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Cronyism, Corruption, and Political Intrigue: A New Approach for Old Problems in Public Sector Employment Law

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CRONYISM, CORRUPTION, AND POLITICAL INTRIGUE: A NEW APPROACH FOR OLD PROBLEMS IN PUBLIC SECTOR EMPLOYMENT LAW

*Jonathan Fineman**

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I. INTRODUCTION

The face of public employment in the United States in recent decades has not typically been that of cronyism or corruption, although a bit of political intrigue has emerged from time to time.[1] This was not always the case. In earlier centuries, concerns about corruption and political influence led to the creation of job protections for public employees that were designed to promote an independent bureaucracy.[2] Efficiency was tied to effectiveness, and effectiveness required independence.

Today, calls for efficiency in government service ring with a very different tone. Efficiency remains tied to the idea of effectiveness, but effectiveness is now cast in terms of managerial control over public employees, and reform is modeled on the private workplace.[3] In today's parlance, inefficiency has become almost synonymous with incompetence, and earlier ideas about independence from overreaching political pressures being

1. For example, political intrigue surfaced in the dispute over the firing of the U.S. Attorneys during the presidency of George W. Bush. *See infra* Part VI.B.4.a.

2. *See infra* Part II.B.

3. *See infra* Part III.B.

essential for governmental efficiency have been obscured.[4]

After waiting in long lines at the post office or going through seemingly useless procedures at the Department of Motor Vehicles (D.M.V.), most people can embrace the argument for greater efficiency in its modern sense—as a call for greater competence in government services. Reforms that would supposedly create more efficient performance from the public workforce are popular and the concept of "efficiency" has accordingly become the rallying call for a diverse group of government reformers.[5] While some commentators regard the modern charges of inefficiency as exaggerated, the perception that there is widespread inefficiency is still politically powerful.[6] In considering popular response to job protections for public employees, it is important to remember that most employees in the private sector have no job protections and might understandably wonder why public employees should receive preferential treatment.

Over the last few decades, reformers have used the efficiency argument to successfully remove traditional public sector job protections at the federal and state levels.[7] The ideology of the primary reform movement—a school of thought known as New Public Management (NPM)—is that the public personnel system should be recast in the image of the private sector.[8] Public managers should be freed from special rules governing hiring, promoting, and disciplining employees and, like their private counterparts, should be able to make such decisions at will using their own discretion. According to NPM theory, removing traditional civil service protections would allow public managers to get rid of underperforming employees and motivate the remaining employees to be more efficient.[9]

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4. *See infra* Part III.B.
5. *See infra* Part III.B.
6. *See infra* Part III.A
7. *See infra* Part IV.A.
8. *See infra* Part III.B.
9. Not all reformers are necessarily or even primarily motivated by a sincere desire to increase efficiency, however. The end goal of NPM reform is to make government function like the private corporation, an objective that resonates with other agendas as well. For some, the problem is government

Harking back to an earlier history, public administration scholars criticize the NPM movement for ignoring the important distinctions between public and private employment. [10] These scholars point out that destroying public sector job protections and other civil service rules will negatively impact the functioning of public agencies.[11] Traditional civil service protections guard against cronyism, undue political influence, and corruption.[12] They also protect the integrity of the agency and help maintain the balance of power between the executive and legislative branches.[13] Public agencies are different than private workplaces in important ways and should not be treated the same.

This article is written from the perspective of an employment law scholar, focusing on the conditions of employment for public employees, particularly the degree to which they have been granted job security not afforded to their private counterparts. There are constitutional arguments that have shaped earlier debates about public employment, but these constitutional considerations focus either on the larger struggle between branches of government over agency design and operation, or on what minimal level of protections must be offered to an individual public employee under the Constitution.[14] These debates should not obscure the fact that, for some categories of

itself, and the desire is to privatize governmental functions and shrink the bureaucracy. This topic is addressed more fully in Part III.

10. Not much has been written on this subject in legal academic circles, especially outside of a few specific areas such as patronage firing and free speech. Apart from the small number of constitutional restrictions on government action, public employment is generally considered conceptually similar to private employment. The primary focus of this project is to examine how the law can and should define and secure the public interests involved in public employment.

11. *See infra* Part V.A.

12. *Id.*

13. *Id.*

14. See, *e.g.*, DAVID E. LEWIS, PRESIDENTS AND THE POLITICS OF AGENCY DESIGN: POLITICAL INSULATION IN THE UNITED STATES GOVERNMENT BUREAUCRACY, 1946–1997 (2003). In his book, Lewis tracks the sources of presidential authority to create agencies, both non-delegated constitutional authority and authority delegated by Congress. He also discusses possible congressional strategies for Congress to exercise control over agencies after they have been created. *Id.* at 7–85.

public employees, there may be basic policy concerns that require employment protections independent of grand separation of powers debates, and more protective than those provided to individuals by the constitution. While recognizing that agency design, operation, and function are more the "product of politics than of any rational or overarching plan for effective administration,"[15] this article also proceeds from the assumption that the treatment of public employees should be consistent with principles of agency integrity and serve to enhance the public interest in professional and non-partisan implementation of policy.

This article argues that the best interest of the public is served when at least some public employees receive some degree of job protection. However, there is also value in the argument that we no longer can justify the retention of a uniform system of traditional civil service protections for all public employees. Therefore, this article takes the position that this debate should not be framed as an "either/or" proposition between a rigid system of job protections for all (or most) employees on one hand and unfettered managerial discretion on the other. Instead, job protections should be context-based, varied depending upon the nature of service, and provided only when there is a clear connection between the adverse employment action in question and the public interest. The closer the connection between the public interest and the employment action, the stronger the job protections should be.

Part II of this article looks at the history and rationale of public sector job protections in the context of the "at-will" rule of American employment law. Traditional arguments for public sector job protection rules focused on what might be considered unique in the nature of public employment, particularly government employees contending with competing and powerful political forces in fulfilling their responsibilities.

Part III considers modern reforms and addresses the erosion in recent years of historic constitutional, statutory, and norm-based job security protections for public employees in the United States. Concerns about managerial flexibility and efficiency have

15. *Id.* at 2.

overtaken the discussions of civil service reform, with less attention being paid to the historical contexts that generated public-sector job protections. This section breaks the purported needs for reform into three categories of arguments: those based on efficiency, privatization, or political responsiveness.

Part IV details the successes of the NPM movement at the federal and state levels and addresses the unintended consequences of that success, including a crisis in morale and recruitment of public employees, and the distortion of agencies through attempts to ensure greater political responsiveness.

Part V returns to the question of the special or unique nature of public employment from a "modern" perspective, folding in legitimate concerns about efficiency and the need for managerial control raised in the NPM literature. This is balanced against the concerns raised about erosion of public employment job security by public administration scholars who have developed arguments about why public employment should continue to be viewed as fundamentally different than private employment.

Part VI sets forth a new way of approaching public-sector job protections, which I am labeling the "public context" approach. As an illustration, I discuss four different intersections between the public interest and job protections, and suggest the type of job protections that would be appropriate with respect to the public interests involved in each case.

II. TRADITIONAL JOB PROTECTIONS FOR PUBLIC EMPLOYEES

Public employees are protected by both generally applicable employment rules and special laws designed specifically for public employees.[16] Both sets of employment protections have changed significantly since the first statute protecting public employees was passed in the 1880s.[17] This section provides a

16. *See infra* Part II.

17. *See* James S. Bowman & Jonathan P. West, *Lord Acton and Employment Doctrines: Absolute Power and the Spread of At-Will Employment*, 74 J. BUS. ETHICS 119, 120 (2007) [hereinafter *Lord Acton*]; Robert G. Vaughn, *The Civil Service Reform Act of 1978 and Legal Regulation of Public Bureaucracies*, 31 HOW. L.J. 187, 187 n.1 (1988).

brief history of the major developments in both general and public employment law.

A. General Employment Law: The At-Will Rule

Since the late nineteenth century, the "at-will" rule has been the basic foundation of American employment law.[18] Pursuant to the at-will rule, each party to an employment relationship is viewed as equally competent and capable of bargaining with the other and each is able to unilaterally terminate the employment without notice at any time for any reason.[19] Since each party is able to terminate the relationship at any time, each may also unilaterally change the terms of the relationship.[20] In practice, this arrangement favors employers who typically are the parties in possession of more bargaining power when it comes to the employment relationship and the position of an at-will employee is consequently one of inherent instability.[21] Employers and

18. *See* Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 118–19 (1976) (summarizing the English common law and tracing the development of the at-will doctrine in the United States). In recent years, a number of academics have criticized the at-will rule, especially the assumption of egalitarianism upon which it is based. *See* Robert C. Bird, *Rethinking Wrongful Discharge: A Continuum Approach*, 73 U. CIN. L. REV. 517, 517 & n.1 (2004) (noting that over 200 scholarly articles critical of the at-will rule have been published between 1985 and 2004).

19. Feinman, *supra* note 18, at 125–27.

20. In many states, like California, an employer may unilaterally modify the terms of the employment relationship even in the rare instance where the terms are memorialized in a written contract between the parties. According to one court, "with respect to an at-will employee, the employer can terminate the old contract and make an offer for a unilateral contract under new terms." Digiacinto v. Ameriko-Omserv Corp., 69 Cal. Rptr. 2d 300, 304 (Ct. App. 1997). As a matter of law, the *Digiacinto* court found that "an at-will employee who continues in the employ of the employer after the employer has given notice of changed terms or conditions of employment has accepted the changed terms and conditions." *Id.* at 304–05.

21. Feinman, *supra* note 18, at 132–33. Although either party has equal ability to terminate the relationship, the consequences of doing so are often imbalanced. Frank J. Cavico, *Employment At Will and Public Policy*, 25 AKRON L. REV. 497, 502 (1992) ("Given the considerable disparity in economic power and bargaining positions between employers and employees, particularly large corporate employers, and the employer's chiefly unchecked control over the terms and conditions of the employment relation, abuses in the treatment of employees naturally arise.").

employees can contract around the at-will rule, most commonly by agreeing that employees can only be fired for good cause. Such an agreement can be express or implied.[22] However, few employees have express contracts with job protection provisions and implied contract claims are increasingly difficult to win.[23]

Over the past few decades, a number of statutory and common law exceptions to the at-will rule have evolved. For example, concern over employee welfare led to the enactment of minimum wage and occupational safety and health statutes.[24] Other statutes prohibit discrimination in employment on the basis of gender, race, religion, disability, or age.[25] In addition, most states constrain employer actions that would adversely affect public policies or general laws.[26]

Importantly, however, these exceptions do not displace the at-will rule. Rather, the exceptions merely identify certain designated unlawful reasons for termination that allow an employee to bring a wrongful termination claim. Unless the reason for termination can be shown to fall within one of these specifically delineated exceptions, at-will employment is the norm.[27]

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22. Jonathan Fineman, *The Inevitable Demise of the Implied Employment Contract*, 29 BERKELEY J. EMP. & LAB. L. 345, 360 (2008). *See also* Sally C. Gertz, *At-Will Employment: Origins, Applications, Exceptions and Expansions in the Public Service*, INT'L J. OF PUB. ADMIN. (2006).

23. Fineman, *supra* note 22, at 349.

24. *See, e.g.*, Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (2006); Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–678 (2006).

25. *See, e.g.*, Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634 (2006); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2006); The Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2006).

26. Many jurisdictions follow rules broadly prohibiting terminations that violate important public policies. *See, e.g.*, Palmateer v. Int'l Harvester Co., 421 N.E.2d 876 (Ill. 1981); Pierce v. Ortho Pharm. Corp., 417 A.2d 505 (N.J. 1980); Tameny v. Atl. Richfield Co., 610 P.2d 1330 (Cal. 1980); Geary v. U.S. Steel Corp., 319 A.2d 174 (Pa. 1974). *See also* Scott A. Moss, *Where There's At-Will, There Are Many Ways: Redressing the Increasing Incoherence of Employment at Will*, 67 U. PITT. L. REV. 295 (2005) (discussing variation among states in recognizing public policy and other common law exceptions to employment at will). This topic will be covered in more detail in Part VI.A.

27. MARK ROTHSTEIN ET AL., EMPLOYMENT LAW 774 (3d ed. 2004). It is

B. Public Employment Law

Among the oldest exceptions to the at-will rule are the civil service protections given to some public employees. When this nation was founded, public employees were assumed to have the status of independent civil servants and were generally not terminated without good cause.[28] Historians note that President Andrew Jackson broke with this tradition and created a loyalty, or "spoils," system of government, which resulted in the creation of political machines leading to partisan interest and corruption.[29] In such systems, employees were often hired, promoted, and terminated on the basis of political affiliation, personal connection or influence, or in order to further corrupt schemes.[30] Government agencies had difficulty competently and effectively performing their duties under this spoils system, and reformers began to look for a way to protect public employees from politics.[31]

Transformations in what was then perceived as a corrupt patronage system began with passage of the Pendleton Act in 1883, which initially established the civil service system and designated public employees as a distinct class of employees

curious that the law largely treats employment as a matter of private concern, considering the significant effects employment decisions have on employees and society as a whole. Studies have shown that employees who are fired from their jobs have an increased likelihood of depression, substance abuse, illness, and suicide. Robert C. Bird, *Employment as a Relational Contract*, 8 U. PA. J. LAB. & EMP. L. 149, 162 (2005). There is also evidence that spouses of fired employees also suffer similar effects. *Id.* In addition, unemployment is linked to increased levels of divorce, child abuse and infant mortality. *Id.* Unemployment also contributes to poverty and crime. *Id.* at 162–63. For every 1% increase in unemployment, there are increases of 5.7% in homicides, 4.1% in suicides, and 1.9% in heart, liver and stress-related deaths. *Id.* at 162.

