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PUBLIC-PRIVATE PARTNERSHIPS AND TERMINATION FOR CONVENIENCE CLAUSES: TIME FOR A MANDATE

*Julie A. Roin**

For better or worse, and for richer or poorer, the line between government and private provision of goods and services is disappearing. It was never a bright line; governments have always turned to private purveyors of goods and services to acquire many of the tools required for the provision of public services.¹ The sanitation workers picking up garbage may have been employed directly by a city, but they picked up the trash in trucks built by private companies. Beneath those trucks are public roads, which have almost always been built entirely by private construction companies, not government employees.² Increasingly, however, governments at all levels are contracting out responsibility for the services themselves.³ Private enterprises now build and staff the garbage trucks.⁴ They build and operate roadways; they staff manual and electronic toll collection systems;⁵ and they plow and maintain road surfaces. Private enterprises also own and run “public” schools⁶ and

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¹ JOHN D. DONAHUE, *THE PRIVATIZATION DECISION: PUBLIC ENDS, PRIVATE MEANS* 4 (1989) (“Large fractions of federal, state, and local budgets have always gone to purchase goods and services from suppliers outside government.”).

² U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-44, *HIGHWAY PUBLIC-PRIVATE PARTNERSHIPS: MORE RIGOROUS UP-FRONT ANALYSIS COULD BETTER SECURE POTENTIAL BENEFITS AND PROTECT THE PUBLIC INTEREST* 3 (2008) [hereinafter GAO REPORT], available at <http://www.gao.gov/new.items/d0844.pdf> (“The private sector has traditionally been involved as contractors in the design and construction of highways.”).

³ These contractual arrangements are often denominated “public-private partnerships” (PPPs). It is unclear why they are so denominated, as most of these contractual arrangements do not form “partnerships” in which the participants share losses and gains but instead are elaborate contractual relationships “in which the private partner provides a public benefit, such as building transportation infrastructure improvements, in return for receiving a business opportunity or other benefit from the public agency.” DANIELLE M. CONWAY, *STATE AND LOCAL GOVERNMENT PROCUREMENT* 122 n.66 (2012). They thus entail delegations of authority from public authorities to private ones, rather than a joint enterprise between public and private entities.

⁴ See Robert S. Freedman, Comment, *The Future of Privatization in Florida*, 19 STETSON L. REV. 899, 900–01 (1990) (mentioning that governments have transferred the “responsibility of control and ownership to the private sector . . . in providing sanitation services”).

⁵ Donald G. Featherstun et al., *State and Local Privatization: An Evolving Process*, 30 PUB. CONT. L.J. 643, 645 (2001).

⁶ See Vaughan Brynes, *Getting a Feel for the Market: The Use of Privatized School Management in Philadelphia*, 115 AM. J. EDUC. 437, 439 (2009) (describing the decision to hire Edison Schools to run some of Philadelphia's public schools).

prisons.⁷ On occasion, the government retains its role as financier, collecting taxes or fees with which to defray the costs of hiring the private purveyors of goods or services.⁸ Often, however, the government's role is limited to picking the private enterprise which will provide a good or service and negotiating the fees that the enterprise can charge for its services; the enterprise then collects the appropriate fee directly from residents and other users.⁹ In theory, the incentive provided by the profit motive and the absence of legal restrictions, such as civil service protections, allow private entrepreneurs to provide better quality services at lower cost than their public counterparts.¹⁰

But what if things go wrong? At times, the public authorities or their constituents are dissatisfied with the performance of the private enterprise and wish to switch to another private purveyor, to return to public provision, or to eliminate the service entirely. Unless the private enterprise's lack of performance rises to the level of a breach of its contractual obligations, a government must buy its way out of the contract. And under standard contract law, such buyouts do not come cheaply. Private parties insist on receiving payments comparable to the compensation due following the government's breach of its obligation to continue the contract. Expectation damages are the norm; this measure of damages requires that the nonbreaching party be placed in the position that it would have been in had the contract been completed in accordance with its terms.¹¹ In the normal course of events, the nonbreaching party is entitled to the discounted present value of its projected future profits. The extensive term of many of these privatization arrangements not only causes the amount of damages to balloon but also ensures that the calculation of the amount owed will be contentious and expensive to calculate.¹²

⁷ See E. ANN CARSON & WILLIAM J. SABOL, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, BULL. No. NCJ 239808, PRISONERS IN 2011, at 13 (2012), available at <http://www.bjs.gov/content/pub/pdf/p11.pdf> ("The percentage of all prisoners housed in private prison facilities increased slightly in 2011 from 7.9% to 8.2%.")

⁸ Featherstun et al., *supra* note 5, at 646 n.17.

⁹ See *id.* at 647.

¹⁰ See, e.g., DONAHUE, *supra* note 1, at 217 ("When it works well, privatization can boost efficiency through accelerated innovation, more appropriate technologies or management styles, or a more sensible scale of operation."); Ellen Dannin, *Red Tape or Accountability: Privatization, Public-ization, and Public Values*, 15 CORNELL J.L. & PUB. POL'Y 111, 113 (2005) ("[T]hose who advocated privatization argued that markets and competition could always be relied upon to provide the highest quality services at the lowest cost.')

¹¹ Daniel R. Fischel & Alan O. Sykes, *Governmental Liability for Breach of Contract*, 1 AM. L. & ECON. REV. 313, 324–25 (1999).

¹² See *id.* at 314 n.2.

There is an alternative. It is to follow the pattern set by federal procurement law and mandate the inclusion of termination for convenience clauses in all privatization contracts. Including such clauses would diminish a government's damage obligation in the event it desires to cancel a contract. Instead of paying expectation damages, the government would pay something closer to out-of-pocket reliance damages.¹³ Specifically, under a termination for convenience clause, the government need only pay "the price on work completed, actual costs incurred plus a reasonable allowance for profit on partially completed work, and nothing whatsoever on work not yet begun (thus, no lost profits on such work)."¹⁴

As other commentators have noted, one-sided termination privileges are not an unalloyed blessing.¹⁵ This Article, however, argues that in the context of privatization agreements, the costs of including a termination for convenience clause are far outweighed by the benefits. Indeed, in this Article I urge that such clauses be both mandatory and nonwaivable.

Part I describes the history and current use of termination for convenience clauses. Part II argues for the use of these clauses in the privatization of (previously) government services. Part III concludes.

