

# Privatizing Public Litigation

MARGARET H. LEMOS\*

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\* Robert G. Seaks LL.B. '34 Professor of Law, Duke University School of Law; Visiting Professor, Yale Law School (Fall 2014). © 2016, Margaret H. Lemos. Thanks to Rick Bierschbach, Joseph Blocher, Curtis Bradley, Elizabeth Chambliss, Guy Charles, David Freeman Engstrom, Barry Friedman, Jill Hasday, Harold Koh, Anita Krishnakumar, Aziz Huq, John Langbein, Marin Levy, Bill Marshall, Jon Michaels, Max Minzner, Rafael Pardo, Jed Purdy, Alex Reinhart, Dana Remus, Judith Resnik, Stewart Sterk, Adam Zimmerman, and workshop participants at Brigham Young University, Cardozo, University of Chicago, Duke, Minnesota, Vanderbilt, and Yale Law Schools, for illuminating conversations and helpful comments on earlier drafts. Thanks to Bill Clayman, and to both the Duke and Yale Law Libraries for invaluable research assistance.

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#### INTRODUCTION

Public litigation is being privatized as public entities turn to private actors to perform, and sometimes to pay for, litigation on behalf of the state and federal governments. Consider the following examples:

- The U.S. Department of Justice hires David Boies to lead antitrust litigation against the Microsoft Corporation.<sup>1</sup>
- The National Credit Union Administration (NCUA) hires two private law firms to represent it in litigation against large banks concerning toxic mortgage securities. One of those firms boasts “long-standing and continuous representation of the NCUA in various matters.”<sup>2</sup>
- Multiple states hire private attorneys to represent them in litigation against tobacco companies in exchange for a portion of the proceeds.<sup>3</sup>
- After the state attorney general refuses to sue, the Nevada governor creates a “Constitution Defense Fund,” supported by private donations, to pay for costs associated with prosecuting the state’s challenge to the Affordable Care Act (ACA).<sup>4</sup> Other states’ challenges to the ACA are handled, in part, by a private firm and financed by a private lobbying group.<sup>5</sup>
- Private citizens, many from out of state, bankroll a special prosecutor’s efforts to target topless bars in Memphis.<sup>6</sup>

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1. See Elisabeth Bumiller, *Public Lives; Readyng the Slingshot for a Modern Goliath*, N.Y. TIMES (June 12, 1998), <http://www.nytimes.com/1998/06/12/nyregion/public-lives-readyng-the-slingshot-for-a-modern-goliath.html>.

2. James V. Grimaldi & Alicia Mundy, *Nice Payday for ‘Toxic’ Work*, WALL ST. J. (Oct. 26, 2012, 12:46 PM), <http://www.wsj.com/articles/SB10001424052970203937004578076651157057278?mg=id-wsj>.

3. See Howard M. Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. DAVIS L. REV. 1, 17 (2000) (noting that “the state tobacco litigation was precedent-setting in the scale and prominence of its use of contingent fee lawyers”).

4. *Gibbons Sets Up ‘Constitution Defense Fund’ to Fight Health Reform*, LAS VEGAS SUN (Apr. 8, 2010, 4:04 PM), <http://lasvegassun.com/news/2010/apr/08/gibbons-sets-constitution-defense-fund-fight-health/>.

5. Charles Elmore, *Lobbying Group Picks Up Costs of Florida’s Health-Care Legal Challenge*, PALM BEACH POST (Feb. 19, 2011, 7:07 PM), <http://www.palmbeachpost.com/news/news/lobbying-group-picks-up-costs-of-floridas-health-c/nLqFxl/>.

6. Lawrence Buser, *Private Giving Tops \$300,000 in War on Topless Clubs*, COM. APPEAL (MEMPHIS, TENN.), Sept. 15, 1997, at A1.

- Ben & Jerry's ice cream company contributes \$1 from every purchase at certain locations to support the defense of Vermont's law requiring special labels for food containing genetically modified organisms. Ben & Jerry's recently committed to using non-GMO ingredients in its own products.<sup>7</sup>

Though these examples are all of recent vintage, the privatization of government litigation is not new.<sup>8</sup> Indeed, much of what appears as privatization today would have been taken for granted as a historical matter. Before we had a United States Department of Justice (DOJ), it was commonplace for private lawyers to handle the federal government's work.<sup>9</sup> And private prosecutions were once the norm in many jurisdictions.<sup>10</sup> Over time, however, our system "publicized" most litigation in the name of the government, shifting control from private actors to salaried public servants.

We are now witnessing at least a partial shift back as privatization becomes more prevalent, particularly at the state and local levels.<sup>11</sup> The trend coincides with a marked rise in the visibility and ambition of state attorneys general.<sup>12</sup> As government litigators aspire to do more, they are increasingly turning to private resources—both human and financial—to support their efforts.

Privatization in the litigation context also coincides with broader trends toward privatization more generally.<sup>13</sup> At least since the 1980s, state and federal

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7. *Ben & Jerry's Supports Vermont in GMO-Labeling Fight*, NBC NEWS (June 16, 2014, 5:32 PM), <http://www.nbcnews.com/news/us-news/ben-jerrys-supports-vermont-gmo-labeling-fight-n132571>.

8. For example, South Carolina hired a prominent private lawyer to represent the state before the Supreme Court in *Briggs v. Elliot*, a later companion case to *Brown v. Board of Education*. See RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 529–31 (rev. ed. 2004).

9. See Neal Devins & Michael Herz, *The Uneasy Case for Department of Justice Control of Federal Litigation*, 5 U. PA. J. CONST. L. 558, 559 (2003) (explaining that one of the primary purposes behind the creation of the DOJ was "to eliminate the reliance on private lawyers in litigation").

10. See *infra* notes 227–38 and accompanying text.

11. See *infra* Part I.B. This Article focuses on privatization of the government's work as litigator. It does not address privatization of the government's adjudicative functions. On the latter question, see Dana A. Remus & Adam S. Zimmerman, *The Corporate Settlement Mill*, 101 VA. L. REV. 129, 165–76 (2015); Judith Resnik, *The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure at 75*, 162 U. PENN. L. REV. 1793 (2014); Judith Resnik, *Opinion, Renting Judges for Secret Rulings*, N.Y. TIMES, Mar. 1, 2014, at A19.

12. See Margaret H. Lemos & Kevin M. Quinn, *Litigating State Interests: Attorneys General as Amici*, 90 N.Y.U. L. REV. 1229, 1235–36 (2015) (detailing the growing responsibilities, activism, and ambitions of state attorneys general).

13. The literature on privatization is vast and ever-expanding. For a small sampling, see JOHN D. DONAHUE, *THE PRIVATIZATION DECISION: PUBLIC ENDS, PRIVATE MEANS* (1989); GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY (Jody Freeman & Martha Minow eds., 2009); ELLIOTT D. SCLAR, *YOU DON'T ALWAYS GET WHAT YOU PAY FOR: THE ECONOMICS OF PRIVATIZATION* (2000); PAUL R. VERKUIL, *OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT* (2007); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003); Jon D. Michaels, *Privatization's Progeny*, 101 GEO. L.J. 1023 (2013); Symposium, *Public Values in an Era of Privatization*, 116 HARV. L. REV. 1211 (2003).

policymakers have embraced privatization as a way to cut costs and reduce the size of government. In the United States, privatization typically involves enlisting private actors to perform, on the government's behalf, functions that otherwise would be carried out by government employees.<sup>14</sup> Less intuitively, privatization also may entail a move from public to private financing for public goods and services.<sup>15</sup> Both types of privatization have been the subjects of extensive debate. On the performance side, advocates argue that outsourcing work to private firms is more efficient than relying on bloated government bureaucracies staffed by overpaid and unmotivated civil servants.<sup>16</sup> Critics question whether privatization is cheaper in practice, and contend that any efficiency gains come at an intolerable cost to democratic and programmatic accountability.<sup>17</sup> As for financing, privatization's proponents argue that many government services can and should be funded individually rather than collectively—that is, via user fees and the like rather than general taxes.<sup>18</sup> User fees allow governments to generate revenue while reducing taxes, and can send useful signals about the value of the services in question while ensuring that those who reap the benefits also absorb the costs.<sup>19</sup> Critics worry that citizens will be unwilling or unable to bear the expense of valuable government services, particularly when nonpayers can still enjoy many of the benefits.<sup>20</sup>

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14. See Metzger, *supra* note 13, at 1370 (describing the prevalent model of privatization in the United States as “government use of private entities to implement government programs or to provide services to others on the government’s behalf”).

15. See, e.g., Ronald A. Cass, *Privatization: Politics, Law, and Theory*, 71 MARQUETTE L. REV. 449, 461–62 (1988) (discussing “direct dollar choices”).

16. See Michaels, *supra* note 13, at 1034 (“Rank-and-file government workers are viewed [by privatization’s proponents] as receiving higher base pay and more generous benefits than their private-sector counterparts.” (footnote omitted)).

17. See Jody Freeman & Martha Minow, *Introduction: Reframing the Outsourcing Debates*, in GOVERNMENT BY CONTRACT, *supra* note 13, at 1, 4–5 (summarizing the major critiques of privatization). Some critics have cast the accountability critique in constitutional terms, arguing that privatization violates due process, the separation of powers, the Appointments Clause, or a freestanding “constitutional principle of accountability.” See Harold J. Krent, *The Private Performing the Public: Delimiting Delegations to Private Parties*, 65 U. MIAMI L. REV. 507, 511, 523–54 (2011) (describing the various constitutional arguments and emphasizing accountability). Constitutional challenges have had little success. See Ira P. Robbins, *The Impact of the Delegation Doctrine on Prison Privatization*, 35 UCLA L. REV. 911, 919–20 (1988) (“[T]he Supreme Court has not invalidated a private delegation since the New Deal era case of *Carter v. Carter Coal Co.* . . .”).

18. See Clayton P. Gillette & Thomas D. Hopkins, *Federal User Fees: A Legal and Economic Analysis*, 67 B.U. L. REV. 795 (1987).

19. See *id.* at 814 (noting that user fees can “lessen burdens that otherwise would be borne by taxpayers who derive little or no benefit from the service”); Milton Kafoglis, *User Fees as a Regulatory Tool*, in ADMINISTRATIVE CONFERENCE OF THE UNITED STATES: FEDERAL USER FEES, PROCEEDINGS OF A SYMPOSIUM 13, 17 (Thomas D. Hopkins ed., 1988) [hereinafter ACUS SYMPOSIUM] (arguing that user fees “generate incentives on the part of payees to monitor the efficiency of the operation of agencies”); Laurie Reynolds, *Taxes, Fees, Assessments, Dues, and the “Get What You Pay for” Model of Local Government*, 56 FLA. L. REV. 373, 397–429 (2004) (describing local governments’ increasing reliance on user fees and similar mechanisms to raise money while reducing or freezing taxes).

20. See Gillette & Hopkins, *supra* note 18, at 808 (cautioning against user fees for services that have the qualities of public goods).

Opponents also insist that some government goods and services are simply too fundamental to ration according to citizens' willingness and ability to pay.<sup>21</sup>

The privatization of public litigation warrants a place in these debates. Privatizing government litigation promises many of the same benefits, and threatens many of the same costs, as privatization in other contexts. In a sense, the question whether to rely on private attorneys to perform the government's legal work presents the same "make or buy" dilemma that governments—and private firms—regularly face. And the question whether private actors should be permitted or required to finance government litigation presents the same tradeoffs between allocative efficiency and distributive fairness that have been aired in the commentary on user fees. Understanding these questions, not as discrete policy dilemmas but as part of the broader privatization phenomenon, helps clarify the interests at stake and suggests useful avenues for normative assessment.<sup>22</sup>

As is true of privatization elsewhere, outsourcing the government's legal work may or may not be cost-effective, depending on the work in question and how the government selects and supervises private attorneys. Contracting out is easiest to defend on efficiency grounds when the government needs to expand its capacity in the short-term—to handle a temporary spike in litigation, for example, or for cases that require special expertise. Although private attorneys often have higher effective hourly rates than government attorneys, it may still be cheaper for the government to "buy" the necessary manpower on an as-needed basis than to "make" it in the form of a long-term, full-time employee. Matters are more complicated for work that recurs regularly. Here, competition is critical. In the absence of meaningful competition for government legal work, replacing government employees with private contractors may well increase the costs of public litigation.

Even if we could be sure that privatizing the performance of government litigation would be cheaper, important questions would remain. Generally speaking, outsourcing is most appealing in areas where ends matter more than means: "The more precisely a task can be specified in advance and its performance evaluated after the fact, the more certainly contractors can be made to

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21. See Reynolds, *supra* note 19, at 387 ("[I]f the service or infrastructure is deemed to provide an important benefit to the general welfare, dues will be an inappropriate revenue raising technique.")

22. For example, contingent-fee arrangements between state attorneys general and private counsel drew substantial academic attention in the wake of the multistate tobacco lawsuits. See, e.g., Daniel J. Capra et al., *The Tobacco Litigation and Attorneys' Fees*, 67 *FORDHAM L. REV.* 2827 (1999) (moderating a panel discussion on the policies and professional responsibility issues related to attorneys' fees in tobacco litigation); John C. Coffee, Jr., "When Smoke Gets in Your Eyes": *Myth and Reality About the Synthesis of Private Counsel and Public Client*, 51 *DEPAUL L. REV.* 241 (2001); David A. Dana, *Public Interest and Private Lawyers: Toward a Normative Evaluation of Parens Patriae Litigation by Contingency Fee*, 51 *DEPAUL L. REV.* 315, 323–28 (2001). Yet the commentary has tended to view such arrangements in isolation, rather than recognizing them as part of a broader set of practices involving private attorneys and private sources of financing for government litigation.

compete . . . .”<sup>23</sup> Relying on private actors to perform public work becomes more problematic when objective truth is elusive, or where value judgments and discretion reign. Government litigation is nothing if not discretionary. Particularly in a system dominated by settlements and plea bargains, the choices government litigators make about what claims to pursue and what remedies to seek carry profound consequences for the “law in action.” Privatization empowers private attorneys to exercise discretion on the public’s behalf. But private attorneys may bring different incentives, and different habits of practice, to their work for the government. For example, private attorneys may be more likely than salaried government employees to focus on maximizing financial penalties, or on winning cases at all costs. Competition for government contracts—while critical to cost-savings—may exacerbate those incentives by encouraging private attorneys to emphasize easily quantifiable indicia of effectiveness, such as win rates or dollars recovered. The consequence is that government litigation may be changed, not just cheaper, when private attorneys are involved.

On the question of financing, the privatization literature suggests the greatest need for caution in areas marked by substantial externalities and where distributive concerns are strongest. Both sets of considerations counsel against private funding in the litigation context. Private financing threatens to skew government litigation away from the public interest and toward the more narrow interests of donors.<sup>24</sup> By treating public litigation as an item up for sale, moreover, private financing diminishes the expressive value of public litigation, sapping its civic and moral import.

More broadly, both approaches to privatizing public litigation allow private actors to stand in the shoes of government, to exercise aspects of sovereign power. As such, litigation privatization triggers concerns about democratic governance that are familiar to the broader debates over the private role in government.<sup>25</sup> But this particular form of privatization also raises questions

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23. DONAHUE, *supra* note 13, at 79 (emphasis omitted).

24. Private financing is not the only way that private interests might influence government litigation, of course. See, e.g., Eric Lipton, *Lobbyists, Bearing Gifts, Pursue Attorneys General*, N.Y. TIMES, Oct. 29, 2014, at A1 (describing influence via lobbyists). Private financing is a particularly direct means of influence, however, and unlike lobbying and campaign contributions, it can be regulated without triggering serious First Amendment concerns. See *infra* notes 275–79 and accompanying text (discussing the relationship between private financing of government services and private financing of candidates’ campaigns).

25. As with privatization in other contexts, some aspects of litigation privatization have inspired constitutional challenges grounded in due process or the separation of powers. See, e.g., Martin H. Redish, *Private Contingent Fee Lawyers and Public Power: Constitutional and Political Implications*, 18 SUP. CT. ECON. REV. 77, 80–81 (2010) (arguing that contingent-fee arrangements between government and private attorneys violate the Due Process Clause). Courts have largely rebuffed such challenges, though due process challenges have found some traction in criminal cases. See *State v. Culbreath*, 30 S.W.3d 309 (Tenn. 2000) (sustaining a due process challenge to a prosecution led by a private attorney whose hourly fees were paid by a special interest group); see also *infra* note 98 (due process challenges to contingent-fee arrangements); *infra* note 244 (due process challenges to private prosecutors); *infra* note 262 (separation of powers challenges to contingent-fee arrangements); cf. *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 814 (1987) (using supervisory



unique to litigation concerning the purposes of public litigation and its relationship to purely private suits. Decades of scholarship have mapped the differences between public and private enforcement of the law.<sup>26</sup> Courts and policymakers likewise distinguish between public and private litigation in countless ways, treating them as distinct categories even in areas where they overlap. The core distinctions rest on the interests served and the incentives of those who serve them: Whereas private litigation typically seeks to vindicate the interests of the parties (and their attorneys), litigation by the government is supposed to promote the public interest.<sup>27</sup> Privatization upsets those distinctions, smuggling aspects of private litigation into litigation in the government's name. It therefore pushes us to think more carefully about what we expect from government litigation and how we ought to treat it.

This Article proceeds in four parts. Part I begins by sketching the characteristic attributes of public and private litigation, then introduces the possibility of merger—instances in which private actors participate in public litigation. The discussion focuses on two types of privatization. In one, private attorneys perform legal work on behalf of the government; in the other, private actors finance government litigation. Parts II (private performance) and III (private financing) examine the benefits and risks of each approach to privatization.

The particulars vary, but the net effect of both types of privatization is the same. Privatization makes public litigation more, well, *private*. Private attorneys and financiers imbue public litigation with private norms and direct it toward private goals. Though that consequence is important in its own right, it also suggests some of the longer term costs of privatizing public litigation. As Part IV explains, government litigation currently offers a path around the many—and mounting—obstacles that stand in the way of private litigation.<sup>28</sup> Privatization gives private interests access to that route, allowing them to make their way to court in the shoes of the government. The path may not stay open indefinitely, however. Opponents of private litigation are already expanding their focus to take in government litigants, arguing that limitations on private suits should be

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authority to forbid a private firm from prosecuting a contempt action on behalf of the government where the firm also represented one of the parties in a civil action); *People v. Eubanks*, 927 P.2d 310, 322 (Cal. 1996) (holding that private financing for a criminal prosecution created a conflict of interest for the district attorney requiring recusal under state law). *But see* *People v. Looney*, 145 N.E. 365, 367 (Ill. 1924) (“There is no rule which declares the private subscription of funds for the prevention, discovery, or prosecution of crime to be contrary to public policy.”).

26. *See infra* Part I.A. More recently, scholars have begun to explore areas where public and private litigation intersect. *See, e.g.*, David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 *YALE L.J.* 616 (2013); Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 *HARV. L. REV.* 486 (2012); Amanda M. Rose, *The Multienforcer Approach to Securities Fraud Deterrence: A Critical Analysis*, 158 *U. PA. L. REV.* 2173 (2010); Adam S. Zimmerman, *Distributing Justice*, 86 *N.Y.U. L. REV.* 500 (2011).

27. *See infra* Part IV.A.

28. *See, e.g.*, Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 *U. CHI. L. REV.* 623, 668–75 (2012) (describing challenges for private litigation, especially class actions).

applied to government actions as well.<sup>29</sup> To the extent that privatization blurs the lines between public and private litigation, it may also spell the end of legal rules and practices that treat government differently, cutting off access to courts for public and private interests alike.

### I. THE PRIVATE ROLES IN PUBLIC LITIGATION

Privatization can take various forms. At its extreme, privatization entails a shift from a fully public to a fully private model, as when a government sells off a state-owned enterprise.<sup>30</sup> In the United States, privatization typically results in hybrid arrangements in which private actors either finance the provision of services by public actors or deliver services that might otherwise be performed by government.<sup>31</sup>

Consider garbage collection—a favorite example of privatization buffs. A municipality that followed a public approach to garbage collection would purchase its own trucks and employ its own garbage collectors.<sup>32</sup> Citizens would pay for trash collection collectively, via taxes, and would receive the same level of service whether they wanted it or not. In a private model, by contrast, the government would leave garbage collection to the market. Individuals and households would engage private firms to pick up their trash and would pay them directly.

Between these two extremes lie a variety of arrangements in which public and private actors collaborate in the financing and delivery of public services. The most common type of public–private hybrid occurs when government outsources the performance of some government service to private actors.<sup>33</sup> In our garbage example, rather than buying garbage trucks and employing garbage collectors, a municipality might enter into a contract with one or more private firms to collect the city’s trash.

A different approach to privatization would combine public performance with private financing. Although public employees might do the work of garbage

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29. See Deborah R. Hensler, *Goldilocks and the Class Action*, 126 HARV. L. REV. F. 56, 57 (2012) (“It does not seem coincidental . . . that just when the battle in the United States against private class actions seems to have been won and just as American consumer protection advocates are turning their attention to public litigation, a new genre of attacks on state attorneys’ general suits is emerging, arguing that they are really class actions in disguise.” (footnote omitted)).

30. See DONAHUE, *supra* note 13, at 6 (“In other countries, privatization has been mostly a matter of selling off parts of an abundant stock of public assets.”).

31. See *id.* at 7–8.

32. The model sketched here is not fully public because the municipality is buying garbage trucks rather than creating them. For the sake of simplicity, the discussion here focuses on the public (or private) nature of government service delivery, bracketing questions related to the specific hardware itself.

33. See Michaels, *supra* note 13, at 1025 (describing government service contracting as “ubiquitous” and “mainstream”); Scott Shane & Ron Nixon, *In Washington, Contractors Take on Biggest Role Ever*, N.Y. TIMES (Feb. 4, 2007), <http://www.nytimes.com/2007/02/04/washington/04contract.html?pagewanted=all> (describing contracting out as “the government’s reflexive answer to almost every problem”).



collection, their efforts would be financed by private payments rather than tax revenues. For example, some cities require residents to buy special garbage bags if they wish to take advantage of municipal trash-collection services.<sup>34</sup> The bags are expensive, as the price reflects the costs of collection as well as the cost of the plastic itself. The upshot is that only those citizens who use the service pay for it, and they pay according to the volume of trash they produce.

Commentators have explored privatization across a range of government functions, including regulatory policymaking, prison administration, and military combat—to name just a few.<sup>35</sup> Yet privatization remains uncharted territory in the context of litigation. Although scholars have extensively analyzed the relationship between public and private litigation, few have focused on hybrid arrangements in which private actors perform, or pay for, litigation undertaken by the government.

A simple 2x2 matrix illustrates the possibilities:<sup>36</sup>

	<b>Collective/public payment</b>	<b>Individual/private payment</b>
<b>Public performance</b>	A. Public: government attorneys litigate cases on behalf of the government using resources drawn from tax revenues	C. Private financing: private individuals or groups donate money to support litigation by the government
<b>Private performance</b>	B. Private performance: government entities hire private attorneys to do legal work for the government	D. Private: private plaintiffs hire private attorneys to handle litigation on their behalf

The upper left quadrant (A) captures what most of us imagine when we think of public litigation: government attorneys—federal, state, or local—litigate cases on behalf of the government, using funds drawn from collective tax payments.<sup>37</sup> In contrast, the lower right quadrant (D) features private clients, private attorneys, and private financing. The remaining two quadrants combine aspects of public and private litigation, resulting in government litigation that is

34. See, e.g., *Curbside Trash Collection*, CITY OF PORTLAND, ME., [www.portlandmaine.gov/502/Curbside-Trash-Collection](http://www.portlandmaine.gov/502/Curbside-Trash-Collection) (last visited Oct. 1, 2015).

35. See, e.g., Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437 (2005); Freeman, *supra* note 13, at 636–57 (describing privatization of regulation); Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46 B.C. L. REV. 989 (2005).

36. The matrix below is adapted from DONAHUE, *supra* note 13, at 7 (mapping the possibilities for privatization more generally). This Article focuses on private interventions into government litigation, but does not address the converse—where government supports private litigation with subsidies or other financial support and/or through the work of government lawyers. Government intervention into private litigation is an interesting topic in its own right, but it is beyond the scope of this Article.

37. Cf. A. Mitchell Polinsky & Steven Shavell, *The Economic Theory of Public Enforcement of Law*, 38 J. ECON. LITERATURE 45, 45 (2000) (defining public enforcement of law as “the use of public agents (inspectors, tax auditors, police, prosecutors) to detect and to sanction violators of legal rules”).

either performed by private lawyers (B) or financed by private interests (C). The remainder of this Part describes each category in more detail. The discussion begins by outlining the differences between public and private litigation (that is, between quadrants A and D), then turns to alternatives in which public and private are merged. Tracking the labels of the matrix, section B describes scenarios in which government outsources legal work to private attorneys. Section C takes up the question of private financing for government litigation. Section C also considers cases in which private actors supply both legal work and funding—creating an action that would seem fully private but for the all-important detail of the government’s name on the caption.

