Statutory Contracts

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Private law offers a unique solution to the problem of long-term fiscal commitment. When Congress enacts a spending program that will take many years to reach fruition, there is a risk of a subsequent Congress or President cutting off funding in the interim. There is no escape from the problem within appropriations law itself. One solution, however, is to entrust private sector allies as vessels of long-term commitment. As a matter of political economy, that solution draws on policy-feedback theory. As a matter of law, the solution rests on a mechanism that Congress already uses but has not recognized its potential: statutory contracts.

Statutory contracts are spending statutes that promise to pay if a counterparty performs a specified action. Most tax credits, most farm subsidies, and even Medicare work this way. Because statutory contracts are structured like, and implicate, the same normative interests as other contracts, this Article argues that they should be interpreted according to principles of contract law. Contract law provides remedies for a subsequent government's breach that public law cannot match. At the same time, not all statutory contracts should be enforceable, just as some executive branch contracts are held unenforceable when they constrain subsequent policy freedom.

Even if courts do not adopt the interpretive positions that this Article advances, the increased use of statutory contracting is reshaping the balance of fiscal power within Congress, between the branches, and between the government and its spending recipients. Statutory contracts shift power away from the appropriations committees, provide a central point of access for lobbyists, and reduce fiscal transparency by obligating the government to unknown sums. These factors make statutory contracts particularly susceptible to public choice concerns. And yet, statutory contracts are more procedurally attractive than existing forms of public-private governance where the executive strikes one-off deals with selected firms. Inherent in their nature as unilateral contract offers, statutory contracts are open to any willing counterparty who meets performance requirements. This Article

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suggests that statutory contracts could thus become the fiscal mechanism of a more open and performance-based industrial policy.

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Introduction

Suppose Congress wants to pass a law that will spend public money to build high-speed rail nationwide. And suppose this is a fairly controversial proposition, with the risk that the next election might bring a government hostile to expanding railroads. What options does Congress have to make its spending commitment last long enough for the rail network to be built?

As Part I of this Article makes clear, none of the familiar options are bulletproof. Congress could pass an annual appropriation providing funds to the Department of Transportation and direct DOT to use those funds to build railroads. But the next Congress could simply decline to continue the appropriation in subsequent years.[1] Congress could instead appropriate a lump sum large enough to last DOT for ten years of railroad building and make the sum available until expended.[2] That would be safe from any future Congress's whims. But if a future President and future Congress both opposed railroad-building, the President could use her recission authority under the Impoundment Control Act and, with Congress's approval, rescind the funds.[3] Even without Congressional assent, the President could illegally impound funds and delay their obligation until an injunction or political pressure forced her to relent. This is the course President Trump took in temporarily refusing to release Congressionally appropriated security assistance to Ukraine.[4] If the appropriation were sufficiently general, the President could reprogram the appropriated funds to a different activity within the same budget account: perhaps building airports rather than railroads.[5] More informally, the President could instruct DOT to defer the obligation of appropriated funds until near-expiration of their period of availability. Years of delay wouldn't necessarily halt railroad building, but it would create enormous uncertainty and raise project costs.[6] Perhaps administrative incompetence would prevent the obligation of funds by the statutory deadline—permissible under the Impoundment and Control Act.[7] The bottom line is that Congress cannot count on a hostile executive branch to implement long-term appropriations on the intended timeline.

1. *See* U.S. GOV. ACCOUNTABILITY OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 2-9 (4th ed. 2016) (describing "the most common type of appropriation," an "annual" appropriation that lasts only one year).
2. *See id.* at 2-66 (describing a "no-year" appropriation).
3. 2 U.S.C. §§ 682(3), 683, 688. *See infra* Section I.B.
4. *See* U.S. Gov. Accountability Office, GAO-331564, *Office of Management and Budget (OMB), Withholding of Ukraine Security Assistance* (2020).
5. *See* Lincoln v. Vigil, 508 U.S. 182, 183 (1993) (reprogramming lump-sum appropriations is committed to agency discretion).
6. *See* Bent Flyvbjerg, Mette K. Skamris Holm & Søren L. Buhl, *What Causes Cost Overrun in Transport Infrastructure Projects?*, 24 TRANSP. REV. 3, 5 (2004) (finding that each year of delay causes a 5% increase in annual costs in large infrastructure projects, not counting financing costs).
7. *See infra* Section I.B.

For a Congress determined to entrench its spending programs, one alternative is to appropriate funds directly to private-sector contractors rather than to the executive branch.[8] There are presumably a number of companies willing to build railroads for pay and unlikely to change their minds at the next electoral cycle. This is in fact exactly what Congress does in the form of enacting tax credits to which counterparties are automatically entitled by conducting an enumerated action—like building a bridge, a wind turbine, or a semiconductor plant.[9] There is still a risk that the tax-credit authorization might expire, or be repealed, before private firms finish their multi-year projects and qualify for payment. Cognizant of that risk, Congress often includes a "begin construction" safe harbor in tax credits for long-term initiatives, meaning that the counterparty can qualify for the credit so long as it starts the project before the program has expired.[10] But even this protection is not good enough against a future Congress bent on repeal. The Supreme Court has upheld retroactive repeals of tax legislation against Due Process challenges.[11] Under the prevailing understanding of tax incentives for long-term investment, recipients would have no recourse if Congress repealed the incentive even after they had met the "begin construction" test.[12]

Instead of looking for principles to support long-term fiscal commitment within appropriations law or tax law, this Article proposes that those principles can be found in the general law of contracts.[13] The prevailing understanding of the spending programs mentioned above misses something critical: they are best understood as contract offers, and they should thus be interpreted to provide remedies for breach. When Congress passes a law offering to pay a certain amount to anyone who produces a certain commodity or builds a certain piece of infrastructure, it is sending a contract offer into the world.[14] Specifically, it is making a unilateral contract offer, the kind where only one party is bound and the

8. *See infra* Section I.C. For more on entrenchment through commercial transactions, see Christopher Serkin, *Public Entrenchment Through Private Law: Binding Local Governments*, 78 U. CHI. L. REV. 879, 887-92 (2011).

9. *See infra* Part II (providing examples of tax benefits to which firms become entitled by performing a specific action).

10. *See infra* Section I.D.

11. *See* United States v. Carlton, 512 U.S. 26, 27 (1994); *infra* Section I.E.

12. *See infra* Section I.E.

13. *See* Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 509-11 (2006) (describing it as a "well-settled proposition" that federal courts use general principles of contract law accepted in most states to determine the federal government's rights and duties under its contracts). For a discussion of the relevance of a general law of contracts, see *infra* Part II.

14. This claim has been made by scholars and justices in analogical terms. *See* Bowen v. Massachusetts, 487 U.S. 879, 923 (1988) (Scalia, J., dissenting) ("The Medicaid Act itself can be analogized to a unilateral offer for contract—offering to pay specified sums in return for the performance of specified services and inviting the States to accept the offer by performance."). A rare literal version of this claim can be found in David E. Engdahl, *The Contract Thesis of the Federal Spending Power*, 52 S.D. L. REV. 496, 498-99 (2007); *see also* Bridget A. Fahey, *Federalism by Contract*, 129 YALE L.J. 2326, 2354 (2020) (examining how courts deploy both literal and analogical versions of the claim).

second party accepts by rendering performance.[15] Statutory contracts are poorly understood, yet ubiquitous. The Supreme Court described one statutory offer as "creat[ing] a rare money-mandating obligation requiring the Federal Government to make payments" once a private party met certain conditions.[16] But in fact, this sort of statute is not rare at all. Most tax credits, most farm subsidies, and even Medicare are statutory contracts.[17]

In Part II, drawing on general principles of contract law, this Article proposes that when a statute offers specific consideration as an inducement for the performance of specific services, it should be interpreted as a contract offer.[18] This approach treats the notion of a statutory contract more literally than existing scholarly and judicial analysis, where the idea of "statutes as contracts" is often invoked as an enlightening analogy but rarely as an invitation to bring contract doctrine into statutory interpretation.[19] Although some lower courts have treated statutes of this sort as contracts, the Supreme Court has resisted that characterization, especially with regard to tax statutes, holding instead that "[t]ax legislation is not a promise, and a taxpayer has no vested right in the Internal Revenue Code."[20]

But the Court has not appreciated the distinction between most tax laws, which are no more promises than any law that creates reliance interests, and the sorts of statutes under study here, which deliberately induce reliance in order to elicit behavior that legislators seek.[21]When Congress enacts a statutory contract offer, it is not merely announcing consequences that will follow a certain action; it is trying to induce that action. When Congress sends this sort of message to prospective counterparties, it is engaging in what Justice Holmes called "reciprocal conventional inducement," a classic trigger for the invocation of

15. *See* Mark Pettit, Jr., *Modern Unilateral Contracts*, 63 B.U. L. REV. 551, 553 (1983); Peter Meijes Tiersma, *Reassessing Unilateral Contracts: The Role of Offer, Acceptance and Promise*, 26 U.C. DAVIS L. REV. 1, 20 (1992).

16. Me. Cmty. Health Options v. United States, 590 U.S. 296, 328 (2020).

17. *See infra* Part II.

18. *See infra* Section II.A.2.

19. For academic analysis of statutes as contracts, see Fahey, *supra* note 14, at 2339 (2020) (analyzing intergovernmental agreements, including Spending Clause programs, as contracts); William N. Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1522-23 (1987) (criticizing the statutes-as-contracts analogy); Mark L. Movsesian, *Are Statutes Really "Legislative Bargains"? The Failure of the Contract Analogy in Statutory Interpretation*, 76 N.C. L. REV. 1145 (1997); Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345, 393 (2008); Abbe R. Gluck, *Our [National] Federalism*, 123 YALE L.J. 1996, 2030-31 (2014). *But see* David E. Engdahl, *The Contract Thesis of the Federal Spending Power*, 52 S.D. L. REV. 496, 498-500 (2007) (arguing that certain statutes are literally contracts).

20. United States v. Carlton, 512 U.S. 26, 33 (1994); *see also* Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981); Bennett v. Ky. Dep't of Educ., 470 U.S. 656, 669 (1985); San Juan City Coll. v. United States, 391 F.3d 1357, 1361-62, (Fed. Cir. 2004).

21. *See infra* Sections II.B.1-2.

contractual duties.[22] Under an account of contract law grounded in interpersonal justice and promissory duties, I argue that statutes meant to elicit behavior are best interpreted as contract offers.[23]

Alternatively, law and economics provides a separate rationale for recognizing these statutes as contracts. From an economic perspective, the question of whether to treat statutory inducements as contracts is just a question about who should bear the risk of the government changing its plans.[24] If the inducement gives counterparties a contractual right, then the government bears the risk of changing its plans, whereas if there is no contract right, the private parties bear the risk. Both sides should be motivated to minimize the joint cost of changed circumstances because any additional costs will presumably be shared between them.[25] That is, if the private parties are made to bear extra costs they can force those costs onto the government by demanding a larger subsidy for the same behavior, whereas if the government is made to bear extra costs it can get away with offering a smaller subsidy in the first place. In this light, the question of who should bear the risk reduces to the question of who can more cheaply mitigate it, i.e. who can better anticipate and avoid the costs of changed circumstances.[26] If the relevant costs stem from political instability, only the government can mitigate. In this light, providing contractual protections should allow the government to be thriftier in the monetary value of its subsidies.[27]

In light of these philosophical and economic interests, I argue that statutory contracts should be subject to many of the same rules of contract interpretation as ordinary contracts—at least, to the version of those rules that apply to government contracts executed by agencies rather than by

22. *See* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 302 (1881]) (describing contracts as triggering "reciprocal conventional inducement"). The Second Restatement's account of the consideration requirement directly echoes Holmes's words. RESTATEMENT (SECOND) OF CONTRACTS § 81 cmt. a (AM. L. INST. 1981) ("Consideration requires that a performance or return promise be "bargained for" in exchange for a promise; this means that the promisor must manifest an intention to induce the performance or return promise and to be induced by it, and that the promisee must manifest an intention to induce the making of the promise and to be induced by it."). For a critical account of the relevance of reciprocal inducement to consideration doctrine, see Jed Lewinsohn, *Paid on Both Sides: Quid Pro Quo Exchange and the Doctrine of Consideration*, 129 YALE L.J. 690 (2020).

23. *See infra* Section II.B.2.

24. *See infra* Section II.B.2.

25. *See* Charles J. Goetz & Robert E. Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 VA. L. REV. 967, 973 (1983).

26. *See generally* GUIDO CALABRESI, THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970) (discussing the logic of assigning liability to the cheapest cost avoider); Robert Cooter, *Unity in Tort, Contract, and Property: The Model of Precaution*, 73 CALIF. L. REV. 1 (1985) (applying the cost avoider framework to contract law).

27. *See* Kyle D. Logue, *Tax Transitions, Opportunistic Retroactivity, and the Benefits of Government Precommitment*, 94 MICH. L. REV. 1129, 1138-46 (1996) (observing that, without the expectation of transition relief, taxpayers may demand more expensive subsidies than they would with the expectation of such protection).

statute.[28] After all, there is nothing new about holding the government to its contractual commitments. In the realm of government procurement, the Court of Federal Claims and the Court of Appeals for the Federal Circuit have elaborated an extensive body of contract law that binds the United States, often drawing on the common law of contracts.[29] And while the federal government typically enjoys contractual powers that ordinary contractors do not—like the power to terminate a contract for convenience and pay only reliance damages—there are some contracts so important to sovereign credibility, like public debt contracts, that the Supreme Court has forbade even Congress from breaching.[30] The question of this Article is when to import the strictures of contract law from the administrative context into the statutory one, and likewise when the limits on holding the government to its contractual obligations should apply to statutes.

In Part III, I examine four main dimensions of interpreting statutes from the perspective of contract law. First, the government's counterparties should be protected against breach in cases where they have partially but not fully performed the requirements of the contract at the time the government revokes its offer.[31] Case law on revocation of unilateral contract offers suggests a way to protect reliance interests without exposing the government to endless fiscal liability. Second, when the government does breach a unilateral contract offer, reliance damages should be available, but expectation damages should probably not be.[32] Third, certain indirect beneficiaries of statutory contracts should have a right to enforce those contracts under third-party beneficiary doctrine.[33] This could have significant implications for consumers that Congress intends to benefit through a producer-level subsidy, and vice versa. Finally, statutory contracts should not always be enforceable, just as executive branch contracts are sometimes held unenforceable for restricting the government's freedom to make new policy as it wishes.[34] There is an inevitable tension between making the government credible through contract and preserving space for legislative sovereignty, but existing doctrine offers useful principles for drawing such a line.

My argument for treating certain statutory inducements as contract offers builds on three main bodies of scholarship. The first step in the argument is the normative principle that government commitment is desirable, especially when seeking to induce private sector behavior. I draw that principle from (one faction in) the scholarly debate over tax transitions, where the question is whether the government should

28. *See infra* Part III.
29. *See infra* Part III.
30. Perry v. United States, 294 U.S. 330 (1935).
31. *See infra* Section III.A.
32. *See infra* Section III.B.
33. *See infra* Section III.C.
34. *See infra* Section III.D.

compensate parties harmed by an unfavorable change in the law.[35] Kyle Logue articulates the position in that debate that most closely resembles mine: failure to offer transition relief inefficiently increases the default payment that the government must pay to induce its counterparties (i.e. to compensate them for the possibility of policy reversals).[36] But where Logue advances the case for pre-commitment as one of economic prudence, I see it as baked into the contractual nature of the statutes at issue. The second step in my argument, then, is to establish that statutes can sometimes be interpreted using concepts from private law in general and contract law in particular. This point requires turning to public law scholarship on the legislative power and statutory interpretation. To start, Bridget Fahey provides many examples of contracts that Congress has directly offered or accepted.[37] But where the contracts Fahey analyzes are generally express and bilateral, the contracts under study here are generally implied and unilateral, making them more difficult to identify.[38] Finding implied unilateral offers requires analyzing statutes from the perspective from which potential offerees would perceive them. To that end, I draw on work by Anita Krishnakumar, who shows that the Supreme Court often turns to the common law to infer background norms incorporated into statutes.[39] Here, the relevant norms pertain to the language and context that constitute an offer. The final step in the argument is therefore to identify the specific features of statutory offers, and of return performance, that should trigger contractual liability. This requires delving inside contract theory to insights on the nature of inducement and the obligations of a unilateral offer.[40] To summarize, law and economic theory provides the normative orientation, public law theory provides the basis for employing contract law principles, and contract law provides the substantive guide to identifying the cases where the government should bear an obligation.

35. For an overview of the transition debate, see Richard L. Revesz & Allison L. Westfahl Kong, *Regulatory Change and Optimal Transition Relief*, 105 N.W. U. L. REV. 1581, 1583 (2011) (describing the old and new views). For a recently articulated version of the "old view," see Steven Shavell, *On Optimal Legal Change, Past Behavior, and Grandfathering*, 37 J. LEGAL STUD. 37 (2008). For the "new view," see Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509 (1986); and Michael Graetz, *Legal Transitions: The Case of Retroactivity in Income Tax Revision*, 126 U. PA. L. REV. 47, 57-58 (1977).

36. Kyle D. Logue, *Tax Transitions, Opportunistic Retroactivity, and the Benefits of Government Precommitment*, 94 MICH. L. REV. 1129, 1132 (1996).

37. *See* Bridget A. Fahey, *supra* note 14, at 2339 (2020).

38. On the federal jurisprudence of implied contracts, see Willard L. Boyd III & Robert K. Huffman, *The Treatment of Implied-in-Law and Implied-in-Fact Contracts and Promissory Estoppel in the United States Claims Court*, 40 CATH. U. L. REV. 605 (1991).

39. *See* Anita Krishnakumar, *The Common Law as Statutory Backdrop*, 136 HARV. L. REV. 608, 654-55 (2022) (providing examples of how the textualist Roberts Court frequently turns to the common law to interpret statutes).

40. *See, e.g.*, Pettit, Jr., *supra* note 15, at 555 (theorizing unilateral contracts); Curtis Bridgeman, *Twenty-First-Century Contract Law Is a Law of Agreements, Not Debts: A Response to Lewinsohn*, 129 YALE L.J. F. 535, 542-43 (2020) (on the importance of inducement to the consideration requirement).

In Part IV, I observe that Congress's increased use of statutory contracting has important political and economic implications even if courts do not pursue the interpretive moves I have suggested. Statutory contracts place control over federal spending decisions more centrally in Congress than under the traditional fiscal paradigm, where Congress appropriates funds to executive branch agencies and agencies decide how to spend those funds. And even within Congress, statutory contracting shifts the balance of fiscal power away from the appropriations committees and toward the subject matter committees that write the relevant authorizing statutes—in particular, the tax committees. This reshuffling creates a central target for lobbyists hoping to channel federal spending their way, potentially exacerbating public choice concerns that apply to federal spending generally.[41] And because appropriations are not necessary to backstop statutory contracts, the government can end up obligated to pay as much or as little as its counterparties become entitled to by their performance. This fiscal uncertainty is a potentially troubling feature of statutory contracts, although one that is not unique to them (it is shared with all indefinite appropriations).[42] It makes it impossible for Congress to anticipate how much it is obligating the government to spend, and makes it easy for legislators and their private sector allies to hide potentially enormous spending commitments in nondescript statutes.

On the other hand, statutory contracts have democratic and procedural virtues compared to the alternative avenues by which the government enlists private firms to carry out public policy. In an age when the executive has grown accustomed to striking one-off deals with high-profile companies, statutory contracting represents a form of public-private administration that is open to any willing counterparty; one that conditions subsidies on meeting performance requirements rather than presumptively picking winners.[43] In this light, statutory contracts may be the right fiscal tool for an ambitious developmental state that aims to engage in some measure of economic planning while preserving competition and evenhandedness between firms.[44]

I. The Problem of Long-Term Commitment

In this Part, I introduce the problem that Congress faces in committing to long-term spending initiatives. Commitment is essential to getting the most out of public spending, especially when the point of

41. *See infra* Section III.A.

42. *See infra* Section III.B.

43. *See infra* Section III.C.

44. On the concept of a developmental state, see Fred Block, *Swimming Against the Current: The Rise of a Hidden Developmental State in the United States*, 36 POL. & SOC'Y 169 (2008). On the resurgence of interest in industrial policy and the importance of competition to its successful practice, see Réka Juhász, Nathan Lane, and Dani Rodrik, *The New Economics of Industrial Policy*, 16 ANN. REV. ECON. (2024).

spending is to convince private firms to make long-term plans in reliance. But there is practically no way to bind a future Congress and/or a future President to continue spending money in the way the initial Congress intended. One potentially compelling alternative, then, is for Congress to commit money directly to private counterparties rather than appropriate it to the executive branch. This approach is helped by a recent Supreme Court case confirming that money-mandating statutory commitments must be honored, even if a subsequent Congress refuses to appropriate funds.[45] But that case offers little in situations when Congress repeals a law before counterparties have finished performing whatever task the statute asked of them. Efforts to secure spending beneficiaries' rights against Congressional repeal—even retroactive repeal—on due process grounds have likewise failed. A new legal theory is needed if Congress is to become capable of long-term fiscal commitment.

A. The Importance of Commitment

There is a limit on what lawmakers can accomplish by changing the law that governs the present moment. Certain policy goals can only be accomplished through years of sustained action: for example, years of continuous emissions reductions to reach net-zero climate goals, or years of training and investment to develop a domestic semiconductor manufacturing industry and workforce.[46] If law and policy were pointed doggedly at these ends for two or four years, but subsequently lost interest, the result would be closer to one where no effort were made than to "mission accomplished." Richard Lazarus distills the features that make climate change, in particular, uniquely demanding of long-term commitment: the longer one delays addressing the problem the costlier it becomes to do so, people in the present have less immediate incentive to address the problem than future people will, and there will necessarily be a long time lag between when mitigating actions are taken and when improvements in global warming become noticeable.[47] Combine these features with short-term election cycles, which make it difficult to form long-term political coalitions, and the deck appears stacked against prescient, future-regarding action.[48]

Policy commitment is especially important as a means of convincing private actors to incur costs in concordance with a vision for the future.

45. Me. Cmty. Health Options v. United States, 590 U.S. 296 (2020).

46. *See* Alan M. Jacobs, *Policy Making for the Long Term in Advanced Democracies*, 19 ANN. REV. POLI. SCI. 433 (2016) (describing a range of policy problems that require long-term commitment).

47. Richard Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1160, 1167 (2009).

48. *See* ALAN M. JACOBS, GOVERNING FOR THE LONG TERM: DEMOCRACY AND THE POLITICS OF INVESTMENT 15-17 (2011) (describing how political coalitions tend to be organized around short term concerns); Lazarus, *supra* note 47, at 1179-84.

