REGULATORY BODY SHOPS

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ABSTRACT

Agencies do not always write their own rules. Contractors assist agencies in nearly all tasks relating to rulemaking, including reviewing public comments, conducting specialized research, and writing regulatory text. Despite perceptions that contractors’ roles are entirely ministerial, the reality is that contractors fulfill many more functions in the rulemaking process than is commonly understood, including everything right “up to pushing the big red policymaking button,” as one agency employee put it. The use of contractors in rulemaking fits within a broader pattern of increased government reliance on service contractors. Scholars have documented a bevy of governance concerns relating to ethics, capacity, and more, stemming from the fact that contractors are in privity with the government, not the public. This scholarship does not take up the implications of service contracting for rulemaking, the primary mode of executive branch lawmaking, nor does it delineate between types of contracting arrangements, which vary dramatically.

This Article takes variation in rulemaking contracting arrangements seriously. We define three types: ministerial contractors, who perform administrative work; expertise contractors, who provide discrete scientific and technical inputs; and regulatory body shops, which are embedded into agencies and function like staff. We argue that while the former two arrangements pose minimal risks to an agency, regulatory body shops are a different story. Not only do they open the door to conflicts of interest that are not adequately addressed under current law, they also threaten the quality of agency reasoning and have the potential to hollow out an agency’s rulemaking apparatus over the long...
run. Reliance on regulatory body shops has the potential to put an agency’s rules in legal jeopardy by violating the Administrative Procedure Act and diminishing an agency’s claim to Chevron deference. These various risks, which pose challenges for the quality of public decision-making, sit in tension with the reality that some agencies lack adequate resources to staff their rulemakings and turn to regulatory body shops as a pragmatic matter. The Article concludes with reforms to help agencies responsibly manage the risks posed by regulatory body shops.

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**INTRODUCTION**

A core tenet of administrative law is that administrative agencies make decisions. Over the pages of many law reviews, scholars have puzzled at various aspects of agencies, including their institutional
design, their boundary lines, their independence, and their processes, but the general assumption is that, when agencies decide, they do so as themselves.\footnote{1} Statutes make this same assumption; for example, in laying out agency rulemaking requirements and responsibilities, the Administrative Procedure Act (“APA”) refers to and defines “the agency” as the responsible party and decision-making entity.\footnote{2} When theoretical accounts of agencies anticipate that agencies will encounter special interests, they assume that these interests are external.\footnote{3} Indeed, even the language of “agency capture” presumes the dynamic of a threat of influence to agency decision-making that is exogenous.

We challenge both of these assumptions.\footnote{4} In contemporary practice, agencies get a lot of help in making regulatory decisions. At

\begin{enumerate}
\item 5 U.S.C. § 551(1) (defining “agency”). The law designates “the agency” as the entity responsible for soliciting public comments on a proposed rule and considering the comments received on the proposal, among other responsibilities. \textit{Id.} § 553(c).
\item We are, of course, not the first to point out that there is considerable daylight between theory and practice in administrative law. For example, Professor Christopher J. Walker shows
times, this help can call into question the ability of “the agency” to
effectively function as the decision-maker. Often, assistance comes
from private sector contractors.\(^5\) As we documented in a recent report
for the Administrative Conference of the United States (“ACUS”),
contractors perform manifold functions in the rulemaking process,
ranging from purely administrative tasks like scheduling conference
rooms to substantively meaningful work like providing assistance in
drafting what will ultimately become binding regulatory text.\(^6\) Building
on interviews with forty-five agency rulemaking officials, experts, and
contractors, and a survey of rulemaking officials, our research findings
are striking for the breadth and depth of contractor support
undergirding the administrative state.\(^7\)

Agency use of contractors to assist with rulemaking is not
necessarily problematic. Indeed, contractors can bring much-needed
capacity and expertise to the government. However, as we explain in
this Article, there are situations where contractors are not separable
from agencies. Contractors’ roles can grow to encompass many support
functions for an agency such that contractors can be viewed almost like
staff.\(^8\) Building on Professor Kathleen Clark’s work on body shops in

\(^5\) We use the term “private sector” to mean nongovernmental. The term encompasses
both for-profit and nonprofit organizations.

\(^6\) Bridget C.E. Dooling & Rachel Augustine Potter, Admin. Conf. of the U.S.,
Contractors in Rulemaking 25–37 (2022) [hereinafter Dooling & Potter, ACUS
Report], https://www.acus.gov/sites/default/files/documents/Contractors%20in%20Rulemaking%20Fi
nal%20Report.pdf [https://perma.cc/G6AJ-B6NP]; see also Bridget C.E. Dooling & Rachel
Augustine Potter, Rulemaking by Contract, 74 ADMIN. L. REV. 703, 725–36 (2022) [hereinafter
Dooling & Potter, Rulemaking by Contract] (capturing many of the ACUS Report findings).

\(^7\) See Dooling & Potter, Rulemaking by Contract, supra note 6, at 725–36.

\(^8\) Dooling & Potter, ACUS REPORT, supra note 6, at 25 (quoting Interview with
Interviewee 1 (interview notes on file with authors)).
government contracting, we refer to this situation where embedded contractors perform multiple, significant rulemaking functions associated with an agency’s rule as a “regulatory body shop.”

Body shops are often embedded within agencies, to the point that, for example, their employees are on-site in government offices. This setup makes it so that contractor employees rub elbows with agency personnel at the water cooler and participate in office social engagements. Sometimes these contractors have the same agency “.gov” email addresses as agency employees. This lack of distinction in status can make it so email recipients—those within the agency or outside of it—assume that they are corresponding with an agency employee, even if the sender happens to be a contractor. Body shop employees might also work offsite but with a degree of discretion that mirrors or perhaps exceeds that of agency staff.

Our empirical findings show that regulatory body shops can be integral to rulemaking. Our thesis is that extensive reliance on regulatory body shops to produce rules limits the agency’s ability to govern by introducing greater opportunity for ethical conflicts, harming the agency’s reasoning processes, and reducing agency

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10. Others describe the more general phenomenon (inclusive of tasks beyond rulemaking) as the “blended workforce.” Richard J. Bednar & Gary P. Quigley, Viewpoint: The Blended Workforce, GOV’T EXEC. (May 1, 2007), https://www.govexec.com/management/2007/05/the-blended-workforce/24375 [https://perma.cc/FXX7-KSAL] (“Federal workers frequently are co-located with contractor personnel in the same government offices, virtually indistinguishable, and often doing the same or similar work.”); Andrew J. Taylor, The Revolution in Federal Procurement: 1980-Present, 21 BUS. & POL. 27, 38 (2019) (“In many cases individuals work side-by-side in the same space on the same projects doing the same things in what is often called the ‘blended workforce.’ Nothing distinguishes them except their employer and possibly wages and benefits.”); Collin D. Swan, Note, Dead Letter Prohibitions and Policy Failures: Applying Government Ethics Standards to Personal Services Contractors, 80 GEO. WASH. L. REV. 668, 674 (2012) (describing the blended workforce as a phenomenon wherein “the practical distinctions between contractors and civil servants in the federal workplace have become opaque, if not completely unrecognizable”). Meanwhile, Professor Jon D. Michaels labels this phenomenon “deep service contracting,” or “the outsourcing of sensitive policy design and policy-implementing responsibilities.” Jon D. Michaels, Constitutional Coup 111 (2017). There is another use of the term “body shop” that is narrower than the present application. This version applies to contracting firms who serve in a head-hunter type role. In this conception, a body shop is a contracting firm “that specialize[s] in finding [highly skilled] candidates, often for a fee that approaches $50,000 a person, according to those in the business.” Dana Priest & William Arkin, National Security, Inc., WASH. POST (July 20, 2010, 12:00 PM), https://www.washingtonpost.com/investigations/top-secret-america/2010/07/20/national-security-inc [https://perma.cc/9XPP-A4EK].

11. See infra Part I.A.
capacity for innovation. Ultimately, reliance on regulatory body shops can diminish the democratic possibilities proffered by notice-and-comment rulemaking. The use of regulatory body shops also provokes unique legal risks for agency rules under the APA. Put simply, the embedded nature of regulatory body shops means that they can become a source of influence that is "internal to the agency." This, in turn, can compromise the agency's capacity to act as an independent decision-maker.

We are not the first to question the wisdom of extensive reliance on contractors to perform government functions. Indeed, attention to the issue of contractors in government is often particularly acute on the heels of scandals. However—as far as we are aware—there have not
been any major scandals involving regulatory body shops. But the absence of evidence should not be interpreted as evidence of absence. As we argue, the deep enmeshment of these entities into the bureaucracy means few have visibility into the complete portfolio of responsibility and influence held by a regulatory body shop at any one point in time. Further, the feeble legal framework surrounding body shops leaves little room for whistleblowing since many practices fall into areas that are legally gray but questionable from a governance or doctrinal perspective. In short, even without media fanfare or intense congressional scrutiny, regulatory body shops should give participants in and observers of the administrative state reason for pause.

We make our argument in five parts. Part I draws on the empirical findings in our ACUS report to describe the tasks that contractors perform in the rulemaking process. We situate these tasks in the context of broader trends towards service contracting in the administrative state. Part II introduces three types of rulemaking contractors that we observed in our study: ministerial contractors, who perform administrative work in relation to rules; expertise contractors, who provide discrete scientific and technical inputs into rules; and regulatory body shops. In Part III we analyze the ethical, reasoning, and capacity risks across these three contractor types, showing that regulatory body shops present the most serious risks. In Part IV we articulate the doctrinal risks associated with relying on contractors in rulemaking—specifically, risks related to an agency’s procedural responsibilities and deference considerations—and find that regulatory body shops can jeopardize not only agency rules but also the policy goals they embody. Part V offers options to manage the regulatory body shop problem and enable the administrative state to move forward.

ONE NATION UNDER CONTRACT 2–4 (2009) (describing various examples of military contractor misconduct); VERKUIL, supra note 13.

16. We note that different terminology is used in this literature, including “outsourcing,” “contracting,” “contracting out,” and “privatizing,” among other terms. For purposes of this Article, we use the terms outsourcing and contracting interchangeably. We understand privatization to refer to a broader set of activities, including the conversion of formerly public assets into private assets, a practice that is outside the scope of the present argument.
I. CONTRACTORS, RULEMAKING, AND THE ADMINISTRATIVE STATE

Contractors are ubiquitous in agencies across the federal government. Their work can be mundane or substantive, routine or highly specialized, and performed side-by-side with federal employees. Contractors have performed services on behalf of the government since the Republic’s earliest days, but the dynamics of government reliance on contractors have changed considerably in recent decades. This trend and its underpinnings are well documented by scholars and oversight bodies, and the consequences for the government and for society are well theorized. But in the day-to-day,
contractors round out the federal workforce in important, if sometimes controversial and unexamined, ways.

The role of contractors in rulemaking has received scant attention. Federal procurement involves billions of dollars and thousands of transactions, so it is not surprising that this relatively narrow slice of activity has escaped deeper scrutiny. In an interview, one expert perceptively noted that “rules aren’t aircraft carriers.” While a handful of scholars have raised alarms about the extensive use of contractors in rulemaking, those alarms have been of a hypothetical and mostly unsubstantiated nature. Nearly three decades ago, there was some attention to particular agencies’ use of contractor support for specific pieces of the rulemaking process, such as writing the economic analysis that is part of an agency’s rulemaking package. But the general lack of attention to contractors in rulemaking in the intervening years has led some to the false impression that most or all rulemaking activities are “inherently governmental”—an important concept that we describe in detail later—and are therefore off-limits to contractors. One interviewee even told us that the very idea of having precipitated by outsourcing: a human capital crisis fueled in part because there “simply are not enough warm bodies in government service to man the [contractor] oversight positions” and an accountability crisis “since most contracts prompt a chain of subcontracting . . . much of our foreign policy has consequently been rendered opaque . . . . [C]reating the perfect conditions for all variants of corruption and abuse of power”); VERKUIL, supra note 13, at 3 (“[T]he temptations are great to expand [outsourcing] to include governmental functions inherent in sovereignty.”).

21. DOOLING & POTTER, ACUS REPORT, supra note 6, at 1–2 (quoting Interview with Interviewee 31 (interview notes on file with authors)) (discussing interviewee comment that procurement oversight is often focused on high dollar-value purchases, like aircraft carriers, rather than smaller dollar buys like rulemaking services).

22. See, e.g., Michaels, supra note 10, at 111 (arguing that “[c]verywhere we look, the federal government is engaged in deep service contracting: the outsourcing of sensitive policy design and policy-implementing responsibilities,” including rulemaking activities (emphasis omitted)); VERKUIL, supra note 13, at 24–25, 191 (arguing that “[a]gencies contract with regularity for a variety of private management services,” including rulemaking activities, and that some of these activities “cross[] the line”).

contractors involved in rulemaking was “highly irregular.” However, our empirical findings establish that contractors are used for a wide variety of rulemaking tasks—sometimes extensively so.

A. Empirical Findings about Contractor Use in Rulemaking

In our ACUS report, we draw upon interviews with forty-five agency rulemaking officials, experts, and contractors along with a survey of rulemaking officials. We asked about whether and how agencies use contractors in the rulemaking process, which we define as the rule-writing process within an agency. We encountered a wide range of attitudes from agency staff and former staff about contractor use in the rulemaking process. Some expressed concern about involving contractors in rulemaking at all, as a matter of principle and procurement law—in some cases with the incorrect notion that all tasks related to rulemaking are “inherently governmental.” Others indicated that, while the default was to complete rulemaking in-house, outside expertise and capacity could sometimes be very helpful. A final group described an ongoing need to supplement agency staff with contractors—what we refer to in this Article as a regulatory body shop. For this group, contractors are “basically staff augmentation,” working closely with agency staff on a consistent basis.

In terms of what contractors do when an agency brings them on, many responses tied contractor tasks to specific stages of the rulemaking process. At the pre-rule stage, respondents shared that agencies involve contractors to help with crafting regulatory strategies.