#### A. THE PUBLIC/PRIVATE CHOICE

Who should enforce the law in court: private parties or public servants? In the United States, the answer has always been “it depends.” We rely on a mix of public and private litigation, though the balance has shifted over the years as private enforcement has gained prominence in some areas once dominated by government,<sup>38</sup> and has given way to public authority in other contexts.<sup>39</sup>

There is a rich literature on the relative strengths and weaknesses of public and private enforcement of the law.<sup>40</sup> The commentary builds from the recognition that litigation is a matter of choice. Litigants of all types—both governmental and private—decide whether to sue, what targets to pursue, what claims to assert, what remedies to seek, and so on. (Although the literature tends to focus on affirmative litigation, defensive litigation presents many of the same choices.) Litigation, in other words, vests litigants with significant discretion. How litigants exercise that discretion depends on who they are. Because public and private litigants have different incentives and capabilities, it stands to reason that they will lead public and private litigation down different paths.<sup>41</sup> The precise location of those paths, and the distance between them, will depend on a variety of contextual factors. This section sketches the conventional distinctions between government litigation and the private alternatives, and then discusses areas where the division blurs.

Standard economic theory predicts that private parties will sue if, and only if, the expected value of the litigation outweighs the expected costs. For private

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38. See SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* 6–16 (2010) (detailing the rise of private enforcement in late 20th century); Engstrom, *supra* note 26, at 627–29 (same).

39. See *infra* notes 227–38 and accompanying text (describing the shift from private to public responsibility for criminal prosecutions).

40. See, e.g., Gary S. Becker & George J. Stigler, *Law Enforcement, Malfeasance, and Compensation of Enforcers*, 3 J. LEGAL STUD. 1 (1974); William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1 (1975); A. Mitchell Polinsky, *Private Versus Public Enforcement of Fines*, 9 J. LEGAL STUD. 105 (1980).

41. See generally David Freeman Engstrom, *Private Enforcement’s Pathways: Lessons from Qui Tam Litigation*, 114 COLUM. L. REV. 1913 (2014) (describing conventional distinctions between public and private litigation and examining how the differences affect practice in one area of law).

litigants, the benefits of suit typically are private benefits: damages and/or injunctive relief that will benefit the plaintiffs personally.<sup>42</sup> The same assumption holds for private attorneys, most of whom will take a case only if the expected payoff exceeds the costs of the litigation, including the cost of foregoing other work.

A litigation system propelled solely by private incentives has significant limitations. One is that private actors may underinvest in socially beneficial litigation. Litigation produces various public goods; among other things, it deters wrongful behavior and contributes to an evolving body of precedent.<sup>43</sup> Private parties may not care much about general deterrence or law development, however, particularly if the litigants are “one shotters” who do not anticipate future encounters with the courts.<sup>44</sup> Thus, an injured citizen may decide not to sue if the costs of litigation exceed the available damages, or if the appropriate remedy is nonmonetary. And an attorney may decline a case if it threatens to gobble up time and resources while promising only a minimal payoff.<sup>45</sup> The social benefit of the suit may be substantial, but the stake to any individual may be too small to justify the cost.<sup>46</sup> There is reason to worry, then, that a purely private system would produce too little litigation.<sup>47</sup>

At the same time, private actors will tend to overinvest in socially wasteful litigation. Private parties (and attorneys) have ample incentives to litigate in areas where prevailing plaintiffs can recover large damages, for example. But

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42. See Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575, 579 (1997) (noting that private litigants are more concerned with personal benefits than social purposes).

43. See Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 99–104 (2005).

44. See Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC’Y REV. 95, 97 (1974) (distinguishing between repeat players and one-shotters).

45. See Margaret H. Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782, 790 (2011) (noting that “high litigation costs coupled with a low expected recovery can make finding a lawyer difficult indeed”).

46. See Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1214 n.72 (1982) (“When the social benefits of eliminating an unlawful activity are widely shared, the stake of any individual is often small and each individual can enjoy a ‘free ride’ on the enforcement efforts of others. As a result, no individual may have sufficient incentive to bring suit.”).

47. See Shavell, *supra* note 42, at 582 (explaining that “the social benefits of suit could be . . . greater than the private benefits, and thus that suit . . . might not be brought when it should be”). This concern, though conventional in the literature on public and private litigation, should not be overstated. It gives inadequate weight to mechanisms like the modern class action, which provide ways to manage free riders and aggregate small stakes so that they add up to something that promises an attractive attorney’s fee. It also ignores the reality of public interest law—a branch of litigation that is private in form but public in orientation. See *infra* note 71 and accompanying text. For a small taste of the literature on public interest lawyering, see ALAN K. CHEN & SCOTT L. CUMMINGS, *PUBLIC INTEREST LAWYERING: A CONTEMPORARY PERSPECTIVE* (2013); CAUSE LAWYERS AND SOCIAL MOVEMENTS (Austin Sarat & Stuart A. Scheingold eds., 2006); Scott L. Cummings & Deborah L. Rhode, *Public Interest Litigation: Insights from Theory and Practice*, 36 FORDHAM URB. L.J. 603 (2009); Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027 (2008). For an effort to make sense of public interest lawyering from an economic perspective, see BURTON A. WEISBROD ET AL., *PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS* (1978).

high damage awards do not necessarily correlate with effective deterrence. In some cases deterrence may be minimal, notwithstanding hefty damages, because “there is little injurers can do to reduce harm.”<sup>48</sup> In other areas, the penalty may exceed the harm, as where multiple or punitive damages are available. Although supracompensatory penalties often reflect efforts to economize on enforcement, they may induce financially motivated private parties to devote more resources to enforcement—which may, in turn, result in “overenforcement.”<sup>49</sup>

In short, a system in which private actors controlled all the levers of litigation would likely produce too little deterrence, and too much waste. As Steven Shavell famously put it, there is a “fundamental divergence between the private and the social motive to use the legal system.”<sup>50</sup> That divergence helps explain why our system relies on the government to perform and pay for certain important litigation functions.

Public litigation differs in important ways from the private analogue. Rather than focusing on private costs and benefits, public litigants are expected to consider the full consequences of suit, including effects on the court system, opposing parties, and third parties.<sup>51</sup> As a result, they can practice “discretionary nonenforcement,” abstaining from suits that might be profitable in the short term but promise little public payoff.<sup>52</sup> Whereas private litigation serves private interests, public litigation aims to vindicate the public interest.<sup>53</sup> That, at least, is the ideal.

Various institutional features work—albeit imperfectly—to tether government litigation to the public interest. To begin with, public attorneys usually are salaried government employees who do not stand to benefit in any direct, immediate way from a successful action. The lack of financial motivation allows them to focus on claims with the most significant impact, as opposed to the most lucrative.<sup>54</sup>

Like other lawyers, moreover, government attorneys are subject to ethical rules that demand zealous advocacy on behalf of their clients.<sup>55</sup> The clients in public litigation typically are government officials and institutions who are

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48. Shavell, *supra* note 42, at 578.

49. Landes & Posner, *supra* note 40, at 15 (describing the “overenforcement theorem”).

50. Shavell, *supra* note 42, at 575.

51. Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement*, 127 HARV. L. REV. 853, 897 (2014).

52. Landes & Posner, *supra* note 40, at 38.

53. See Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789, 789 (2000) (“It is an uncontroversial proposition in mainstream American legal thought that government lawyers have greater responsibilities to pursue the common good or the public interest than their counterparts in private practice . . .”).

54. Landes & Posner, *supra* note 40, at 15 (“In the case of public enforcement, [a] high fine need not be taken as a signal to invest greater resources in crime prevention, since the public enforcer is not constrained to act as a private profit maximizer.”).

55. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (1983) (“[A] lawyer shall abide by a client's decisions concerning the objectives of representation . . .”); *id.* R. 1.3 cmt. 1 (“A lawyer must also act

themselves duty-bound to serve the public interest.<sup>56</sup> And, in some cases, the only client is the public itself. When a government prosecutor decides to pursue charges against a criminal defendant, for example, or a state attorney general initiates affirmative litigation seeking to redress some harm to the state's citizens, there is no agency to act as intermediary between the public and the attorney. The attorney acts in the name of the state and its citizens, and her obligation is to the public generally.

The duties embodied in formal ethical rules are reinforced by institutional norms that emphasize government lawyering as public service. Many lawyers choose government work “out of a devotion to public service” and a belief that their work will promote the public good.<sup>57</sup> Those ideals are reflected in an inscription that rings the space outside the U.S. Attorney General's Office: “The United States wins its point whenever justice is done its citizens in the courts.”<sup>58</sup>

Perhaps most importantly, government litigators are subject to various democratic controls that are foreign to private litigation. Government litigants operate with set—and often quite limited—budgets, determined by legislative appropriations. Unlike their counterparts in private practice, they cannot borrow against the prospect of a successful suit and a large recovery.<sup>59</sup> Limited budgets mean that government litigators must pick their battles carefully. And the budgeting process means that decisions about the absolute level of government litigation are made, in part, by the people's representatives in the legislature and the White House.

Elected officials can also shape public litigation in other ways. The President appoints agency heads with the advice and consent of the Senate and, with the exception of independent agencies, can remove them at will.<sup>60</sup> Moreover, government litigation is marked by centralization within the executive branch, particularly at the federal level: the Department of Justice handles most litigation for the United States and its agencies.<sup>61</sup> Centralization helps ensure that public litigation adheres to a coherent set of guiding principles, and that those

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with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.”).

56. Bruce A. Green, *Must Government Lawyers “Seek Justice” in Civil Litigation?*, 9 WIDENER J. PUB. L. 235, 269 (1999) (“Whether one views the client as the government, a government agency or a government official, the client is distinctive in at least this respect: the client owes fiduciary duties to the public.”).

57. Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401, 1442 (1998); Berenson, *supra* note 53, at 830 (suggesting that “idealism, or a desire to serve the public interest, might indeed be a significant motivating factor in lawyers' decisions to seek work in public service”).

58. Memorandum from David W. Ogden, Deputy Att'y Gen., U.S. Dep't of Justice, to Dep't Prosecutors (Jan. 4, 2010), [www.justice.gov/dag/memorandum-department-prosecutors-0](http://www.justice.gov/dag/memorandum-department-prosecutors-0) (describing the inscription).

59. See Landes & Posner, *supra* note 40, at 36–37.

60. See Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1152 (2014) (linking appointment and removal procedures to notions of political accountability).

61. Devins & Herz, *supra* note 9, at 560.

principles reflect the current Administration's vision of the public interest.<sup>62</sup> Not surprisingly, studies show significant shifts in the enforcement efforts of federal agencies as presidential and congressional politics change.<sup>63</sup>

While there is less centralization in most state systems, there is more direct accountability. Whereas the federal Attorney General, U.S. Attorneys, and heads of DOJ's various divisions are political appointees, most state attorneys general and district attorneys are elected officials.<sup>64</sup> Such attorneys represent the public in a dual sense—politically as well as legally—and the prospect of periodic elections links their professional fortunes to the interests of their constituents.

The upshot of all this is not that public litigation is superior to private litigation, but that it is different. Public and private litigation empower different actors and promote different interests. Just as public interests would be ill-served by a purely private model of litigation, private interests would suffer if government litigation were the only game in town. Precisely because public and private interests often diverge, a system of litigation devoted to the public interest would leave many private harms without remedy, many private goals unmet.<sup>65</sup> The hard question for system designers is how to achieve an optimal mix of public and private litigation so as to leverage the strengths, and compensate for the weaknesses, of each model.

Although the differences between public and private litigation are critical—indeed, it is impossible to understand the privatization of government litigation without an appreciation of how public and private are likely to differ premerger—they should not be overstated. Every government agency is staffed and run by individuals with private goals and interests. Although government attorneys are sworn to serve the public interest, private considerations may influence how they exercise their considerable discretion. For example, government lawyers may worry about their future job prospects,<sup>66</sup> or they may shy away from

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62. *Id.* at 570; cf. Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293, 1295 (1987) (“Although the public interest as a reified concept may not be ascertainable, the Constitution establishes procedures for approximating that ideal through election, appointment, confirmation, and legislation.”).

63. See Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 718 n.84 (2011) (citing sources).

64. See Sara Sun Beale, *Prosecutorial Discretion in Three Systems: Balancing Conflicting Goals and Providing Mechanisms for Control*, in *DISCRETIONARY CRIMINAL JUSTICE IN A COMPARATIVE CONTEXT* 27, 32 (Michele Caianiello & Jacqueline S. Hodgson eds., 2015) (“Forty seven states elect their chief prosecutors.”); William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2448 n.3 (2006) (noting that forty-three states provide for popular election of the attorney general).

65. See generally Lemos, *supra* note 26 (raising concerns about the fate of private interests in representative litigation by state attorneys general).

66. See Tom McGinty, *Staffer One Day, Opponent the Next*, WALL ST. J., Apr. 5, 2010, at C1 (discussing the “revolving door” at the SEC); Olufunmilayo B. Arewa, *Risky Business: The Credit Crisis and Failure (Part III)*, 104 NW. U. L. REV. ONLINE 441, 449–50 (2010), <http://www.northwesternlawreview.org/online/risky-business-credit-crisis-and-failure-part-iii> (suggesting that “[c]oncerns about future career opportunities” influenced SEC official who declined to pursue enforcement action with respect to Allen Stanford’s alleged Ponzi scheme); see also Jonathan R. Macey & Geoffrey



important cases for fear of igniting political controversies,<sup>67</sup> focusing instead on low-stakes issues with relatively scant social benefit.<sup>68</sup> In other circumstances, political and reputational considerations might spur government attorneys—or the entities they represent—to take unduly aggressive action.<sup>69</sup>

The converse also is true, as private litigants and lawyers often work in service of public ends. The point is most obvious with respect to public interest firms,<sup>70</sup> which self-consciously select cases with an eye to the social benefit, and which often are funded by donations by like-minded citizens rather than the spoils of litigation.<sup>71</sup> Yet even for-profit litigation can be public-oriented. Indeed, the U.S. legal system relies heavily on litigation by private parties and attorneys to resolve disputes peacefully, develop bodies of precedent, and regulate primary behavior.<sup>72</sup> Because we recognize that private parties might not internalize the full social benefits of their litigation efforts—and therefore might have inadequate incentives to litigate—our system takes pains to encourage valuable private suits through sweeteners like damage enhancements, attorney-fee shifts, and the like.<sup>73</sup> Such provisions help support the work of so-called private attorneys general—private actors who pursue litigation in the public

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P. Miller, *Reflections on Professional Responsibility in a Regulatory State*, 63 GEO. WASH. L. REV. 1105, 1117–18 (1995) (describing government lawyers' incentives to engage in career building).

67. See, e.g., Tamar Frankel, *Let the Securities and Exchange Commission Outsource Enforcement by Litigation: A Proposal*, 11 J. BUS. & SEC. L. 111, 113 (2010) (arguing that “political pressure may thwart [SEC] accusations of large organizations and renowned defendants”); Judith Burns & Kara Scannell, *SEC Brings Fewer Enforcement Cases*, WALL ST. J., Oct. 27, 2006, at C3 (noting former SEC attorney’s allegations that supervisors refused to take testimony from a former Wall Street chief executive who “was a major fund-raiser for President Bush” and had “political connections and clout”).

68. See, e.g., Selmi, *supra* note 57, at 1444–45. In the securities realm, for example, critics have argued that the SEC tends to pursue relatively small targets, in part because “small cases settle fast, cost less, but show larger settlement or conviction numbers than one large case that is likely to bring about a tough fight with well-endowed large law firms and would last far longer.” Frankel, *supra* note 67, at 113; see also John C. Coffee, Jr., *Is the SEC’s Bark Worse Than Its Bite?*, NAT’L L.J., July 9, 2012, at 10, 10 (bemoaning the SEC’s apparent preference for small cases).

69. See Alon Harel & Alex Stein, *Auctioning for Loyalty: Selection and Monitoring of Class Counsel*, 22 YALE L. & POL’Y REV. 69, 106–07 (2004) (identifying predatory prosecution as a potential risk of public enforcement).

70. The term public interest law is increasingly contested, as lawyers pursuing conservative causes enter a field previously dominated by the political left. See CHEN & CUMMINGS, *supra* note 47, at 5–8; Ann Southworth, *What Is Public Interest Law? Empirical Perspectives on an Old Question*, 62 DEPAUL L. REV. 493, 494 (2013).

71. See Rhode, *supra* note 47, at 2053–58 (describing funding for public interest law firms).

72. See John C. Coffee, Jr., *Understanding the Plaintiff’s Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 669 (1986) (“Probably to a unique degree, American law relies upon private litigants to enforce substantive provisions of law that in other legal systems are left largely to the discretion of public enforcement agencies.”).

73. Margaret H. Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782, 785–95 (2011); see also Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1586 (2014) (linking the rise of private enforcement in the late 20th century to “the fact that Congress provided incentives that made certain types of litigation . . . promising opportunities for the investment of lawyers’ time and money”).

interest, often with no prospect of direct personal gain.<sup>74</sup> Even sweeter are the *qui tam* provisions of the False Claims Act, which empower private plaintiffs to sue private defendants for fraud against the United States and to keep a portion of the proceeds.<sup>75</sup>

Thus, public and private efforts may at times converge as private litigants pursue public goals. Such public-spirited private litigation raises difficult questions about whether and to what extent we should empower private actors to vindicate the interests of a public they do not formally represent.<sup>76</sup> But government litigation remains in the background, capable of filling in where private efforts fall short, or—in many areas—altering or even ending private litigation that government officials deem to be misguided.<sup>77</sup>

Privatization, as the term is employed here, is different.<sup>78</sup> Privatization entails more than an overlap between public and private; it is a *fusion* of the two, with private actors and private interests participating in litigation in the name of the government.

#### B. PRIVATE PERFORMANCE

The lower left quadrant of the matrix introduces the first approach to privatization, whereby private attorneys perform some aspect of litigation on behalf of

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74. See generally William B. Rubenstein, *On What a "Private Attorney General" Is—And Why It Matters*, 57 VAND. L. REV. 2129 (2004) (discussing the possible benefits of private attorneys general).

75. See David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 COLUM. L. REV. 1244 (2012). *Qui tam* suits may be viewed as part of the privatization phenomena I explore here. Such suits differ in one important respect, however: although *qui tam* relators are authorized to sue on behalf of the United States, they do not litigate as the government itself. As the Supreme Court has explained, the False Claims Act “can reasonably be regarded as effecting a partial assignment of the Government’s damages claim.” *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773 (2000). Thus, although *qui tam* suits serve to vindicate the interests of the United States (and the United States takes the lion’s share of the recovery), relators also “are suing to vindicate their own rights.” Redish, *supra* note 25, at 97; see also *Vt. Agency*, 529 U.S. at 772 (“[T]he statute gives the relator himself an interest in the lawsuit . . .” (emphasis omitted)). Moreover, “the very nature of the process makes formally clear to anyone concerned that a private actor motivated by financial concerns, in addition to the government, is a party to the suit against the private defendant.” Redish, *supra* note 25, at 98.

76. See, e.g., Frank B. Cross, *Rethinking Environmental Citizen Suits*, 8 TEMP. ENVTL. L. & TECH. J. 55, 58–64 (1989) (raising practical and constitutional concerns about citizen-suit provisions of environmental laws).

77. Engstrom, *supra* note 26, at 623 (“[M]any of our most consequential regulatory regimes have evolved in recent decades into hybrids of public and private enforcement in which multiple enforcers—including federal and state administrative agencies, private litigants, and state attorneys general—operate and interact within complex ecologies of enforcement.”).

78. Some scholars have used similar terminology to describe our system’s growing reliance on private litigation to vindicate public ends. See, e.g., Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432 (1988). Such private litigation is public in some senses—it is public-serving, and it involves public law. The term public litigation is employed here in a more limited sense, to refer to litigation in the government’s name. Privatization, in turn, refers to the private roles in such litigation.

the government.<sup>79</sup> At the federal level, for example, the Federal Deposit Insurance Corporation regularly contracts with private attorneys to handle the agency's litigation work with respect to failing banks.<sup>80</sup> Similarly, the DOJ contracts with private attorneys to litigate claims regarding nontax debts owed to the United States.<sup>81</sup> Both arrangements tend to involve long-term contracts in which private firms handle a bundle of cases. In other instances, government agencies reach out to private counsel to help with a specific case, as when DOJ's antitrust division hired David Boies to litigate the blockbuster antitrust case against Microsoft.<sup>82</sup>

The federal government's arrangements with private counsel are governed by a complicated overlay of constitutional provisions, statutes, regulations, and executive guidance that prohibit agencies from contracting out "inherently governmental functions."<sup>83</sup> The Federal Activities Inventory Reform (FAIR) Act defines that term to include functions "so intimately related to the public interest as to require performance by Federal Government employees."<sup>84</sup> The Office of Federal Procurement Policy has interpreted the FAIR Act to preclude outside contracts for the "control of prosecutions" and the "[r]epresentation of the government before administrative and judicial tribunals, unless a statute expressly authorizes the use of attorneys whose services are procured through contract."<sup>85</sup> The upshot is that outsourcing requires both legislative authoriza-

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79. It bears emphasis that the lines dividing the four cells of the matrix are more porous in reality than they appear on paper. For example, "in many small towns it is not uncommon for many governmental lawyering functions to be performed by private attorneys acting on a part-time basis." David B. Wilkins, *Rethinking the Public-Private Distinction in Legal Ethics: The Case of "Substitute" Attorneys General*, 2010 MICH. ST. L. REV. 423, 429. It is not entirely clear whether part-time government attorneys should register as public or private as a formal matter, or what kinds of relationships with government are required to move attorneys from the contractor to employee box. This Article does not attempt to resolve the difficult questions of categorization that may arise at the borders of privatization, though the analysis here should help illuminate the relevant normative considerations.

80. William V. Luneburg, *Contracting by the Federal Government for Legal Services: A Legal and Empirical Analysis*, 63 NOTRE DAME L. REV. 399, 451-52 (1988).

81. See 31 U.S.C. § 3718(b)(1)(A) (2012) ("The Attorney General may make contracts retaining private counsel to furnish legal services, including representation in negotiation, compromise, settlement, and litigation, in the case of any claim of indebtedness owed the United States.").

82. See Bumiller, *supra* note 1.

83. Federal Activities Inventory Reform (FAIR) Act of 1998, Pub. L. No. 105-270, § 5(2), 112 Stat. 2382, 2384.

84. *Id.* § 5(2)(A). That definition includes activities that require "either the exercise of discretion in applying Federal Governmental authority or the making of value judgments in making decisions for the Federal Government" so as "to bind the United States to take or not to take some action" or "to significantly affect the life, liberty, or property of private persons." *Id.* § 5(2)(B)(i, iii).

85. Notice of Policy on Performance of Inherently Governmental and Critical Functions, 76 Fed. Reg. 56,227, 56,240, 56,241 (Office of Mgmt. & Budget Sept. 12, 2011) (effective Oct. 12, 2011). The FAIR Act does not apply to private attorneys who are hired on a temporary basis as "special government employee[s]." 18 U.S.C. § 202 (2012) (defining "special government employee" to mean an employee hired to perform "temporary duties" for up to 130 days during any 365-day period). David Boies held that designation when he led the Microsoft litigation for DOJ, as have other private lawyers who have worked for DOJ on more recent cases. See Melissa Lipman, *DOJ Adds Munger Tolles*

tion and sufficient oversight by government officials so that private attorneys cannot be said to exercise final, independent authority to “bind” the United States.<sup>86</sup> The Office of Legal Counsel has taken the position that such oversight also is required by the Appointments and Take Care Clauses.<sup>87</sup> The test is formal and easily satisfied: it focuses on the government’s reservation of ultimate authority and “eschews any weighing of the functional importance of the private [attorney’s] role” or “pragmatic evaluation of how influential [a private attorney] may be.”<sup>88</sup>

Private attorneys play an even greater role in public litigation at the state and local levels, where budgets tend to be more limited and the regulatory framework governing outsourcing even more permissive. State attorneys general routinely hire outside counsel to handle aspects of the state’s litigation work. For example, in 2011 the Kansas Attorney General announced that he had hired the largest private firm in the state to help defend against lawsuits challenging new state laws related to licensing abortion clinics and distributing healthcare funding. The arrangement came under fire after it was reported that the firm, which charges upwards of \$300 per hour of attorney work, also represents the Koch brothers.<sup>89</sup>

In many cases, outside counsel works for the state on a contingency basis.<sup>90</sup> Contingent-fee arrangements between private attorneys and state attorneys gen-

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*Partner to AT&T Merger Team*, LAW360 (Nov. 22, 2011, 4:55 PM), <http://www.law360.com/articles/287955/doj-adds-munger-tolles-partner-to-at-t-merger-team> (describing DOJ’s reliance on private lawyers in major antitrust cases). Special government employees are subject to less restrictive rules governing salary and compensation, nonfinancial conflicts of interest, and so on. *See* 18 U.S.C. §§ 203–209 (2012); Luneburg, *supra* note 80, at 464–65.

