of letter carriers are now ubiquitous in our highly marketized political climate.\textsuperscript{245} Excoriated for awarding high salaries and generous pensions to low-skilled workers, the Postal Service is starting to heed these calls.\textsuperscript{246} (By contrast, Moynihan once recommended that the Postal Service provide twice-daily mail service—seemingly inefficient as a purely commercial consideration and unnecessary as a matter of promoting democratic engagement but perhaps an effective means of employing and empowering many more, otherwise-struggling families.)\textsuperscript{247}

While it is certainly clear that the “mission” of private competitors UPS and FedEx is to turn a profit,\textsuperscript{248} the Postal Service has traditionally had a broader set of objectives.\textsuperscript{249} For better or worse, the forces of marketization are seemingly and summarily changing that—not just within the Postal Service but also all across the administrative state.\textsuperscript{250}

3. Marketization’s Doctrinal Feedback Loops

The above two discussions emphasized the ways in which marketization

\textsuperscript{244}. See Donahue, supra note 111, at 137.
\textsuperscript{245}. See supra note 240 and accompanying text.
\textsuperscript{247}. See Meehan, supra note 242; see also James T. Patterson, \textit{Freedom Is Not Enough: The Moynihan Report and America’s Struggle over Black Family Life}—from LBJ to Obama 15 (2010). As Meehan notes, Moynihan’s proposal was not without precedent. Until 1950, the Postal Service routinely provided twice-daily mail services. Meehan, supra note 242.
\textsuperscript{248}. But see Jon D. Michaels, \textit{All the President’s Spies: Private–Public Intelligence Partnerships in the War on Terror}, 96 \textit{CALIF. 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).
\textsuperscript{249}. See generally Megan Woolhouse, \textit{Now Hiring: Your Uncle Sam}, \textit{BOS. GLOBE} (May 30, 2009), http://www.boston.com/jobs/news/articles/2009/05/30/unlike_rest_of_us_federal_government__is_hiring_____a_lot/ (quoting a government personnel official who described 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 239.
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 prompt 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 section addresses how federal 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 does not necessarily 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 judicial 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 decision making.251 Scholars characterize this judicial scrutiny (which they call hard-look review) as “expertise-forcing”252 and as hostile to “political considerations [serving] as rational justifications for agency action.”253

To the extent courts insist that agencies provide detailed explanations justifying their actions,254 invariably it falls on career personnel to generate much of the supporting documentation.255 These career personnel have been members of

251. See Massachusetts v. EPA, 549 U.S. 497, 533–34 (2007) (requiring agencies to provide reasoned justifications when rejecting petitions for proposed rulemaking); Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto. Ins. Co., 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. 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.”).

252. Jody Freeman & Adrian Vermeule, Massachusetts v. EPA: From Politics to Expertise, 2007 SUP. CT. REV. 51, 52 (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”).

253. Magill & Vermeule, supra note 60, at 1053; id. at 1078 (suggesting judicial scrutiny focused on expertise “reduce[s] the political responsiveness of agency decisionmaking”).

254. State Farm, 463 U.S. at 48–51; SEC v. Chenery Corp., 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).

the politically insulated civil service.\textsuperscript{256} Thus, they have served as an important check against, among other things, excessive politicization of agency rulemaking. When the political leadership discounts, distorts, or disregards the civil servants’ findings, it does so at its own peril.\textsuperscript{257}

So long as it is implicitly understood that the independent bureaucracy plays a critical role within the black box of administrative agencies,\textsuperscript{258} hard-look review need not be more demanding than it currently is. But, by removing government workers’ civil-service protections, marketization politicizes the bureaucracy.\textsuperscript{259} Concerned now that the underlying support for agency action is itself politicized (by the at-will employees staffing marketized administrative agencies),\textsuperscript{260} courts might become more skeptical of agency justifications.\textsuperscript{261} That is, they might make hard-look review even harder, specifically requiring agencies to more thoroughly consider alternatives and otherwise justify their ultimate choices.\textsuperscript{262}