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25. Id. at 2, 67–78.
26. Id. This excludes enforcement activities and regulatory systems relying upon third-party certification or accreditation. See, e.g., Miriam Seifter, Rent-a-Regulator: Design and Innovation in Environmental Decision Making, in Government by Contract 94 (Jody Freeman & Martha Minow eds., 2009) (describing third-parties used for certification, compliance, and enforcement); Emily S. Bremer, Private Complements to Public Governance, 81 Mo. L. Rev. 1115, 1118–22 (2016) (discussing the governance role of standards-setting organizations and other nongovernmental bodies).
28. Id.
29. Id. at 24–25 (quoting Interview with Interviewee 1 (interview notes on file with authors)).
30. Our ACUS Report provides more detail on these various functions. We sketch them here to demonstrate the breadth of activities that were reported.
planning timelines, conducting research, convening stakeholders, and developing models that inform the agency’s thinking ahead of writing a proposed rule. At the proposed rule stage, contractors help draft and edit internal materials such as memos and presentations that are used in the agency’s deliberations, including gathering and analyzing data. They also draft and edit the proposed rule itself, including the preamble, analysis sections, and the regulatory text—a set of tasks with profound implications that we will discuss in detail below. Contractors also help manage the agency’s internal workflow, helping agency staff respond to feedback from reviewers in the agency and other parts of the executive branch, including centralized regulatory review by the Office of Information and Regulatory Affairs. Contractors also play a role in managing public comments, another set of tasks that we discuss in more detail below but which can include tracking incoming comments, organizing them into spreadsheets, and drafting summaries of the comments for use internally or in the preamble of the final rule. At the final rule stage, contractors help with the same kinds of tasks mentioned in the proposed rule stage plus some communications activities like drafting fact sheets and guidance documents for the public.

Other contractor tasks were ongoing, like project management, meeting and negotiation support, writing and editing services, statistical and other data support, developing and reviewing draft guidance documents and other agency materials, training, and general office support. Respondents also shared that contractors helped with one-time projects related to rulemaking such as developing guidelines for conducting regulatory impact analysis, helping to coordinate review of other agencies’ rules, developing software systems to help with the

32. Id. at 28.
33. Id. at 29–30.
36. Id. at 31–32. Although we did not gather information on post-promulgation activities, some respondents shared that their agencies used contractors to staff an implementation hotline, to help with education and outreach, to monitor and evaluate, and to provide systems support for information-collection systems used by the public. Litigation support was also mentioned. Id. at 32.
37. Id. at 33–34.
rulemaking process, and one-off expert reviews of particular documents.\textsuperscript{38}

In addition to divergent attitudes about whether to use contractors and a wide variety of contractor tasks, our ACUS report uncovered ways that the working arrangements of contracting relationships vary, often in important ways.\textsuperscript{39} Contracts could be arm’s-length and tied to a single task, with a deliverable like an expert report or literature review.\textsuperscript{40} Some tasks, such as regulatory analysis or comment analysis, might be consistently given to contractors to perform, or that might be the exception to the rule with agency staff turning to contractors only when overwhelmed.\textsuperscript{41} Sometimes the latter can turn into the former.\textsuperscript{42} Contractors could also be part of a regulatory body shop, with a long-term staffing relationship that might include the contractors working side-by-side with agency staff.\textsuperscript{43}

B. Service Contractors and the Administrative State

The scale and scope of modern federal procurement is immense. The Government Accountability Office estimates that in Fiscal Year ("FY") 2020 the U.S. Government spent roughly $665 billion on contracts for goods and services.\textsuperscript{44} Of this total, 59 percent of those funds ($391.8 billion) went to service vendors.\textsuperscript{45} This percentage has grown over time and eventually overtook federal contracting for goods.\textsuperscript{46} Clark reports that from FY 1983 to FY 2007, service acquisition steadily grew from 46 percent of government procurement spending to 58 percent (with the remaining 42 percent allocated to

\textsuperscript{38} Id. at 34–35.
\textsuperscript{39} Id. at 25–26.
\textsuperscript{40} Id. at 25.
\textsuperscript{41} Id. at 25 & n.152.
\textsuperscript{42} Id.
\textsuperscript{43} Id. at 25.

\textsuperscript{45} Id.

\textsuperscript{46} Professor Andrew J. Taylor explains that “[h]istorically, most federal procurement was in the form of what the FAR calls ‘supplies’ but what economists call goods . . . . Today, the federal government acquires considerably more in the way of services.” Taylor, supra note 10, at 32.
product purchases). The nature of the services acquired has also slowly and subtly shifted, moving from support services (such as janitorial support, food service, or clerical assistance) to include so-called “professional” or “high-skill” services or those for which more formal education is typically required. While spending on services has been increasing, the size of the federal civilian workforce has remained level at approximately two million Full-Time Equivalents (“FTEs”) since 1960. These trends are well documented, with scholars referring to contractors as a “shadow” of government that supplements the federal civilian workforce.

There is a paucity of data to track service contracting associated with rulemaking. Although funding for contractors flows from congressional appropriations, it is nearly impossible to use publicly


48. Michaels explains that “[j]ust a few short decades ago, service contracting was largely confined to the most ministerial and vanilla of government functions. Now, of course, contracting knows no such bounds.” Michaels, supra note 10, at 111. The push toward acquiring highly skilled services from the private sector has led to a conversation about whether there is a “brain drain” occurring wherein top talent leaves the federal service to perform comparable work on behalf of contractors, who may offer higher pay and other perquisites. See, e.g., Julie Tate, CIA’s Brain Drain: Since 9/11, Some Top Officials Have Left for Private Sector, WASH. POST (Apr. 12, 2011, 11:05 PM), https://www.washingtonpost.com/world/cias-brain-drain-since-911-some-top-officials-have-left-for-private-sector/2011/03/25/AF3Nw1RD_story.html [https://perma.cc/56HL-LL73].


available information to link appropriated dollars to specific contracts for rulemaking services. Appropriations bills are generally enacted at a high-enough level of abstraction (such as funding a particular program or set of programs in an agency) that the attendant legislative language, committee reports, and other technical materials cannot be used to parse out which money is used for which contract. At the other end of the contracting process, the Federal Procurement Data System—Next Generation ("FPDS") collects contract-related spending and actions. This system was designed for procurement oversight and lacks the kind of information that would be needed to understand whether specific contracts and spending are related to the wide variety of rulemaking tasks that our ACUS report uncovers. This owes in part to the fiction that in modern contracting relationships there is one contract that sets all the terms of a relationship. Instead, contracts are often written with broad statements of work and structured under broad umbrella agreements such as “blanket purchase agreements” or “indefinite delivery/indefinite quantity” agreements against which agencies attach “task orders” as needed.\footnote{See Robert Mahealani M. Seto, Basic Ordering Agreements: The Catch-22 Chameleon of Government Contract Law, 55 SMU L. REV. 427, 445–47 (2002).}

The FPDS data does shed some light, however. One of us (Potter) analyzed FPDS data on “regulatory analysis” and “cost-benefit studies and analysis,” estimating that inflation-adjusted spending on these narrow categories was on average $39 million between FY 2002 and FY 2021.\footnote{Rachel A. Potter, How Much of Rulemaking Is Done by Contractors?, BROOKINGS INST. (Feb. 16, 2022), https://www.brookings.edu/research/how-much-of-rulemaking-is-done-by-contractors [https://perma.cc/ZNJ7-FBK7].}

These analysis categories are only one slice of the larger set of tasks that contractors do in rulemaking, but, even without good data, it is reasonable to assume that service contracting related to rulemaking is only a small drop in the broader ocean of federal spending on service contracts.

The traditional rationales for public procurement of goods and services rest on benefits associated with efficiency, flexibility, and expertise.\footnote{See, e.g., Jody Freeman & Martha Minow, Introduction: Reframing the Outsourcing Debates, in GOVERNMENT BY CONTRACT 1 (Jody Freeman & Martha Minow eds., 2009); DOOLING & POTTER, ACUS REPORT, supra note 6, at 5–7.} Our empirical findings bear these out in the context of rulemaking. For example, we show that some agency officials value the ability to bring in outside expertise when it is needed and without the
need to hire someone for a permanent position. This could include a short-term project or surge capacity when an agency experiences a sudden high level of rulemaking workload, perhaps because a new statute was enacted or more public comments were received than the agency expected. Another benefit in the rulemaking process is the contractor’s ability to serve as a “neutral broker” in working with outside stakeholders or collecting information. We also heard from those who value the ability to delegate a task to a contractor as a way to ensure that it gets done, to supplement a high turnover agency with some extra-institutional memory, and to get fresh perspective.

Aside from these benefits, the rise of service contracting is attended by concerns about government accountability, capacity, and ethics. Each of these considerations is relevant in the rulemaking context. In our ACUS report, we noted that issues of trust and shared

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54. Dooling & Potter, ACUS Report, supra note 6, at 38.
55. See id. at 37–38.
56. Id. at 38–39.
57. See id. at 39.
58. E.g., Verkuil, supra note 13, at 19 (“[F]or example, [the Government Accountability Office] has reported that DOD oversight was insufficient in about one-third of contracts . . . at least partially [due] to declining personnel levels.”); Kimberly N. Brown, We the People, Constitutional Accountability, and Outsourcing Government, 88 Ind. L.J. 1347, 1349 (2013) (characterizing the current situation as an “accountability vacuum”); Diulio, supra note 20, at 21 (noting the “Leviathan by proxy”); Michaels, supra note 10, at 10–11 (describing a “Constitutional coup” wherein private actors “carry out State policymaking or policy-implementing responsibilities . . . such that it is logistically and legally more difficult for the rest of civil society to participate meaningfully in policy development and execution”); Light, supra note 50, at 8–14 (referring to the “government-industrial complex”); Chiara Cordelli, The Privatized State 7–13 (2020) (discussing the “regression to the state of nature” that abrogates the citizen-government relationship); id. at 148–50 (discussing the increased role of money in politics). Another accountability issue is shifting tasks to contractors when their actions are less accountable to oversight than governmental actions. For instance, in spite of so-called “green” procurement protections in place to safeguard the environment, widespread exemptions for defense contractors results in a “landscape where contractor environmental performance is unchanging with defense contractors persistently polluting in high amounts.” Dustin T. Hill & Mary B. Collins, Toxic Waste and Public Procurement: The Defense Sector as a Disproportionate Contributor to Pollution From Public-Private Partnerships, 17 Reg. & Gov. 389, 389 (2022).
values sometimes create a rift between agency staff and contractors.\textsuperscript{60} The strain of the contract management process is also evident in that agency staff sometimes think the benefits of using contractors are not worth the considerable effort needed to go through the contracting process itself, to integrate contractors and their output into the agency's workflow, to ensure an appropriate level of quality, and to manage cultural disconnects.\textsuperscript{61} Conflicts of interest were rarely mentioned by the agency officials who participated in our research, in contrast to outside experts who expressed concern about the opportunities for self-dealing that rulemaking presents.\textsuperscript{62} The state of ethics rules for contractors, which we discuss in more detail in Part III.A below, only amplifies this concern. Agency respondents expressed awareness of the idea that certain tasks could not be given to contractors to complete but were unsure about how to identify the cut point.\textsuperscript{63}

C. Legal Landscape for Contractors in Rulemaking

Contractors have a long history of supporting the bureaucracy, and, over time, Congress and executive branch leaders implemented protections in an attempt to protect the government and the public interest. Many of these protections were designed to guard against the kinds of risks introduced by body shops or to prevent body shops from emerging in the first place. However, these protections are patchy at best and largely inadequate given the scale of the modern contracting enterprise and the pressures facing an overwhelmed administrative state.

Federal procurement law limits what tasks the government may contract out to those that are not “inherently governmental function[s].”\textsuperscript{64} As the name implies, the idea is that there are some tasks that are, by their very nature, government work and therefore not appropriate to give to a contractor, whereas other functions or tasks could be performed equally well—or even better—by nongovernmental entities. The Federal Activities Inventory Reform

\textsuperscript{60} Dooling & Potter, ACUS Report, supra note 6, at 43.
\textsuperscript{61} See id. at 40–42.
\textsuperscript{62} See id. at 43.
\textsuperscript{63} Id. at 42.
Act of 1998 defines inherently governmental functions to include “activities that require either the exercise of discretion in applying Federal Government authority or the making of value judgments in making decisions for the Federal Government, including judgments relating to monetary transactions and entitlements.”65 It goes on to say that such functions involve “the interpretation and execution of the laws of the United States so as . . . to bind the United States to take or not take some action by . . . regulation.”66 It also notes that the definition does not “normally include” information-gathering or provision of “advice, opinions, recommendations, or ideas” to the government.67

The line that emerges from this definition is between decision-making and assistance. This accords with what one interviewee shared with us, that contractors can do “everything up to pushing the big red policymaking button.”68 Applying this test to rulemaking functions quickly exposes some flaws. First, how does one determine where decisions get made in the often complex regulatory decision-making process? Regulation development can take years and involve a multitude of decisions, both large and small. The line between support activities and decisions is less clear upon closer inspection of rulemaking functions involving analysis and drafting, which Professor Paul R. Verkuil argues “are surely significant if not inherent government functions.”69 Our ACUS report documented that contractors are involved in both regulatory analysis and drafting.70 In other lawmaking contexts, specifically those related to legislation, drafting is sufficient for a task to be inherently governmental.71 Why not for rulemaking? Further, at present, an agency official’s signature is treated as definitive evidence that the government made the underlying decisions reflected in the rule. What motivates the present Article is a concern that this approach—centered on a fiction of one big decision-making moment that cures any upstream decision-making

65. Id., 112 Stat. at 2385.
66. Id.
67. Id. The Federal Acquisition Regulation incorporates this definition and also clarifies that “[t]his definition is a policy determination, not a legal determination.” FAR 2.101 (2021).
68. DOOLING & POTTER, ACUS REPORT, supra note 6, at 44.
69. VERKUIL, supra note 13, at 111.
70. DOOLING & POTTER, ACUS REPORT, supra note 6, at 28–30.
71. See infra Part V.A (describing other agency functions that have been carved out as inherently governmental functions).
defect—elides the realities of how decisions actually are made in rulemaking.