86. *See* FAIR Act of 1998 § 5(2)(B)(iii).

87. Memorandum from William P. Barr, Assistant Att’y Gen., Office of Legal Counsel, to Gen. Counsel, Justice Mgmt. Div., at 97 (Apr. 27, 1990) (“Properly appointed federal officials must maintain both legal and effective control over the direction of United States policy . . . .”) (on file with author). *But cf.* Memorandum from Walter Dellinger, Assistant Att’y Gen., Office of Legal Counsel, to the Gen. Counsels of the Fed. Gov’t, at 143 n.53 (May 7, 1996) (disavowing the stronger position, taken in earlier memoranda, that any person representing the United States in court must be appointed pursuant to the Appointments Clause). The Supreme Court’s decision in *Morrison v. Olson*, 487 U.S. 654 (1988), offers a sense of the level of control required by Article II. There, the Court rejected a challenge to the role of independent counsel, as an “inferior officer,” notwithstanding that “she possesses a degree of independent discretion to exercise the powers delegated to her under the [Independent Counsel] Act,” including the “full power and independent authority to exercise all investigative and prosecutorial functions of the Department of Justice.” *Id.* at 671. The Court emphasized that independent counsel was subject to removal by the Attorney General, empowered to perform “only certain, limited duties,” and her “office is limited in jurisdiction.” *Id.* 671–72.

88. Krent, *supra* note 17, at 542–43 (describing federal statutory and constitutional limits on privatization generally).

89. Jan Biles, *AG Defends Outside Counsel Decision*, TOPEKA CAPITAL-J. (July 15, 2011, 3:31 PM), <http://m.cjonline.com/news/2011-07-15/ag-defends-outside-counsel-decision#gsc.tab=0>.

90. Contingent-fee arrangements are less common at the federal level, where an Executive Order prohibits the hiring of private counsel on a contingency basis. *See* Exec. Ord. No. 13433, 3 C.F.R. 13,433 (2007). The order exempts attorneys hired to assist the government in the recovery of nontax debts under sections 3178 and 3711 of Title 31, United States Code. *See infra* notes 146–49 and accompanying text (describing contingent fees in the debt-collection context); *see also* Grimaldi & Mundy, *supra* note 2 (describing contingent-fee arrangements between private firms and the National

eral became headline news in the 1990s when the states inked a landmark \$206 billion settlement with the major tobacco companies. Many of the states had turned to private counsel to handle their share of the legal work, and some of those attorneys took home jaw-dropping sums in fees.<sup>91</sup> More recently, states have used private contingent-fee counsel to perform government work in suits against lead-paint producers, poultry companies, and HMOs, among others.<sup>92</sup>

Attorneys general are not the only state officials who use outside counsel, including contingent-fee lawyers. State pension funds play an active role in securities litigation, for example, often serving as lead plaintiff. Increasingly, the states are represented by private law firms working for contingent fees.<sup>93</sup> Those firms are selected by officials like state comptrollers and treasurers, with the consequence that state treasurers now enjoy generous campaign contributions from law firms hoping to cash in on lucrative legal work.<sup>94</sup>

Contracting out is also common at the local level. In the wake of the Deepwater Horizon oil spill, for example, several Louisiana cities hired contingent-fee private counsel to help them pursue claims against BP. Perhaps more surprisingly, cities and towns often rely on private attorneys to handle criminal prosecutions. One city recently hired a private law firm to prosecute municipal code violations at \$180 per hour; another paid a private firm a flat fee of \$201,700 for a year's worth of prosecutions in municipal court; and a third paid a private firm to handle certain criminal appeals for \$300 per case.<sup>95</sup>

State law on contracting out government work is relatively undeveloped as a general matter,<sup>96</sup> though some states have adopted statutes governing contingent-fee arrangements.<sup>97</sup> And, while state courts have indicated that such arrangements would run afoul of constitutional limits if used in criminal prosecutions, they have generally condoned other approaches to outsourcing state and local litigation, provided that government officials retain ultimate authority over the

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Credit Union Administration, which, as an independent agency, claims an exemption from the executive order).

91. See Robert A. Levy, *The Great Tobacco Robbery: Hired Guns Corral Contingent Fee Bonanza*, LEGAL TIMES, Feb. 1, 1999, at 27, 27 (reporting that some private attorneys earned contingent fees equal to more than \$105,000 an hour).

92. See Mark A. Behrens & Andrew W. Crouse, *The Evolving Civil Justice Reform Movement: Procedural Reforms Have Gained Steam, but Critics Still Focus on Arguments of the Past*, 31 U. DAYTON L. REV. 173, 177–78 & nn.26–29 (2006) (describing various contingent-fee arrangements between state attorneys general and private counsel); Adam Liptak, *A Deal for the Public: If You Win, You Lose*, N.Y. TIMES, July 9, 2007, at A10 (same).

93. Coffee, *supra* note 22, at 242–43.

94. *Id.* at 244.

95. Roger A. Fairfax, Jr., *Delegation of the Criminal Prosecution Function to Private Actors*, 43 U.C. DAVIS L. REV. 411, 417 & nn.17–19 (2009).

96. Ellen Dannin, *Red Tape or Accountability: Privatization, Public-ization, and Public Values*, 15 CORNELL J.L. & PUB. POL'Y 111, 142 (2005) (noting that “most states lack any regularized oversight of contracting”).

97. See *infra* notes 157–58 and accompanying text.

course and conduct of the case.<sup>98</sup> Like the federal rules described above, the states' approach has tended to be more formal than functional. For example, state courts presented with challenges to contingent-fee arrangements have focused on the language of the relevant contracts to satisfy the requirement of public control rather than delving into the details of the relationship between public and private attorneys.<sup>99</sup>

### C. PRIVATE FINANCING

A different kind of privatization is reflected in the upper right quadrant of the matrix: arrangements in which private interests finance litigation by public actors.<sup>100</sup> Private financing may be case specific or for a certain type of litigation, and payments may be solicited by the government or volunteered by donors. In Philadelphia, for example, the District Attorney established a non-profit corporation to accept contributions for a variety of purposes, including financing certain prosecutions.<sup>101</sup> In another much remarked case, people from all over the country sent donations to help defray the costs of prosecuting Susan Smith for the murder of her two young sons after media reports suggested that the county might not be able to afford a death penalty prosecution.<sup>102</sup> More recently, several states have turned to private funding to support costly litigation efforts in defense of state law or states' rights against the federal government.<sup>103</sup>

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98. Courts have reasoned in dicta that contingent-fee arrangements are impermissible in criminal cases because of the conflict between the private attorney's financial interest and the imperative of prosecutorial neutrality. *See, e.g.,* *Cnty. of Santa Clara v. Superior Court*, 235 P.2d 21, 31 n.7 (Cal. 2010) ("It . . . seems beyond dispute that due process would not allow for a criminal prosecutor to employ private cocounsel pursuant to a contingent-fee arrangement that conditioned the private attorney's compensation on the outcome of the criminal prosecution."); *State v. Lead Indus. Ass'n.*, 951 A.2d 428, 475 n.48 (R.I. 2008) ("[W]e are unable to envision a criminal case where contingent fees would ever be appropriate . . ."). Those same courts have rejected challenges to the government's use of contingent-fee arrangements in civil cases. *See Cnty. of Santa Clara*, 235 P.2d at 36 (holding that "retention of private counsel on a contingent-fee basis is permissible in [most civil] cases if neutral, conflict-free government attorneys retain the power to control and supervise the litigation"); *Lead Indus. Assn.*, 951 A.2d at 475. Courts have likewise held that private attorneys may participate in criminal prosecutions on a noncontingency basis, though most have insisted that government attorneys maintain formal control. *See infra* notes 243–44.

99. *See Leah Godesky, State Attorneys General and Contingency Fee Arrangements: An Affront to the Neutrality Doctrine?*, 42 COLUM. J.L. & SOC. PROBS. 587, 615 (2009); *see also Cnty. of Santa Clara*, 235 P.2d at 40–41 (emphasizing contractual language stating that government attorneys "retain final authority over all aspects of the [l]itigation").

100. Line-drawing can be complicated here, too. *See, e.g.,* *People v. Eubanks*, 927 P.2d 310, 317–21 (Cal. 1996) (struggling to distinguish between improper private financing of prosecution and conventional forms of assistance by victims).

101. Joseph E. Kennedy, *Private Financing of Criminal Prosecutions and the Differing Protections of Liberty and Equality in the Criminal Justice System*, 24 HASTINGS CONST. L.Q. 665, 668 (1997).

102. Rebecca A. Pinto, Note, *The Public Interest and Private Financing of Criminal Prosecutions*, 77 WASH. U. L.Q. 1343, 1346 n.11 (1999).

103. *See* Elmore, *supra* note 5 (describing private financing for state challenges to the ACA); Miriam Jordan, *Donors Send Millions to Defend Arizona Law*, WALL ST. J. (Oct. 26, 2010, 12:01 AM), <http://www.wsj.com/articles/SB10001424052702304248704575574461341942940?alg=y&mg=id-wsj> (reporting that Arizona had collected more than \$3.6 million of private donations to help defend its



Such payments are part of a larger category of voluntary, private gifts to government.<sup>104</sup> Gifts to government are much like voluntary tax payments, but with one important difference: unlike taxes, voluntary donations can sometimes be earmarked by citizens for particular uses. Various states have statutes explicitly authorizing the Attorney General to receive gifts “[f]or the purpose of performing any functions, duties, or responsibilities of the office of the Attorney General.”<sup>105</sup> Other state statutes provide in more general terms that, if a donor files a “written designation of the fund or appropriation he desires to benefit . . . , his donation shall be credited accordingly.”<sup>106</sup>

Earmarking is complicated at the federal level by laws designed to channel all funding through the general treasury and the congressional budgeting process. The Miscellaneous Receipts Act requires federal agencies to turn over any funds to the general treasury,<sup>107</sup> and the Anti-Deficiency Act prohibits agencies from expending funds in excess of their legislative appropriations.<sup>108</sup> Together, those statutes would appear to prevent federal agencies from using private donations to support their operations—whether litigation-related or otherwise—in the absence of congressional authorization.<sup>109</sup> Importantly, however, both limitations are subject to statutory override.<sup>110</sup> Congress has provided that the Attorney General may accept gifts on behalf of DOJ “where the donor intends to donate property for the purpose of preventing or controlling the abuse

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controversial immigration law); *see also* IDAHO CODE ANN. § 18-510 (West 2015) (creating a “pain-capable unborn child protection act litigation fund,” which may include private gifts, “for the purpose of providing funds to pay for any costs and expenses incurred by the state attorney general in relation to actions surrounding defense of [state abortion law]”).

104. Gifts to government institutions must be distinguished from gifts to government employees or officials, which are prohibited. *See, e.g.*, Richard Rifkin, *Gift Giving in the Public Sector*, in *ETHICAL STANDARDS IN THE PUBLIC SECTOR* 249, 249–55 (Patricia E. Salkin ed., 2008). Gifts to government institutions are not only permitted, but are encouraged via tax deductions. *See* I.R.C. § 170(3)(c)(1) (2012) (providing that gifts to state and federal government are tax deductible, so long as they are made for “exclusively public purposes”).

105. ALA. CODE § 36-15-4.1 (2015); *see also, e.g.*, COLO. REV. STAT. § 24-31-108(1)(b)(I) (West 2015) (“The department of law is authorized to solicit, accept, and expend gifts, grants, and donations from public and private sources for the purposes of this article [describing exceptions to the general powers and duties of the Attorney General] . . . .”); OKLA. STAT. tit. 74, § 19.1 (2015) (creating an “Attorney General’s Law Enforcement Revolving Fund” which consists of gifts (among other things) and is available to be “expended by the Attorney General for the purposes of investigation, enforcement and prosecution of cases involving [state and federal] criminal and forfeiture laws”). Some states have more targeted gift funds. *See, e.g.*, NEV. REV. STAT. § 228.290 (2015) (establishing a unit to prosecute offenses against older persons and providing that “[t]he Unit may . . . accept gifts . . . or donations to assist the Unit in carrying out its duties”); N.H. REV. STAT. ANN. § 21-M:8-m (2015) (creating a cold case homicide unit and related fund, which may include donations); UTAH CODE ANN. § 67-5-24 (West 2015) (creating a special fund for the attorney general to spend on the prevention of crime and violence and providing that “[t]he fund shall consist of gifts, grants, devises, donations, and bequests of real property, personal property, or services, from any source, made to the fund”).

106. CAL. GOV’T CODE § 16302 (West 2015).

107. 31 U.S.C. § 3302(b) (2012).

108. 31 U.S.C. § 1341(a)(1)(A) (2012).

109. Kate Stith, *Congress’ Power of the Purse*, 97 *YALE L.J.* 1343, 1372 (1988).

110. *Id.* at 1368 (describing statutory “gift authority” enjoyed by many agencies).

of controlled substances.”<sup>111</sup> Another statute provides that “[t]he Attorney General may accept, hold, administer, and use gifts, devises, and bequests of any property or services for the purpose of aiding or facilitating the work of the Department of Justice.”<sup>112</sup>

The federal government also benefits from private largesse in ways that fall outside the ambit of the Miscellaneous Receipts Act and the Anti-Deficiency Act. For example, when the Justice Department hired David Boies to lead the Microsoft litigation, the government paid \$250 an hour—a bargain compared to Boies’s normal rate. Boies told a reporter that he expected his total bill to the Justice Department would total around \$100,000. For a corporate client, he said, “I would have added at least a zero.”<sup>113</sup> Boies’s willingness to offer the government a discount may not be covered by the Miscellaneous Receipts or Anti-Deficiency Acts, but it is nevertheless a valuable gift.

As the Boies case suggests, in some circumstances private actors both finance and perform government litigation. Although Boies did not provide any direct funding for the suit against Microsoft, his decision to charge the DOJ less than half his normal hourly fee saved the government hundreds of thousands of dollars. Contingent-fee arrangements like those described above also should be understood as instances of private financing as well as private performance, because the private attorney fronts the costs of the litigation and collects nothing unless the suit is successful.<sup>114</sup> Indeed, the cost-shifting advantages of contingent-fee arrangements are one of their major selling points. Such arrangements allow cash-strapped government agencies to take advantage of top legal help at no immediate cost to taxpayers.<sup>115</sup> In effect, a contingent-fee arrangement operates as a forgivable loan—which is, of course, a form of financing.

An even more obvious melding of financing and performance occurs when private donors pay private attorneys to perform litigation on behalf of the government. For example, some states allow the victim of a crime to hire a private attorney to prosecute the offender in the name of the state.<sup>116</sup> A somewhat different arrangement emerged in the late 1990s in Memphis, Tennessee, when the district attorney appointed a special prosecutor—Larry Parrish, a former Assistant U.S. Attorney who had developed a reputation as a crusader

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111. 21 U.S.C. § 871(c) (2012).

112. 28 U.S.C. § 524(d) (2012).

113. Bumiller, *supra* note 1.

114. *See* Wilkins, *supra* note 79, at 433 (noting that “[c]ontingent fee contracts typically shift some or all of [the significant up-front costs and expenses] to the outside lawyers”).

115. *See* John C. Coffee Jr., *SEC Enforcement: What Has Gone Wrong?*, NAT’L L.J., Dec. 3, 2012, at 23, 24 (arguing that SEC should “retain private counsel on a contingent-fee basis in those large cases that it cannot staff adequately itself” because doing so would “allow[] the SEC to acquire highly experienced trial counsel for big cases (without having to pay their salaries for the long term) . . . [and] economize[] on the SEC’s budget by paying the attorney fees only out of any recovery obtained”).

116. *See* Michael Edmund O’Neill, *Private Vengeance and the Public Good*, 12 U. PA. J. CONST. L. 659, 689–99 (2010) (describing private prosecutions in Alabama, Georgia, Indiana, New Jersey, New York, Ohio, Pennsylvania, Tennessee, Vermont, Virginia, West Virginia, and Wisconsin).

against pornography—to spearhead the city’s efforts to shut down topless bars.<sup>117</sup> Parrish’s salary and expenses were paid by private individuals and groups. One contributor explained:

“I feel that those types of clubs . . . erode our society” . . . . “I think we as citizens need to do whatever we can do to help, and I knew if I gave money for this cause, it would go for this cause and not for something else. We’re government by the people, and obviously I’m part of that government.”<sup>118</sup>

Similar arrangements are prevalent on the civil side as well, perhaps because the simplest way for citizens to finance government litigation is to pay private attorneys to do the work. The recent multistate challenge to the federal Affordable Care Act is an example. The states’ suit was bankrolled in part by the National Federation of Independent Businesses (NFIB), a private lobbying group (and another plaintiff in the case), which paid a private firm to handle most of the legal work.<sup>119</sup> Although it is unclear just how much NFIB spent on the states’ behalf, the amount is likely to have been substantial. Shortly after the states won a victory in the district court, Florida’s Attorney General Pam Bondi told lawmakers that NFIB had “dedicated a tremendous amount of resources to the lawsuit,” and her predecessor, Bill McCullom—who spearheaded the states’ challenge—acknowledged that “NFIB is paying for the bulk of the outside counsel.”<sup>120</sup>

Scenarios in which private actors both perform and pay for government litigation highlight a critical feature of privatization in the litigation context. In most other areas, the combination of private performance and financing would result in arrangements that register as fully private. For example, most observers would refer to a system in which private citizens pay private firms to collect their trash as a private system of garbage collection. Litigation is different. Because the client is still the government—and, as the case caption reflects, the litigation proceeds in the name of the state or federal government, or some arm of it—it is possible to have formally public litigation that is driven by private actors. The remainder of this Article explores the consequences.

## II. PRIVATE LAWYERS, PUBLIC WORK

Why hire a private firm to do government work? Advocates of privatization in other contexts argue that contracting out government functions can result in significant cost savings. Private contractors typically cost less than public employees, in part because they lack the civil-service protections and generous

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117. Buser, *supra* note 6, at A1.

118. *Id.*

119. Elmore, *supra* note 5.

120. *Id.*

benefits that government workers often receive.<sup>121</sup> And private contractors have ample incentives to drive down costs as much as possible so as to maximize profits.<sup>122</sup> Competition for lucrative government contracts sharpens those incentives. Indeed, some commentators suggest that competition—not privatization as such—“is the key” to efficient delivery of services.<sup>123</sup>

Similar considerations help explain the government’s widespread reliance on private lawyers.<sup>124</sup> As section A explains, the potential benefits of contracting out government litigation work are fairly straightforward, and correspond neatly to themes stressed by proponents of privatization more generally. But the privatization debates make clear that cost savings do not follow ineluctably from privatization. If handled poorly, outsourcing might actually be more expensive than relying on government employees. Section A explores the financial costs of privatizing government litigation. Section B considers a different kind of cost: the possibility that placing private attorneys at the helm of public litigation will change the conduct and focus of that litigation in ways that diminish its relative strengths.

#### A. IS OUTSOURCING GOVERNMENT LITIGATION EFFICIENT?

At first blush, the privatization of government litigation may be hard to understand in terms of efficiency. Private attorneys often are paid more—sometimes much more—than their counterparts in government service.<sup>125</sup> Private lawyers also may have longer learning curves than government employees who are accustomed to performing the work in question. Even at discounted rates, then, private attorneys may cost significantly more on an hourly basis than salaried government attorneys. And government attorneys are no slouches—

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121. See *supra* note 16 and accompanying text.

122. See Michaels, *supra* note 13, at 1030–32 (describing the “long-standing efficiency rationale” for privatization).

123. Simon Domberger & Paul Jensen, *Contracting Out by the Public Sector: Theory, Evidence, Prospects*, 13 OXFORD REV. ECON. POL’Y 67, 75 (1997).

124. The desire to minimize costs is not the only reason for litigation outsourcing, of course. The government also may turn to outside attorneys in circumstances where government employees are subject to conflicts of interest. For example, the DOJ hires private attorneys to represent government officials who may eventually become the targets of a DOJ prosecution. See Kathleen Clark, *Paying the Price for Heightened Ethics Scrutiny: Legal Defense Funds and Other Ways that Government Officials Pay Their Lawyers*, 50 STAN. L. REV. 65, 73 (1997). The appointment of independent counsel is driven by analogous considerations. See *id.* at 81. Similarly, many cases involving private prosecutions are contempt proceedings, where there may be a special need for the judicial branch not to be dependent on executive-branch attorneys to defend its own authority. See *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 795 (1987) (“The . . . assumption [of Rule 42(b) of the Federal Rules of Criminal Procedure] that private attorneys may be used to prosecute contempt actions reflects the longstanding acknowledgement that the initiation of contempt proceedings to punish disobedience to court orders is a part of the judicial function.”); O’Neill, *supra* note 116, at 684 (“The majority of the modern-day cases involving privately managed prosecutions deal with the issue of whether a private attorney may lawfully prosecute a contempt citation after an adverse party’s alleged violation of a court order.”).

125. See Lemos & Minzner, *supra* note 51, at 889 (noting that the maximum salary for government employees on the General Schedule is lower than the starting salary for associates at the nation’s largest law firms).

many hold credentials that are “comparable to those of lawyers who work for the most elite firms in the nation.”<sup>126</sup> Why outsource in these circumstances?

### 1. The Case for Contracting Out: Temporary Needs and Market Discipline

Perhaps the easiest case for outsourcing is where private attorneys possess special expertise that the government lacks in-house.<sup>127</sup> In such circumstances, it may be cheaper for the government to buy (or, more accurately, to lease) the necessary legal talent from private sources than to make it in the form of a full-time government employee—even if private attorneys demand hefty fees.<sup>128</sup> On issues the government encounters rarely, outsourcing allows the government to reduce learning-curve costs by hiring experienced private attorneys.<sup>129</sup> The David Boies example is again helpful. Even DOJ’s Antitrust Division—a specialized agency—recognized that it could benefit from Boies’s distinctive talents. The Assistant Attorney General in charge of the case told reporters that the Division had not handled many major antitrust cases and needed an attorney with extensive experience: “There’s no substitute for that many years of orchestrating litigation . . . . It’s a high art form.”<sup>130</sup>

Part of what Boies brought to the table was experience with blockbuster cases and powerful defendants. As New Orleans’s Mayor Marc Morial put it in a different context: “You want lawyers who can take on giants.”<sup>131</sup> Just as corporations with in-house legal staffs often turn to outside counsel for the big case, governments may find it particularly valuable to use private lawyers for large and/or complex litigation efforts. In addition to expertise, private lawyers may offer the resources of their firms, including copious support staff. Private firms with repeat work on big cases can take advantage of economies of scale

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126. Nicholas S. Zeppos, *Department of Justice Litigation: Externalizing Costs and Searching for Subsidies*, 61 LAW & CONTEMP. PROBS. 171, 173 (1998).

127. See Coffee, *supra* note 22, at 250 (emphasizing the government’s “need to lease, rather than buy, specialized legal talent”).

128. Similar considerations govern the choice between in-house and outside corporate counsel. See Steven L. Schwarcz, *To Make or to Buy: In-House Lawyering and Value Creation*, 33 J. CORP. L. 497, 500 (2008) (“[A] decision whether to bring legal work in-house is a subset of the broader question of vertical integration: whether a company should make needed products in-house, or whether it should buy them . . . .”). For a discussion of the “make or buy” decision more generally, see Paul L. Joskow, *Vertical Integration*, in HANDBOOK OF NEW INSTITUTIONAL ECONOMICS 319 (Claude Menard & Mary M. Shirley eds., 2008).

129. Cf. Schwarcz, *supra* note 128, at 507 (“For transactions that a company does not engage in repetitively, economies of scale may favor outside counsel who frequently engage in that type of transaction and therefore are able to apportion to more than one client the cost of gaining experience and expertise.”).