I. TERMINATION FOR CONVENIENCE CLAUSES

Contractual parties have always had the right to terminate their contracts without cause. Ordinarily, such terminations are labeled as "breaches" and require the terminating party to pay expectation damages. Termination for convenience clauses, by contrast, give the holder of the right the ability to terminate the contract without cause while limiting the other party's recovery to "costs incurred, profit on work done, and costs of preparing the termination settlement proposal. Recovery of anticipated profit is precluded."¹⁶ They confer a "major contract right" on the holder "with no commensurate advantage" to the other side—though we should expect prices to reflect the agreement and the legal rule.¹⁷

¹³ *Id.* at 356.

¹⁴ *Id.* at 354.

¹⁵ *See, e.g., id.* at 357 ("Thus, in our view, it seems a difficult empirical question whether the benefits of the termination for convenience option exceed the costs.").

¹⁶ JOHN CIBINIC, JR. & RALPH C. NASH, JR., *ADMINISTRATION OF GOVERNMENT CONTRACTS* 1073 (3d ed. 1995).

¹⁷ *Id.*; *see also* Fischel & Sykes, *supra* note 11, at 357 (predicting price increases in the presence of termination for convenience clauses).

These clauses were initially developed “as a means to end the massive procurement efforts that accompanied major wars”¹⁸ in the face of “objections to paying a contractor profits on unperformed work”¹⁹ following the cessation of hostilities. Such clauses first appeared at the time of the Civil War, when army regulations required that “contracts for subsistence stores ‘shall expressly provide for their termination at such time as the Commissary-General may direct.’”²⁰ The concept reappeared during World War I when Congress passed statutes granting the government authority to settle claims for damages from the termination of defense contracts at the end of that war.²¹ These statutes were interpreted as disallowing settlements containing awards of “prospective or possible profits.”²² A combination of statutory law²³ and regulatory provisions²⁴ prevented the award of prospective profits on contracts entered into in connection with the World War II war effort.

Termination for convenience clauses spread to a wider variety of federal government contracts after World War II. By 1950, the Armed Services Procurement Regulations required all Department of Defense contracts in excess of \$1,000 to include such clauses.²⁵ The first edition of the Federal Procurement Regulations, published in 1964, contained an “optional” termination for convenience clause to be used “‘whenever an agency considered it necessary or desirable . . .’”²⁶ In June 1967, those regulations were amended to make the use of such clauses mandatory in most federal

¹⁸ CIBINIC & NASH, *supra* note 16, at 1073.

¹⁹ *Id.* at 1074.

²⁰ *Id.* (quoting Rule 1179 of the Army Regulations of 1863).

²¹ These laws included the Dent Act, Pub. L. No. 65-322, 40 Stat. 1272 (1919), *see* CIBINIC & NASH, *supra* note 16, at 1074, and the Emergency Shipping Fund Act, Pub. L. No. 65-23, 40 Stat. 182 (1917), *see* W. NOEL KEYES, GOVERNMENT CONTRACTS UNDER THE FEDERAL ACQUISITION REGULATION 1087 n.6 (3d ed. 2003).

²² *G.L. Christian & Assocs. v. United States*, 312 F.2d 418, 426 (Ct. Cl. 1963) (citing *Russell Motor Car Co. v. United States*, 261 U.S. 514, 523–24 (1923)); KEYES, *supra* note 21, at 1087.

²³ *See* Act of Aug. 7, 1946, Pub. L. No. 79-657, 60 Stat. 902; Contract Settlement Act of 1944, Pub. L. No. 78-395, 58 Stat. 649, 653, § 6(d)(5); *G.L. Christian & Assocs.*, 312 F.2d at 426.

²⁴ *See G.L. Christian & Assocs.*, 312 F.2d at 426; 32 C.F.R. § 8006.3(c) (Supp. 1944); CIBINIC & NASH, *supra* note 16, at 1074.

²⁵ *See* CIBINIC & NASH, *supra* note 16, at 1074. Indeed, in federal contracts entered into after the date on which these regulations were promulgated, termination for convenience clauses were inferred as a matter of law when express clauses were lacking. *See G.L. Christian & Assocs.*, 312 F.2d at 424 (“As the Armed Services Procurement Regulations were issued under statutory authority, those regulations . . . had the force and effect of law. . . . [T]here was a legal requirement that the plaintiff’s contract contain the standard termination clause and the contract must be read as if it did.” (footnote omitted) (citations omitted)).

²⁶ *See* CIBINIC & NASH, *supra* note 16, at 1074 (quoting 41 C.F.R. § 1-8.700-2(a) (1964)).

(including non-defense) procurement and construction contracts.²⁷ Current procurement regulations continue to require the use of a termination for convenience clause in virtually all federal procurement contracts.²⁸

The federal government does not have an unfettered right to terminate a contract under a termination for convenience clause. If a termination is made in “bad faith” or the contracting agency “abuses its discretion in its decision to terminate the contract,”²⁹ the termination is treated as a breach entitling the nonbreaching party to a recovery of expectation damages.³⁰ Contractors must present clear and convincing evidence of bad faith to prevail,³¹ however, and few plaintiffs have succeeded.³²

Although a finding of bad faith may be predicated on the existence of animus, or an “‘intent to injure’ the contractor,”³³ animus is not required. Bad faith encompasses situations in which the government enters into a contract without intending to honor it, regardless of motive.³⁴ In *Torncello v. United States*, for example, the government entered into a requirements contract with the plaintiff while “knowing that it [could] obtain an item the contract cover[ed] for less than the contract price and intend[ed] to do so.”³⁵ Essentially, the court found that the government never intended to purchase any items under the contract. The Court of Claims held that the government could not use the contract’s termination for convenience clause to reduce the

²⁷ See *id.*

²⁸ See FAR 49.502(b)(1)(i) (2012) (requiring contracting officers to include termination for convenience clauses in most federal procurement contracts); *id.* 52.249-1 to -5 (requiring text of termination for convenience clauses to be incorporated into federal procurement contracts).

²⁹ See *TigerSwan, Inc. v. United States*, 110 Fed. Cl. 336, 345 (2013).

³⁰ See, e.g., *Krygoski Constr. Co. v. United States*, 94 F.3d 1537, 1545 (Fed. Cir. 1996) (refusing to award anticipatory profits because there was no indication that the agency abused its discretion or acted in bad faith); *TigerSwan, Inc.*, 110 Fed. Cl. at 345 (explaining that common law damages for breach of contract would be available to contractor-plaintiffs); *Torncello v. United States*, 681 F.2d 756, 772 (Ct. Cl. 1982).

³¹ See *T & M Distribs., Inc. v. United States*, 185 F.3d 1279, 1285 (Fed. Cir. 1999).