28. *Lord Acton*, *supra* note 17, at 120. This was an underlying assumption, probably based on British practice, and not the result of formal legal rules.

29. *Id.*

30. "Rather than emphasizing good government and policy, the system encouraged mediocre governance; its highest priority was to reward its friends, to grant favors for favors given." *Id.*

31. *See, e.g.*, U.S. OFFICE OF PERSONNEL MGMT., BIOGRAPHY OF AN IDEAL: A HISTORY OF THE FEDERAL CIVIL SERVICE 284 (2003); PAUL P. VAN RIPER, HISTORY OF THE UNITED STATES CIVIL SERVICE 537(GREENWOOD PRESS 1976) (1958); David E. Lewis, *Modern Presidents and the Transformation of the Federal Personnel System*, 7 FORUM, no. 4, 2009, at 1, 1 [hereinafter *Modern Presidents*].

entitled to special protections.[32] The Pendleton Act's initial protections were expanded in other reforms, such as the Lloyd-LaFollette Act, which in 1912 provided protection from dismissal without cause for federal employees, thus making them exempt from the at-will rule.[33]

On the federal level, the cumulative accomplishment of these reforms was the establishment of the Civil Service Commission, which administered merit-based procedures for hiring, promotion, and termination.[34] In addition to protections against dismissal, demotion, or transfer without cause, federal legislation mandated that federal employees be hired and promoted on the basis of merit.[35] Detailed rules were established governing pay grades, promotions, and tenure.[36] Federal employees could also take advantage of a grievance procedure for challenging adverse employment actions.[37] While federal employers could still terminate covered employees, they would usually have to be able to show that the employee was unproductive or had misbehaved in some way.[38] The legislation provided no comparable protections for private employees, who remained subject to the at-will rule unless their employer chose to give them greater protection.[39]

States also enacted civil service protections and some states added other special protections for public employees. For example, Texas' Whistleblower Act[40] protects public employees who blow the whistle on their employer, even though Texas law

32. *Lord Acton, supra* note 17, at 120; Vaughn, *supra* note 17, at 187 n.1.

33. *Modern Presidents*, supra note 31, at 3 n.6.

34. James S. Bowman & Jonathan P. West, *Removing Employee Protections: A 'See No Evil' Approach to Civil Service Reform, in* L. W. HUBERTS, JEROEN MAESSCHALCK, AND CAROLE L. JURKIEWICZ, EDS., ETHICS AND INTEGRITY OF GOVERNANCE 181, 183 (Edward Elgar 2008).

35. *Modern Presidents, supra* note 31, at 3.

36. *Id.*

37. *Id.*

38. *Lord Acton, supra* note 17, at 120.

39. *See generally* KATHERINE V. W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 27–67 (2004) (noting that many employers voluntarily chose to offer similar protections, but did so at their own discretion).

40. TEX. GOV'T CODE ANN. §§ 554.001–554.010 (West 2013).

does not recognize any similar protection for private employees.[41]

The rationale for civil service protections articulated during this period lay in the public nature of the employment; employees who were free from arbitrary and unfair treatment, particularly in regard to termination, were more likely to be effective and efficient public servants.[42] The belief was that employees who had some job stability and who did not have to worry about retribution could focus on performing their jobs to the best of their ability. The public would be better served if employees were rewarded based on their competence and expertise rather than their adherence to the dictates of a particular political party or as a reward for political favors.[43]

In addition to the civil service laws, public employees are protected by the Constitution. For example, in 1976, the Supreme Court restricted public employers' ability to terminate employees based on their political affiliation, holding that political affiliation is protected by the First Amendment.[44] Public employers are only entitled to terminate "policymaking" employees on the basis of political affiliation, defined as employees in a position to obstruct the implementation of the administration's policies.[45] The protection also applies to hiring, promotion, and adverse employment actions short of termination.[46] The First Amendment also protects against undue

41. Terrence S. Welch, *A Primer on Texas Public Employment Law*, 56 BAYLOR L. REV. 981, 1003–04 (2004).

42. *Lord Acton*, *supra* note 17, at 120.

43. J. Edward Kellough & Lloyd G. Nigro, *Dramatic Reform in the Public Service: At-Will Employment and the Creation of a New Public Workforce*, 16 J. PUB. ADMIN. RES. & THEORY 447, 448 (2006).

44. Elrod v. Burns, 427 U.S. 347, 356–57 (1976). The employees in *Elrod* were Republican employees of the Cook County Sheriff's Department who were terminated by an incoming Democratic sheriff. It was undisputed that the employees were terminated solely on the basis of their political affiliation. *Id.* at 350. Applying a strict scrutiny standard, the court ruled that public employers can only engage in patronage dismissals if necessary to further a vital governmental interest and where there is no less restrictive means of obtaining the employer's objective. *Id.* at 356.

45. *Id.* at 367. In *Branti v. Finkel*, the Court outlined a test for determining whether an employee is a "policymaker." 445 U.S. 507 (1980). The relevant question is whether "party affiliation is an appropriate requirement for the effective performance of the public office involved." *Id.* at 518.

46. Rutan v. Republican Party, 497 U.S. 62, 77–79 (1990).

interference with public employees' right to free speech.[47]

Public employees also have some constitutional due process protections, but only if they have a protected property interest in continued employment.[48] Absent special civil service protections, public employees are treated the same as those in private employment and are assumed to be employed at-will unless there is evidence to the contrary.[49] In effect, then, public employees only have due process protections against arbitrary termination if they have been given such protection from the legislature in the form of civil service laws, or through contractual agreements with their particular employer.[50]

III. "MODERN" REFORMS AND NEW PUBLIC MANAGEMENT

Since the passage of the Pendleton and Lloyd-LaFollette Acts, the role of public agencies has changed significantly. The New Deal created a slew of new agencies and ushered in an era of increased delegation of responsibility from Congress to agencies.[51] The number of federal employees rose from 603,587 in 1933 to over two million in 1953.[52] Even after budget cuts and outsourcing to private firms, the federal government, as of 2008, had almost two million employees.[53]

American administrative agencies in existence during the Eisenhower Administration were more professional and insular than those that existed before, and the perception began to grow that this might be problematic in light of the fact that

47. *Id.* at 72 ("[T]here are some reasons upon which the government may not rely [in denying benefits]. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.") (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)).

48. Gattis v. Gravett, 806 F.2d 778, 780 (8th Cir. 1986).

49. *Id.*

50. Welch, *supra* note 41, at 984.

51. *Modern Presidents*, *supra* note 31, at 1–2.

52. *Modern Presidents*, *supra* note 31, at 2; U.S. Office of Personnel Management, *Executive Branch Employment Since 1940*, FED. EMP. REPS., *available at* www.opm.gov/feddata/HistoricalTables/ExecutiveBranchSince1940.asp.

53. *Executive Branch Employment*, *supra* note 52.

expectations for the executive branch were growing.[54] The modern administrative state also was assuming a much broader range of responsibilities, including regulating many areas of the economy.[55] In this context, while providing civil service protections to public employees may have increased the independence of government agencies, it also was perceived as creating a new set of problems for elected officials.[56] It is against this background that the modern arguments for changes to civil service protections should be understood. As the Executive became more powerful, there was a corresponding belief in the need for more political influence and control over the bureaucracy.[57]

A. Framing the Modern Reform Agenda: Competence versus Responsiveness

On one level, modern critics maintain that civil service job protections, particularly as developed during the early part of the twentieth century, resulted in an inefficient and cumbersome bureaucracy with public employees who need not perform their tasks competently or efficiently.[58] This is a "work ethic" problem of competence or motivation. Another set of criticisms centers on the assertion that bureaucrats were not sufficiently responsive to political direction.[59] Political actors were ultimately held responsible for the actions of the bureaucracy, and the fear was that protected public employees might follow their own course if they could evade supervisory sanctions.[60] This is a political problem. Both sets of criticisms reflect valid underlying concerns

54. *Modern Presidents*, *supra* note 31, at 6.

55. *Id.* at 2.

56. *See* Louis Lawrence Boyle, *Reforming Civil Service Reform: Should the Federal Government Continue to Regulate State and Local Government Employees?*, 7 J.L. & POL. 243 (1991).

57. *See Modern Presidents*, *supra* note 31, at 6.

58. Nancy Buonanno Grennan, *A Legal Roadmap to Privatizing Government Services in Washington State*, 72 WASH. L. REV. 153, 156 (1997).

59. *Id.*

60. Bruce J. Winick, *Harnessing the Power of the Bet: Wagering with the Government as a Mechanism for Social and Individual Change*, 45 U. MIAMI L. REV. 737, 789–90 (1991).

and thus have some merit, but the transformations are both out of proportion to valid concerns and inefficient themselves in that they undermine bureaucratic effectiveness.[61]

Interestingly, both criticisms of competency and of responsiveness are often framed in terms of efficiency, but the nature of what is objected to in each case is different. If a civil servant is incompetent or lazy, this can be deemed inefficient in that he or she is not adequately performing the tasks required of their position. This is a question of efficient employment of requisite skills, and the measure would be the same whether employment is in the public or the private realm. This type of inefficiency should be addressed by manager intervention and supervision, even by termination of employment in both realms.

However, a civil servant's failure to implement the political objective of a supervisor should not be labeled an efficiency concern. More accurately, this is an issue of political independence or responsiveness. The employee in question may well be performing in exemplary terms judged from a competence or expertise perspective. The perceived difficulty is not with task performance per se, but rather the disconnect between employee performance and the desired political objective. This type of concern raises issues and questions reminiscent of those posed during the Jacksonian reforms and different from those issues focused on employee incompetence more generally. The primary question remains: when do we want public employees to be free from political pressure?

In spite of this important difference in the situations of employee incompetence and employee unresponsiveness, modern critics identify job security as the problem in both circumstances.[62] Of course, thus characterized, the inevitable resolution for both types of situations is removal of civil service protection, allowing managers to fire or discipline public employees without showing "cause."[63] This solution, although cast in efficiency terms, has

61. *See infra* Part IV.B.

62. *See, e.g.*, Patricia Wallace Ingraham, *Building Bridges over Troubled Waters: Merit as a Guide*, 66 PUB. ADMIN. REV. 486 (2006).

63. It is important to remember that even under the most protective civil service system, public employers are theoretically free to terminate unproductive employees. Poor job performance is considered just cause for

political as well as managerial implications. In conflating situations of employee indolence with those of employee independence from political pressure, efficiency concerns are transformed into expediency objectives and any underlying political arguments for requiring the more cumbersome process of justifying terminations are obscured.[64]

B. The Problem of Efficiency: The "New Public Management"

For decades, public managers have complained about delay and lack of flexibility created by government bureaucracy, arguing this is the result of the imposition of controls on referrals, recruitment, and discipline procedures.[65] Critics have attacked "protectionist" public employment practices ushered in by early twentieth-century reformers, arguing that public employers should model their workplaces on private firms in order to increase efficiency.[66]

There has been more than one reform movement based on assertions of decreased efficiency.[67] The most cogent and sustained critiques in the American context have been those falling under the classification of NPM—New Public

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termination or other discipline. *See infra* Part V.C.

64. Reverting to at-will employment is a "fusion of political and managerial ideas that now seem to constitute the conventional wisdom about how governments should be run." Richard Green et al., *On the Ethics of At-Will Employment in the Public Sector*, 8 PUB. SECTOR 305, 305 (2006).

65. Ingraham, *supra* note 62, at 491.

66. Sarah T. Zaffina, Note, *For Whom the Bell Tolls: The New Human Resources Management System at the Department of Homeland Security Sounds the Death Knell for a Uniform Civil Service*, 14 FED. CIR. B.J. 705, 732 n.167 (2005).

67. The three major approaches are NPM, Network Governance, and the sociological or traditional Weberian approach. Advocates of network governance reforms suggest that the government form partnerships with private actors to reach consensus, creating a form of governing outside of hierarchical government authority. *See* Johan P. Olsen, *Citizens, Public Administration and the Search for Theoretical Foundations*, 37 PS: POL. SCI. & POL. 69, 70–71 (2004). The network governance movement has not had a pronounced effect on public sector personnel practices and is therefore not addressed in detail in this article. By contrast, implementation of the ideas of NPM reformers has successfully transformed the administration of both federal and local governments in the United States. Therefore, this paper focuses on NPM ideology and practice.

Management.[68] NPM critics argue that public workplaces should be reformed in order to increase efficiency and accountability for results.[69] The reforms fall within two major groups, both emphasizing the superiority of private over public workplace practices: advocates of restructuring of public employment and advocates of transferring public functions to the private sphere.

1. Restructuring Public Employment by Importing Private Models

According to NPM proponents, managers are unable to function under the traditional civil service system to the extent they are constrained by its rules.[70] Unable to effectively discipline and direct their employees, public managers are unable to increase efficiency. NPM thus advocates the need to "liberate" these managers, who are viewed as "good people trapped in a bad system."[71] This logic posits as the appropriate reform model the presumed superiority and efficiency of the private workplace.

Advocates of NPM have generated a myriad of suggestions for gaining more managerial freedom through restructuring the workplace, but the primary objective of NPM in regard to public agencies is to give managers more authority over employees.[72] They seek to accomplish this control in a variety of ways, including by providing positive inducements, such as using

68. *Id.* The network governance movement has not had a pronounced effect on public sector personnel practices and is therefore not addressed in detail in this article. By contrast, implementation of the ideas of NPM reformers has successfully transformed the administration of both federal and local governments in the United States. Therefore, this paper focuses on NPM ideology and practice.

69. "NPM builds on values, concepts, and experiences drawn from the private sector and the institutional centerpiece is a replica of the private firm in competitive markets." Olsen, *supra* note 67, at 70.