\begin{itemize}
  \item \textsuperscript{256} See supra note 28 and accompanying text.
  \item \textsuperscript{257} See Tummino v. Von Eschenbach, 427 F. Supp. 2d 212, 233 (E.D.N.Y. 2006) (treating a top senior career employee’s resignation “in protest over the decisionmaking process” as bolstering plaintiff’s allegation that the FDA acted improperly). There are also nonjudicially mediated ways for politically insulated government workers to let it be known that politics supplanted their work. See supra note 61 and accompanying text.
  \item \textsuperscript{258} See Magill & Vermeule, supra note 60, at 1053 (suggesting that 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 level of the agency to technocrats and lawyers at lower levels of the agency”).
  \item \textsuperscript{259} See supra section I.C.
  \item \textsuperscript{260} Of course, where service contractors effectively sideline non-marketized civil servants in matters pertaining to, for example, rulemaking, similar politicization concerns would arise. See supra note 6 and accompanying text.
  \item Furthermore, marketization’s effects on compensation and job security might precipitate a brain drain. See Hays & Sowa, supra note 94, at 115; Joe Davidson, Report Shows Federal Workers Are Increasingly Dreary About Their Jobs, O R I G I N A L P O S T (Nov. 16, 2011), http://www.washingtonpost.com/politics/report-shows-federal-workers-are-increasingly-dreary-about-their-jobs/2011/11/16/gIQAjAXSN_story.html (“Pay 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.”) (quoting U.S. Representative Jim Moran); Dan Eggen, Civil Rights Focus Shift Roils Staff at Justice, W A S H . P O S T (Nov. 13, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/11/12/AR2005111201200.html (reporting that the politicization of the Civil Rights Division damaged morale and prompted career Justice Department lawyers to leave the government). If so, lower-quality analysis—a byproduct 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.
  \item \textsuperscript{261} See, e.g., Barron, supra note 68, at 1140–41 (noting hard-look review works to limit the effects of agency politicization); Metzger, supra note 61, at 445 (“Evidence that [agency] decisions were made over the objections of career staff and agency professionals often triggers more rigorous review.”); see also STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 60–63 (1993) (emphasizing the important role played by expert, politically insulated government officials in improving the quality and legitimacy of agency action).
  \item \textsuperscript{262} See Matthew C. 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 generally refers to whether an agency took a hard look at the evidence,
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) politically accountable administrative governance, because it raises the costs of administrative action, and because it might simply prompt marketized agencies to eschew rulemaking in favor of information bulletins, voluntary safety recalls, and other informal approaches not subject to the same degree of judicial scrutiny.

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, many scholars, judges, and agency officials treated the Chevron doctrine as the first, last, and only word. Under Chevron, where statutory language is ambiguous, courts uphold agencies’ legal interpretations provided those interpretations are reasonable. 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.

see Greater Bos. Television Corp. 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 of the term by reviewing courts would produce a substantially similar effect on marketized agencies.


See Maslaw & Harfst, supra note 264; McGarity, supra note 264, at 1441–43 (describing alternative, less-formal vehicles through which agencies route policymaking to evade hard-look review).


Mead, 533 U.S. at 239 (Scalia, J., dissenting) (calling Mead’s invigoration of Skidmore deference an “avulsive change” to the Chevron regime).

Chevron, 467 U.S. at 865–66 (explaining that courts will not overturn an agency’s interpretation of an ambiguous statute provided that interpretation is reasonable).
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."  

Expertise, to be sure, is not banished from the *Chevron* calculus. But it plays only a supporting role on a stage where political control shines the brightest. Thus, given *Chevron’s* emphasis on political accountability, the politicization associated with marketization would seemingly only increase the degree to which courts defer on questions of law.  

*Mead*, however, presents additional wrinkles. *Mead* insists upon the limited reach of *Chevron*, 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." In contexts where *Chevron* does not apply, courts often employ *Skidmore* deference, which is less deferential than *Chevron*, "depend[s] upon the thoroughness evident in [the agency’s] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."  

Thoroughness, strength of reasoning, and consistency over time all place an

271. Id. at 865.

272. The Court explicitly acknowledges as much in deferring to the agency not just because the agency is politically accountable but also because "the regulatory scheme is technical and complex [and] the agency considered the matter in a detailed and reasoned fashion." Id.; see also Evan J. Criddle, *Chevron’s Consensus*, 88 B.U. L. Rev. 1271 (2008).