³² See *Krygoski Constr. Co.*, 94 F.3d at 1541 (stating that “contractors have rarely succeeded in demonstrating the Government’s bad faith”); *Rice Sys., Inc. v. United States*, 62 Fed. Cl. 608, 620–21 (2004) (“The court proceeds from a ‘strong presumption that government officials exercise their duties in good faith.’” (quoting *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1239 (Fed. Cir. 2002)) (citing numerous supporting cases)); *CIBINIC & NASH*, *supra* note 16, at 1078–79 (stating that “[i]t has been virtually impossible for terminated contractors to demonstrate Government bad faith” and listing cases).

³³ See *TigerSwan, Inc.*, 110 Fed. Cl. at 345 (quoting *Am-Pro Protective Agency, Inc.*, 281 F.3d at 1239–40).

³⁴ See *Krygoski Constr. Co.*, 94 F.3d at 1545; *TigerSwan, Inc.*, 110 Fed. Cl. at 346 (“The court disagrees, however, with the government’s contention that allegations of intent to harm or animus toward the plaintiff are always required to establish a breach of contract claim based on an improper termination for convenience.”).

³⁵ 681 F.2d at 773 (Friedman, C.J., concurring).

damages owed to the plaintiff in that case.³⁶ More recently, the Court of Federal Claims refused to grant the government's motion for judgment on the pleadings in *TigerSwan, Inc. v. United States*³⁷ when the plaintiff alleged that contracts terminated by the Department of Defense had been awarded after the Department had awarded sole-source contracts for the same work to a competitor.³⁸ Again, the basis of the claim was that the government never intended to live up to its obligations under the contracts.³⁹

A plurality of the *Torncello* court⁴⁰ wanted to go further, mandating that “the termination for convenience clause . . . [be read] to require some kind of change from the circumstances of the bargain or in the expectations of the parties,”⁴¹ so that terminations could not be “based on knowledge of a lower cost when that knowledge preceded award of the contract.”⁴² The plurality also intimated that post-contract changes in the price situation might not be enough to trigger the termination for convenience clause.⁴³ However, the remaining three judges wrote opinions that were considerably narrower in scope, and therefore of precedential value.⁴⁴ Chief Judge Friedman's brief concurrence did not mention the “change in circumstances” test.⁴⁵ Judge Davis's concurrence criticized the plurality's opinion as “unnecessarily broad . . . and, on some points, incorrect,”⁴⁶ noting in particular that it was “wrong and a mistake to intimate, even provisionally or gratuitously, that the convenience termination clause cannot be utilized when a better price appears *after* the contract is made.”⁴⁷

³⁶ *Id.* at 772 (plurality opinion).

³⁷ *See* 110 Fed. Cl. at 346 (“[T]he Circuit has also recognized a potential breach claim where the government abused its discretion or never intended for the contract to go forward.”).

³⁸ *See id.* at 347 (“[T]he facts, as alleged in the complaint, demonstrate that the DOD engaged in a pattern of conduct to ensure that Aegis completed the contract notwithstanding the awards to TigerSwan. The complaint alleges that prior to TigerSwan's award of contract 6005, the DOD already had a sole-source contract to Aegis in the works.”).

³⁹ *See id.* at 343.

⁴⁰ *Torncello* was decided by six judges sitting en banc. *See* 681 F.2d at 756, 757.

⁴¹ *Id.* at 772.

⁴² *Id.*

⁴³ *See id.* at 767.

⁴⁴ *See id.* at 773–74.

⁴⁵ *See id.* at 773 (Friedman, C.J., concurring).

⁴⁶ *Id.* (Davis, J., concurring in the result).

⁴⁷ *Id.* at 774.

Subsequent cases seem to have rejected the broader implications of the *Torncello* plurality opinion.⁴⁸ In *Krygoski Construction Company, Inc. v. United States*, for example, the Federal Circuit allowed the government to terminate (and rebid) a contract to demolish some buildings prior to performance when a post-contract, but predemolition, survey revealed considerably more asbestos contamination than first estimated.⁴⁹ The plaintiff contended that the variation in the amount of asbestos was within the scope of the original contract, so that there had been no change in circumstances justifying a termination for convenience,⁵⁰ and the trial court agreed.⁵¹ The Federal Circuit reversed, holding that “*Torncello* applies only when the Government enters a contract with no intention of fulfilling its promises,”⁵² and finding “no evidence that the Corps intended from the outset to void its promises.”⁵³

But decisions remain mixed as to whether termination for convenience treatment is appropriate in situations caused by “a serious lack of planning, and a haphazard process” on the part of the government.⁵⁴ In *Krygoski*, where termination for convenience was allowed,⁵⁵ the government could and likely should have done a much better job of determining the amount of asbestos that needed to be removed prior to bidding out the contract. The same could be said of the situation in *Special Waste*, where the government bid out the removal of pounds of waste rather than the twenty-five-times-heavier drums of waste in one line item of a much larger bid, and again the error was held to justify terminating the contract for convenience.⁵⁶ In *T & M Distributors v. United States*,⁵⁷ the Federal Circuit specifically ruled out a requirement that “a

⁴⁸ See Fischel & Sykes, *supra* note 11, at 356 (“More recent cases have backed away from *Torncello*, however, suggesting that termination for convenience is permissible in the absence of bad faith (such as an intention to injure the contractor in question), as long as the government intended to honor its promises at the time they were made.”).

⁴⁹ See 94 F.3d 1537, 1544–45 (Fed. Cir. 1996).

⁵⁰ *Id.* at 1539–40.

⁵¹ See *id.* at 1545.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ LeRoy J. Haugh, *Chapter 18 Terminations*, in ACCOUNTING FOR GOVERNMENT CONTRACTS: FEDERAL ACQUISITION REGULATIONS § 18.01A(1) (Darrell J. Oyer ed., 2013).

⁵⁵ *Krygoski Constr. Co.*, 94 F.3d at 1545.

⁵⁶ *Special Waste, Inc.*, ASBCA No. 36775, 90-2 BCA ¶ 22,935, at 115,129 (“All that is necessary is a good faith determination by the contracting officer that its estimate for one of the contract line items was so unrealistic that it affected whether the contract had been awarded to the offeror with the lowest overall price.”).