Second, the inherently governmental function test (that is, determining whether a function involves decision-making or assistance) is focused on individual tasks and therefore cannot guard against the kind of creep that may erode an agency’s capacity and expertise over time. This could happen in a few ways. In our ACUS report, several respondents noted that rulemaking contracts grew incrementally over time as the agency’s confidence in the contractor’s capabilities expanded and as agencies needed more support.72 Agency incentives also push towards larger, broader contracts that allow the agency to get more of what it needs while minimizing the number of contracts that it needs to administer. The alternative is one-off contracts that prove insufficient to meet agency needs.73 Also, as contracts grow or task orders get issued, screening for inherently governmental functions can become less systematic. During the procurement process, an agency is expected to consult a checklist before contracting for services that are “closely associated with inherently governmental functions.”74 This includes rulemaking tasks.75 Only one respondent mentioned this checklist to us, though many expressed uncertainty about the boundaries of inherently governmental functions.76 If the checklist is only applied at the initial onset of a rulemaking-related contract, and to review a very broad scope of work that does not offer many specifics of what the contractor will do, the checklist—which is meant to inform management practices throughout the contract’s administration—cannot fulfill its function.77 And if this is taking place while the agency is coming to see the contractor as ‘one of its own,’ the potential for contractors to creep into inherently governmental functions is significant.

Legal disputes about inherently governmental functions are typically constrained to bid protests, so opportunities to litigate the

72. DOOLING & POTTER, ACUS REPORT, supra note 6, at 42, 52.
73. In one case, a respondent noted the need to find additional funding for a contract that grew larger than planned. Id. at 42.
75. See id. at 56234.
76. DOOLING & POTTER, ACUS REPORT, supra note 6, at 42, 44–45.
meaning of the test are limited. The set of plaintiffs with standing to file a bid protest claim, that is, firms that did not win the contract, are different from the set of plaintiffs with standing to pursue an APA claim against an agency challenging a particular rule. This greatly constrains the ability of the inherently governmental function test to serve as a bulwark against inappropriate use of contractors in rulemaking.

The Federal Acquisition Regulation ("FAR") also includes a prohibition on "personal service" contractors, which should prevent the type of body shop arrangements we discuss in this Article. FAR 2.101 defines a personal services contract as "a contract that, by its express terms or as administered, makes the contractor personnel appear to be, in effect, Government employees." The intention here seems to be to limit government managers from forming a direct supervisory relationship with contractor employees. In practice, however, this prohibition is a "dead letter." Further, conflict-of-interest provisions are only applied to contractors in limited circumstances, a situation that is well documented by scholars. We discuss this further in Part III, but to call the status quo for contractor ethics a patchwork is charitable.

In sum, the inherently governmental function test is too limited to adequately catch inappropriate use of contractors in rulemaking, and likely in other policymaking areas too. Unless explicitly authorized by statute, personal services contracts are technically impermissible but also appear to be prevalent. And the ethics rules for contractors fall well short of what we should expect, and far short of what we expect of civil servants. Overall, the legal framework surrounding the use of contractors in rulemaking is long past due for an upgrade, especially in light of the legal risk generated by different contracting arrangements—and regulatory body shops in particular.

79. FAR 37.104 (2021).
80. FAR 2.101 (2021) (citing FAR 37.104).
81. Swan, supra note 10, at 672; see also Michael K. Grimaldi, Abolishing the Prohibition on Personal Service Contracts, 38 J. LEGIS. 71, 74 (2012) (arguing that the "phantom barrier" against personal services contracts should be formally removed); William V. Luneburg, Contracting by the Federal Government for Legal Services: A Legal and Empirical Analysis, 63 NOTRE DAME L. REV. 399, 413–25 (1988) (discussing the challenges of applying the "personal services" test to legal services).
82. See, e.g., Gordon, supra note 59, at 37–40.
II. VARIATION IN RULEMAKING CONTRACTOR ARRANGEMENTS

Rulemaking contracting arrangements are not all created equal. As the preceding Part highlighted, there is considerable diversity in the tasks that contractors perform in rulemaking. Additionally, there are other factors that can impact the relationship between a contractor and an agency—such as the contracting vehicle used or the level and type of transparency surrounding the contractor and their work. These factors define the nature of the relationship such that the benefits and risks discussed previously accrue unevenly across different configurations of key factors. In this Part, we introduce a novel typology of three distinct forms of contracting arrangements—the ministerial contractor, the expertise contractor, and the body shop, which sets up our discussion in Parts III and IV about their governance and doctrinal risks.

These three types of regulatory contracting arrangements build from the findings of our ACUS report; to be clear, they are stylized examples that illustrate types of contracting arrangements that we encountered in the course of our research and are not a definitive typology. They serve as useful cases, however, to animate our analysis of how variation in contracting arrangements translates to risk.

For each type of contractor, we sketch the kinds of tasks performed, the number or frequency of the tasks, the nature of the relationship’s duration and enmeshment, internal transparency (that is, the visibility within the agency as to which tasks in a rulemaking are performed by contractors versus agency personnel), and external transparency (that is, visibility to the public and other stakeholders outside of the agency as to which tasks in a rulemaking are performed by contractors versus agency personnel).

These criteria characterize the level of exposure to risks—risks that we outline in detail in Parts III and IV—that are induced when an agency works with a contractor. The type of task affects the

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83. The benefits of contracting are well explored in the literature. Our focus in this Section, and in this Article generally, are on the risks of one type of contracting arrangement in particular—regulatory body shops—as they apply to rulemaking.

84. Given the qualitative nature of the data collection in our ACUS report, we are unable to quantify how many rulemaking contractors fit into each category. However, even if such data were available, the categorization process would necessarily be subjective. Additionally, the methodology of our study was not designed to detect or measure instances of agencies relying too much on contractors, however one might define that. The methodology did, however, allow us to see how outsourcing certain tasks can, either on their own or by accumulating, shift significant discretion to contractors.
contractor’s ability to influence a rulemaking proceeding. When a contractor performs a purely administrative function (such as photocopying), that contractor will have less access to the agency’s decision-making process for rules than a contractor who performs more substantive work (such as drafting rulemaking text). The number of tasks that a contractor performs and how often they perform them also matter; a contractor that performs one task one time will have less reach than a contractor who routinely performs multiple tasks. The nature of the relationship is important too; contractors with a purely transactional relationship may have less potential influence than those who are embedded into the agency, perhaps by the nature of the work environment or the duration of the relationship and how those factors can subtly foster feelings of trust. Finally, the level of transparency associated with contractor use can affect risk levels by making different forms of oversight more or less difficult.

A. The Ministerial Contractor

The business of government involves a hefty number of administrative tasks, and rulemaking is no different. Ministerial contractors perform discrete, defined tasks that are largely administrative in nature. A critical feature of this type of contracting relationship is that the contractor’s position requires limited exercise of personal or professional judgment to complete the assignment. For example, the process of creating a rule could entail a slew of administrative tasks, such as booking conference rooms for internal and external meetings, gathering and sharing personal information with building security for in-person meetings, finding times to meet and dealing with the inevitable need to reschedule, photocopying and printing, formatting documents, and so on.85 Some of these ministerial tasks are specifically part of the rulemaking process. For example, in our study, some respondents mentioned having contractors download public comments from Regulations.gov.86 Another noted that they used a contractor to format documents to align with the standards set by the Office of the Federal Register.87 And another respondent shared

85. See DOOLING & POTTER, ACUS REPORT, supra note 6, at 33–35.
86. Id. at 30.
that their agency used a contractor to compile and transmit the paper reports about final rules that agencies are required to send Congress under the Congressional Review Act.88

The number and frequency of tasks performed by a ministerial contractor can vary and so can the duration of the contract and the extent to which the contractors are embedded into the agency.89 Internally, the level of transparency is mixed; at some agencies, internal practices such as requiring the contractor to disclose their affiliation in email signatures or wear a distinctive badge might alert agency personnel of their status, but a contractor’s status may be less well delineated at other agencies without such practices in place.90 Because of the administrative and support nature of this work, it is generally not disclosed outside of the agency, giving it limited external transparency.91

B. The Expertise Contractor

Expertise contractors support agencies by contributing their substantive policy knowledge or technical skills. Agencies have long looked to contractors to fulfill these niche expertise needs.92 The use of an external expert, in addition to being efficient, might also improve the credibility of an agency’s decision.

This type of contracting arrangement involves the contractor exercising professional judgment, whether scientific or technical, in service of the agency’s rule. For example, one respondent in our study discussed using a contractor to collect and analyze environmental samples—a highly technical task.93 A contractor’s deliverable in this

88. DOOLING & POTTER, ACUS REPORT, supra note 6, at 32 (citing JESSE M. CROSS, ADMIN. CONF. OF THE U.S., TECHNICAL REFORM OF THE CONGRESSIONAL REVIEW ACT (2021) (discussing the materials that agencies must send to Congress in compliance with the Congressional Review Act)).
89. DOOLING & POTTER, ACUS REPORT, supra note 6, at 25-26.
90. See id. at 45–46.
91. See, e.g., id. at 47.
93. Interview with Interviewee 14 (interview notes on file with authors). As part of our recruitment, we extended a promise of anonymity to our interviewees and survey respondents, so here and below we omit information that would identify respondents.
instance would likely be a report summarizing their findings about the samples. Another example is a contractor that uses a proprietary text analysis tool to analyze public comments. One such relationship we encountered involved a contractor, a small data management and consulting firm, that provided comment analysis services for an agency using the contractor’s natural language processing (“NLP”) program.94 Other rulemaking examples include the use of a contractor to prepare all or part of an agency’s regulatory impact analysis (“RIA”) or departmental guidelines for how to prepare regulatory impact analyses.95

The number or frequency of the tasks might vary, but an expertise contractor will generally be brought in to address an acute, particular, and time-limited need.96 In the NLP analysis example above, the agency would issue a task order against its standing contract to engage the contractor when the agency anticipated receiving a high volume of comments on a proposed rule (typically one thousand or more was the operating threshold).97 The engagements were short, typically a few weeks in duration.98 Contractors working on RIAs tend to be delegated tasks with a defined scope—preparation of a specific cost valuation or literature review, for example.99 Similarly, contractors that support revisions to RIA guidelines are infrequently engaged, since those guidelines are updated only occasionally.

For the expertise contractor, the nature of the relationship tends to be more transactional and short-term. This is clear in the environmental sample analysis example. There, the contractor receives

94. Interview with Interviewee 26 (interview notes on file with authors).
96. It may be more efficient to acquire short-term access through a contract rather than incurring the long-term costs associated with hiring the expert as a civil servant. This is an application of Professor Ronald H. Coase’s insight about the way transaction costs shape firms, as expanded to other forms of governance bodies by Professor Oliver E. Williamson. Oliver E. Williamson, The Mechanisms of Governance 65–70 (1996) (citing Ronald H. Coase, The Nature of the Firm, 4 Economica 386 (1937)). The well-known challenges of hiring staff in the federal government exacerbate these considerations, particularly for short-term needs.
97. Id.
98. Interview with Interviewee 26 (interview notes on file with authors).
99. Interview with Interviewee 19 (interview notes on file with authors).
direction from the agency (collect this material and conduct that analysis) but then performs its work independently and separately from agency personnel. 100 The interactions between the agency and the contractor in the NLP example are similar. There, the work was “collaborative,” but the relationship between the contractor and the agency was arm’s-length. 101 For example, the contractors’ employees worked remotely, off-site in their firm’s offices, and were not co-located with the agency. Asked whether the contract employee felt a greater allegiance to the firm or the agency, one employee commented, “I feel like a [firm name] employee,” and another noted that while they had experienced relationships with other agency clients where the lines were more blurred, “[h]ere the boundaries are more clear.” 102

The level of internal transparency for expertise contractors tends to be fairly high. For the environmental sample contractor, for example, the arm’s-length nature of the interactions between the agency personnel and the contractor personnel are consistent with a high level of internal transparency; agency staff will be more likely to know that they do not have experts on staff with this particular sampling expertise and are therefore more likely to be aware that the people doing the analysis are contractors. This internal awareness may also travel to other types of one-off expertise contractors, such as those performing comment analysis or those interacting with regulatory impact analysis.

External transparency also tends to be high for expertise contractors. 103 For the environmental analysis and RIA contractors, the contract deliverable would likely bear the contractor’s logo and perhaps the names of individual contractor employees that worked on the analysis. ACUS has recommended that agencies should place the contractor’s report into the public rulemaking record, and we observed that at least some agencies do this. 104 Depending on the agency, the

100. See DOOLING & POTTER, ACUS REPORT, supra note 6, at 28 (listing contractor responsibilities).
101. Interview with Interviewee 26 (interview notes on file with authors).
102. Id.
103. Two interviewees told us that when they worked with a contractor to revise the agency’s guidance, they “try to be transparent that this is done with government funds” and that the project is “done with lots of collaboration.” Interview with Interviewee 19 (interview notes on file with authors).
104. Previously, ACUS recommended that agencies place consultant reports supporting RIA in the public docket of a rulemaking proceeding, Agency Procedures for Performing Regulatory
contractor supporting an RIA guideline revision may be more or less visible outside the agency.

C. The Regulatory Body Shop

Few agencies enter into a contract expecting to procure a body shop. Rather, by their very nature, body shops emerge over time as relationships grow and trust is built between the agency and the contractor. One agency official described how their agency developed a body shop relationship. At first, the agency had to issue a large rule and needed a contractor to serve as the project manager. This task involved developing a project plan, keeping the master documents for the rule, and managing document templates. This was all the contractor did for the first year, and the engagement went smoothly. From there, the relationship evolved such that the contractor began taking on more and more tasks for other rules, including writing summaries of public comments, drafting white papers for major decisions about the rule, drafting and editing rulemaking documents, taking minutes at key meetings, and developing communication documents (such as fact sheets or slide decks). Initially, one person at the contract firm was allocated full-time to work on the agency’s rules, but over time the contract grew to cover five full-time contractor employees. As the responsible agency official put it, these contract employees came to be seen as “basically staff augmentation.” In what the agency staff

Analysis of Rules (Recommendation No. 85-2), 50 Fed. Reg. 28364, 28366 (July 12, 1985) (to be codified at 1 C.F.R. pt. 305.85-2). In our ACUS report, we recommended that agencies disclose contractor involvement when such disclosure serves the public interest. DOOLING & POTTER, ACUS REPORT, supra note 6, at 65. Agencies can do this for consultant reports, for example, by disclosing the relevant contracting firm names, contract numbers, and employee names for contributing contractors. Id. at 49–50. More recently, in its recommendations associated with our ACUS report, ACUS recommended that

[when an agency uses a contractor to perform an activity closely associated with an inherently governmental function in a specific rulemaking, the agency should disclose the contractor’s role in the rulemaking docket, the notice of proposed rulemaking, or the preamble to the final rule. Agencies should, unless legally precluded from doing so, also disclose the identity of the contractor.]