Behavioral economics teaches that people generally respond more enthusiastically to inducements that promise *certain* reward than offers that are potentially more generous yet uncertain.[49] Recognition of this principle appears in every branch of public law where public action is meant to motivate (rather than compel) private behavior. In the realm of administrative law, some scholars criticize the flexibility agencies enjoy to reverse their legal interpretations and policy statements on the grounds that too much flexibility makes agency commitments less credible and gives private firms reason to ignore regulatory bargains.[50] In utility law, scholars bemoan the tendency of rate-setting regulators to disregard costs incurred in capital-heavy projects, thereby dissuading investment the next time around.[51] And in government contracting, some judges worry that allowing the government to breach its contract offers would "undermin[e] the reliability of dealings with the government."[52]

The domain of federal subsidy spending offers an especially salient example of how a lack of commitment produces trust problems. A "sunset" is a legislative provision that announces a date at which that legislation will no longer have effect.[53] Since the 1970s, Congress has attached sunset rules to many tax provisions, yet repeatedly renewed those provisions shortly before or after their sunset dates, in a now-familiar process known as "tax extenders."[54] Given that tax extenders have generally been extended—even if occasionally retroactively after a brief expiration—one might expect their recipients to treat them like permanent legislation. But in fact, what we observe is a boom and bust cycle in renewable energy development (which has historically relied on tax credits) where developers squeeze in as many projects as possible in the year before a scheduled expiration and then build very few projects in the year following even a temporary lapse.[55] The rush to finalize projects before expiration

49. On the behavioral economics of certain incentives, see Yoram Halevy, *Strotz Meets Allais: Diminishing Impatience and the Certainty Effect*, 98 AM. EC. REV. 1145 (2008); Amos Tversky & Craig R. Fox, *Weighing Risk and Uncertainty*, 102 PSYCH. REV. 269 (1995); Uri Gneezy, John A. List & George Wu, *The Uncertainty Effect: When a Risky Prospect is Valued Less Than its Worst Possible Outcome*, 121 Q. J. ECON. 1283 (2006).

50. *See* Jonathan Masur, *Judicial Deference and the Credibility of Agency Commitments*, 60 VAND. L. REV. 1021, 1023-25 (2007) (observing that flexibility can undermine agencies' own interests by dissuading private parties from opting in to regulatory offers); Aaron L. Nielson, *Sticky Regulations*, 85 U. CHI. L. REV. 85, 92-93 (2018) (adding that ossification can serve as a commitment mechanism to help overcome the credible commitment problem that Masur identified).

51. *See* Howard A. Shelanski & J. Gregory Sidak, *Antitrust Divestiture in Network Industries*, 68 U. CHI. L. REV. 1, 29-30 (2001) (collecting citations).

52. Moda Health Plan, Inc. v. United States, 892 F. 3d 1311, 1340 (2018) (Newman, J., dissenting).

53. Rebecca Kysar, *Lasting Legislation*, 159 U. PA. L. REV. 1007, 1016-21 (2010) (describing the growth and operation of sunset provision).

54. *Id.* at 1016 (describing tax extenders).

55. *See* Erin Dewey, *Sundown and You Better Take Care: Why Sunset Provisions Harm the Renewable Energy Industry and Violate Tax Principles*, 52 B.C. L. REV. 1105, 1128-29 (2011)

indicates that developers are understandably concerned about being left hanging if they start building but fail to qualify for the credit before it disappears.

B. Public Spending Law Makes No Promises

U.S. law is not completely without the capacity to make long-term commitments. The granting of Constitutional rights is the paradigmatic example of our legal system's capacity for enduring commitment.[56] But consider the domain of public spending: one of Congress's signature powers, the site of landmark federal policy from healthcare to defense to energy, and, per the prior Section, a domain where it is often useful to convince potential spending recipients that the government is committed to maintaining a program for years to come. In this Section, I will make the case that public spending law offers no promises; that is, whenever Congress enacts a new spending program, it cannot avoid the possibility that a future Congress or a future President will prevent that money from reaching its intended use.

First, consider the exception that proves the rule. The Supreme Court has identified certain government spending commitments the enforcement of which is essential to sovereignty, even when subsequent legislatures would prefer to undo them. The classic example is government debt contracts.[57] The Contract Clause is sufficient to defend the inviolability of such commitments at the state level, but not federally.[58] In *Perry v United States*, the Supreme Court rejected Congress's attempt to repudiate the

(discussing the boom and bust cycle attributed to sunsets); Eric Lantz et al., *Implications of a PTC Extension on U.S. Wind Deployment*, NAT'L RENEWABLE ENERGY LAB. 3 (Apr. 2014), https://docs.nrel.gov/docs/fy14osti/61663.pdf [https://perma.cc/W5RS-4SKY] (concluding that "the on-again, off-again historical policy environment has created substantial uncertainty and deployment volatility" and that past expirations of the wind production tax credit "have resulted in reductions in year-on-year installations between 73% and 93%"); *Wind Energy Tax Credit Set to Expire at the End of 2012*, U.S. ENERGY INFO. ADMIN. (Nov. 21, 2012), https://www.eia.gov/todayinenergy/detail.php?id=8870 [https://perma.cc/7QMQ-6CPL] (noting "substantial retrenchment" in wind energy installations after short-term reauthorizations of the tax credit); A. Will Frazier, Cara Marcy & Wesley Cole, *Wind and Solar PV Deployment after Tax Credits Expire: A View from the Standard Scenarios and the Annual Energy Outlook*, 32 ELECTRICITY J. 1, 1 (2019) ("The policy uncertainty during [1999-2015] created a volatile market which had a boom-and-bust cycle that followed the lapses and extensions of the tax credit").

56. *See* Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 701 (2011) (reviewing influential accounts of how long-term commitment is the distinguishing characteristic of constitutionalism).

57. *See, e.g.*, Daniel R. Fischel & Alan O. Sykes, *Governmental Liability for Breach of Contract*, 1 AM. L. & ECON. REV. 313, 348 (1999) ("[A]s a practical matter, the capacity to make credible commitments to repay debt may be exceedingly important to the welfare of the nation to the point that any impairment of that capacity would have costs that exceed the benefits . . . . And, although the treatment of debt instruments as binding obligations leaves the government relatively unconstrained in its ability to raise revenues as it wishes through taxes or deficits, it is indeed subject to important constraints on the expenditure side.").

58. *See* United States Trust Co. v. New Jersey, 431 U.S. 1, 32 (1976) (holding that the Contract Clause prohibits the retroactive repeal of a covenant entered into with bondholders).

terms of a federal bond that required payment in gold with a subsequent enactment allowing payment only in legal tender.[59] In response to the argument that the government should not be able to restrict the exercise of a sovereign power by contract, Chief Justice Hughes affirmed that "the right to make binding obligations is a competence attaching to sovereignty."[60] In other words, even if borrowing money subject to a debt contract does constrain subsequent fiscal operations, it is nonetheless such a fundamental exercise of sovereignty that even a subsequent Congress should not be allowed to reverse it.[61]

Outside the special case of sovereign debt, Congress has a harder time ensuring that its spending commitments are followed to fruition. Start with the most straightforward way Congress might fund the hypothetical railroad-building program introduced earlier. Congress could authorize the Department of Transportation (DOT) to build railroads subject to certain specifications and enact an annual appropriations bill providing several billion dollars for that year's railroad costs. This approach is the most obviously vulnerable to subsequent reversal. Any subsequent Congress could excise that appropriations item from the annual appropriations bill, or even revoke the enabling statute. Cognizant of that risk, suppose Congress instead appropriated the entire amount necessary for years of railroad building in one fell swoop. Congress could structure this as a multi-year appropriation (i.e. funds available for a fixed number of years) or a no-year appropriation (i.e. funds "available until expended").[62] Under this approach, no subsequent Congress, acting alone, could claw back the money—though it could still repeal the enabling statute and thereby prevent DOT from using appropriated funds on rail building.[63]

But suppose the President, too, were opposed to rail. Using authority granted by the Impoundment and Control Act of 1974, the President could

59. 294 U.S. 330, 357-58 (1935).

60. *Id*. at 353.

61. Taken literally, this reasoning invites financial engineering that might structure regulatory commitments as debt contracts. For example, suppose Congress passed a statutory contract offering firms the opportunity to enter into a "green swap" arrangement, where the government would pay each counterparty a fixed sum upfront, but then the counterparty would have to pay back an annual amount indexed to the volume of its carbon emissions. The green swap is effectively a voluntarily-entered carbon tax. If Congress were to pass a carbon tax in the conventional manner, there is no question that a subsequent Congress would be empowered to repeal it. But a literal reading of *Perry* would protect the first Congress's "right to make binding obligations," even if for purposes beyond the traditional bounds of fiscal policy. *See* Aneil Kovvali & Yair Listokin, *Valuing ESG*, 49 B.Y.U L. REV. 705, 751-52 (2024) (introducing the green swap idea as a potential transaction between two private parties).

62. *See* U.S. GOV. ACCOUNTABILITY OFF., PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 2-9 (4th ed. 2016) (describing the temporal variants of appropriations statutes).

63. In case of a conflict between an appropriations statute and an enabling statute (or repeal thereof), the later-in-time controls. *Id.* 2-70; *see also* U.S. GOV. ACCOUNTABILITY OFF., Comp. Gen. B-247119 (1992) (applying the last-in-time rule to dueling authorization and appropriations provisions).

propose rescinding money already appropriated, but Congress would have to agree to any recission proposal.[64] Without Congressional approval, the President might be able to *defer* budget authority, or in other words postpone obligating or expending budget authority. Deferral is only allowed to provide for contingencies, to achieve savings made possible by changes in requirements or greater efficiency of operations, or as otherwise specifically provided by law.[65] The President may not defer budget authority for policy reasons, but in practice a President and OMB might be able to disguise policy reasons underneath the allowable justifications.[66] In attempting to defer appropriated Ukraine security assistance, the Trump administration failed to concoct a colorable non-policy justification, leading GAO to deem that action unlawful under the Impoundment and Control Act.[67]

Even when the President cannot use the formal powers granted by the Impoundment and Control Act to reverse appropriations, there are informal methods available to delay or frustrate the actual obligation and expenditure of funds. First, note that if an agency allows budget authority to expire as a result of ineffective or unwise program administration, GAO will not regard it as an impoundment of funds, unless accompanied by a clear intent to withhold budget authority.[68] Likewise, appropriations law does not protect against "programmatic delays," situations where operational factors impede the obligation of budget authority.[69] If the President, with cooperation from agency leadership, could manufacture such delays, they could wait out the expiration of appropriated funds without facing sanction under the Impoundment and Control Act. This would be especially viable in cases where obligating funds were dependent on identifying suitable private sector contractors, a process that could be delayed by insisting on onerous contract terms. Moreover, nothing prevents the agency from waiting until the waning months of a multi-year appropriation to begin obligating funds. If the appropriation were available until expended (i.e. indefinite), the executive branch could delay indefinitely without violating appropriations law. The bottom line is that if the executive branch is hostile to a spending program, Congress cannot count on money making it out the door.

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64. 2 U.S.C. §§ 682(3), 683, 688.

65. 2 USC § 684(b).

66. *See, e.g.*, City of New Haven v. United States, 809 F.2d 900 (D.C. Cir. 1987).

67. Off. of Mgmt. & Budget, Comp. Gen. 331564, *Withholding of Ukraine Security Assistance* (2020); *see also* S. Rep. No. 93-688, at 75 (1974) (explaining that the objective of the Impoundment and Control Act was to assure that "the practice of reserving funds does not become a vehicle for furthering Administration policies and priorities at the expense of those decided by Congress").

68. U.S. GOV. ACCOUNTABILITY OFF., B-229326 (Aug. 29, 1989); *see* U.S. GOV. ACCOUNTABILITY OFF., *supra* note 62, § 2-50.

69. *See, e.g.*, U.S. GOV. ACCOUNTABILITY OFF., Comp. Gen. B-290659 (2002); Comp. Gen. B-329739 (2018); Comp. Gen. B-291241 (2002); and Comp. Gen. B-241514.5 (1991).

C. Private Partners as Commitment Devices

In light of the risks of relying on a potentially hostile executive branch to oversee long-term spending, there is a potential alternative available: delegate directly to non-governmental allies, rather than to the executive branch, as the vessels of long-term commitment. By delegating, I mean making private actors responsible for carrying out a course of spending rather than the executive branch. As administrative law scholars like Jody Freeman and Gillian Metzger have explained, what is sometimes labeled "privatization" often represents the delegation of public authority rather than government withdrawal from a policy area.[70] But whereas most scholarship on privatization focuses on handing over responsibility for government functions to private actors, what I am describing is the narrower phenomenon of Congress obligating money directly to private actors rather than appropriating money to an executive agency in order to, ultimately, contract with those same private actors.

At the risk of getting ahead of the argument, it is important to be clear about what this notion of dealing directly with the private sector means for the administrative state. In no way does it undermine the critical role of the administrative state in implementing spending programs. Even when Congress makes a direct obligation to private firms, administrative agencies are responsible for adjudicating each individual firm's claim of entitlement.[71] In such a scenario, Congress is taking only one power out of the executive branch's hands: the power to decide when, how much, and on whom to spend. Agencies tend to enjoy more discretion in their spending capacity than in their adjudicative capacity, which is what creates the opportunities for political interference with spending directives as described above.[72] I return to the role of the executive branch in implementing statutory spending directives in Section II.A.

Before focusing on the legal mechanics of what it would mean for Congress to transact directly with private firms, consider the theory of why it might be desirable to do so. Within political science, an immense body of research under the heading of "policy feedback" attests to the capacity of policy change to create political coalitions that shape subsequent policy

70. Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285 (2003); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1394-1395 (2003) (characterizing privatization as a delegation of governmental power rather than government disinvolvement).

71. *See infra* Section II.A.

72. On the relative underdevelopment of administrative law in the spending domain, see W. Nicholson Price, *Grants*, 34 BERKELEY TECH. L.J. 1 (2019); Gillian E. Metzger, *Taking Appropriations Seriously*, 121 COLUM. L. REV. 1075 (2021); and Eloise Pasachoff, *The President's Budget as a Source of Agency Policy Control*, 125 YALE L.J. 2182 (2015).

outcomes.[73] While most of the early research on policy feedback concerned the mass politics of social welfare programs, a number of recent studies focus on firms as vessels that can keep a course of policy reform alive even when it falls out of favor in the government. In a study of electric vehicle policy, Jonas Meckling and Jonas Nahm observe that even when state actors lack bureaucratic features associated with a strong state, they can form coalitions with upstart technology challengers to promote technological change against incumbent interests.[74] Leah Stokes finds that renewable energy firms use states with favorable policies as "beach-heads" for further expansion into more hostile states.[75] Similarly, Samuel Trachtman finds that favorable state-level policy toward rooftop solar leads to solar industry growth not only in those states but in others, which subsequently leads to more favorable solar policy even in the initially unfriendly states.[76] Legal scholars have taken note of these findings. In advocating for making climate policy more durable for the long-term, Richard Lazarus advocates "design[ing] federal climate legislation in a manner that would create a powerful political constituency with a strong economic incentive favoring the legislation's preservation."[77] Unlike the executive branch which might one day decide it no longer wants the money Congress has assigned to it, private firms can be expected to keep taking the money. The trickier part is ensuring that they uphold their end of whatever bargain Congress specifies.

Even holding aside the compliance problem for the moment, private firms are not suitable delegates for every spending program. Congress will often have good reason to task a public agency with conducting the activities at hand. For some tasks, like staffing the armed services, the only capable organization is a public one. In other areas, private firms sit alongside "public options," like the Veterans Health Administration amid a sea of private health systems, and Congress may wish to fund the public

73. For a review, see Andrea Louise Campbell, *Policy Makes Mass Politics*, 15 ANN. REV. POLI. SCI. 333 (2012); Paul Pierson, *When Effect Becomes Cause: Policy Feedback and Political Change*, 4 WORLD POLI. 595 (1993) (discussing how public policy shapes the actions and views of political actors and the public at large); ERIC M. PATASHNIK, REFORMS AT RISK: WHAT HAPPENS AFTER MAJOR POLICY CHANGES ARE ENACTED (2008); THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES (1992).

74. Jonas Meckling & Jonas Nahm, *When Do States Disrupt Industries? Electric Cars and the Politics of Innovation,* 25 REV. INT. POL. ECON. 505, 506 (2018).

75. LEAH STOKES, SHORT CIRCUITING POLICY: INTEREST GROUPS AND THE BATTLE OVER CLEAN ENERGY AND CLIMATE POLICY IN THE AMERICAN STATES 36-37 (2020).

76. Samuel Trachtman, *Policy Feedback and Interdependence in American Federalism: Evidence from Rooftop Solar Politics*, 21 PERS. ON POL. 462, 472 (2023).

77. Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1210 (2009); *see also* RICHARD LAZARUS, THE MAKING OF ENVIRONMENTAL LAW 161-62 (2004) (arguing that many large companies had "internalized environmental law" and "no longer so naturally welcomed the destabilization and legal uncertainty that would likely result from widespread reinvention and reformation efforts").

option for reasons of equity, access, and low cost.[78] The prospect of transacting directly with private firms is most relevant in situations where the alternative would be appropriating funds to the executive branch so that it could turn around and contract with those same firms. To return to the railroad hypothetical, private construction companies are going to build the railroads regardless; the question is just whether Congress arranges to pay them directly or entrusts the Department of Transportation to do so.

Suppose one agrees with the strategic reasons given above for entrusting private actors, rather than the executive branch, to carry out certain spending programs.[79] The next question must be: what is the legal mechanism for doing so?

D. Commitment Without Appropriations

Thus far, I have discussed the commitment problems associated with appropriating funds to the executive branch. But what is the alternative mode of spending that does not involve appropriations?

A brief foray into the basics of appropriations law is the place to start. The Appropriations Clause and the Anti-Deficiency Act prohibit the executive branch from making or authorizing payments without an appropriation.[80] The most common way for the government to spend money therefore involves Congress appropriating a sum to an agency for a given purpose, and the agency entering contracts, grants, or other payment arrangements with third parties.[81] Most appropriations are annual, but Congress can also make appropriations available for a multi-year period.[82] It can even issue permanent indefinite appropriations: the authority to incur any costs at any point in time and be assured that a matching appropriation will automatically follow.[83] Refundable tax expenditures are

78. *See generally* GANESH SITARAMAN & ANNE L. ALSTOTT, THE PUBLIC OPTION: HOW TO EXPAND FREEDOM, INCREASE OPPORTUNITY, AND PROMOTE EQUALITY (2019) (discussing possible reasons to support the existence of public options).

79. *Cf.* Lazarus, *supra* note 77, at 1212 ("A far bolder move, however, would be to insulate parts of the greenhouse gas emissions reduction and climate change adaptation programs from the appropriations process altogether.").

80. *See* U. S. CONST., art. I, § 9, cl. 7 (requiring an "Appropriatio[n] made by Law" before money may "be drawn" to satisfy a payment obligation); 31 U.S.C. § 1341(a)(1)(A) ("[A]n officer or employee of the United States Government . . . may not . . . make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation.").

81. *See* U.S. GOV. ACCOUNTABILITY OFF., *supra* note 62, § 2-1.

82. James V. Saturno & Megan S. Lynch, THE APPROPRIATIONS PROCESS: A BRIEF OVERVIEW, CONG. RES. SERV. R47106 (May 17, 2023) ("The appropriations process is characteristically annual.").

83. U.S. GOV. ACCOUNTABILITY OFF., *supra* note 62, § 2-10. To illustrate, Medicare's SMI trust fund is set to recover any shortfall incurred in the previous year by drawing as much money as necessary from general federal revenues. That is, Congress has effectively committed to appropriate whatever is necessary to meet Medicare Part B and D program costs. *See* 42 U.S.C.

a notable category of spending that rely on a single permanent indefinite appropriation used for all tax refunds.[84] Congress made that appropriation indefinite for the practical reason that the annual amount of tax benefits owed will be contingent on so many factors that it may not easily be calculated in advance.[85]

But even when Congress provides no appropriation, indefinite or otherwise, it can still obligate the United States to pay any amount to which a private party is entitled by statute. The Appropriations Clause and the Anti-Deficiency Act are limits on the executive branch making payments, not on Congress incurring obligations.[86] As the Supreme Court has explained, "'[a]n appropriation *per se* merely imposes limitations upon the Government's own agents,'" but "'its insufficiency does not pay the Government's debts, nor cancel its obligations.'"[87] One might wonder, what good is an obligation if no money is appropriated to pay it? The answer is that a party to whom the United States is obligated can sue to enforce the obligation under the Tucker Act, which waives federal immunity for damages suits when a law mandates compensation by the federal government.[88] If successful, the party can collect payment out of the Judgment Fund, which has a permanent indefinite appropriation.[89] The Court confirmed this view in the 2020 case *Maine Community Health Options*, referring to "an obligation directly by statute" as the alternative to an explicit appropriation.[90]

§ 1395w-116(c)(3) (providing for ongoing appropriation of moneys from the Treasury to the Medicare Part D account "equivalent to the amount of payments made from the Account").

84. *See* I.R.C. § 6402(a) (providing authority to refund overpayments of tax); 31 U.S.C. § 1324 (providing a permanent indefinite appropriation for tax refund payments). The only vulnerability to appropriations that tax benefits must nonetheless deal with is the possibility of a government shutdown. GAO has ruled that during a shutdown, even though the IRS has indefinite budget authority to issue tax refunds and refundable tax benefits, IRS lacks budget authority to pay salaries to its employees to oversee those functions, and so the benefits must go unpaid for the duration of the shutdown. *See* GOV. ACCOUNTABILITY OFF., B-331093, *U.S. Department of the Treasury—Tax Return Activities during the Fiscal Year 2019 Lapse in Appropriations*(Oct. 22, 2019).

85. *See* H.R. REP. NO. 2089, at 3-4 (June 1, 1948) ("The amount of funds required for this purpose will be contingent upon a number of unrelated factors which are not susceptible of measurement in advance . . . the calculation of the sum necessary for this purpose cannot be made in advance.").

86. Me. Cmty. Health Options v. United States, 590 U.S. 296, 312 (2020) ("Neither the Appropriations Clause nor the Anti-Deficiency Act addresses whether Congress itself can create or incur an obligation directly by statute. Rather, both provisions constrain how federal employees and officers may make or authorize payments without appropriations.").

87. Salazar v. Ramah Navajo Chapter, 567 U.S. 182, 197 (2012) (quoting Ferris v. United States, 27 Ct. Cl. 542, 546 (1892)).

88. *See* 28 U.S.C. § 1491(a)(1) (allowing "claim[s] against the United States founded either upon . . . any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort"); United States v. White Mountain Apache Tribe, 537 U.S. 465, 472 (2003); United States v. Mitchell, 463 U.S. 206, 217-218 (1983).

89. *See* 31 U.S.C. § 1304(a)(1).

90. *Me. Cmty. Health Options*, 590 U.S. at 309.

Maine Community Health Options concerned a component of the Affordable Care Act (ACA) known as the Risk Corridors program. In order to limit healthcare plans' profits and losses during the first three years (2014-2016) of the ACA exchanges, Section 1342 of the Act set out a formula for calculating plans' gains or losses, and required that excessively profitable plans "shall pay" the Secretary of the Department of Health and Human Services, while the Secretary "shall pay" excessively unprofitable plans.[91] But Congress never appropriated funds to pay the amounts it might end up owing unprofitable insurers—not in 2010 when the Affordable Care Act was passed, and not at any point thereafter. Moreover, at the end of the program's first year, when Congress owed $2.5 billion on net, Congress enacted a bill appropriating a lump sum for the Centers for Medicare and Medicaid Services that included a rider prohibiting the use of the funds for the Risk Corridors program.[92] Similar events followed in 2015 and 2016, such that the government owed $12 billion in total, which the insurers sued to collect.