⁵⁷ *T & M Distribs., Inc. v. United States*, 185 F.3d 1279 (Fed. Cir. 1999).

cardinal change was a prerequisite for a valid termination for convenience,⁵⁸ approvingly citing an earlier opinion allowing a contracting officer to terminate upon his discovery that “a critical contract provision had been poorly drafted.”⁵⁹ Courts have allowed both rebidding of contracts and terminations for convenience to remedy bidding defects to further “full and open competition,”⁶⁰ but only if the defects are meaningful.⁶¹ The facts of the more recently decided *Sigal Construction Corp. v. General Services Administration*,⁶² though, were quite similar to those in *Krygoski* and *Special Waste*. In *Sigal Construction*, the government entered into contracts containing unit prices for certain types of work and estimates—which turned out to be gross underestimates—of the amount of such work involved in the project.⁶³ When the true scope of the work became known, the government terminated the contracts and sought to rebid the items.⁶⁴ Yet in that case, the Board of Contract Appeals held that termination for convenience treatment was inappropriate and that the contracting party could recover anticipated profits.⁶⁵

It is also unclear whether contracts can be terminated solely due to post-contract price changes. Several opinions state that such terminations are unacceptable.⁶⁶ However, contracts can be terminated because of post-contract

⁵⁸ *Id.* at 1284.

⁵⁹ *Id.*; see also *Custom Printing Co. v. United States*, 51 Fed. Cl. 729, 734 (2002) (upholding termination for convenience when “Determination of Awards significantly underestimated the actual requirements of the Contract . . . and that the integrity of the competitive bidding was adversely affected” when the “figure for strip-ins . . . was incorrectly figured at 108, when actually the figure should have been figured at 65,000” (quoting Defendant’s Motion for Summary Judgment at 56, *Custom Printing*, 51 Fed. Cl. 729 (No. 99-265C)).

⁶⁰ See *T & M Distribs., Inc.*, 185 F.3d at 1284 (quoting *Krygoski Constr. Co.*, 94 F.3d at 1544) (internal quotation mark omitted).

⁶¹ See *Diversified Sys. Res., Ltd.*, GSBGA No. 8493-P, 88-3 BCA ¶ 21,017, at 106,173.

⁶² CBCA No. 508, 10-1 BCA ¶ 34,442.

⁶³ *Id.* at 169,968–69.

⁶⁴ *Id.* at 169,969.

⁶⁵ *Id.* at 169,971.

⁶⁶ See *Krygoski Constr. Co. Inc. v. United States*, 94 F.3d 1537, 1541 (Fed. Cir. 1996) (“A contracting officer may not terminate for convenience in bad faith, for example, simply to acquire a better bargain from another source.”); *NCLN20, Inc. v. United States*, 99 Fed. Cl. 734, 759 (2011) (“The United States Court of Appeals for the Federal Circuit and its predecessor also have held that entering a contract with no intention of honoring it, or terminating a contract to find a better bargain, are grounds for invalidating a termination for convenience.”). Both of these cases, however, cite the plurality opinion in *Torncello* for this proposition, and as discussed, it is unclear that a majority would hold that terminations for convenience would not be allowed for post-contract price changes. *Torncello v. United States*, 681 F.2d 756, 767 (1982). *But see Sigal Constr. Corp.*, CBCA No. 508, 10-1 BCA at 169,971 (holding termination for convenience not available because “the Government may not terminate simply to get a better price for performing needed work”—“[t]hat is what GSA did here . . . [i]t was a breach of the contract”). It is hard to square the outcome in *Sigal Construction* with that in *Special Waste*, in which the Armed Services Board of Contract Appeals allowed the government to terminate a contract for convenience “before performance had begun, because the agency had underestimated

changes in policy, including changed conceptions of efficiency. In *Northrop Grumman Corp. v. United States*,⁶⁷ for example, the Court of Federal Claims held that the plaintiff's contract for work on the Space Station was properly terminated "for convenience" when the project was restructured in order to save the project by reducing its costs.⁶⁸ In addition, courts can transform improper terminations by default into terminations for convenience.⁶⁹

Although damages representing anticipated profits are unavailable following a termination for convenience, the government has to recompense its contractual partners for completed work as well as the out-of-pocket costs of submitting a settlement proposal⁷⁰ and the costs of entering into the contract.⁷¹ The contracting party is also entitled to compensation for preparations made for the terminated parts of the contract, including a reasonable amount for profit on those expenditures.⁷² Damage awards are, however, capped by the contract price;⁷³ termination for convenience cannot be used to turn a losing contract into a profitable one. Consequential damages are also foreclosed.⁷⁴

its requirements and the C[ontracting] O[fficer] expected to award at a lower price after recompeting for a larger quantity." Haugh, *supra* note 54, § 18.01A(1).

⁶⁷ 46 Fed. Cl. 622 (2000).

⁶⁸ *See id.* at 627 ("The Government did not terminate this contract for convenience 'simply' to acquire a better bargain from another source, even if that may have been the result. . . . NASA wanted to save the Space Station. It was in serious jeopardy politically."). The original configuration involved four prime contractors; under the new, more efficient configuration, one of the four, Boeing, became the sole prime contractor. *See id.* at 623; *see also* CIBINIC & NASH, *supra* note 16, at 1081 (citing C.F.S. Air Cargo, Inc., ASBCA No. 36113, 91-3 BCA ¶ 23,583 as holding that termination for convenience was allowed "where the Government learned of better prices 1/2 year after the award").

⁶⁹ *See, e.g.*, Best Foam Fabricators, Inc. v. United States, 38 Fed. Cl. 627, 637-38 (1997) (explaining that when the government lost its claim that no contract existed and that, alternatively, plaintiff's performance under the contract was substandard, the court held that the government's conduct constituted a constructive termination for convenience); John Reiner & Co. v. United States, 325 F.2d 438, 443 (Ct. Cl. 1963) (citing Coll. Point Boat Corp. v. United States, 267 U.S. 12, 15-16 (1925)). *See generally* CIBINIC & NASH, *supra* note 16, at 1089 ("The convenience termination clause has been consistently applied to limit the contractor's recovery when the Government wrongfully cancels as a result of an award controversy.").

⁷⁰ The vehicle for requesting compensation following a termination for convenience is called the "termination settlement proposal." The document is supposed to contain written evidence of the amount of money claimed to be due and must be submitted to the appropriate termination contracting officer within one year from the effective date of the termination. *See* Robert D. Witte et al., *Termination Settlement Proposals*, in 2 FEDERAL CONTRACT MANAGEMENT ¶ 12.04 (Henry Goldberg ed., 2013).

⁷¹ *See* CIBINIC & NASH, *supra* note 16, at 1098 ("In fact, it has been stated that the effect of a termination for convenience is to convert a fixed-price contract into a cost-reimbursement contract as to the work performed up to the effective date of the termination The contractor's recovery is thus measured by the costs recovered rather than the value of the performance to the Government.").