105. Interview with Interviewee 1 (interview notes on file with authors). Respondents did not refer to the relationship or the contractor as a “body shop”; that language is our characterization of the situation.

106. Id. Beyond rulemaking, commentators have critiqued the federal government’s use of contractors in lieu of or as supplements to agency staff. Jeff Zients, Remarks at White House Forum on Accountability in Federal Contracting, YouTube (July 7, 2011), https://www.youtube.co
would likely argue is an unmitigated good, these contractors become trusted members of the team. As the same agency official engaged with the regulatory body shop told us, contractors are “part of our family.” The contractors agreed.

The reasons why these kinds of relationships can develop is partly a product of the way agency staff are funded. A manager’s legitimate need for additional staff does not necessarily result in additional funding or “slots” to hire more people into the civil service. If contract dollars are available, but personnel dollars are not, a sensible government manager might reasonably turn to contractors to help fulfill the agency’s mission. Far from being seen as a risky or problematic practice, it can be viewed as a masterstroke of good government.

As this example highlights, the regulatory body shop is embedded. Although this does not necessarily mean that contractors work on-site in the agency’s office space, it does mean contractors work very closely with agency personnel. This proximity can limit internal transparency; staff in the immediate program office may be cognizant of who is an agency employee and who is a contractor, but this distinction may be less stark for other agency personnel who work on the rule but are not directly involved in programmatic work. For example, someone in the Office of General Counsel or the part of the agency responsible for the Paperwork Reduction Act may contribute to a rulemaking but not be aware that some of the personnel in the program office that they are corresponding with about a rule are contractors and not agency personnel. They may simply assume they are agency staff because of how they function within the team. These limits on internal transparency also imply limited external transparency. Because a regulatory body shop performs multiple functions—many of which are internally focused—the arrangement is

107. Id.
108. Interview with Interviewee 25 (interview notes on file with authors).
109. Dooling & Potter, ACUS REPORT, supra note 6, at 36; Interview with Interviewee 1 (interview notes on file with authors).
110. We wonder how the COVID-19 pandemic, and the switch to remote work for many federal employees and their contractors, has affected these relationships.
not generally amenable to clear disclosure or to scrutiny from outside the agency.

We recap three types of rulemaking contractors in Table 1.

Table 1. Types of Rulemaking Contracting Arrangements

<table>
<thead>
<tr>
<th></th>
<th>The Ministerial Contractor</th>
<th>The Expertise Contractor</th>
<th>The Body Shop</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Type of Task</strong></td>
<td>Administrative</td>
<td>Substantive</td>
<td>Substantive, but can also include Administrative</td>
</tr>
<tr>
<td><strong>Number and Frequency of Task(s)</strong></td>
<td>Any</td>
<td>Singular/ Infrequent</td>
<td>Multiple/ Frequent</td>
</tr>
<tr>
<td><strong>Nature of Relationship</strong></td>
<td>Any</td>
<td>Transactional/ Short-term</td>
<td>Embedded/ Long-term</td>
</tr>
<tr>
<td><strong>Internal Transparency</strong></td>
<td>Medium</td>
<td>High</td>
<td>Low</td>
</tr>
<tr>
<td><strong>External Transparency</strong></td>
<td>Low</td>
<td>High</td>
<td>Low</td>
</tr>
</tbody>
</table>

III.  GOVERNANCE RISKS OF RULEMAKING CONTRACTING ARRANGEMENTS

Scholars have sounded the alarm about the extent to which service contractors present serious governance risks within the administrative state and beyond. These risks manifest in three areas: ethical risks that arise due to potential conflicts of interest, threats to the quality of agency reasoning, and risks of “hollowing out” the government’s capacity over time as skills drift to the private sector. Of course, the expansion of service contracting has other implications, too. See, e.g., Shu-Yi Oei & Diane M. Ring, Tax Law’s Workplace Shift, 100 B.U. L. Rev. 651, 654–55 (2020)
describe these risks in greater detail and consider how they might attach differently to each of the three types of contracting arrangements described above. To preview, we find that regulatory body shops pose the greatest governance threat.

A. Ethical Risks

Government employees are covered by a network of personal conflicts-of-interest rules intended to protect the public interest from the private interests of government workers. This includes criminal liability for working on matters related to the employee’s financial interests or those of their family.112 Disclosures of potential financial conflicts of interest are also required for some government employees.113 The disclosure apparatus in the government is imperfect but extensive. According to Clark, hundreds of thousands of federal employees are required to disclose “their income, assets, liabilities, gifts, travel reimbursements, and employment and business affiliations.”114 Some of these reports are made publicly available.115

As Clark explains, contractors operate under a different and patchy set of requirements.116 The only government-wide financial

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114. Clark, supra note 10, at 970.
116. See Clark, supra note 10, at 971–85. One place where the government appears to have taken a stronger stand on contractor ethics is for campaign contributions. While federal employees are not generally barred from making campaign contributions, federal contractors are. Under 52 U.S.C. § 30119(a)(1), individuals who hold a contract are prohibited from making campaign contributions “to any political party, committee, or candidate for public office or to any person for any political purpose or use.” This prohibition applies from the commencement of negotiations for the contract until the completion of performance or termination of the contract. The D.C. Circuit recently upheld the contractor ban in Wagner v. Fed. Election Comm’n, 793 F.3d 1 (D.C. Cir. 2015). This is a critical ethics measure, as social scientists have uncovered a causal relationship between contractor campaign contributions and procurement-related corruption in countries without such a ban. See, e.g., Saad Gulzar, Miguel R. Rueda & Nelson A. Ruiz, Do Campaign Contribution Limits Curb the Influence of Money in Politics?, 66 AM. J. POL. SCI. 932, 939–41 (2022); Taylor C. Boas, F. Daniel Hidalgo & Neal P. Richardson, The Spoils of Victory: Campaign Donations and Government Contracts in Brazil, 76 J. POL. 415, 423–27 (2014). However, one is left to wonder about the broader implications of an individual-level contractor campaign contribution ban in a system where contracting firms (and employees tied to such firms)
conflicts-of-interest requirement is a fairly recent development and applies narrowly to contractors who work in the agency’s acquisition process. Beyond that, some agencies have promulgated their own regulations or issued policies covering contractors for particular programs. However, the burden of compliance typically rests entirely with the contracting firm, not the agency. Another approach is to add conflicts-of-interest clauses to individual contracts, but Clark does not understand this to be a widespread, default practice. Contracting firms might also maintain their own independent conflicts-of-interests programs. But the result, Clark finds, is that “[m]ost contractor personnel are not bound by any financial conflict-of-interest restriction.”

can nonetheless participate in the campaign finance arena, particularly since research suggests that campaign contributions by contracting firms are influential in the U.S. See, e.g., Christopher Witko, Campaign Contributions, Access, and Government Contracting, 21 J. PUB. ADMIN. RES. & THEORY 761, 776 (2011) (showing that “firms that contribute more [political action committee or PAC] money receive a larger number of contracts”); Mihály Fazekas, Romain Ferrali & Johannes Wachs, Agency Independence, Campaign Contributions, and Favoritism in US Federal Government Contracting, 33 J. PUB. ADMIN. RSCH. & THEORY 262, 263 (2023) (replicating Professor Christopher Witko’s earlier finding that “donating companies tend to win a higher total contract value”).


118. Clark, supra note 10, at 972–73 (noting that the Department of Health & Human Services personal conflicts of interest rules for contractors working in the Medicaid Integrity Audit Program).

119. For example, the Environmental Protection Agency explains the process it follows for managing conflicts of interest relating to Superfund contractors as follows:

the contractor must analyze interrelations between the work the firm will be performing under the current contract and any work performed under other contracts to understand whether the new work would cause the contractor to be unable to render impartial assistance or advice to EPA, impair the firm’s objectivity, or give the firm an unfair competitive advantage. If the firm discovers no conflicts of interest, then it certifies this fact to the contracting officer.


120. Clark, supra note 10, at 974.

121. Id. (emphasis in original).
On top of this already uneven structure, emerging practices in rulemaking-related procurement exacerbate the concern. If personal or organizational conflicts of interest are evaluated at all, it would not be sufficient to do it once at the initiation of the contract award. In our interviews, we heard that agency personnel encourage broad contracts for maximum flexibility. This savvy operational move—which allows different parts of an agency to issue task orders against fairly broad contracts, and even allows agencies to take advantage of other agencies’ contracts—nevertheless opens a contractor up to potential conflicts of interest that have no chance of being evaluated because the specific matters that the contractor would work on were unknown when the contract was initially awarded.

That a contractor’s personal or organizational interests could lead them to try to influence an agency’s rulemaking decision should be reasonably clear. In USA Group Loan Services, Ltd. v. Riley, Judge

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122. Interview with Interviewee 16 (interview notes on file with authors). As the Government Accountability Office and others have documented, government procurement is moving towards more flexible contracting arrangements. U.S. GOV’T ACCOUNTABILITY OFF., GAO-17-329, FEDERAL CONTRACTS: AGENCIES WIDELY USED INDEFINITE CONTRACTS TO PROVIDE FLEXIBILITY TO MEET MISSION NEEDS 3 (2017); see also Nathaniel E. Castellano, “Other Transactions” Are Government Contracts, and Why It Matters, 48 PUB. CONT. L.J. 485, 486–96 (2019) (discussing the emerging category of “Other Transactions” in federal procurement). These arrangements are advantageous to agencies because they are less rigid, encourage innovation, and tend to move more rapidly. See id. at 486–87, 88. However, they can make it more difficult to monitor contractors’ roles.

123. A recent case involving policymaking (not rulemaking) by the Food and Drug Administration (FDA) highlights this tension. The agency hired a contractor—the consulting firm McKinsey & Company—to help define strategic goals and objectives for its drug regulation division. Ian MacDougall, McKinsey Never Told the FDA It Was Working for Opioid Makers While Also Working for the Agency, PROPUBLICA (Oct. 4, 2021, 5:00 AM), https://www.propublica.org/article/mckinsey-never-told-the-fda-it-was-working-for-opioid-makers-while-also-working-for-the-agency [https://perma.cc/MV53-TM2G]. However, at the same time that the firm was providing advice to the FDA, it also “counted among its clients many of the country’s biggest drug companies—not least those responsible for making and distributing the opioids that have ravaged communities across the United States.” Id. According to a House committee investigation, the firm profited inappropriately from its connections to the agency: “Documents show that one opioid manufacturer, Purdue Pharma (Purdue), explicitly tasked McKinsey with providing advice on how to influence the regulatory decisions of the [FDA], another McKinsey client. The Committee’s investigation has uncovered evidence that McKinsey sought to use its government connections to solicit private sector business.” STAFF OF H.R. COMM. ON OVERSIGHT & REFORM, REPORT ON THE FIRM AND THE FDA: MCKINSEY & COMPANY’S CONFLICTS OF INTEREST AT THE HEART OF THE OPIOID EPIDEMIC 3 (2022), https://oversightdemocrats.house.gov/sites/democrats.oversight.house.gov/files/2022-04-13.McKinsey%20Opioid%20Conflicts%20Majority%20Staff%20Report%20FINAL.pdf [https://perma.cc/N39V-HVZ2].

124. USA Grp. Loan Servs., Inc. v. Riley, 82 F.3d 708 (7th Cir. 1996).
Richard Posner considered an agency’s duty to withstand such interests in the context of a final rule that was the product of negotiated rulemaking. There, the Department of Education promised to implement the negotiated consensus but ultimately made changes, and some of the negotiating parties sued. Leaving the Department’s action undisturbed, in part because the promise was unenforceable, the opinion nevertheless noted that such a promise “sounds like an abdication of regulatory authority to the regulated, the full burgeoning of the interest-group state, and the final confirmation of the ‘capture’ theory of administrative regulation.” Contractors, like the parties during a negotiated rulemaking, have their own interests—interests that might derive from personal or organizational financial interests, responsibilities to shareholders or other clients, or ideological and mission-related incentives—and therefore introduce dynamics into the agency’s internal rulemaking process that cannot be understood to serve the public interest automatically.

Turning to our three contracting arrangements, the more a task influences the agency’s policy choices, the more ethical risk is introduced by allowing those tasks to be completed by a contractor. It follows that the ministerial contractor—which we define as being involved with administrative tasks that are unlikely to involve weighing in on policy choices—does not pose much of a threat of conflicts of interest.

For expertise contractors, the risk increases slightly; by relying on the contractor to supplement its knowledge, the government opens itself up to being potentially misled. It also creates opportunities for self-dealing. A recent ACUS report speculates about one way this might play out with an expertise contractor that provides AI tools for public comment analysis in support of a rulemaking:

Consultants might be able to monetize their access to the inner workings of agency notice and comment systems by advising clients on how to carefully draft comments in order to achieve the desired agency classification and avoid being filtered out by an algorithm.

125. Id. at 714.
126. Id.
127. Id.
They may also charge a premium for this “insider” expertise, disadvantaging stakeholders who do not hire their services.129

The level of risk in an expertise contracting relationship might vary according to the amount of external transparency involved. When an expertise contractor’s role is disclosed externally, there is an incentive to select a vendor whose reputation and potential conflicts do not undermine the contractor’s credibility or the government’s. A less transparent arrangement naturally has more risk potential.130

In the body shop, the embedded nature of the contractors gives them special access, not only to the folkways and culture of the agency—something that our interviews suggest agencies value very much because it helps the contractors be effective—but also to inside knowledge about the agency and its planned actions. Where contractors function almost like staff,131 the opportunities for conflicts may be numerous and frequent in the same way they are for federal employees. However, as articulated above, contractor employees are not subject to the same ethics restrictions as federal workers, which introduces a vulnerability. Even in the presence of a nondisclosure provision in the contract, the contractor could use inside information for their own gain, either on a personal or on an organizational level. For that reason, body shops present the highest risk in this category.