After a divided panel of the Court of Appeals for the Federal Circuit ruled that the statute had created a government obligation to pay the full amount but that the riders had impliedly repealed that obligation, the Supreme Court reversed, ruling that the obligation survived the riders. Writing for the Court, Justice Sotomayor found that the Risk Corridors statute created an "obligation" to pay the full amount. She avoided characterizing the statute as a contract, noting that "the Government may incur an obligation by contract or by statute."[93] Nevertheless, she concluded that Congress could create an obligation by statute without specifying how it will be paid, drawing on GAO authority for support.[94] The statute in question rises to that level due to its "express terms and context," especially the use of the word "shall," which conveys a requirement not subject to discretion. Finally, the Court rejected the argument that the appropriations riders had impliedly repealed Section 1342, reasoning that refusing to appropriate funds for a purpose does not modify the underlying obligation, absent language that the obligation "shall not take effect" or that the refusal to appropriate funds is "notwithstanding" the prior obligation.[95]

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91. *See* § 1342, 124 Stat. 211-212 (codified at 42 U.S.C. § 18062).

92. Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. 113-235, § 227, 128 Stat. 2130, 2477.

93. *Me. Cmty. Health Options*, 590 U.S. at 312 (citing GOV. ACCOUNTABILITY OFF., A GLOSSARY OF TERMS USED IN THE FEDERAL BUDGET PROCESS 70(2005)).

94. *See* U.S. GOV. ACCOUNTABILITY OFF., *supra* note 62, § 2-36.

95. *Me. Cmty. Health Options*, 590 U.S. at 318. Not all scholars agree that this is the right result. Gillian Metzger argues that if courts were to take appropriations bills seriously, they would honor riders that purport to deny the underlying obligation any practical effect. *See* Gillian E. Metzger, *Taking Appropriations Seriously*, 121 COLUM. L. REV. 1075, 1163 (2021) (noting that the obligation only covered three years, and that Congress denied an appropriation in each of those three years, so the only possible effect the obligation could have had was to serve as the basis for

The implication of *Maine Community Health Options* is that Congress does not need to make any appropriations—not even indefinite ones—to guarantee payments it has obligated by statute. For example, even if the HI trust fund were to run out of money, the government would be obligated to continue paying Medicare claims out of some other source, and could be sued to fulfill claims out of the Judgment Fund if it failed to do so.[96] But the decision leaves open the possibility that an appropriations rider could successfully undermine the prior statutory obligation by using more explicitly revocatory language.[97] The Court did not have to rule about what to do in cases where Congress successfully revokes its obligation but the counterparty has already begun performance—an issue to which I return in Part IV.[98]

E. The Limits of Current Doctrine

Maine Community Health Options confirmed that money-mandating statutory language commits the government to pay anyone who has fulfilled the statutory criteria. But the holding offers little in cases where Congress attempts to renege on a spending commitment before private actors have fully qualified for payment.[99] That fact pattern might be especially common in spending programs meant to stimulate activities that take a long time to complete, like constructing physical infrastructure. There, the concern is that private firms might be reluctant to embark on a multi-year construction project under the possible threat of the money falling through just before completion.

After all, taxpayers do not obtain the right to investment tax credits—the main device used to incentivize long-term building projects—until they have more or less completed construction. Take for example the Advanced

a legal judgment). But what matters is not the difference between appropriations riders and other statutes, but the clarity of language needed to repeal an obligation by implication. The Court pointed to other cases in which Congress had canceled an obligation to pay via appropriations bill by, for example, "suspending" payments or restricting funds from "this Act or any other Act." Metzger rightly points out that it is often unrealistic for Congress to substantively repeal or modify a law (in part because doing so must overcome a Presidential veto), and more realistic to change it by appropriations rider. But one might still insist that appropriations riders be completely unambiguous about their effect on the underlying law in order to divest it of funding.

96. *Cf.* Matthew B. Lawrence, *Medicare "Bankruptcy"*, 63 B.C. L. REV. 1657, 1689-95 (2022) (arguing that Medicare providers would probably be able to collect from the Judgment Fund if the HI trust fund were insolvent, but acknowledging a "plausible argument" that the statute conditions payment on the availability of funds in the HI trust fund).

97. *Me. Cmty. Health Options*, 590 U.S. at 318-19. *But see* Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 440 (1992) (indicating that the presumption against repeal by implication is especially strong in the appropriations context).

98. *See infra* Section III.A.

99. Indeed, Justice Sotomayor stressed that a key reason for enforcing the spending commitment was that the insurers had completed their obligations for each year at the point Congress issued the appropriations riders. *Me. Cmty. Health Options*, 590 U.S. at 317 (2020) ("finding a repeal in these circumstances would raise serious questions whether the appropriations riders retroactively impaired insurers' rights to payment").

Manufacturing Investment Credit, the tax credit for constructing semiconductor manufacturing facilities.[100] A taxpayer earns that credit by "placing in service" certain "qualified property."[101] Under regulations pertaining to all investment tax credits, property counts as placed in service at the earlier of the taxable year when its depreciation period begins or the taxable year when it is placed in "a state of readiness and availability for a specifically assigned function."[102] The IRS and the courts have been somewhat inconsistent on how fully operational a facility must be before it is "placed in service." At the most, courts have held that property is not placed in service until it is operating at its expected production capacity.[103] At the least, courts have held that property can be placed in service when it is ready for immediate use, even if not actually being used yet.[104] At either end of this spectrum, the taxpayer cannot be paid until they have at least finished constructing the piece of infrastructure.

In light of the risk of a tax credit expiring or being repealed before taxpayers had finished construction, in 2012 Congress adopted the practice of allowing taxpayers to qualify for investment credits when they *begin* construction, even though they will only be paid after placing property in service.[105] For example, the Advanced Manufacturing Investment Credit is available to property the construction of which begins by December 31, 2026.[106] Taxpayers qualify as having begun construction when they meet either the "physical work" test or "five percent safe harbor" test. The physical work test is met when "physical work of a significant nature begins," so long as the taxpayer maintains continuous effort after that point.[107] The 5% safe harbor is met when the taxpayer incurs five percent of the total costs of the property.[108] The point is that either test is reasonably easy to meet within one year of beginning a long-term project, so taxpayers should have little fear that they will be stuck in mid-construction when the tax credit expires. As long as they ultimately place

100. I.R.C. § 48D.

101. *Id.* § 48D(b)(1).

102. 26 C.F.R. § 1.46-3(d)(ii).

103. *See* Consumers Power Co. v. Comm'r, 89 TC 710 (1987) (holding that petitioner's hydroelectric plant was placed in service when operating at rated capacity); Oglethorpe Power Corp. v. Comm'r, TC Memo 1990-505 (same).

104. *See* Sealy Power, Ltd. v. Comm'r, 46 F.3d 382 (5th Cir. 1995); Northern States Power Co. v. U.S., 151 F.3d 876 (8th Cir. 1998); Sears Oil Co. v. Comm'r, 359 F.2d 191 (2d Cir. 1966).

105. The American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, § 407; *see also* Brian Americus & Gary L. Hecimovich, *Digging In: Beginning of Construction for Energy Credits*, TAX NOTES (Mar. 20, 2017), https://www2.deloitte.com/content/dam/Deloitte/us/Documents/Tax/us-tax-special-report-digging-in-beginning-of-construction-for-energy-credits.pdf [https://perma.cc/MSV2-NRXN] (explaining the history and operation of the "begin construction" requirement for the production tax credit under section 45 and the energy investment tax credit under section 48).

106. I.R.C. § 48D(e).

107. 26 C.F.R. § 1.48D-5(c).

108. *Id.* § 1.48D-5(d).

the property in service, they should be guaranteed payment by virtue of having started construction by the statutory deadline.

And yet, even the safe harbor for beginning construction would not be sufficient if a subsequent Congress decided to repeal the tax credit with retroactive effect. In *United States v. Carlton*,[109] the Supreme Court upheld a retroactive change to the tax law, denying a deduction to which the taxpayer had an undisputed valid claim before Congress changed the law. The Court has in fact repeatedly upheld retroactive tax legislation while acknowledging only a potential limit under the Due Process Clause if the retroactive application were "so harsh and oppressive as to transgress the constitutional limitation."[110] But the "harsh and oppressive" test is no more than the prohibition against "arbitrary and irrational" legislation that applies generally to economic regulation, i.e. subject to be satisfied by a legitimate legislative purpose.[111] It is not hard to identify rational legislative purposes for retroactivity, such as a desire to modify a law that Congress has come to view as unwise. In a concurring opinion, Justice O'Connor proposed that there must be some limit to retroactive tax law. For example, a wholly new tax cannot be imposed retroactively.[112] Further, Justice O'Connor suggested that "[a] period of retroactivity longer than the year preceding the legislative session in which the law was enacted would raise, in my view, serious constitutional questions."[113] But lower courts have allowed retroactive changes to tax law that affect multiple tax years, and the Supreme Court has denied certiorari on several such cases.[114] Most recently, in the landmark constitutional tax case *Moore v. United States*, the taxpayers' arguments against a retroactive change affecting

109. 512 U.S. 26 (1994).

110. United States v. Hemme, 476 U.S. 558, 568-69 (1986) (quoting Welch v. Henry, 305 U.S. 134, 147 (1938)).

111. *Carlton*, 512 U.S. at 30-31 (quoting Pension Benefit Guaranty Corporation v. R. A. Gray & Co., 467 U.S. 717, 730 (1984) ("The retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former . . . [b]ut that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose.") (internal quotation marks omitted).

112. *See Hemme*, 476 U.S. at 568.

113. *Carlton*, 512 U.S. at 38 (O'Connor, J., concurring).

114. *See, e.g.*, Dot Foods, Inc. v. Dep't of Revenue, 185 Wn.2d 239, 248, 36 (Wash. 2016), *cert. denied*, 581 U.S. 992 (2017) (applying *Carlton* to a retroactive application spanning multiple years); Gillette Com. Operations N. Am. & Subsidiaries v. Mich. Dep't of Treas., 312 Mich. App. 394, 878 N. W. 2d 891 (Mich. 2015), *cert denied*, 581 U.S. 1000 (2017); Licari v. Comm'r, 946 F.2d 690 (9th Cir. 1991) (upholding application of tax penalty passed in 1986 to returns filed between 1982 and 1984); Canisius Coll. v. United States, 799 F.2d 18, 26 (2d Cir. 1986) (upholding 4-year retroactive application); Rocanova v. United States, 955 F. Supp. 27 (S.D.N.Y. 1996) (upholding retroactive application of amendment extending statute of limitations on tax collection actions from 6 to 10 years), *aff'd. per curiam*, 109 F.3d 127 (2d Cir. 1997).

more than a decade of tax returns were dismissed at the Court of Appeals level and not even raised at the Supreme Court.[115]

In light of the Court's retroactivity jurisprudence, we are back to where we started: Congress has almost no way to commit that spending will remain in place for the long term. Appropriating funds to the executive branch can be rescinded, reprogrammed, or delayed. Obligating money directly to private parties through the tax code may have a political economy advantage, but under current law is not safe from retroactive reversal. In *Carlton*, the Court put it boldly: "Tax legislation is not a promise, and a taxpayer has no vested right in the Internal Revenue Code."[116] Viewed through the lens of the Due Process Clause—and applied to tax legislation as a whole—that may be so. But as I argue below, starting from the perspective of private law sheds a different light on certain tax expenditure statutes and other similar money-mandating legislation.

II. Introducing Statutory Contracts

In this Part, I introduce the notion that certain statutes should be understood as contract offers to the general public. In my account, a statutory contract commits to binding the government to a contractual arrangement once an eligible counterparty meets the enumerated terms of the offer. Statutory contracts are inherently unilateral contracts: the sort of contracts where the offeror is bound by the offer, but the offeree is not, and may therefore cease performing at any point.[117] I begin by making the case for treating certain statutes as contracts on relatively formalist grounds: they have the classical features of contracts, and some lower courts have even treated them as such. I then make the case based on the normative interests at stake in treating statutory inducements as contracts.

A. Statutory Contracts in Practice

Before proceeding to the argument, consider a few examples of statutory contracts to make the subject concrete. In each example, the statute promises to pay any counterparty who takes a specific action, in order to convince someone to take that action. The agricultural commodity support programs promise to pay farmers who produce certain

115. Moore v. United States, 36 F.4th 930, 939 (9th Cir. 2022) ("[W]hile the MRT's retroactive period is long, it does not decide the analysis. The Moores cannot cite a bright-line rule regarding how long ago a retroactive tax can apply because courts deferentially review tax legislation's purpose on a case-by-case basis.").

116. 512 U.S. 26, 33.

117. 1 CORBIN ON CONTRACTS § 1.23 (Joseph M. Perillo ed., 1999) (noting that the "promisee is the only one in whom the contract creates an enforceable legal right").

commodities when market prices fall below a historical benchmark.[118] The advanced manufacturing production tax credit offers to pay the producers of industrial components per quantity of output, including photovoltaic wafers, torque tubes, wind turbine blades, and more.[119] The renewable energy investment tax credit promises to pay in proportion to the tax basis of "energy property" constructed, including solar energy equipment, geothermal equipment, fuel cell power plants, and microturbine power plants.[120] The semiconductor manufacturing tax credit promises to pay in proportion to the tax basis of property constructed for the purpose of manufacturing semiconductors or semiconductor equipment.[121] In each of these cases, the purpose of the statute is to encourage the construction or production of some item that Congress considers to be in insufficient supply.[122]

Finally, the most prominent statutory contract is Medicare.[123] Medicare is a promise by the federal government to reimburse hospitals and physicians for the costs of providing medical care to covered patients.[124] Nicholas Bagley argues that Medicare is better understood as a contract offer between the government and healthcare providers than as a voucher provided to patients.[125] Abstracting away from important details, the offer is to pay for whatever medically necessary services providers choose to undertake.[126] Bagley observes that in this light, Medicare manages private-sector contracts worth more than all of the government's other contracts combined.[127] To be precise, Bagley only describes contract as "the better analogy" for Medicare.[128] Indeed, courts and scholars often

118. *See* 7 U.S.C. §§ 9011-9018 (defining how to establish payment yields, creating formula for how many acres to compensate, defining payment rate in relation to reference prices and effective prices). On the history of the farm commodity programs, see Shane Hamilton, *Crop Insurance and the New Deal Roots of Agricultural Financialization in the United States*, 21 ENTERPRISE & SOC'Y 648 (2020).

119. I.R.C. § 45X(b).

120. *Id.* § 48(a)(3)(A).

121. *Id.* § 48D.

122. I will argue that the fact of Congress encouraging these activities is legally significant to the statutes' nature as contract offers. *See infra* Section II.B.2.

123. *See* 1965 Medicare Act, Pub. L. No. 89-97, 79 Stat. 303 (codified at 42 U.S.C. § 1395d) (providing an entitlement to make payments for certain services).

124. Nicholas Bagley, *Bedside Bureaucrats: Why Medicare Reform Hasn't Worked*, 101 GEO. L.J. 519, 526 (2013).

125. *Id.* at 529-30 ("In practical effect, Medicare has entered into separate output contracts with nearly every physician and hospital in the country.").

126. *See* 2 U.S.C. § 1395g(a) (mandating that the "provider of services shall be paid . . . from the Federal Hospital Insurance Trust Fund, the amounts so determined"); *id.* § 1395w-23(f) ("The payment to a Medicare+Choice organization under this section . . . shall be made . . . .").

127. *Id.* at 530.

128. *Id.*

describe statutes as analogically similar to contracts.[129] My argument begins where they leave off: sometimes, in addition to the analogy, there is something literally contractual going on.

The best way to grasp the distinctive features of statutory contracting is to compare it with the dominant alternative modality of federal spending, which I refer to as the ordinary fiscal paradigm. The essence of the ordinary fiscal paradigm is that Congress appropriates money and then delegates the actual spending, or obligating, of that money to the executive branch. GAO categorizes spending as either discretionary, mandatory, or entitlement.[130] With "discretionary spending," Congress authorizes programs and appropriates funds, but delegates the responsibility of *obligating* funds—committing to spend the funds on specific goods or services—to agencies.[131] With "mandatory spending," Congress directs an agency to enter into certain obligations.[132] And with "entitlement spending," Congress obligates the government to spend certain funds directly, without the need for agency action.[133] Both discretionary spending and mandatory spending can be grouped together as *delegated spending*: spending that Congress delegates to the executive branch. The difference between a statutory contract and delegated spending is that a statutory contract binds the government as soon as a counterparty acts in reliance on it, while delegated spending does not bind the government until an agency makes an obligation.[134]

To illustrate the difference between delegated spending and statutory contracts, consider two closely related programs enacted within the CHIPS and Science Act. First, Congress established a CHIPS for America Fund in the Commerce Department to provide financial assistance for entities that build semiconductor manufacturing facilities in the United States.[135] Congress listed many criteria that the Commerce Department should use in selecting recipients, including whether the applicant made commitments to worker and community investment, secured commitments from local higher education and workforce training institutions, and had an

129. *See, e.g.*, Daniel A. Farber, *Legislative Deals and Statutory Bequests*, 75 MINN. L. Rev. 667 (1991); Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705 (1992). *But see* William N. Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987) (criticizing the statutes-as-contracts analogy); Mark L. Movsesian, *Are Statutes Really "Legislative Bargains"? The Failure of the Contract Analogy in Statutory Interpretation*, 76 N.C. L. REV. 1145 (1997) (same).

130. *See* U.S. GOV'T. ACCOUNTABILITY OFF., *supra* note 62, § 2-1.

131. *Id*.

132. *See id.* at 2-37 n.40.

133. *See id.* at 2-20; *see also* GOV'T. ACCOUNTABILITY OFF., A GLOSSARY OF TERMS USED IN THE FEDERAL BUDGET PROCESS 70, GAO-05-734SP (2005) (distinguishing mandatory from entitlement spending).

134. The question of exactly which actions in reliance are sufficient to bind the government is discussed in Section III.B, *infra*.

135. 15 U.S.C. § 4652.

executable plan to mitigate supply chain security risks. Due to the open-ended nature of these criteria, the Commerce Department's express discretion in applying them, and the fact that the statute does not specify how much money each qualifying applicant should receive, no semiconductor firm could demand payment from the government based on the statute alone.[136] By contrast, the tax credit for semiconductor manufacturing that Congress enacted simultaneously to the CHIPS fund is a statutory contract offer. That credit offers 25% of the basis of property placed in service which is part of a facility for manufacturing semiconductors or semiconductor equipment.[137] The sufficient criteria for qualifying for this tax credit are all named in the statute, the payment amount is specified, and any taxpayer who meets the enumerated terms is entitled to payment.

B. The Formalist Case

It is time to get more precise about exactly which statutes should be treated as contracts. In this Section, I review how the Supreme Court has treated the notion that statutes might be interpreted as contracts before presenting an alternative account focused on a specific subset of statutes most deserving of contractual treatment.

1. The Contract Analogy in the Courts

Modern discussion of the contractual nature of certain statutes begins with *Pennhurst State School & Hospital v. Halderman*, where Chief Justice Rehnquist, writing for the Court, observed that "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States [or other recipients] agree to comply with federally imposed conditions."[138] In that case, the point of the contract analogy was to observe that Congress can demand conditions for the distribution of federal funds, but must make its conditions "unambiguous[]" if they are to bind recipients.[139] Samuel Bagenstos argues that the Supreme Court has used the contractual analogy to support only

136. For another example of a statute that falls short of a contract, consider the Essential Air Service program by which the government provides subsidies to airlines for serving remote and non-hub destinations. Congress delegated the task of determining rates of compensation to the Secretary of Transportation. "The Secretary shall pay compensation under this section at times and in the way the Secretary decides is appropriate. The Secretary shall end payment of compensation to an air carrier for providing basic essential air service to an eligible place when the Secretary decides the compensation is no longer necessary to maintain basic essential air service to the place." 49 U.S.C. § 41733(d).

137. I.R.C. § 48D.

138. 451 U.S. 1, 17 (1981).

139. *Id.*; *cf.* Emps. v. Dep't of Pub. Health & Welfare, 411 U. S. 279, 285 (1973) ("It would also be surprising in the present case to infer that Congress deprived Missouri of her constitutional immunity without changing the old § 16(b) under which she could not be sued or indicating in some clear language that the constitutional immunity was swept away.").

a "weak contract theory" of the spending power, which involves requiring certain contract-like formalities of statutes that would impose conditions on recipients of federal money.[140] Indeed, soon after, the Court made clear that there was a limit on which contractual features it would impute to contract-like spending programs. In *Bennett v. Kentucky Department of Education*, Kentucky argued that in interpreting whether it had complied with the conditions of a Title I education grant, the Court should apply the contract law principle of resolving ambiguities against the drafting party (here, the federal government).[141] The Court disagreed: "Although we agree with the State that Title I grant agreements had a contractual aspect . . . the program cannot be viewed in the same manner as a bilateral contract governing a discrete transaction."[142]

The Court's anti-contractual reasoning in *Bennett* hewed closely to the nature of the grant agreement at issue. The federal government had "established general guidelines" for the use of Title I funds, which made it impossible to "prospectively resolve every possible ambiguity concerning particular applications of the requirements of Title I."[143] Most importantly, the fact that Title I was a cooperative state-federal program "meant that grant recipients had an opportunity to seek clarification of the program requirements."[144] In other words, the collaborative, open-ended context of the grant agreement at issue argued against applying the doctrine of *contra proferentem*, which is ordinarily applied in situations of unequal bargaining power. This decision is far from a sweeping rejection of applying contract principles to spending statutes. After all, many ordinary contract interpretation cases also decline to apply *contra proferentem*.[145] The *Bennett* Court left open both that *contra proferentem* might apply to a spending statute with different facts and that other contract interpretation doctrines might apply to the same and other statutes.[146] I return to the question of contract interpretation principles in Part IV. The immediate task is to identify the types of spending statutes that have the best case for being understood as contracts.

140. Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345, 393 (2008).

141. 470 U.S. 656, 666 (1985).

142. *Id.* at 669.

143. *Id.*

144. *Id.*

145. *See* Ethan J. Leib & Steve Thel, *Contra Proferentem and the Role of the Jury in Contract Interpretation*, 87 TEMPLE L. REV. 773, 787-88 (2015).

146. *Cf.* San Juan City Coll. v. United States, 391 F.3d 1357, 1361-62 (Fed. Cir. 2004) ("There is nothing in *Bennett v. Kentucky* that indicates, or even suggests, that in implementing the different federal grant programs there involved, a formal written contract, comparable to the one executed in this case, had been breached by the Department or the state recipient.").

2. A Contract Law Definition

What makes a statute a contract? Applying basic contract law principles, I propose that a statute is a contract offer when it offers specific consideration as an inducement for the performance of specific services.[147] This definition has two core elements. First, the statute must promise consideration. Federal courts have emphasized this factor as a determinant for when private parties may sue the federal government in the Court of Federal Claims for non-tort money damages under the Tucker Act.[148] The key to Tucker Act jurisdiction is whether a statute "can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained."[149] Federal Circuit cases refer to this as the "money-mandating" requirement, which is met when "the government has an absolute duty to make payments to any person who meets the specific requirements set forth in the statute."[150] The Supreme Court has held that such a duty is indicated by mandatory language in a statute, such as "the Secretary shall pay."[151] The Court has walked up to the boundary of my argument and described such statutes as "obligation[s] directly through statutory language."[152] To be clear, money is not the *only* consideration that statutory contracts can offer, but certainly the most common consideration and the one the courts have had greatest opportunity to discuss. My argument is that when a statutory obligation is joined by the feature in the next paragraph, there is no difference between the resulting legal form and a contract offer.