⁷² 48 C.F.R. § 49.201(a) (2012).

⁷³ *See* CIBINIC & NASH, *supra* note 16, at 1098 (explaining that there is "overall limitation of the contract price"). *But see* KEYES, *supra* note 21, at 1090 ("[S]ome courts have been more generous to the contractor and

Although termination for convenience clauses are mandatory in most federal procurement contracts, few states impose similar requirements for their (and their subordinate governments') procurement contracts. Instead, their codes tend to allow, rather than require, the promulgation of regulations authorizing the inclusion of termination of contracts for convenience of the state or local government. The statutory language, where it exists at all, follows the language contained in the American Bar Association's Model Procurement Code.⁷⁵ The Model Code's article 6, Modification and Termination of Contracts for Supplies and Services, provides the following:

(3) *Additional Contract Clauses.* The [Policy Office] [Chief Procurement Officer] may promulgate regulations including, but not limited to, regulations permitting or requiring the inclusion in [State] contracts of clauses providing for appropriate remedies and covering the following subjects:

...

(d) termination of the contract in whole or in part for the convenience of the (State).⁷⁶

Interestingly, the ABA's more recent Model Code for Public Infrastructure Procurement⁷⁷ "[r]eserved", or failed to propose any language for, the entirety of article 6, which, had it been written, would have covered "Modifications and Termination of Contracts for Supplies."⁷⁸ The difference between a permissive and a mandatory approach to inclusion of termination for convenience contract clauses is significant. For example, in the infamous Chicago parking meter lease agreement, the contract specifically disavowed the city's right to terminate the contract for convenience.⁷⁹ Given the immense profitability

have measured the benefit conferred on the party in breach by the injured party's part performance under a losing contract and then allowed the injured party restitution of that sum.").

⁷⁴ See CIBINIC & NASH, *supra* note 16, at 1099.

⁷⁵ MODEL PROCUREMENT CODE FOR STATE AND LOCAL GOVERNMENTS (2000). According to the ABA's website, "17 states and many hundreds of local jurisdictions" have adopted the "principles" of this Code. *State and Local Model Procurement Code*, A.B.A., <http://apps.americanbar.org/dch/committee.cfm?com=PC500500> (last modified Nov. 11, 2013).

⁷⁶ MODEL PROCUREMENT CODE FOR STATE AND LOCAL GOVERNMENTS § 6-101(3) (bracketed words in original).

⁷⁷ MODEL CODE FOR PUBLIC INFRASTRUCTURE PROCUREMENT (2007).

⁷⁸ See *id.* at 47.

⁷⁹ See JOURNAL OF THE PROCEEDINGS OF THE CITY COUNCIL OF THE CITY OF CHICAGO, ILLINOIS 50,637 (Dec. 4, 2008), available at http://docs.chicityclerk.com/journal/2008/dec4_2008/120408_SP.pdf (providing that the city may not terminate "this Agreement for convenience").

projected for the private investors in this transaction, the contractual provision all but guarantees that the agreement will run its full seventy-five year term.⁸⁰

II. THE NEED TO PRESERVE GOVERNMENTAL FLEXIBILITY

There are many different types of public-private partnerships. This Article focuses on those in which a private entity creates an income-generating public asset—usually some item of public infrastructure—and is paid out of the income generated by that asset. For example, an investor group may finance the rebuilding (or building) of a tollway in return for some number of years' worth of toll revenues. It may build a water or sewer system in return for the taxes or fees generated by the system. There are two reasons for special concern about these arrangements. First, they have long lives. Second, they typically grant the private investors “mini-monopolies,” proscribing the development of competing or alternative public (and sometimes private) projects in order to protect the investors' returns. This combination of long-lived restrictions on public policy gives rise to special concerns. These agreements entrench policy choices and thus constrain future governments to the point where they are unable to be “democratically responsive to [their] own electorate.”⁸¹ Mandating the inclusion of termination for convenience clauses would offset at least some of that entrenchment.

A. *The Problematic Length of Public-Private Infrastructure Contracts*

Many, if not most, government actions have long-lasting effects, so a long time horizon is not necessarily cause for alarm. Thus, for example, the decision to adequately fund (or not) public education can have profound, life-long effects on the affected schoolchildren. Most publicly constructed infrastructure is expected to last for a long time. However, many recent public-private infrastructure deals run for terms that are long even by the standards of government projects. Many have terms exceeding thirty years, and terms more than seventy years are not unknown. The terms of these infrastructure deals now found in the United States are often double those found in comparable European infrastructure agreements.⁸²

⁸⁰ *Id.* at 50,555.

⁸¹ See Christopher Serkin, *Public Entrenchment Through Private Law: Binding Local Governments*, 78 U. CHI. L. REV. 879, 881 (2011).

⁸² See ALLEN & OVERY, *TERMINATION AND FORCE MAJEURE PROVISIONS IN PPP CONTRACTS: REVIEW OF CURRENT EUROPEAN PRACTICE AND GUIDANCE* 9 (March 2012) (describing typical European PPP terms as “between 15 and 30 years”); Jeffrey N. Buxbaum & Iris N. Ortiz, *Protecting the Public Interest: The Role of*

Initially, the longer terms reflected tax considerations.⁸³ Under U.S. income tax law, only the “owners” of depreciable property are entitled to claim depreciation deductions with respect to such property. As these depreciation deductions are accelerated,⁸⁴ generating time value of money gains, obtaining the right to claim these deductions often constitutes an important economic element in the overall deal.⁸⁵ In the absence of fee simple ownership,⁸⁶ tax law requires an “owner” to have an investment interest in property that extends beyond the design life of the asset at the time of the transaction.⁸⁷ The terms of many public-private infrastructure deals have been set with those rules in mind.⁸⁸ In some cases, however, the only explanation for an expansive lease term seems to lie in the government’s desire for a larger up-front payment.⁸⁹

The justification for lengthy contractual terms is immaterial to the problem they create. That problem is that as long as the contract remains in force, the public infrastructure asset has to be operated in accordance with whatever operational standards were set forth in the initial contract. Even if—and it is a big if—the standards set in these contracts were perfectly appropriate at the

Long-Term Concession Agreements for Providing Transportation Infrastructure 10 (USC Keston Inst. for Pub. Fin. & Infrastructure Policy, Research Paper No. 07-02, 2007) (citing the ninety-nine-year lease for the Chicago Skyway and the seventy-five-year lease for the Indiana Toll Road).