130. Bumiller, *supra* note 1.

131. Howard M. Erichson, *Private Lawyers, Public Lawsuits: Plaintiffs’ Attorneys in Municipal Gun Litigation*, in SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS 129, 137 (Timothy D. Lytton ed., 2005). Appearances may also play a role. See SHARON Y. EUBANKS & STANTON A. GLANTZ, *BAD ACTS: THE RACKETEERING CASE AGAINST THE TOBACCO INDUSTRY* 11 (2013) (describing DOJ’s decision to create “a David Boies type arrangement” in the early stages of the RICO case against big tobacco as an effort “to stage a battle of comic book titans. It was all about appearances.”).

that make it cost-effective for them to develop sizable “back-office service departments” to handle logistical work such as proofreading, word-processing, and so on.<sup>132</sup> Government litigation, by contrast, tends to be far more leanly staffed.<sup>133</sup>

As the discussion so far suggests, the make-or-buy decision will tend to weigh in favor of outsourcing legal work that government handles relatively infrequently. That may mean complicated or especially big cases, but it might also mean more routine work that is not voluminous enough to support a full-time employee. Governments typically must pay the full salaries of their employees regardless of how hard those employees actually work. Any downtime is money down the drain. Thus, governments may be able to save money by hiring private attorneys—even relatively expensive ones—on an as-needed basis.<sup>134</sup>

The case for outsourcing is harder to make for legal work that does recur with sufficient frequency to support a full-time employee.<sup>135</sup> Contracting out such work may harm the government’s interests in the long run by impeding in-house expertise and attorney professional development.<sup>136</sup> Indeed, a government entity that repeatedly turns to outside counsel for big, complex, challenging—and interesting—cases may find it more difficult to recruit and retain talented attorneys.<sup>137</sup> In this sense, privatization may be self-reinforcing: the more work an office outsources, the more it needs to outsource.

The justification for contracting out recurring government work [must be that competition and market discipline will drive private attorneys to perform the same work at lower cost than salaried government employees.<sup>138</sup> Given their job protections and relatively fixed pay, government employees—including attorneys—may “have ‘low powered’ incentives compared to private employees.”<sup>139</sup> They may be less inclined to work hard, to innovate, to take on difficult

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132. Schwarcz, *supra* note 128, at 508 & n.70 (explaining the use of outside counsel on large corporate deals and noting that the point would apply with even more force to litigation).

133. Zeppos, *supra* note 126, at 179–80 n.41.

134. *See* Fairfax, *supra* note 95, at 418 (“Particularly in smaller, rural jurisdictions where it is most prevalent, the outsourcing of the prosecution function is not a choice among alternatives; it is the recognition of the reality that a public prosecutor is a cost-prohibited luxury.”).

135. *Cf.* LARRY SMITH, *INSIDE/OUTSIDE: HOW BUSINESSES BUY LEGAL SERVICES* 245 (2001) (“[There is] a whole generation of in-house [corporate] counsel that have concluded . . . that repetitive, non-litigation legal work will usually be handled more cost-efficiently in-house. . . . Not only is the learning curve for outside counsel eliminated, so too are the myriad small costs of doing business, such as visits to the client, talking through the issues, etc., that add up significantly from start to finish.”).

136. *Cf.* Freeman & Minow, *supra* note 17, at 1, 4–5 (noting “diminished government capacity” as one of the “most prevalent and provocative objections to contracting”).

137. EUBANKS & GLANTZ, *supra* note 131, at 11 (describing consternation on the part of DOJ attorneys when they learned that higher-ups were bringing in a private lawyer to handle a big case).

138. This is, of course, the core justification for privatization more generally. *See supra* notes 121–23 and accompanying text.

139. Lemos & Minzner, *supra* note 51, at 889 (quoting Jean Tirole, *The Internal Organization of Government*, 46 OXFORD ECON. PAPERS 1, 6 (1994)).



cases, and so on.<sup>140</sup> An added advantage of privatization (so the theory goes) is that a contractual relationship can be revisited each year. It may be easier to award a contract to a new firm than it is to replace a government employee.<sup>141</sup> Thus, a firm whose initial bid is successful has a strong incentive to perform well in the hope that it will win future government contracts.<sup>142</sup>

Such considerations appear to have motivated the Fair Debt Collection Practices Act Amendments of 1986, which authorized DOJ to contract some of the government's litigation work associated with the collection of nontax debts owed to the United States.<sup>143</sup> The amendments were enacted on the theory that outsourcing offered a cost-effective means of reducing the extensive backlog of civil cases in U.S. Attorney Offices (USAOs) nationwide. Adopted initially as a pilot program, the DOJ's Private Counsel Program now operates in nineteen "private counsel" districts nationwide, with "further expansion planned."<sup>144</sup> At least when measured by outputs, the program appears to be a success. In its first seven years of operation, the average number of pending civil debts declined by 76%.<sup>145</sup> And private counsel appear to be diligent in their duties. According to a recent study documenting an increase in federal suits for the recovery of defaulted student loans, the four districts with the highest litigation rates—measured both in absolute numbers and per capita—are all private counsel districts.<sup>146</sup>

Yet to say that private attorneys have accomplished more than existing DOJ staff, circa 1986, is not to suggest that the Private Counsel Program has been more cost-effective than the alternative strategy of hiring more government attorneys to litigate debt-collection cases. The attorneys in the Program are

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140. See Selmi, *supra* note 57, at 1442–45 (noting concerns that government attorneys, particularly careerists, might shirk, avoiding hard cases and hard work in favor of easier and less controversial alternatives).

141. Many government lawyers enjoy civil-service protections that make their termination difficult. See, e.g., Todd Lochner, *Strategic Behavior and Prosecutorial Agenda Setting in United States Attorneys' Offices: The Role of U.S. Attorneys and Their Assistants*, 23 JUST. SYST. J. 271, 284 (2002) (discussing the obstacles to firing assistant U.S. attorneys); see also Lemos & Minzner, *supra* note 51, at 888 ("Public sector enforcement lawyers are frequently union members with the protections that come from negotiated collective bargaining agreements."); cf. Michaels, *supra* note 13, at 1031–32 ("Civil-service laws sharply reduce at-will government employment—and, with it, the threat of termination. The same civil-service safeguards . . . also restrict opportunities for agency heads to reward industrious workers (through rapid advances or monetary bonuses).") (footnote omitted).

142. See Patrick McFadden, *The First Thing We Do, Let's Outsource All the Lawyers*, 33 PUB. CONT. L.J. 433, 445 (2004).

143. Pub. L. 99-578 (1986), 100 Stat. 3305 (codified in relevant part at 31 U.S.C. § 3718).

144. *Debt Collection Management Staff, Private Counsel Program*, U.S. DEP'T OF JUST., <http://www.justice.gov/jmd/debt-collection-management-staff#pcp>. (last visited Jan. 24, 2016).

145. U.S. GEN. ACCT. OFF., GAO/GGD-94-195, CIVIL DEBT COLLECTION: JUSTICE'S PRIVATE COUNSEL PILOT PROGRAM SHOULD BE EXPANDED, at 3 (1994) [hereinafter GAO REPORT].

146. See *Recent Rise in Federal Suits to Recover Student Loans*, TRANSACTIONAL REC. ACCESS CLEARINGHOUSE (TRAC) REP. (May 4, 2012), <http://trac.syr.edu/tracreports/civil/280> (listing districts with highest litigation rates); U.S. DEP'T OF JUST., NATIONWIDE CENTRAL INTAKE FACILITY, BRIEFING MATERIAL FOR FEDERAL AGENCIES 2 (2011), <http://www.justice.gov/jmd/dcm/nationwide-central-intake-facility-briefing-material.pdf> (listing private counsel districts).

compensated on a contingency basis: depending on the terms of each contract, they take home between 19.5% and 35% of the debts they recover in litigation.<sup>147</sup> Is the government saving money? According to a 1994 report by the General Accounting Office (GAO), the answer depends on how costs and benefits are measured. The GAO found that although private counsel handled more cases, the participating USAOs collected more total dollars. When costs were compared to dollars recovered, USAOs looked better: government attorneys collected \$38.32 for every \$1 estimated in cost, whereas private firms collected \$3.90 for every \$1 in cost.<sup>148</sup> But the GAO reasoned that a collection-to-cost ratio might be misleading, given that USAOs' cases tended to be significantly larger than those handled by private firms. For example, USAOs reaped more than 60% of their total collections from fourteen cases alone—all worth more than \$1 million—with the biggest private-counsel case weighing in at \$52,667.<sup>149</sup> When costs were instead compared to the number of cases resolved, private firms looked better: the GAO calculated that it cost USAOs an estimated \$421.54 for every case closed compared to \$242.58 for every case that private counsel firms closed.<sup>150</sup>

Reasonable minds can disagree on the lesson of the debt-collection example. It is clear, however, that privatization does not automatically produce cost savings.<sup>151</sup> In the litigation context, privatization might fail to deliver the anticipated savings for a variety of reasons. Private lawyers might charge exorbitant rates, might not be so expert after all, or might drive up fees with wasteful work. In theory, competition should ameliorate these problems, at least in the context of recurring work. But, as in other privatization contexts, competition is not a given when it comes to doling out the government's legal work.

## 2. Obstacles: Cronyism, Politics, and Inadequate Competition

Concerns about inefficient outsourcing have been brought to the fore by reports suggesting that state attorneys general and other government officials have awarded lucrative contracts to firms that have contributed large sums to their campaigns. For example, during the multistate tobacco litigation, Mississippi Attorney General Mike Moore selected his largest campaign donor to represent the state for a contingent fee, while Texas Attorney General Dan Morales chose five firms, four of which had contributed to Morales's campaign.<sup>152</sup> (Morales was later indicted for trying to secure unearned legal fees for

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147. See GAO REPORT, *supra* note 145, at 16.

148. *Id.* at 15. Those figures overstate what USAOs' costs would look like absent privatization because current costs include the cost of supervising private counsel.

149. *Id.* at 19. The cases referred to private counsel had, on average, 10% of the value of the cases controlled by USAOs.

150. *Id.* at 15–16.

151. See, e.g., DONAHUE, *supra* note 13, at 57–78 (surveying the (mixed) empirical evidence on the efficiency of privatization).

152. See Carolyn Lochhead, *The Growing Power of Trial Lawyers*, WEEKLY STANDARD, Sept. 23, 1996, at 21, 22–23.

another lawyer involved in the litigation.)<sup>153</sup> More recently, Louisiana Attorney General Buddy Caldwell drew fire in the media after it was revealed that he had paid \$27 million in hourly fees to thirteen law firms that had given a combined \$277,000 to his campaigns, including firms of Caldwell's campaign chief and treasurer.<sup>154</sup>

"Pay to play" arrangements present obvious problems, not least of which is the absence of any meaningful competition. Studies of privatization elsewhere demonstrate that, without real competition, contracting with private firms tends to be at least as expensive as relying on government employees to perform the work in question.<sup>155</sup> So too in litigation: a lack of competition risks saddling government with excessive fees and underqualified attorneys. Not only might government officials overlook private firms that could have done the work for less, but a temptation to award contracts to contributors and cronies might lead officials to outsource litigation work that could and should be performed in-house.

The federal government and some states have instituted reforms designed to combat cronyism in the award of government litigation work by requiring officials to select private firms via open and transparent bidding systems.<sup>156</sup> A Florida statute, for example, requires the attorney general to make a written determination that any contingent-fee representation "is both cost-effective and in the public interest," to request proposals from private attorneys, and to publicize the resulting contract.<sup>157</sup> The statute also imposes caps on the percentage and total amount of contingent fees. The Florida statute has served as a model for similar legislation in at least five other states<sup>158</sup> and some attorneys general

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153. See R.G. Ratcliffe & Clay Robison, *Morales Indicted on 12 Charges: Ex-Attorney General Accused of Defrauding State in Tobacco Suit*, HOUS. CHRON., Mar. 7, 2003, at A1.

154. David Hammer, *Attorney General Called Out for Giving Contracts to Top Campaign Donors*, WWLTV EYEWITNESS NEWS (Oct. 30, 2013, 7:25 AM), <http://www.wwltv.com/story/news/local/investigations/david-hammer/2014/09/03/14591396/>.

155. See DONAHUE, *supra* note 13, at 78 ("Public versus private matters, but competitive versus noncompetitive usually matters more. . . . [H]alf of a market system—profit drive without meaningful specifications or competitive discipline—can be worse than none." (emphasis in original)).

156. Cf. MODEL RULES OF PROF'L CONDUCT, R. 7.6 (1983) (barring private attorneys and firms from accepting government legal work if they made or solicited political contributions "for the purpose of obtaining" the business). *But see* Coffee, *supra* note 22, at 245 (noting that "the evidence suggests that state bar groups are steering clear of the ABA's new ethical rule on 'pay-to-play' practices").

157. See FLA. STAT. ANN. § 16.0155 (West 2015).

158. See, e.g., ARIZ. REV. STAT. ANN. § 41-4803 (2012); IND. CODE § 4-6-3-2.5(b) (2012); IOWA CODE §§ 13.7, 23B.3 (2015); MISS. CODE ANN. §§ 7-5-8, 7-5-21, 7-5-39 (2015); MO. REV. STAT. §§ 34.376, 34.378, 34.380 (2015); see also COLO. REV. STAT. § 13-17-304(1)(a)(III) (2015) (capping the effective hourly rate of contingent-fee attorneys at \$1,000); KAN. STAT. ANN. § 75-37,135(a)(1) (2014) (establishing elaborate procedures for contracts that might result in the payment of more than \$1,000,000 in fees to private attorneys); N.D. CENT. CODE § 54-12-08.1 (2015) (providing that attorney general may not enter into contingent-fee arrangements in cases worth more than \$150,000 without approval from emergency commission); TEX. GOV'T CODE ANN. § 2254.103(e) (2013) (requiring legislative approval for most contingent-fee arrangements); VA. CODE ANN. § 2.2-510.1 (2015) (requiring open and competitive bidding for contingent-fee contracts).

have issued administrative orders implementing equivalent requirements.<sup>159</sup>

Though such reforms are a move in the right direction, they do not themselves ensure that outsourcing will be cost-effective. To begin with, most of the state statutes are limited to contingent-fee arrangements, ignoring the potential for analogous problems under hourly or flat fees. More fundamentally, avoiding cronyism is only a first step toward an efficient system of privatization, which requires actual competition, not just the absence of collusion. To return to the debt-collection example, the GAO reported that DOJ had awarded contracts to every firm that submitted a proposal in the first three pilot districts. The reason is simple: DOJ was under a mandate from Congress to make best efforts to contract with at least four firms in each pilot district, but received qualified proposals from only three firms in each district.<sup>160</sup> An absence of meaningful competition might explain why DOJ pays private counsel contingent fees ranging up to 35%. Thirty-five percent is slightly above the norm in the market for contingent fees and is justified by the risk that the attorney will devote significant resources to the case only to lose, earning nothing at all.<sup>161</sup> But, unlike the typical contingent-fee case, there is virtually no risk of loss for DOJ's contractors. Most cases settle quickly, or the debtor defaults. And private firms have thousands of cases from which to choose: if one case looks risky, the firm can easily move on to the next. Thus, the conventional justifications for generous contingent fees have little force in this context.

The debt-collection example also suggests some of the more subtle political forces that may stand in the way of clear-headed assessments of the relative merits of outsourcing.<sup>162</sup> Recall that the Amendments were enacted in 1986—during the early, heady years of privatization. For legislators committed to shrinking government, devoting additional funds to DOJ may not have been a viable option. Clouding matters further, the costs of contingent-fee lawyers like

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159. See, e.g., Samuel S. Olens, Ga. Att'y Gen., Administrative Order, May 29, 2012 (regarding the hiring of outside counsel on a contingency-fee basis); Patrick Morrissey, W. Va. Att'y Gen., Outside Counsel Policy, July 16, 2013 (same).

160. GAO REPORT, *supra* note 145, at 6, 8. Although the report is not explicit on this point, it seems that similar patterns may have occurred in the later-added districts. As of 1992, DOJ had contracted with twenty-five firms in seven districts, with only one district meeting the "at least four" threshold. GAO REPORT, *supra* note 145, at 2, tbl.1.

161. See Nora Freeman Engstrom, *Attorney Advertising and the Contingency Fee Cost Paradox*, 65 STAN. L. REV. 633, 667 n.188 (2013) (reporting that contingency fees have remained steady at 33% for several decades); see also Dana, *supra* note 22, at 318 n.3 ("The classic justification for the allocation of a relatively high percentage of recovery to lawyers, typically one-third, is that tort litigation entails risk of loss and hence the risk that the lawyers will be left with nothing in the hole. To compensate for that downside risk, plaintiffs' lawyers need the upside incentive of a substantial share of any tort proceeds, even though that share may well exceed what would have been paid to well-compensated lawyers on a standard hourly basis.").

162. See DONAHUE, *supra* note 13, at 13 ("Unless we are luckier or more careful than we are likely to be, political pressures will tend to retain for the public sector functions where privatization would make sense, and to privatize tasks that would be better left to government."); Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1291–95 (2003) (describing the ideological overtones common in debates over privatization).

those in the private counsel program are less transparent than the costs of government employees. Because the private attorneys are compensated with a portion of the debts they collect, it is possible to squint at the program and see more money coming in at zero cost to taxpayers. That view is mistaken, of course—every dollar paid to a private attorney is a dollar that is not deposited into the general treasury—but it may be easy for politicians to blink that reality when faced with a choice between devoting more tax dollars to DOJ’s budget and paying private attorneys off the books.

Government officials who anticipate a limited time in office may also find it all too easy to focus on the immediate advantages of outsourcing while ignoring the bigger picture. For example, Idaho has paid private attorneys more than \$30 million over the past three years in order to supplement the limited staff of the Attorney General’s Office.<sup>163</sup> Governor C.L. “Butch” Otter explained: “You’ve got to find a happy medium with what you know you need, and maintain that and supplement it. . . . I like to know that when we don’t need them, we don’t have to pay them.”<sup>164</sup> Though the idea of turning to private counsel to handle temporary spikes in litigation work makes sense in theory, the volume of Idaho’s outsourcing suggests reason to doubt the state has struck a happy medium in fact. Given that the annual outlay for outside counsel represents more than half the Attorney General’s budget, it seems unlikely that the state’s need for additional manpower will suddenly dry up.<sup>165</sup> And the cost of such repeated outsourcing may be substantial, measured not only in wasted tax revenue but also in the decreased capacity of the Attorney General’s Office. Nevertheless, each contract may seem entirely sensible (even necessary) if viewed in isolation—and government officials have little incentive to gather the data necessary to fill out the picture.

Finally, even if government officials take care at the front end to measure the projected costs of outsourcing, they may also need to supervise the work of private attorneys to ensure that privatization is cost-effective in practice. As students of the legal-services market have long recognized, attorneys have both motive and means to maximize their fees at the expense of clients. Attorneys who are paid by the hour have incentives to “run the meter,” driving up costs by performing unnecessary work.<sup>166</sup> Flat fees avoid that problem but encourage

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163. See Rebecca Boone & John Miller, *Idaho Spends Millions on Outside Attorneys*, MAGICVALLEY.COM (TIMES-NEWS) (Feb. 17, 2014, 6:30 PM), [http://magicvalley.com/news/local/govt-and-politics/idaho-spends-millions-on-outside-attorneys/article\\_01e10e30-9825-11e3-b2d5-001a4bcf887a.html](http://magicvalley.com/news/local/govt-and-politics/idaho-spends-millions-on-outside-attorneys/article_01e10e30-9825-11e3-b2d5-001a4bcf887a.html).

164. *Id.*

165. Similarly, some state attorneys general hire private contingent-fee attorneys with such frequency that they could almost certainly support a full-time employee (or several) with the fees such attorneys are paid. For example, the website of Mississippi AG Jim Hood lists forty-nine “active contingency fee cases.” See *Outside Legal Counsel*, OFF. OF ATT’Y GEN. STATE OF MISS., <http://www.ago.state.ms.us/outside-legal> (last visited Oct. 23, 2015).

166. See Wilkins, *supra* note 79, at 452. Cf. Joel F. Henning, *Law Firms and Legal Departments: Can’t We All Get Along?*, 7 BUS. L. TODAY, Aug. 1998, at 24, 28 (“In a recent survey, more than one-third of outside counsel admitted that the prospect of billing additional hours at least sometimes

shirking.<sup>167</sup> Contingent-fee arrangements create incentives for lawyers to settle claims quickly, so as to avoid the risk and expense of more protracted proceedings.<sup>168</sup> All of these practices increase the cost (or reduce the value) of private lawyers' services.

Supervision by government employees might ameliorate these problems somewhat, and some states have adopted supervision requirements via statutes and/or judicial decisions.<sup>169</sup> (Again, those rules tend to focus predominantly on contingent-fee arrangements.) Similar requirements exist at the federal level by virtue of rules that prohibit outsourcing inherently governmental functions.<sup>170</sup> Supervision is not a panacea, to be sure; I argue below that the promise of meaningful supervision may often be illusory. But when the concern is the financial bottom line—hours clocked, dollars billed, and so on—oversight seems possible and can help the government police against overcharging.<sup>171</sup> The harder question is whether government attorneys can superintend the day-to-day details of private attorneys' work, looking beyond cost to how they handle litigation in the government's name. The next section takes up that question.

#### B. ARE PUBLIC AND PRIVATE LAWYERS FUNGIBLE?

The discussion so far suggests reasons for skepticism about the supposed financial benefits of privatization. But private provision might change more than the price of government litigation; it might change the litigation itself. Government attorneys enjoy vast discretion, both as to the ends sought by litigation and the means used to achieve them. Government attorneys cannot (and should not) go after every apparent violation of the law. They must choose their battles. As Justice Jackson put it during his tenure as Attorney General, “[w]hat every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the

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influences their decisions to undertake work that they wouldn't otherwise have performed . . . .”); Adam Liptak, *Gap Seen Between Court-Appointed Lawyers and Public Defenders*, N.Y. TIMES (July 13, 2007), <http://www.nytimes.com/2007/07/13/us/13cnd-defenders.html> (reporting on study showing that court-appointed lawyers, who are paid by the hour, impose an additional \$5,800 in costs for the system for every case they handle, as compared to salaried public defenders).

167. Wilkins, *supra* note 79, at 455; cf. Selmi, *supra* note 57, at 1442–45 (noting similar concerns about shirking by salaried government attorneys).

168. See Coffee, *supra* note 72, at 686–90 (using economic analysis to demonstrate why contingent-fee class counsel's focus on fees may lead to premature settlement).

169. See, e.g., *Cnty. of Santa Clara v. Superior Court*, 235 P.3d 21, 40 (Cal. 2010) (holding that “contingent-fee agreements between public entities and private counsel must provide . . . that a government attorney with supervisory authority must be personally involved in overseeing the litigation”); *State v. Lead Indus. Ass'n*, 951 A.2d 428, 475 (R.I. 2008) (ruling that any contingent-fee arrangement between attorney general and private counsel must provide that the attorney general “retains absolute and total control over all critical decision-making” (emphasis omitted)).

170. See *supra* notes 83–88 and accompanying text.

171. That is particularly true with respect to firms that hope to secure future work. The prospect of repeat play allows government to leverage competition, not only at the initial point of contracting, but throughout the arrangement.



greatest, and the proof the most certain.”<sup>172</sup> Jackson was referring to prosecutorial discretion, but the necessity—and desirability—of discretion extends to the civil sphere as well. Many laws are written in broad and general terms that, if taken literally, could embrace a range of benign activities. We rely on public attorneys and officials to exercise their discretion in ways that focus on the law’s core targets, ignoring violations that fall outside the principal purposes of the law. Indeed, this has long been considered one of the key differences between public and private litigation. Unlike private litigants and lawyers, who can be expected to pursue any litigation that serves their self-interest, governmental entities and their attorneys are supposed to prioritize initiatives that best serve the public interest.<sup>173</sup>

Defensive litigation entails similar discretionary choices. The point is captured vividly in recent high-profile decisions by government attorneys not to defend certain state and federal laws against constitutional challenges.<sup>174</sup> Yet even run-of-the-mill cases require government defendants to determine whether the public interest would be served by an aggressive defense or the equivalent of a confession of error.<sup>175</sup>

Those discretionary choices are all the more important in a world of vanishing trials, where the overwhelming majority of cases settle (or, in the criminal sphere, plead out).<sup>176</sup> Settlements are at the heart of critiques of so-called regulation-by-litigation, whereby government litigators use negotiated settlements in enforcement actions to impose new substantive requirements on regulated entities.<sup>177</sup> Of course, regulation-by-litigation need not be a pejorative term: many commentators celebrate government’s ability to promote regulatory values via litigation. The important point for present purposes is that, as a practical matter, the outcome of government litigation often will be determined,

172. Robert H. Jackson, *The Federal Prosecutor*, 31 AM. INST. CRIM. L. & CRIMINOLOGY 3, 5 (1940).

173. See *supra* notes 51–58 and accompanying text.

174. See, e.g., U.S. DEP’T OF JUST., OFF. OF PUB. AFFAIRS, STATEMENT OF THE ATT’Y GEN. ON LITIGATION INVOLVING THE DEFENSE OF MARRIAGE ACT (2011) (announcing that DOJ will not defend the constitutionality of aspects of the Defense of Marriage Act); Niraj Chokshi, *Seven Attorneys General Won’t Defend Their Own State’s Gay-Marriage Bans*, WASH. POST (Feb. 20, 2014), <https://www.washingtonpost.com/blogs/govbeat/wp/2014/02/20/six-attorneys-general-wont-defend-their-own-states-gay-marriage-bans>.