130. External transparency is not a universal cure, however. In the case of McKinsey’s consulting relationship with the FDA, the firm never disclosed its conflicts to the agency. McKinsey’s client list is notoriously secretive, so it would be difficult, if not impossible, for outsiders to detect the overlap. Ian MacDougall, How McKinsey Makes Its Own Rules, PROPUBLICA (Dec. 14, 2019, 10:20 AM), https://www.propublica.org/article/how-mckinsey-makes-its-own-rules [https://perma.cc/8Y6Y-R3V6]. Although the firm’s contract with the agency required disclosure of such conflicts, the House investigation found that “McKinsey appears to have repeatedly certified that there were ‘no relevant facts or circumstances which would give rise to an organizational conflict of interest.’” STAFF OF H.R. COMM. ON OVERSIGHT AND REFORM, supra note 123, at 5.

131. Interview with Interviewee 1 (interview notes on file with authors).
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B. Reasoning Risks

Reasoning is an important part of the rulemaking process.\textsuperscript{132} Having a reasoned basis for a rule is more than just a legal requirement—an aspect of rulemaking that we discuss later in Part IV.A. The act of reason giving can also influence the deliberative process within agencies, leading agencies to make decisions that incorporate sound legal and policy principles.\textsuperscript{133} Forcing policymakers to elucidate the reasons why they are proposing a certain course of action can clarify the advantages and disadvantages of a policy and highlight potential inconsistencies. This logic undergirds much support for cost-benefit analysis (“CBA”) as an analytic tool in rulemaking. Proponents of CBA often point to how, by virtue of explicitly stipulating (and, ideally, quantifying) the costs and benefits of a proposed policy, agencies can guard against biases and shortcomings in human reasoning and judgment, such as availability heuristics and differential evaluations of gains and losses.\textsuperscript{134}

Contractors introduce risk into agency reasoning in a curious way. Our argument is not that contractors are any less capable of reasoning or reason giving than bureaucrats.\textsuperscript{135} Rather, we point out that—in addition to potentially conflicted work, as discussed in the prior

\textsuperscript{132} Indeed, Professor Edward H. Stiglitz argues that, when it comes to policymaking, reasoning is the bureaucracy’s comparative advantage over the legislature. \textit{Edward H. Stiglitz, The Reasoning State} 8 (2022). He argues that “the administrative state has the promise of producing policy that possesses reasonableness, a justifiable nexus between means and ends—and it is publicly believed to have that attribute.” \textit{Id}. at 9–10.

\textsuperscript{133} As such, reason giving can also affect public perceptions of the agency’s legitimacy. \textit{Id}. at 9–10.

\textsuperscript{134} Cass R. Sunstein, \textit{Cognition and Cost-Benefit Analysis}, 29 J. LEGAL STUD. 1059, 1060 (2000) (noting that “[c]ost-benefit analysis should be understood as a method for putting ‘on screen’ important social facts that might otherwise escape private and public attention” and “a way of ensuring better priority setting and of overcoming predictable obstacles to desirable regulation”); \textit{see also} Peter Mackie, Tom Worsley & Jonas Eliasson, \textit{Transport Appraisal Revisited}, 47 RSCH. TRANSP. ECON. 3, 4 (2014) (arguing that “[a] framework within which impacts are quantified on a consistent basis forces decision makers to face up to numbers, so decreasing optimism bias and our inherent reluctance to give up beliefs and ideas”). Finally, Professors Benjamin Minhao Chen and Brian Libgober provide experimental evidence of bias reduction associated with both reason giving and cost-benefit analysis. \textit{See generally} Benjamin Minhao Chen & Brian Libgober, \textit{Do Administrative Procedures Fix Cognitive Biases?}, 20 J. PUB. ADMIN. RSCH. & THEORY 15 (2023).

\textsuperscript{135} Contractors may, in fact, be equipped to make better decisions on some matters than civil servants because of their specialized expertise. The point we are making here is that the incentive structures of the two different types of actors are sufficiently different such that they warrant evaluation, irrespective of the quality of the decisions rendered.
Section—contractors’ incentives to engage in difficult conversations and to question edicts from leadership differ meaningfully from those of career staff. For example, contractors may have less long-term perspective than career staff. Those differences may discourage contractors from probing and interrogating proposed policies in ways that may challenge an agency’s planned course of action or identify flaws in the agency’s logic. The concern is that the resulting rulemaking policies are not as carefully reasoned and may be less well-designed than they might be otherwise.

Put simply, contractors do not have the same motivation to “kick the tires” that career civil servants do. Professor Jon D. Michaels encapsulates these differential incentives:

Contractors are motivated to be hired, anxious to be retained, and eager to be assigned additional fee-generating responsibilities. They thus have every reason to internalize the agency chiefs’ political priorities. Again, civil servants are quite different. Civil servants are protected against politically motivated hiring and firing decisions. Civil servants enjoy such protection notwithstanding the ostensible inefficiencies job tenure invites—and do so precisely because we have long valued the rank-and-file’s capacity to assert expertise, resist partisan over-reaching, and further the mission of the agency.136

The result of these structural differences is that, compared to career civil servants, contractors are considered “far more solicitous”137 and more “obedient and enthusiastic.”138

Reasoning is, of course, most important for substantive decisions rather than administrative ones. It follows that the reasoning risk does not apply to ministerial contractors, whose purview may cover many tasks but are limited to those of an administrative nature.

136. Michaels, supra note 10, at 117.
137. Id. at 133.
138. Paul R. Verkuil, Public Law Limitations on Privatization of Government Functions, 84 N.C. L. REV. 397, 465 n.380 (2005). Of course, the extent to which this is a feature or a bug depends on one’s perspective. This is demonstrated by recent efforts to undermine civil service protections and reclassify groups of federal employees as at-will employees. See generally Donald P. Moynihan, Public Management for Populists: Trump’s Schedule F Executive Order and the Future of the Civil Service, 82 PUB. ADMIN. REV. 174, 174–76 (2022) (detailing the development of and reaction to an executive order that would permit the president and his appointees to fire career officials at will); see also Robert N. Roberts, The Administrative Presidency and Federal Service, 51 AM. REV. PUB. ADMIN. 411, 411 (2021) (arguing that “danger of misuse of the administrative state has just become too serious to permit presidential administrations to coerce career civil servants to put the ideological interests of a President over the public interest”).
The risk of faulty or feckless reasoning does have bearing for expertise contractors and regulatory body shops, however. Both types of contractors provide agencies with substantive advice. Being unwilling to ask probing questions or upset the agency’s planned course of action can harm a rule, regardless of whether such advice comes from an expertise contractor or a regulatory body shop contractor. But the circumscribed, task-specific nature of expertise contracts means the reach of these harms is necessarily limited. Contractors from regulatory body shops, by contrast, may face greater incentives to engage in “‘yes’ men and women”\textsuperscript{139} behavior. These contracts can be associated with large sums of money (perhaps more so than discrete expertise contracts), and, accordingly, they can also occupy a greater proportion of individual contractors’ time. Therefore, from the contracting firm’s perspective, maintaining the contract and keeping “the boss” (that is, the agency) happy is likely to be a highly salient concern. Following this logic, regulatory body shops present the greatest risk to reasoning.

\subsection*{C. Capacity Risks}

For this set of risks, we consider both short-term and long-term impacts on agency capacity. By capacity, we mean the ability of an agency to carry out its mission successfully, particularly with regard to the human capital that is native to the agency.\textsuperscript{140} These capacity risks do not carry the same implications for each type of contractor. We therefore begin by describing our assessment of the risks and then explore the implications across the contractor types.

The short-term risk to agencies of using contractors is relatively limited. In the near term, contractors can serve as an essential set of additional hands, providing agencies with necessary surge capacity. But they can also leave the agency in the lurch, as an abrupt change to a contracting relationship where a contractor is performing timely and important work can seriously disrupt an agency’s regulatory pipeline. This might occur because of normal turnover in contractor staff, disputes between the contractor and the agency, contractor suspension

\textsuperscript{139} M ICHAELS, supra note 10, at 128.

\textsuperscript{140} Conceptually, an agency’s capacity might include other features such as material resources. We follow Professor Nicholas R. Bednar in focusing on the role of human capital in agency capacity. See Nicholas R. Bednar, \textit{Bureaucratic Autonomy and the Policymaking Capacity of United States Agencies, 1998–2021}, POL. SCI. RSCH. & METHODS 1, 2 (2023) (defining a high-capacity workforce as having “(1) substantive and procedural expertise, (2) an ability to recruit and retain skilled employees, and (3) an ability to organize itself for efficient team production”).
or debarment, or an appropriations issue such as a sequester or partial
government shutdown that interrupts a contract. While every
institution faces the potential for turnover in its staff, a contract
covering the entirety of a function (such as paralegal services) exposes
an agency to more capacity risk than a situation where the contractor
is merely supplementing existing agency capacity (such as contract
paralegals working with agency paralegals).

Over the longer term, the risks of contractor reliance for capacity
are more severe and carry the potential to chip away at an agency’s
rulemaking apparatus. Two capacity risks emerge with a longer time
horizon in focus.

First, the time-delimited nature of contractual relationships
encourages short-termism and can ultimately dampen appetites for
innovation within an agency. Some agencies prefer contracts to be
rebid annually—even for established relationships like regulatory body
shops. Yet as Professors H. Brinton Milward and Keith G. Provan
note: “[f]requent rebidding of contracts is counterproductive as it
discourages a long-run perspective on the part of the providers.”
For example, in rulemaking this incentive structure can deter investments
in reforms that could vastly improve an internal agency process or
discourage the adoption of new technologies that require considerable
training. Contractors, who may not hold the same contract in the next
cycle, have less of an incentive to encourage or propose long-term
improvements in an agency since they may not be able to complete
these projects before their contract ends, and, even if they do, their
organization may not be the one that reaps the benefits of such
improvements.

Second, contractor use can undermine democratic principles.
When contractors—rather than bureaucrats—provide government
services, the distance between citizens and their government increases.
This contributes to what Professor Suzanne Mettler refers to as the
“submerged state,” or the idea that many policies—often by design—
can obscure government’s role from ordinary Americans. She
explains: “[o]ur government is integrally intertwined with everyday life

141. Interview with Interviewee 1 (interview notes on file with authors).
142. H. Brinton Milward & Keith G. Provan, Governing the Hollow State, 10 J. PUB. ADMIN.
143. SUZANNE METTLER, THE SUBMERGED STATE: HOW INVISIBLE GOVERNMENT
POLICIES UNDERMINE AMERICAN DEMOCRACY 4–6 (2011).
from health care to housing, but in forms that often elude our vision: governance appears ‘stateless’ because it operates indirectly, through subsidizing private actors.”144 The implications of her argument are enormous, including declining trust in government; diminishing capacity for citizens to form meaningful opinions about government; and, ultimately, undermining what citizenship in a democracy means.145

While this argument straightforwardly applies to contractors providing “street-level” services to citizens, rulemaking contractors are also implicated, although perhaps less obviously so. Consider the following scenario. In order to support a planned proposed rule, Agency A contracts with Firm B to administer a survey of regulated entities about “best practices” in the industry.146 The survey instruments include Firm B’s logo, but the text at the start of the survey clearly discloses that the research is being conducted on Agency A’s behalf. Some respondents note Agency A’s fine-print role and understand that this is actually a government data collection. However, with survey attention being notoriously low,147 others may register Agency A’s name but not realize that the survey is on behalf of the agency, and still others may never notice Agency A’s role.

The failure by some groups to internalize Agency A’s involvement in the survey is problematic. Imagine that the results of the survey lead Agency A to decide not to issue the proposed rule after all. Many people are disappointed by the agency’s decision not to issue a proposed rule. Some respondents to the survey, particularly those who did not understand the agency’s sponsorship role, think “Agency A is not taking the problem seriously, even though we all care about this issue. Even Firm B cares about the problem!” While hypothetical, this scenario is plausible, and the misunderstanding may contribute to exactly the problems Mettler points to: diminished trust in the agency (and perhaps government in general) and undermining of these

144. Id. at 6.
145. Id. at 6, 26–28, 123.
146. One agency official we interviewed indicated that using contractors to survey industry was “extremely useful” and led to better results than if the agency had done a survey in-house. Interview with Interviewee 18 (interview notes on file with authors).
147. Distracted or low-attention respondents are a problem that perennially vexes survey researchers. See, e.g., R. Michael Alvarez, Lonna Rae Atkeson, Ines Levin & Yimeng Li, Paying Attention to Inattentive Survey Respondents, 27 Pol. Analysis 145, 146 (2019) (explaining that “[s]ome respondents may pay little attention to the questions or their responses, while others may deliberately misrepresent their behavior or preferences”).
groups’ ability to form meaningful—and accurate—opinions about government.148

We now turn to consider how these capacity risks attach to each contractor type. Ministerial contractors are associated with low capacity risks across the board. In the short term, an abrupt loss of an individual contractor might not be too disruptive to a rulemaking, but the loss of the entirety of an administrative support team, for example, could potentially throw a rulemaking into confusion. However, given the administrative nature of the work, the tasks would likely flow to the remaining (and likely already overworked) agency staff. While unfortunate, this is a challenge an able manager could overcome and does not suggest a serious threat to the agency.

Over the longer term, outsourcing of ministerial functions poses some capacity risks to the government, but not of a serious or grave nature. The use of ministerial contractors to perform multiple administrative functions may allow contractors’ biases against long-term investments to stymie innovation. Administrative innovations can be important in rulemaking, and this should be taken seriously. At the same time, administrative innovations can be handled centrally—not at the program level, where most rulemaking contractors may engage with the agency. Thus, the agency may not be wholly shut off from reform efforts due to contractor use. The limited external transparency associated with ministerial contractors may actually be a boon for democracy. That it is difficult for outsiders to discern which ministerial tasks in rulemaking contractors perform and which agency personnel perform means that this type of contracting work product is often conflated with agency work product. This lack of external transparency puts the agency front and center in the public’s mind; they do not know that a contractor was even involved. Therefore, the public perception is that the agency performed the ministerial work. And the public can appropriately hold the agency accountable for ministerial successes or failures. Counterintuitively, then, the lack of external transparency is a positive force in this case; it does not introduce unnecessary confusion about who is the ultimate sponsor of the rulemaking.