⁸³ See GAO REPORT, *supra* note 2, at 26–27 (describing how ninety-nine- and seventy-five-year lease terms of tollway agreements enable investors to claim accelerated depreciation deductions for tax purposes).

⁸⁴ That is, these deductions may be claimed on a schedule faster than economic depreciation, resulting in the understatement of investors’ taxable income relative to their economic income in the early years of the asset’s use. In later years, investors’ depreciation deductions would fall below economic depreciation; as a result in those years taxable income would exceed economic income. However, assuming a positive rate of interest, the tax savings generated by the earlier years’ taxable income understatements would more than make up for the tax detriment of later years’ overstatements. See *id.* at 27 n.19.

⁸⁵ See *id.* at 21–26 (“[T]he availability of these [depreciation] deductions were important incentives to the private sector to enter some of the highway public-private partnerships we reviewed.”).

⁸⁶ Governments often would not or could not (because of “public trust” issues) give up fee simple ownership of the underlying property to private investors, even had the investors wanted such ownership. For example, the City of Chicago would not be willing to permanently alienate the portions of its streets used for on-street parking.

⁸⁷ See Rev. Rul. 55-541, 1955-2 C.B. 19 (holding that a lease transfers “equitable ownership” when a lessee “will enjoy all of the benefits of ownership for substantially the entire useful life of the property”).

⁸⁸ See Celeste Pagano, *Proceed with Caution: Avoiding Hazards in Toll Road Privatizations*, 83 ST. JOHN’S L. REV. 351, 374 (2009) (“The long terms of the agreements arise in part from the economic benefit that the toll road company gets by claiming accelerated depreciation for tax purposes.”).

⁸⁹ See OFFICE OF THE INSPECTOR GEN., CITY OF CHI., REPORT OF INSPECTOR GENERAL’S FINDINGS AND RECOMMENDATIONS: AN ANALYSIS OF THE LEASE OF THE CITY’S PARKING METERS 19 (2009), available at <http://chicagoinspectorgeneral.org/wp-content/uploads/2011/03/Parking-Meter-Report.pdf> [hereinafter INSPECTOR GENERAL’S REPORT] (“[T]he useful life of the parking meters is not likely to exceed 10 years. Thus, extending the length of the lease to 75 years was not necessary to allow the concessionaire to claim accelerated depreciation and thus increase the size of the upfront payment.” (footnotes omitted)).

time they were entered into, they are very unlikely to be appropriate twenty, forty, or sixty years in the future. For example, the types of vehicles that will be on the road thirty years from now may be quite different from those that currently exist, making changes in road design or construction that are at odds with the standards set in a tollway contract highly desirable. Alternatively, climate change or changes in development patterns may suggest changes in road construction or location, which could have the effect of making a particular tollway unexpectedly valuable—or worthless.⁹⁰ Impurities in water once thought to be harmful may be proved the opposite, and those thought safe (or simply unknown at the time a water or wastewater facility was contracted for) may be proven dangerous. Empirical studies may show that certain rehabilitation programs called for in a contract for the operation of a prison are counterproductive, while other types of programs have positive impacts. Similarly, theories of incarceration may change; a jurisdiction may decide that it should substitute house arrest or monitored release for incarceration, but may find itself bound to provide a certain number of prisoners to a private jail facility by contract. Government officials may decide that parking meters should be eliminated in favor of phone- or wireless-based metering, or that parking should be made less accessible to encourage people to use public transportation. Investors (or governments) may learn how to subvert the intent of standards set forth in a contract while formally adhering to them, leading to public policy disasters.

Even in Europe, where terms of public-private infrastructure agreements tend to be about half the length of those entered into in the United States,⁹¹ it is widely acknowledged that such contracts are necessarily “incomplete” because “[t]hey cannot cover the entire range of possible events that might arise during their lifetime.”⁹² Over the term of the contract, then, renegotiation or termination may be likely, desirable, or both. Unfortunately, application of the general rule for calculating contract damages—expectation damages—makes it both extremely difficult and costly to amend or terminate even the most

⁹⁰ See, e.g., Justin Gillis & Felicity Barringer, *As Coasts Rebuild and U.S. Pays, Repeatedly, the Critics Ask Why*, N.Y. TIMES, Nov. 19, 2012, at A1 (questioning whether it “actually makes sense to keep rebuilding in disaster-prone areas”); Mireya Navarro, *New York Is Lagging as Seas and Risks Rise, Critics Warn*, N.Y. TIMES, Sept. 11, 2012, at A1 (describing possible impacts of climate change on “teeming roads and fragile infrastructure”).

⁹¹ See ALLEN & OVERY, *supra* note 82, at 9 (describing the typical European public-private infrastructure deal term as “between 15 and 30 years”); Buxbaum & Ortiz, *supra* note 82, at 10.

⁹² See ALLEN & OVERY, *supra* note 82, at 9.

anachronistic of these “incomplete” agreements. In the absence of a low-cost termination threat, the costs of renegotiation escalate.

B. Expectation Damages Unduly Limit Desirable Contract Terminations

The use of expectation damages is generally defended as necessary to prevent the inefficient termination of contracts.⁹³ However, this argument hinges on two predicates, neither of which is likely true in the context of public-private infrastructure contracts. The first is that expectation damages can be accurately calculated at a reasonable cost. The second is that politicians will accurately weigh the costs and benefits of terminating these contracts.

The term of many public-private infrastructure contracts makes calculating expectation damages both uncertain and expensive. Expectation damages include profits projected to the end of the contractual term—an amount that more or less corresponds to the present value of the stream of revenues the counterparty would have received under the contract had it continued in force less the costs saved by the counterparty through the cessation of performance following its notification of the contract’s termination.⁹⁴ The more long-lived the contractual arrangement, the more difficult and uncertain this calculation becomes.⁹⁵ Parties can argue over the appropriate interest rate to be used when discounting a projected stream of revenue to present value, they can dispute those estimates of future revenue, and they can quarrel over estimates of future costs. The longer the contractual term and the more distant in time the events being predicted, the less reliable the estimates of costs, revenues, and appropriate discount rates become—and the more likely the parties will proffer hugely different estimates of value.⁹⁶ Even if the agreement spells out a

⁹³ See Gillian Hadfield, *Of Sovereignty and Contract: Damages for Breach of Contract by Government*, 8 S. CAL. INTERDISC. L.J. 467, 511 (1999) (“The argument places expectation damages in the role of the invisible hand, guiding private decisions to coincide with socially optimal decisions, namely efficient allocation of resources to their highest valued use.”).