Second, then, a statutory obligation becomes a contract offer if it intends to induce performance from a counterparty as reciprocal consideration. The doctrine of consideration requires a contract to include a return promise that is bargained for.[153] Other statutes obligate the

147. On the centrality of consideration to the conception of contract, see RESTATEMENT (SECOND) OF CONTRACTS § 17 (AM. L. INST. 1981) ("[T]he formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration."); *id.* § 71 ("To constitute consideration, a performance or a return promise must be bargained for.").

148. Tucker Act of 1887, 24 Stat. 505 (1887) (codified as amended in scattered sections of 28 U.S.C.). The Tucker Act confers jurisdiction upon the Court of Federal Claims for certain actions brought against the United States, and waives the Government's sovereign immunity for those actions. *See* Fisher v. United States, 402 F.3d 1167, 1172 (Fed. Cir. 2005).

149. United States v. Testan, 424 U.S. 392, 400 (1976) (citing Eastport Steamship Co. v. United States, 372 F.2d 1002, 1009 (Ct. Cl. 1967)).

150. ARRA Energy Co. I v. United States, 97 Fed. Cl. 12 (Fed. Cl. Jan. 18, 2011) (citing Grav v. United States, 886 F.2d 1305, 1307 (Fed. Cir. 1989)).

151. Me. Cmty. Health Options v. United States, 590 U.S. 296, 324 (2020) ("Statutory 'shall pay' language often reflects congressional intent 'to create both a right and a remedy' under the Tucker Act.") (internal quotation marks omitted); *ARRA Energy Co. I*; Greenlee County, Ariz. v. United States, 487 F.3d 871, 877 (Fed. Cir. 2007) (noting that "use of the word 'shall' generally makes a statute money-mandating"); Agwiak v. United States, 347 F.3d 1375, 1380 (Fed. Cir. 2003) ("We have repeatedly recognized that the use of the word 'shall' generally makes a statute money-mandating.").

152. *Me. Cmty. Health Options*, 590 U.S. at 297 (2020).

153. RESTATEMENT (SECOND) OF CONTRACTS § 71 (AM. L. INST. 1981).

government to spend money or act when certain conditions manifest, but lack what Holmes called "reciprocal conventional inducement."[154] Consider Social Security, where the statute obligates the United States to make payments to individuals who have met certain criteria and attained the age of 62.[155] The statute reflects no intent to induce anyone to do anything—neither to age, nor to fill out the application for benefits. It simply provides an entitlement to those who meet the conditions. And so Social Security should not be understood as a contract offer. A similar reason distinguishes legislative earmarks, appropriations that "specif[y] the location or recipient, or otherwise curtail the ability of the Administration to control critical aspects of the funds allocation process."[156] In their typical form, earmarks direct appropriations to specific recipients regardless of actions taken by those recipients. Earmarks are not contract offers because they do not intend to induce performance from counterparties.[157]

One key difference between statutory contracts and many familiar contracts is that statutory contracts are always *unilateral contracts*. In a unilateral contract, the offeror promises to give something as soon as any counterparty appears and meets the terms set out in the contract.[158] While a bilateral contract is "an exchange of promises," a unilateral contract is "an exchange of a promise for an act."[159] Because only one party makes a promise, only that party is under an enforceable legal duty—but that duty usually only begins once a second party takes some action in response.[160] Exactly which actions activate the offeror's duty—e.g. accepting by performance, partial performance, and/or preparing to perform—is a

154. *See* OLIVER WENDELL HOLMES, JR., THE COMMON LAW (1991 ed.) (describing contracts as triggering "reciprocal conventional inducement").

155. *See* 42 U.S.C. § 401 *et seq*.

156. OMB Memorandum M-07-09 (Jan. 25, 2007). On earmarks, see Jack M. Beerman, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 89-90 (2006); Rebecca M. Kysar, *Listening to Congress: Earmark Rules and Statutory Interpretation*, 94 CORNELL L. REV. 519 (2008); Donald N. Langenberg, *Earmarked Appropriations: The Debate Over the Method of Federal Funding*, 20 U. MICH. J. L. REFORM 1029 (1987). In 2022, after a 10-year moratorium on earmarks, Congress appropriated about $10 billion in earmarks or "directed spending." RACHEL OREY, FRANZ WUERFMANNSDOBLER, & MICHAEL THORNING, CONGRESSIONALLY DIRECTED SPENDING FY2022 DATASET, BIPARTISAN POLICY CENTER (Mar. 31, 2022), https://bipartisanpolicy.org/blog/congressionally-directed-spending-fy2022-dataset [https://perma.cc/G847-8RDC].

157. Incidentally, most earmarks are not even statutes. Most earmarks are placed in conference reports and committee recommendations accompanying an appropriations bill; fewer than 5% of earmarks are found in bill text itself. But even when earmarks are statutes, they are not contracts for the reason discussed. *See* Robert Novak, *How to Erase Earmarks*, REAL CLEAR POLITICS (Mar. 27, 2006); Jason Heaser, *Pulled Pork: The Three Part Attack on Non-Statutory Earmarks*, 35 J. LEGIS. 32, 33 (2009).

158. *See, e.g.*, Chenard v. Marcel Motors, 387 A.2d 596, 601 (Me. 1978) (finding a unilateral contract in promise by contest organizer to give new automobile to any golfer who shot hole in one in golf tournament which bound organizer once plaintiff shot a hole in one and thereby accepted defendant's offer).

159. Pettit, Jr., *supra* note 15, at 553.

160. 1 CORBIN ON CONTRACTS § 1.23 (Joseph M. Perillo ed., 1999).

critical question for the interpretation of unilateral contracts.[161] One classic example of a unilateral contract is a reward: for example, "Lost dog: will pay $500 to whoever finds and returns to me." Unilateral contracts are well-suited for rewards, where the offeror may not know the identities of potential offerees much less be able to negotiate with them all.[162] And beyond rewards, courts commonly use the unilateral contract principle to analyze cases where employees assert rights to pension benefits or bonus payments for which they claim to have rendered performance.[163] The concept of unilateral contract is useful in those cases because it "allows a finding of promissory liability of the employer without the necessity of finding a return promise by the employee."[164]

Most significantly for the present analysis, the unilateral contract concept has been used to describe the statutory enactment of public obligations. In *Seneca Nursing Home v. Kansas State Board of Social Welfare*,[165] the Tenth Circuit ruled that plaintiff nursing homes became entitled to compensation promised in a statutory contract by providing the services delineated therein. The government had argued that the statute at issue "cannot support a finding of a contract because it is a legislative act and therefore not a contract of the Board."[166] But the court maintained that "there was a unilateral contract and accept[ed] the finding of such a contract under Kansas law."[167] The Tenth Circuit did exactly what this Article urges other courts to do: treat certain statutory commitments as unilateral contract offers.

One apparent difficulty for my argument is that what I call a statutory contract rarely binds the offeree to do anything, at least not until the instant the offeree receives payment. If a private party has been undertaking to meet the statutory offer but then decides to abandon its efforts, it is not liable to the government for breach; after all, there had been no acceptance. This may seem different from ordinary contracts where both parties are bound. But it is no different from any other unilateral contract, where courts hold that beginning performance does not necessarily constitute a promise to perform.[168] Nor is it accurate to say that unilateral statutory contracts *never* bind the offeree: they may do so once

161. *See supra* Section II.B.1.

162. William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83, 117 (1978) (explaining that when someone offers a reward, there is no feasible way to negotiate with every person who might compete for it, and so a unilateral contract enables transactions without actual negotiations).

163. *See* Pettit, Jr., *supra* note 15 at 559-67.

164. *Id.* at 565.

165. 490 F.2d 1324 (10th Cir.), *cert. denied*, 419 U.S. 841 (1974).

166. 490 F.2d 1324, 1332.

167. *Id*.

168. *See* Pettit, Jr., *supra* note 15 at 566-67. *But see* RESTATEMENT (SECOND) OF CONTRACTS § 62 (AM. L. INST. 1981) (effectively denying the existence of unilateral contracts by insisting that offerees accept offers when they begin performance).

the offeree has performed and entitled itself to payment on the first segment of a multi-step contract. Many statutory contracts include clawback provisions that require repayment of funds if the offeree takes some forbidden action after completing the first stage of performance. For example, all tax credits provided for investment in property are subject to clawback if the claimant stops using the property for the contracted purpose within five years.[169] Certain investment credits can be clawed back if the claimant engages in prohibited transactions with foreign countries of concern.[170] And Medicare Advantage payments can be clawed back when audits reveal that insurers have overbilled the government by adding superfluous diagnoses to sick patients.[171] The existence of a clawback provision might serve as especially good evidence that a statute is meant to operate as a contractual quid-pro-quo.

While my account of statutory contracts advances a more sweeping interpretation of when Congress is acting contractually than the Supreme Court has yet recognized, it is important to clarify that my account remains grounded in the conventional view that all spending statutes are only enacted pursuant to the Article I legislative power. In this respect, my argument does not go as far as that of David Engdahl, who argues that certain statutes are not enacted pursuant to the Article I power, but simply as ordinary contracts of the kind any legal person—including the United States, with Congress as its agent—can form. According to Engdahl:

> Our Constitution does contemplate—and in some instances, even specifies—that Congress will have certain *non*-legislative powers. The power to spend—like the powers to receive and hold property, to make contracts, and to sue for injuries like trespass and waste—inhere in every body politic as an artificial person.[172]

If the spending power were not a legislative power, far-reaching legal conclusions would follow. For example, third parties would not be able to challenge state violations of federal spending conditions under § 1983 or under the doctrine of *Ex parte Young*, because those conditions would be a matter of contract rather than of federal law; nor could Congress invoke the Necessary and Proper Clause to see that its contract-like conditions are

169. I.R.C. § 50(a)(1).

170. *Id.* §§ 50(a)(3)(A), 50(a)(6)(D)(i).

171. Policy and Technical Changes to the Medicare Advantage, Medicare Prescription Drug Benefit, Program of All-Inclusive Care for the Elderly (PACE), Medicaid Fee-For-Service, and Medicaid Managed Care Programs for Years 2020 and 2021, 88 Fed. Reg. 6643, 6655 (Apr. 3, 2023) (to be codified at 42 C.F.R. pt. 422).

172. David E. Engdahl, *The Contract Thesis of the Federal Spending Power*, 52 S.D. L. REV. 496, 498-99 (2007).

met.[173] Justice Thomas has recently endorsed the Engdahl view in dissent.[174]

Against this view, I see no contradiction in an Article I statute simultaneously being a contract.[175] Congressional contracts are federal law passed pursuant to the Spending Clause. They are also contracts—in a literal, not just analogical, sense.[176] The novelty of this position is that it suggests that *both* traditional statutory interpretation principles *and* general contract law should come into play in interpreting statutory contracts.[177] How these interpretive tools should interact is the subject of Part IV. And yet, because I maintain that statutory contracts are statutes enacted pursuant to the Spending Clause, none of Engdahl's more far-reaching consequences follow.

C. The Normative Case

The formalist case presented above only goes so far. These statutes may resemble contracts in significant respects, but to most modern scholars, the reasons for applying contract law sound in certain relational and economic values at stake between counterparties. To fully make the case for interpreting statutes as contracts, we must ask whether the relevant normative considerations are at play. The primary interests behind contractual obligation are generally considered to be the protection of reliance interests in promises, the fulfillment of promissory duties, the facilitation of mutually beneficial exchange, and the value of a shared perspective created by contracting.[178] That last interest, the value of a shared perspective, probably does not arise here because unilateral contracts do not involve an interaction or relationship between the parties. But the other major interests are implicated, as I explore next.

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173. *See* Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345, 386-87 (2008).

174. *See* Health and Hospital Corporation of Marion County v. Talevski, 143 S. Ct. 1444, 1468 (2023) (Thomas, J., dissenting) (arguing that "spending conditions do not operate with the force of federal law").

175. *See* Bagenstos, *supra* note 173 at 391-92.

176. *Cf.* Fahey, *Federalism by Contract*, *supra* note 14, at 2357 (2020) (providing nineteenth-century examples of contracts established by formal legislative act).

177. *See* Priebe & Sons, Inc. v. United States, 332 U.S. 407, 411 (1947) (applying federal common law to the construction of a federal government contract and stating that it "is customary, where Congress has not adopted a different standard, to apply to the construction of government contracts the principles of general contract law"). *See generally* Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585 (2006) (crafting a theory of federal common law to justify courts' power to create federal law and guide the discretionary refusal to exercise such power).

178. *See* Daniel Markovits, *Philosophy of Contract Law*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Nov. 23, 2021), https://plato.stanford.edu/entries/contract-law [https://perma.cc/7C8U-XKVY].

1. Reliance Interests

Contract offers induce offerees to take actions in reliance. If the offer is revoked or modified, the offerees' actions may turn out to have been wasted. That waste of resources plausibly amounts to a harm for which the offeror should owe compensation.[179] The reliance view of contract obligation sounds in principles similar to those of tort law in that it aims to compensate people for harms imposed by others, specifically through misrepresentation (of the offeror's course of action).[180] Statutory offers generate reliance in the same way that ordinary offers do: by giving potential counterparties the belief that if they follow the terms of the statute (offer), they will be entitled to certain compensation.

Of course, statutory contracts are far from the only statutes that generate reliance interests.[181] Many legal rules lead people to arrange their affairs in compliance, and to bear the costs of adjustment if the rule changes. The ubiquity of such costs—call them "transition costs"—has inspired an extensive scholarly debate about whether the government should provide transition relief when it changes the law. The concept of transition relief is not exactly the same as reliance damages, but it shares a similar form of payments made to compensate one harmed by an unexpected change. To summarize the debate, an "old view" favored transition relief because of the reliance interest, while a "new view" opposes transition relief because it may discourage actors from anticipating socially desirable changes in the law.[182] Both views have tended to analyze transition relief through a purely economic lens, asking whether it is more efficient to cushion reliance harms or to incentivize parties to anticipate and adapt to change. One exception is David Hasen, who points out that the appropriateness of transition relief might depend on the extent to which the initial rule had the character of a "quasi-promise" and the extent to which conditions justifying a departure from that promise were in place.[183] In other words, reliance interests may not be sufficient to justify relief, but they might nonetheless justify it in

179. On reliance interests as a justification for contract liability, see Lon L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages*, 46 YALE L. J. 373 (1937).

180. *See* Markovits, *supra* note 178.

181. *See* William N. Eskridge, *Reliance Interests in Statutory and Constitutional Interpretation*, 76 VAND. L. REV. 681 (2023) (exploring the circumstances under which courts credit reliance interests in interpreting statutes).

182. Richard L. Revesz & Allison L. Westfahl Kong, *Regulatory Change and Optimal Transition Relief*, 105 N.W. U. L. REV. 1581, 1583 (2011) (describing the old and new views). For a recently articulated version of the "old view," see Steven Shavell, *On Optimal Legal Change, Past Behavior, and Grandfathering*, 37 J. LEGAL STUD. 37 (2008). For the "new view," see Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 515 (1986); Michael Graetz, *Legal Transitions: The Case of Retroactivity in Income Tax Revision*, 126 U. PA. L. REV. 47, 63 (1977).

183. David Hasen, *Legal Transitions and the Problem of Reliance*, 1 COLUM. J. TAX L. 120, 156 (2010).

combination with the presence of a promissory duty. It is to that consideration that we must next turn.

2. Promissory Duties and Consideration

A second view on contracts is that their obligatory force derives from the moral duty one has to keep one's promises.[184] Scholars agree that unilateral offers ordinarily carry the obligation of a promise even though they do not require acceptance to go into effect.[185] But there might nonetheless be something about the statutory context that makes it unreasonable to hold Congress to the standard of promising. For example, given the reality that Congress revises its past enactments all the time, it might be inappropriate to treat those enactments as carrying the moral force of a promise. It might be more fitting to adopt a general understanding that statutory law is always in flux, and that there are *no promises* about the law remaining constant at any point in the future. Indeed, this is exactly why most statutes that generate reliance interests should probably not generate reliance damages or transition relief. In the ordinary case, when Congress announces the law, it does not communicate any promise to keep the law the same.[186]

But there is something distinct about the statutes at issue here. These promises are supported by considerations on both sides: they are promises that the government will pay in exchange for private parties doing something the government desires. There is a distinction between statutes that communicate the message, "if you do X, consequence Y will follow," and others that say "please do X, in exchange for Y." The latter set carry an *intent to induce* private parties to act. If potential counterparties perceive that the government is encouraging them to do something, it is reasonable for them to infer a promise that the government will hold up its end of the deal. That inference follows from the commonplace logic of deal making: when you want to induce someone to do what you want, you have

184. *See* CHARLES FRIED, CONTRACT AS PROMISE (1984) (arguing that the central moral principle of contract law is the promise principle). *But see* Joseph Raz, *Promises in Morality and Law*, 95 HARV. L. REV. 916 (1982) (arguing that the bare value of promising is a strange end for a liberal state to pursue); Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 709 (2007) (observing that contract law differs from what a justification in promising would predict).

185. Tiersma, *supra* note 15, at 24-34. *See generally* JOHN R. SEARLE & DANIEL VANDERKEVEN, FOUNDATIONS OF ILLOCUTIONARY LOGIC 192-98 (1985) (discussing speech acts that commit the speaker); Robert Samek, *Performative Utterances and the Concept of Contract*, 43 AUSTRALASIAN. J. PHIL. 196, 204-05 (1965) (arguing that promises unilaterally commit the speaker to a course of action).

186. *See* United States v. Carlton, 512 U.S. 26, 33 (1994) ("Tax legislation is not a promise, and a taxpayer has no vested right in the Internal Revenue Code.").

to represent that the consequences will be as they want—or, as Holmes called it, "reciprocal conventional inducement."[187]

Contract law puts heavy weight on the presence of inducement. In the famous case of *Allegheny College*, Mary Yates Johnson's alleged "gift" was properly considered a contract offer because she offered it to induce the college into establishing a fund in her name.[188] By contrast, Williston's example of someone offering to buy a coat if the recipient will go to the store and pick it up is a conditional gift, not a contract offer, because the giver has no interest in inducing the recipient to go to the store.[189] Most directly on point, in *Radium Mines, Inc. v. United States*, a regulation was adopted "to stimulate domestic production of uranium," listing minimum prices the government would pay for any uranium that met certain conditions.[190] When the government argued that the regulation did not create a contract offer but was only "a mere invitation to the industry to make offers to the [g]overnment," the Court of Claims disagreed, reasoning in part that the regulation's "purpose was to induce persons to find and mine uranium" and that the inducement worked by providing a guaranteed price.[191] One might go so far as to say that facilitating reciprocal inducement in order to enable complex undertakings is one of the core purposes of modern contract law.[192]

In practice, identifying the intent to induce will require examining the context and purpose behind statutory enactments. The difference is not necessarily apparent in the language of these respective stylized statutes; both can be written with the same wording ("if you do X, then Congress will do Y"). In order to determine when an if-then statement implies a contract offer, courts can turn to the common law as a background policy norm, something textualist courts commonly do, as Anita Krishnakumar has shown.[193] Upon turning to the common law of contracts, it becomes

187. *See* RESTATEMENT (SECOND) OF CONTRACTS § 81 cmt. a (AM. L. INST. 1981) ("Consideration requires that a performance or return promise be 'bargained for' in exchange for a promise; this means that the promisor must manifest an intention to induce the performance or return promise and to be induced by it, and that the promisee must manifest an intention to induce the making of the promise and to be induced by it.").

188. Allegheny Coll. v. Nat'l Chautauqua Cty. Bank, 159 N.E. 173 (N.Y. 1927).

189. 1 S. WILLISTON, CONTRACTS § 112, at 445-46 (3d ed. 1957); *see generally* Curtis Bridgeman, *supra* note 40 at 542-43 (2019) (explaining how inducement distinguishes certain contract offers from conditional gifts).

190. 153 F. Supp. 403, 404 (Ct. Cl. 1957).

191. *Id*. at 405-6; *see also* Portland Mint v. United States, 102 F.4th 1371, 1379 (Fed. Cir. 2024) (affirming the inducement-based reasoning in *Radium Mines*).

192. *See* Bridgeman, *supra* note 40, at 550 ("There is good reason to view inducement as central not only to the consideration doctrine, but also to contract law itself.").

193. *See* Anita Krishnakumar, *The Common Law as Statutory Backdrop*, 136 HARV. L. REV. 608, 654-55 (finding that the majority of Supreme Court invocations of the common law do so in order to supply a background policy norm treated as incorporated by statute); *Id.* at 613 (finding that the Roberts Court invokes the common law in 17% of all statutory cases).

necessary to assess the intent of the parties.[194] The Second Restatement defines an offer as "the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it."[195] What is most relevant is whether an offeree would be justified in thinking the government is trying to propose a bargain. This question is not so different from the one asked by textualists about any statute: how would ordinary members of the public understand Congress's statements?[196] To ascertain whether members of the public would perceive an offer, a court might look to both text and context around the statute's enactment. In fact, the Supreme Court has shown a willingness to consider negotiation history in interpreting government contracts in some cases, while applying the parol evidence rule in others.[197] In *Oklahoma v. New Mexico*, a case involving an interstate water rights compact consented to by Congress, the Supreme Court rejected the parol evidence rule and found it "appropriate to look to extrinsic evidence of the negotiation history of the Compact" in the same way a court might look to legislative history around an ambiguous statute.[198]

Under the statutes likely to be at issue here, it is not hard to tell when Congress is promising a reward in order to encourage behavior, as opposed to stating the consequences that will follow that behavior. In unilateral contract cases, courts are often willing to find an implied promise when an offeror describes a prize or benefit that can be earned through action.[199] Here, the use of the word "incentive" within the statute or legislative materials is one clue as to the intent to induce behavior. In the Inflation Reduction Act, the source of several of the tax-based statutory contracts discussed above, section headings describe "Clean Energy and Efficiency Incentives for Individuals" and "Incentives for Clean Electricity and Clean Transportation."[200] The Joint Committee on Taxation report on that statute repeatedly describes the tax credits involved as incentives.[201] Nearly every statement made by the bill's sponsors emphasized the desire to "incentivize" or "encourage" investment in green electricity and/or green

194. *See* Jody S. Kraus & Robert E. Scott, *Contract Design and the Structure of Contractual Intent*, 84 N.Y.U. L. REV. 1023, 1025 (2009) ("Honoring the contractual intent of the parties is the central objective of contract law.").

195. RESTATEMENT (SECOND) OF CONTRACTS § 24 (AM. L. INST. 1981).

196. *See* Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2202 (2017).

197. Fahey, *supra* note 14, at 2358-59.

198. 501 U.S. 221, 235 n.5 (1991).

199. *See* Pettit, Jr., *supra* note 15, at 578 (referring to cases where courts find contract offers in statements of employment benefits to be earned).

200. Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat. 1941, 1982.