For the expertise contractor, the short-term risk of losing access to contracted expertise is akin to the risk of losing access to on-staff expertise. So long as the government is capable of supervising the work, we might not be too worried about the implications for

148. Mettler, supra note 143, at 6, 26–28, 123.
government capacity. However, supervisory capability for expertise contractors is a fine line; while the agency wants to harness all the benefits of private sector expertise, it needs to retain sufficient competence to ensure that the deliverables it receives reflect the agency’s goals and represent the public interest. Keeping track of this line over the long term is an ongoing challenge, one that can get lost in the shuffle of competing agency priorities and ongoing staff shortages.

For long-term innovation risks associated with capacity, expertise contractors may be an asset rather than a liability. Some agency officials describe contractors as “fresh eyes”\textsuperscript{149}; this characterization may be most apt for expertise contractors, who know a lot about their respective fields—and, accordingly, best practices in the field—and who, by definition, interact with the agency in a transactional way. This relationship allows expertise contractors to nudge agencies towards innovations, although it is up to the agency to implement them. For long-term democracy risks, the survey example described above could be the product of an expertise contractor or a regulatory body shop. Expertise contractors’ task-specific nature, however, limits the reach of this particular risk.

Compared to the other kinds of rulemaking contracting arrangements, body shops carry the greatest capacity risks, both short- and long-term. An abrupt end to a contract could mean that multiple people woven into the fabric of the agency’s day-to-day decision-making processes are suddenly gone from the team, making this more acute than ordinary staff turnover, which tends to happen on an individual basis. This could disrupt an agency’s rulemaking. Whether they are contractors or federal employees, agencies need people to write rules. Any disruption involving core staff could jeopardize the expertise and labor necessary to complete the rulemaking.

Over the long run, body shops can also exacerbate risks associated with innovation and democracy. Institutionally, body shops are oddly situated—they are deeply enmeshed with the agency but might be on the short-term leash of a one-year contract. This juxtaposition makes a terrible combination for institutional innovation. Contractors in a regulatory body shop are well positioned to identify problems in and potential reforms to an agency’s rulemaking apparatus. But, by virtue of their contract structure, they are poorly incentivized to initiate or pursue such reforms.

\textsuperscript{149} Dooling & Potter, ACUS Report, supra note 6, at 39.
The risks to democracy are also concerning. Regulatory body shops take on tasks that the public assumes the agency is performing. The more they take on, the higher the odds that they will interact with the public. This has consequences because, like the survey example introduced earlier, the public might be confused about the contractor’s role, contributing to misunderstanding about the government, the agency, and its rule.

Finally, regulatory body shops introduce another long-term democracy-related risk, one that is not relevant to the other contractor types. When they use them, agencies rely extensively on regulatory body shops. While this reliance can build incrementally, it can also result in what we call a *doom loop*, where, rather than using contractors as a short-term bridging strategy, agency reliance on contractors morphs into the de facto status quo. Using regulatory body shops may enable an agency to keep up appearances; to top agency leaders and congressional overseers, the agency appears to be performing well and producing steady regulatory output. But, because the bureaucrat-contractor equilibrium is not always visible—even to overseers—what began as a capacity deficit within the agency becomes a self-fulfilling prophecy. In the long term, this can erode the ability of the agency to produce rules on its own, without the help of contractors. This doom loop poses a long-term democracy risk because it undermines an agency’s capacity to advocate for additional bureaucratic staff in the future and further pushes the rulemaking process outside democratically accountable agency entities.

The limited transparency associated with regulatory body shops, combined with the weak ethical restrictions discussed above, could easily put an agency in the situation where a body shop has drafted most or all of a rule that is flawed in some way (such as biased toward the contractors’ preferences). But given the hollowed-out capacity at the agency, that agency is unable to detect or remedy the flaw. In sum, body shop contractors, serving in a manner very similar to agency staff and doing a blend of both administrative and substantive tasks, are indispensable in a way that presents short- and long-term capacity risks to the agency. This dynamic is ironic given that these contractors are brought on to supplement agency capacity but may ultimately weaken it.

We recap our analysis of the various governance risks associated with rulemaking contractors in Table 2.
Table 2. Ethical, Reasoning, & Capacity Risks of Rulemaking Contractors

<table>
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<th>The Ministerial Contractor</th>
<th>The Expertise Contractor</th>
<th>The Body Shop</th>
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<tbody>
<tr>
<td>Ethical</td>
<td>Low</td>
<td>Medium</td>
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<tr>
<td>Reasoning</td>
<td>Low</td>
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<tr>
<td>Staffing Capacity</td>
<td>Low</td>
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<tr>
<td>Innovation Capacity</td>
<td>Low</td>
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<td>Democratic Capacity</td>
<td>Low</td>
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IV. DOCTRINAL RISKS OF RULEMAKING CONTRACTING ARRANGEMENTS

Beyond the heightened governance risks that accompany body shops and some expertise contracting arrangements, there are at least two ways that these arrangements may put agency rules in direct legal jeopardy. First, they may open the agency to attack on procedural grounds. What does it mean for an agency to have a reasoned basis for its rule if contractors did some or all of the reasoning? Can an agency be understood to have fulfilled its obligation to consider the public comments if only a contractor read them all? Second, these contracting arrangements may undermine an agency’s claims to *Chevron* deference. These doctrinal considerations have implications for all three types of rulemaking contracting arrangements discussed above; however, the consequences are most severe with respect to regulatory body shops, which, by virtue of their embedded status, put agencies on
a collision course with doctrines that take for granted the agency’s role in rulemaking.\footnote{150}

\section*{A. Compromising Procedural Responsibilities}

When promulgating rules, agencies have procedural responsibilities to meet. The APA lays out the most essential procedures, notably the requirement for publication of a proposed rule in the Federal Register and the opportunity for public comment.\footnote{151} Over time, subsequent statutes, executive orders, and case law have layered more elaborate procedures on top of the APA’s skeletal framework.\footnote{152} Administrative procedures are a tool of legitimation by bureaucratic agencies.\footnote{153} Many, therefore, view procedures as a means

\footnotetext{150}{
We hold aside the very real challenges that plaintiffs would have to overcome due to the presumption of regularity and limitations on discovery. This is on display in litigation in which plaintiffs make claims related to contractor involvement in the rulemaking process. One set of these claims that an agency’s involvement with its own contractors constitutes ex parte contacts. \textit{E.g.}, United Steelworkers of Am. v. Marshall, 647 F.2d 1189, 1217–20 (D.C. Cir. 1980), \textit{cert. denied sub nom.} Nat’l Ass’n of Recycling Indus., Inc. v. Sec’y of Lab., 453 U.S. 913 (1981) (finding that contractors acting after the record closed were “the functional equivalent of agency staff” and therefore communications with them were not ex parte contacts); Nat’l Small Shipments Traffic Conf., Inc. v. ICC., 725 F.2d 1442, 1449–50 (D.C. Cir. 1984) (finding that an implied-in-fact contract was sufficient to conclude that one was “an agency insider for purposes of the ex parte contacts rule”). Others have complained when agencies failed to place their consultant reports in the rulemaking record for public comment. \textit{E.g.}, Nat’l Mining Ass’n v. Chao, 160 F. Supp. 2d 47, 87–88 (D.D.C. 2001) (finding that when a consultant helps the agency analyze the record, the consultant’s work product does not need to be disclosed).}

\footnotetext{151}{
Congress has added procedural requirements through statutes like the Regulatory Flexibility Act, which, among other things, requires agencies to take additional procedural steps to accommodate small businesses. 5 U.S.C. § 601. And through unilateral actions like Executive Order 12,866, presidents have tasked agencies with analytical requirements like regulatory impact analysis. Exec. Order No. 12,866, 58 Fed. Reg. 190 (Sept. 30, 1993). While courts are more reticent to formally command agencies to adopt procedures, a principle articulated in \textit{Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council}, 435 U.S. 519, 555 (1978), the de facto result of judicial review of rulemaking has been to compel agencies toward greater formalization of regulatory preambles, for example. See Michael Sant’Ambrogio & Glen Staszewski, \textit{Democratizing Rule Development}, 98 WASH. U. L. REV. 793, 807 (2020) (“The requirement that agencies provide a reasoned response to salient public comments creates an incentive for agencies to front-load their analytic efforts and puts them in a \textit{defensive posture} during notice and comment.” (emphasis added)); Richard W. Parker, \textit{The Empirical Roots of the Regulatory Reform Movement: A Critical Appraisal}, 38 ADMIN. L. REV. 359, 397 (2006) (“Goaded by judicial appeals and court decisions, agencies have developed the tradition of offering extremely long explanations densely packed with technical detail and responsive to a host of comments but targeted only at an insider audience.”).}

\footnotetext{152}{
See, e.g., Bruce Ackerman, \textit{The New Separation of Powers}, 113 HARV. L. REV. 633, 697 (2000) (explaining that, despite its shortcomings, the Administrative Procedure Act nonetheless}
to ensure that agencies have acted rationally, equitably, and democratically. Whether this view is correct or not—though we tend to think it is—the APA opens up the agencies to litigation when they violate these procedures. What happens when contractors—and not agencies themselves—are ultimately the ones guiding an agency’s procedural actions?

Two examples highlight the stakes of contractor enmeshment in an agency’s procedural obligations: the need to provide a reasoned basis for their actions and the need to consider public comments. The reasoned basis requirement in rulemaking demands that the agency explain what it is doing and why. Professor Jerry Mashaw elaborates: “[Statutory authority must be combined with reasons, which usually means accurate fact-finding and sound policy analysis. Otherwise, an administrator’s rule or order will be declared ‘arbitrary,’ perhaps even ‘capricious.’” Meanwhile, the comment requirement under the APA stipulates that agencies must give “consideration” to comments filed in response to a proposed rule. We consider how contractor involvement influences each procedural responsibility in turn.

With respect to reasoned basis, agencies have a strong incentive to have good reasons for taking a specific course of action and to document those reasons in the preambles to their final rules, among

“recognizes that regulatory decisionmaking needs special forms of legitimation that enhance popular participation”). Administrative procedures are also understood to be a mechanism of political control. See Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, Administrative Procedures as Instruments of Political Control, 3 J.L. ECON. & ORG. 243, 244 (1987) (noting that “[a]dministrative procedures are [a] mechanism for inducing compliance. Procedural requirements affect the institutional environment in which agencies make decisions and thereby limit an agency’s range of feasible policy actions”); Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies, 75 VA. L. REV. 431, 433 (1989) (arguing that “effective political control of an agency requires ex ante constraints on the agency (that is, a means of restricting the agency’s decisionmaking before it actually makes policy choices), one source of which is manipulation of its structure and process”).

154. Professor Nicholas Bagley critiques this view of procedures, arguing that the legal and academic focus on procedure is misguided and a “fetish.” He argues that “[p]roceduralism has a complex, contingent, and often ambiguous connection to legitimacy and capture. Many well-intentioned efforts to promote good governance can—and do—drain agencies of their legitimacy, impair their responsiveness to the public, and expose them to capture.” Nicholas Bagley, The Procedure Fetish, 118 MICH. L. REV. 345, 400 (2019).


156. 5 U.S.C. § 553(c).
other places. 157 In *Citizens to Preserve Overton Park, Inc. v. Volpe* 158 the Court established that when an agency fails to produce a contemporaneous record to justify its decision, a court may take a more searching review than it otherwise would. 159 Professor Thomas McGarity explains that, “[f]ully aware of the consequences of a judicial remand, the agencies are constantly ‘looking over their shoulders’ at the reviewing courts in preparing supporting documents, in writing preambles, in responding to public comments, and in assembling the rulemaking ‘record.’” 160

The D.C. Circuit previously explained that a final rule’s preamble need not “discuss every item of fact or opinion included in the submissions made to it in informal rule making.” 161 Instead, the preamble should “enable us to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did.” 162 In modern agency practice, regulatory preambles can be hundreds or even thousands of pages long. 163 As the task of preparing preambles has become more extensive, it is perhaps not surprising—at least at a practical level—that agencies turn to contractors for help.

As we documented, contractors fulfill a wide range of tasks associated with producing a rule’s preamble. For example, some contractors are involved at every step of a proposed and final rule’s development, including drafting and reviewing the preamble, analysis sections, and the regulatory text. This could involve writing the first

161. Auto. Parts & Accessories Ass’n v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968). Other courts have noted that agencies have discretion—albeit limited—in this task. See United States v. N.S. Food Prods. Corp., 568 F.2d 240, 252 (2d Cir. 1977) (noting that “[t]he agencies certainly have a good deal of discretion in expressing the basis of a rule, but the agencies do not have quite the prerogative of obscurantism reserved to legislatures”).
draft or editing agency staff work for content and clarity. As noted in the report, “[o]ne interviewee estimated that any given preamble might be 60% written by federal employees and 40% written by contractors,” a setup congruent with a regulatory body shop relationship. At the other extreme, there is a version of this drafting assistance in which contractors merely take care of formatting and other administrative tasks, a setup akin to a ministerial contracting relationship.

Involving contractors in the fact-finding, policy analysis, and drafting of rulemaking complicates the notion of agency reason giving. At what point does an agency’s reasoning start or stop being its own? Beginning with an edge case is helpful. While our report did not uncover instances of agencies simply handing the regulatory pen to contractors and signing the output, were such a case of “rubber-stamping” to occur, would—or should—the agency head’s signature ratify the contractor-drafted reasoning basis?

That the agency must be the one to determine the agency’s position and reasoning, rather than rubberstamping contractors’ work, is both obvious and somewhat invisible in administrative law. The Court has articulated that “the agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” The question is whether a contractor can stand in for the agency to “examine” data and “articulate” its explanation. To the extent that contractors are mere agents, faithfully carrying out their contractual duties without question, the answer is a straightforward yes—as straightforward as it is, anyway, when the drafters are agency staff. While the agency head’s signature might violate her own duty to supervise, the error might be harmless with respect to the regulation.