273. 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 168, at 1764–65; Watts, *supra* note 262, at 37.  

274. 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 255 and accompanying text (characterizing the critical role played by civil servants in rulemaking proceedings).


276. *Mead*, 533 U.S. at 228–31 (suggesting that *Chevron* is not being circumscribed but rather that *Chevron* itself was a carve out from so-called *Skidmore* deference).


278. *Mead*, 533 U.S. at 227–31; see *Skidmore* v. Swift & Co., 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 N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 Geo. L.J. 1083 (2008); cf. Peter L. Strauss, Essay, "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.

279. *Skidmore*, 323 U.S. at 140.
apparent premium on expert, rational, professional administration. Skidmore thus seems decidedly anti-political, and correspondingly favorably disposed to the efforts of politically insulated, professional civil servants. To the extent this is true, then presumably courts applying Skidmore deference to marketized decisions would find themselves deferring to a lesser extent than they would pre-marketization.

Some scholars have suggested Mead has had little practical effect. They’ve argued that regardless whether courts apply Skidmore or Chevron, reversal rates do not differ substantially. If these scholars are correct, and if marketization

280. See Mead, 533 U.S. at 228 (noting “relative expertness” among the factors relevant to how much deference to accord an agency’s interpretation); Eskridge, Jr. & Baer, supra note 278, at 1168; Kristin E. Hickman & Matthew D. Krueger, In Search of the Modern Skidmore Standard, 107 Colum. L. Rev. 1235, 1288–89, 1293–94 (2007); Magill & Vermeule, supra note 60, at 1045.

281. Elizabeth Magill and Adrian Vermeule remind us that political insulation is not the same as expertise. See Magill & Vermeule, supra note 60, at 1039. While they are 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. Cf. 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 department” and would generate polices “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, when comparing insulated civil servants to those government workers serving at the pleasure of the political administration.

282. For this reason, marketization’s resulting “brain drain,” supra note 260—apt to peel off some of the most highly skilled government workers—also counsels against deference.

283. See Mead, 533 U.S. at 244–45 (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 J. 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).

284. Where agencies have not marketized relevant parts of their bureaucracies (such as, for example, their cadres of administrative law judges), the decisions arrived at by those non-marketized units would presumably receive more favorable treatment under the Skidmore framework.

285. See, e.g., David Zaring, Reasonable Agencies, 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”).


287. Eskridge, Jr. & Baer, supra note 278; Richard J. Pierce, Jr., What Do the Studies of Judicial Review of Agency Actions Mean? 63 Admin. L. Rev. 77 (2011); Zaring, supra note 285, at 180–83. Of course, the similarity in reversal rates could be a function of agencies anticipating and responding to the different levels of deference. An agency expecting Skidmore deference might prepare a rule more carefully (and take fewer interpretive risks) than an agency expecting Chevron deference. See E. Donald Elliot, Chevron Matters: How the Chevron Doctrine Redefined the Roles of Congress, Courts and
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’ (roughly, pro-political) *Chevron* deference and lessen courts’ (roughly, anti-political) *Skidmore* deference. That is to say, post-marketization reversal rates under *Chevron* should decline and rise under *Skidmore*.288

And, if we are 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 harbor289—marketization’s widening the gap between *Chevron* and *Skidmore* deference would only intensify agencies’ preference for rulemaking over less formal approaches. Whether that is good, bad, or simply an unanticipated cost that diminishes marketization’s purported fiscal windfall will have to be sorted out as marketization takes firmer root, as courts become more attuned to marketization’s effects, and as we evaluate the post-marketization case law.

c. Due Process. Finally, and briefly, marketization might also implicate constitutional due process considerations. Over the years, the Supreme Court has expressed unease when politicized decision makers act in adjudicatory capacities. This is especially true when politicized decision makers tasked with assessing fines 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 she awards, under the theory that she’ll be tempted to favor guilty verdicts.290 The Court has found it similarly troubling when a statutory scheme directs a political decision maker to assess fines if that decision maker then exercises some control over how her institution later spends that money.291

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.292 To the extent

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


290. See *Tumey v. Ohio*, 273 U.S. 510, 532 (1927) (finding a due process constitutional violation where an adjudicator has a financial incentive to favor a particular outcome).