⁹⁴ There are many ways of calculating expectation damages. At a conceptual level, the damages should equal the present value of the stream of revenues the counterparty would have received under the contract less the costs the counterparty avoids by ceasing performance following notification of the contract’s termination. See *supra* notes 11–12 and accompanying text.

⁹⁵ GAO REPORT, *supra* note 2, at 54 (describing difficulties encountered in “modeling long-term events and reliably estimating costs” for purposes of determining life-cycle costs of PPP projects). Indeed, some courts refuse to grant expectation damages for contracts with excessive duration because such damages cannot be determined with sufficient certainty. See E. ALLEN FARNSWORTH, 3 FARNSWORTH ON CONTRACTS 273 (3d ed. 2004) (“[A] significant factor [in disallowing the use of expectancy damages because of uncertainty] . . . is the length of time over which performance is to extend.”).

⁹⁶ If calculating expectation damages is too difficult, of course, even standard contract theory would call for the award of damages calculated under the reliance measure of damages. This measure of damages could

procedure or authority for making these tough decisions, the underlying difficulty—the rather nebulous correspondence between past events and predictions of future revenue and costs—inevitably will leave the process subject to charges of misbehavior. A government operating in good faith may be unwilling to run the political risks of being tarred with such accusations and may, therefore, let an agreement run its course, despite its social costs.

Moreover, even in the absence of a dispute over the amount of damages, the sheer size of an expectation-based award may prevent the government from cancelling an obsolete contract. The temporal split between the year in which these damages would be announced or paid and the years in which the benefits of the cancellation would be reaped could discourage many politicians from cancelling contracts.⁹⁷ This discouragement would exist whether or not the cancellations would be “efficient” from a social welfare perspective. Damages have to be paid—and the budgetary impacts dealt with—during the political lifetime of the politicians voting to terminate the contract, while many benefits of termination would accrue to future voters and politicians. The longer the remaining term of the contract, the less likely it is that those future voters and politicians would be the same individuals as the current voters and politicians, and the less likely it is that those future individuals’ interests will be adequately taken into account by current politicians trying to decide whether to terminate a contract.⁹⁸ From a political standpoint, it may be easier for politicians to blame policy failures on the handcuffs placed by previous administrations than to incur the costs necessary to unlock the restraints.

lead to an award that is even lower than that provided for under a termination for convenience clause. However, no private investor would willingly accept such a lesser award; the possibility that a court might impose this damage measure as a result of litigation is sufficiently remote that it would be unlikely to have much effect on private investors’ negotiating position in the event of an attempt to terminate or reform these contracts. *See generally* MARVIN A. CHIRELSTEIN, *CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS* 189–216 (6th ed. 2010).

⁹⁷ This is the converse of the problem that may lead to the unwarranted popularity of these deals. *See* Julie A. Roin, *Privatization and the Sale of Tax Revenues*, 95 MINN. L. REV. 1965, 1993 (2011) (noting that “governments’ need for immediate cash” can encourage “unwise privatization[s] . . . which provide little or no efficiency advantages while burdening future generations of taxpayers with higher out-of-pocket costs for the privatized service, or higher government taxes or fees or some combination of the two”); *see also* Fischel & Sykes, *supra* note 11, at 336 (“There is no reason to think that expectation damages against the government will in general promote efficient performance and breach decisions, for example, or that a specific performance remedy will tend to induce efficient renegotiation about performance.”).

⁹⁸ *See* Fischel & Sykes, *supra* note 11, at 333 (“By contrast, there is less reason to suppose that government agents will place proper value on the long-term consequences of their policies. . . . [G]overnment agents have a finite time horizon, and the pursuit of their own utility may not by itself lead them to give much weight to future events after their departure from government.”).

The inclusion of a termination for convenience clause will not eliminate these problems. Difficult questions may arise regarding the amount owed under a termination clause.⁹⁹ Further, the amount of damages due following a termination for convenience may be far from nominal. Particularly where the private investors made significant up-front investments in facilities or large cash payments, the payments called for under a termination for convenience clause could be substantial.¹⁰⁰ They may be substantial enough to prevent politicians from engaging in some socially efficient terminations—even taking into account the chilling effect on future contract negotiations. However, eliminating unearned profits from the damages calculation should reduce the total amount due, thus making it at least somewhat more likely that inefficient or obsolete contracts will be terminated.

Moreover, the inclusion of a termination for convenience clause may cause public infrastructure contracts to be drafted in ways that would make the calculation of damages easier. Depreciation or amortization schedules for private investors' contributions may be spelled out, making it easier (and less controversial) to calculate damages due if a termination for convenience is contemplated.¹⁰¹

Even if the costs of terminating for convenience continue to deter governments from terminating most obsolete public infrastructure contracts, the availability of a termination option may affect the terms on which contracts may be renegotiated to deal with changed circumstances. The threat of termination can counterbalance private investors' incentive to behave opportunistically during a renegotiation.

⁹⁹ See, e.g., CIBINIC & NASH, *supra* note 16, at 1109 (“The consideration of initial and preparatory costs in termination settlements has caused considerable confusion.”).

¹⁰⁰ Those payments also, of course, will make it more likely that private parties would enter into these contracts at all. Without a guarantee that their costs will be covered in the event of a change in government policy, investors would be unwilling participate in contracts that require them to incur large up-front expenses, as called for under many public infrastructure contracts. See Fischel & Sykes, *supra* note 11, at 323 (“[I]n the absence of contract rights and remedies, parties to nonsimultaneous exchange may decline to undertake jointly valuable reliance.”).

¹⁰¹ It is not beyond the realm of possibility that some investors will try to insert “poison pills,” in the form of extremely back-loaded depreciation/amortization schedules for their contributions, in an effort to nullify the termination for convenience option. Presumably, such specifications (if accepted by the government counterparty to begin with) could be treated as a penalty (excessive liquidated damages) by a court. Relying on a court for salvation from a bad deal would, however, be quite messy and uncertain. See *id.* at 354–57 (discussing the termination for convenience option).

C. *The Termination for Convenience Option Provides Needed Leverage in Negotiations*

In 1987, Robert Scott developed a model for analyzing “the decisionmaking strategies of parties to long-term commercial contracts,” and, in particular, for how they decide “whether to adjust cooperatively . . . or to respond to immediate self-interest and evade . . . responsibility.”¹⁰² His aim was to determine the conditions necessary to “promote stable patterns of cooperation” rather than “a counterpattern of exploitation and conflict.”¹⁰³ One key to ensuring a stable cooperative equilibrium, he argued, was the availability of “contractual sanctions.”¹⁰⁴ Essentially, the game is one of “tit for tat” with good behavior by one party rewarded with good behavior by the other, and vice versa. Both sides must have credible threats to use in the event of bad behavior by the other party.