70. *See, e.g.*, *id.* (stating that NPM focuses on "performance and cost efficiency rather than compliance with formal rules").

71. Jerrell D. Coggburn, *Personnel Deregulation: Exploring Differences in the American States*, 11 J. PUB. ADMIN. RES. & THEORY 223, 224 (2000).

72. Tishisa L. Braziel, *Contracting Out Contracting*, 38 PUB. CONT. L.J. 857, 869 (2009).

market-style incentive systems to motivate employees.[73] However, the major thrust of the reforms in regard to the public employee is in the direction of removing the job protections gained a century earlier.[74]

NPM reformers argue that removing job protections for public employees increases productivity. [75] According to this reasoning, employees with job protections have little independent incentive to be productive, and it is only if they fear losing their jobs will they be motivated to perform better.[76] Competition and individual personal ambition are seen as the primary motivations for improved performance, and should thus be prioritized.[77]

Note that in this account of employee motivation there has been a shift of focus from the earlier perceived need to protect public employees from abuses of political power by managers to the idea that managers need increased power over employees in order to make sure they are productive.[78] The problem is the laggard public employee, not the overreaching political supervisor. A deregulated approach places great reliance on the personal and professional accountability of managers, rather than on the establishment of over-arching rules mandating professional conduct and the establishment of regulations and systems of interlocking agency accountability that define a more traditional bureaucratic state.[79] This is consistent with more general trends toward deregulation that have occurred during

73. Kathleen D. Hall, *Science, Globalization, and Educational Governance: The Political Rationalities of the New Managerialism*, 12 IND. J. GLOBAL LEGAL STUD. 159 (2005).

74. *Id.*

75. In addition, reformers call for decentralizing and flattening existing government structures, which is thought to encourage employee innovation. *See generally* Kellough & Nigro, *supra* note 43, at 447; Ingraham, *supra* note 62, at 491; Olsen, *supra* note 67, at 70.

76. *Lord Acton*, *supra* note 17, at 122. For a more general argument regarding the performance and other economic benefits of at-will employment, see Richard A. Epstein, *In Defense of Contract at Will*, 51 U. CHI. L. REV. 947 (1984).

77. "Self-interested behavior and competition are assumed to improve efficiency and adaptability." Olsen, *supra* note 67, at 70.

78. Coggburn, *supra* note 71, at 225–26.

79. *Id.* at 226.

the latter part of the twentieth century.[80] Congressional reports considering civil service reform include such comments as: "[m]any managers and personnel officers complain that the existing procedures intended to assure merit and protect employees from arbitrary management actions have too often become the refuge of the incompetent employee."[81]

2. Exporting Public Functions through Privatization

While much of NPM rhetoric focuses specifically on individual employment rules within public agencies, it also urges a hollowing out of federal agencies through downsizing and privatizing governmental functions, as well as devolving federal powers to the state level and limiting public spending.[82] Importantly, while NPM proponents advocate for these measures in terms of efficiency and effectiveness, the suggested reforms go beyond influencing employee performance. They reflect an assumption that government is inherently inefficient—and irredeemably so—as contrasted with the private sector. [83]

Most notably, some commentators believe government is inherently negative. Ronald Reagan famously said in his inaugural address, "[g]overnment is not the solution to our problem. Government is the problem."[84] The current rise of the Tea Party movement exemplifies this assertion and urges a reduction in government programs and political action to ensure

80. Deregulation has been characterized as generally representing a fundamental shift in personnel accountability. *Id.* at 225–26.

81. S. REP. NO. 95-969, at 3 (1978).

82. Green *supra* note 64, at 305.

83. "The term bureaucracy has become equated with stodgy, hidebound, and inefficient operations. Much of the emphasis among recent proponents of good government has been on finding ways to encourage an escape from or a 'banishing' of bureaucracy—and a move toward alternative forms and processes." Laurence J. O'Toole, Jr. & Kenneth J. Meier, *Plus ça Change: Public Management, Personnel Stability, and Organizational Performance*, 13 J. PUB. ADMIN. RES. & THEORY 43, 43 (2003) (internal citation omitted).

84. Woodrow Wilson Sch. Task Force, *The Changing Nature of Government Service*, WOODROW WILSON SCH. OF PUB. & INT'L AFFAIRS 7 (Apr. 13, 2009), *available at* http://wws.princeton.edu/gstf/ [hereinafter Volcker Report] (This report was the Final Report of the Woodrow Wilson School Task Force, chaired by Paul A. Volcker. Hence, the name "Volcker Report" is used to refer to this source).

the repeal of national health care reforms and other social programs.[85] In this line of argument, the term "efficiency" serves as a populist hook. It builds on images of bureaucracy as incompetent and out of touch, but at the same time it creates and perpetuates them. However, the underlying issue for reform movements like the Tea Party is not with employee efficiency, but rather with government being in the business of providing services such as Social Security or management of issues such as health insurance.[86]

Supporters of severely limited government may support NPM style reforms because they are a way to attack what they see as an unwarranted expansion of the government. They see the arguments for reform as supporting and encouraging the privatization of government functions and decreasing funding for public agencies. Such reforms are easier if the public believes government is inefficient on a grand scale. While there may be a legitimate disagreement in contemporary America regarding the proper size and scope of government, such a debate should take

85. One Tea Party group states it's primary organizational principles thusly: "The Boston Tea Party supports reducing the size, scope and power of government at all levels and on all issues, and opposes increasing the size, scope and power of government at any level, for any purpose." THE BOSTON TEA PARTY OF INDIANA, http://btpin.wordpress.com/about-2 (last visited Sept. 6, 2013). Fox News reported the formation of a political action group distinct from, but complementary to, the general Tea Party Movement. *Tea Party Movement Produces New Political Organization*, FOX NEWS, Feb. 5, 2010, http://www.foxnews.com/politics/2010/02/05/tea-party-movement-produces-new-political-organization/ (last visited Aug. 26, 2013). The announcement was made at a national Tea Party convention and the groups seem to have some overlapping membership. *Id.* In announcing the "Ensuring Liberty Corporation," and its affiliated political action arm, which comes complete with a political platform, Fox News reported that organizers believed an "official platform . . . could help define what the multi-faceted tea party movement stands for and expects from the candidates it supports." *Id.* They further reported that "[t]he group's leaders plan to support candidates who stand for a set of 'First Principles.' *Id.* Those principles are: fiscal responsibility, lower taxes, less government, states' rights and national security." *Id.*

86. It is important to note that despite the rhetoric of conservative governments to reduce the size of the federal government, the mission of the government has consistently expanded through the last several administrations, both Democratic and Republican. Even when funding is reduced, the government is still asked to accomplish more and more, leading to a government that is "starving." PAUL C. LIGHT, A GOVERNMENT ILL EXECUTED: THE DECLINE OF THE FEDERAL SERVICE AND HOW TO REVERSE IT 36–38 (2008).

place on its own terms. Since this class of arguments for public personnel reform is more about shrinking or eliminating government programs than they are about addressing legitimate concerns within the functioning bureaucracy, they are not addressed in detail in this article.[87]

C. Questions About the Nature of Efficiency

On a practical level, there are empirical questions regarding whether greater managerial control will actually result in greater efficiency, defined as ability to address incompetence or laggardness. A number of scholars question this assumption, noting that removing job protections does not necessarily increase productivity.[88] Indeed, some studies suggest quite the opposite—job protections actually increase productivity, because they create a stable and loyal workforce.[89]

On a more theoretical level, there are questions about the narrow use and constricted definition of efficiency as a measure of the need for reform. NPM reforms may make it easier for managers to terminate employees they deem unproductive, but the question of what constitutes efficiency within a public agency is by no means clear. Given the prevailing contemporary reform rhetoric around efficiency, it is interesting to recall that job protections for public employees originally were designed (at least in part) to promote a goal of efficiency, enhancing the independence and thus effectiveness of public employees.[90]

The early theory informing civil service reform was that secure employees would be free to concentrate on work rather

87. Other movements may also support NPM reforms for reasons other than efficiency. NPM resonates with "pro-business" political posturing and anti-union movements, for example. For the same reasons as the limited government movement, these other ideologies are not legitimate concerns for the current project.

88. John J. McCall, *A Defense of Just Cause Dismissal Rules*, 13 BUS. ETHICS Q., no. 2, Apr. 2003, at 151, 155.

89. *Id. See also* David I. Levine & Laura D'Andrea Tyson, *Participation, Productivity and the Firm's Environment*, *in* PAYING FOR PRODUCTIVITY 183, 203 (Alan S. Blinder ed., 1990); JEFFERY PFEFFER, THE HUMAN EQUATION 65 (1998); FREDERICK F. REICHHELD, THE LOYALTY EFFECT: THE HIDDEN FORCE BEHIND GROWTH, PROFITS, & LASTING VALUE 117–19 (1996).

90. *See supra* Part II.B.

than playing politics, and that they would be loyal to a system of government in the public interest more generally, rather than adherence to the dictates of a specific partisan political party.[91] In addition, and quite aside from patronage and corruption concerns, early reformers also argued for public work situations that fostered the development of expertise and professionalism, which in turn was thought to be essential to making government more effective and efficient.[92] In the modern rhetoric of public administration reform, this historic justification for public sector job protections has become obscured. Job *insecurity* is now seen as the answer to asserted governmental inefficiency.[93] The focus is on the needs of the manager, not those of the employee, and the possible distorting nature of politics on the realization of what is in the public interest has seemingly dropped from view.

The juxtaposition of manager with employee and the narrowing of efficiency concerns to supervisory control raise a further conceptual issue around the definition of efficiency: what would be the implications for the public interest if the government were managed like a private firm? NPM theory asserts that once managers are freed from the constraints of the civil service rules, they will use their newfound freedom to increase efficiency.[94] But this tidy alignment of interest does not necessarily translate into the public sector.

In the private sector, the ultimate object is clearly defined as maximizing profit. Pay structures and incentives are tied to performance in order to align managerial, personnel, and corporate incentives. Therefore, when given discretion over personnel matters, a private sector manager is likely to weed out underproductive employees in order to increase efficiency and profits. By contrast, the objective of a public agency is not profit, but rather fulfilling the agency's statutory mandate and political objectives.[95] While there is certainly incentive for public managers to create efficient agencies, it is not their only concern,

91. *Id.*
92. *Id.*
93. *See Lord Acton*, *supra* note 17, at 120.
94. *See* Coggburn, *supra* note 71, at 225–26.
95. *See* Braziel, *supra* note 72, at 869–70.

and sometimes not their predominant concern.[96] When left to their own discretion, it is not necessarily true that public managers will weed out unproductive employees rather than, for example, weed out employees who are seen as out of step with the political beliefs of the prevailing administration. The reliance on managerial discretion that works in the private sector is not necessarily a good fit for the public sector.

If there is a general problem with employee competence, perhaps the answer is not to remove job protections in an attempt to replicate the perceived efficiencies of the private firm, but to refine them consistent with the public interest. There are situations in which the benefits of protection outweigh any suggested problems with "efficiency." And, while it is true that reform or streamlining of general civil service termination processes may be warranted in order to address incompetence and lack of motivation, this is not the same as conceding that civil service protections should be totally removed for all public employees.[97]

D. The Problem of Political Responsiveness

In contrast to concerns couched in terms of efficiency, other criticisms have focused on the dangers of agency unresponsiveness to political imperatives.[98] While the distinction is not always clear in the rhetoric of the reformers, or the understanding of the public, this component of NPM critique differs importantly from those concerned with efficiency, based on either a need for managerial supervisory power, or a transfer of governmental functions from the public to private sphere.

In fact, far from valorizing the private sector, advocates of greater responsiveness are concerned with ensuring the domain of the political.[99] From this perspective, a perceived benefit of removing job protections for public employees would be greater political loyalty.[100] The logic is that employees who fear losing

96. *See id.*
97. *See infra* Part VI.A.
98. *Lord Acton*, *supra* note 17, at 120.
99. *Id.*
100. The loyalty is to hierarchies of political parties, rather than to the

their jobs are more likely to follow orders and help achieve the policy objectives of the administration.[101] In its negative characterization, this prevents employees from pursuing their own agendas or obstructing the administration.[102] While some advocates of NPM may have been motivated by sincere concerns with agency flexibility and effectiveness, for others, the real agenda has been exerting greater executive control over agencies.[103]

This presentation of the problem fails to recognize that there may be a place for protected agency or employee integrity, defined as the ability to act consistently with the general welfare and to follow sound professional and ethical norms independent of the political expediency. As such, calls for greater responsiveness within agencies raise important issues concerning the relationship between branches of government, as well the ordering of hierarchies within agencies themselves.[104] Some scholars are critical of extending the reach of politicians into

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larger governmental or agency project, which is posited as transcending specific partisan administrations. *Id.* at 122.

101. *See id.*

102. *See id.* at 126 (stating that civil servants who are subject to at-will employment may just "go along to get along"); Ian Maitland, *Rights in the Workplace: A Nozickian Argument*, 8 J. BUS. ETHICS 951 (1989).

103. This article does not dispute that there are important responsiveness questions associated with protection for public employees. However, these questions should be debated openly, not obscured by references to efficiency and stereotypes about federal employee competence.

104.

> [F]unctionalists argue that the insulation of agencies from presidential control, like the legislative veto, formed part of the legislative-executive bargain, making delegation to the agencies possible. The formal rules defining the executive and legislative powers present the government with the possibility of a Coasean bargain. In agreeing upon the legislative veto or for-cause removal, the [P]resident and Congress have contracted around the separation of powers to reach a level of delegation which they both want, but which is not necessarily permitted by the formal rules. Presidents agree to these conditions because without them, Congress would delegate little administrative authority at all. Put more conventionally, Congress's broad delegation of authority to the executive justifies new forms of checks and balances on the President to correct the imbalance in the separation of powers.