201. Joint Committee on Taxation, Description of Energy Tax Changes Made by Public Law 117-169, JCX-5-23 (Apr. 17, 2023).

manufacturing.[202] In general, subsidies are the prototypical example of statutes that involve this sort of inducing. When we call something a subsidy, part of what we are identifying is that the state is *encouraging* private parties to do more of something, not just neutrally announcing the consequences that will follow if they do it.[203] Any potential recipient of such a subsidy would be justified concluding that the statute conveys Congress's desire that they perform the enumerated actions in exchange for a reward. Importantly, these indicia are outward-facing and do not require looking deep into the guts of legislative process or statutory history, i.e. the sorts of inquiries that textualists most forcefully decry.

3. Efficient Exchange

Quite apart from the morality of promising and the injustice (such as it may be) of uncompensated reliance costs, treating certain statutes as contracts may be justified on the basis of mutually beneficial exchange.[204] From an economic perspective, the question of whether to treat statutory inducements as contracts is just a question about who should bear the risk of Congress changing its plans. If the inducement gives counterparties a contractual right, then the government bears the risk of changing its plans. Whereas if there is no contract right, then the private parties bear the risk. Both parties should be motivated to minimize the joint cost of changed circumstances because any additional costs will presumably be shared between them.[205] That is, if the private parties are made to bear unnecessary costs they can force those costs onto the government by demanding a larger subsidy for the same behavior, whereas if the government is made to bear unnecessary costs it can offer only a smaller subsidy.[206]

In this light, the question of who should bear the risk reduces to the question of who can more cheaply mitigate it, i.e. who can better anticipate

202. *See, e.g.*, U.S. Senate Committee on Finance, *Wyden, Colleagues Introduce Legislation to Overhaul Energy Tax Code, Create Jobs, Combat Climate Crisis* (Apr. 21, 2021) (providing statements of multiple bill sponsors).

203. Subsidies are often described as Pigouvian, which refers to their propensity to encourage socially desirable behavior that actors would otherwise not undertake. When an actor would already perform the behavior without the encouragement of the subsidy, the subsidy is deemed "inframarginal" and considered to be wasted. *See* Brian Galle, *Carrots, Sticks, and Salience*, 67 TAX L. REV. 53, 59, 96 (2013).

204. *See* Alan Schwartz & Robert Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 550-555 (2003).

205. *See* Charles J. Goetz & Robert E. Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 VA. L. REV. 967, 973 (1983).

206. *See* Kyle D. Logue, *Tax Transitions, Opportunistic Retroactivity, and the Benefits of Government Precommitment*, 94 MICH. L. REV. 1129, 1138-46 (1996) (observing that, without the expectation of transition relief, taxpayers may demand more expensive subsidies than they would with the expectation of such protection).

and avoid the costs of changed circumstances.[207] In any unilateral contract setting, it is clear that the offeror is the least cost-avoider. There is nothing any offeree can do that would impose costs on the offeror, since the offeror is not relying on any single person to perform. By contrast, the offeror can impose significant costs on the offeree(s) by revoking or changing the offer after performance has begun.[208] It therefore appears that it is more efficient for the government (offeror) to bear the costs of changing plans.

But there is an important counterargument to the efficiency justification. The justification rests on a premise that statutory contracts involve value-for-value exchange; that is why we can assume that offerees demand better subsidy rates when they are forced to bear the risk of change. But consider the possibility that these spending programs are better viewed as gratuitous transfers from the government. If statutory spending commitments are gratuitous giveaways, then recipients would have scant leverage (and perhaps even motivation) to demand a better deal under different legal rules.[209] It might therefore be possible for the government to impose all costs of changed circumstances on the offerees and still obtain the same level of performance from them.

Is there reason to think that the relevant spending programs are in fact gratuitous transfers rather than value-for-value exchanges? One reason might follow from the observation that some spending programs offer greater than market value for the production or construction of certain goods or assets—in other words, that they function as subsidies. But market value is not the right baseline for assessing what it is *worth to the government* for firms to take these desired actions. In the typical case, lawmakers choose to subsidize some activity (e.g. the production of carbon-free electricity) because they deem it to be socially beneficial, or in economic language to generate positive externalities. Accordingly, the government is rationally willing to pay market price plus any amount up to the externality value. And yet, such an above-market subsidy would likely entail more than the private firm needed to receive in order to render the desired behavior. And with respect to the efficiency justification presented above, it is the firm's perspective on fair value that matters. When firms receive super-normal profit margins from public spending programs, they may be willing to forego contractual protections. The corollary to this argument is that if the government granted contractual rights to its spending recipients, it might not need to pay so far above market price.

207. *See* GUIDO CALABRESI, THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970); Robert Cooter, *Unity in Tort, Contract, and Property: The Model of Precaution*, 73 CALIF. L. REV. 1 (1985); George M. Cohen, *The Negligence-Opportunism Tradeoff in Contract Law*, 20 HOFSTRA L. REV. 941 (1992).

208. *See supra* Section II.B.1.

209. *See generally* Gillian Hadfield, *Of Sovereignty and Contract: Damages for Breach of Contract by Government*, 8 S. CAL. INTERDISC. L.J. 467, 524 (1999) (expressing doubt that government contract negotiation resembles an efficient market).

From this perspective, contractual rights are substitutable with subsidy generosity. Therefore, the strength of the efficiency argument for statutory contracts should vary empirically with the above-market generosity of specific spending programs.

III. Interpreting Statutory Contracts

If one agrees in principle that certain statutes should be treated like contracts, the next question must be, exactly which elements of contract law are relevant?[210] A useful starting point is to compare to the law involved when the executive branch enters contracts. Ordinary federal contracts (e.g. procurement contracts) are interpreted according to the laws in Title 41 of the U.S. Code and their implementing rules within the Federal Acquisition Regulation (FAR). But those laws only apply to acquisitions undertaken by executive agencies with appropriated funds, and so are not directly relevant to statutory contracts.[211] What *is* relevant is the Supreme Court's instruction, that when Congress does not adopt a different standard, "it is customary . . . to apply to the construction of government contracts the principles of general contract law"[212] and that government contracts "are governed generally by the law applicable to contracts between private individuals."[213] Amid recent scholarly debates about the existence of general law, scholars seem to agree that if general law operates anywhere, it is in the interpretation of government contracts.[214] Even those who argue against the invocation of general law in other settings acknowledge that it is more suitable to speak of a general law of contracts than one of, e.g., property.[215] Moreover, the case for applying a federal common law of contracts is a narrow one: it would apply only to federal government contracts, as opposed to contracts between

210. Bridget Fahey asks a similar question about the construction of intergovernmental agreements, to which courts sometimes apply purely statutory canons, sometimes contract law canons, and sometimes hybrids. Fahey, *supra* note 14, at 2372-80 (2020).

211. 41 U.S.C. § 131 (defining acquisition as undertaken by "an executive agency" "with appropriated funds").

212. Priebe & Sons, Inc. v. United States, 332 U.S. 407, 411 (1947). *See also* United States v. Seckinger, 397 U.S. 203, 210-11 (1970) (observing that in interpreting a federal contract, "we are, of course, guided by the general principles that have evolved concerning the interpretation of contractual provisions").

213. Mobil Oil Exploration & Producing Southeast v. United States, 530 U.S. 604, 607 (2000) (first citing United States v. Winstar Corp., 518 U.S. 839, 895 (1996); then citing Lynch v. United States, 292 U.S. 571, 579 (1934)).

214. *See* Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 509-511 (2006) (describing it as a "well-settled proposition" that federal courts use general principles of contract law accepted in most states to determine the federal government's rights and duties under its contracts).

215. *See* Maureen E. Brady, *The Illusory Promise of General Property Law*, 132 YALE L.J. 1010, 1030 (2023) (observing that the European Union has succeeded in harmonizing nations' contract laws while carving out property law as an area of member-state expertise).

private parties.[216] In practice, this means that courts would look—as they already do—to "the common denominator" of state contract law, which is often usefully reflected in the Uniform Commercial Code.[217] The only innovation suggested here is to extend that approach to statutory contracts in addition to contracts executed by agencies. In the rest of this Part, I apply that approach to issues of breach, remedies, third-party beneficiaries, and unenforceability.

A. Cause of Action

Before a court can apply principles of contract law to interpreting a statute, the party seeking to enforce the statute needs a cause of action. Suits to enforce statutory contracts should proceed under the Tucker Act in the ordinary case, but could be reformulated as takings suits if Congress undermines the availability of Tucker Act remedies.

1. Statutory Claims

Any party to whom the United States is obligated can sue to enforce the obligation under the Tucker Act, which waives federal immunity for damages suits when a law mandates compensation by the federal government.[218] If successful, the party can collect payment out of the Judgment Fund, which has a permanent indefinite appropriation.[219] Most Tucker Act suits involve allegations that the government has breached a contract entered into by the executive branch. But the Tucker Act applies to all government obligations, not just those created by traditional contracts. In the 2020 case *Maine Community Health Options*, the Supreme Court confirmed that the Tucker Act applies to "an obligation [made] directly by statute."[220]

The key to Tucker Act jurisdiction in the statutory context is whether a statute "can fairly be interpreted as mandating compensation by the

216. *Cf.* Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes*, 54 WM. & MARY L. REV. 753, 799 (2013) (proposing "a law of statutory interpretation methodology" that would function as "a species of federal common law expressly tied to federal statutes in the same way that the federal common law of contract interpretation applies only to federal contracts.").

217. Linear Tech. Corp. v. Micrel, Inc., 275 F.3d 1040, 1048 (Fed. Cir. 2001) (explaining that courts should seek the "common denominator" in "the body of state law" developed under "individual [state] versions of the UCC"); *see also* O'Neill v. United States, 50 F.3d 677, 684 (9th Cir. 1995) ("The Uniform Commercial Code is a source of federal common law and may be relied upon in interpreting a contract to which the federal government is a party.").

218. *See* 28 U.S.C. § 1491(a)(1) (allowing "claim[s] against the United States founded either upon . . . any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort"); United States v. White Mountain Apache Tribe, 537 U. S. 465, 472 (2003); United States v. Mitchell, 463 U. S. 206, 217 (1983).

219. *See* 31 U.S.C. § 1304(a)(1).

220. Me. Cmty. Health Options v. United States, 590 U.S. 296, 309 (2020).

Federal Government for the damages sustained."[221] Federal Circuit cases refer to this as the "money-mandating" requirement, which is met when "the government has an absolute duty to make payments to any person who meets the specific requirements set forth in the statute."[222] The Supreme Court has held that such a duty is indicated by mandatory language in a statute, such as "the Secretary shall pay."[223] The archetypical statutory contract would give rise to Tucker Act jurisdiction by virtue of its money-mandating language, i.e., language stating that the offeree is entitled to certain compensation as a consequence of performing the services described in the statute.

But if Congress were motivated to abrogate the contract—exactly the circumstance where the beneficiary would hope to sue for breach—it could potentially revoke Tucker Act jurisdiction in the language of its repeal statute. For example, suppose Congress had previously enacted a statutory contract offer to encourage railroad construction, but the current Congress wished to repeal the offer. If the repeal statute merely excised the prior statute from the U.S. Code, or accelerated a preexisting expiration date up to the present day, firms engaged in railroad construction would have plausible claims under the Tucker Act for the reasons expressed above.[224] But suppose the repeal statute included language to the effect of withdrawing federal jurisdiction for any money claim against the United States arising out of its enactment. Just as Congress provides a waiver of sovereign immunity via the Tucker Act, it can reassert sovereign immunity in specific contexts. There would be little ambiguity that the later-in-time, specific repeal statute would supersede the earlier, more general Tucker Act in such a scenario.[225]

2. Constitutional Claims

Even if Congress takes away the statutory cause of action for breach of contract, disappointed counterparties could still bring a constitutional version of the same claim. Under either the Due Process Clause or Takings

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221. United States v. Testan, 424 U.S. 392, 400 (1976) (citing Eastport Steamship Co. v. United States, 372 F.2d 1002, 1009 (Ct. Cl. 1967)).

222. ARRA Energy Co. I v. United States, 97 Fed. Cl. 12 (Fed. Cl. Jan. 18, 2011) (citing Grav v. United States, 886 F.2d 1305, 1307 (Fed. Cir. 1989)).

223. Me. Cmty. Health Options v. United States, 590 U.S. 296, 324 (2020) ("Statutory 'shall pay language' often reflects congressional intent 'to create both a right and a remedy' under the Tucker Act.") (internal quotation marks omitted); Greenlee County v. United States, 487 F.3d 871, 877 (Fed. Cir. 2007) (noting that "use of the word 'shall' generally makes a statute money-mandating"); Agwiak v. United States, 347 F.3d 1375, 1380 (Fed. Cir. 2003) ("We have repeatedly recognized that the use of the word 'shall' generally makes a statute money-mandating.").

224. *See also* Section IV.B *infra* (explaining why the revocation of a pending unilateral offer may give rise to a breach of contract claim).

225. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 183 (2012) (discussing the principle that specific provisions govern over general ones).

Clause of the Fifth Amendment, government contracts can amount to a protected property interest. However, the federal courts are very reluctant to allow constitutional claims that arise out of contract interests. When a plaintiff has the option of pursuing contract remedies, the courts usually make the plaintiff take that route rather than refashion a contract dispute as a constitutional one. But when a plaintiff has no opportunity to seek contract remedies, courts sometimes make an exception and allow the constitutional claim. The hypothetical entertained above where Congress takes away contract remedies is exactly the situation where such an exception should apply.

Under both due process and takings jurisprudence, government contracts can create protected property interests. Most of the relevant cases involve state and local government contracts, because federal contracts usually end up being litigated under the Tucker Act. In the foundational case of *Perry v. Sindermann*, the Supreme Court stated a person's interest in a benefit is a property interest if there are "rules or mutually explicit understandings that support his claim of entitlement to the benefit."[226] In context, that language referred to an employee tenure contract, but it would seem to cover many contractually assured benefits. However, circuit courts have been reluctant to give the same constitutional protection to service and supply contracts as they do to employment contracts.[227] In *S&D Maintenance Co. v. Goldin*, the Second Circuit offered a relatively more deeply theorized reason for the distinction, suggesting that due process is implicated only when a public contract involves "extreme dependence" or "permanence," qualities that amount to a "status" or "an estate within the public sphere" more than a simple economic benefit.[228] But it is not clear that those features should be unique to employment compared to other contracts.

Federal courts have been able to avoid defining which contracts are entitled to constitutional protection because, in the vast majority of cases, non-constitutional contract law remedies are available to resolve breaches. The Court of Federal Claims and the Federal Circuit make clear that parties aggrieved by interference with government contracts must seek

226. Perry v. Sindermann, 408 U.S. 593, 601 (1972); *see also* Town of Castle Rock v. Gonzales, 545 U.S. 748, 756 (2005) (citing Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972) (attributing due process protection to "a legitimate claim of entitlement").

227. *See* San Bernardino Physicians' Servs. Med. Grp., Inc. v. County of San Bernardino, 825 F.2d 1404, 1410 (9th Cir. 1986) (rejecting a due-process claim for a four-year services contract, distinguishing it from *individual* employment contracts); S&D Maintenance Co. v. Goldin, 844 F.2d 962, 966 (2d Cir. 1988) (only those public contracts involving "extreme dependence" or "permanence" give rise to protected status); *see also* Zachary D. Krug, *Due Process and the Problem of Public Contracts: A Critical Look at Current Doctrine*, 89 CORNELL L. REV. 1044 (2004) ("While the last thirty years have seen a tremendous expansion in the scope of property encompassed by procedural due process, there has been one notable exception: service and supply public contracts.").

228. 844 F.2d 962, 966 (2d Cir. 1988).

recourse in a breach of contract claim rather than a takings claim.[229] The Federal Circuit explains the reason why: "plaintiffs' contract rights cannot be greater in a takings analysis than in a contract analysis. If they do not have a contract right, there is no property to be taken. Vice versa, if they have a contract right, their remedy is to assert that right."[230] But the available contract law remedies—such as those under the Tucker Act—do not always amount to a full replacement for what a constitutional suit might offer. For one thing, the Tucker Act offers only money damages, and so some circuits allow plaintiffs to allege a Fifth Amendment due process violation originating out of a breach of contract when seeking specific performance.[231] These circuits reason that "to accept the [contrary] position we would have to find that, in enacting the APA and the Tucker Act, Congress intended to preclude any review at all of constitutional claims seeking equitable relief, where the constitutional claims stem from contracts."[232] Relatedly, courts make an exception to the bar on takings claims when the government has abrogated the contract holder's ability to pursue a contract remedy.[233] If the government makes it impossible to achieve a remedy through contract law, then a takings claim becomes the plaintiff's only hope, and one that courts will entertain.[234]

If Congress were to revoke Tucker Act jurisdiction in the same breath it revoked a statutory contract offer, plaintiffs would have a strong argument that they were left without contract remedies and should therefore be entitled to get into court on a takings or due process claim. Other than the constitutional elements discussed in this Section, plaintiffs' complaint could look practically identical to the complaint for breach of contract that they might otherwise have filed under the Tucker Act. The constitutional claim would originate out of breach of contract, and so it would be necessary to plead the existence of a statutory contract and a breach in just the same way one would do under the Tucker Act. Nor would

229. *See, e.g.*, Piszel v. United States, 833 F.3d 1366, 1376 (Fed. Cir. 2016).

230. *Id*.

231. Transohio Sav. Bank v. Dir., Offi. of Thrift Supervision, 967 F.2d 598, 610 (D.C. Cir. 1992); Wabash Valley Power v. Rural Elec. Admin., 903 F.2d 445, 452 (7th Cir. 1990); Robbins v. United States BLM, 438 F.3d 1074 (10th Cir. 2006). *But see* Tucson Airport Auth. v. Gen. Dynamics Corp., 136 F.3d 641, 647 (9th Cir. 1998) (denying a due-process argument because it was "in the first instance dependent on the contract" or "contractually based").

232. *Robbins*, 438 F.3d at 1084 (quoting *Transohio*, 967 F.2d at 611).

233. John Echeverria, *Public Takings of Public Contracts*, 36 VT. L. REV. 517, 529 (2011) (discussing *Castle v. United States*, 48 Fed. Cl. 187, 218 (2000) and citing *Lynch v. United States*, 292 U.S. 571 (1934)). *Lynch* stands for the "basic" principle that "a litigant to whom a contract remedy is available has not been deprived of the rights conferred on him by contract." *Id.* But a takings claim is proper if the contract right is "abrogated by [retroactive] statute, leaving that plaintiff without recourse to a breach of contract claim." *Id.*; *see also* Stockton E. Water Dist. v. United States, 583 F.3d 1344, 1369 (Fed. Cir. 2009) (holding that a takings claim remained viable even when plaintiff had availed itself of contract law remedies).

234. *See Castle*, 301 F.3d at 1342 (Fed. Cir. 2002); Granite Mgmt. Corp. v. United States, 55 Fed. Cl. 164, 166 (Fed. Cl. 2003) (takings claim not allowed because plaintiff was not precluded from seeking "the full range of remedies associated with any contractual property right [it] possessed").

a constitutional suit provide a basis for different remedies than might be won under a Tucker Act suit; "just compensation" for a takings originating in breach of contract should naturally entail contract damages, the contours of which are examined below.[235]

To be clear, getting into court on a constitutional basis (or a Tucker Act basis, for that matter) would not establish anything about the substantive validity of the breach of contract claim. On that question, we must turn next to substantive principles of contract law as applied to statutory contracts.

B. Revocation and Breach

Viewing statutes as contracts helps clarify the conditions under which Congress can revoke or modify its fiscal offers and, alternatively, the conditions under which Congress's non-fulfillment of accepted offers should be treated as a breach of contract. Analyzing Congress's offers through the lens of contract law suggests the principle that the United States should be treated as breaching a contract if Congress modifies or revokes an offer after counterparties have initiated substantial performance in reasonable reliance upon it.

1. Revocation of Unilateral Contracts

In general, contract offerors may revoke their offers up until acceptance.[236] But this standard is more complicated in the realm of unilateral contracts, which are accepted by rendering performance. Here, revocation doctrine must deal with the fact performance is not always instantaneous, or in other words that counterparties may incur costs in partial performance.[237] As soon as an offeree begins to perform in response to a unilateral offer, the Second Restatement creates an "option contract" which constitutes a promise of irrevocability.[238] A comment clarifies that the rule "is designed to protect the offeree in justifiable reliance on the

235. *See infra* Section III.C.

236. *See* Charles L. Knapp, *An Offer You Can't Revoke*, 2004 WIS. L. REV. 309, 309-10 (2004) ("Classical contract law steadfastly regarded all offers—whether firm or not—as completely (and indeed blamelessly) revocable in the absence of an ancillary "option contract" of nonrevocability.").

237. *See* Pettit, Jr., *supra* note 15, at 557 ("[W]here an offer invites the offeree to choose between acceptance by promise and acceptance by performance[,] . . . the tender, beginning . . . performance constitutes an acceptance by performance that operates as a promise to render complete performance.") (internal parenthetical omitted).

238. RESTATEMENT (SECOND) OF CONTRACTS § 45 (AM. L. INST. 1981); *see also* Knapp, *supra* note 236, at 313 (2004) ("[I]t is not possible to speak of a traditional 'option contract' without assuming the presence, in some form, of an express promise of irrevocability.").

offeror's promise."[239] In common law cases on the revocation of unilateral contracts, it is clear that offerors are not liable to offerees who have merely prepared to perform or are planning to perform.[240] But for most courts, there is some degree of performance—short of complete performance—that nonetheless entitles the offeree to damages. A rare position is that an offeror is liable as soon as the offeree has rendered any part of the requested performance.[241] The more common position is that the offeree must have rendered "substantial" performance.

Some authorities hold that unilateral offers can be revoked even after substantial performance if the offer was made to the general public rather than to specific, known counterparties. The idea is that an offeror might have less obligation to unknown parties than to someone he has specifically induced to action by dangling a unilateral offer. Relatedly, prospective counterparties who have not personally communicated with the offeror might have reason to be wary that the offer still stands. Peter Tiersma writes:

> At least where the promise is made to the world at large, there is probably no subsidiary commitment not to terminate the promise . . . Unless the promisor acts in bad faith or prevents performance, he should normally be entitled to terminate a general promise of a reward before someone meets the conditions without being liable for expectation damages.[242]

The intuition that an offer to the world creates no individual expectancy in a reward is most appropriate in the domain of prize offers, where courts generally treat each contestant's chance of winning the prize as too speculative to permit recovery when the offeror revokes.[243] The main

239. RESTATEMENT (SECOND) OF CONTRACTS § 45 cmt. b (AM. L. INST. 1981); *see also* Tiersma, *supra* note 15, at 32 ("In the unilateral context . . . section 45 of the *Restatement* creates an option contract as soon as the offeree begins to perform *without inquiring* whether the reliance on the offer was reasonable.").

240. *See* RESTATEMENT (SECOND) OF CONTRACTS § 45 (AM. L. INST. 1981); U.C.C. § 2-206, cmt 3.

241. *See, e.g.*, Boswell v. Panera Bread Co., 879 F.3d 296, 303 (8th Cir. 2018) (relying, for the purpose of stating Missouri law, on Comment d to § 45 of the Restatement (Second) of Contracts, which states that it is "the beginning of performance" that renders the offer of a unilateral contract binding so that the offeror cannot revise its terms).