291. *Ward v. Vill. of Monroeville*, 409 U.S. 57, 60 (1972) (invalidating fine assessments adjudicated by a village mayor when those fines are deposited in the village’s coffers).

292. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 250–51 (1980) (upholding an administrative adjudicatory scheme in part because the adjudicators were politically insulated from those agency decision makers who decided how agency funds—including collected fees—would be spent); *Wiener v. United States*, 357 U.S. 349, 356 (1958) (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).
marketization reaches far enough to chip 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 Administrative Procedure Act’s substantial-evidence standard, or, they might even go so far as to invalidate those adjudicators’ holdings on due process grounds. 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 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 service contracts, bounties shift costs and responsibilities to would-be bounty seekers. Those shifted costs and responsibilities might, however, lead many private actors to prefer the financial security of fee-for-service contracts.

To overcome private actors’ relative lack of enthusiasm, 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. 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

296. 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 J. Baumol, Payment by Performance in Rail Passenger Transportation: An Innovation in Amtrak’s Operations, 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); Michael C. Jensen & Kevin J. Murphy, Performance Pay and Top-Management Incentives, 98 J. Pol. Econ. 225 (1990) (discussing the need to encourage agent participation notwithstanding requirements that the agent bear risks); Levmore, supra note 23, at 503 (describing “rewards [as] an important means of reducing agency costs”).
in which these sweeteners transform government by bounty’s ostensibly voluntary, open-market invitations into de facto compulsory mandates (section 1); render participatory democracy and intergenerational sovereignty alienable assets over which the government may barter (section 2); and, influence courts’ decisions whether to ascribe civil and constitutional liability to bounty seekers furthering government aims (section 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 costless to the government but prized commercially.\(^\text{297}\) The government can be especially lavish with those in-kind enticements—ensuring highly motivated participation without having to raise taxes or cut spending elsewhere.\(^\text{298}\)

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.\(^\text{299}\)

Consider, as one such example, the Food and Drug Administration’s (FDA) priority-review voucher program. Treating 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.\(^\text{300}\)

Given the apparent market vacuum, and in light of the fact that successful,

\(^{297}\) Of course not all in-kind benefits are costless or even cost effective. See, e.g., Martha B. Coven, *The Freedom To Spend: 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 substantive, non-monetary welfare services toward a “negative income tax” scheme).

\(^{298}\) See supra notes 48–55 and accompanying text.


\(^{300}\) See David B. Ridley et al., *Developing Drugs for Developing Countries*, 25 Health Aff. 313, 313 (2006).
accessible treatments would further U.S. foreign-policy and humanitarian aims, 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 contracts with private companies, paying those contractors (a flat fee or on a cost-plus schedule) to develop the drugs.

Instead, it announces a bounty. Pursuant to the FDA Amendments Act of 2007, the government awards a transferrable priority-review voucher to pharmaceutical companies that successfully bring to market new drugs targeting tropical and other neglected diseases. 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 million—may use it for any of the blockbuster drugs they are developing. Or, they may sell the voucher to another company that values priority review more highly.

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


308. As with many other regulatory schemes, there is a debate whether these vouchers provide too little of an incentive or too great of a private windfall. See, e.g., Aaron S. Kesselheim, Drug Development for Neglected Diseases—The Trouble with FDA Review Vouchers, 359 NEW ENG. J. MED. 1981, 1981–82 (2008).
FDA approval, it loses its entire investment.  

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 Treasury’s wallet closed.  

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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 do not 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.

