
THE SALARY REVOLUTION AND THE
MARKS OF GOVERNMENT'S DISTINCTNESS:
A RESPONSE TO JON MICHAELS

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In *Against the Profit Motive: The Salary Revolution in American Government, 1780–1940*,¹ I trace the process by which American lawmakers went from paying public officials by fees for service and bounties to paying them the fixed salaries that we now take for granted in public administration. In his thoughtful and wide-ranging review essay, Professor Jon Michaels rightly casts the banishment of the profit motive as one of multiple developments by which American government came to be differentiated from the surrounding society and especially from the market. He points out two other developments — civil service protection for officials and participation rights for citizens — that further contributed to this differentiation. As Michaels acknowledges, the salary revolution was completed largely before the advent of civil service protection and well before the advent of citizen participation rights, and the salary revolution did not make either of these two later developments inevitable. Still, when they did arise, civil service protection and citizen participation rights had the effect of setting government apart — as salarization, too, had done. Michaels makes a powerful argument that these three features, together, have been key to the emergence of an effective, legitimate, and meaningfully democratic government in the United States.

Thus, Michaels provides us with a usable ideal of “government” that is defined in terms of practical organizational features that we can readily identify. It is an ideal grounded in America’s recent past and — less so but still meaningfully — in America’s present. A government agency today will often bundle the three features, and thus Michaels’s ideal tells us what we are likely to give up when we outsource a public function from an agency to a profit-seeking firm.²

To Michaels, the three features form a package; they can reinforce each other and also operate in productive tension with each other.³

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¹ NICHOLAS R. PARRILLO, *AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940* (2013).

² For further elaboration, see Jon D. Michaels, *Privatization's Pretensions*, 77 U. CHI. L. REV. 717 (2010).

³ Michaels argues that the tension between civil servants, participating citizens, and politically appointed agency heads replicates, in certain important ways, the virtues of the constitutional

This view does capture the reality of many agencies. But I want to suggest that each of the three features (and especially salarization) can also be viable and consequential even when the full triad is not in place. I think this point is significant because, given the skepticism that prevails today regarding so many aspects of government that were once taken for granted, it may prove impossible — for any particular public function or more generally — to maintain intact the triple combination of nonprofit status, civil service protection, and citizen participation rights. If we insist that every agency must stick with all three features, the result may be that skeptical lawmakers and agency heads will circumvent agencies altogether through outsourcing to profit-seeking firms, thereby negating all three features. But perhaps — in the context of a particular public function or more generally — some of the triad can be given up and the remainder conserved.

On this point, I think it especially important to consider the relationship between the nonprofit status of public functions and civil service protection for those who carry out those functions. “One might go so far as to suggest,” writes Michaels, “that whereas salarization helped eliminate problematic financial incentives to work diligently, the civil service spawned salutary, nonmonetary alternatives,” that is, the promise of security that induced government employees to stick with their jobs for life and to invest in expertise and reputation valuable to the agency’s mission.⁴ This relatively rational process of development did indeed play out in some instances. But establishing and maintaining civil service protection was (and remains) difficult, for several reasons: the need of political parties for personnel and funding to conduct the electoral campaigns that are essential to democracy; the possible resistance of nonpartisan employees to the efforts of elected officials to carry out what those officials consider their democratic mandate; and populist hostility among the middle class and working class toward job protections that exceed, often greatly, those available to workers in the private sector. The greatest practical support for civil service protection often comes from lobbying and unionization on the part of protected bureaucrats themselves,⁵ but that very lobbying and unionization may serve to delegitimize civil service protection in the long run by structuring protection to serve the narrow interests of bureaucrats

separation of powers. Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. (forthcoming 2015).

⁴ Jon D. Michaels, *Running Government Like a Business . . . Then and Now*, 128 HARV. L. REV. 1152, 1164 (2015) (book review).