242. Tiersma, *supra* note 15, at 81; *see also* Zwolanek v. Baker Mfg. Co., 137 N.W. 769, 773 (Wis. 1912) ("It is true, as a general proposition, that a party making an offer of a reward may withdraw it before it is accepted. But persons offering rewards must be held to the exercise of good faith, and cannot arbitrarily withdraw their offers, for the purpose of defeating payment.").

243. *See, e.g.*, Wilkerson v. Wegner 793 P.2d 983 (Wash. Ct. App. 1990) (mere speculation that a prize would have been won by a prospective contestant does not give rise to recoverable damages for breach of contract); Youst v. Longo, 729 P.2d 728 (Cal. 1987) (plaintiff could not recover value of lost prize discounted by probability of winning in absence of interference because

exception to this rule comes when the pool of contestants is known and limited. There, some courts apply an "English rule" of awarding pro rata expectation damages among the contestants.[244]

Beyond the general body of contract law, there is specialized federal government contract law on the revocation of contracts. The executive branch enjoys a special "termination for convenience" doctrine that is mandatory in most federal contracts and even read in by courts as implied where it does not literally appear.[245] The doctrine originates in the 1875 case of *United States v. Corliss Steam-Engine Co.*, which acknowledged the need for military departments to modify, suspend or settle contracts for armaments due to changing "contingencies."[246] Termination is not "a method of unlimited exculpation;" it cannot be used in bad faith, though few plaintiffs have met that bar.[247] But contracts can be terminated due to post-contract changes in policy, which is exactly the sort of situation in which one Congress might be expected to terminate the contracts of its predecessor.[248]

2. Revocation of Statutory Contracts

We can now apply the law of revoking unilateral offers to statutory contracts. Suppose a taxpayer intends to claim the investment tax credit. A taxpayer can generally claim investment tax credits only upon placing eligible property into service, but it might take a year or more of construction efforts before the property is ready to be placed in service. What happens if Congress repeals the statute in a year after the prospective counterparty has spent money preparing to perform, but before it is actually eligible for the credit?

Under current law, the prospective counterparty would have no recourse.[249] *Maine Community Health Options* is no help because that holding assumes the petitioner has already met the statutory criteria, not that it was partway through doing so. In *Maine*, the insurance company plaintiffs had already been performing (by incurring losses in the health

outcome of the race was too speculative); Alderson v. Miami Beach Kennel Club, 336 So. 2d 477 (Fla. Dist. Ct. App. 1976) (disallowing damages consisting of anticipated purses which racer might have earned as too speculative to allow recovery).

244. *See, e.g.*, Chaplin v. Hicks 2 K.B. 786 (1911); Van Gulik v. Resource Dev. Council, 695 P.2d 1071 (Alaska 1985); Wachtel v. National Alfalfa J. Co., 176 N.W. 801 (Iowa 1920).

245. See 48 C.F.R. § 49.502; Coll. Point Boat Corp. v. United States, 267 U.S. 12 (1925) (finding constructive termination for convenience available); General Eng'g & Mach. Works v. O'Keefe, 991 F.2d 775 (Fed. Cir. 1993); G.L. Christian & Assocs. v. United States, 312 F.2d 418 (Ct. Cl. 1963).

246. 10 Ct. Cl. 494 (1874), *aff'd*, 91 U.S. 321 (1875).

247. Torncello v. United States, 681 F.2d 756, 760 (Ct. Cl. 1982) (en banc); Krygoski Constr. Co. v. United States, 94 F.3d 1537, 1541 (Fed. Cir. 1996).

248. *See* Northrop Grumman Corp. v. United States, 46 Fed. Cl. 622 (2000).

249. *See supra* Section I.E (discussing the prospect of retroactive repeal of tax incentives before a taxpayer had fully qualified for the incentive).

care exchanges) for most of a year at the point when Congress passed its rider denying funds from the Risk Corridors program for that year. The majority opinion noted that "finding a repeal in these circumstances would raise serious questions whether the appropriations riders retroactively impaired insurers' rights to payment."[250] It's relatively easy to agree that Congress should not be able to retroactively breach its contracts. The harder question is whether Congress should be able to revoke its contractual offers once a counterparty has begun performing but has not completed performance.

Recall the view, introduced above, that an offeror should always be able to revoke an offer made to the world at large rather than to specific, known offerees. This view makes particular sense in the context of offers for a prize that can only have a limited number of winners. If someone has already earned the prize, the offeror arguably owes nothing to additional competitors. But the prize analogy is imperfect because it rests on the assumption that a prize usually has a fixed number of winners, whereas statutory contract offers are often open to an indefinite number of claimants. In prize competitions, the determination of winners is at least partially outside any contestant's control: it depends on the performance of other contestants and/or the judgment of the organizer. But statutory offers provide fixed criteria that, if met, guarantee anyone compensation, no matter what other competitors may do. And so, while prize offers do not generally create a reliance interest for contest entrants, statutory offers generally should.

Of course, in some cases, there might be reason to infer that Congress does not actually intend to pay for an unlimited quantity of performance and that, past a certain point, Congress would be likely to revoke the offer. One indication as to the reasonableness of reliance might be the presence or absence of an expiration date for the statutory offer.[251] If the offer is set to expire upon a certain date or the triggering of a certain condition, then it might be reasonable to infer against revocation at any earlier date. Statutory silence on expiration creates a more ambiguous situation. The reasonableness of assuming against revocation would depend on the context of the policy. Some statutory offers should be understood as permanent policies, like the offer to reimburse medical providers for necessary care that forms the core of Medicare. It would be reasonable for any medical provider to continue providing care under the assumption that the Medicare statute will not be repealed. But if the statute or legislative history communicated a fixed, achievable goal that the policy is meant to accomplish, offerees should arguably be on notice that the statutory offer may be revoked once that goal has been reached.

250. Me. Cmty. Health Options v. United States, 590 U.S. 296, 317 (2020).

251. *See, e.g.*, I.R.C. § 45Y(d)(3) (setting an expiration date for the Clean Electricity Production Tax Credit).

In the vanilla hypothetical where Congress revokes a statutory offer, the question of whether the offeree has rendered substantial performance should be dispositive as to liability, following the general principle introduced above.[252] Courts could draw on the large body of cases concerning revocation of unilateral offers to draw out the meaning of "substantial" in this context. Courts deem it substantial performance when people respond to awards for help leading to the arrest of criminal suspects even when the assistance still leaves the police with some additional work to complete the arrest.[253] Courts deem it substantial performance when an offeree attempts to recover lost property, has the lost possession in hand, but is turned away by the offeror.[254] And they deem it substantial performance when employees attempt to qualify for a pension or bonus by working a certain number of years, but the offer is revoked before the employees had reached the target, so long as the employees had remained in their jobs for a "substantial" period.[255] Substantiality can be applied as a sliding scale rather than a bright line by modifying the resulting damages; in the employment cases, for example, damages are sometimes scaled back in proportion to the amount of time the employee had worked relative to the contacted target.[256]

One might think the existence of termination for convenience doctrine might undermine the above result. If the government can unilaterally terminate its ordinary contracts, why shouldn't it be able to do the same with statutory contracts? In a literal sense, the provisions of the Federal Acquisition Regulation on termination for convenience would not apply to statutory contracts.[257] But one can imagine that if Congress repealed a statutory contract and frustrated offerees sued, courts might import the Federal Circuit's termination precedent in the course of

252. *See infra* Section III.B.1.

253. *See, e.g.*, Haskell v. Davidson, 40 A. 330 (Me. 1898) (offeree may recover reward where he investigated crime, discovered facts, found suspect, and obtained confession, even though actual arrest was made by deputy sheriff); Madsen v. Dakota State Bank, 114 N.W.2d 93 (S.D. 1962) (deciding that reward offering $1,000 for capture of bank robbers was accepted when offeree gave license number of car used in bank robbery to police officers, leading police to arrest robber); Blain & Kelly v. Pacific Express Co., 6 S.W. 679 (Tex. 1887) (disallowing reward for arrest of two people because only part performance of apprehending one of the two people completed).

254. *See, e.g.*, Wood v. Pierson, 7 N.W. 888 (1881); MacFarlane v. Bloch, 115 P. 1056 (1911).

255. R.I. Council 94 v. Carcieri, 2011 R.I. Super. LEXIS 120, at *60 (Sept. 13, 2011); Harnischfeger Indus. v. Wis. Dep't of Workforce Dev., 270 B.R. 188, 198-99 (D. Del. 2001); Sylvestre v. State, 298 Minn. 142, 214 N.W.2d 658 (1973) (notable in that the offeror is a state legislature).

256. *See, e.g.*, Morton v. E-Z Rake, Inc., 397 N.E.2d 609 (Ind. Ct. App. 1979); Sinnett v. Hie Food Prod., 174 N.W.2d 720 (Neb. 1970); Marvin Turner Engineers v. Allen, 326 S.W.2d 200 (Tex. Ct. App. 1959); Kollman v. McGregor, 39 N.W.2d 302, 304 (Iowa 1949) ("There is much authority that where an agreement provides for a bonus for continuous service which is terminated by the employer through no fault of the employee, the latter is entitled to a proportionate share of the bonus according to the time served.").

257. *See* 41 U.S.C. § 131 (defining acquisition as undertaken by "an executive agency" "with appropriated funds").

developing contract rules for the statutory context. And yet even if termination for convenience were made available to Congress, it would still require granting remedies for breach, unlike the status quo. When the executive branch terminates for convenience, it must compensate its contract partners for completed work, costs incurred in anticipation of performance, costs arising from the termination, and in some cases partial recovery for profit.[258] Because of this set of remedies, termination has frequently been described as "converting fixed-price contracts into cost-reimbursement contracts."[259] This is a world away from the status quo where the government has no obligation to reimburse parties induced into reliance on its statutory spending commitments.

C. Remedies

The stakes of applying contract law to statutory offers depend in large part on what sort of remedies are in play.

1. Remedies in Government Contracts

Conventional wisdom holds that frustrated counterparties cannot obtain an injunction commanding the government to render specific performance.[260] As the Supreme Court stated in *Larson v. Domestic & Foreign Commerce Corp.*, "[i]n the absence of a claim of constitutional limitation, the necessity of permitting the Government to carry out its functions unhampered by direct judicial intervention outweighs the possible disadvantage to the citizen in being relegated to the recovery of money damages after the event."[261] That holding, rooted in general principles of sovereign immunity, was augmented by the language of the Tucker Act, which waives sovereign immunity specifically for contractual money damage claims but not for injunctive relief.[262] A slight wrinkle presents itself when contractual counterparties seek injunctive relief under the Administration Procedure Act (APA), which has a sovereign immunity waiver inverse to the Tucker Act waiver, i.e. applicable only for

258. *See* 48 C.F.R. § 52.249-6(h) (Termination (Cost-Reimbursement)).

259. White Buffalo Constr., Inc. v. United States, 52 Fed. Cl. 1, 4 (2002) ("When a fixed-price contract is terminated for convenience, it is essentially converted into a cost reimbursement contract.").

260. *See* Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949); *see also* Bowen v. Massachusetts, 487 U.S. 879, 921, (1988) (Scalia, J., dissenting) ("It is settled that sovereign immunity bars a suit against the United States for specific performance of a contract . . . .").

261. *Larson*, 337 U.S. at 704.

262. *See*, *e.g.*, Presidential Gardens Assocs. v. United States, 175 F.3d 132, 143 (2d Cir. 1999); North Star Alaska v. United States, 14 F.3d 36, 38 (9th Cir. 1994).

suits "seeking relief other than money damages."[263] In *Bowen v. Massachusetts*, the Supreme Court held that plaintiffs can sue under the APA—rather than the Tucker Act—to seek monetary elements of equitable relief.[264] In other words, the Court distinguished money from "money damages"—sometimes money is just the thing originally owed, and therefore the natural object of an injunction. But suppose a plaintiff wants to sue under the APA in pursuit of an injunction requiring the government to honor a contract through non-monetary specific performance. For over a decade, the Tenth Circuit alone allowed this.[265] But now, all circuits agree that the APA does not waive sovereign immunity for claims that arise out of a contract and that seek specific performance, on the grounds that the Tucker Act impliedly forbids this.[266]

Most often, plaintiffs in breach of contract suits seek expectation damages, or damages that would put the plaintiff in as good a position as if the contract had been performed to completion.[267] Such damages are typically measured as losses caused and gains prevented by the breach, in excess of savings made possible.[268] When expectation damages are not awarded (e.g. for reasons discussed below), it is generally accepted that a plaintiff who suffers breach should at least be entitled to recover its pre-breach expenditures.[269] When full expectation damages are too uncertain, parties sometimes seek, and courts may award, reliance damages.[270]

263. 5 U.S.C. § 702 ("[A]n action in a court of the United States seeking relief other than money damages . . . shall not be dismissed nor relief therein be denied on the ground that it is against the United States.").

264. *Bowen*, 487 U.S. at 891-901 (interpreting APA's exclusion from judicial review of actions seeking "money damages" as referring only to claims which seek compensation for a loss, rather than monetary aspects of equitable relief); *see also* Robert Porter, *Contract Claims Against the Federal Government: Sovereign Immunity and Contractual Remedies*, HARV. L. SCH. FED. BUDGET POL'Y SEMINAR BRIEFING PAPER NO. 22, at 13 (May 2, 2006) (discussing *Bowen* and questions of the "longstanding principle of limitation to damages" based on actions pursued under the APA).

265. *See* Hamilton Stores, Inc. v. Hodel, 925 F.2d 1272, 1276-79 (10th Cir. 1991) (holding that the Tucker Act did not forbid the court from requiring the government to specifically perform a contract under APA review).

266. *See* Up State Fed. Credit Union v. Walker, 198 F.3d 372, 375 (2d Cir. 1999); Tucson Airport Auth. v. Gen. Dynamics Corp., 136 F.3d 641, 646 (9th Cir. 1998); Transohio Sav. Bank, 967 F.2d at 610; Coggeshall Dev. Corp. v. Diamond, 884 F.2d 1, 3 (1st Cir. 1989); Sea-Land Serv., Inc., 600 F.2d at 432-33; Robbins v. United States BLM, 438 F.3d 1074, 1082 (10th Cir. 2006) ("We now join our fellow circuits in holding that the Tucker and Little Tucker Acts 'impliedly forbid' federal courts from ordering declaratory or injunctive relief, at least in the form of specific performance, for contract claims against the government, and that the APA thus does not waive sovereign immunity for such claims.").

267. *See* Daniel Friedmann, *The Performance Interest in Contract Damages*, 111 LAW Q. REV. 628 (1995); W. David Slawson, *Why Expectation Damages for Breach of Contract Must Be the Norm: A Refutation of the Fuller and Perdue "Three Interests Thesis,* 81 NEB. L. REV. 839 (2003).

268. RESTATEMENT (FIRST) OF CONTRACTS § 329 (AM. L. INST. 1932); RESTATEMENT (SECOND) OF CONTRACTS § 347 (AM. L. INST. 1981).

269. 4 CORBIN ON CONTRACTS § 57.3 (Joseph M. Perillo ed., 1999).

270. *See, e.g.*, United States v. Behan, 110 U.S. 338, 339 (1884) (allowing recovery of reasonable expenditures when contractor could not prove lost profits); Las Colinas, Inc. v. Banco Popular, 453 F.2d 911 (1st Cir. 1971), *cert. denied*, 405 U.S. 1067 (1972).

Damages awarded under a reliance theory may be "limited as justice requires."[271]

2. Expectation vs. Reliance Damages

There are several reasons to question whether expectation damages are suited to statutory contracts. First, scholars have raised doubts about whether expectation damages are appropriate for government contracts in general. The standard economic argument for expectation damages is that they cause promisors to internalize the costs of breach to promisees and thereby encourage jointly efficient breach decisions.[272] That argument assumes both parties are primarily motivated by maximizing the economic value of the contract. But there is reason to think that government contractors face a more nuanced set of incentives. The possibility that the government will have to pay damages for breach could conceivably be given "too little" or "too much" weight (relative to a private promisor) depending on the political and organizational accountability structures in place.[273] For example, if it is viewed as possible to offload liability for damages onto taxpayers without repercussions, expectation damages would not necessarily convince the government to perform where standard contract theory says it should. An even more fundamental difference between public and private contracting is that the government that signs a contract may not expect to be in power at the time when damages materialize. In that light, expectation damages may encourage governments to enlarge their contractual commitments so as to "lock in" future governments to continuing the same policy or program.[274] These sorts of differences from the private contracting setting make scholars skeptical of the relevance of expectation damages.[275]

Second, calculating expectation damages requires that the loss be determined "with reasonable certainty."[276] In the case of unilateral

271. RESTATEMENT (SECOND) OF CONTRACTS § 90 (AM. L. INST. 1981).

272. Steven Shavell, *Damage Measures for Breach of Contract*, 11 BELL J. ECON. 466 (1980); Fischel & Sykes, *supra* note 57, at 335-36.

273. Fischel & Sykes, *supra* note 57, at 336.

274. *See* Gillian Hadfield, *Of Sovereignty and Contract: Damages for Breach of Contract by Government*, 8 S. CAL. INTERDISC. L.J. 467, 521 (1999); Abraham L. Wickelgren, *Contracting with the Government: The Inadequacy of Traditional Damage Measures* (1997) (unpublished manuscript).

275. Hadfield, *supra* note 274, at 469; Fischel & Sykes *supra* note 57, at 336.

276. RESTATEMENT (SECOND) OF CONTRACTS § 352 (AM. L. INST. 1981). However, some courts have mitigated this rule by stating that what must be reasonably certain is the fact of the injury, not the amount of the loss. *See* Mutual Life Ins. Co. v. Estate of Wesson, 517 So. 2d 521, 536 (Miss. 1987) ("The rule that damages, if uncertain, cannot be recovered applies to their nature, and not to their extent. If the damage is certain, the fact that its extent is uncertain does not prevent recovery."), *cert. denied*, 486 U.S. 1043 (1988); Najjar Indus. v. City of New York, 451 N.Y.S.2d 410, 414-15 (App. Div. 1982) ("[W]hen it is certain that damages have been caused by a breach of contract, and the only uncertainty is as to their amount, there can rarely be good reason for refusing, on account of such uncertainty, any damages whatever for the breach.").

statutory contracts, the government could argue that plaintiffs' losses cannot be determined with any certainty because statutory contracts do not specify a contracted quantity of performance. The strength of this argument would depend on the nature of the performance already undertaken by the plaintiff and the extent to which its actions could be used to predict how much performance would have occurred if the offer had not been withdrawn. For example, suppose EnergyCorp were in the process of constructing a solar energy facility in pursuit of the investment tax credit, had expended $2 million in construction expenses, but had not yet placed the property in service to qualify for the credit, and then Congress suddenly repealed the credit. EnergyCorp might show plans attesting that the project was expected to cost $10 million and argue that it should therefore be entitled to $3 million in expectation damages ($10M x 30% credit). If the evidence were convincing as to the likely total cost of the project at the time of breach, EnergyCorp could establish its loss "with reasonable certainty." On the other hand, arguments for expectation damages might be less persuasive in cases where anticipated gains would depend on factors outside the offeree's control. In the case of production tax credits, the producer only earns the credit upon selling goods to third parties. If Congress repealed a production credit and the plaintiff could show contracts with ready buyers, it could establish a precise loss figure. But if such contracts had not yet been formed, the plaintiff would have a weaker case, even if it claimed an intent to produce and sell a certain volume of goods.

Third, and finally, if courts construed the government's revocation of statutory offers as a form of termination for convenience, application of that doctrine would yield only reliance damages, for the reasons discussed in the previous Section.[277]

Indeed, in the absence of awarding expectation damages, courts should at least award damages for costs incurred in reliance on the government's statutory offer.[278] One critical aspect of determining proper damages in statutory contract cases is recognizing that the statutory offer may not be the only cause of the plaintiff's investment. In most ordinary contracts, the contract offer is the only reason for the offeree to perform its side of the bargain. But many statutory contracts are partial subsidies: they increase the financial incentive to perform some activity that counterparties might have independent reasons to perform. For example, a company might generate and sell solar energy both because it is

277. *See supra* Section III.A.3; White Buffalo Constr., Inc. v. United States, 52 Fed. Cl. 1, 4 (2002) ("When a fixed-price contract is terminated for convenience, it is essentially converted into a cost reimbursement contract.").

278. *See* Hadfield, *supra* note 274, at 529 (1999) ("[E]nsuring that contracting partners are in the same position vis-a-vis bearing the costs and enjoying the benefits of government policy changes as non-contractors means protecting what the common law defines as the reliance interest.").

independently profitable and because a statutory contract promises to further subsidize it. In such cases, the government could argue that plaintiffs did not take their actions *wholly* in reliance on the statutory offer. It might then be appropriate to award reliance damages for costs incurred only in proportion to the share of the plaintiff's expected compensation that would have come from the government, as opposed to from other sources.

Without such a limit, reliance damages could easily become larger than expectation damages. Suppose, in the example above, that EnergyCorp had spent $5 million out of a project expected to cost $10 million. Then, reliance damages ($5 million) would exceed expectation damages ($3 million). For this sort of reason, some scholars recommend a damages regime that pays reliance damages up to a maximum value set in reference to hypothetical expectation damages.[279] Using expectation damages as an upper limit would be a simpler rule than trying to discern what share of the counterparty's reliance was attributable to the government offer.

D. Third-Party Beneficiaries

Viewing certain spending statutes as contracts also opens up the possibility of treating non-counterparties who are meant to benefit from those contracts as third-party beneficiaries.[280]

1. Third-Party Beneficiaries in Government Contracts

Subcontractors to ordinary government procurement contracts routinely vindicate their right to enforce those contracts as third-party beneficiaries. According to the Second Restatement, a third party can sue to enforce a contract between two other parties, but must demonstrate that they are the intended, and not just an incidental, beneficiary of the contract.[281] Accordingly, Federal Circuit precedent holds that subcontractors need not be specifically identified in the contract, but "must fall within a class clearly intended to be benefited thereby."[282]

To be clear, it is not easy to show that a third party is an intended beneficiary: "a party that benefits from a government contract is presumed

279. Fischel & Sykes, *supra* note 57, at 357.

280. On the philosophy of using contract law to protect the interests of third parties affected by contracts, see Aditi Bagchi, *Other People's Contracts*, 32 YALE J. ON REGUL. 211, 212 (2015) ("[W]hile public law regulates diffuse externalities, private law attends to concentrated externalities. The third-party interests at issue in contract are among the concentrated externalities that contract law should mitigate.").

281. RESTATEMENT (SECOND) OF CONTRACTS § 302 (AM. L. INST. 1981).

282. Montana v. United States, 124 F.3d 1269, 1273 (Fed. Cir. 1997); *see also* Flexfab, L.L.C. v. United States, 424 F.3d 1254, 1259 (Fed. Cir. 2005) (noting that "the intent of the parties to the contract is therefore the cornerstone of a claim for third-party beneficiary status").

to be an incidental beneficiary, and that presumption may not be overcome without showing a clear intent to the contrary."[283] In the domain of public benefits, numerous courts have held that the recipients of public benefits are third-party beneficiaries to contracts designed to implement those benefits.[284] Moreover, courts have even treated statutes (like Medicaid) as themselves contracts giving rise to third-party beneficiary status for the intended recipients.[285] In these cases, what matters is not whether Congress intended to create a private cause of action in the statute, but whether the plaintiffs are intended beneficiaries of the contract (whether ordinary contract or statutory contract).[286] If they are intended beneficiaries, then the common law doctrine of third-party beneficiaries comes into play.