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. 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. Otherwise, they will have to pay what amounts to a “tax,” namely the cost of purchasing a priority-review voucher on the open market. 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 can-

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310. 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, 75, 87 and accompanying text.
313. Cf. Jon D. Michaels, Deputizing Homeland Security, 88 Tex. L. Rev. 1435, 1454 & n.100 (2010) (describing the pressure felt by firms to cooperate with the government—so long as its competitors are doing so).
not or will not participate.315

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.316 But this risk shifting is not necessarily advantageous to private actors, many of whom prefer the financial security that fee-for-service contracting affords. To maximize the desirability of the bounty, governments might therefore work to ameliorate other types of risk, specifically those beyond the bounty seeker’s control.317 In so doing, governments might choose to sign away future policymaking discretion—discretion of the sort that, when left in public hands, could compromise the bounty seeker’s ability to secure its reward. Such risk-removing decisions are fraught ones, at least for those alarmed by a government’s willingness to enter into long-term political pre-commitments that bind—to the point of disenfranchising—future generations of citizens.318

Consider, for example, the recent spate of transportation-infrastructure arrangements that operate as bounties. These arrangements involve states and cities transferring operational control over roads, bridges, and parking facilities to private firms.319 Firms lease the facilities, paying the government for the right to collect and keep user fees. Leases for the likes of the Chicago Skyway and the Indiana Toll Road (both entered into in the mid-2000s) run between seventy-five and ninety-nine years—and have already netted governments billions of dollars.320 By design, the lease payments are heavily front-loaded.321


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.


317. Perhaps because traditional service contracts are fee-for-service arrangements—and contractors usually are paid regardless what happens beyond their control, see NASH ET AL., supra note 16—privatization scholars have not given much thought to such questions.

318. See infra notes 339–41 and accompanying text.

319. These leases are more akin to service than construction contracts, BOT (Build–Operate–Transfer) arrangements, or BOOT (Build–Own–Operate–Transfer) arrangements. For discussions of these contracts and other private–public arrangements, see E.R. YESCOMBE, PRINCIPLES OF PROJECT FINANCE 10–11 (2002). There is no building or construction component to the transportation-infrastructure leases discussed in this section—just private responsibility for managing and maintaining existing public resources.

Such payment structures provide an immediate windfall to fiscally beleaguered governments. For example, Chicago’s Skyway lease enabled the city to set up a $500 million rainy-day fund, which “raised the city’s credit rating and lowered its borrowing costs.” (It is for this reason that many jurisdictions are attracted to such leases’ temporal cost savings, which take the form of de facto loans.)

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 service contractors (on a cost-plus or flat-fee basis) to perform maintenance and collect user fees—user fees that are then turned over to the government.

With transportation-infrastructure leases, though they are superficially structured differently from 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, management, 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.

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.

Second, some risks are beyond the control of the leaseholder and the govern-
ment. Environmental upheaval from, among other things, earthquakes or floods could damage the infrastructure, lowering the value of the lease. Moreover, given that these leases run for nearly a century, technological breakthroughs could conceivably render toll roadways and parking lots obsolete. (Imagine if, in the year 1870, one were to enter into a 99-year lease for a government-owned stagecoach line. With the expansion of railroad service and, later, the invention of the automobile, 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 in fifty years we’re all traveling around like the Jetsons.)

The third set of risks remains 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 constructing new, alternative transportation options, or to increase the cost of continued maintenance by ratcheting up environmental regulations requiring leaseholder compliance.\(^{328}\)

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.\(^{329}\) This is not true with respect to those risks within the government’s control.\(^{330}\) The more the government is willing to tie its own hands regarding incidentally related public policymaking, the less risky \((and\ more\ valuable)\) the lease becomes to private bidders. Fiscally strapped governments thus have strong incentives to pre-commit to allowing the lessee to set parking and toll rates and refraining from subsequent policy interventions—such as building new roads, bridges, or parking structures—that lessen demand for the lessee’s infrastructure.\(^{331}\)

All else being equal, governments might want to lower user fees during times of economic dislocation.\(^{332}\) Or, if traffic congestion or pollution becomes intractable, governments might want to charge particularly high rates, effec-

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\(^{328}\) See Roin, supra note 157, at 2011.

\(^{329}\) The government may financially indemnify the bounty seeker. But there are fiscal and perhaps philosophical reasons why doing so would not be a bounty-promoting government’s preferred choice.