John Yoo, *Unitary, Executive, or Both?*, 76 U. CHI. L. REV. 1935, 1953 (2009).

agency workings, arguing that the inability of the executive to control all aspects of agencies protects against decisions based on short-term political considerations at the expense of continuity, neutral data collection, and expertise. This perspective highlights why it is important to separate the responsiveness issue from traditional efficiency or competency concerns.

IV. NEW PUBLIC MANAGEMENT IN ACTION

Pro-managerial reformers have had some real success in reshaping federal, state, and local civil service practices.[105] This section outlines the movement towards removing special employment protections for public employees. In addition, this section addresses some of the consequences of those reforms. NPM reforms (and the rhetoric that accompanies them) have made it more difficult to recruit and train quality civil servants.[106] Paradoxically, the focus on responsiveness may have also led to a greater level of inefficiency as the Executive Branch has added layers of additional bureaucracy to government agencies.[107]

A. The Changing Public Employment Landscape

The weakening of public sector employment protections in the federal government began with the passage of the Civil Service Reform Act of 1978, which eliminated the Civil Service Commission and allowed some agencies to fashion their own

105. Although it is beyond the scope of this paper, it is also interesting to note that the NPM movement has successfully been exported abroad. In addition to influencing reform movements in many other countries, certain NPM-style reforms are sometimes required as conditions to receiving aid from the World Bank or International Monetary Fund. Richard C. Kearney & Steven W. Hays, *Reinventing Government, the New Public Management and Civil Service Systems in International Perspective*, REV. OF PUB. PERS. ADMIN., Fall 1998, at 38. But it appears that these institutions are losing their zeal for reform somewhat. The World Bank has gone from pushing NPM reforms across the board to a more nuanced approach, which recognizes that the reforms may not be right (or practical) in every situation. Olsen, *supra* note 67, at 71–72.

106. *See, e.g.*, LIGHT, *supra* note 86, at 17.

107. *See id.* at 54–55.

personnel practices outside of the civil service system.[108] The creation of the Federal Senior Executive Service in 1978 induced senior managers (GS 16 and higher) to give up civil service protections in exchange for private-style incentives and greater responsibility.[109] More than 98% of eligible managers did so. As a result of these reforms, the percentage of public employees who have civil service protection has declined significantly. In 1953, almost 90% of the federal civilian workforce was covered by the civil service system.[110] Today, fewer than 50% of such employees are covered.[111] For those still covered, new incentive systems give more control to politically appointed managers. For example, a pay for performance, rather than a pay grade system now determines some employees' pay.[112]

On the federal level, a number of departments have received full or partial waivers from Title 5, which establishes the federal civil service system.[113] Reformers continue their attempts to deregulate more federal employees. In the wake of the tragedy of 9/11, there were arguments that the ability to respond quickly to terrorist threats might be hampered by cumbersome employee protections. The Bush Administration proposed that the newly created Transportation Security Agency and Department of Homeland Security be allowed to operate outside of civil service protections.[114] However, the statute as ultimately adopted did not exempt these departments from the civil service laws. If the Bush Administration's plans for the Department of Homeland Security had been implemented, fewer than 30% of federal employees would now be covered by civil service rules.[115]

108. 5 U.S.C. § 2302(a)(2)(C) (2006) (indicating that CSRA merit system principles do not apply to government corporations, the General Accounting Office (G.A.O.), the Federal Bureau of Investigation (F.B.I.), the C.I.A., the D.I.A., the N.S.A., and any Executive agency or component part whose principle function the President determines is "the conduct of foreign intelligence or counterintelligence activities"); *Modern Presidents*, *supra* note 31, at 7.

109. Ingraham, *supra* note 62, at 491.

110. *Modern Presidents*, *supra* note 31, at 11.

111. *Id.* at 11.

112. Ingraham, *supra* note 62, at 491.

113. *Lord Acton*, *supra* note 17, at 2.

114. Zaffira, *supra* note 66, at 725.

115. *Modern Presidents*, *supra* note 31, at 12.

In addition to NPM transformations on the federal level, inroads have been made into state civil service systems. In the United States today, most public employees are employed at the state and local levels. At these levels we see an even more dramatic transformation in public employment civil service protection, especially in recent years.[116] In many states, NPM-style reforms effectively redefine how public employees can be treated.[117]

Texas was the first state to convert a large number of employees to at-will status.[118] In 1985, the legislature eliminated the Texas Merit Council and let agencies design their own personnel systems.[119] Georgia followed suit in 1996, when the legislature declared that all new hires would be at-will.[120] In Georgia, the number of employees unprotected by state civil

116. Research suggests that deregulation of employee job protections are more likely to occur in states that are controlled by Republicans. Coggburn, *supra* note 71, at 236.

117. For the most part, courts have enabled the managerial reform movement in public employment to proceed. Significantly, the Eighth Circuit allowed a state legislature to unilaterally alter the public employment contract for its workers by removing just cause protections. Gattis v. Gravett, 806 F.2d 778, 781 (8th Cir. 1986) (holding that where the legislature extinguishes a property interest for a general class of people, rather than an individual employee, no due process is required). This rule has been followed in other jurisdictions. *See* Gertz, *supra* note 22, at 22.

118. *Lord Acton*, *supra* note 17, at 120. This left only general constitutional protections, which were described as follows: "The key distinction between public and private employment is that, in certain instances, constitutional safeguards attach to public employment. The two principal constitutional provisions implicated in the employment context are the Fourteenth Amendment's Due Process Clause and the First Amendment's free speech provisions." Welch, *supra* note 41, at 983 (footnote omitted). There are some additional protections in limited circumstances for protection of liberty interest. Rothstein v. City of Dallas, 876 F.2d 392, 395–96 (5th Cir. 1989). However, to satisfy the elements of a cause of action for violation of a Fourteenth Amendment liberty interest, a terminated public employee must show among other things that stigmatizing charges were made against the employee in connection with the discharge and that the charges were false. In addition, the charges had to be made in public and when the employee requested a hearing to clear his name, the public employer refused the request for a hearing. *Id.*

119. *Lord Acton*, *supra* note 17, at 120.

120. Kellough & Nigro, *supra* note 43. Georgia's civil service reform had several components, implemented partially through executive action and partially through legislation. *Id.* at 448.

service protections rose from 18% of the workforce in 1996 to 58% in 2001.[121] By 2004, more than 70% of the state workforce was employed at-will.[122] Florida moved 16,000 supervisory positions to at-will employment by first eliminating the positions and then recreating at-will positions which were offered to the same employees.[123] Florida also instituted no-cause and no-grievance termination procedures.[124] South Carolina and Arkansas similarly abolished their merit systems.[125] In Washington, the state legislature passed a bill that allows the state's personnel director to rewrite civil service rules.[126] In Washington D.C., upper and middle management positions are now at-will.[127] Arizona passed a law in 2001 that allows state employees to trade civil service protections for a pay increase, becoming at-will employees.[128]

B. Unintended Consequences of Reform

The confluence of changes, designed to fix perceived problems of inefficiency and lack of political responsiveness, has introduced some significant problems for the bureaucracy. These adverse consequences seem to have been neither intended nor anticipated by reformers. However, having now emerged, both demoralization of the public workforce and thickening of the bureaucracy jeopardize agencies and undermine the public interest in effective government.[129] Ironically, reforms undertaken on the grounds of improving efficiency and responsiveness have had the opposite effect.[130]

121. *Id.* at 461.

122. *Id.* at 450.

123. *Id.* at 452.

124. *See* Linafelt v. Beverly Enters., Inc., 662 So. 2d 986, 989 (Fla. Dist. Ct. App. 1995).

125. *Lord Acton, supra* 17, at 120.

126. WASH. REV. CODE ANN. § 41.06.150 (West 2011).

127. *See* Perkins v. Dist. Gov't Emp. Fed. Credit Union, 653 A.2d 842 (D.C. 1995).

128. Green, *supra* note 64, at 306.

129. *See infra* Parts IV.B.1 & 2; *see also* Kellough & Nigro, *supra* note 43, at 6–12.

130. *Id.* These concepts are discussed extensively by Paul C. Light, see LIGHT, *supra* note 86, at 17.

1. Demoralization of the Public Workforce

Studies show that poor treatment and loss of job security have created what some call a "quiet crisis," in which agencies have difficulty attracting the most qualified people.[131] The most gifted or talented people are seen as preferring the political rather than the civil service realms of public service.[132] New entrants into public service have little reason to make a long-term commitment to public work and thus may switch between public and private sectors, focusing on narrow conceptions of self-interest in seeking experience and benefits, rather than dedication to public service.[133]

In part this crisis is explained as a reaction to the loss of historic job protections. Absent security, an employee may feel: "[i]f the employer is not loyal to me, why should I be loyal in return?"[134] Lack of job security makes government jobs less desirable, and this is particularly the case given the typically lower public salary as compared to that available in the private sector.[135] From the employees' perspective this reduction in salary may be justified because public employment offers challenging work assignments in service of one's country, as well as the opportunity to be part of the achievement of ideals, to make a difference, and to participate positively in the policy process.[136]

The admirable aspects of such a calculation are lost in much of the modern reform rhetoric, which undercuts these motivations by describing bureaucracies as inept, useless, and

131. The term "quiet crisis" is commonly used to describe this phenomenon, but some scholars now believe that the term does not adequately suggest the magnitude of the problem. *See, e.g.*, LIGHT, *supra* note 86, at 17 ("The erosion of the federal service is no longer a quiet crisis easily dismissed. To the contrary, it is now deafening.").

132. Donald P. Moynihan, *The Normative Model in Decline? Public Service Motivation in the Age of Governance*, *in* MOTIVATION IN PUBLIC SERVICE MANAGEMENT: THE CALL OF PUBLIC SERVICE 247 (James L. Perry & Annie Hondeghem eds., 2008).

133. *Id.* at 248.

134. *Lord Acton*, *supra* note 17, at 123.

135. *Removing Employee Protections*, *supra* note 34, at 10–11.

136. Ingraham, *supra* note 62.

part of the problem rather than part of the solution to the America's challenges and by taking away benefits and protections.[137] The pervasive and persistently negative nature of the anti-bureaucrat rhetoric is particularly demoralizing to public employees because of the way in which their efforts are devalued. High-level politicians on both sides of the political aisle have complained about the inefficiencies of government bureaucracy, including Jimmy Carter and Bill Clinton.[138] President Obama appears to have broken with the anti-government rhetoric to a large degree, but continues to at least pay lip service to the idea that "too much government" can be a problem.[139] One report noted, "government employees are thought to be paper-pushing bureaucrats whose only power is to say 'no,' rather than fellow citizens empowered to solve real problems."[140] Individual efforts, as well as agency achievements, are not recognized in the rhetoric that treats public employment as little better than a waste of public funds.

Given the popular perception of government employees, formed by decades of exposure to NPM-style critiques, it should not be surprising if the best and brightest increasingly give little serious thought to a career in civil service.

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137. Volcker Report, *supra* note 84, at 7.

138. *Id.*

139. President Obama addressed this issue in a recent speech to the graduating class of 2010 at the University of Michigan. In that speech, President Obama stated:

> We know that too much government can stifle competition and deprive us of choice and burden us with debt. But we've also clearly seen the dangers of too little government, like when a lack of accountability on Wall Street nearly leads to the collapse of our entire economy.
>
> So, class of 2010, what we should be asking is not whether we need "big government" or a "small government," but how we can create a smarter and better government.

President Barack Obama, Commencement Address at the University of Michigan in Ann Arbor, Michigan (May 1, 2010) [hereinafter Obama Commencement Address]. According to President Obama, "[w]hen our government is spoken of as some menacing, threatening foreign entity, it ignores the fact that in our democracy, government is us." *Id.*

140. Volcker Report, *supra*, note 84, at 7.

2. Bloated Agencies

The drive for greater political responsiveness has also had questionable effects on public agencies. Presidents have attempted to exercise greater control over bureaucracies by appointing more and more politically accountable managers and supervisors, leading to a "thickening" of public agencies.[141] Thickening has occurred both through increased appointment of political appointees, spreading downward, and the appointment of career executives, spreading upward.[142] The federal government is constantly adding new layers of management.[143] During the George W. Bush Administration, for example, federal agencies averaged two additional layers[144] of management per year.[145] All but one federal department added additional layers between 1998 and 2004.[146] There are now more senior and middle level federal employees than front-line employees actually delivering services. Some of the new titles invented to describe the ever-increasing levels of managers include: Associate Deputy Assistant Administrator, Deputy Executive Associate Administrator, Chief of Staff to the Assistant Assistant Secretary, and Principal Associate Assistant Secretary.[147]

It is doubtful that this thickening of public agencies actually makes government more efficient in absolute terms, or even more responsive when assessed from a political perspective.[148] In fact,

141. LIGHT, *supra* note 86, at 53–55.

142. *Id.* at 57.

143. Thickening can result from factors unrelated to political control. For example, aging baby boomers might not retire, thus skewing the upper levels of the bureaucracy. *Id.* at 54. Contracting out public functions may clear bureaucracies of lower-level employees, as might the application of various technological advances. *Id.* at 54–55. Thickening can also be the result of natural bureaucratic forces. Departments mimic each other, follow norms regarding management, and use titles to evade increasing salaries. *Id.* at 73.

144. The average rate of two per year during Bush Administration was actually slower rate than previous administrations. *See id.* at 60–61.

145. *See id.*

146. *Id.* at 65.