175. See Neil M. Peretz, *The Limits of Outsourcing: Ethical Responsibilities of Federal Government Attorneys Advising Executive Branch Officials*, 6 CONN. PUB. INT. L.J. 23, 30 (2006) (recording one court’s suggestion that government attorneys ask of each claim, “[i]s opposing this claim just, is it fair, is there a reasonable basis for believing that the government can prevail on both the law and facts?”).

176. See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 461, 483 (2004); John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 522 (2012); cf. GEORGE FISHER, *PLEA BARGAINING’S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA* 17 (2003) (describing the “triumph” of plea bargaining and noting that “the prosecutor, who always had the strongest interest in plea bargaining, now has almost unilateral power to deal”).

177. See Andrew P. Morriss et al., *Choosing How to Regulate*, 29 HARV. ENVTL. L. REV. 179, 204–05 (2005) (“Regulation-by-litigation . . . requires settlement as an element. Settlement is critical because . . . ‘it is the nature of a settlement to sublimate questions of right and duty and to silence further consideration of the merits or the policies advanced by the agreed result.’”).

not by a court, but by government litigators themselves.<sup>178</sup>

Privatizing the performance of public litigation means relying on private actors to exercise discretion in the name of the government.<sup>179</sup> But private attorneys have different incentives, and may be accustomed to different norms, than their counterparts in public service. Thus, hiring private attorneys to do the government's work might provoke a subtle shift in the conduct and focus of public litigation.

Perhaps the most obvious difference between public and private attorneys concerns financial motivations—a point that critics have used to challenge states' reliance on private lawyers who work for contingent fees. Contingent-fee lawyers, so the argument goes, seek only to maximize their fees, whereas public lawyers “should work to maximize the public interest.”<sup>180</sup> It is easy to imagine instances in which those interests might diverge. For example, in a case where the public interest would be best served by nonmonetary relief, one might worry that a lawyer working for a contingent fee would focus on boosting damages rather than crafting an effective injunctive remedy.<sup>181</sup> Critics argue, therefore, that substituting contingent-fee lawyers for civil servants threatens to steer government litigation off its normal path and away from the public interest.<sup>182</sup>

That challenge captures an important intuition, but it is both too broad and too narrow in its conventional telling. In some respects, the argument overstates the effects of privatization. The states' critics assume that contingent-fee lawyers emphasize fees to the exclusion of all else—ignoring that many private lawyers, including those who work on a contingency basis, have strong ideological commitments to the causes they pursue.<sup>183</sup> Meanwhile, critics overlook that public attorneys may have their own reasons for maximizing financial rewards. Large recoveries are easy to measure and to publicize to voters, superiors, and

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178. See Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271, 272 (2013) (“[F]ederal prosecutors . . . have almost unlimited and unreviewable power to select the charges that will be brought against defendants. . . . Prosecutors' selection of charges and their decision whether to file a motion for a sentencing departure typically dictate a defendant's sentence as well.”).

179. Cf. Metzger, *supra* note 13, at 1395 (arguing that “delegations of discretion are unavoidable [in most cases of privatization] because the power to implement and apply rules is inseparable from the power to set policy”).

180. Wilkins, *supra* note 79, at 436.

181. See Robert S. Khuzami & George S. Canellos, Opinion, *Unfair Claims, Untenable Solution: Professor John Coffee Does Not Do the SEC's Enforcement Record Justice*, NAT'L L.J., Jan. 14, 2013, at 34, 34 (criticizing proposal that SEC hire private lawyers on a contingent-fee basis because “that solution assumes that the SEC's general goal is to sue as many deep-pocketed parties, and collect as much in penalties, as possible. But, as enforcer of the nation's securities laws, the SEC's goal is aggressively to uphold the law and serve the interests of justice”).

182. See Dana, *supra* note 22, at 323–28.

183. See, e.g., Howard M. Erichson, *Doing Good, Doing Well*, 57 VAND. L. REV. 2087, 2096–97 (2004) (“Just as lawyers in ‘public interest’ litigation explain their involvement in terms of commitment to the cause, similar explanations often can be heard from plaintiffs' lawyers in mass tort litigation, focusing on their contribution to the public good. . . . [S]ome of the rhetoric is backed up by litigation decisions that suggest genuine commitment to the policy objectives.”).

legislative overseers. It is far more difficult to convey the importance or the scale of injunctive remedies. Government litigators anxious to develop reputations as strong enforcers therefore have good cause to concentrate their efforts on monetary recoveries.<sup>184</sup> Similar incentives are created by institutional arrangements that allow public enforcement agencies to retain a portion of any financial awards, or fees, that they win.<sup>185</sup> Such arrangements can and do exist in the absence of privatization, but contingent-fee agreements with private counsel create new opportunities for revenue building. Some contracts between state attorneys general and private lawyers provide for contingent fees, not only for the private counsel but also for the government. In South Carolina, for example, the attorney general regularly retains 10% of the fees that otherwise would be allocated to private counsel.<sup>186</sup> Privatization may be to blame if such arrangements encourage states to maximize financial recoveries, but the blame must be shared with other institutional structures that create similar tendencies.

In other respects, a focus on the financial incentives of contingent-fee lawyers understates the effects of privatization. Regardless of their fee arrangements with the government, private lawyers may focus on maximizing financial recoveries simply because that is what they are accustomed to doing for private clients. Competition, considered a key to cost-effective outsourcing, may reinforce that pattern. Private lawyers who wish to secure future government contracts have strong incentives to focus on easily quantifiable measures of success—and dollars recovered may well be the most promising metric.

More broadly—and again regardless of their fee arrangements with the government—private attorneys may have different instincts about how to frame claims and arguments than their counterparts in the public sector. For example, Howard Erichson has described the efforts by several jurisdictions to use litigation against gun manufacturers to combat gun violence. New Orleans and other jurisdictions hired private lawyers to handle the work in exchange for contingent fees, whereas Chicago relied on its own lawyers to develop a theory of the case. Erichson explains that the difference in lawyers was reflected in the way the respective cities' claims were framed and presented:

Private lawyers naturally bring a mass tort/product liability orientation, whereas public lawyers are more likely to bring a law enforcement orientation. The [private attorneys'] complaints in New Orleans and other cities relied largely on traditional product liability theories and focused upon handguns as defective products based on missing safety features. . . . [T]he approach mirrored what might have been asserted in an individual tort lawsuit or in a class action brought by handgun victims. Chicago's complaint, by contrast, relied on a

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184. Lemos & Minzner, *supra* note 51, at 875–86.

185. *Id.* at 864–75.

186. See *Contingency Fee Litigation Retention Agreements*, S. C. ATT'Y GEN., <http://www.scag.gov/litigation-retention-agreements> (last visited Dec. 1, 2015) (citing to examples of agreements providing the 10% retention fee).

public nuisance theory and focused largely on the handgun industry's methods of distribution. . . . Whereas the New Orleans complaint looks like a mass tort case, the Chicago complaint resonates with the language of law enforcement.<sup>187</sup>

As Erichson's example suggests, private lawyers may bring to government work habits formed in service of private clients. In the firearms cases, private lawyers framed government claims in the same way they would have framed private claims. Products liability theories not only are readily available to private claimants, but they also are likely to generate substantial damages. Perhaps the lawyers focused on lucrative theories in hope of maximizing fees. But an additional possibility is they wrote what they knew, so to speak, relying on theories that were familiar to them—because they would be attractive to their clients—in private practice.

The idea that aspects of lawyering may be habitual suggests a still broader point, and a call for caution, about outsourcing public litigation. Lawyers can shape the conduct of litigation in myriad ways, ranging well beyond the headline questions of what claims to assert and what relief to pursue. Take, for example, the question of discovery: civil litigants must comply with various disclosure requirements, but the state and federal rules of procedure leave ample room for both facilitative and obstructive approaches to the exchange of information.<sup>188</sup> The same is true in criminal cases. Government is obligated to turn over certain information to the defense, but prosecutors' offices vary widely in their approaches. Some follow "open file" policies that exceed legal requirements, while others are far more stingy with disclosures.<sup>189</sup>

Similar points could be made with respect to countless other aspects of litigation, including motion practice, the handling of witnesses in depositions and trial testimony, briefing, and so on. In short, the rules governing litigation practice are capacious enough to permit a wide range of attorney conduct. Through their decisions on the day-to-day details of legal work, lawyers have enormous power to transform the litigation process into something aggressively adversarial or cordial and cooperative. They can "play hardball" or "seek justice;" act like "junkyard dogs" or "officers of the court."

Importantly for present purposes, those decisions can have profound effects on opposing parties. Research in social psychology suggests that parties' assessments of the legitimacy of the law, and of legal authority more generally, are

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187. Erichson, *supra* note 131, at 138, 147–48.

188. See Kimberly Kirkland, *The Ethics of Constructing Truth: The Corporate Litigator's Approach*, in *LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT* 152, 157, 159 (Leslie C. Levin & Lynn Mather eds., 2012) ("Most corporate litigators report that they generally read discovery requests narrowly, thereby reducing the universe of 'responsive' documents . . . . [C]orporate litigators view evasive responses to document requests as acceptable—as merely part of the 'game' of complex and high-stakes litigation.").

189. Ellen Yaroshefsky & Bruce A. Green, *Prosecutors' Ethics in Context: Influences on Prosecutorial Disclosure*, in *LAWYERS IN PRACTICE*, *supra* note 188, at 269, 279–80.

informed by their perceptions of the fairness of legal processes.<sup>190</sup> Most of the research focuses on how parties are treated by authority figures—primarily judges, but also police officers, arbitrators, and so on.<sup>191</sup> Although some work investigates the importance of the relationship between parties and their own attorneys,<sup>192</sup> less attention has been devoted to the influence that opposing counsel might have on parties' perceptions of procedural justice.<sup>193</sup> However, the available evidence (consisting largely of studies of negotiations and mediations where there is no central authority figure) suggests that opposing parties and lawyers do matter.<sup>194</sup> That finding is hardly surprising in light of the emphasis that procedural-justice theories place on factors such as parties' ability to exercise voice and be heard in a meaningful way, and the degree to which they were treated with dignity and respect. Attorneys have ample opportunities to influence the tenor of proceedings in ways that might promote those values—or undermine them, as the case may be.<sup>195</sup>

When the opposing party is the government, moreover, the line between party/attorney and authority is, at best, blurred. Particularly when the government litigates against a private party in a sovereign capacity to enforce or defend its laws, it is “itself *in authority*.”<sup>196</sup> The government brings the full machinery of the state to bear against the opposing party. It represents the same sovereign that supplies the court system, the same sovereign that will enforce the eventual judgment. If citizens' perceptions of the law's legitimacy are influenced by the conduct of the authority figures they confront in the legal process, the conduct of government attorneys—or private attorneys who stand

190. See E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 70 (1988) (reporting on research showing connections between citizens' positive perceptions of procedural justice and their evaluation of legal outcomes and their “greater overall satisfaction with the legal experience and more positive affect with respect to an encounter with the justice system”).

191. See Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 HASTINGS L.J. 127, 137–38 (2011) (summarizing the state of the field).

192. See William L. F. Felstiner & Ben Pettit, *Paternalism, Power, and Respect in Lawyer–Client Relations*, in HANDBOOK OF JUSTICE RESEARCH IN LAW 135, 139 (Joseph Sanders & V. Lee Hamilton eds., 2001); see also Jonathan D. Casper et al., *Procedural Justice in Felony Cases*, 22 L. & SOC'Y REV. 483, 498 (1988).

193. Hollander-Blumoff, *supra* note 191, at 146 (“The role of lawyers has been relatively understudied in empirical procedural justice research.”).

194. For example, parties reported greater satisfaction with mediations when the attorneys behaved in a cooperative manner. See, e.g., Bobbi McAdoo et al., *Institutionalization: What Do Empirical Studies Tell Us About Court Mediation?*, 9 DISP. RESOL. MAG. 8, 10 (2003); see also Hollander-Blumoff, *supra* note 191, at 160 (“Although attorneys are not decisionmakers themselves, they are nonetheless in a position of some status in a court proceeding and their behavior may affect the procedural justice perceptions both of the other attorneys involved in the action and of the litigants themselves.”).

195. For an argument that prosecutors' behavior can enhance (or undermine, with “high-handed” tactics) the perceived procedural fairness of plea bargaining, see Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 415–19 (2008).

196. DANIEL MARKOVITS, *A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE* 173 (2008) (“The government . . . is not an ordinary disputant who confronts the authority of the state (through litigation or in some other way) but is, rather, itself *in authority*.”) (emphasis in original).

in the shoes of the government—would seem to be a factor in that calculus.<sup>197</sup>

All of this suggests that, when assessing government litigation, we ought to look beyond ends—whether cases are won or lost, or what relief was obtained—and consider means as well. But as we shift our focus from the outcome of government litigation to its conduct, the privatization analysis becomes increasingly complicated. The literature on privatization makes clear that outsourcing may be particularly problematic in areas where the principal cares about means as well as ends, and where it is difficult to specify in advance the hallmarks of a job well done.<sup>198</sup> The problem stems from the limitations of contracting. Although a contract with private lawyers may prescribe certain guidelines—perhaps requiring private attorneys to comply with the office’s policies with respect to particular matters—it is difficult at best to anticipate and resolve every question in advance. In practice, guidelines tend to be cast at a fairly high level of generality, leaving unresolved countless questions that may come up in the course of any given litigation.<sup>199</sup>

Not surprisingly, then, studies suggest that informal institutional norms may be more important than formal policies in shaping attorneys’ conduct.<sup>200</sup> Lawyers learn what is expected of them via a host of contextual cues, including interactions with coworkers and supervisors, plaudits given or withheld, habits gleaned from shared work product, and so on.<sup>201</sup> Such nuances of institutional culture may be difficult to convey to outside contractors who work for the government on a temporary basis.

That is not to say that acculturation is unthinkable: it may be possible to remake every private lawyer into a government lawyer (effectively, if not formally).<sup>202</sup> But acculturation takes time, and it may be harder than we

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197. Government attorneys sometimes acknowledge as much. For example, a study of local prosecutors reported that “[o]ne chief prosecutor said that he told his assistants: ‘If we don’t do our jobs in a manner that is ethically appropriate, then the longer term consequence is that people don’t trust you.’” Yaroshefsky & Green, *supra* note 189, at 276.

198. *See, e.g.*, DONAHUE, *supra* note 13, at 79–83.

199. *See* Beale, *supra* note 64, at 136 (“Although prosecutorial guidelines are increasingly common, in many cases the guidelines are stated in such general terms that they do not provide clear standards in individual cases.”).

200. *See, e.g.*, Kirkland, *supra* note 188, at 164 (“[C]orporate lawyers learn to identify and follow relevant ‘practice norms.’ Practice norms are the unwritten rules that govern their approaches to litigation . . . .”); Yaroshefsky & Green, *supra* note 189, at 280–81, 286 (“Informal socialization through ongoing discussion with other prosecutors and supervisors ultimately appears to have a greater effect on prosecutors’ resolution of disclosure questions [than formal policies and training.]”); *see also* Kay L. Levine & Ronald F. Wright, *Prosecution in 3D*, 102 J. CRIM. L. & CRIMINOLOGY 1119, 1131, 1134 (2012) (explaining that “explicit policies in state prosecutors’ offices form only a thin visible crust on a deep set of office structures that shape or reinforce attorney identity” and describing links between prosecutors’ role orientation and their professional conduct).

201. *See* Levine & Wright, *supra* note 200, at 1122 (“In addition to understanding the official policies, new prosecutors must discover the unwritten social rules, norms, and language of the profession and of their offices. Newcomers learn these expectations informally, whether through lunchtime chats or through careful observation of how veterans behave and speak.”).

202. In addition to the limitations described in the text, there is also a question whether government entities would want to transform private lawyers into the equivalents of government employees. As Jon



think.<sup>203</sup> Research on “[o]rganizational socialization”—the “process by which an individual comes to appreciate the values, abilities, expected behaviors, and social knowledge essential for assuming an organizational role and for participating as an organizational member”—indicates that the initial experience of acculturation in any new job can take months and “is characterized by disorientation, foreignness, and a kind of sensory overload.”<sup>204</sup>

Any meaningful process of acculturation also would require far more oversight than the formal reservation of decisional authority required by law.<sup>205</sup> It can be challenging, however, for government attorneys to keep up with the details of work performed by private counsel—particularly when the justification for privatization is that the private attorneys possess specialized expertise that the public attorneys lack.<sup>206</sup> Even in more routine cases, anecdotal evidence suggests that requirements of meaningful supervision are ineffectual.<sup>207</sup> (They are also extremely difficult to enforce, given attorney-client and work-product protections.) In the debt-collection context, for example, DOJ tasks one Assistant U.S. Attorney to oversee the work of the multiple firms working in each private counsel district. The numbers are daunting: the GAO’s report indicates that, over the first four years of the private counsel program, DOJ referred a total of 25,519 cases to private firms in seven districts—suggesting something in the range of 900 cases per district, per year.<sup>208</sup> While supervising attorneys may be capable of maintaining a spreadsheet tracking cases resolved, dollars collected, and fees paid out, it is fanciful to suggest that a single government attorney can provide meaningful oversight for 900 additional private-counsel cases while keeping up with her own workload.

Even where it is feasible, supervision may itself be costly. At some point, extensive oversight of private attorneys will consume all the resources that

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Michaels has detailed, government often uses privatization to exploit the differences between civil servants and private contractors. See Jon D. Michaels, *Privatization’s Pretensions*, 77 U. CHI. L. REV. 717, 745–50 (2010) (describing privatization as a means of transferring “decisionmaking input . . . from the politically insulated bureaucrats to potentially more responsive contractors”).

203. See generally John Van Maanen & Edgar H. Schein, *Toward a Theory of Organizational Socialization*, 1 RES. ORGANIZATIONAL BEHAV. 209 (1979) (exploring the challenges of socializing newcomers into new organizations or roles).

204. Meryl Reis Louis, *Surprise and Sense Making: What Newcomers Experience in Entering Unfamiliar Organizational Settings*, 25 ADMIN. SCI. Q. 226, 229–31 (1980).

205. See *supra* notes 83–88, 98–99 and accompanying text.

206. Cf. Freeman, *supra* note 162, at 1317 (noting that governmental agencies are “generally ill-equipped” to “extensive[ly] monitor[] . . . private contractors . . . for quality control, which these agencies charged with oversight have traditionally not done very effectively”).

207. See, e.g., *Merck Sharp & Dohme Corp. v. Conway*, 947 F. Supp. 2d 733, 747, 748 (E.D. Ky. 2013) (rejecting a challenge to the State’s reliance on a private firm notwithstanding the supervising assistant attorney general’s “unfamiliarity” with aspects of the case, reasoning that “the AG’s office does not need to be intimately involved in all of the everyday work or decision-making that occurs in the . . . litigation to exercise meaningful control over the proceedings”).

208. GAO REPORT, *supra* note 145, at 10, tbl.3.

outsourcing was intended to save.<sup>209</sup> Yet the alternative—using lawyers who may be accustomed to different norms of practice—carries costs of a different kind.

Consider a case from California, in which Governor Gray Davis hired private attorneys to defend the state against charges that it had failed to provide basic educational necessities to public school children. The case made news—and not in a good way—when reports emerged that the state’s defense team had taken a heavy hand in depositions. The San Francisco Chronicle ran an article titled “High-priced legal team browbeats youths about shoddy schools”:

For 24 days this summer, high-priced attorneys from a politically connected law firm grilled 13 witnesses, trying to topple their testimony . . . . The lawyers . . . exhaustively combed through each claim. Some witnesses cried. Others became frightened when the questioning took on the tone of an interrogation. And some were defiant, angry at suggestions that they had lied or exaggerated. The witnesses ranged in age from 8 to 17.<sup>210</sup>

Of course, it is impossible to know whether government attorneys would have behaved any differently in the California schools case, or any other. The point here is not that public and private lawyers are different in some essential, immutable way. Rather, like other workers, their professional habits are shaped by the contexts in which they work—and those contexts may vary from government to private practice.

It bears emphasis that this is a point of caution, not condemnation. Many private firms take pains to cultivate the highest standards of ethical behavior in their employees, believing that their reputations will win them credibility in the courts and, thus, clients. And, as noted above, government offices themselves may differ starkly in their internal norms and cultures. In some cases, private lawyers may raise the bar for attorney conduct above what government would have generated in-house.

Indeed, there may be an independent value to dislodging the settled norms of government litigators. One of the potential benefits of outsourcing is that private contractors can bring new perspectives to government work, spurring innovations that would not have occurred if the doors between public and private had remained closed. In the litigation context, private lawyers may help correct for

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209. Letter from Arnold I. Burns, Deputy Att’y Gen., Dep’t of Justice, to the Hon. Marshall J. Breger, Chairman, Admin. Conference of the U.S. 4 (Nov. 10, 1986) (on file with author) (“Attorneys without experience in representing the government, and without day-to-day supervision by experienced government officials, would be unfamiliar with the special problems of public practice and the special standards of conduct to which government attorneys are generally held. Conversely, for the Department to expend substantial resources necessary adequately to supervise private counsel . . . would almost certainly make the retention of private attorneys uneconomical and impractical.”).

210. Nanette Asimov & Lance Williams, *Gov. Davis vs. Schoolkids / High-Priced Legal Team Browbeats Youths About Shoddy Schools*, S.F. CHRON. (Sept. 2, 2001), <http://www.sfgate.com/education/article/Gov-Davis-vs-schoolkids-High-priced-legal-2883621.php>.

“tunnel vision” on behalf of government litigators, who may be accustomed to seeing only one side of their cases and blind to the opposing considerations.<sup>211</sup>

The notion of cross-pollination between the public and private spheres suggests a final caveat. Today’s legal profession is extraordinarily mobile, and it is not uncommon for attorneys to move in and out of government practice.<sup>212</sup> This mobility suggests both that lawyers are capable of internalizing the norms of new institutions fairly quickly, and that many private attorneys may already have substantial experience in government work. Still, there are meaningful differences between full-time government employees and attorneys who perform the public’s work while maintaining private practices. As David Wilkins has observed, lawyers in the latter position “will continue to represent private clients at the same time that they are doing the people’s work—and if the lawyer herself does not, then other members of her firm surely will.”<sup>213</sup> Wilkins points out that “[t]his duality creates a significant potential for conflicts of interest.”<sup>214</sup> But it also complicates any effort on the part of the private attorney to adopt the norms of government practice on a temporary basis.<sup>215</sup>

In sum, outsourcing government litigation holds undeniable promise in terms of cost savings. In some instances it may not only be sensible, it may be necessary. But lawyers are not widgets, and when governments rely on private attorneys to litigate on their behalf, they may not be getting the same product at a lower cost. They may be getting a different kind of lawyer, a different kind of litigation.

There is a tension, moreover, between the goal of cost saving and the need for training and close supervision to ensure that private lawyers embrace the norms of government practice. Outsourcing government litigation is easiest to defend in financial terms where it is sporadic rather than routine, used to fill short-term needs for manpower or specialized expertise. But those instances also pose the greatest difficulties for acculturation. By contrast, the costs of acculturation might be minimized by what the literature on corporate counsel calls “convergence”—a reference to efforts by in-house counsel to reduce the number of outside firms on their “approved lists,” so as to “establish closer inside/outside relationships, to ‘partner’ with outside providers.”<sup>216</sup> Among other advantages, convergence allows in-house counsel to keep closer tabs on outside counsel and

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211. See Susan Bandes, *Loyalty to One’s Convictions: The Prosecutor and Tunnel Vision*, 49 *How. L.J.* 475, 485–87 (2006).

212. A nationwide survey of legal careers conducted in 2007 found that almost half of the surveyed lawyers who were working in the federal government, and 37% of those working in state or local government, had been in different practice settings in 2003. RONIT DINOVITZER ET AL., *AFTER THE JD II: SECOND RESULTS FROM A NATIONAL STUDY OF LEGAL CAREERS* 54–55 (2009).

213. Wilkins, *supra* note 79, at 456–56.

214. *Id.* at 457.

215. Cf. Louis, *supra* note 204, at 231 (noting that most instances of organizational socialization involve not only “changing to” a new role, but “changing from” one’s old situation, and that research suggests the difficulty of accomplishing one without the other).

216. SMITH, *supra* note 135, at 173.

to impress on them the norms of the client corporation.<sup>217</sup> We can imagine similar ongoing partnerships between government litigators and private firms. But despite its benefits in terms of acculturation, convergence runs counter to the goal of ongoing competition among private firms, and therefore is likely to raise the financial costs of outsourcing.<sup>218</sup>

### III. PRIVATE FINANCING OF PUBLIC LITIGATION

The discussion so far has focused on who handles litigation in the name of the government. But, as we saw in Part I, the choice between public and private extends beyond the delivery of public goods; it also concerns how we pay for them. Just as we might rely on private actors to perform tasks that once were done by government employees, we can (and often do) privatize funding by moving from a system of collective tax payments to one in which individuals pay for the services they want. Some public parks are supported by taxes and free to users, for example; others charge an entrance fee.