\(^{330}\) See Baumol, supra note 296, at 289 (discussing performance-based incentives and the need to avoid penalizing agents for events or circumstances that are beyond their control).

\(^{331}\) See Roin, supra note 157, at 2010–11 (“[D]ecreasing the riskiness of the enterprise increases the price the investors will pay for it upfront. 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 will interfere with the terms of a lease thus falls into the category of risks outside the control of both parties to the lease.

\(^{332}\) See Celeste Pagano, Proceed with Caution: 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, and economic development).
tively (and purposely) discouraging car use. Finally, if changes in labor, housing, transportation, or environmental policy so demand, governments might want to respond by building new transportation conduits. But under what we might call “sovereignty-abdicating” provisions to bounty agreements, governments promise not to compete against the leaseholder’s services by offering new public transportation and parking options. They also promise not to adjust user fees, thus denying themselves—and successor governments—opportunities to subsidize or tax certain transportation choices.

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

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

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. 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

334. See Roin, supra note 157, at 2011 (describing non-compete clauses).
335. Governments choosing to reassert sovereign authority will incur steep penalties for violating the lease agreements. See Amended and Restated Comprehensive Agreement (Relating to the Grant of a Permit) To Develop and Operate the Route 895 Connector 61 (2006), available at http://www.virginiadot.org/business/resources/Amended%20and%20Restated%20comprehensive%20Agreement.pdf; Dannin, supra note 320, at 61–62 (describing a government forced to buy back its lease because the non-compete clause was so restrictive).
336. See supra note 335.
337. See supra note 318 and accompanying text.
338. Whether the market is a normatively or pragmatically attractive alternative venue for influencing public policy is beyond the scope of this project.
340. Id. at 618.
Scalia’s argument might sound jarring to those schooled to reflexively 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 might want to know how heightened autonomy factors into bounty-seeker liability for civil and constitutional violations. This section 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 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 Corp., the Supreme Court held that military-hardware contractors are immune from civil lawsuits alleging damages provided those contractors produce goods pursuant to (and in conformance with) government specifications. Federal courts have since extended Boyle along two dimensions. First, the government-contractor defense now generally applies to manufacturers of civilian goods. And, second—and of much greater relevance to this inquiry—the defense now also covers service contractors, civilian and military alike.

In crafting the government-contractor defense, the Supreme Court equalized...
conditions between private contractors and government officials.\textsuperscript{345} The Federal Tort Claims Act,\textsuperscript{346} though generally subjecting government workers to civil liability, expressly exempts personnel carrying out “discretionary function[s]”\textsuperscript{347} similar to those undertaken by contractors. The government-contractor defense simply levels the playing field.\textsuperscript{348}

But the emergence of bounty arrangements threatens to introduce a new measure of doctrinal uncertainty. Given the courts’ apparent dedication to equalizing 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 seem to protect bounty seekers. Unlike with contractors, the government does not prescribe how bounty seekers should proceed, a necessary condition for immunity.\textsuperscript{349} It appears unlikely, too, that courts would expand 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.\textsuperscript{350}

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


\textsuperscript{346} 28 U.S.C §§ 1346(b), 2671–80 (2006).


\textsuperscript{348} Schooner & Siuda-Pfeffer, supra note 345, 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.”).

\textsuperscript{349} See supra notes 342, 344 and accompanying text.

\textsuperscript{350} See Cass & Gillette, supra note 345, 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 against liability “reduces the positive incentives to avoid error”). This differential treatment between service contractors and bounty seekers could be seen as its own form of parity: a private actor submits either to close supervision \textit{ex ante} or to lawsuits \textit{ex post}. Cf. Filarsky v. Delia, 132 S. Ct. 1657, 1670 (2012) (Sotomayor, J., concurring) (indicating that contractors who are closely supervised are more likely to receive qualified immunity than are contractors who are not closely supervised).
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). Self-selection might, however, run in
the opposite direction. Cautious, would-be bounty seekers will opt out, leaving
only risk-seeking, perhaps judgment-proof, parties vying for bounties. 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 pool-skewing effect of this doctrine. But where the
bounty cannot be made sufficiently high to offset the risk of future lawsuits,
we will likely see fewer—or simply riskier—bounty arrangements than govern-
ment agencies might otherwise prefer.

b. State-Action Doctrine. State-action doctrine ascribes liability to those who
commit constitutional violations while acting under color of State law. Because
government agencies delegate so many public responsibilities to pri-
ivate actors, state-action doctrine has become 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 consis-
tency.’”