147. *Id.* at 60.

148. *Id.* at 53. ("What they fail to realize is that more leaders does not equal more leadership. Rather, more leaders may actually weaken government's capacity to act by diffusing accountability for what goes right or wrong in the

thickening should be seen as a problem of efficiency because it has been shown to slow the transfer of information between governmental actors.[149] Each level of hierarchy creates delay and the possibility for a good idea to go astray.[150] In addition, no one gets credit or reward when things go well.[151] New managers create paperwork and regulation just to justify their positions, sucking resources away from the work the agency is supposed to be doing.[152]

In 1996, frontline jobs like revenue agents, air traffic controllers, and customs inspectors reported on average through nine layers of formally designated officers and sixteen layers of informally designated officers.[153] For policy and budget questions, there were an average of sixty layers of decision-makers.[154] This means that information does not pass easily either from top to bottom or vice versa. As a result, at various levels, policies are "translated, reworked, reinterpreted, and formalized to the point of irrelevance and confusion."[155] This description hardly portrays the efficient bureaucracy that reformers said they wanted. Paradoxically, reform attempts at building in more political responsiveness have led to the evolution of more dysfunctional agencies, in terms of competence and performance.

Ironically, while Congress and Presidents have attempted to make the bureaucracy more responsive for decades by adding more managers, it is not clear that political responsiveness has been improved. Not only are there now more senior and middle-level employees than front-line employees actually delivering services,[156] the thickening of the upper levels of the bureaucracy has also diffused clarity of command and reduced lines of constitutional accountability.[157] No one can be held accountable

faithful execution of the laws.").

149. *Id.* at 76.
150. *Id.*
151. *Id.*
152. *Id.* at 76–77.
153. *Id.* at 67.
154. *Id.*
155. *Id.* at 68.
156. *See id.* at 54.
157. *Id.* at 56.

when something goes wrong if it is too confusing to figure out who has authority.[158]

Light also argues that political appointees are no better equipped to lead public agencies than career public servants. Appointees serve an average of eighteen to twenty-four months,[159] and are selected on the basis of political loyalty rather than merit.[160] Political appointees are less likely to worry about long-term government goals because they know they will only be there a short time.[161] They are more likely to make a decision based on career advancement than government needs.[162]

The role of NPM reforms in the agencies responsible for assessing and monitoring economic policies and practices in the United States should be explored in more detail. For example, it may prove both interesting and productive from a policy perspective to consider how such changes contributed to agency failure to identify and respond to financial sector practices that lead to the recent global economic crisis. Was the effect of concerns with political responsiveness, such as those expressed through NPM-type reforms, to position politics above practices of effective regulation? In other words, did NPM philosophy play a role in agency inability to timely identify events leading up to the crisis?

Certainly the "quiet crisis" in agency staffing, which has been attributed to NPM policies, could help to explain why the Securities and Exchange Commission lacked the expertise and sophistication to uncover frauds like the Bernie Madoff pyramid scheme. The thickening of agencies at the supervisory level may have been instrumental in sidetracking reports of concern from underlings evaluating the new market in mortgage securities. Fannie Mae and Freddie Mac, along with the SEC, have been clearly identified as "maladministered" in the days leading up to the crisis.[163] Would a less demonized and demoralized

158. *See id.* at 76.

159. *Id.* at 82.

160. *Id.* at 83.

161. *Id.* at 82.

162. *Id.*

163. Peter H. Schuck, *Is a Competent Federal Government Attainable or Oxymoronic?*, 77 GEO. WASH. L. REV. 101, 102 (2009).

bureaucracy have been more aggressive and proactive in uncovering and addressing questionable practices in the institutions they were charged with regulating?

Also worth considering is how the effects of NPM might have influenced the response to the crisis once it occurred. The Bush Administration's initial response was to save Wall Street and the financial sector, leaving homeowners and job seekers behind. Did NPM play a role in that decision by marginalizing the input and effectiveness of less politically connected career civil servants?

It may not be possible to conclusively establish what effect NPM reforms had on the global economic crisis. Nevertheless, engaging in the inquiry is instructive on a number of levels. Economic regulation is only one of many functions the government performs. The link between administrative missteps and employment policy is more obvious with other recent events, such as the United States' failure to adequately prepare for the occupation of Iraq.[164] Government agencies are a powerful and integral part of the modern political state, and they must be healthy in order to function well. Any system governing public employment should recognize that the treatment of public employees has implications well beyond those employees' individual rights to fair treatment.

V. PUTTING REFORM IN CONTEXT: THE SPECIAL NATURE OF PUBLIC EMPLOYMENT

Academics in the public administration field have challenged NPM public sector reforms on both theoretical and practical grounds.[165] Central to these challenges is the idea that there are important differences between public and private employees that reach well beyond the question of whether the entity that signs their paychecks is designated as either public or private.

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164. *See generally* Donald P. Moynihan, *A Heckuva Job: How Management Failures Doomed the Bush Administration*, 11(1) PUB. MGMT. REV. 121 (2009).

165. *See generally* JAN-ERIK LANE, NEW PUBLIC MANAGEMENT: AN INTRODUCTION 6,14 (2000) (refuting some challenges to NPM but also acknowledging that there may be areas where NPM does not offer the best government).

A. Public Agencies and Public Functions

Public Administration scholarship reminds us first and foremost that public agencies and public employees are inevitably linked to the public interest because they serve important public functions.[166] Public employees supervise and implement the exercise of public power over policymaking and implementation.[167] They serve as sources of expert and institutional knowledge for government agencies.[168] They also are the conduits for the integration and coordination of the three branches of government and help to preserve a balance of power between them.[169] They are the means whereby citizens have access to and can participate in government, and they staff the structures that can hold government accountable.[170]

In listing the various roles envisioned for public employees, it becomes clear that citizens have a stake in public employment. They also have an interest in ensuring that the terms of public employment facilitate the development and use of employee skills, training, and experience in service to the public good. The terms of employment should highlight that public employment is based on professional expertise and objectivity and recognizes the need for continuity. A competent and motivated workforce that understands itself as having unique, special public responsibilities may well be the best guarantee of agency integrity in operation.

Sometimes political or managerial interests can be driven by short-term concerns. For example, while a simplistic notion of efficiency might value speed in relation to production of a report on a new drug, sometimes in the interest of the public, it may be

166. MICHAEL LIPSKY, STREET LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES 87-89 (1980).

167. JEFFREY L. PRESSMAN & AARON WILDAVSKY, HOW GREAT EXPECTATIONS IN WASHINGTON ARE DASHED IN OAKLAND 6-14, 35-41 (1973) (discussing the Economic Development Administration's involvement in the implementation of the "Oakland Project").

168. Doug Morgan, *The Public Interest*, HANDBOOK OF ADMINISTRATIVE ETHICS 43–44 (1994); JOHN A. ROHR, TO RUN A CONSTITUTION: THE LEGITIMACY OF THE ADMINISTRATIVE STATE 121 (1986).

169. ROHR, *supra* note 168, at 121.

170. ROHR, *supra* note 168, at 121; Olsen, *supra* note 67, at 70.

essential that things be slowed down. It may take more time to assemble a broad base of evidence, including a wide range of differing perspectives on such an issue, but the choices that can then be presented to a decision maker are more likely to be shaped by expertise and neutrality than the expediency of politics responsive to public pressure. Simply calling for more managerial flexibility focuses only on one dimension of the public employment relationship, which should be understood as both dynamic and complex. Looking solely at managerial needs can obscure both the needs of the public, as well as the needs of a public employee charged with acting in the public interest.[171]

B. Partisanship, Patronage, and Corruption

It would seem that unless we live in a perfect political world, there is a need for some public employees to have protection in certain situations from the exercise of excessive partisanship by their superiors.[172] In order to perform their public functions effectively, career public employees must be able to act without fear of improper retaliation, retribution, or coercion for actions or beliefs unrelated to the quality of their job performance. This concern with partisanship and corruption was one of the fundamental reasons the system of public employment was initially reformed in the nineteenth and early twentieth centuries.[173] One can speculate about why NPM reformers downplay the historic justification for civil service protections. Perhaps they assumed the possibilities for inappropriate partisanship no longer applied in the modern bureaucratic state, perhaps they didn't view partisanship as such a great evil after all, or perhaps they thought the possibility of partisanship was outweighed by the evil of inefficiency as they understood it in

171. Protected public employees are more likely to challenge abuses of power or share information about questionable agency practices with superiors or the public. In fact, the due process hearings to which employees are entitled can be an important way for policy makers and the public to learn about agency practices and conditions. Kellough & Nigro, *supra* note 43, at 465; Olsen, *supra* note 67, at 70.

172. Morgan, *supra* note 168, at 43–44; ROHR, *supra* note 168, at 121; Green, *supra* note 64, at 315.

173. *See supra* Part II.B.

terms of managerial inflexibility. In any case, the imposition of a private model on the public workplace would allow a situation in which the public employee would operate totally within the domain of the political. This may be viewed as unacceptable if it also appears that the possibility of corruption, cronyism, and the use of undue political influence have not disappeared in modern politics.

Old-fashioned cronyism may not be dead. For example, a 2009 report by the inspector general of the Justice Department concluded that, under the Bush Administration, managers at the Department's Civil Rights Division attempted to hire conservatives and prevent the hiring of liberals for career positions.[174] Apparently, hiring decisions were made as part of a larger effort by the Bush Administration to redirect the Division away from enforcing antidiscrimination and voting rights laws.[175] Further, perhaps our understandings of what constitutes corruption, cronyism, or undue political influence is in need of a more modern face, understood as undemocratic processes in which private interests "corrupt" the political process through direct lobbying or the strategic exercise of extraordinary economic resources.[176] Such continuing threats need to be addressed in any comprehensive system of public personnel administration. Public agencies must still be protected from

174. Charlie Savage, *Report Examines Civil Rights During Bush Years*, N.Y. TIMES, Dec. 3, 2009, at A26, *available at* http://nytimes.com/2009/12/03/us/politics/03rights.html.

175. *Id.*

176. Cronyism is defined as "special treatment and preference given to friends or colleagues, especially in politics," while corruption is defined as the "dishonest exploitation of power for personal gain." Encarta Dictionary: English (North American). Issacharoff discusses a contemporary perspective in which corruption is viewed quiet broadly. Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118 (2010). This understanding of corruption is built around a desire to ensure that public, not private, interests and processes shape the outputs from the policy making process of government. "[T]he threat to democratic governance may come from the emergence of a 'clientelist' relation between elected officials and those who seek to profit by relations to the state." *Id.* at 121. A reorientation of the idea of corruption as presenting a threat to the outputs of policy making would cover a broad range of current practices whereby private interests use financial resources to influence politicians. If this is the view of corruption adopted, it provides even further arguments for strong public employee protections.

corruption and cronyism however defined.

In addition to traditional corruption and cronyism concerns, there is a more generally compelling reason for resisting the wholesale importation of a private model with its concern with flexibility into public employment. Public employment is simply not private employment—its product and process are different and that fact must be recognized. It is important to realize that public employees are often in a position in which they must manage conflicting loyalties. There are political and institutional values and loyalties that direct what is owed to superiors or to overarching agency or departmental structures. But there are also important professional norms that might be evident in serving the public interest. Sometimes these conflict and public employees may need to be protected from excessive partisan retaliation. Public employees in such positions may need to be able to challenge violations of public policy and abuses of power by their superiors.[177] This would make the best—hence most efficient—agency result more likely.

The reformers, who first introduced protections for public employees, understood the idea of agency efficiency broadly.[178] Efficiency was not only measured by speed of performance or responsiveness to managerial direction, but also by the need for employee independence from politics.[179] Independence allows norms of professionalism to prevail, which fosters a commitment to the public good that extends beyond immediate and short-term political concerns.[180]

It may not be necessary to give all public employees traditional civil-service job protections in order to guard against these dangers. However, there must be some sort of safeguard against corruption and undue political influence, and some way to promote agency integrity. If traditional job protections are unwarranted, then we need to develop a new version of protections that addresses the public implications of public

177. Whistle blower statutes recognize this in some situations.

178. *See* U.S. OFFICE OF PERSONNEL MGMT., *supra* note 31, at 196.

179. *See* Steven Breker-Cooper, *The Appointments Clause and the Removal Power: Theory and Séance*, 60 TENN. L. REV. 841, 846 (1993).

180. *See supra* Part III.C.

employment. The NPM movement is problematic because it only focuses on removing traditional job protections, and does not provide an alternate method for protecting civil servants when such protection is necessary. To the extent that these are threats to contemporary public agency functioning that arise from recent transformations in public employment, we should search for tools that allow public employees to deal with them.

C. Legitimate Reasons for Reform

Some scholars call into question the linking of managerial discretion with productivity, noting that a public employer is theoretically allowed to terminate an employee who is not productive, even with strong civil service protections in place.[181] Federal civil service is governed by the Office of Personnel Management and the Merit Systems Protection Board.[182] State employees are subject to state civil service laws, and local municipalities and cities may have their own set of specific rules in place. Generally, the rules provide that "[n]o permanent employee in the classified service shall be reprimanded, discharged, suspended without pay, or, demoted except for just cause."[183] In addition, before a civil servant is terminated or given a serious reprimand, he or she is typically entitled to a hearing by which the public employer must provide the employee with notice of the reasons for the action, an opportunity to review the evidence, and an opportunity to respond.[184]

Despite the statutory language permitting firing for cause, the perception seems to be that it is difficult to terminate employees with civil service protections whether or not there is good cause to do so. There is also concern, even among those who do not generally share the NPM or anti-government mentality, that the federal hiring system is too cumbersome and rigid, making it difficult for federal agencies to hire employees.[185]

181. *Lord Acton*, *supra* note 17, at 123.