When prospective plaintiffs seek to vindicate their rights by enforcing spending agreements between the United States and a state or local government, there is generally no need to invoke common law third-party beneficiary doctrines, because 42 U.S.C. §1983 provides an avenue to redress violations, by anyone acting "under the color of" state law, of rights secured by federal law.[287] In other words, § 1983 is a statutory version of third-party beneficiary rights applicable to some, but not all, statutory contracts.

2. Third-Party Beneficiaries of Statutory Contracts

By contrast, third-party beneficiary claims are yet unheard of in statutory contracts between the United States and private entities. If courts were to apply third-party beneficiary doctrine to statutory contracts, these claims might succeed in the context of subsidy programs where the intended beneficiary of a subsidy lacks contractual privity with the United States. In numerous instances, the federal government subsidizes some economic activity in a manner that benefits both consumer and producer of some good or service. The choice to levy a subsidy directly on the consumer or producer is referred to as the "legal incidence," but is irrelevant to the "economic incidence" of who benefits most from the subsidy.[288] The choice of legal incidence is often driven primarily by

283. Caltex Plastics, Inc. v. Lockheed Martin Corp., 824 F.3d 1156, 1160 (9th Cir. 2016) (internal quotation marks omitted).

284. *See* Linton v. Comm'r of Health & Env't, 65 F.3d 508, 520 (6th Cir. 1995) (treating Medicaid recipients as third-party beneficiaries to contracts between the state and nursing facilities); Cherry v. Crow, 845 F. Supp. 1520, 1523 (M.D. Fla. 1994) (treating prisoner as third-party beneficiary of contract to provide medical care to inmates); Bossier Parish School Bd. v. Lemon, 370 F.2d 847, 851 (5th Cir. 1967) (treating school children as third-party beneficiaries of contracts to assurance compliance with Title VI).

285. *See* Mallo v. Pub. Health Tr. of Dade Co. 88 F. Supp. 2d 1376 (S.D. Fla. 2000).

286. *See* Brogdon v. Nat'l Healthcare Corp. 103 F. Supp. 2d 1322, 1333-34 (N.D. Ga. 2000).

287. Health and Hosp. Corp. of Marion Cnty. v. Talevski, 599 U.S. 166, 175 (2023).

288. *See* Russell Krelove, *Concepts of Tax Incidence*, *in* TAX POLICY HANDBOOK 35 (1995); Kimberly A. Clausing, *In Search of Corporate Tax Incidence*, 65 TAX L. REV. 433 (2011).

administrative considerations (e.g. whether it is easier to verify transactions from the consumer or producer side), whereas the economic incidence is often outside policymakers' control and instead subject to the balance of bargaining power in the relevant market. All this is to say that it is common for policymakers to design a subsidy that is intended to benefit both producers and consumers, but that only directly transacts with one or the other. When such subsidies are statutory contracts, the party that lacks privity may have a claim to enforce the contract as a third-party beneficiary.

An important application of this principle is in the realm of production tax credits, which are subsidies that convey to the producer only upon selling a certain good to a third party. For example, the renewable electricity production credit is a credit paid to the producer of electricity using certain qualified energy resources upon sale of that electricity to an unrelated person.[289] Direct recipients of the credit already have a means to enforce the contract using the tax refund procedure. But a cursory review of legislative history would reveal that Congress intended to benefit not just electricity generators but also consumers and intermediary utilities (both of whom could be the "unrelated person" on the other end of the transaction). This result is particularly obvious in the case of subsidies to electric utilities, which are often governed by law requiring them to refund some portion of a subsidy to customers.[290] But the same logic would apply to subsidies in other industries, like the advanced manufacturing production credit's subsidies for the production and sale of critical minerals like lithium or nickel.[291] There, third-party beneficiary doctrine could open up a right of action for the industrial firms that buy critical minerals directly from the mining firms that themselves produce the minerals and claim the credit.

While the facts supporting a third-party beneficiary claim would vary from case to case, the general test would be whether the petitioner falls in a class that Congress intended to benefit from a contract. The upshot of allowing these claims would be to empower the purchasers of subsidized goods and services to enforce the contractual criteria meant to govern the subsidy. For example, purchasers of critical minerals might have a third-party beneficiary claim against the seller if the minerals turned out to fall short of the purity standards required by the statutory subsidy.[292] This sort of claim would effectively provide a private monitoring and enforcement

289. I.R.C. § 45(a).

290. FLORIDA POWER & LIGHT, *FPL Proposes Plan to Refund Customers Nearly $400 Million in Federal Corporate Tax Savings*, (Sept. 23, 2022), https://newsroom.fpl.com/2022-09-23-FPL-proposes-plan-to-refund-customers-nearly-400-million-in-federal-corporate-tax-savings [https://perma.cc/T9KH-QH8B].

291. I.R.C. § 45X(b)(1)(M).

292. The viability of this claim might depend on the language of the direct contract between the buyer and seller, which might supersede the terms of the statutory contract to which the buyer is a third-party beneficiary.

mechanism for statutory subsidies. Congress could increase the likelihood of success for such claims by referring explicitly to the class of parties intended to benefit in such statutes.

E. Unenforceability

Even if a statute is acknowledged as a contract, this does not guarantee that courts will enforce it. In contract law, certain contracts are held unenforceable for being contrary to public policy.[293] In the realm of government contracting, the pertinent causes of unenforceability are contract terms that threaten to entrench policy choices and constrain sovereignty. In this Section, I first lay out the state of unenforceability doctrine in government contracts generally, before applying those principles to statutory contracts.

1. Unenforceability in Government Contracts

What would it mean for a contract to constrain sovereignty? As elaborated in Section IV.C courts practically never order specific performance when the government breaches contracts. And so, the concern cannot be that courts would order the government to perform a contract contrary to the wishes of a democratically elected government. Instead, the upshot of finding the current government to have breached a contract entered into by its predecessor would be forcing the current government to pay damages to those parties harmed by the breach.[294] In this light, "the only barrier to legal change is whatever political consequences flow from paying that amount of money."[295] Of course, if the prospect of having to pay damages to counterparties were to discourage the government from making new policy in the first place, one might characterize that as a restraint on sovereignty.[296] But the existence of costs and benefits to governing seems qualitatively different from an inability to govern at all.[297]

293. 1 CORBIN ON CONTRACTS § 1.8 (John E. Murray ed., 2020).

294. *See* United States v. Winstar Corp., 518 U.S. 839, 868 ("We read this promise as the law of contracts has always treated promises to provide something beyond the promisor's absolute control, that is, as a promise to insure the promisee against loss arising from the promised condition's nonoccurrence.").

295. Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400, 429 n.104 (2015); *see also Winstar*, 518 U.S. at 885-87 (holding that the government's breach of its contractual obligations due to subsequent legislation did not relieve it of liability, as awarding damages would not restrict sovereign authority to regulate banking).

296. Fischel & Sykes, *supra* note 57, at 371.

297. *Cf. Winstar*, 518 U.S. at 883 ("But all regulations have their costs . . . . [W]e must reject the suggestion that the Government may simply shift costs of legislation onto its contractual partners who are adversely affected by the change in the law, when the Government has assumed the risk of such change.").

What we need, then, is a way to distinguish between money damages that make the government's preferred course of action not worth pursuing and those that merely make it costlier. The plurality opinion in the landmark government contracts case *United States v. Winstar Corp.* points the way toward such a middle ground.[298] *Winstar* dealt with the question of when a government contract is unenforceable due to constraining the sovereignty of the current legislature. Federal bank regulators had entered contracts with thrifts to acquire failing rivals in exchange for certain regulatory guarantees, in particular a guarantee to count certain goodwill toward capital reserve requirements. Congress later changed the capital accounting rule, removing goodwill from the reserve calculation, and the thrifts sued for contractual damages. Reviewing the Supreme Court's cases, Justice Souter distilled a set of tests for determining when the government should be liable for breach and when government contracts should instead be unenforceable.[299]

The first test is whether the governmental powers at issue were too important to be bargained away in the first place—the so-called "reserved powers" doctrine.[300] Nearly all the cases that have gone against a government on these grounds have pertained to 19th century state and local governments exercising police powers, taxation powers, eminent domain authority, or the like.[301] At the federal level, an equivalently impermissible contract would be one that attempts to bargain away an Article I power in its entirety.

As the second test for unenforceability, courts ask whether the government action that supposedly breached the contract was a "public and general" action, in which case the government is not liable for breach. Courts refer to this defense as the "sovereign acts" doctrine, but it is better understood as a version of contract law's impossibility defense. The rule originates in *Horowitz v. United States*.[302] There, the government had contracted to sell silk from the Ordnance Department, but, unrelatedly, the Railroad Administration put an embargo on shipments of silk, preventing delivery.[303] The Supreme Court held that the Ordnance Department was not liable for breach, drawing on Court of Claims precedent establishing that "The United States as a contractor are not responsible for the United States as a lawgiver."[304] The *Horowitz* Court's logic was that the government as contractor should be in no worse a

298. *Winstar*, 518 U.S. at 839.

299. Justice Souter's opinion presents the considerations in a different order than I do here. Mine is an attempt to clarify and streamline the logic of the opinion.

300. *Winstar*, 518 U.S. at 874-75.

301. *See, e.g.*, Stone v. Mississippi, 101 U.S. 814, 817 (1880) (holding that a state legislature cannot bargain away its police power); W. River Bridge Co. v. Dix, 47 U.S. (6 How.) 507, 507 (1848) (holding that a state cannot contract away its eminent domain power).

302. 267 U.S. 458 (1925).

303. *Horowitz*, 267 U.S. at 461.

304. Deming v. United States, 1 Ct. Cl. 190, 191 (1865).

position than a similarly situated private contractor would be—i.e., able to claim an impossibility defense if the government had embargoed the materials it was supposed to deliver.[305] The logic of common law impossibility is that a party should not be discharged from obligation if its own act made performance impossible.[306] The public law cases modify this principle to reflect the notion that the government that contracts is not necessarily responsible for the government that legislates. To that end, courts hold governmental action can generate an impossibility defense so long as "the action's impact upon public contracts is, as in *Horowitz*, merely incidental to the accomplishment of a broader governmental objective."[307] But "the greater the government's self-interest" in frustrating its prior contracts, or where "a substantial part" of the impact of the action is to frustrate such contracts, the impossibility defense is unavailable.[308]

When a government contract neither bargained away reserved powers nor conflicted with "public and general" acts, the government's last chance at escaping liability for breach is if the contract bargained away "sovereign powers" without surrendering them "in unmistakable terms."[309] This test has two components—(1) unmistakable surrender and (2) sovereign powers. And while courts refer to this test as the "unmistakability doctrine," in Justice Souter's analysis it is really the question of sovereign power that does most of the work. To briefly cover the unmistakability component, the idea is that the government *can* contract away its right to exercise sovereign powers if the contract explicitly announces that it is doing so.[310] This would generically take the form of a promise not to adopt a policy inconsistent with the contract. But assuming there is no such promise, the question is whether enforcing the contract would "block the exercise of a sovereign power of the Government."[311]

The "sovereign powers" test is fundamentally a question of proportionality: it asks how significant is the remedy sought in proportion to the government's motive in breaching the contract. In *Winstar*, Justice Souter reasoned that if the government were made to pay damages to make up for the thrifts' costs of coming into compliance with the new capital reserve regulation, the government would still enjoy the benefit of

305. *Horowitz*, 267 U.S. at 461; *see also* Hadfield, *supra* note 274, at 486 (stating that the impossibility defense "holds that the government's own acts as legislator will afford it the same impossibility defense as a private actor would obtain, provided the acts in question cannot properly be attributed to the government-as-contractor").

306. *See* RESTATEMENT (SECOND) OF CONTRACTS § 261 (AM. L. INST. 1981); 2 E. FARNSWORTH, FARNSWORTH ON CONTRACTS § 9.6, at 551 (1990).

307. United States v. Winstar Corp., 518 U.S. 839, 898 (citing O'Neill v. United States, 231 Ct. Cl. 823, 826 (1982).

308. *Winstar*, 518 U.S. at 898.

309. Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment, 477 U.S. 41, 52 (1986).

310. With the exception, of course, of the "reserved powers" discussed above.

311. *Winstar*, 518 U.S. at 879.

that regulation (which was motivated around protecting the thrift deposit insurance fund), and so the government's sovereign "purpose" would not be undermined.[312]

Justice Souter distinguished the above situation from three previous cases, cited by the government, where the Court had held that enforcing a contract would frustrate a sovereign power. In *Merrion v. Jicarilla Apache Tribe*, a tribe had issued oil leases that required payment of a royalty to the tribe, and then later imposed a tax on oil production.[313] The leaseholders sued, arguing that the tax violated their contract. In *Bowen v. Public Agencies Opposed to Social Security Entrapment*, state agencies participated in the Social Security system pursuant to agreements that allowed withdrawal with two years notice, Congress then eliminated the right of withdrawal, and several California agencies sued under an unconstitutional taking theory.[314] And in *United States v. Cherokee Nation of Oklahoma*, the federal government had signed a treaty conveying property rights to a riverbed, but then began making navigational improvements, prompting the tribe to sue for a taking.[315] Justice Souter argued that in each of these cases, awarding the requested remedy would have frustrated the government's purpose in its later-in-time policy.[316] In *Merrion*, that is because plaintiffs sought an injunction of the new law. But even when plaintiffs only seek money damages, it is still possible for those damages to undermine the government's value proposition. [317] Justice Souter distinguishes *Cherokee Nation* because if the government had been made to pay damages, it would have vitiated the benefit of claiming a navigation easement, effectively forfeiting the economic value if that property right.[318] Likewise in *Bowen*, compensating the state agencies for the loss of their withdrawal right "would have been the equivalent of exemption from the terms" of that policy.[319]

The Souter analysis recognizes that it is possible for the enforcement of a pre-existing contract to make a subsequent sovereign act costlier without frustrating its essential purpose. In that sense, the Souter opinion encourages a sort of Coasean bargain: if the contractual harms to the private party are equaled by benefits to the sovereign, then tie goes to the sovereign and the contract should not be enforced (absent an unmistakable

312. *Id.* at 854, 882.

313. 455 U.S. 130, 148 (1982) ("No claim is asserted in this litigation, nor could one be, that petitioners' leases contain the clear and unmistakable surrender of taxing power required for its extinction. We could find a waiver of the Tribe's taxing power only if we inferred it from silence in the leases.").

314. 477 U.S. 41 (1986).

315. 480 U.S. 700, 706 (1987). The Supreme Court held that the treaty had not unmistakably ceded the federal government's navigational easement power.

316. *Winstar*, 518 U.S. at 881.

317. *Id*. at 879-80.

318. *Id*. at 879.

319. *Id*. at 879-80.

surrender); but if benefits to the sovereign exceed harms to the private party, then the sovereign should compensate that party and proceed with its desired activity. The practical difficulty is that this approach requires careful weighing of the requested remedies against the value to the government of regulating—with the latter quantity not always readily expressible in dollar terms.[320]

2. Unenforceability in Statutory Contracts

We can now apply the three tests of unenforceability laid out above to statutory contracts. The reserved powers doctrine will generally not be relevant to statutory contracts, unless Congress attempts to bargain away a core Article I power. Next, the government's impossibility defense will be at its weakest in the context of statutory contracts. In every public law case where the defense has even been considered, the original contract and the subsequent, contradictory act were executed by two distinct branches of government or two distinct agencies—e.g. the Federal Home Loan Bank Board and Congress in *Winstar*, or the Army and the Railroad Administration in *Horowitz*. The institutional separation between the two actors helps substantiate the conceptual divide between government-as-contractor and government-as-lawgiver on which the impossibility defense relies. But if Congress itself had executed the original contract, then only Congress would have the authority to execute a contradictory enactment. In that situation, it would be hard to argue that the later Congress was unaware of or unmotivated by contradicting the commitments made by the earlier Congress. For example, if hearings or floor debate included discussion of the new law's implications for the older law, it would support a court's finding that the original statutory contract were a "focal point of the congressional debate" and thus unsuited for an impossibility defense.[321]

Therefore, any chance of finding a statutory contract unenforceable for frustrating legislative sovereignty would rest on the sovereign powers defense. Applying the balancing test—whether the contract remedy would offset the government's entire motive for breaching the contract—will be fact-dependent. But in the most typical case, we should expect that breach damages would not fully undermine Congress's purpose in breaching. Suppose Congress offered a reward for building railroads, several firms began construction, and then the next Congress repealed the law. Presumably, part of Congress's purpose in repeal would be to prevent even more companies from seeking to participate and demand compensation. Compensating the initial set of performers for their reliance damages would not undermine the entirety of Congress's purpose, and so the

320. *See* Michael W. Graf, *Determination of Property Rights in Public Contracts After Winstar v. United States: Where has the Supreme Court Left Us*, 38 NAT. RES. J. 197, 201 (1998).

321. *Winstar*, 518 U.S. at 854, 900.

contract could still be enforced. On the other hand, if the statutory offer somehow only applied to one potential counterparty, and the next Congress repealed as to that counterparty, the government could argue that requiring damages would frustrate Congress's entire purpose in the same way that enforcing the contracts in *Bowen* and *Cherokee Nation* would have. Under the sovereign powers test, it is permissible for a prior contract to make subsequent policy change more expensive, but not to the point of sapping the change of all its significance. In this way, the test reflects a compromise between the obligations of contractual commitment and the importance of ongoing legislative freedom.

IV. The Political Economy of Statutory Contracts

In everything that has preceded, I have developed a case for interpreting money-mandating statutes as contract offers. But even if my interpretive suggestions are disregarded, it is worth understanding that this form of spending raises complex, underappreciated political economy issues. Committing to spend money by statute promotes a distinctive set of relationships between Congress and the executive branch and between the government and private firms. In each of these regards, statutory contracting produces different results than the traditional fiscal paradigm. I focus on four differences: susceptibility to a public choice critique, fiscal transparency, procedural openness, and potency of eliciting commitment. Throughout this Part, my purpose is to clarify the extent to which statutory contracts raise distinctive considerations on each of these fronts, rather than produce novel first-order arguments about any of these normative issues, each of which enjoy enormous literatures of their own.

A. Public Choice Concerns

No matter what private law rights prospective recipients have in federal spending commitments, those private actors will seek to influence the composition of the spending so as to benefit themselves. This observation is typically associated with the public choice tradition in law and economics.[322] In the public choice paradigm, scholars model legislation and regulation as a system in which individuals and groups try to further

322. For the public choice account of lawmaking as serving the private interests of the politically powerful, see Gary Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371, 396 (1983); Frank H. Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 15 (1984) (stating that many laws are designed to serve private interests); Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 714 (1984); (claiming that legislation driven by interest groups is a form of "legislative abuse"); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986) (proposing interpretive tools for striking down statutes that impermissibly advance private interests).

their own economic interests.[323] The basic assumption is that "taxes, subsidies, regulations, and other political instruments are used to raise the welfare of more influential pressure groups."[324] Public choice concerns have even led some scholars to argue against enforcing government contracts, which are said to be irredeemably tainted by rent-seeking.[325] But the nature and severity of the public choice concern should vary depending on the institutional process that generates spending decisions. Statutory contracting shifts lobbying effort from the agencies to Congress, and particularly to the tax-writing committees, which may lead to more politicized and more lobbyist-driven spending.

In the traditional fiscal paradigm, firms and trade associations lobby Congress at the appropriations stage and then lobby the agencies at the contracting stage. A large body of evidence indicates that lobbying at both stages is reasonably successful. The Congressional tendency to distribute pork is well established. Ordinarily, it is the members—and above all the chairs—of the appropriations subcommittees that seem to funnel federal spending to firms in their districts.[326] But despite their additional layer of insulation from the electoral process, executive branch agencies are also influenced by corporate lobbyists.[327] In fact, Dusso et al. find that firms that spend proportionally more on lobbying executive agencies secure more lucrative procurement contract awards than those that prioritize lobbying Congress.[328] More generally, agency-led procurement bears similar marks of political influence as Congressional legislation: agencies with the most political appointees are the most likely to have noncompetitive bid processes, and agencies issue more noncompetitive contracts in

323. *See* Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 878 (1987). (treating "the legislative process as a microeconomic system in which" political decisions are made by those trying to advance their interest).

324. Gary Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371, 373-74 (1983).

325. *See* Fischel & Sykes, *supra* note 57, at 332.

326. *See* Christopher R. Berry & Anthony Fowler, *Cardinals or Clerics? Congressional Committees and the Distribution of Pork*, 60 AM. J. POL. SCI. 692, 705 (2016) (finding that Appropriations subcommittee chairs distribute significantly more pork than ordinary subcommittee members); Andrew J. Taylor, *Does Presidential Primary and Caucus Order Affect Policy? Evidence from Federal Procurement Spending*, 63 POL. RES. Q. 398, 402 (2010) (finding that legislators on the Armed Services and Appropriations committees secure more Department of Defense dollars for contractors in their districts than other lawmakers); Steven J. Balla, Eric D. Lawrence, Forrest Maltzman & Lee Sigelman, *Partisanship, Blame Avoidance, and the Distribution of Legislative Pork*, 46 AM. J. POL. SCI. 515 (2002) (finding that legislators on higher education committees direct more funds to universities in their districts).

327. *See* Aaron Dusso, Thomas T. Holyoke & Henrik Schatzinger, *The Influence of Corporate Lobbying on Federal Contracting*, 100 SOC. SCI. Q. 1793, 1795 (2019) ("The resources, experience, and industry expertise they can call on are arguably more useful for shaping details in administrative rules to support the specific needs of individual businesses."); David Nelson & Susan Webb Yackee, *Lobbying Coalitions and Government Policy Change: An Analysis of Federal Agency Rulemaking*, 74 J. POL. 339, 351-52 (2012) (same in the rulemaking setting).

328. Dusso et al., *supra* note 327, at 1805. But note that they do not directly observe breakdown of lobbying budgets between Congress, EOP, and the agencies, and instead impute it based on frequency of mentioning each entity in the firms' lobbying disclosure statements.

battleground states around elections (but only agencies in executive departments).[329]

In the statutory contracting paradigm, nearly all of the discretion for awarding funds—and therefore also the lobbying—moves to Congress. Besides sidelining the role of agency discretion, the main difference between statutory contracting and ordinary Congressional spending is that the relevant power over the purse shifts from the appropriations committees to the authorizing committees that write the statutory contract offers. And because so many statutory contracts are written into the tax code, this means the tax-writing committees—the Senate Finance Committee and House Ways and Means Committee—will have the most control over federal spending and attract the most interest from its potential recipients. It is hardly news that these have become the most powerful committees in Congress.[330] Some scholars worry that policymaking suffers when "generalist" tax committees take the lead over more "specialist" subject matter committees (e.g. the House Agriculture Committee for agricultural subsidies, or the Energy and Commerce Committee for renewable energy subsidies).[331] But on the other hand, the tax committees may be more neutral in their allegiances than the members of committees that cover, and are therefore lobbied by, a smaller number of industries.[332]

In any case, firms view the drafting of statutory contracts as a golden opportunity to secure guaranteed benefits. We can guess at the presence of lobbying from recently enacted contract offers for the domestic production of critical minerals like beryllium, for which Materion Corp. is

329. Carl Dahlström, Mihály Fazekas & David E. Lewis, *Partisan Procurement: Contracting with the United States Federal Government, 2003–2015*, AM. J. POL. SCI. 652, 653 (2021).