To determine whether state action applies, courts functionally assess the
relationship between the government and a private actor. They focus on,
among other things, how closely the government directs and controls the

351. See Michaels, supra note 313, at 1460–62; see also Cass & Gillette, supra note 345, at 279;
that provide the government with electronic surveillance assistance); Public Readiness and Emergency
Preparedness Act, 42 U.S.C. § 247d-6d (2006) (immunizing from civil liability manufacturers of
emergency medical countermeasures).
353. See, e.g., NCAA v. Tarkanian, 488 U.S. 179, 191 (1988); Hudgens v. NLRB, 424 U.S. 507,
Leesville Concrete Co., 500 U.S. 614, 632 (1991) (O’Connor, J., dissenting)). For cases attributing state
action to private actors, see West v. Atkins, 487 U.S. 42, 53–57 (1988); Rosborough v. Mgmt. &
Training Corp., 350 F. 3d 459, 461 (5th Cir. 2003). For cases declining to extend state action to private
355. 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. (emphases removed) (footnotes and internal quotation marks omitted).
private actor, and how closely the private actor is entwined with the government. As already discussed, bounty seekers generally operate with greater autonomy than traditional service contractors. Bounty seekers are therefore less likely to be deemed state actors. What this means is that bounty seekers have the capacity to infringe upon constitutional rights, certainly with far greater impunity than government personnel—and likely with greater impunity than at least some, if not many, service contractors. For a political administration frustrated by the constitutional constraints imposed on its personnel, the use of bounty seekers might be especially enticing. They might enable, for example, more intrusive law-enforcement searches than the Fourth Amendment permits government personnel and many contractors to conduct. They might also enable governments to more thoroughly infuse religious programming into social-welfare programs.

Two conclusions follow from this admittedly speculative treatment of how courts might apply civil and constitutional immunity to bounty seekers. First, the doctrinal distinctions likely to be drawn among government employees, service contractors, and bounty seekers mark the otherness of bounties. Marketization, as discussed, pushes courts to adjust pre-existing doctrines to reflect the nascent changes to bureaucratic governance. With bounties, courts are apt to hold the line, preserving—but not expanding—pre-existing doctrines. This makes sense: whereas marketization transforms an existing institution around which case law 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 pre-existing doctrines in light of

356. 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. Smith, 383 F.3d 700, 705 (8th Cir. 2004); United States v. Lambert, 771 F.2d 83, 89 (6th Cir. 1985); see also United States v. Hall, 142 F.3d 988, 995 (7th Cir. 1998) (rejecting a state-action claim alleging warrantless search by a computer maintenance firm on the grounds that although the firm ultimately contacted the police the search was independent of any law-enforcement objective); 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”). See generally Michaels, supra note 313, at 1465 (discussing state-action doctrine in contexts related to the government informally deputizing private actors to facilitate counterterrorism operations).


358. See Volokh, supra note 355, 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).

359. Elsewhere, I’ve made this argument about service contractors. See, e.g., Michaels, supra note 65, at 735–38 (describing the use of service contractors to carry out “constitutional workarounds”). For the reasons described above relating to bounty-seeker autonomy, the claims I’ve made in previous works about service contractors having greater leeway than government personnel to act outside the color of State law apply a fortiori to bounty seekers.

360. See supra note 356.

361. Cf. Michaels, supra note 65, at 735–38 (discussing religiously infused social-welfare programs carried out by service contractors).
bounties, nor to treat bounty arrangements as covered by those pre-existing 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, service contracting seemingly remains an especially viable approach for boosting efficiency, conserving budgetary resources, maximizing unitary executive control, and scoring political points 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 service contracting. Third, it addressed challenges we are likely to encounter as these new pathways 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 businesslike agendas in ways both liberating and threatening.