It is hard to identify the government’s threat in many public-private infrastructure contracts that suffer from drastically changed conditions. As a result, a private “partner” may be tempted to try to extract a premium for its cooperation when asked to renegotiate.¹⁰⁵ Nothing would prevent a strategically minded private prison operator, for example, from refusing to substitute classes or activities (now) known to reduce recidivism for those that were specified in the original contract—even if the better classes were of equal cost. In such cases, the inclusion of a termination for convenience clause would provide the government bargaining leverage. A private investor will be more likely to cooperate in the social interest if it knows that its governmental counterpart can terminate the contract and prevent it from earning any further profits.

Strategic behavior by investors is not just a theoretical possibility. When the City of Chicago wanted to provide its citizens with the option of paying parking fees through their cell phones—an option touted as cost reducing¹⁰⁶—the consortium holding the parking meter lease refused to allow this revision to its agreement until the city agreed to allow it to charge users a 35¢-per-transaction convenience fee and maintain a \$20 interest-free, prepayment

¹⁰² See Robert E. Scott, *Conflict and Cooperation in Long-Term Contracts*, 75 CALIF. L. REV. 2005, 2008 (1987).

¹⁰³ *Id.*

¹⁰⁴ See *id.* at 2039.

¹⁰⁵ See *id.* at 2021.

¹⁰⁶ See *Pay-by-Phone Parking*, WIKIPEDIA, http://en.wikipedia.org/wiki/Pay-by-phone_parking (last visited Dec. 11, 2013) (explaining that “pay-by-phone parking offers an opportunity for reduced costs”).

balance with the company,¹⁰⁷ a combination that is at the high end of charges for this service. The parking meter investors seem to have used these renegotiations as an opportunity to increase their profits while likely decreasing their costs of performance. The city might have been able to strike a better balance if the investors' rights to continued profits under the original agreement were at risk in the negotiations. In the absence of a termination for convenience term, however, Chicago had no leverage. If it wanted parkers to enjoy the benefits of pay-by-phone, it had to pay the investors off, even though the option is likely to simultaneously reduce investors' overall costs and increase their revenues.¹⁰⁸

III. THE DOWNSIDE OF TERMINATION FOR CONVENIENCE CLAUSES: A CLOUD WITH A SILVER LINING?

A termination for convenience clause is not something that can be slipped into a contract. Because it confers a substantial benefit on the contracting government, the other contracting party will undoubtedly extract some price for its inclusion. Indeed, at least one pair of academic commentators has concluded that "it seems a difficult empirical question whether the benefits of the termination for convenience option exceed the costs."¹⁰⁹ There is, after all,

¹⁰⁷ See Bill Ruthhart & Hal Dardick, *Private Parking Firm Would Make More Money on Pay-by-Cell Plan*, CHI. TRIB. NEWS (May 9, 2013), http://articles.chicagotribune.com/2013-05-09/news/ct-met-city-council-parking-meters-20130509_1_parking-firm-meter-hours-chicago-parking-meters-llc (discussing how the company expected to make \$2 million per year from convenience fees, making no estimate of profit derived from investing money placed by drivers into prepaid accounts). The charges are relatively high. The contractual modification involved much more than the addition of the cell-phone payment option, however. The agreement includes alterations in parking meter hours and rates and a settlement of disputed charges for out-of-service meters and the overuse of handicapped parking permits. See Hal Dardick, *Revised Deal Still a Gain for Parking Meter Vendor, Analysis Finds*, CHI. TRIB. NEWS (May 24, 2013), http://articles.chicagotribune.com/2013-05-24/news/ct-met-emanuel-parking-meters-deal-0524-20130524_1_remaining-71-years-chicago-parking-meters-llc-metered-spaces/2. Absent a detailed accounting of the projected costs and savings from each part of the contract, which both parties refused to provide, it is impossible to know whether the arrangement concerning cell-phone charges stood on its own or was intended to subsidize some other part of the agreement. Thus, it may be unfair to cast aspersions on the investors. Or it may be totally accurate.

¹⁰⁸ As more parkers opt to use cell phones rather than physical meters, it would not be surprising to see some reduction in the number of physical meters over time (as well as a decrease in the costs of servicing existing meters). In addition, parkers paying by cell phone receive messages alerting them to expiring meters and encouraging them to add additional time to the meter (again by cell phone). Under the terms of the Chicago Parking Meter lease, the private investors receive all parking meter revenues, while the city benefits from fines levied on overstaying parkers. See INSPECTOR GENERAL'S REPORT, *supra* note 89, at 3.

¹⁰⁹ Fischel & Sykes, *supra* note 11, at 357. Ultimately, they conclude that if a termination for convenience clause is a desirable feature of government contracting, it is because "it makes it harder for officials in power at the moment to enter durable deals for the inefficient transfer of rents to favored interest

no particular reason to think that private investors will undercharge for this restriction on their contract rights. As a result, governments (and their tax- and fee-paying publics) that are parties to contractual relationships will end up paying more for their projects than if these clauses were not required.

But a problem with at least some public-private infrastructure deals is that they offer public officials a mechanism for obtaining up-front cash without fully disclosing the long-term price (in the form of higher user fees or taxes) that will have to be paid later on.¹¹⁰ It is possible (if not probable) that the costs of a termination for convenience clause will be absorbed by a reduction in the amount of these up-front payments. Providing for a longer contract term or higher payment rates—both of which may disappear should the termination clause be invoked—would seem to be inferior payment options from the standpoint of the investors in such deals. Diminishing initial cash transfers should make these deals less attractive to politicians. If surreptitious debt capable of financing current noncapital expenditures is the great attraction for politicians, then we should welcome means of reducing these transactions. Transparency is both attractive from a democratic perspective and cheaper.¹¹¹

There is, in the end, a trade-off. Exceptionally well crafted agreements might be long-term, without termination clauses, and yet in the interest of taxpayers. It is more likely, however, that citizens and taxpayers would benefit from further constraints on politicians inclined to strike very long-term deals. The impossibility of seeing seventy-five years ahead is sufficient reason to favor a rule making it easier and cheaper to revise or terminate long-lasting agreements.

groups” because when “political power changes hands, new officials can terminate the contract at lower cost than if ordinary contract damages were payable.” *See id.* at 356–57.

¹¹⁰ *See* Roin, *supra* note 97, at 2012–18 (explaining how the public generally misunderstands these transactions).

¹¹¹ *See id.* at 2010.