In the world of litigation, performance and payment tend to go hand in hand. The coupling of performance and payment is not inevitable, however. As Part I described, private dollars are fueling public litigation in areas ranging from criminal prosecutions to constitutional challenges to federal law. If anything, we can expect private financing to expand in scope as state and local jurisdictions grapple with persistent budget limitations. This Part explores the costs and benefits of private financing.

#### A. HOW SHOULD WE PAY FOR GOVERNMENT LITIGATION?

There are a variety of reasons why governments might prefer public funding over private payments. Some of those reasons are moral or philosophical, reflecting a view that certain goods and services are too fundamental to be allocated according to individuals' willingness and ability to pay. Other reasons are economic, reflecting a judgment that the good or service in question would otherwise be underproduced due to some form of market failure.

Both concerns are reflected in debates over user fees and other means of financing public services individually rather than collectively. Like outsourcing, private funding mechanisms have become more prevalent in recent decades, as part of the larger push toward privatization.<sup>219</sup> The federal government collects billions of dollars in user fees each year, and several agencies are funded

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217. *Id.* at 174.

218. *Cf.* SCLAR, *supra* note 13, at 14 (“The longer the term of the contract and the more complex the service provided, the smaller the role played by market competition in the costs and benefits of privatization.”).

219. Marshall J. Berger, *Introduction*, in ACUS SYMPOSIUM, *supra* note 19, at 1–2 (describing increased use of federal user fees during 1980s, and push by Bush Administration “for greater reliance on user fees”); Thomas Gale Moore, *User Fees and Privatization*, in ACUS SYMPOSIUM, *supra* note 19, at 7 (“[U]ser fees facilitate privatization, which I believe is generally a good idea.”).

entirely by such fees.<sup>220</sup> States, too, rely on fees to pay for a range of government services.<sup>221</sup>

The argument in favor of fees is grounded in the same aspirations to economic efficiency that drive privatization more broadly. By matching benefits to burdens—ensuring that those who enjoy the fruits of government services also bear the costs—fees promote efficient use and production of government services.<sup>222</sup> But the system works only where it is possible to extract payments from those who derive benefits. Where the benefits of government services are diffuse, extending to the general public and not just those individuals who directly use the services, user fees will lead citizens to underutilize (and government to underproduce) beneficial services.<sup>223</sup>

Thus, one reason to disfavor user fees and other forms of private payment is that the government service in question generates positive externalities that cannot be captured in a price that individual users are willing to pay. Put simply, the market for government services may not work very well. It may deprive the public of services that we sorely need.

A different objection is that market pricing is inappropriate for some kinds of services. This objection may take two forms. The first, and most straightforward, sounds in distributive fairness: in a world with severe wealth inequality, rationing government services according to ability to pay will mean that some citizens must go without.<sup>224</sup> More subtly, one might object to a system of private payments for government services because of the message it sends about the nature of those services. For example, there is longstanding disagreement over whether public parks ought to be funded individually or collectively, by user fees or by taxes.<sup>225</sup> The debate centers on how we should conceive of

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220. Peter A. Pfohl, *Who Should Pay for Agency Adjudication? A Study of \$200,000 Filing Fees at the Surface Transportation Board*, 25 *TRANSP. L.J.* 57, 71 (1997) (“Almost two hundred billion in user fees is collected annually by agencies.”).

221. See Reynolds, *supra* note 19, at 376 (describing “how special assessments, fees, and the formation of business improvement districts have overtaken general taxation as the preeminent revenue raising device” in local government).

222. See Moore, *supra* note 219, at 7 (“User fees . . . are prices . . . . They tell a producer or producers what to produce and how much to produce. . . . User fees also ration the output. . . . People then [look at the fee] and decide whether in fact paying that price is worth it for that particular service.”).

223. See Gillette & Hopkins, *supra* note 18, at 801–04, 808–09. Suppose, for example, that a municipality charges residents a fee for each garbage pick-up; it is up to residents to decide how often to schedule pick-ups and pay the fee. Frequent garbage collection benefits users individually, but it also benefits the neighborhood collectively—or at least those neighbors who care about cleanliness. Residents are unlikely to take account of such third-party benefits when deciding how often to use (and pay for) the service. “Measured from a societal perspective, underuse of the service will likely result.” Gillette & Hopkins, *supra* note 18, at 809.

224. See RICHARD BRIFFAULT & LAURIE REYNOLDS, *CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW 727* (7th ed. 2009) (“If there is a broad social interest in universal availability of a particular service, the fee might have to be set below the cost of providing the service—or dropped altogether—to avoid excluding people who cannot otherwise afford to pay.”).

225. See J.M. Bowker et al., *User Fees for Recreation Services on Public Lands: A National Assessment*, 17 *J. PARK & RECREATION ADMIN.* 1, 1–2 (1999) (summarizing the debates).

public lands. Are outdoor recreation areas simply glorified playgrounds for the (mostly relatively affluent) individuals who have the inclination and ability to spend time hiking and sight-seeing? Or should they be understood as aspects of “America the Beautiful,” parts of our shared national heritage and points of collective pride and enjoyment? One’s answer to that question will likely shape one’s view of user fees. User fees imagine the relationship between citizen and government as one between consumer and seller. A customer-service mentality might be entirely appropriate, and beneficial, in certain areas. In other areas, treating government services as if they exist for the benefit of particular individuals—those who pay for them—might work a pernicious shift in how we perceive those services, and ultimately how the services are provided.<sup>226</sup>

Similar considerations help explain why we (usually) finance public litigation collectively rather than individually. As Part I explained, litigation produces various public goods, including deterrence and law development. Left to their own devices, individuals may underinvest in those goods, while overinvesting in wasteful litigation that generates immediate financial recoveries but minimal public payoff. If private actors are unlikely to invest in private litigation at optimal levels, it is even less likely that they would finance public litigation effectively. Moreover, some forms of litigation might strike most of us as too important to leave to the vagaries of private decision making. Just as we might support collective payments for certain basic services, such as medical insurance for the elderly, we might prefer public funding for core aspects of public litigation. Finally, private payments might send an inappropriate message about the beneficiaries of government litigation, shifting the focus from public to private interests.

Criminal prosecutions offer a ready example.<sup>227</sup> Though the history of prosecutions in the United States remains murky, it appears that private prosecutions were common in the colonies, mirroring early English practices.<sup>228</sup> The system “reflected the philosophical view that a crime involved a wrong against an individual rather than against society as a whole.”<sup>229</sup> That model became difficult to sustain in the face of swelling populations and rising crime rates. In an effort to combat the “chaos and inefficiency” of private prosecutions, the

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226. See Reynolds, *supra* note 19, at 376 (criticizing funding mechanisms that link public benefits to private payments and so “exacerbate[] and cement[] [a] dues mentality in the minds of the citizenry”).

227. See Jeffrey Standen, *An Economic Perspective on Federal Criminal Law Reform*, 2 *BUFF. CRIM. L. REV.* 249, 269–70 (1998) (“The reason to desire public funding of criminal justice is because it connotes public control over criminal justice. Public control in turn reflects a deep antipathy toward entrusting large and important matters to the vagaries and occasional self-interestedness of uninhibited private initiatives.”).

228. Compare JOAN E. JACOBY, *THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY* 10 (1980) (“Although the system of private prosecutions prevailed in the English world at the time of the establishment of the first American colonies . . . it quickly vanished in America.”), with Fairfax, *supra* note 95, at 413 (“Up until the late nineteenth century, when the office of the public prosecutor developed, private lawyers regularly prosecuted criminal cases on behalf of both crime victims and the state.”).

229. ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 9 (2007).



colonies—and later, states—began to develop the systems of public prosecution that prevail today.<sup>230</sup> The shift was, in part, a response to the realities of the time: private prosecutions could not maintain public order in the rapidly industrializing society.<sup>231</sup> Some victims were too poor to pay for prosecutions. Others “negotiated private settlements with their offenders, resulting in sporadic, unequal applications of the law.”<sup>232</sup> In other cases, no victim could be found, given the nature of the offense; breaches of the peace are a prime example.<sup>233</sup> In some respects, then, the move to public prosecutions may be understood in terms of market failure—concerns that private actors lack the will and wherewithal to use the legal system to socially beneficial ends. But the shift to a public model also reflected a growing recognition that managing crime was a social, and not just individual, imperative.<sup>234</sup> As crime came to be conceived as a wrong against society as a whole, the logic of vesting prosecutorial authority in democratically accountable public officials took hold.<sup>235</sup>

Yet the rise of public prosecutions did not, in itself, strip private individuals of their influence over the criminal justice system. Many early prosecutors were paid fees for every case they took to trial.<sup>236</sup> Although those fees typically were drawn from the public treasury, they were linked in some jurisdictions to the actions of private citizens, who initiated prosecutions by bringing accusations. Because more cases meant more fees, prosecutors had little incentive to scrutinize accusations for merit.<sup>237</sup> As Nicholas Parrillo has described, the upshot was a “customer-seller relationship between the public prosecutor and private accusers.”<sup>238</sup>

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230. Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J.L. & PUB. POL’Y 357, 368–69 (1986).

231. See Carolyn B. Ramsey, *The Discretionary Power of “Public” Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309, 1311 (2002) (arguing that “public prosecution evolved from a private model in a slow, uneven manner in response to fears of social disorder”).

232. DAVIS, *supra* note 229, at 10.

233. See Allen Steinberg, *From Private Prosecution to Plea Bargaining: Criminal Prosecutions, the District Attorney, and American Legal History*, 30 CRIME & DELINQ. 568, 579 (1984) (arguing that the system of private prosecution declined in Philadelphia “because it was an ineffective means of law enforcement in the matter of breaches of the public order”).

234. See O’Neill, *supra* note 116, at 681 (discussing “the trend towards subordinating the interests of the victim to those of society”).

235. See JACOBY, *supra* note 228, at 10 (“Private prosecution was inconsistent with the American concept of democratic process . . . [T]he American system conceives of the criminal act to be a public occurrence and of society as a whole the ultimate victim.”); O’Neill, *supra* note 116, at 678 (emphasizing the “desire to ensure that public prosecutors could be held directly accountable by the people”); see also Beale, *supra* note 64, at 52–53 (describing systems of accountability for federal and state prosecutors); Michael J. Ellis, Note, *The Origins of the Elected Prosecutor*, 121 YALE L.J. 1528, 1530–36 (2012) (describing the trend toward electing prosecutors).

236. See NICHOLAS R. PARRILLO, *AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940*, at 259–60 (2013); see also *id.* at 262–72 (describing alternate payment systems in which prosecutors were paid fees only for convictions).

237. See *id.* at 258–62 (describing case-based fee systems, with special emphasis on Philadelphia).

238. *Id.* at 261.

This history suggests some of the problems that might follow from a move to private financing for criminal prosecutions and other forms of public litigation. But the private financing that concerns us here is not a substitute for collective tax payments. Instead, it supplements the funds already available to government litigators via the normal budgeting process. At least at first blush, private gifts in support of public litigation may seem unproblematic, even desirable. Just as we might welcome philanthropic donations to support the upkeep of public parks and national monuments,<sup>239</sup> perhaps we should celebrate private donations in the litigation context. If private dollars can help public attorneys do their jobs, is that not a good thing?

Despite the surface appeal of private gifts, there are good reasons to be wary of supplemental funding for public litigation. The following sections argue that such funding fails to achieve the advantages associated with user fees and other private payment systems, while recreating many of the problems.

#### B. PRIVATE PAYMENTS AND EXCESSIVE LITIGATION

Private financing for public litigation is, in essence, a form of “maintenance”—an archaic term that refers to circumstances in which a third party provides support for litigation in which she has no direct financial interest. (When funding is provided in exchange for a cut of the winnings—as in contingent-fee arrangements—the assistance is called champerty, a subset of the broader category of maintenance.)<sup>240</sup> Maintenance was prohibited at common law, but is now permitted in many U.S. jurisdictions.<sup>241</sup> That shift has paved the way for so-called third-party litigation funding, both ad-hoc and increasingly organized, as litigation-funding firms with extensive experience overseas expand into the United States.

Although the commentary on third-party litigation funding has focused on outside funding for private litigation, many of the relevant considerations translate to the public realm. Proponents argue that third-party litigation funding “enables liquidity-constrained plaintiffs to bring more cases and to prosecute cases more effectively. Increased funding for litigation should thus reduce legal error and help achieve the legal system’s goals, including both compensation and deterrence of negligent or wrongful acts.”<sup>242</sup>

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239. See Michael E. Ruane, *Billionaire Philanthropist Rubenstein to Give Millions to Help Fix Washington Monument*, WASH. POST (Jan. 18, 2012), [https://www.washingtonpost.com/local/billionaire-philanthropist-rubenstein-to-give-millions-to-help-fix-washington-monument/2012/01/18/gIQAPYmb9P\\_story.html](https://www.washingtonpost.com/local/billionaire-philanthropist-rubenstein-to-give-millions-to-help-fix-washington-monument/2012/01/18/gIQAPYmb9P_story.html).

240. *In re Primus*, 436 U.S. 412, 424 n.15 (1978) (defining “maintenance” and “champerty”).

241. See Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61, 98–100, 100 n.162, 107 & n.190 (2011) (reporting that twenty-eight U.S. jurisdictions explicitly permit maintenance and champerty in some form). U.S. jurisdictions have long made exceptions for contingent-fee arrangements. See *id.* at 99–100.

242. Michael B. Abramowicz, *Litigation Finance and the Problem of Frivolous Litigation*, 63 DEPAUL L. REV. 195, 196 (2014).

Similar arguments could be made with respect to private financing for public litigation. Consider private prosecutions, in which an interested party (often the victim) pays all or part of the cost of prosecuting the perpetrator, usually by paying a private attorney to litigate the case in the name of the state, or to assist state prosecutors.<sup>243</sup> Private prosecutions are still permitted in some states<sup>244</sup> and the impulse is easy enough to grasp. Prosecutors' offices often are overburdened and understaffed. Public prosecutors cannot possibly handle all the cases that come across their desks, and are forced to plead out even serious crimes because they lack the resources to invest in a full-blown trial. Privatization, so the argument goes, allows the state to discharge its core duties to victims, and to the public at large.<sup>245</sup>

Those who defend states' reliance on contingent-fee lawyers offer similar arguments. In a world of limited state budgets, there will be "industries that will not be taken on, . . . cases that will not be brought, unless we allow contingency fees."<sup>246</sup> As one group of contingent-fee attorneys put it, when defending their \$14 million fee for work on behalf of the state of Mississippi,

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243. See, e.g., O'Neill, *supra* note 116, at 690–91 (describing several New Jersey cases in which private prosecutors acted in the name of the state); see *id.* at 689 n.184, 692–95 (describing state laws and judicial decisions permitting private attorneys to assist in prosecutions).

244. Most courts to consider the question have held that private prosecutions are constitutionally permissible as long as public officials retain formal control over the litigation. The Fifth Circuit has held, for example, that:

There is no *per se* constitutional prohibition against the use of special prosecutors. However, the use of special prosecutors raises concerns that the prosecutor's loyalty to the person who pays the special prosecutor may override the interests of society in justice and a fair trial for the accused. We require, therefore, that the district attorney retain control of the prosecution, the special prosecutor not be guilty of conduct prejudicial to the defendant, and the rights of the defendant be duly observed.

Faulder v. Johnson, 81 F.3d 515, 517 (5th Cir. 1996) (citation omitted) (citing Powers v. Hauck, 399 F.2d 322 (5th Cir. 1968)). Other courts have held similarly. See Jordan v. State, 786 So. 2d 987, 1011–12 (Miss. 2001) (rejecting due process challenge to private lawyer's appointment as special prosecutor, where "either the District Attorney himself or one of his assistants were present with [the attorney] during most of the pre-trial hearings and at trial"); State v. Nichols, 481 S.E.2d 118, 122–23 (S.C. 1997) (not unconstitutional for prosecutor to be assisted by three private attorneys hired by victim's family where prosecutor "maintained control of the case"); State v. Bennett, 798 S.W.2d 783, 786 (Tenn. Ct. App. 1990) (statute allowing victim to hire private counsel to assist prosecutor constitutional where extent of participation is to be determined by prosecutor); Riner v. Commonwealth, 601 S.E.2d 555, 569 (Va. 2004) (requirement that public prosecutor "remain in continuous control of the case" satisfied; not necessary that private attorney "handle only innocuous witnesses and evidentiary matters").

245. See O'Neill, *supra* note 116, at 661 ("It is widely acknowledged that the state possesses limited resources to allocate to the criminal justice system. . . . [I]f private resources can be tapped to enforce criminal statutes, the public at large may benefit as the result of those individual efforts."); Tim Valentine, *Private Prosecutions*, in *PRIVATIZING THE UNITED STATES JUSTICE SYSTEM: POLICE, ADJUDICATION, AND CORRECTIONS SERVICES FROM THE PRIVATE SECTOR* 226, 226 (Gary W. Bowman et al. eds., 1992) (defending private prosecutions on the ground that "[t]he average district attorney's assistant just has not the time to give every case the attention it needs before trial").

246. Daniel J. Capra et al., *supra* note 22, at 2840–41 (quoting Barbara S. Gillers, remarks at the Fordham University Law panel on tobacco litigation and attorneys' fees).

“no attorney would work for the state if they had to depend on the Legislature for compensation.”<sup>247</sup>

Note a common assumption running through all of these arguments: more is better. Third-party funding is beneficial, we are told, because it facilitates litigation that would otherwise have been impossible given the resource limitations of the party in interest.

But herein lies the problem. Whether more is better in the litigation context is a difficult, and often hotly contested, proposition. Indeed, one of the most common critiques of private litigation is that it produces too much litigation.<sup>248</sup> From that perspective, government enforcers making do with limited budgets is a feature, not a bug. Limited resources set a ceiling on how much, in total, government litigation can do.<sup>249</sup> That is a blunt tool for combating excessive litigation, but it has long been considered a critical difference between public and private enforcement.<sup>250</sup> Supplementing public budgets with private dollars removes that important check on public litigation. And, unlike traditional user fees, private financing does not trade a democratic check for a market check. Recall that a core justification for user fees is that they ration both use and production of government services. Supplemental payments have the opposite effect. Because government litigators can access both legislative appropriations and private dollars, the ratchet moves in only one direction: toward more public litigation. The potential consequence—too much of a government service—runs counter to the belt-tightening justification for user fees and other private payment mechanisms.

Defenders of private financing might concede this point as a theoretical matter, but insist that resource limitations are so stark (particularly at the state and local levels) that the risk of excessive public litigation is negligible in fact. Even where more government litigation would be desirable, however, it matters which cases public litigants pursue. As the next section explains, private financing is unlikely to raise litigation levels indiscriminately. Donations do not create a rising tide that lifts all boats; they tend to support particular types of initiatives. The resulting distortions may be worse than any budgeting shortfall.

### C. CHECKBOOK JUSTICE

Consider an extreme hypothetical: suppose that resource constraints prevent a local prosecutor’s office from pursuing more than one out of every ten crimes. And suppose that, after an influx of new money, the prosecutor is able to boost enforcement levels significantly. But suppose that the extra enforcement is

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247. *Payment by Attorney General in MCI Case at Issue*, VENTURA CNTY. STAR, June 9, 2011.

248. See *supra* notes 48–49 and accompanying text.

249. See Zeppos, *supra* note 126, at 182 (“[B]oth the level of salaries for federal attorneys and the low number of attorneys (given the amount of the legal work handled in the federal government) . . . may reflect strong legislative preferences concerning the level of law enforcement desired by Congress.”).

250. See, e.g., Landes & Posner, *supra* note 40, at 36–37.

focused exclusively on middling offenses committed by the prosecutor's political rivals (or minority groups, religious leaders, public school children, etc.—the reader may choose her poison). The point is simple: it can rarely be said that more is better, full stop. The details matter.

As discussed in Parts I and II, government litigators enjoy broad discretion in determining how to allocate their time and resources, and in most areas our law is capacious enough to give them a wide range of choices. Private financing—like private performance—can alter the exercise of that discretion. Private dollars will tend to push public decision making in a particular direction, prompting government attorneys to pursue cases that serve the interests of their donors rather than “those in which the offense is the most flagrant, the public harm the greatest.”<sup>251</sup>

According to critics, that is precisely what happened in Ventura County, California, after prosecutors began to accept private funds to pay for certain initiatives. In 1993, with the blessing of the state attorney general and legislature, District Attorney Michael Bradbury set up a fund to raise money from local businesses for the prosecution of workers' compensation fraud. Citing state and county budget cuts, Bradbury contended that he would be unable to prosecute fraud cases without private dollars.<sup>252</sup>

Bradbury quickly raised more than \$150,000 in contributions from school districts, insurance companies, and other business affected by fraudulent claims of injury. The Ventura County Agricultural Association, for example, donated \$70,000 in seed money to the cause. Bradbury used the funds to set up a special unit in the District Attorney's office, and staffed it with a new prosecutor, investigator, and clerk. Three years in, the new unit had charged nineteen defendants with insurance fraud. Meanwhile, workers' compensation claims in the County decreased—a shift that defenders of the fund attributed to the “mere presence of the unit.”<sup>253</sup> As one Assistant District Attorney put it, “[t]he deterrent factor is . . . important in fighting this kind of fraud.”<sup>254</sup> Donors echoed the same theme: “‘We paid for the publicity and educational value’ of the unit,” one explained.<sup>255</sup>

Critics offered a different assessment. The apparent purpose of criminal sanctions for workers' compensation fraud was to punish and deter repeat offenders who were making fraud a booming business. In the late 1980s and early 1990s, complaints by employers about widespread fraud—most of it instigated by unscrupulous lawyers and doctors in “medical mills”—led the legislature to adopt harsher sanctions, including criminal penalties, aimed at

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251. Jackson, *supra* note 172, at 5.

252. Gary Gorman, *D.A. Sets Up Funds for Workers' Fraud Cases*, L.A. TIMES (Jan. 26, 1993), [http://articles.latimes.com/1993-01-26/local/me-1805\\_1\\_comp-fraud](http://articles.latimes.com/1993-01-26/local/me-1805_1_comp-fraud).

253. Paul Elias, *D.A. Inches Ahead in War on Insurance Fraud*, L.A. TIMES (Feb. 19, 1996), [http://articles.latimes.com/1996-02-19/local/me-37743\\_1\\_insurance-fraud](http://articles.latimes.com/1996-02-19/local/me-37743_1_insurance-fraud).

254. *Id.*

255. *Id.*

fraudsters.<sup>256</sup> The result was the legislation that served as the basis for the prosecutions by the Ventura County special fraud unit. Yet critics charged that the unit focused overwhelmingly on “the little guys”—workers—while ignoring the fraud mills and turning a blind eye on possible wrongdoing by employers and insurers.<sup>257</sup>

Such a system lines up neatly with the interests of the companies footing the bill. Employers and insurers are likely to welcome any reduction in claims activity, fraudulent or otherwise. Matters look different from the public perspective, however. The public interest is served by wiping out fraud (and only fraud) on both sides of the transaction.

Making matters worse, many areas of law are marked by deep and persistent disagreement over what counts as harm in the first place, and what government should do about it. Are topless clubs a scourge on society or simply a source of steamy entertainment?<sup>258</sup> Should the state pursue the death penalty for a mother who kills her two children?<sup>259</sup> Are gun manufacturers responsible for injuries caused by their products?<sup>260</sup> Does the federal Affordable Care Act offend principles of federalism?<sup>261</sup> Private financing gives private interests a powerful lever of influence over the resolution of these and countless other contests concerning the appropriate focus of government litigation.

Of course, government can choose to take private funds or leave them—but that choice may be clouded in important ways by the promise of free money. Government litigators may feel beholden to donors in ways that undermine their impartiality, making them reluctant to take steps that disserve donors’ interests.<sup>262</sup> And if public attorneys do not feel indebted to their private financiers, they still may experience an indistinct, and perhaps wholly subconscious, pull toward litigation initiatives that have a ready source of funding. Even if government employees are formally in control—free to accept or reject funding

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256. Ted Rohrlich & Evelyn Larrubia, *Public Fraud Unit Favors Those Who Privately Fund It*, L.A. TIMES (Aug. 6, 2000), <http://articles.latimes.com/2000/aug/06/news/mn-65499>.

257. Elias, *supra* note 253.

258. *See supra* notes 117–18 and accompanying text (describing private financing for prosecutions targeting topless clubs).

259. *See supra* note 102 and accompanying text (describing private financing in the Susan Smith case).

260. *See supra* note 187–88 and accompanying text (describing private contingent-fee arrangements in municipal suits against gun manufacturers).