164.  DOOLING & POTTER, ACUS REPORT, supra note 6, at 28–29.
165.  Id. at 29.
166.  Id.
Yet, as canonical principal-agent models from economics and political science aptly illustrate, rarely are agents perfectly faithful to their principals’ preferences.\textsuperscript{169} If, instead, contractors are acting as agents with their own set of interests that are not perfectly aligned with those of the agency they are working for, then the agency head may have signed a regulation that does not reflect the agency’s choice but instead some blend of the contractors’ preferred option and the agency’s. This problem is compounded when the agency head has not conducted a sufficient analysis of the regulation, since not only has the agency promulgated a regulation that does not reflect its preferred policy, but it is also unaware of the defect. Concerns about personal and organizational conflicts of interest are particularly acute in the context of the feeble ethics protections in place for contractors. The implication is that there is a logical defect—potentially a consequential one—in the agency’s claim to have articulated a reasoned basis.

This defect lands differently across the various contracting arrangements. Having a contractor help to prepare a proposed or final rule preamble can improve the agency’s deliberations, but the implications of contractor assistance are not the same for ministerial contractors and expertise contractors as compared to regulatory body shops. For example, one interviewee “called it ‘excruciatingly useful’ to have contractors review drafts because they could point out where the agency might not be fully explaining their decisions.”\textsuperscript{170} This kind of feedback might come from a ministerial contractor providing copyediting services, from an expertise contractor who provided data supporting an argument in the preamble, or from a regulatory body shop that performed both of these tasks in addition to helping draft the preamble and the regulatory text. Drafting such large, complex documents involves many steps: conducting background research,

\textsuperscript{169} The principal-agent model is the theoretical workhorse for rational choice explanations of organizations as well as political oversight of the bureaucracy. See generally Jean-Jacques Laffont & David Martimort, The Theory of Incentives: The Principal-Agent Model 2 (2002) (noting that “[c]onflicting objectives and decentralized information” are limitations on the principal-agent model); Gary J. Miller, The Political Evolution of Principal-Agent Models, 8 Ann. Rev. Pol. Sci. 203, 206 (2005) (explaining that the principal-agent theory’s “applications have also provided the basis for understanding persistent and puzzling inefficiencies in bureaucracy and other forms of political hierarchy”); Sean Gailmard & John W. Patty, Formal Models of Bureaucracy, 15 Ann. Rev. Pol. Sci. 353, 355 (2012) (“The vertical relationship between one or more principals and one or more agents is arguably the centerpiece of a bureaucratic institution.”).

\textsuperscript{170} Doolding & Potter, ACUS REPORT, supra note 6, at 29.
making an outline, fleshing out that outline into coherent prose, many rounds of substantive editing, and copyediting. As any good writer knows, the choices inherent in these tasks are often impossible to parse, they are not always linear, and each of them plays a role in the quality of the ideas expressed in the writing. In practice, participation in any element of the “writing” of written regulatory materials can lead to, for example, more or less stringent regulations. Back-and-forth between any of these types of contractors and agency staff might conceivably result in regulatory exemptions being widened or narrowed, documentation requirements being made more comprehensive or less onerous, or criteria for program inclusion being raised or lowered.171

In this scenario, the regulatory body shop proves problematic. The internal transparency associated with ministerial and expertise contractors means that agency staff are more likely to be cognizant of potential biases arising from contractor input. In contrast, when a regulatory body shop suggests a change to a rule, their embedded status means that agency staff—who are accustomed to regularly working with them—might be less vigilant about surveilling for potential biases in that feedback. Additionally, the reach of the regulatory body shop—across many tasks within one rulemaking and across many rulemaking projects—enables multiple opportunities for influence. Meanwhile, the limited, task-specific reach of the ministerial or expertise contractor means that, even if the contractor had a particular agenda to pursue with respect to the policy included in a rule, their ability to push this agenda would be limited.

Turning to an agency’s obligations to consider comments, a similar question arises: can an agency be understood to have considered the comments if a contractor manages most or all of the comment processing?

Of the various functions for which agencies turn to contractors, multiple interviewees noted tasks involving public comments.172 We found that contractors help with a wide variety of tasks associated with public comments.173 Some tasks are ministerial, such as uploading

171. Professor Glen Staszewski explained how deliberation helps decision-makers identify good reasons for taking an action. Glen Staszewski, Reason-Giving and Accountability, 93 MINN. L. REV. 1253, 1282 (2009). This can come in the form of “information and competing perspectives.” Id. Our concern is outside influence that comes cloaked in trusted, insider status.
172. DOOLING & POTTER, ACUS REPORT, supra note 6, at 30.
173. Id. at 30–31.
public comments received by the agency, including by fax or email, to Regulations.gov or downloading comments received on Regulations.gov to agency systems. Contractors also help screen public comments for personally identifying information, such as the commenter’s home address or birthdate, that the commenter included on their comment but which the agency, as a policy matter, does not release back to the public when the agency posts public comments on its website or releases them on Regulations.gov.

Other tasks involve more discretion. A common task given to contractors was organizing comments into a worksheet or database of some sort. This could help an agency get a sense of what kind of people or groups are commenting on the rule. A worksheet that includes commenter name and organization, and perhaps the date of the comment, is straightforward. Other fields begin to introduce discretion. Consider a worksheet that asks for the commenter’s primary issue; to characterize the commenter’s arguments as legal, policy, or programmatic; or to summarize any proposed changes the commenter offers. While this could be a copy-and-paste exercise for some comments, it is likely to involve judgment on the part of the person who is reading the comment and translating it into the worksheet’s format. Further, contractors can help analyze comments using language processing tools with their own proprietary software or programs provided by the agency. Finally, some contractors draft the agency’s response to comments for use in the final rule preamble. These tasks contain judgment points for how analysis is set up, how the output is captured, and how many of these tasks the contractor takes on.

The extent of contractor involvement in comment processing triggers different levels of procedural implications. A ministerial contractor that downloads the comments and removes any confidential information is unlikely to pose serious legal problems for the agency. An expertise contractor that applies text analysis algorithms on the comments according to a set of well-defined criteria selected by the agency is similarly low risk. However, an expertise contractor or a
regulatory body shop that takes on many comment management tasks and exercises a considerable amount of judgment in performing that work may introduce a procedural defect. If, for example, the regulatory body shop staff read each and every comment, and agency staff exclusively relied on the contractor’s summaries of those comments to inform its final rule, then the agency may have failed to adequately consider the public comments.

National Small Shipments Traffic Conference, Inc. v. Interstate Commerce Commission179 is instructive in evaluating the role of contractors in comment analysis. Here, the D.C. Circuit considered the role of agency staff in the rulemaking process.180 The petitioner complained that agency staff biased the material placed before agency decision-makers in a manner that produced a procedural defect under the APA.181 The court noted that agencies are permitted to delegate “detailed consideration of the administrative record to its subordinates while retaining the final power of decision for itself.”182 The court specifically mentioned that decision-makers “are free to rely on the summaries prepared by agency staff” and that the presumption of regularity generally shields such internal agency processes from review.183 The use of contractors was not a part of this case, but the court’s reasoning explores how “severely skewed staff summaries may breach the decisionmaker’s statutory duty” under APA § 553(c) to give consideration to comments.184 In that scenario, the court posited that “negligence or intentional bias” could lead to such skewed summaries.185 In a situation where the bias was introduced due to a contractor’s conflict of interest, the analysis in National Small Shipments suggests a procedural defect as well.186

180. Id. at 1450–52.
181. Id. at 1450.
182. Id. (citing United States v. Morgan, 313 U.S. 409, 421–22 (1941)).
183. Id. (emphasis added) (citing Braniff Airways, Inc. v. Civ. Aeronautics Bd., 379 F.2d 453, 461 (D.C. Cir. 1967)).
184. Id. at 1451 (citing 5 U.S.C. § 553(c)).
185. Id. at 1451 n.12.
186. A contractor making this error due to negligence does not obviously introduce any error beyond that introduced by an agency staff member making the same mistake. Therefore, we focus instead on an error introduced due to a conflict of interest. In that situation, an agency staff member is governed by both the oath they took and the conflict-of-interest requirements that attach to the civil service.
Any legal challenge along these lines would likely have to
overcome the presumption of regularity. This deference doctrine
“credits to the executive branch certain facts about what happened and
why and, in doing so, narrows judicial scrutiny and widens executive
discretion over decisionmaking processes and outcomes.”187 In
National Small Shipments, in the absence of “evidence suggesting bad
faith or improper behavior” by agency staff, the procedural challenge
failed.188 Researcher Dan Guttman argues that the presumption of
regularity should not extend to contractor involvement in agency work
because “the ‘axiomatic’ proposition . . . that officials . . . maintain the
capacity to evaluate and supervise all government work . . . can no
longer be taken for granted.”189 This, combined with the differences in
how conflicts of interest are handled for agency staff and contractors,
counsels away from allowing the presumption of regularity to shield
agency actions that rely extensively on contractors.

Given recent cases that arguably narrow the presumption of
regularity, it is plausible that a case raising contractor conflicts could
overcome that presumption and therefore subject an agency’s rules to
legal risk.190 This is where sensitivity to the type of contracting
arrangement at play is material. An agency’s argument in favor of the
presumption of regularity will be more compelling in the case of a
ministerial contractor or an expertise contractor, where the reach of
the contractor into the comment consideration function is more
limited. When a regulatory body shop has managed most or all of the
comment consideration, an agency’s entitlement to the presumption
ought to be weaker.

Stepping back, reliance on regulatory body shops in the
preparation of regulatory preambles and comment analysis muddles an
agency’s claims to have fulfilled its procedural responsibilities. Other

(2018). Describing the presumption of regularity as “amorphous” in scope, Professors Aram A.
Gavoor and Steven Platt explain that “[i]t is not a singular evidentiary or proof rule, but rather
an array of quasi-doctrinal deference principles that heavily weigh in favor of the government”
and that it “flows from the ‘common experience’ that administrative agencies generally act
lawfully and in the best interest of the public.” Aram A. Gavoor & Steven Platt, In Search of the
Presumption of Regularity, 74 FLA. L. REV. 729, 733 (2021) (citing Stone v. Stone, 136 F.2d 761,
763 (D.C. Cir. 1943)).

188. Nat’l Small Shipments, 725 F.2d at 1452.

189. Dan Guttman, Governance by Contract: Constitutional Visions; Time for Reflection and

contracting arrangements like ministerial contractors or expertise contractors do not present the same complications. While this Section has addressed two of an agency’s primary procedural responsibilities—explaining its reasoning and responding to comments—there are likely other available legal theories too.191

B. Undermining Claims to Deference

Professor Kimberly N. Wehle argues that “when rules are organized and drafted in the first instance by entities other than the agency delegatee identified in the enabling legislation, judicial review must be more—not less—searching.”192 When contractors are the delegatee in question, a more searching review could mean an adjustment to the level or type of deference to which an agency is entitled.

Under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,193 courts defer to reasonable agency interpretations when statutory language is ambiguous.194 The *Chevron* majority explained that Congress might have “consciously desired the [agency] to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so.”195 Indeed, a common—and some have argued “predominant”196—justification for *Chevron* deference is that agencies possess relevant and reliable expertise that courts do not.197

191. Beyond the APA, similar theories could involve that agency’s non-APA procedural obligations such as conducting Regulatory Flexibility Act analysis or evaluating the administrative burdens associated with the Paperwork Reduction Act. 5 U.S.C. § 601 et seq.; 44 U.S.C. § 3501 et seq. Others have also raised constitutional issues. See Dooling & Potter, Rulemaking by Contract, supra note 6, at 713 n.40.


194. *Id.* at 865–66.

195. *Id.* at 865.


Exactly what kind of agency expertise merits deferential treatment is less clear. Professors Shoba Sivaprasad Wadhia and Christopher Walker offer three conceptions of expertise that might justify deference: first, scientific and technical expertise of the type perhaps most apparent when thinking about the thousands of scientists, engineers, and other specialists employed by the executive branch; second, institutional or craft expertise, as that concept is articulated by Professor Sidney A. Shapiro to describe the multifaceted knowledge gained from day-to-day and long-term exposure to the inner workings of government; and third, legislative expertise honed as agencies interact with Congress in the formation of statutes, giving agencies insight into legislative compromises and objectives. \footnote{198}{Wadhia & Walker, supra note 196, at 1217–23 (citing Sidney A. Shapiro, The Failure To Understand Expertise in Administrative Law: The Problem and the Consequences, 50 WAKE FOREST L. REV. 1097, 1099 (2015)).} Contractors—and the different types of contracting arrangements—intersect with each of these forms of expertise.

First, with regard to scientific and technical expertise, the Court has afforded agencies the highest amount of deference. When an agency acts “within its area of special expertise, at the frontiers of science[,] . . . a reviewing court must generally be at its most deferential.” \footnote{199}{Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc., 462 U.S. 87, 103 (1983).} Notably for purposes of our analysis in this Article, the deference is attached to the agency’s own expertise. Does, or should, the introduction of a contractor disrupt this rationale for deference?