182. *See* 5 U.S.C. §§ 1101–1105 (2006) (Office of Personnel Management); 5 U.S.C. §§ 1201–1206 (2006) (Merit Systems Protection Board).

183. *E.g.*, MINN. STAT. § 43A.33 (2012).

184. *Lord Acton*, *supra* note 17, at 126.

185. Volcker Report, *supra* note 84, at 7.

Civil service regulations have been described as "cumbersome" and "slow moving" at best, with lots of "red tape" to cut through.[186] Complaints have generated a market for "how-to" books with instructions for supervisors. Perhaps some of the problems with effecting discharge or discipline lie with the managers themselves. It is interesting to note that out of 700,000 federal employees rated by their managers in 2001 under a pass fail system, only 0.06% failed.[187] Of 800,000 rated using a five-point system, only 0.55% were scored at one of the lowest two rankings, and 43% received the highest ranking.[188] Since documentation of negative employee performance is essential for a "for cause" process, such evaluations provide a ready defense for an employee objecting to an adverse employment action.[189]

Significantly, there is a widespread perception of cumbersomeness in public sector discipline. It will have repercussions regardless of whatever contradictory empirical realities might come to the fore. The perception of a broken system means that the idea of reform is an attractive position for politicians to advocate, and dramatic reforms have been undertaken, particularly at the state level, with impressively little resistance.[190] If reform is seemingly inevitable, it is important that those who continue to believe there is a need for employee protection in many situations address legitimate concerns and grapple with the issues reformers suggest. A failure to do so may mean that protection for all employees will eventually be eliminated or so diluted as to be meaningless.

Reformers also raise some genuine issues regarding political responsiveness.[191] It makes sense that politicians desire a certain

186. STEWART LIFF, THE COMPLETE GUIDE TO HIRING AND FIRING GOVERNMENT EMPLOYEES 13–18 (2009). *See also* ROBERT D. BEHN, LEADERSHIP COUNTS: LESSONS FOR PUBLIC MANAGERS FROM THE MASSACHUSETTS WELFARE, TRAINING AND EMPLOYMENT PROGRAM (1998); GORDON CHASE AND ELIZABETH REVEAL, HOW TO MANAGE IN THE PUBLIC SECTOR (1983); STEWART LIFF, MANAGING GOVERNMENT EMPLOYEES: HOW TO MOTIVATE YOUR PEOPLE, DEAL WITH DIFFICULT ISSUES AND ACHIEVE TANGIBLE RESULTS (2007).

187. LIGHT, *supra* note 86, at 115.

188. *Id.*

189. *See supra* Part V.C.

190. *See supra* Part IV.A.

191. *See supra* Parts III.A & III.D.

degree of control over agencies in order to ensure that the agencies carry out their policy agendas. The executive branch has a clear and entirely rational motivation for wanting to direct government agencies: the President is held responsible for agency actions.[192] Perhaps the most important function that responsiveness could play is to make sure that rules set in one area are consistent with the administration's overall domestic priorities and are coherent with national policy.[193]

Opponents of NPM reforms should also be skeptical of continuing the current legal protections for public employees without alterations. There are some conceptual limitations that warrant rethinking those protections as they now stand. For example, current legal analysis of public employment issues focuses disproportionately on the individual rights or classification of public employees.[194] In part, this is due to the nature of the constitution and civil service laws. The constitution grants only individualized rights to citizens.[195] In addressing constitutional rights in the public employment context, courts typically will balance the government's interest in efficient operations against the individual employee's rights to continued employment.[196] On the other hand, civil service laws deal with

192. Terry M. Moe, *The Presidency and the Bureaucracy: The Presidential Advantage*, *in* THE PRESIDENCY AND THE POLICIAL SYSTEM 425, 429–33 (Michael Nelson, ed., 7th ed. 2003); *Modern Presidents*, *supra* note 31, at 1.

193. Yoo, *supra* note 104, at 1943–44. Calabresi and Yoo argue that the early effectiveness of the civil service was in requiring competitive examinations for federal employment, not providing job protections. *Id.* at 1956. The civil service helped presidents avoid the partisan-minded spoils system, *Id.*, but allowed the termination of federal employees, with the "for cause" requirement being only a formality at best in that the president could give any "cause," for termination. *Id.* They argue that over time protections against termination have evolved that sharply reduce the president's ability to control the bureaucracy and that as early as the 1970s the civil service was considered an obstacle to improving the responsiveness and effectiveness of government. *Id.* at 1956–57.

194. *See* Connick v. Myers, 461 U.S. 138, 140 (1983); Pickering v. Bd. of Educ., 391 U.S. 563, 574–75 (1968).

195. *See* U.S. CONST. amend. I–X.

196. In First Amendment cases, for example, a court must balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Connick*, 461

groups, focusing on the classification of the employee and granting protections if the employee falls within the proper category.[197] Lost in both of these approaches to protection is a consideration of public non-individualized interests, which should be paramount.

VI. A NEW APPROACH TO REFORM: REHABILITATING JOB PROTECTIONS FOR PUBLIC EMPLOYEES

How can a system of job protections strike the right balance between efficiency, responsiveness, and agency integrity? This article introduces a new framework for thinking about this question, which I call the "public context approach."

The public context approach begins with the assumption that the traditional civil service system is broader than necessary to protect the public interest in agency integrity. Not all public employees need job protections in order for agencies to function in the public's best interest. Furthermore, the subset of employees who should be protected does not necessarily require a uniform, one-size-fits-all set of protections. While some employees might need protection against termination without cause, others may not. Any job protection regime must be flexible enough to distinguish between different types of employees and place them in the context of the various public interests at stake, as well as balance the legitimate need for managerial control.

The first step to developing a system of job protections under the public context approach is to identify the core public interests in public employment that are worth protecting, a task that was undertaken in the preceding sections of this article. Where an important public interest is at stake, such as agency integrity or the need to guard against corruption, employees should be given job protections sufficient to protect that interest. Where no public interest is implicated, public employees require less protection

U.S. at 140 (quoting *Pickering*, 391 U.S. at 568).

197. *E.g.*, N.Y. CIV. SERV. LAW § 75 (McKinney 2011) (Employees that fall within a particular category of this subdivision "shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section").

and should not be treated any differently from employees in the private sector.[198]

Readers who are concerned about corruption, political influence, and agency integrity may wonder why we should abandon traditional civil service rules for an approach that in many situations would offer fewer job protections. The answer is that maintaining the current system is likely to be untenable. As discussed in Part IV.A, the number of federal employees with civil service protections has been in decline and several states have been even more successful in creating an at-will public workforce. NPM adherents are continuing to press for additional reforms.[199] Although adopting the public context approach may involve risks, I argue that further attacks on the civil service system are riskier still. Moreover, adopting the public context model may make it more likely that NPM reformers will lose some of their popular support. There may be more popular support for job protections if the public sees the connection between job protections and their own public interest, rather than thinking about job protections as preventing the lazy person at the D.M.V. from being terminated. Adoption of the public context approach may also reduce complaints from public managers as they are given greater flexibility in personnel matters.

The second step, after identifying the interests worth protecting, is to determine how to match job protections to those interests. I argue that this determination should be accomplished through the establishment of a flexible, yet comprehensive and coherent, system that is able to place individual public employment decisions within categorical contexts at the intersection of political, managerial, and public interests. The means to accomplish this involves the initial classification of the public interest involved, and the subsequent balancing of that interest, if any, against asserted managerial and political necessities. This approach would be a decidedly different system

198. There may be public interest in the fact that the employer is the government and the employee a citizen as well as an employee, but this aspect of the relationship is not the subject of this article and will be addressed in a subsequent piece.

199. *See supra* Part IV.A.

than the current classification of broad groups of employees as either protected or not.

A. A Useful Starting Point: The Public Policy Exception to the At-Will Rule

The degree of job protections required in a particular situation will vary based on such factors as the type of employee, the type of agency, the particular motivation for the employer's adverse employment action, and the changing nature of the public's needs. A helpful starting place for this project is through reference to an "exception" to the at-will rule already widely used in most American states: wrongful termination in violation of public policy.[200] In a state that recognizes this type of exception, an employer is prohibited from firing an employee if doing so runs contrary to public policy.[201] For example, in almost all jurisdictions it is unlawful to fire an employee for refusal to perform an unlawful act like committing perjury[202] or for whistle

200. The nomenclature varies amongst jurisdictions. Public policy claims are not recognized in all jurisdictions. For example, the New York Court of Appeals held that only the legislature should decide what public policies are important enough to override the at-will rule. Murphy v. Am. Home Prods. Corp., 448 N.E.2d 86, 90 (N.Y. 1983). ("If the rule of nonliability for termination of at-will employment is to be tempered, it should be accomplished through a principled statutory scheme, adopted after opportunity for public ventilation, rather than in consequence of judicial resolution of the partisan arguments of individual adversarial litigants.").

201. *See, e.g.*, Palmateer v. Int'l Harvester Co., 421 N.E.2d 876 (Ill. 1981); Pierce v. Ortho Pharma. Corp., 417 A.2d 505 (N.J. 1980); Tameny v. Atl. Richfield Co., 610 P.2d 1330 (Cal. 1980); Geary v. U.S. Steel Corp., 319 A.2d 174 (Pa. 1974). While the elements of a public policy claim may vary somewhat by jurisdiction, most agree on the following: (1) the existence of a clear and substantial public policy; (2) an adverse employment action that negatively impacts or jeopardizes the public policy; (3) a causal connection between the conduct implicating public policy and the adverse employment action; and (4) the lack of an overriding business justification for the adverse employment action. *See, e.g.*, Gardner v. Loomis Armored Inc., 913 P.2d 377, 380 (Wash. 1996); Collins v. Rizkana, 652 N.E.2d 653, 657–58 (Ohio 1995); Henry H. Perritt, Jr., *The Future of Wrongful Dismissal Claims: Where Does Employer Self Interest Lie?*, 58 U. CIN. L. REV. 397, 398–99 (1989).

202. The earliest case on this point, in which an employee was fired for refusing to commit perjury at a legislative hearing, is *Petermann v. International Brotherhood of Teamsters*, 344 P.2d 25, 27 (Cal. Dist. Ct. App. 1959). *See also* Scott A. Moss, *Where There's At-Will, There Are Many Ways:*

blowing in relation to an issue of public concern.[203]

This doctrine of wrongful termination recognized in the context of violations of public policy is a useful beginning point for the public context approach because it focuses on the public interest. It is not automatic protection for an employee; the employee must demonstrate a nexus between the public policy at issue and the adverse employment action in order to prevail. For example, in *Foley v. Interactive Data Corp.*, the employee alleged that he was terminated for internally reporting that one of his supervisors had embezzled from his previous employer.[204] The Supreme Court of California held that the plaintiff could not state a claim for wrongful termination in violation of public policy.[205] Even though the court recognized that employees may have a duty to act in their employers' best interests by reporting relevant information to them, the public had no interest in the matter.[206] Whether the supervisor embezzled or not was a matter of private concern for the employer, and therefore the termination was not actionable.[207]

The wrongful termination model also recognizes there is often a general need for managerial flexibility. This analysis may

Redressing the Increasing Incoherence of Employment at Will, 67 U. PITT. L. REV. 295 (2005) (discussing variation among states in recognizing public policy and other common law exceptions to employment at will).

203. There are wide variations among state whistle-blower protections. One area of dispute is whether internal whistle-blowing situations are covered in the same way as external cases. If an employee has only complained to internal management and not to public authorities, a court may find that this reflects nothing more than an internal disagreement between the employee and decision makers within the company and conclude that the circumstances surrounding an employee's termination do not constitute a wrongful discharge. *Compare* Belline v. K-Mart Corp., 940 F.2d 184 (7th Cir. 1991) (holding that an employee who alleged that he was fired in retaliation for reporting suspicious behavior by his supervisor to management had a cause of action under Illinois law for retaliatory discharge) *with* House v. Carter-Wallace, Inc., 556 A.2d 353 (N.J. Super. Ct. App. Div. 1989) (holding employee's internal objections to company conduct did not provide grounds for wrongful termination claim based on retaliatory discharge). Federal legislation on this point includes the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A (2006), 18 U.S.C. § 287 (2006), and the False Claims Act, 31 U.S.C. §§ 3729–3730 (2006).

204. 765 P.2d 373, 375–76 (Cal. 1988).

205. *Id.* at 380.

206. *Id.*

207. *Id.*

begin with analyzing the effect on the public, but defendants in such cases can effectively respond by demonstrating that their particular interests outweigh any negative effects on public policy.[208]

The wrongful termination model is also useful in responding to potential criticisms that may be leveled against the public context approach—that, in bringing in contexts, it introduces too many factors to be balanced and thus leads to uncertainty. The concern will be that managers will not know when it is safe to discipline public employees without clear indications of who is covered, based on strictly-designated categories.

The jurisprudence around wrongful discharge can alleviate some of this concern. While wrongful discharge is a flexible remedy, it is not without limitations, and courts have generated guidelines designed to reduce uncertainty.[209] Initially, there is a limited notion of what defines public policy, with only clear and substantial policies derived from appropriate sources forming the basis of a claim.[210] Similarly, the public context approach should ultimately be based on a consensus about what types of things represent significantly important public interests.

Also instructive is the way in which courts have created a number of categories of wrongful discharge actions to deal with frequently recurring situations. Courts have recognized that many wrongful discharge actions involve recurring patterns of behavior, such as an employer retaliating against an employee for refusing to violate the law, or for performing an obligation imposed by law;[211] an employer retaliating for an employee claiming a benefit arising from employment;[212] or for

208. Gardner v. Loomis Armored Inc., 913 P.2d 377, 386 (Wash. 1996).

209. *See* discussion *supra* note 199 (listing elements).