⁵ See generally RONALD N. JOHNSON & GARY D. LIBECAP, *THE FEDERAL CIVIL SERVICE SYSTEM AND THE PROBLEM OF BUREAUCRACY* (1997).

rather than the public, or at least contributing to the popular impression that protection is so structured.⁶

Amid the present backlash against civil service protection that is prevalent at the state level⁷ and possibly gaining momentum at the federal level,⁸ those sympathetic to Michaels's normative argument may need to ask whether they prefer to (a) concede some rollback of civil service protection within the public sector, or (b) insist on maintaining full protection within the public sector at the risk of pushing skeptical lawmakers to "go private" by outsourcing to profit-seeking firms. Or if outsourcing is taken as a given, there remains the question of whether to preserve the nonprofit status of public functions by directing contracts toward private nonprofit organizations rather than toward profit-seeking businesses.⁹

In the history of salarization, lawmakers found profit-seeking to be so incompatible with the emergent demands and challenges of modern governance that they often abolished profit-seeking with a cry of "anything but this!" and shifted to salaries without a clear idea of what would now motivate administrators. The salutary motivators for civil servants described by sociologists — clear orders and monitoring from above, hope for advancement, dedication to technocratic standards, professional pride and reputation, and the like — were established and grew robust only in some agencies, with others left to muddle through. The pre-salary experiences of modernizing nineteenth-century lawmakers were so bad that even the relatively unaccountable, capricious, unresponsive, or directionless behavior of many post-salary administrators seemed an improvement.

Consider a few examples. As federal criminal law grew to include more technical regulatory crimes, conviction fees motivated prosecutors to convict huge numbers of people for nit-pickingly trivial

⁶ For an attack on tenure protection along these lines in the context of public schools, see Steven Brill, *The Rubber Room*, NEW YORKER (Aug. 31, 2009), <http://www.newyorker.com/magazine/2009/08/31/the-rubber-room> [<http://perma.cc/595D-DLVR>]. For broad discussions of collective lobbying and unionization among government employees, see JOHN D. DONAHUE, *THE WARPING OF GOVERNMENT WORK* 75–79 (2008); JOHNSON & LIBECAP, *supra* note 5.

⁷ *E.g.*, Stephen E. Condrey & R. Paul Battaglio, Jr., *A Return to Spoils? Revisiting Radical Civil Service Reform in the United States*, 67 PUB. ADMIN. REV. 425 (2007).

⁸ Some observers think that recent legislation curtailing tenure protections for the Senior Executive Service at the Department of Veterans' Affairs (VA) could be used as a model for other agencies. Joe Davidson, *New VA Law Does Good, but Gratuitously Hits Civil Service Rights*, WASH. POST (Aug. 8, 2014), http://www.washingtonpost.com/politics/federal_government/new-va-law-does-good-but-gratuitously-hits-civil-service-rights/2014/08/07/052aa70a-1e48-11e4-ae54-0cfe1f974f8a_story.html [<http://perma.cc/FMZ9-2KEB>] (quoting the chair of the Merit Systems Protection Board: "If it is the VA today, which agency is next?").

⁹ See Peter Frumkin, *Service Contracting with Nonprofit and For-Profit Providers: On Preserving a Mixed Organizational Ecology*, in MARKET-BASED GOVERNANCE 66 (John D. Donahue & Joseph S. Nye, Jr., eds., 2002).

offenses, and congressmen responded by replacing those fees with salaries without establishing any other mechanisms of accountability, blithely assuming that now-salaried prosecutors would choose their targets more-or-less reasonably (hence our present regime of prosecutorial discretion, which targets a mercifully small proportion of prosecutable conduct, albeit in an often politicized and arbitrary manner).¹⁰ Meanwhile, as federal lands were increasingly depleted, conservationists and some land users organized to challenge the old policy of distributing lands to homestead applicants as if those applicants were the government's customers, and Congress responded by marginalizing the old fee-taking officers, transferring lands to new sustainable-use programs run partly by civil service bureaucrats but also by local advisory boards highly responsive to the interests of the big land users in each locality — a nonprofit regime that promoted sustainability but hardly in a neutral or technocratic manner.¹¹

Examples like these reveal the attraction of nonprofit government, compared to profit-seeking government, even in the absence of the tenured civil service ideal. Banishing the profit motive, even without much of an accountability mechanism to replace it, can at least prevent the perverse run-up in government activity that may occur when monetary rewards are pegged to numerical measures of performance. Likewise, banishing the profit motive can at least prevent the favoring of a narrow interest that may occur when government adopts a “customer service” mentality (say, toward immediate resource users) to the exclusion of the other interests that inhabit a pluralist polity (such as future generations of users). The virtues of nonprofit government are deep, and the experience that gave us the nonprofit norm in our public sector lies so deep in our history that we may easily forget it. Michaels shows us that salarization was, in many contexts, only the beginning of American government's differentiation from the market. But it is in beginnings that we make our most basic, minimum commitments.

¹⁰ PARRILLO, *supra* note 1, at 272–94.

¹¹ *Id.* at 173–79.