261. *See supra* note 119–20 and accompanying text (describing private financing for ACA challenges).

262. Reasoning from this premise, two state courts have held that private financing in criminal cases makes it increasingly difficult for public prosecutors to exercise their independent professional judgment free of “compromising influences and loyalties.” *State v. Culbreath*, 30 S.W.3d 309, 315–16 (Tenn. 2000); *People v. Eubanks*, 927 P.2d 310, 321–22 (Cal. 1996). The concern is analogous to the concern about gifts to government employees and officials. *See, e.g., Rifkin, supra* note 104, at 250 (“In addition to the problem of public perception, there is a real advantage gained by the private-sector individual who has previously . . . given a gift to a public official. . . . It is difficult, if not impossible, for a public official, including one of complete honesty and integrity, to deny a request for a meeting or to refuse to take a telephone call from someone . . . from whom a gift was received.”).



as they see fit—private financing inevitably shifts some measure of power from the public to the private sphere.

Worse still, private financing empowers a decidedly nonrandom sample of citizens: those who are willing and able to pay for government litigation. As such, private financing raises obvious concerns about access to justice, because citizens' ability to participate in the market for public litigation is patently unequal. Government services typically are governed by a norm of equal provision: "[a]s a matter of legal doctrine, the delivery of a higher level of service to the wealthy side of town rather than to the poor side of town is considered an inequity to be remedied, often by judicial intervention."<sup>263</sup> User fees and other modes of private financing represent a departure from that norm, as they allow government services to be rationed according to citizens' relative wealth and willingness to pay.<sup>264</sup> But that, of course, is one of their principal drawbacks.<sup>265</sup>

Inequality in the market for governmental legal services is problematic in its own right, but it also threatens to diminish the relative advantages of public enforcement. One of those advantages is that the government can pursue claims that would not be asserted in a system of purely private enforcement. For example, research suggests that torts committed against poor and elderly victims are under-deterred, because the victims often cannot afford to sue and their claims are too small to attract the interest of attorneys willing to work on a contingency basis.<sup>266</sup> Public enforcement can, in theory, fill that void.<sup>267</sup> And, to the extent that budget limitations (or mere inattention) prevent government from vindicating certain interests, we might welcome private donations if we thought they would push government attorneys toward cases that would otherwise be ignored. Private financing is unlikely to serve that gap-filling role, however. Instead, it may tend to duplicate existing means of redress. In many instances, the private money available for public litigation could instead be used to pursue

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263. Clayton P. Gillette, *Opting Out of Public Provision*, 73 DENV. U. L. REV. 1185, 1197 (1996).

264. See David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2617–18 & nn.283–84 (2005) (explaining that user fees are one of various ways government can “extract[] funds from a subset of taxpayers in exchange for dedicating the proceeds to those taxpayers’ benefit”).

265. See, e.g., *id.* at 2619 (“Special assessments convert government from a social and political community into a kind of business, more responsive to major customers than to a broader community.”). Critics raise similar objections to the federal policy of allowing tax deductions or credits for charitable donations, thereby subsidizing the charitable causes wealthy donors opt to support. See Mark P. Gergen, *The Case for a Charitable Contributions Deduction*, 74 VA. L. REV. 1393, 1405 (1988) (“Many question the propriety of vesting power to choose what charities get funded in the wealthy donor class instead of elected officials or democratic majorities.”).

266. See, e.g., Paul H. Rubin & Joanna M. Shepherd, *The Demographics of Tort Reform*, 4 REV. OF L. & ECON. 591, 592 (2008) (finding that tort reforms have a disproportionate effect on certain low-income groups).

267. See, e.g., Michael Selmi, *The Value of the EEOC: Reexamining the Agency’s Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 3 (1996) (explaining that the EEOC tends to focus its efforts on small employment discrimination cases that “may not be sufficiently lucrative to attract profit-motivated attorneys”).

private litigation.<sup>268</sup> Shifting those dollars into the governmental sphere not only decreases the distinctiveness of public litigation; it also raises doubts about whether outside funding of public litigation adds value to the legal system as a whole.

Private financing is likely to be duplicative in a second way as well. Rather than empowering new groups or amplifying new voices, private dollars will tend to reinforce existing sources of influence. In most cases, the monied interests that can afford to bankroll public enforcement will be the same interests that already hold sway in the political process. Insurance companies, for example, are hardly shrinking violets likely to escape the notice of state officials. Nor is the plaintiffs' bar. Just as money can buy enforcement, it can also pay for campaign contributions and lobbyists. The upshot is that private financing is likely to benefit the interests of those who need it the least.

Notwithstanding these concerns, one might still insist that private financing is tolerable—even beneficial—as long as it operates to supplement public funding for government litigation. Arguably, private financing simply expands the pie, leaving more (public) resources available for other causes. Even if aspects of the privately funded “slice” are regrettable, one might think the benefits are worth the costs.

Maybe so—but it is important to be clear about both the benefits and the costs. It bears emphasis that private financing may not always expand the resources available for other public litigation. Most obviously, the human resources available for government litigation may be finite. If government employees must do the work that private contributions pay for, they will have less time to spend on other initiatives. Moreover, we might expect legislatures to respond to widespread or repeated private donations by cutting appropriations for public litigation in future years.

But even if private financing expanded the total resources available for government litigation, it would not follow that we should take the deal. There are fates worse than inadequate funding. In addition to the concerns outlined above, there is a distinctive harm that follows from letting citizens buy the public litigation they want. Imagine a criminal prosecution “brought to you by McDonalds.” The problem is not—or not only—the suggestion that a large corporation is in a position to influence the exercise of prosecutorial discretion. The problem is the apparent commodification of government litigation.

#### D. LITIGATION FOR SALE

Just as one might object to treating public parks as sites for the individual benefit of those who can afford to use them, one might worry about the broader social consequences of treating public litigation as a customer-service industry. This objection reaches beyond concerns about inequality and the duplication of

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268. See *infra* Part IV.B.

advantage. To see why, imagine a more egalitarian example of private financing: a state official creates a fund for private donations and caps donations at \$100. Such “crowdsourcing” of funds may allow people of limited means to participate in the market for government litigation, ameliorating problems of inequality.<sup>269</sup> But even if we assumed (contrary to fact) that all citizens were able to contribute in equal amounts, we might still object to arrangements that allow them to buy legal action in the name of the state.

Here too, third-party financing of private litigation offers an illuminating analogy. Historical prohibitions on maintenance reflected the view that legal claims should not be “convert[ed] . . . to a commodity to be exploited and transferred to economic bidders.”<sup>270</sup> That view was based in part on consequentialist concerns akin to those explored above—that allowing third-party financing would produce excessive litigation, or would place too much power in the hands of “wealthy litigants and over-zealous attorneys.”<sup>271</sup> But the anticommodification impulse also rested on a harder-to-pin-down sense that treating legal claims as items to be bought and sold would corrupt them in some way, leaching away their moral and civic import and rendering them “purely mercenary instruments.”<sup>272</sup> On that view, legal claims serve expressive functions, articulating the relationship between the parties and the rights and obligations they have to and against each other. Commodification changes the message, or so the argument goes. What was once a demand for justice by the interested party becomes a quest for profit by a faceless third-party funder. That transformation may be harmless in isolation, but it could be contagious: As more and more legal claims become the subjects of market transactions, the legal system as a whole is degraded.<sup>273</sup>

Reasonable minds may disagree on the force of the anticommodification argument as applied to private claims. For example, Michael Abramowicz has dismissed such concerns on the ground that legal claims for money damages “are already partially commodified” in the sense that they “are generally already

269. It might raise a different objection, akin to the duplication point above: the causes that will tend to capture the attention of multiple donors—so that small donations add up to a meaningful total—will likely already have the attention of government. Cf. Gergen, *supra* note 265, at 1409 (noting that, when making decisions about charitable donations, people tend “to commit excessive resources to highly publicized causes, e.g., the gifts showered on Jessica McClure, the girl rescued from a well in Midland, Texas”).

270. Sebok, *supra* note 241, at 68 (quoting *MNC Credit Corp. v. Sickles*, 497 S.E.2d 331, 333–34 (Va. 1998)).

271. *Id.* at 93–94.

272. Michael Abramowicz, *On the Alienability of Legal Claims*, 114 *YALE L.J.* 697, 707 (2005). For a definition of “corruption” as that term is used in debates over commodification, see MICHAEL J. SANDEL, *WHAT MONEY CAN’T BUY: THE MORAL LIMITS OF MARKETS* 34 (2012) (“To corrupt a good or social practice is to degrade it, to treat it according to a lower mode of valuation than is appropriate to it.”); as applied to politics, see Zephyr Teachout, *The Anti-Corruption Principle*, 94 *CORNELL L. REV.* 341, 382 (2009) (“Broadly put, corruption is the use of public forum to pursue private ends.”).

273. See Margaret Jane Radin, *Market-Inalienability*, 100 *HARV. L. REV.* 1849, 1913 (1987) (explaining “domino theory” of commodification); Abramowicz, *supra* note 272, at 707 (discussing Radin’s domino theory as applied to litigation).

seen as largely financially motivated.”<sup>274</sup> That may be true of private claims, but it is far from clear that the same conclusions follow when the subject is public litigation. As Part I detailed, public and private litigation have long been distinguished by reference to the interests at stake. Public litigation is presumed not to be financially motivated; it is supposed to vindicate the public interest, not narrow private interests. Private financing does not fit comfortably in that conception. It represents a break, a change in the social meaning of public litigation.

To be sure, private financing is hardly the only means by which citizens may use money to influence public litigation; campaign contributions and expenditures are obvious additional examples. But unfettered private spending on campaigns is intensely controversial precisely because of what it portends for government in the public interest.<sup>275</sup> The Supreme Court has held that concerns about the corrupting influence of money are insufficient in most cases to trump citizens’ First Amendment right to “participate in democracy through political contributions.”<sup>276</sup> Yet, despite the current Court’s increasingly muscular protection of that interest, it has never recognized an equivalent right to use personal funds to support specific government initiatives. That is, the right to spend in service of a government of one’s choosing appears to be limited to the processes of electing candidates; it does not extend to funding the services that government offers once candidates assume office. Instead, and quite unlike campaign financing, funding for government services typically reflects principles of collective—rather than individual—control and benefit.<sup>277</sup>

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274. Abramowicz, *supra* note 272, at 701, 709.

275. For a small sample of the vast literature on campaign financing and its effects on democratic governance, see LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* (2011); Deborah Hellman, *Defining Corruption and Constitutionalizing Democracy*, 111 MICH. L. REV. 1385 (2013); Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118 (2010); Teachout, *supra* note 272.

276. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014).

277. See KATHRYN A. FOSTER, *THE POLITICAL ECONOMY OF SPECIAL-PURPOSE GOVERNMENT* 107 (1997) (“Taxing districts *collectivize* the costs of service delivery. Collectivizing districts spread service costs across all property owners within district boundaries rather than assess individual users for services actually consumed.” (emphasis in original)). Thus, taxpayers cannot use the First Amendment as a shield against paying taxes for services they oppose (including services that involve government speech), nor can they object to taxes on the ground that they will derive no benefit from certain services being funded. See *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 559 (2005) (“‘Compelled support of government’—even those programs of government one does not approve—is of course perfectly constitutional, as every taxpayer must attest.”); Reynolds, *supra* note 19, at 384 (noting the “legal irrelevancy of the taxpayer’s assertion that he or she will receive no benefit from the service being funded by taxes”). Of course, the question whether citizens have an affirmative right to make targeted payments for government services is different from the question whether they can avoid paying general taxes. But the absence of the latter right suggests the absence of the former. At least at the federal level, moreover, an individual right to fund particular government programs would run headlong into the competing constitutional principle of legislative control over government spending. See Stith, *supra* note 109, at 1356–60 (describing principles of the public fisc and of appropriations control).

Again, user fees and the like are exceptions to the rule; such fees explicitly do link government services to voluntary payments by individual beneficiaries.<sup>278</sup> But again, that is one of their principal drawbacks. Critics contend that user fees and similar funding mechanisms create a “get what you pay for” mentality that casts government as seller and citizen as consumer.<sup>279</sup> So too with litigation financing. Allowing citizens to buy public litigation sends a signal—to opposing parties, to courts, to government attorneys, and to the public at large—about the purposes and priorities of government generally and of government litigation specifically. Whereas public funding implies public benefit and control, private funding implies private benefit and control. Private funding suggests that government litigation is no different from private suits, and that similar financial considerations drive decisions about which of the myriad competing litigation initiatives government will pursue.

#### IV. PRIVATIZATION’S PATHOLOGIES

The discussion in Parts II and III reveals a common objection that runs against both approaches to privatization: private performance and private financing may change public litigation. By imbuing ostensibly public litigation with private interests and incentives, privatization imports the pathologies of private litigation into litigation in the name of the government. One consequence of privatization, then, is that it can skew government litigation away from the public interest, rendering it public in name only.

As we have seen, however, privatization is not just distorting; it is also empowering. It allows private actors to influence the conduct and direction of government litigation, thereby subverting public control over important aspects of sovereign authority. In that sense, the privatization of public litigation triggers concerns about democratic governance that are familiar to the broader debates over privatization. Government litigation calls on public attorneys to make a series of contestable, value-laden choices, with significant consequences for law and policy. Ours may be a government of laws and not men, but it is men (and women) who make the decisions that shape our law and determine its practical effect. Their decisions represent “fragment[s] of sovereignty,” “instances in which law acknowledges its own limits and confers a kind of sovereign prerogative on a legal official.”<sup>280</sup>

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278. See Reynolds, *supra* note 19, at 409 (explaining the traditional requirements for user fees); see also *id.* at 397–429 (describing other mechanisms that link government services to payments by individual beneficiaries).

279. *Id.* at 376–77; see Gerald E. Frug, *City Services*, 73 N.Y.U. L. REV. 23, 32 (1998) (arguing that a consumer-oriented view of government services undermines “values commonly associated with democracy— notions of equality, of the importance of collective deliberation and compromise, [and] of the existence of a public interest not reducible to personal economic concerns”).

280. Austin Sarat & Conor Clarke, *Beyond Discretion: Prosecution, the Logic of Sovereignty, and the Limits of Law*, 33 LAW & SOC. INQUIRY 387, 390 (2008).

Privatization affects the exercise of that power in ways that disrupt the normal mechanisms of democratic accountability and control. Outsourcing public litigation to private attorneys extends to them the sovereign prerogative typically reserved for government employees. As Part II detailed, the choices private attorneys make about the conduct and goals of government litigation will be shaped by their own private incentives, and the habits they bring from private practice. Like outsourcing in other contexts, privatizing the government's legal work creates a "danger that private actors will exploit their position in government programs to advance their own financial or partisan interests at the expense of . . . the public."<sup>281</sup>

Private financing is similarly empowering. Private dollars expand the budgets of public litigators beyond the bounds staked out by legislative appropriations. The budgeting process can be understood as a lever for democratic control over executive discretion. Not only does a limited budget place a cap on how much any government litigator can do, but it also ensures that decisions about the scope of public litigation are made (at least in part) by the legislature. Unlimited private donations upset that balance, consolidating power in the executive branch.

Critics of states' reliance on contingent-fee attorneys have emphasized similar themes.<sup>282</sup> Indeed, some argue that the primary reason states hire private lawyers on a contingency basis is "to bypass state legislatures."<sup>283</sup> Properly framed, however, the objection is not about contingent-fee arrangements as such; it is about any form of private financing that allows public litigators to supplement their budgets in the absence of legislative approval.<sup>284</sup>

The objection that private financing aggrandizes executive power at the legislature's expense evaporates—as a formal matter, at least—when the legisla-

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281. Metzger, *supra* note 13, at 1372.

282. See Wilkins, *supra* note 79, at 436–37 (“[M]any . . . critics assert that contingent[-]fee and other related contracts in this setting undermine fundamental democratic values, either by reducing the legislatures’ ability to check prosecutorial discretion or by violating the zone of freedom from state action to which individual defendants are entitled under our democratic form of government.”).

283. Dana, *supra* note 22, at 319. Some litigants have tried to leverage this objection into a claim that contingent-fee arrangements between private attorneys and state attorneys general violate the separation of powers. Most courts have rejected such challenges. See, e.g., *State v. Hagerty*, 1998 ND 122, ¶ 28, 580 N.W.2d 139, 147–48; *Kinder v. Nixon*, 2000 WL 684860, at \*8 (Mo. Ct. App. 2000). Alternatively, some courts have deemed them nonjusticiable. See, e.g., *Philip Morris Inc. v. Glendenning*, 709 A.2d 1230, 1239 (Md. 1998). The Supreme Court of Louisiana reasoned that contingent-fee arrangements violate the state’s separation of powers for a somewhat different reason. Rather than focusing on how contingent-fee arrangements increase the capacity of the attorney general’s office, the court focused on the fact that, in a successful suit, private counsel is paid out of funds that would otherwise go to the state or its citizens. *Meredith v. Ieyoub*, 96-1110, p. 6 (La. 9/9/97); 700 So. 2d 478, 481 (“[U]nder the separation of powers doctrine, unless the Attorney General has been expressly granted the power in the constitution to pay outside counsel contingency fees from state funds, or the Legislature has enacted such a statute, then he has no such power.”).

284. Cf. Stith, *supra* note 109, at 1385 (arguing that to allow federal agencies to use private donations as they see fit “would be to permit private power, subject only to executive discretion, to influence the contours of government and governmental policy” (footnote omitted)).



ture has authorized government litigators to accept funds from private sources.<sup>285</sup> But the underlying concerns about private power remain. Private financing does not just remove a legislative check on public litigation; it also may influence the exercise of executive discretion itself. The critique of contingent-fee arrangements sees government officials as clear-eyed and calculating, devising ways to augment their authority. That view ignores that private financing may cloud the judgment of those very officials, making one course of action seem more attractive and the opposite course less so.

What should be made of all this? As noted, concerns about undermining public control over sovereign authority are common to debates over privatization in contexts ranging well beyond litigation. They are strongest when the government privatizes functions that seem uniquely sovereign, such as prisons or the military. Thus, proponents of privatization sometimes use a so-called yellow pages test.<sup>286</sup> The idea is that government services that have private, market analogues—that is, services provided by individuals and firms who can be found in the yellow pages—are prime candidates for privatization.<sup>287</sup> If private actors are already providing the service themselves, it is hard(er) to see the problems with hybrid arrangements that empower them to act on behalf of the government.

The yellow pages test may seem to support the privatization of public litigation, as litigation is by no means unique to government. We have private litigation too—and lots of it. But while the yellow pages may be full of private actors providing litigation services, they are not providing the same service as the government. As Part I detailed, public and private litigation are different in significant respects. Whereas private litigation is fueled by the self-interest of private litigants and lawyers, public litigants and lawyers work within institutional structures designed to ensure that government litigation serves the public interest.

This Part revisits the distinction between public and private litigation. As it explains, the notion that government litigation is—and should be—different from private litigation is not just the stuff of academic theory, but is reflected throughout our law. In various ways, some subtle and others more overt, we treat public litigation as distinctive, special. Privatization subverts those prac-

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285. See *supra* notes 105–06, 111–12 and accompanying text (providing examples of legislative authorization). For an argument that such an authorization by Congress may represent an unconstitutional abdication of its power and responsibility to control appropriations, see Stith, *supra* note 109, at 1384–86. Professor Stith acknowledges that courts are unlikely to enforce the constitutional principles she identifies, and urges Congress to “subject . . . gift authority to . . . legislative scrutiny and control.” *Id.* at 1395.

286. See, e.g., SCLAR, *supra* note 13, at 29 (describing the test).

287. E.g., H. Brinton Milward, *Make or Buy?*, 16 J. PUB. ADMIN. RES. & THEORY 319, 320 (2006) (“[A] presumptive case for contracting out exists if you can find at least three firms in the phonebook offering a service the [government] produces . . . .”) (reviewing E.S. SAVAS, *PRIVATIZATION IN THE CITY: SUCCESSES, FAILURES, LESSONS* (2005)).

tices, allowing private attorneys and interest groups to gain the benefit of preferential treatment typically reserved for government.

A. THE PUBLIC/PRIVATE DISTINCTION REVISITED

Nowhere is the distinction between public and private litigation more obvious than in areas where public litigators have exclusive authority. A decision to grant the government a monopoly on litigation authority rests, quite explicitly, on the view that public and private litigation are likely to follow different pathways, and that the public route is preferable to the private. Consider criminal prosecutions, for example. Recall that the move toward public prosecutions coincided with a shift in our understanding of crime from a wrong against the victim to a wrong against the public as a whole. As we came to emphasize the public interest in prosecuting crimes, we began to doubt whether private decision making would vindicate that interest. Instead, we placed our faith in public officials who could represent the government itself—and ultimately the people. In the words of the California Supreme Court:

That body of ‘The People’ includes the defendant and his family and those who care about him. It also includes the vast majority of citizens who know nothing about a particular case, but who give over to the prosecutor the authority to seek a just result in their name.<sup>288</sup>

Courts not only assume that government litigators will promote the public interest in criminal prosecutions, they demand it. Writing for the Supreme Court in *Berger v. United States*, Justice Sutherland put it this way:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.<sup>289</sup>

Although the criminal context has been the locus of the sharpest distinctions between public and private litigation, similar considerations carry over into the civil sphere. Criminal law is hardly unique in its public purposes; civil penalties serve similar goals of deterrence and, sometimes, retribution.<sup>290</sup> It should come as no surprise, then, that both state and federal courts have applied the Supreme

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288. *People v. Eubanks*, 927 P.2d 310, 315 (Cal. 1996).

289. 295 U.S. 78, 88 (1935).

290. See Max Minzner, *Why Agencies Punish*, 53 WM. & MARY L. REV. 853, 853–54 (2012) (describing the conventional wisdom that government uses civil penalties to deter wrongdoing and arguing that agencies’ goals are in fact often better understood in terms of retribution).

Court's statements in *Berger* to the government's civil lawyers as well.<sup>291</sup> Nor should it be surprising that government typically holds a monopoly on litigating so-called public rights, which implicate interests that all citizens hold in common.<sup>292</sup> And, even where it would be easy to imagine private rights of action, policymakers frequently vest government attorneys with exclusive authority for certain aspects of civil law enforcement. As in the criminal context, the decision to disallow private litigation reflects a judgment that the incentives and capacities of private litigants and lawyers are different from those of government, and less likely to promote the public interest. Justice Powell articulated the typical concern in his famous dissent in *Cannon v. University of Chicago*, where he bemoaned the prevailing tendency in the federal courts to imply private rights of action from ambiguous statutes.<sup>293</sup> Private interests, Justice Powell argued, are far more likely to overburden defendants with "expensive, vexatious litigation" than are public processes "under the control of Government officials whose personal interests are not directly implicated and whose actions are subject to [legislative] oversight."<sup>294</sup>

For better or worse, Justice Powell's perspective came to command a majority of the Court, and federal courts are now reluctant to imply private rights of action in the absence of clear evidence of congressional intent. Notably, however, they tend to be far more generous when it comes to recognizing public rights of action.<sup>295</sup> As one court put it, "it is natural . . . to adopt a more restrictive view" of the judicial remedies available to private enforcers as

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291. See, e.g., *Freeport-McMoran Oil & Gas Co. v. Fed. Energy Regulatory Comm'n*, 962 F.2d 45, 47 (D.C. Cir. 1992) ("The Supreme Court was speaking [in *Berger*] of government prosecutors . . . but no one, to our knowledge . . . has suggested that the principle does not apply with equal force to the government's civil lawyers."); see also *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249 (1980) (citing *Berger* in a civil case for the proposition that "administrative prosecutors . . . are also public officials; they too must serve the public interest"); *Cnty. of Santa Clara v. Superior Court*, 235 P.3d 21, 35 (Cal. 2010) ("[I]t is a bedrock principle that a government attorney prosecuting a public action on behalf of the government must not be motivated solely by a desire to win a case, but instead owes a duty to the public to ensure that justice will be done."); Green, *supra* note 56, at 256 ("Judicial decisions and other professional writings take the view that, even outside the context of criminal prosecutions, government litigators have a different role and different ethical responsibilities from lawyers representing private litigants.").

292. See Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 693–704 (2004) (explaining that "[p]ublic rights are those that belong to the body politic" and describing longstanding "requirements of public control over public rights"). Legislation that permits private parties to litigate public rights, such as the citizen-suit provisions of many environmental laws, represents a narrow (and controversial) exception to the general rule. See Cross, *supra* note 76, at 58–64. Even in those cases, however, government litigation is available as an alternative, and public officials typically have authority to take over (or even end) private litigation if they wish. See *infra* notes 300–01 and accompanying text.

293. 441 U.S. 677 (1979) (Powell, J., dissenting).

294. *Id.* at 747–48 & n.18.