210. Appropriate sources for public policy vary by jurisdiction, but always include statutes and state constitutions. It may also include common law and administrative regulations.

211. *See* William M. Howard, J.D., Annotation, *Common-Law Retaliatory Discharge of Employee for Refusing to Perform or Participate in Unlawful or Wrongful Acts*, 104 A.L.R. 5th 1 (2002) (listing cases and courts that have recognized retaliatory discharge where employee refused to commit illegal actions).

212. *See, e.g.*, Jean C. Love, *Retaliatory Discharge for Filing a Workers' Compensation Claim: The Development of a Modern Tort Action*, 37 HASTINGS

whistleblowing about improper conduct.[213] For each of these categories of wrongful discharge, the courts have developed distinct rules appropriate to address the type of public policy interests that are at stake. The same sort of implementation process would most likely occur under the public context approach. Certain types of employer actions and public interests would tend to arise more frequently, and rules would develop to deal with these situations so that decision makers could not resort to unfettered discretion and employers would have some degree of certainty regarding whether their actions will violate the law.

I propose to adopt the basic framework of the wrongful discharge claim for public employees. Under the public context approach, an individual public employee subject to an adverse employment action would be allowed to bring an improper termination claim. In order to prevail, the employee would have to (1) articulate a legitimate public interest implicated in the employer's action, and (2) demonstrate a nexus between the adverse employment action and some harm to the public interest. The employer could defend its action by showing that the managerial interest in taking the adverse employment action outweighs the public interest.

B. Placing Public Employees in a Public Context: Defining Classes of Employees

What would the public context approach look like in practice? This section lays out a framework for beginning to address that question, recognizing that any specific proposal at this point should also lead to further discussion and debate. Articulating this framework for rethinking public sector job protection will also help to also elucidate the more theoretical argument presented above. The following framework is based on the

L. REV. 551 (1986) (discussing cases that deal with retaliatory discharge when an employee seeks benefits under workers' compensation acts).

213. *See* William M. Howard, J.D., Annotation, *Common-Law Retaliatory Discharge of Employee for Disclosing Unlawful Acts or Other Misconduct of Employer or Fellow Employees*, 105 A.L.R.5th 351 (2003) (Listing cases and courts that recognize retaliatory discharge for whistle-blowing). *See also* RESTATMENT (THIRD) OF EMP'T LAW § 4.02 (Tentative Draft No. 6, 2013).

premise that much public employment falls into distinct patterns of intersecting managerial, political, and public interest concerns. The categories developed in this section will ensure that public employees receive both appropriate and consistent treatment and would remove the need for ad hoc determinations in many situations, as well as restricting resort to unfettered discretion in individual cases that marks current practice. The following categories are not intended to be exclusive or exhaustive but rather illustrative.

1. Incidental Public Employees

Some public employees are not really different from private employees with respect to the public interest in the tasks they each perform. This means the public has less interest in the personnel decisions these employers make with respect to these particular public employees. To take an obvious example, some public agencies may have cafeterias staffed by public employees. These employees may prepare and serve food and perform other functions similar to private cafeteria employees. Although their paychecks may be issued by a public agency, and although they may serve food primarily to government workers, it is difficult to discern any important public interest involved in their employment. Only in the most tangential manner does their employment affect the functioning of government. The same reasoning applies to a mechanic who services governmental vehicles or a janitorial employee who performs building maintenance.[214]

Managers should be able to discipline incidental public employees under the prevailing at-will standards. Although this may seem unfair to the employees involved, this is a condition of employment shared with employees in the private sphere.[215] So long as the at-will rule remains an entrenched foundation of American employment law, the proper question would be not whether its application is fair in the public employee context, but whether there is any overriding public purpose that should

214. In fact, in many of these instances there is a good likelihood that such services have been privatized.

215. Feinman, *supra* note 18.

supersede it.

This resolution recognizes NPM proponents' argument that the public has an interest in the efficient or competent operation of public agencies. Incidental public employees are generally remunerated through public funds, so the public has an interest in ensuring that money is not wasted or squandered on unqualified employees. While NPM proponents might assume that managers will naturally hire competent workers and weed out incompetent ones, this will not always be true. Public managers should be required to follow some merit-based principles for hiring and promotion. For incidental public employees, we do not need a complex or formalized system like the current civil service ladder. Instead, it can be a rebuttable presumption that hiring and promotion decisions be based on merit, with the burden on the claimant to show that the decision was made for some other reason. For example, if a manager bypasses an experienced candidate in favor of his unqualified nephew, the experienced candidate should be able to challenge the decision by showing (1) that there is a substantial difference in qualifications or experience and (2) the decision was actually based on nepotism.[216]

2. Provision of Public Services

The public has obvious interests in the effective and efficient provision of public services. I use the term "provision of public services" here to refer to services directly provided by government and directly used by public citizens. For example, public schools and fire departments provide services and are organized on a state and local level. In the federal government, agencies such as the U.S. Postal Service provide services to the public.[217] Many employees in such direct service areas are

216. This hypothetical scenario would be lawful in the private sector. Under the at-will rule, an employer could choose to hire or promote a less qualified candidate for any reason, including nepotism, if it does not fall within one of the limited statutory or public policy exceptions. The fact that a public incidental employee is paid from public funds provides sufficient public interest in the hiring decision to support protection under the public context model.

217. On a federal level, there have been calls for privatization of service providers like the U.S. Postal Service. *See* Chris Edwards, *Privatization*, CATO

protected by unions, but those protections, as well as any afforded by the civil service are under attack. Certainly the trend is for declining protection.[218]

As in the incidental public employee context, the public has an interest in merit-based hiring and promotion decisions with regard to public services. But the interest is stronger here than with incidental public employees because in addition to the general interest in not wasting public funds, the public directly consumes the services. The public has a stake in hiring competent teachers, for example, that is simply not present for cafeteria workers. The stronger public interest warrants greater attention to merit-based principles.

Employees directly providing services to the public should be hired and promoted based on more formalized merit guidelines. Especially for skilled positions like teachers, employers should have established and published requirements for each position and require examinations, interviews, or both before hiring. In some circumstances, hiring and promotion decisions should be made by committee or be made subject to review to lessen the chances of arbitrary decisions, nepotism, or cronyism. An unsuccessful applicant should be able to challenge an employer's failure to hire or promote her by showing (1) that there is a substantial difference in merit between the applicant and the person actually granted the job and (2) that the proper procedures were not followed, or (3) that the decision was made on a basis other than merit.

It is the area of discipline or termination that is most problematic with service employees, however. It seems apparent that the public interest in public services requires the employee have some degree of protection against improper termination and discipline. The public context approach would focus the issue of individual discipline on whether a particular adverse employment action would undermine or compromise public services generally. Therefore, a claim for improper termination or

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INSTITUTE: DOWNSIZING THE FED GOV'T (Feb. 2009), http://www.downsizing government.org/privatization. In fact, many areas of direct service, such as the military or the FBI are already classed as "exempt" categories, not covered by the civil service.

218. *See infra* Part IV.A.

discipline should arise where an adverse employment action is likely to negatively impact the provision of such services to the public. This concept is flexible to encompass a wide variety of adverse employment actions, but it is not the same as the civil service requirement of good cause before termination. Job protections are not based on the classification of the specific employee, but on the impact that the supervisory actions, such as those undertaken in a specific case, are likely to have on the mass of employees delivering this class of services. Will it undermine or interfere with their ability to act in the public good?

As a hypothetical example, a principal instructs a biology teacher to spend equal time teaching evolution and intelligent design, even though state educational standards include only evolution.[219] The teacher refuses to spend as much class time on intelligent design, and is terminated by the principal. The teacher would only have a First Amendment claim if she spoke out about the situation, and then only if she was terminated for her speech rather than refusing to follow the principal's instructions.[220]

The public context approach would look beyond the issue of free speech to the other public interests at stake in this hypothetical situation. Of course, in order to have a claim for improper termination under the public context approach, the teacher would have to establish that she was terminated as a result of her refusal to teach intelligent design, and not for some other reason. In addition, she would have to establish that her being fired for refusing to teach intelligent design would negatively impact the provision of services to the public by other teachers. Like a wrongful termination in violation of public policy claim, an employee would have to show a nexus between the adverse employment action and the efficient and effective

219. The teacher would be in a very different position if the mandate was issued by the school board rather than an individual principal. In the case of the school board, citizens who disagree with the decision can enforce the public interest at the voting booth by voting offending board members out of office. There is not a comparable political remedy for the errant principal, although he or she could be subject to internal discipline.

220. Welch, *supra* note 41, at 990–91.

provision of public services. Thus, the teacher would argue that the educational needs of students are neglected and undermined when educational time and resources are deflected away from a properly designated subject to one improperly adopted for the curriculum. The teacher could also argue that her termination would have a chilling effect on other teachers who might otherwise be inclined to report or speak out against improper supervisory interference with the curriculum.[221] Finally, the employer would have an opportunity to defend itself by demonstrating the existence of an overriding managerial justification for its actions that outweighs the public interest. Managerial justifications could include responsiveness concerns. In our hypothetical example, the employer could argue that it has an interest in controlling the content taught in the classroom, and must be able to discipline teachers for failing to follow instructions.

3. Production and Assessment of Information

Research, fact gathering, and rigorous analysis of information are vital to the functioning of administrative agencies and the government in general. For example, Environmental Protection Agency (E.P.A.) employees make factual determinations regarding the damage to the environment caused by greenhouse gasses, National Highway Traffic Safety Administration employees determine if a defect exists in a particular car model's braking system, and Food and Drug Administration employees determine if there are medical risks associated with new drugs. It is obvious that under the public context approach there is a strong public interest in ensuring that employees engaged in factual investigations are hired and

221. The Supreme Court in *Pickering* recognized the public interest in a teacher's speech on a subject related to her teaching tasks:

> Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.

Pickering v. Bd. of Educ., 391 U.S. 563, 572 (1968).

promoted pursuant to a merit-based system at least as rigorous as that suggested for employees providing public services.[222]

The types of inquires and investigations that fall into this information gathering category are typically politically and economically sensitive, and it is no surprise that politicians and businesses might try to influence both the conduct and the product of the investigations. The possibility of political or economic influence on factual research is not hypothetical or remote, but a fact of everyday life.[223] The public has a strong and compelling interest in ensuring that factual investigations by public agencies are not unduly influenced by these external forces, but meet the highest standards of professionalism and objectivity. Of course, the ultimate use of these reports and investigations might well be political, and even highly partisan, but the production process should be as independent from those forces as possible.

Employees engaging in such factual investigations require job protections so that they will not be disciplined or removed for lack of political responsiveness. This protection could take the form of "just cause" protection from adverse employment actions.

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222. *See supra* Part V.A.

223. In 2009, a body of research and policy recommendations prepared by employees of the National Highway Traffic Safety Administration was made public after being suppressed for six years because of political concerns. The research suggested that driving while using cell phones was dangerous whether or not the driver used a hands-free device, and recommended that drivers not use wireless communications devices except in emergencies. The decision to suppress the research was ostensibly made because the head of the agency thought certain members of Congress would see it as impermissible lobbying, but people involved in the research suspected pressure from the cell phone industry as well. Matt Richtel, *U.S. Withheld Data on Risks of Distracted Driving*, N.Y. TIMES, July 20, 2009 at A1, *available at* http://www.nytimes.com /2009/07/21/technology/21distracted.html. A judge from the Southern District of New York found that the Food and Drug Administration bowed to political pressure rather than follow proper scientific procedures in ruling that the Plan B contraceptive was only safe for women over the age of eighteen. Agency officials communicated with the White House about its review of the drug and appointed people who shared the administration's political beliefs to the independent panel of experts conducting the review. In adopting the rule, the FDA ignored findings by agency scientists. Natasha Singer, *Contraception Pill Strictures Are Eased by a Judge*, N.Y. TIMES, Mar. 24, 2009, at A12, *available at* http://www.nytimes.com/2009/03/24/health/24pill.html.

In this case, there would be an underlying assumption of competence and adequate performance accompanying the position. Before termination or discipline, an employer would have to demonstrate a valid reason for acting negatively in regard to an employee engaged in factual investigations.[224] This reason could be related to agency needs, such as economic or restructuring necessities, or based on individual performance or competence grounds. The employee would then have an opportunity to challenge the offered defense or to establish either that the proffered reason was pretextual or that the adverse action was actually based on the incompatibility of the results generated by the employee's investigations as judged from a political responsiveness, not a competence, perspective.[225]

The public interest in objective factual investigations in this category may also extend beyond those directly doing the investigating or reporting.[226] Supervisors and those who provide support for investigative teams, for example, may merit some degree of protection even if they are not directly engaged in production and assessment of information. In the supervisory or supportive instances, however, the public context question would not be as apparent, and therefore the initial presumption of competence and requirement of good cause might seem excessively protective. These public employees should be understood as providing an important public service by monitoring, facilitating, or assisting in agency investigations and reports. They have a role to play in ensuring the integrity of the

224. It may be appropriate to have some probationary period before this assumption applied, during which an employee could be fired without having resort to a hearing absent some other category of impermissible action by the employer.

225. Finally, the employer would have an opportunity to prove the existence of an overriding business justification that outweighs the public's interest. This burden-shifting approach mirrors those used in wrongful termination and discrimination cases. *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–03 (1973).

