

Public Agencies Going Private

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Jon D. Michaels, *Privatization's Progeny*, 101 Georgetown Law Journal (forthcoming 2013), available at [SSRN](#).

Administrative law loves binaries. There are executive agencies and independent regulatory commissions. There are federal bureaucratic organizations and state entities. There are public agencies and private firms. In recent years, scholars have examined organizations from different sides of a "boundary" working together – for instance, executive agencies and private firms in the new governance literature and separate federal and state agencies in federalism work. There is little discussion, however, on organizations essentially operating at or near the boundary.

Jon Michaels's previous work has focused on national security agencies turning outward from the public sphere, specifically using government contracting, for classic government tasks. In his forthcoming piece, *Privatization's Progeny*, Michaels turns inward, exploring how privatization is reshaping a wider class of public institutions themselves, through "the marketization of bureaucracy" and "government by bounty."

Michaels starts his article with a concise, straightforward summary of privatization's economic and political benefits. Other scholars tend to emphasize the economic benefits; therefore, Michaels's attention to how privatization can foster control over the administrative state demonstrates some novelty in well-worn discussions. He then takes a clever turn from the thought provoking privatization literature (including his past work): instead of showing how the national security apparatus reaches out to the private sector (through government contracting, for example), he looks at how the broader administrative state is transforming inward as well as shifting the terms of contracting itself.

Michaels concentrates on changes to the civil service and the growth in bounty initiatives in government contracting. For the former, Michaels examines "unprecedented revisions to civil servants' (1) collective bargaining rights, (2) wages and benefits, (3) promotion protocols, and (4) job security." For the latter, Michaels details how social-impact bonds have the "potential to outperform traditional contracting vis-à-vis efficiency, cost-savings, and political payout." Others have written about the undermining of collective bargaining rights and government prizes, but not together. (Nicholas Parillo's historical work makes some interesting connections between Michaels's two case studies; Parillo examines "how American lawmakers remade governance by shifting public officers' monetary compensation away from profit-seeking arrangements—such as fees-for-service and bounties—and toward fixed salaries.").

The heart of the article rests in the implications for the administrative state. Michaels is ambitious here. Although he may not convince all readers of his normative conclusions, he succeeds in getting them to think seriously about important issues. As for the marketization of bureaucracy, Michaels largely bemoans the changes to the civil service. His account of the postal service is compelling (as is his analogy of educators teaching to the test). As for government by bounty, Michaels also worries about the ramifications. His analysis of the Food and Drug Administration's priority-review voucher program raises interesting issues, though firms may not act in the way he predicts.

In both the marketization of the bureaucracy and government by bounty discussions, the consequences

for administrative law are nicely sketched. For instance, Michaels has an interesting take on judicial review of questions of law in light of the marketization of the administrative state. Michaels argues that if marketization produces “greater efficiencies, budgetary savings, and more complete unitary control over the administrative state,” “we might finally see a sharper division between reversal rates under *Skidmore* and *Chevron*.” As Michaels explains, “[t]his would be so because marketization ought to heighten courts’ *Chevron* deference, and lessen *Skidmore* deference.” Perhaps because *Chevron* (and *Skidmore*) is such trampled-on ground in administrative law, I enjoyed the discussion of the government-contractor defense and state action (in some sense opposite sides of the same issue) even more.

There are very clever and striking insights in this article. I am already wrestling with its implications for a project I have about bureaucracy on the boundary. Administrative law scholars would be wrong to think of Michaels as only a national security scholar. He is a national security scholar, but he is also an administrative law scholar. In this forthcoming piece, as with his other work, Michaels shows that he can make significant contributions to our understanding of meaningful issues in administrative law.

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