330. *See* Emma Roller & Stephanie Stamm, *Here Are America's Most Wanted (House Committee Chairmen)*, ATLANTIC (June 5, 2014), https://www.theatlantic.com/politics/archive/2014/06/here-are-americas-most-wanted-house-committee-chairmen/455682 [https://perma.cc/WE4N-RTR2] ("But while the Appropriations Committee has the most money to push around, the Committee on Ways and Means has arguably the most power. More bills are referred to Ways and Means than any other committee. In the 112th Congress, nearly a third of bills were referred to Ways and Means.").

331. *See* Edward Kleinbard, *The Congress Within the Congress: How Tax Expenditures Distort our Budget and Our Political Processes*, 36 OHIO N. L. REV. 1, 26 (2010) ("If Madisonian pluralism is better served by relying on the 'generalist' tax-writing committees rather than 'specialist' substantive committees . . . why rely on committees at all?"); Nancy Staudt, *Redundant Tax and Spending Programs*, 100 NW. U. L. REV. 1197, 1205-1206 (2006) (discussing committees' respective competence in the context of federal welfare programs); Edward Yorio, *Equity, Efficiency, and the Tax Reform Act of 1986*, 55 FORDHAM L. REV. 395, 425 (1987) ("Charged principally with matters of tax and finance, both committees are usually less informed about the specifics of the problems justifying government intervention than those Congressional committees that grapple regularly with the problems.").

332. Edward A. Zelinsky, *James Madison and Public Choice at Gucci Gulch: A Procedural Defense of Tax Expenditures and Tax Institutions*, 102 YALE L.J. 1165, 1176 (1993) ("The specialized orientation of the nontax committees and departments makes each of these institutions highly susceptible to capture by the limited constituencies affected by its comparatively narrow jurisdiction.").

the only domestic producer,[333] cobalt, for which Jervois Global is preparing to open the only domestic mine,[334] and neodymium, dysprosium, and terbium, for which MP Materials Corp. is the only domestic producer.[335] Administrative agencies retain responsibility for clarifying the meaning of certain terms in statutory offers, and so they remain targets of lobbying in their own right. But most of the details that fix who will be eligible to receive contractual spending are baked by the time a bill passes Congress due to the presence of the money-mandating language that defines a statutory contract. In this sense, statutory contracts can be viewed as only one degree removed from earmarks, or spending provisions that explicitly name their beneficiaries.[336] The ability to lobby one government body—Congress—in order to solidify one's eligibility for federal spending with near certainty might be considerably more attractive than having to lobby both Congress and the appropriation-receiving agency in the traditional fiscal paradigm. If that is the case, one might expect statutory contracting to increase firms' total lobbying efforts and expenditures relative to the status quo.

B. Fiscal Transparency

Because the government cannot control how many firms will choose to accept statutory offers, statutory contracts generate unpredictable rates of take-up and unpredictable amounts of spending. As explained above, the fiscal essence of a statutory contract is that it guarantees payment without specifying an appropriation amount.[337] This dynamic leads to a powerful implication: when Congress writes a statutory contract, by default it commits to spending an unknown and unlimited amount of money, to be determined by the actions of counterparties. Absent enumerated limits, unilateral contracts are open to an indefinite number of counterparties, and each counterparty may participate up to an indefinite volume. For

333. I.R.C. § 45X(c)(6)(D); William Ascarza, *Mine Tales: Arizona Mines Supply Beryllium, Important to Defense Industries*, ARIZ. DAILY STAR (Sep. 10, 2017), https://tucson.com/news/retrotucson/mine-tales-arizona-mines-supply-beryllium-important-to-defense-industries/article_c9924269-9c9d-5862-b2a0-a0f69bd1fdc8.html [https://perma.cc/D6U3-9D84].

334. Stacey Vanek Smith & Eric Whitney, *Cobalt is in Demand, So Why Did America's Only Cobalt Mine Close?*, NPR (Dec. 14, 2023), https://www.npr.org/2023/12/14/1219246964/cobalt-is-important-for-green-energy-so-why-has-americas-only-coablt-mine-closed [https://perma.cc/PVR6-XU73].

335. Lara Seligman, *China Dominates the Rare Earths Market. This U.S. Mine Is Trying to Change That*, POLITICO (Dec. 14, 2022), https://www.politico.com/news/magazine/2022/12/14/rare-earth-mines-00071102 [https://perma.cc/8W7M-QKFV].

336. On earmarks, see Jack M. Beerman, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 89-90 (2006); Rebecca M. Kysar, *Listening to Congress: Earmark Rules and Statutory Interpretation*, 94 CORNELL L. REV. 519 (2008); and Donald N. Langenberg, *Earmarked Appropriations: The Debate Over the Method of Federal Funding*, 20 U. MICH. J. L. REFORM 1029 (1987).

337. *See supra* Section I.D.

example, a contractual offer to pay a certain rate for each solar cell produced and sold might elicit uptake by one firm or by a dozen; for the production of $10 million worth of cells or $10 billion worth.

The unknowable fiscal impact of these contracts is a source of tremendous uncertainty for the federal government.[338] Of course, budget estimators at the Joint Committee on Taxation and the Congressional Budget Office regularly estimate the expected uptake of spending programs, including statutory contracts. But these estimates have no legal force; they do not prevent uptake from falling short of or soaring above the estimate. In the aftermath of the passage of the Inflation Reduction Act in 2022, the uncapped nature of unilateral contract spending liability became a point of political controversy as the initially advertised "price tag" of the bill came into question. The Congressional Budget Office initially scored the energy and climate components of the bill (which were mostly contracts structured as tax credits) as costing $391 billion over ten years.[339] Later, Credit Suisse estimated that these portions of the bill will cost the federal government about $800 billion, with Goldman Sachs suggesting an even higher estimate around $1.7 trillion.[340] Both official and private-sector methodologies for estimating uptake are uncertain, as they rely on assumptions about rates of adoption of emerging technologies.[341] Still, opponents of the underlying spending programs have portrayed the rising estimates as a bait-and-switch.[342] But there is little merit to a legal argument that spending more than a CBO estimate is unfaithful to the meaning of an uncapped statutory contract.[343] When Congress wants to

338. For a sense of how private parties salivate at uncapped tax credits, see Jonathan Ponciano, *How to Cash in on Billions in Green Home Improvement Tax Credits and Rebates*, FORBES (Sept. 28, 2022), https://www.forbes.com/sites/jonathanponciano/2022/09/28/how-to-cash-in-on-billions-in-green-home-improvement-tax-credits-and-rebates [https://perma.cc/54YY-PDFR].

339. *CBO Scores IRA with $238 Billion of Deficit Reduction*, COMM. FOR A RESPONSIBLE FED. BUDGET, CONG. BUDGET OFF. (Sept. 7, 2022), https://www.crfb.org/blogs/cbo-scores-ira-238-billion-deficit-reduction [https://perma.cc/BZT9-LMNX]; CONG. BUDGET OFF., ESTIMATED BUDGETARY EFFECTS OF PUBLIC LAW 117-69 (Sept. 7, 2022).

340. *US Inflation Reduction Act: A Tipping Point in Climate Action*, CREDIT SUISSE 15 (2022), http://large.stanford.edu/courses/2023/ph240/sahel-schackis2/docs/cs-2022.pdf [https://perma.cc/D667-RP9X].

341. Jordan Weissmann, *How Washington Underestimated Biden's Big Climate Law*, SEMAFOR (May 4, 2023), https://www.semafor.com/article/05/04/2023/biden-climate-ira-cost-inflation-reduction-act [https://perma.cc/FWQ9-R3ZU].

342. *Analysis: Democrats' "Green" Energy Subsidies Costing Taxpayers $1.2 Trillion—Three Times Original Price Tag*, U.S. HOUSE COMM. ON WAYS & MEANS (Apr. 6, 2023), https://waysandmeans.house.gov/2023/04/06/analysis-democrats-green-energy-subsidies-costing-taxpayers-1-2-trillion-three-times-original-price-tag [https://perma.cc/B9Q2-N56F].

343. *See* Abbe R. Gluck, *Congress, Statutory Interpretation, and the Failure of Formalism: The CBO Canon and Other Ways That Courts Can Improve on What They Are Already Trying to Do*, 84 U. CHI. L. REV. 177, 188 (2017) (stating that an ambiguous statute should be interpreted in accordance with CBO assumptions made *about the statute*, i.e. rather than assumptions made about actions taken by private parties in response to the statute). Note also that CBO has equally under-estimated significant cost savings of certain statutes, so legislators should not assume that

limit a contract to a fixed dollar amount, it has well-established language for doing so.[344]

A similar challenge arises in commercial output and requirement contracts, which likewise do not prescribe a fixed quantity of performance and can similarly subject their participants to unexpected financial obligations.[345] But there, UCC § 2-306(1) applies an "unreasonably disproportionate" limitation to increases in quantity beyond a stated estimate or prior practice.[346] In theory, Congress could write a version of the UCC's "unreasonably disproportionate" standard into statutory contracts in order to give the CBO estimate legal effect. The difficulty would be that the CBO estimate refers to estimated uptake across all counterparties, whereas disputes would be specific to a single counterparty. CBO would need to issue estimates for contractual uptake by individual firms, or individual classes of firms, in order for "unreasonably disproportionate" language to be useful in adjudication.

This lack of fiscal predictability makes statutory contracts less transparent than delegated spending. Congress can disguise the anticipated size of spending programs by hiding them within the fiscal ambiguity of statutory contracts. Jason Oh argues that this feature makes uncapped tax credits more attractive to the business lobby and its supporters in Congress than non-tax spending.[347] His point could be broadened to apply to statutory contracts more generally.

C. Picking Requirements, Not Winners

Yet despite the concentration of lobbying energy that it may engender and the lack of fiscal transparency it offers, statutory contracting has its own democratic and procedural virtues compared to the other settings in which the federal government enlists private firms to do its bidding. Steven Davidoff Solomon and David Zaring have documented the rise of what they call "regulation by deal" and "transactional administration" where

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the net effect of CBO-related uncertainty should be to increase the deficit rather than reduce it. *See* Brendan Mochoruk & Louise Sheiner, *CBO Scoring of Health Legislation*, HUTCHINS CTR. ON FISCAL AND MONETARY POL'Y, BROOKINGS INST. 2 (Feb. 17, 2015), https://www.brookings.edu/wp-content/uploads/2015/06/Hutchins-Center-CBO-Health-Scoring-2015-Feb-17.pdf [https://perma.cc/K2WC-9KQ7] (discussing CBO under-estimates of Medicare cost savings in the Affordable Care Act).

344. *See, e.g.*, I.R.C. § 45D(f) (setting an annual limitation for the New Markets Tax Credit).

345. *See generally Requirements Contracts Under the Uniform Commercial Code*, 102 PENN. L. REV. 654 (1954) (discussing how the U.C.C. recognizes the validity of requirement contracts and attempts to define the extent of obligations between contracting parties).

346. U.C.C. § 2-306(1) (1990); *see* Randal Owings, *Output Contracts and the Unreasonably Disproportionate Clause of 2-306*, 59 MO. L. REV. 1052 (1994) (discussing how whether quantity variation in an open quantity contract is "unreasonably disproportionate" has been extensively litigated).

347. Jason S. Oh, *The Social Cost of Tax Expenditure Reform*, 66 TAX L. REV. 63, 77 (2012).

the government strikes one-off deals with private firms to advance policy priorities.[348] What statutory contracting and regulation by deal have in common—in contrast with the ordinary fiscal paradigm—is that the purpose of the bargain with firms is to elicit desired behaviors rather than to procure goods and services on behalf of the government. Both involve deal making—determining what price the government is willing to pay in exchange for behavioral concessions or commitments. But where Solomon and Zaring critique regulation by deal for its procedural shortcomings, statutory contracting offers a democratically superior alternative.

Solomon and Zaring describe transactional administration as the executive branch using its authority to transact with individual firms, or threaten adverse consequences unless those firms took certain action. Examples include emergency loans made to financial institutions under the Federal Reserve Act;[349] the Treasury seizure of a controlling interest in Fannie Mae and Freddie Mac;[350] President Trump threatening to impose tariffs on Carrier if it moved a factory to Mexico and Carrier's subsequent choice to agree to a local tax incentive deal to stay in Indiana;[351] and President Trump's proposal to bully holders of U.S. sovereign debt to accept write-downs.[352] The appeal of regulation by deal is that it enables opportunism: the government might not have the legal authority or political will to make *every* firm change its behavior in some desired way, but it can take advantage of opportunities when, for whatever reason (such as financial distress), certain firms are willing to do so on voluntary, incentive-driven terms.[353]

348. Steven Davidoff Solomon & David Zaring, *Regulation by Deal: The Government's Response to the Financial Crisis*, 61 ADMIN. L. REV. 463 (2009); *see also* Lev Menand, *The Federal Reserve and the 2020 Economic and Financial Crisis*, 26 STAN. J. L. BUS. & FIN. 295, 320 (describing covenants for participating in Federal Reserve emergency lending facilities). More recently, Solomon and Zaring analyzed the Trump administration's practice of "transactional administration," where the executive branch strikes deals with individual counterparties to achieve policy goals. Steven Davidoff Solomon & David Zaring, *Transactional Administration*, 106 GEO. L.J. 1097 (2017) (discussing on-shoring contracts, shared ownership of infrastructure, and foreign policy deals).

349. Solomon & Zaring, *supra* note 348, at 477; 12 U.S.C. § 343.

350. Solomon & Zaring, *supra* note 348, at 1120-23; *see* "Housing and Economic Recovery Act of 2008," Pub. L. No. 110-289, § 1117, 122 Stat. 2654, 2685 (2008) (to be codified at 12 U.S.C. § 1719) ("[T]he Secretary of the Treasury is authorized to purchase any obligations and other securities issued by the Corporation . . . on such terms and conditions as the Secretary may determine and in such amounts as the Secretary may determine").

351. Solomon & Zaring, *supra* note 348, at 1110; *see* Ted Mann, *Carrier Will Receive $7 Million in Tax Breaks to Keep Jobs in Indiana; Deal Emerges After United Tech CEO's Pilgrimage to Trump Tower*, WALL ST. J. (Dec. 2, 2016, 10:01 AM), https://www.wsj.com/articles/indiana-gives-7-million-in-tax-breaks-to-keep-carrier-jobs-1480608461 [https://perma.cc/NQ99-4NRY].

352. Solomon & Zaring, *supra* note 348, at 1125; Liz Capo McCormick, *Trump's Comments on U.S. Debt Seen as Non-Starter by Bond Market*, BLOOMBERG (May 6, 2016, 1:41 PM), https://www.bloomberg.com/news/articles/2016-05-06/trump-s-comments-on-u-s-debt-seen-as-non-starter-by-bond-market [https://perma.cc/U2AV-3TXU].

353. *See generally* Sidney A. Shapiro & Randy Rabinowitz, *Voluntary Regulatory Compliance in Theory and Practice: The Case of OSHA*, 52 ADMIN. L. Rev. 97 (2000) (on the theory of incentive-driven voluntary compliance).

But the downside of regulation by deal is that it is not procedurally open or even-handed. Solomon and Zaring criticize transactional administration for giving preferential access to chosen firms, placing too much discretion in the hands of the executive, and evading the procedural safeguards of administrative law.[354] The nature of president-driven deal making is to engage ad-hoc with whichever firms the administration chooses. In that light, statutory contracting stands out as a form of voluntary, incentive-driven regulation that is also transparent and open. Congress writes contracts that are open to any willing counterparty and are implemented and enforced by agencies under traditional administrative adjudication. Statutory contracts therefore combine the voluntarism of transactional administration with the procedural transparency and openness of the ordinary legislative process. This mode of incentivizing private actors suggests a promising path forward for a more competition-minded version of industrial policy than the one commonly derided as "pick[ing] winners."[355]

D. Commitment / Entrenchment

The most important difference between statutory contracts and the ordinary fiscal paradigm is that statutory contracts better encourage private investment through the power of commitment. From one perspective, long-term commitment is a signal virtue of fiscal policy. From a different perspective, commitment is just a euphemism for entrenchment, the handcuffing of future governments by the present one.

Treating the government's counterparties as having contract rights in certain legislation is the latest step in the revolution of bringing private law values into public law scholarship.[356] The normative stakes of this interpretive turn are complex and ripe for debate. From one perspective, recognizing contractual rights in spending commitments is just a way to

354. Solomon & Zaring, *supra* note 348, at 1131-38.

355. *See* Scott Lincicome & Huan Zhu, *Questioning Industrial Policy: Why Government Manufacturing Plans Are Ineffective and Unnecessary*, CATO (Sept. 28, 2021), https://www.cato.org/white-paper/questioning-industrial-policy [https://perma.cc/ML8N-GV2Y] (presenting a sophisticated version of the traditional arguments against industrial policy, including concerns about bureaucrats' inability to identify "winners"). On the resurgence of interest in industrial policy and the importance of competition to its successful practice, see Réka Juhász, Nathan Lane & Dani Rodrik, *The New Economics of Industrial Policy*, 16 ANN. REV. ECON. (2023).

356. *See, e.g.*, Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964) (contending that "a government contract replaces a businessman's customers and goodwill"); Michael P. Vandenbergh, *The Private Life of Public Law*, 105 COLUM. L. REV. 2029 (2005) (showing that public environmental regulations spawn private enforce agreements that alter the character of the original public law); Bridget A. Fahey, *Federalism by Contract*, 129 YALE L.J. 2326 (2020) (showing that federalism works through a huge array of intergovernmental contracts; Jody Freeman, *Private Parties, Public Functions and the New Administrative Law*, *in* PETER CRANE, ADMINISTRATIVE LAW (2002) (describing the public-private arrangements of "mixed administration").

enrich private actors and hamstring the government's freedom of action. Scholars have elsewhere observed that when regulatory benefits are construed as property interests, private actors can gain a veto over public policy.[357] For example, in *Ruckelshaus v. Monsanto*, the Supreme Court held that a law that publicly shared firms' regulatory safety submissions was an unconstitutional taking of property because the law had allowed the firms to designate certain submissions as trade secrets, thereby granting a property right.[358] Amy Kapczynski criticizes this result and the cases that followed it for working a contemporary "Lochnerization" of the regulatory state.[359] In a similar way, one might worry that treating public spending as a contract will abdicate some control over the spending power to private actors. To be fair, the prospect of statutory contracts should be less troubling than the prospect of treating regulatory benefits as property because much public spending already takes the form of contracts, just not ones offered by Congress. Yet still, if statutory contracts are as pervasive as I have claimed, they move a substantial additional chunk of public spending into the contractual category.

On the other hand, what may look like constrained sovereignty from one perspective looks like effective commitment from another.[360] This tradeoff echoes a large literature on the benefits and harms of policy entrenchment. In broad strokes, the debate weighs the harms of empowering a previous legislature over the current one, and thereby limiting present-day majoritarianism, against the benefits of promoting durable, long-term policymaking.[361] For those who believe in extending the government's policy reach by striking positive-sum bargains with private firms, it is worth considering that contract rights can help the government achieve what money itself cannot.[362] Most directly, contract rights can help

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357. *See, e.g.*, Christopher Serkin, *Public Entrenchment Through Private Law: Binding Local Governments*, 78 U. CHI. L. REV. 879, 882 (2011) (showing how private law provides governments with legal tools that constitute effectively unrepealable legislation).

358. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1003 (1984).

359. Amy Kapczynski, *The Public History of Trade Secrets*, 55 U.C. DAVIS L. REV. 1367, 1420, 1427 (2022).

360. *See* Section I.A.

361. *See, e.g.*, Levinson & Sachs, *supra* note 295, at 408, 479 (2015) (discussing how functional, as opposed to formal, policies can enable political entrenchment); Julian N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 12 AM. BAR FOUND. RES. J. 381 (1987) (exploring temporal limits on political entrenchment); Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665 (2001) (arguing that legislatures ought to be allowed to bind their successors, and that indeed, such entrenchment is just another policy instrument); William W. Buzbee, *Federalism Hedging, Entrenchment, and the Climate Challenge*, WIS. L. REV. 1037 (2017) (elucidating the phenomena of "federalism hedging," or retaining concurrent federal and state authority); Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153 (2008) (advocating for some amount of entrenchment to protect against climate-related short-termism).

362. *See* Jeff Gordon, *Can Subsidies Discipline Capital*, LPE PROJECT (May 13, 2024), https://lpeproject.org/blog/subsidies-discipline-derisking-capital [https://perma.cc/JRP3-MHWZ]

convince potential counterparties to participate in the government's non-mandatory public-private initiatives, secure in the understanding that they could seek damages if they make investments in reliance and the government changes course.

The likely practical upshot of recognizing the contractual force of these spending statutes would be for Congress to issue statutory contract offers more sparingly, but elicit greater private uptake on the offers it does make. Congress might understandably choose to avoid contractual liability in circumstances where the spending aim is not an urgent priority. It could do this by including statutory terms that disclaim a contractual interpretation, or by avoiding money-mandating language. But for the spending initiatives where Congress is most concerned with spurring private action—especially those that will take many years to complete and that raise the highest risks of political retrenchment—there is a plausible case for trading contractual liability for higher uptake. The energy infrastructure projects incentivized by the Inflation Reduction Act would be a natural example of when Congress might make this choice, given the projects' long-duration construction needs, their high priority to the 117th Congress, and the significant possibility that a subsequent Congress might seek to reverse them.[363] Even if a future Congress does not repeal those politically fraught inducements, the possibility that one *might* do so has likely throttled investment, just as uncertainty about tax credit expiration has stifled investment time and again.[364] There is room in public law to borrow modestly from private law's toolkit of commitment devices.

Conclusion

This Article has argued that a solution to the problem of long-term fiscal commitment cannot be found within appropriations law itself, but can be achieved by entering contracts directly with private parties who are tasked with carrying out Congress's spending priorities. This approach to economic planning raises striking legal and political implications. In interpreting statutory contracts, courts should supplement the ordinary rules of statutory interpretation with contract law principles. This would mean holding the government liable for breach when it repeals statutes that have induced counterparties into substantial performance, assessing reliance damages, and granting enforcement rights to certain third-party beneficiaries. This interpretive approach raises hard questions about the

(articulating the reasons a government might pursue economic policy through voluntary inducements).

363. *See* Madeleine Ngo, *Republican Attacks on Biden's Climate Law Raise Concerns Ahead of Election*, N.Y. TIMES (Feb. 19, 2024), https://www.nytimes.com/2024/02/19/us/politics/inflation-reduction-act-republican-attacks.html [https://perma.cc/TKD9-5FEA] (describing Republican ambitions to repeal all or part of the Inflation Reduction Act).

364. *See supra* note 55.

appropriateness of finding private law rights in public spending. Critics might object that statutory contracts constrain the government's freedom of action and unnecessarily enrich private beneficiaries. But this Article advances the perspective that the private law virtue of predictability can help the government achieve its spending goals rather than hamstring them. If the government is to rely on private firms to carry out critical policy priorities, it may need to offer them a form of commitment in return that generous subsidies alone cannot provide.