226. For example, although this section addresses employees engaged in factual investigations, a similar analysis can be applied to other public employees who are particularly susceptible to political or economic influence. For instance, employees in charge of hiring vendors or contractors for government projects may feel political and economic pressure in making their selections, and might require a similar set of job protections.

agency investigation process and thus warrant some job protections as a result. Unlike the investigator's protection, this would not mean automatic job protection; instead, the supervisory or supportive employee would have to demonstrate a nexus between the adverse employment action and the independence of factual investigations.

For example, a successful claim might be made where a mid-level supervisor, who had previously allocated funds to a group of E.P.A. scientists, was able to demonstrate that her dismissal occurred in anticipation of an unfavorable report by the E.P.A., where such a report would damage the interests of a politically well-connected developer working in the same area as the E.P.A. scientists. She would have to show her dismissal either was likely to derail or damage that investigation, or that her dismissal was intended to send a message to her peers which would likely deter or influence their supervisory responsibilities.[227]

4. Political Positions

Employees who perform political functions are in some ways the easiest and in some ways the most difficult category to address.

a. "Purely" Political Positions

"Purely" political positions are appointees who create policy, or are high-level supervisors of government agencies. Just as they are currently not entitled to civil service protection, under a public context analysis, these employees would receive no special job protections.[228] In the federal sphere, this result is mandated

227. Of course, departmental or agency heads could demonstrate in response that this was a competence issue, but the burden would be on them to do so.

228. Interestingly, First Amendment protections make a distinction between those situations where membership in a political party can be protected as speech versus those situations where policy-making duties make party affiliation an appropriate consideration for employment or continued employment. *See* Elrod v. Burns, 427 U.S. 347, 367–68 (1976).

to some extent by the Constitution.[229] The President has the constitutional right to remove "principal officers" at will.[230] Principal officers are defined as those officers nominated by the President and appointed with the advice and consent of the Senate.[231] However, Congress has the ability to limit the executive's ability to remove "inferior officers," if that limitation does not unduly interfere with his "exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed' under Article II."[232] The public context approach would consider the issue of job protection from a more substantive perspective that is not based on the formal distinction between the designations of principal and inferior. Rather, the basic premise of public context, which is that the public interest mandates there be some consideration of agency integrity in fashioning the rules of employment, must be tempered by the importance of ensuring political responsiveness at higher levels of administration.

Agencies and departments are part of the political apparatus of government and the executives who head them operate under a political mandate to affect policy. Part of their job description is that they are expected to direct agencies to further the political agenda of the administration that appointed them. These employees must adhere to the administration's political goals and their loyalty is to that administration and its objectives.

The category of purely political positions would include the typical high-level supervisors appointed by the executive, but may also include other employees who primarily create policy for the agency. The determining factor should not be the job title or method of appointment, but rather the nature of the employee's job—is it political or policy-related and does it require a great

229. Of course, the federal constitutional analysis does not apply to the states unless they have similar provisions in their state constitutions.

230. Morrison v. Olson, 487 U.S. 654, 689–90 (1988).

231. Buckley v. Valeo, 424 U.S. 130, 132 (1976). Congress can also choose to have certain inferior officers appointed by the President and confirmed by the Senate without those employees losing their status as inferior officers. *Id.*

232. *Morrison*, 487 U.S. at 690. *See also* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 117–18 (1994); Breker-Cooper, *supra* note 179, at 861.

deal of responsiveness to the administration's political concerns? If so, then their superiors should be able to make personnel decisions with respect to these employees at will.

Separating the employees for whom political responsiveness is a valid consideration from those for whom it is not raises some significant questions. These questions are now obscured in the use of the efficiency rhetoric to discuss responsiveness concerns. One value of addressing these issues in terms of the political context approach is that the real issues to be discussed are not hidden or disguised. The balance between responsiveness and agency integrity—between political prerogative and public good—should be explicitly confronted. This may be neither easy nor straightforward.

How far down the hierarchy do we want to privilege political responsiveness over agency integrity? When should someone in an agency hierarchy lose status as a political employee and become entitled to protections, and thereby advancing agency integrity and thus, the public interest?[233] Certainly there is a limit to how far down the political responsiveness should reach. Agencies need a protected class of employees in order to carry on the most mundane and routine tasks that are required to make the wheels of government turn.

b. Positions with Divided Loyalties

Not everyone will agree on the proper balance between political responsiveness and agency integrity, and there might be no single correct answer to this question. Some government agencies and departments may legitimately require more executive control than others. The U.S. Postal Service, for example, is relatively apolitical. Its mission and mode of operation should not change significantly from one administration to the next. Consequently, only the very highest-level supervisors and policy makers should be considered political employees. On the other hand, the Justice Department is an inherently more politicized institution and may require a broader

233. Perhaps undertaking this type of inquiry would have prevented, or at least minimized, the thickening of the upper levels of bureaucracy described in Part IV.B.2.

range of political positions.

Moreover, the appropriate degree of political responsiveness may vary over time, especially in relation to significant world events. For instance, after the terrorist attacks of September 11, 2001, a consensus emerged that there were significant shortcomings in the various security agencies that led to inadequate sharing of information and threat analysis. Given the increased urgency for threat prevention and the need to make changes to the agencies, it is arguable that those agencies had a greater need for political responsiveness at that time. But recognizing that this is a balance to be drawn considering the public context carries with it the additional realization that as context changes, so should the balance between political responsiveness and agency integrity.[234] The same level of responsiveness may well not be needed as a threat recedes.

The idea of looking at public context for assessing job protections is not far-fetched. A few years ago there was a great deal of public and political commentary when Attorney General Roberto Gonzales forced the mid-term resignation of nine U.S. Attorneys, one group of federal employees who clearly embody both the political and non-political dimensions of public employment. U.S. Attorneys are appointed by the President and are expected to be loyal to the administration, but they also have a concurrent duty to the dictates of the office they hold, and to be fair and just in applying the law.[235]

234. Legitimate concerns about responsiveness are easiest to see where political direction is most needed. For example, recent investigations suggest that the Minerals Management Service failed in its mission to regulate offshore oil refineries, and may be riddled with corruption, incompetence, or both. Ian Urbina, *Inspector General's Inquiry Faults Regulators*, N.Y. TIMES (May 24, 2010) *available at* http://nytimes.com/2010/05/25/us/25mms.html. Another example would be a police department determined to have substantial problems with corruption or abuse. In both situations, the public interest would best be served by weeding out the problem employees and getting the agency back on track as quickly as possible. Making substantial changes to an agency requires a high degree of political responsiveness. It is also easier to accomplish if the agency's employees do not have job protections. In these (admittedly drastic) scenarios, job protections may actually impede the public interest.

235. *See* James Eisenstein, *The U.S. Attorney Firings of 2006: Main Justice's Centralization Efforts in Historical Context*, 31 SEATTLE U. L. REV. 219, 221–26 (2008); David C. Weiss, *Nothing Improper? Examining Constitutional*

The administration's supporters argued that U.S. Attorneys are political appointees who should serve at the pleasure of the executive.[236] In what could be a model for a public context argument, critics of the dismissals argued that partisan dismissals "could affect the integrity and independence of the Department [of Justice's] prosecutorial decisions and the public's confidence that such decisions are insulated from political considerations."[237]

Under the public context approach, the primary analysis would not focus on the classification of this type of employee. Instead, we would ask what important public interest is served by these employees and what that interest demands in terms of job protection. If they were terminated for partisan reasons or because they resisted improper influence on their responsibility to justly and impartially apply the law, then the public interest clearly demands that they be given protection and the ability to challenge executive discipline undertaken for impermissible reasons.[238]

In the wake of the controversy, many commentators suggested that U.S. Attorneys be given some sort of job protection against politically motivated termination.[239] The

Limits, Congressional Action, Partisan Motivation, and Pretextual Justification in the U.S. Attorney Removals, 107 MICH. L. REV. 317, 349 (2008). *See generally* Christian M. Halliburton, *The Constitutional and Statutory Framework Organizing the Office of the United States Attorney*, 31 SEATTLE U. L. REV. 213 (2008) (discussing the roles and responsibilities of United States Attorneys).

236. *See* Eisenstein, *supra* note 235, at 261.

237. U.S. DEP'T OF JUSTICE, OFFICE OF PROF'L RESPONSIBILITY & OFFICE OF INSPECTOR GEN., AN INVESTIGATION INTO THE REMOVAL OF NINE U.S. ATTORNEYS IN 2006., at 330 (2008).

238. Interestingly, as the controversy over the resignations unfolded it revealed there was a normative consensus that removal for purely political reasons would be improper, even if it were legal. The administration first tried to explain its actions by indicating that the U.S. Attorneys were terminated on competence grounds, a charge they had to withdraw in light of recent performance evaluations and other evidence.

239. Any such remedy would have to be adopted by Congress. Such legislation would be constitutional under *Morrison v. Olson*, 487 U.S. 654 (1988). Justice Rehnquist, in his majority opinion, even used a functional analysis, asking whether a limitation on the removal power would interfere with the "President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed' under Article

protections could follow those in place for civil service employees, and provide for a due process hearing for claims of improper discipline brought by the federal employee before a special board. On the other hand, some commentators have suggested that adopting an "Accountability Model" would provide a more balanced approach: ensuring executive discretion as well as U.S. Attorneys' ability to administer justice impartially.[240] This model, which is based on independent counsel legislation,[241] would require submission of a report to the Committees on the Judiciary of the Senate and House of Representatives, which would include specified facts found and the ultimate grounds for the removal.[242] The report would be made public and the employee given the opportunity to challenge its assertions in court.[243]

The important objective underlying such suggestions is that there is a balance to be drawn between executive need for employee accountability concerns and the sometimes competing need for protection for political appointees making important decisions that affect the general public interest.[244] The public context approach applies some of these same concepts beyond U.S. Attorneys to public employment in general.

II." *Id.* at 689–90. The "faithfully executed" provision could form the standard for the limitation. Even if Congress could not prevent termination, it could require, at a minimum, that the administration give nonpartisan reasons for the termination, which would allow a challenge to those reasons as pretextual. Congress's role is related to the general proposition that Congress provides a political check in regard to executive power. In fact, Justice Scalia, the lone dissenter in *Morrison*, recognized the significance of this check to the point that he thought it unnecessary to provide any further protections. *Id.* at 711.

240. Weiss, *supra* note 235, at 357–59.

241. *See* 28 U.S.C. §§ 591–599 (2006). This was also the statute at issue in *Morrison*.

242. *See* Weiss, *supra* note 235, at 357.

243. Weiss, *supra* note 235, at 357–58.

244. Some commentators have picked up on the possibility of a position of conflicted loyalty and urged that while government attorneys owe a primary duty to the executive, when there is a conflict the duty to the public should prevail. *See* Note, *Government Counsel and Their Obligations*, 121 HARV. L. REV. 1409, 1415–16 (2008).

VII. CONCLUSION

Critiques extolling the superiority of a private business administration model over a legal bureaucracy were not new when they emerged in NPM literature in the latter part of the twentieth century. Similar criticisms had been circulating since the expansion of the administrative state in the mid-twentieth century, although the impetus toward reform did have unusual success in the last few decades.[245] Significantly, even in the wake of modern reform, complaints about public administration continue. While this might suggest that the reforms have not been successful,[246] it may also indicate that the stated reform objective—efficiency understood in terms of the need for managerial flexibility—was not the only, or even the primary, goal of those who continue to complain. Of course, current complaints may also indicate that reform has generated new problems and challenges for agency operation.[247] In fact, it seems that there is some truth to each of these speculations, which suggests that neither the traditional civil service system nor the modern reformers have the perfect solution. Instead, we need a balanced approach that is more responsive to a range of contemporary problems, such as the one offered in this article.

Part of the balanced approach represented by the public context idea should be to address the crisis in public employment on a symbolic level by rehabilitating the image of the public employee in political and public discourse.[248] Those who work in the public interest should be appreciated as public officers or officials, and not just employees. A call to public service from the highest levels of government, articulating the positive norms associated with the tradition of public service, could help

245. "The horror stories of lazy, inhumane, or powerful bureaucracies turning their political masters into dilettantes have been around for some time. Likewise, the tension between a legal-bureaucratic and a market-managerial approach to public administration, or the propagation of private business administration as an exemplary model for the public sector, is hardly new." Olsen, *supra* note 67, at 71.

246. Olsen, *supra* note 67, at 71.

247. *See supra* Part IV.B., for a description of the problems emerging in the wake of reform.

248. *Id.*

employee morale problems, as well as generate more interest in public employment on the part of young people.[249] Such statements, when forcefully and clearly made, would also stand as a challenge to the stereotype of public employees as lazy and inept. A personnel system that explicitly draws connections between public employment and public interests could be helpful in this project.

Political leaders have a responsibility to recognize that some public employees have an independent obligation to see that government work is carried out in accordance with public interest. Political rhetoric condemning public employment wholesale should be discouraged, and it should be made clear that there is a separation between judgments about individual public employees, which are based on competence, and those about public employees in general, which are more likely to be about issues of political responsiveness or desire for a small government.

The public context approach taken in this article makes it clear that there must be some formal legal protections surrounding certain aspects of public employment. While the full range of formal legal job protections now provided may not be necessary for everyone currently classified under the civil service system, there is a continuing need to provide some protections against abuse or overreaching in designing or assessing a comprehensive system of public personnel administration.[250] The public context approach moves beyond a mere classification of employees to consider the public interest as the central concern in granting employee protection. For this reason, a public context approach also may reach beyond current protections when there are public employees whose positions, in regard to the public interest and agency integrity, warrant more extensive protections based on the nature of the government services they perform.[251]

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249. President Obama has already called young Americans to public service. *See* Obama Commencement Address, *supra* note 139.

250. *See* discussion of U.S. Attorneys, *supra* Part VI.B.4.b.

251. *See supra* Part VI.B.3.