295. See generally Seth Davis, *Implied Public Rights of Action*, 114 COLUM. L. REV. 1, 13 (2014) ("[A]s the right-remedy principle has declined in private litigation, federal courts have expanded public remedies."). For example, courts have been willing to assume that states have authority to enforce federal statutes when those statutes authorize suit by injured citizens—and sometimes when they do not. See Lemos, *supra* note 63, at 711–12 & n.61. And courts have assumed that the federal government

opposed to the government itself.<sup>296</sup> The reason is one that should by now be familiar: whereas “only a private controversy is at stake” in most private actions, “the public interest is involved” when government comes to court.<sup>297</sup>

If pockets of exclusive public litigation authority present obvious instances where our legal system differentiates between public and private litigation, they also capture cases in which the costs of privatization are most clear. These are cases in which policymakers have determined not to open the courthouse to private interests.<sup>298</sup> Privatization upsets that policy judgment, sneaking private interests through the back door cloaked in the mantle of the government.

The question becomes more complicated in areas where private parties could pursue equivalent litigation themselves; that is, where public and private actions exist side by side. If private groups can finance and litigate private suits, what difference does it make if they devote their efforts to public suits instead?<sup>299</sup> Concerns about private influence over public power seem muted here, and the yellow pages test would seem to weigh more strongly in privatization’s favor.

There is a critical difference, however, between allowing private interests to pursue litigation on their own behalf and letting them play influential roles in litigation in the government’s name. Even the most public-spirited private litigation is still private. It reflects the judgments of private individuals and organizations whose visions of the public interest can claim no democratic pedigree. Accordingly, our system rarely (if ever) grants private interests exclusive litigation authority in areas of public concern. Instead, we allow public and private litigation to complement each other, leveraging the distinct incentives and capacities of each so as to cover more ground than either private or governmental actors would reach on their own. The mix is frequently changing and constantly contested. The important point for present purposes is that—whatever the optimal balance—our system can reap the benefits of litigation diversity only to the extent that public and private remain distinct.

In many areas, moreover, public litigants perform a gatekeeping role. As David Freeman Engstrom has elaborated, state and federal agencies are often empowered to “evaluate private lawsuits on a case-by-case basis, blocking bad cases, aiding good ones, and otherwise husbanding private enforcement capacity.”<sup>300</sup> For example, DOJ may intervene in and take control over *qui tam*

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has authority to enforce statutes that “create[] a duty in favor of the public at large.” *Cannon*, 441 U.S. at 690 n.13 (explaining that private rights of action typically will not be implied in such circumstances).

296. *United States v. Lane Labs-USA, Inc.*, 427 F.3d 219, 231 (3d Cir. 2005).

297. *Id.*

298. *Cf. Robertson v. U.S. ex rel. Watson*, 560 U.S. 272, 273 (2010) (Roberts, C.J., dissenting from the dismissal of certiorari as improvidently granted) (“The terrifying force of the criminal justice system may only be brought to bear against an individual by society as a whole, through a prosecution brought on behalf of the government.”).

299. *Cf. Wilkins*, *supra* note 79, at 451 (suggesting that, from the perspective of public control of litigation, contracts between government and private attorneys are “clearly preferable” to purely private litigation).

300. Engstrom, *supra* note 26, at 620.

actions initiated by private parties; it “may dismiss or settle a *qui tam* case out from under a private [party] entirely”; and it may “veto private dismissals or settlements in cases it has not joined.”<sup>301</sup> Such gatekeeping powers allow agencies to calibrate private litigation at the retail level, supplementing legislative judgments necessarily made at wholesale. Here, too, the arrangement makes sense only if government decision makers offer different perspectives than the private litigants they are overseeing. The check dissolves—or is hopelessly diverted—if government litigation simply mimics private actions.

Government litigation also serves expressive functions that differentiate it from purely private suits—even when they concern the same subjects. It is commonplace to observe, for example, that criminal punishment carries with it a unique stigma. The stigma reflects the distinctive nature of criminal sanctions, but it also stems from the fact that the state has decided to prosecute this particular offender. The crime is against the public, suggesting a broader harm than an offense that victimizes particular individuals. Civil enforcement can send a similar message. Rhetoric about civil litigation is brimming with derisive terms for private actions thought to be motivated less by merit than by greed: “strike suits,” “nuisance suits,” “blackmail settlements,” etc. Skepticism about private litigation allows defendants to shrug off private suits as the products of profit-seeking plaintiffs and attorneys. Public actions are harder to dismiss. As Part III indicated, government litigation is widely presumed to be immune to the financial motivations that animate much private litigation. Perhaps more importantly, it is driven by clients and attorneys duty-bound to serve the public interest—to seek justice, not just private satisfaction. The consequence is that government litigation may carry a certain gravitas that private litigation lacks.

In short, putting the government’s name on a case changes the way it is perceived by the public, by courts, and maybe even by opponents. And perceptions can matter a great deal in litigation. For example, Nancy Morawetz has documented (and criticized) the Supreme Court’s tendency to treat unsubstantiated statements of fact made by federal government litigators as “presumptively trustworthy.”<sup>302</sup> Similarly, although scholars have questioned whether courts ought to give special weight to arguments made by state governments in cases involving threats to their authority, empirical evidence suggests that the Supreme Court does pay particularly close attention to arguments advanced by states, perhaps on the view that they offer the best evidence of the states’ institutional and regulatory interests.<sup>303</sup>

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301. *Id.* at 649 (emphasis added).

302. Nancy Morawetz, *Convenient Facts: Nken v. Holder, the Solicitor General, and the Presentation of Internal Government Facts*, 88 N.Y.U. L. REV. 1600, 1605 (2013); see also Zeppos, *supra* note 126, at 188 (“DOJ’s signature on a brief constitutes important information upon which the court relies. In exchange, of course, the court gives DOJ goodwill.”).

303. See Lemos & Quinn, *supra* note 12, at 1238–48 (surveying the empirical evidence on the effects of state amicus briefs); Michael E. Solimine, *State Amici, Collective Action, and the Develop-*

More concretely, the notion that public litigation represents the public interest serves as the backdrop for a set of legal rules and practices that differentiate between public and private litigation, mostly to the advantage of government.<sup>304</sup> Consider a few examples. Where both public and private rights of action are available, government litigants may find it easier to establish standing. State governments, in particular, often sue in a representative capacity as *parens patriae*, asserting quasi-sovereign interests in the health and well-being of their citizens.<sup>305</sup> In *Massachusetts v. EPA*, the Supreme Court cited Massachusetts' "stake in protecting its quasi-sovereign interests" as reason for "special solicitude" in the standing analysis.<sup>306</sup> The representative nature of *parens patriae* suits also enables states to leapfrog over standing limitations that may impede private suits. For instance, whereas the rule of *City of Los Angeles v. Lyons* makes it difficult for private parties to seek injunctive relief from sporadic instances of official misconduct,<sup>307</sup> courts have permitted states to sue as *parens patriae* in equivalent circumstances.<sup>308</sup> Because the state represents all of its citizens, and because those citizens are a diverse group, it will typically have little trouble establishing that a harm that has occurred in the past will likely befall some citizens in the future.

To some extent, government's advantage is shared by other representative groups. But courts sometimes distinguish between public and private representatives. The multistate tobacco litigation provides an illustration. Courts recognized states' standing to sue the tobacco companies to recoup the expenses they had incurred as a result of smoking-related illnesses suffered by their citizens.<sup>309</sup> Yet when private organizations (such as unions and health maintenance organizations) asserted similar claims, courts ruled that their injuries were too remote to establish standing.<sup>310</sup>

Representative suits by states also enjoy a raft of other procedural advantages over their private analogs—class actions. Whereas private class actions are governed by a complex set of procedural requirements designed to promote judicial economy and protect the interests of absent class members, similar suits by states and the federal government are largely free from procedural constraint.

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*ment of Federalism Doctrine*, 46 GA. L. REV. 355, 389–404 (2012) (proposing a taxonomy to guide Justices' decisions on whether to give special weight to state amicus briefs in federalism cases).

304. Cf. Zeppos, *supra* note 126, at 184–86 (discussing administrative-law doctrines that favor government defendants (deference doctrines, exhaustion requirements, etc.) and suggesting that such "rules operate as a kind of subsidy").

305. See Jack Ratliff, *Parens Patriae: An Overview*, 74 TUL. L. REV. 1847 (2000).

306. 549 U.S. 497, 520 (2007).

307. 461 U.S. 95, 96–98 (1983) (holding that plaintiff who had been subjected to a police choke-hold lacked standing to seek an injunction because he could not establish an immediate threat that he would face the same conduct again).

308. See, e.g., *Pennsylvania v. Porter*, 659 F.2d 306, 315 (3d Cir. 1981) (holding that state had standing to sue as *parens patriae* to enjoin police misconduct while noting that "many individual victims may be unable to show the likelihood of future violations of their rights").

309. See Coffee, *supra* note 22, at 241–42.

310. See *id.*



For example, state litigators need not show that the state's claims are typical of those of its citizens, that common issues of law and fact predominate over issues unique to individual citizens, or that the litigators themselves will adequately represent the interests of the state's citizens.<sup>311</sup> Nor must states provide notice, or an opportunity to opt out, to citizens whose interests might be affected by the outcome of the case.<sup>312</sup> State actions are also exempt from the jurisdictional machinations of the recent Class Action Fairness Act.<sup>313</sup> As a result, representative suits by states can proceed in instances where private actions would founder at the class-certification stage.<sup>314</sup> And even if a private class action were possible, the state's case may be significantly cheaper because the state need not sign up clients, provide notice to interested citizens, or litigate the certification question.<sup>315</sup>

Government litigators likewise can avoid mandatory arbitration clauses that would doom private actions, even when government is seeking relief "specific to a victim who agreed to arbitrate claims."<sup>316</sup> The cases rest in part on formal distinctions between public and private parties: although the victim may have agreed to arbitration, the government did not.<sup>317</sup> But the cases also reflect the broader view that government "may be seeking to vindicate a public interest, not simply provide make-whole relief for the [victim], even when it pursues entirely victim-specific relief."<sup>318</sup>

The special procedural treatment for government suits is not mere happenstance; in many cases it is grounded quite explicitly in a presumption that government litigators are different from—and more trustworthy than—their counterparts in the private bar. That perception is on full display in instances where courts have been faced with dueling public and private aggregate actions, and have denied certification to the private class action on the ground that the state suit is a superior method of adjudication. As one court explained, "the

311. Lemos, *supra* note 26, at 502–07 (describing differences between the rules for private class actions and those governing representative actions by states).

312. *See id.* at 507–08.

313. Mississippi *ex rel.* Hood v. AU Optronics Corp., 134 S. Ct. 736, 739 (2014); *cf.* People *ex rel.* Cuomo v. Greenberg, 946 N.Y.S.2d 1, 7 (App. Div. 2012) (holding that suit by state attorney general was exempt from similar jurisdictional rules governing private securities actions).

314. *See* Lemos, *supra* note 26, at 505.

315. Erichson, *supra* note 131, at 142 ("Government entity clients present a perfect opportunity for plaintiffs' lawyers to achieve the effect of aggregation without the need for class action or any other judicial joinder and without the need for signing up numerous clients.")

316. Rent-A-Center, Inc. v. Iowa Civil Rights Comm'n, 843 N.W.2d 727, 740 (Iowa 2014).

317. *See* E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 294 (2002); *Rent-A-Center*, 843 N.W.2d at 741.

318. *Waffle House*, 534 U.S. at 296; *accord* People v. Coventry First LLC, 915 N.E.2d 616, 619 (N.Y. 2009) ("[T]he government agency may seek relief specific to a victim who agreed to arbitrate claims, because . . . that relief is best understood as part of the vindication of a public interest . . ."); *see also* Taylor v. Ernst & Young, L.L.P., 958 N.E.2d 1203, 1211 (Ohio 2011) (reasoning that "the characteristics of the [state insurance commissioner's] public-protection role confirm that she does not stand in the shoes of the insolvent insurer" for purposes of arbitration).

State should be the preferred representative” of its citizens.<sup>319</sup> Thus, whereas courts take pains to ensure that private counsel adequately represent the interests of absent class members, they are willing to assume that state litigators are adequate representatives.<sup>320</sup> “Proceedings by the state,” another court observed, “are presumably taken with the best interests of state residents in mind.”<sup>321</sup>

The list could go on, but the point should be clear. Our legal system reflects our belief that government litigation serves different interests, and promotes different goals, than litigation by private parties and attorneys. And, for the most part, it gives government suits an edge over analogous private actions.

All of this helps to explain why private actors might prefer to support government litigation rather than focusing their efforts on private suits. It also clarifies why privatization matters—and should be cause for concern—even where public and private actions proceed in parallel. Unlike scenarios in which private actors are authorized to pursue litigation that mimics action by the government, privatization allows private interests to influence litigation in the name of the government itself. As such, privatization extends to private actors certain advantages that are grounded in presumed differences between public and private litigation. But while it empowers private interests, privatization simultaneously weakens government litigation, both in the short term—by diminishing its distinctive features—and in the long term. By blurring the lines between public and private litigation, privatization undermines the justifications for treating government litigation differently. Most of the rules described above are judicially created, and they could change if courts’ faith in the distinctiveness of public litigation were to falter. The stronger the resemblance between public and private actions, the harder it becomes to defend preferential treatment for government.

#### B. CORRALLING PRIVATIZATION

I have argued that the government’s reliance on private attorneys and private financing gives private interests undue influence over public litigation, raising concerns about democratic authority and accountability, and about the way we perceive and manage the relationship between public and private litigation. Those objections counsel against a headlong rush to privatization, even where the benefits seem most clear. It need not follow, however, that government must wean itself off private resources entirely. As Part II explained, with sufficient care at the front end and sufficient oversight throughout the contract arrangement, it may be possible for government to reap the benefits of private performance without sacrificing public control over the conduct of litigation. Again, it

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319. *Sage v. Appalachian Oil Co.*, Nos. 3:92-CV-176, 2:93-CV-229, 1994 WL 637443, at \*2 (E.D. Tenn. Sept. 7, 1994).

320. *Lemos*, *supra* note 26, at 502–04.

321. *Thornton v. State Farm Mut. Auto Ins. Co.*, No. 1:06-cv-00018, 2006 WL 3359482, at \*3 (N.D. Ohio Nov. 17, 2006).

bears heavy emphasis that such oversight goes beyond the formal reservation of authority typically required by law; it entails ongoing guidance and supervision to ensure that government employees maintain functional control of litigation, and that important decisions reflect public rather than private values.<sup>322</sup> In many cases—perhaps most—the requisite oversight will render outsourcing more expensive than the in-house alternative. But it is, at least, theoretically possible.

The problems with private financing are harder to avoid, so long as contributions are targeted to particular litigation initiatives. Greater transparency would be a step in the right direction, but it would not remove the risk that government priorities will be skewed by private influence. Anonymity would also help, as it would decrease the likelihood that government officials will prioritize the interests of wealthy donors, whether out of a sense of obligation or a desire to secure further donations. But even anonymous payments—if earmarked—have the potential to deflect public litigation toward the cases that private donors deem important rather than those that serve the public interest. The best (perhaps the only) way to avoid that risk is to require all funds for government litigation to be paid into the general treasury, so that decisions about how they are allocated and ultimately spent are made by government officials according to the usual processes for appropriations. At the very least, gifts should be both anonymous and earmarked only to the extent that they are designated for legal work, not for any particular litigation efforts.

Concededly, a prohibition on earmarks for public litigation would be a bitter pill. First, it would effectively rule out most contingent-fee arrangements. Such arrangements might be instigated by the government or by the attorney, but it is difficult to imagine them being struck in the abstract. From the attorney's perspective, the reasonableness of the deal depends on the details of the case in question—the expected costs of litigation and the probability, and likely size, of a recovery. Remove the target and the deal no longer makes sense.

Second, targeted giving may be significantly more attractive to would-be donors than the alternative of a blank check to the general treasury, or even to legal work more generally. Research on taxation and charitable giving suggests that people are more willing to engage in philanthropic giving when they can earmark the funds.<sup>323</sup> We might get much less giving, then, if we do not allow donors to support public litigation in a targeted manner.

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322. Cf. Gillian E. Metzger, *Private Delegations, Due Process, and the Duty to Supervise*, in *GOVERNMENT BY CONTRACT*, *supra* note 13, at 291, 307 (advocating “the development of a due process-based duty to supervise, under which the government must actively oversee decision making by its private delegates, at least when that decision making directly affects third parties”).

323. Sherry Xin Li et al., *Directed Giving Enhances Voluntary Giving to Government*, 133 *ECON. LETTERS* 51, 51 (2015) (reporting that subjects were more than twice as likely to contribute to charitable causes, including those performed by government, when voluntary donations could be earmarked for specific purposes); Sherry Xin Li et al., *Giving to Government: Voluntary Taxation in the Lab*, 95 *J. PUB. ECON.* 1190, 1191 (2011) (concluding that “the antipathy often expressed toward taxation is due more to coercion or lack of control over the use of resources, rather than to government *per se*, and that taxpayers embrace the voluntary, earmarked feature of a gift to a specific government agency”).

Third, there will undoubtedly be cases in which government litigation will be thwarted if executive-branch attorneys have to rely on the legislature for funding, particularly in times of divided government. For example, several state attorneys general used contingent-fee arrangements with private attorneys to support their suits against the tobacco industry after their funding requests were rebuffed by the legislature (and, in at least one case, by the governor).<sup>324</sup> Without private financing, those suits might not have been possible. As one defender put it:

After nearly forty years of political and legal inactivity, the attorney general litigation represents the first significant progress in holding manufacturers accountable (financially and otherwise) for the undisclosed and undertested hazards of cigarettes. To conclude that the attorney general litigation is on balance a bad thing, then, one also has to accept the fact that without it manufacturers may very well have remained largely unaccountable for the undisclosed hazards of cigarettes.<sup>325</sup>

It is important not to overstate this point, and tobacco litigation at the federal level offers a useful counterexample. Shortly after DOJ initiated its own landmark case against the tobacco companies, Congress denied Attorney General Janet Reno's special appropriation request of \$20 million to finance the preparations.<sup>326</sup> After a year of scraping by, Reno appealed to the public.<sup>327</sup> "Without that money, we will not be able to proceed," she told reporters, "[a]nd I think it is imperative that we move forward to protect the American people and to give them their day in court."<sup>328</sup> In the face of multiplying news reports, Congress caved.

Although the federal example serves as a reminder that appropriation battles can in fact be won, there is no denying that private financing will sometimes make the difference between litigation success and failure. If nothing else, targeted private donations shift the burden of inertia. Whereas the normal appropriations process requires the legislature to rouse itself to authorize funds, private money allows litigation to proceed unless the legislature takes steps to

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324. See Phil Brinkman, *Legal Bill Won't Affect State Much Although the Contract Was with the State, the Issue Is Really Between the Lawyers and the Tobacco Industry*, WIS. ST. J., Mar. 21, 1999, at A1 (reporting that the attorney general defended hiring a contingent-fee lawyer on the ground that "there was little enthusiasm among legislators to spend state money on a lawsuit that some felt shouldn't have been brought and others felt couldn't be won," and the governor had refused a funding request for additional government employees to work on the litigation).

325. Wendy E. Wagner, *Rough Justice and the Attorney General Litigation*, 33 GA. L. REV. 935, 961 (1999) (footnote omitted).

326. EUBANKS & GLANTZ, *supra* note 131, at 28.

327. *Id.* at 32.

328. Michael J. Sniffen, *Reno Asks for Help with Tobacco Suit*, WASH. POST, Oct. 5, 2000, [http://www.washingtonpost.com/wp-srv/aponline/20001005/aponline121207\\_000.htm](http://www.washingtonpost.com/wp-srv/aponline/20001005/aponline121207_000.htm).

block it.<sup>329</sup> In today's world of hyperpolarized parties and legislative gridlock, the difference between action and inaction will often be critical. Restricting private financing will mean reining in government litigators.

Unappealing as it may seem in particular policy contexts, this is our democracy at work. We will not always like the results. It is easy to conjure examples of valuable government litigation that was made possible only by targeted private payments. But it pays to remember that valuable is in the eye of the beholder. Unless one is willing to embrace all instances of private financing, from groups across the ideological spectrum, the defense is hard to sustain on principled grounds.

Some readers will still conclude that privatization, warts and all, is preferable to the alternative. Privatization is particularly attractive in areas where equivalent private actions are unavailable or likely to be unavailing. To see why, recall the defense of contingent-fee arrangements that we considered in Part III: There will be “industries that will not be taken on, . . . cases that will not be brought, unless we allow [targeted private financing].”<sup>330</sup> That is not quite accurate, of course. Rather, there are cases that will not be brought *by the government*. In many areas, public and private rights of action exist side by side, and private attorneys and financiers remain free to throw their resources behind actions on behalf of private interests. We should call those cases what they are—private suits—rather than disguising them as government actions.

Yet—and here we confront the real rub—in some instances disallowing privatization will indeed preclude all actions, both public and private because private suits are not a viable option. As the previous section described, private parties may not have authority to sue, or they may face legal barriers that government could have avoided. Here privatization offers a tempting second-best alternative.<sup>331</sup>

If anything, the relative advantages of government litigation—and, thus, of privatization—have increased in recent years. Although government suits have long enjoyed an edge over purely private actions, the gap has widened as

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329. See Coffee, *supra* note 22, at 251 (“Even if the legislature is circumvented by the use of contingency fees, it is not disabled. It can still act to block the . . . litigation. The critical difference involves on whom the risk of impasse falls.”). Professor Coffee prefers to place the risk of impasse on those opposing litigation, but his focus is on a particular kind of case: securities class actions, most of which are undertaken by state pension funds with the assistance of contingent-fee attorneys. As he points out, the question in that context is not whether a lawsuit will be filed, but who will control it—the state, or a different lead plaintiff. See Coffee, *supra* note 22, at 249. Professor Coffee acknowledges that the concern that “the volume of class litigation in the United States will be inflated by political contributions (i.e., suits that would otherwise not be brought will be brought) . . . may be more valid” in other contexts, such as mass tort or consumer class actions. *Id.*

330. See Wilkins, *supra* note 79, at 433, and accompanying text.

331. Litigation privatization could thus be understood as a variant of what Jon Michaels has called privatization “workarounds.” See generally Michaels, *supra* note 202 (arguing that government may use privatization to substantively alter the policies being administered, often in a way that circumvents limitations on government action). In the litigation context, by contrast, government and private actors are using privatization not only to expand the capacity of government, but also to circumvent limitations on private action.

private litigation has become the target of mounting hostility.<sup>332</sup> Courts and policymakers have channeled that hostility by erecting new obstacles to private suits and shoring up old ones.<sup>333</sup> Controversial as they are, those obstacles show no signs of imminent erosion. It is, perhaps, no coincidence that privatization seems to have become more prevalent during the same period. Privatization offers a way around the barriers to private litigation, allowing private interests to have their day in court under the guise of government.

Understanding privatization as a work-around helps explain its allure, but it also highlights the risks of the strategy. Government litigation is a viable alternative only because—to date—it has escaped most of the enmity that has been directed at private litigation. Instead, our legal system continues to presume that public and private litigation are meaningfully different. As we saw above, however, widespread privatization may precipitate a shift in how other actors in the legal system view government litigation. In so doing, it may spell the end of various legal rules and practices that prioritize public litigation over private lawsuits. In other words, while privatization may seem to offer private interests an opportunity to accomplish more with litigation, in the long run it may leave us with less. And that pill would be bitter indeed.

#### CONCLUSION

Privatization is touted as a way to improve the efficiency of government services. Yet privatizing the government's legal work may have the opposite effect. Contracting with private lawyers may be more expensive than keeping the work in-house, and private financing may encourage excessive, duplicative government litigation. Neither consequence is inevitable, to be sure. Outsourcing will often be the most cost-effective option in cases involving novel or particularly complex legal issues. And private donations may be valuable curatives in circumstances where resource limitations have resulted in a serious undersupply of government litigation.

Even where the advantages of privatization are most pronounced, however, significant costs remain. Private performance and private financing may change public litigation, remaking it in the private image. Private lawyers and donors inject private interests and incentives into government litigation, shifting both the ends sought and the means used to pursue them. As such, privatization saps government litigation of its distinctive potential, leaving it public in name but increasingly private in essence. If privatization becomes more widespread, the line dividing public and private litigation will become difficult to sustain—and so too will the justification for treating government differently.

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332. See generally Stephen C. Yeazell, *Unspoken Truths and Misaligned Interests: Political Parties and the Two Cultures of Civil Litigation*, 60 UCLA L. REV. 1752 (2013) (tracing the complicated political dynamics behind contemporary battles over private litigation).

333. See generally Burbank & Farhang, *supra* note 73 (describing efforts by Congress, courts, and rule makers to restrict private litigation).