In some cases, the courts have viewed the use of competent contractors to augment agency expertise as a boon. \footnote{200}{In at least one case, National Mining Ass’n v. Chao, 160 F. Supp. 2d 47 (D.D.C. 2001), a district court rejected a plaintiff’s argument that the Department of Labor’s scientific determinations were arbitrary and capricious per se because the agency lacked scientific expertise and turned, in part, to contractors. Id. at 78. The court dismissed this as “completely without merit” because Congress had expressly directed the agency to issue the related rule, and “it is not for the Court to make its own determination as to whether the Court believes the agency is qualified for the job the Congress entrusted it with.” Id.} In \textit{Weyerhaeuser Co. v. Costle}, \footnote{201}{Weyerhaeuser Co. v. Costle, 590 F.2d 1011 (D.C. Cir. 1978).} the D.C. Circuit noted that the agency “has taken its responsibility quite seriously, employing no less than three highly qualified private consulting firms to augment its own technological expertise.” \footnote{202}{Id. at 1026.} Courts have also upheld agency use of consultants to
assist the agency with a review of technical information contained in the rulemaking record.203

The central issue is not, then, whether it is appropriate for agencies to employ contractors in a scientific and technical capacity—agencies have been vindicated for making this choice—but rather whether the agency has “enough” of its own expertise to justify deference. This point was raised—but not resolved—in United Steelworkers of America v. Marshall,204 where the D.C. Circuit reviewed a final rule issued by the Occupational Safety and Health Administration (“OSHA”).205 The petitioner argued, among other things, that OSHA’s assistant secretary “hired so many consultants and relied on them so heavily for so many tasks that she essentially abdicated her responsibility for setting the lead standard to outsiders.”206 The court noted that OSHA had admitted that “it lacked sufficient staff expertise to deal with all the important issues without outside help.”207 The court nodded to the petitioner’s “ironic observation” that OSHA’s “request[ed] deference to its expertise while pleading it does not have enough of that commodity.”208 In this case, the court did not reach the question of deference, so this specific question was not resolved.209

Writing in 1985 in a report for ACUS, Professor Thomas O. McGarity took up the issue of resident scientific and technical expertise, homing in on the agency’s capability to oversee contractors.210 His study highlighted the use of scientific and technical contractors in the then-emerging use of “regulatory analysis”—referred to now as “regulatory impact analysis”—to support rulemaking proceedings. He articulates the risk of “[p]olicymaking by [c]onsultants.”211 His analysis hinges on the discretion inherent in this kind of expertise-oriented work: consultants are sometimes asked to

205. Id. at 1207.
206. Id. at 1216.
207. Id.
208. Id.
209. See Robert Choo, Judicial Review of Negotiated Rulemaking: Should Chevron Deference Apply?, 52 Rutgers L. Rev. 1069, 1099 (2000) (arguing in the negative because negotiated rulemaking subordinates the agency’s expertise to its ability to achieve consensus).
210. See McGarity, REGULATORY ANALYSIS, supra note 23, at 269.
211. Id. at 267.
“exercise professional judgment in interpreting facts” and to “be responsible for making the assumptions and drawing the inferences that underlie the predictions that inform regulatory analysis,” examples of what he describes as “subtle policymaking.”212 Consultants must be “closely supervised” by agency staff to prevent these contractors from having “disproportionate impact on the agency’s final decisions.”213 Of course, the supervising staff must “have some familiarity with the technical issues and with the way in which policy preferences can drive the assumptions and inferences that go into technical reports.”214 If the agency staff does not have the expertise needed to supervise the consultant’s technical or scientific output, and the agency relies on that output to make its final rulemaking decisions, this might appropriately sever the agency’s claim to deference based on its technical or scientific knowledge.

Two contracting relationships in particular are implicated by the role of deference to scientific and technical expertise: expertise contractors and regulatory body shops.215 Both of these relationships can involve the agency relying on a contractor providing scientific or technical judgments to inform a rulemaking. Both can involve the contractor assuming some amount of policy discretion and supplying analysis that involves some level of professional judgment.

Returning to the question of resident agency capacity, however, reveals a distinction between expertise contractors and regulatory body shops. In the former case, the discrete, one-off nature of the contracting relationship suggests that agencies are positioned to maintain adequate supervisory capacity over time. For instance, in the case where an agency hires an environmental analysis expert to generate a report that serves as an input for one particular rule, that agency is more likely to be perceived as augmenting its expertise through the use of a contractor. The environmental analysis is but one part of the agency’s rule; it does not stand on its own but requires interpretation by the agency as it is folded into a broader analysis that will come to form the proposed rule.

212. *Id.* at 268–69.
213. *Id.* at 267.
214. *Id.* at 269.
215. Ministerial contractors are definitionally excluded from consideration; they perform administrative tasks and do not conduct substantive work of a scientific or technical nature.
In contrast, consider the agency’s use of a regulatory body shop to prepare an entire RIA. In this scenario, the agency asks the contractor to draft an RIA that may include assumptions about the behavior of regulated parties, the potential benefits of the rule and whether and how to quantify them, the potential costs of the rule and whether and how to quantify them, and choices about which analytical methods to employ. In this case, the contractor’s professional judgment is standing in for the agency’s judgment in a repeated capacity (that is, across many choices), and the contractor’s work product stands on its own. While the agency is obligated to review contractor work product, in theory, the agency could rubberstamp it and include it in the proposed rule without substantive supervision, review, or amendment. It stands to reason that rules supported by contractor-produced analysis, in part or in whole, should be afforded less deference on scientific and technical grounds when the contractor’s expertise has essentially supplanted the agency’s expertise. In that case, the analysis is not a reflection of the agency’s reasoning and assumptions but instead a reflection of the reasoning and analysis of the unsupervised contractor.

Craft expertise is probably more of a conceptual justification for Chevron deference than one that operates in real time. But it certainly exists. Mashaw describes the importance of cultural aspects of agency decision-making that “are not to be found in manuals or regulations.” McGarity explains that agency decisions are “grounded in a kind of intuition that is informed by technical training and expertise.” These agency folkways certainly exist, as they do in all institutions.

Unsurprisingly these folkways are agency-specific, and not universal across the administrative landscape. In our study, we found that agency staff reported that contractor familiarity with agency norms and processes was often a necessary but not sufficient condition

216. DOOLING & POTTER, ACUS REPORT, supra note 6, at 29–30 (discussing instances of agency use of contractors for this purpose).
217. Shapiro, supra note 198, at 1101. Shapiro argues, ruefully, that this is due to the dominant “rational-instrumental” perspective that calls upon agencies to justify their choices using “scientific and social-scientific methodologies, such as cost-benefit analysis.” Id. at 1101, 1135.
218. Mashaw, Bureaucratic Justice, supra note 1, at 67.
220. One contractor’s success with one agency might not be transferable to another, given agency idiosyncrasies. DOOLING & POTTER, ACUS REPORT, supra note 6, at 40.
for an effective contracting relationship; in fact, the lack of such familiarity with an agency was perceived as a drawback to using contractors.221

The agency-specific nature of this type of expertise suggests that there are different implications based on the type of contracting arrangement in question. Because it takes time for contractors to acclimate, the short-term nature of some ministerial contract and expertise contract relationships means that these contractors are unlikely to develop craft expertise. This has an upside for an agency: these arrangements are unlikely to disrupt an agency’s claim to deference on craft expertise grounds.

If, however, contractors stay long enough to learn the unwritten rules of agency procedure—as they are likely to do in a regulatory body shop—the role they play vis-à-vis these unwritten rules becomes material. If, for example, a body shop fulfills a function that was previously handled internally and that plays a meaningful role in how the agency functions, the agency’s own in-house craft expertise will likely dwindle. Consider, for example, a Freedom of Information Act (“FOIA”) office that is staffed mostly by contractors. Over time, the methods and techniques of searching for responsive documents may drift from the “old ways” into some “new ways.” This does not mean that the changes are necessarily for the worse. Contractors might bring outside expertise or technology that makes an agency’s FOIA reviews better. However, if the practical knowledge of how to get something done shifts from agency staff to contractors, then the agency has simultaneously lost some, if not all, of its claim to craft expertise.

In the case of a regulatory body shop, agencies can come to rely on contractors to serve as project managers from “start to finish.”222 These relationships are built on trust and time, with these contractors serving for multiple years and taking on more and more responsibility.223 Regulatory body shops can arise for deeply pragmatic reasons, such as the constraints that apply to hiring agency personnel compared to contractors; nevertheless, reliance on regulatory body shops shifts some measure of the agency’s craft expertise out of the agency and into the private sector. While the tipping point is hard to

221. See id. at 39–40.
222. Id. at 33 (quoting Interview with Interviewee 25 (interview notes on file with authors)).
223. Cf. id. at 32–33 (noting that many tasks “float across a rulemaking project” and defining contractor responsibilities).
locate, it should be clear that there is a point after which the agency’s craft expertise is no longer the agency’s.

Legislative expertise is the notion that an agency’s participation in the legislative process gives it special insight into individual pieces of legislation and their meaning.224 Walker has argued, however, that agency involvement in drafting legislation undermines, rather than supports, the agency’s claim to deference for its interpretations of the resulting statute.225 Relying on his empirical work on the way agencies interact with Congress to help draft legislation, he finds that “agencies have incentives to draft statutes flexibly, broadly, and ambiguously to trigger Chevron deference—and thus engage in self-delegation of primary interpretive authority.”226 Walker weighs these incentives against the special knowledge that agencies gain—about intent and compromises, for example—from being a part of legislative drafting and ultimately recommends that agencies receive less deference when they participate.227

On the surface, contractors are unlikely to disturb the level of deference due to an agency’s legislative expertise because, as we explain in the next Section, current policy categorizes legislative drafting as inherently governmental and therefore off-limits to contractors.228 In articulating this policy, the Office of Management and Budget (“OMB”) did not explain its rationale for considering legislative drafting to be inherently governmental, but one possibility is that this prohibition stems from an interest in protecting the strength of an agency’s special legislative expertise. If a contractor was involved in legislative drafting, and then the contract ended, at least some of that

225. Walker, Legislating in the Shadows, supra note 4, at 1380.
226. Id. at 1419.
228. Off. of Fed. Procurement Pol’y, Final Policy Letter 11-01 on Performance of Inherently Governmental and Critical Functions, 76 Fed. Reg. 56227, 56234 (Sept. 12, 2011). In this Article, we use “legislative drafting” as shorthand for the language of the cited final policy letter: “[t]he drafting of official agency proposals for legislation, Congressional testimony, responses to Congressional correspondence.” Id. at 56241 app. A. That same provision deems drafting of “responses to audit reports from an inspector general, the Government Accountability Office, or other Federal audit entity” to be inherently governmental functions as well. Id.
special knowledge might depart with the contractor. Of course, some of an agency’s special legislative knowledge is likely lost through normal turnover of an agency’s staff. Taking this to an extreme for the sake of argument, if an agency outsourced its entire legislative affairs office, that institutional legislative memory would be lost when the contracting firm turned over. It is reasonable for the executive branch to construct policy that guards against that possibility by placing legislative drafting off-limits to contractors.

Working through these three categories of agency expertise, contractor involvement has divergent implications. More limited contracting arrangements, such as ministerial and expertise contractors, are unlikely to interrupt an agency’s claims to deference. Regulatory body shops, however, stand apart. To the extent that these entities usurp an agency’s own expertise, they shake the agency’s claim to Chevron deference. Agency contracting behavior that undercuts claims to Chevron deference is particularly salient in the present climate, when the doctrine is beset by earthquakes already.

Concerns about contractors undermining deference claims are

229. To the extent that contractors are involved in legislative drafting—in violation of policy—it would be hard to know it from outside. Walker notes that, in the context of agencies advising Congress about draft legislation, there is little to no transparency about how agency involvement influences any given piece of legislation. Walker, Legislating in the Shadows, supra note 4, at 1378–79. As discussed above, it is unlikely that a contractor’s role in helping with legislative drafting would be visible, either.

230. Scholars have diverging views about whether Chevron will last and in what form. Nicholas R. Bednar, What To Do About Chevron—Nothing, 72 VAND. L. REV. EN BANC 151, 154 (2019) (“[W]e have too little evidence about how these reforms would affect Chevron to prescribe any reforms at this time.”); Nicholas R. Bednar & Kristin E. Hickman, Chevron’s Inevitability, 85 GEO. WASH. L. REV. 1392, 1398 (2017) (arguing that Chevron deference, or “something much like it,” is inevitable); Kristin E. Hickman & Aaron L. Nielson, Narrowing Chevron’s Domain, 70 DUKE L.J. 931, 938 (2021) (arguing that Chevron deference should not extend to agency adjudications); Linda Jellum, Chevron’s Demise: A Survey of Chevron from Infancy to Senescence, 59 ADMIN. L. REV. 725, 730 (2007) (explaining “that Chevron is becoming less relevant today”); Gillian E. Metzger, 1930s Redux: The Administrative State Under Siege, 131 HARV. L. REV. 1, 27 (2017) (arguing that “[f]ar too many judicial decisions sustain administrative actions on deferential review to identify a clear move toward rejecting Chevron” as of yet); Cass R. Sunstein, Zombie Chevron: A Celebration, 82 OHIO ST. L.J. 565, 566 (2021) (noting that Chevron “is now under siege”); Wadhia & Walker, supra note 196, at 1200 (dismissing the likelihood of Chevron’s demise).

231. Walker cataloged the various legal arguments that seek to upend Chevron deference. Christopher J. Walker, Attacking Auer and Chevron Deference: A Literature Review, 16 GEO. J.L. & PUB. POL’Y 103, 105 (2018); see also Jack M. Beermann, End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled, 42 CONN. L. REV. 779, 779 (2010) (arguing that “Chevron has been a failure on any reasonable measure and should be overruled”).
exacerbated by the timeframes involved, as the time from initiation of a rulemaking involving contractors to the completion of that project could easily span a decade or more. Gaming out the odds of *Chevron*’s doctrinal staying power over that kind of time span, especially in light of relatively new changes to the composition of the U.S. Supreme Court, might be harder than simply making targeted changes to minimize risk in how agencies use contractors in the rulemaking process.

V. RESPONDING TO REGULATORY BODY SHOPS

So far, we have offered three kinds of rulemaking contracting arrangements and considered how their different features influence an agency’s risk exposure in terms of governance and doctrinal issues. By so doing, we have shown that service contracts differ in meaningful ways.

We conceptualize the risks that an agency faces in working with rulemaking contractors along a continuum. At one end of the continuum, the ministerial contractor is held at arm’s length from the policymaking process and is limited to tasks that are unlikely to influence an agency’s policy choices, thus suggesting low risk of governance or doctrinal issues. In the middle, the expertise contractor performs tasks involving discretion and might expose the agency to more or less risk depending on how the arrangement is structured. At the far end of the continuum is a body shop, where the contractor is deeply embedded into the agency’s rulemaking work—serving long-term and nearly indistinguishable from agency staff—and we argue, in line with conceptual critiques advanced by others, that the agency’s exposure to risk is much higher in this case.

The practical reality is that some agencies lack adequate resources to rely exclusively on their staff for rulemaking, so they turn instead to body shops. Agencies rely on appropriations to fund these contracts, so they operate with the tacit approval of Congress. On a superficial level, they also likely comply with current procurement policy as it relates to “inherently governmental functions,” since the current setup assumes that if an agency official signs off on a rulemaking, that official has assumed responsibility for the rule, irrespective of who—contractor or agency employee—prepared the rulemaking package. This legal fact essentially ends the inquiry.

A first response, then, might be for Congress to prohibit regulatory body shops full stop or for courts to dial back deference and
the presumption of regularity when a regulatory body shop is part of rulemaking. Of course, for the agencies that use them, body shops are indispensable. Understaffed relative to their broad regulatory missions, agencies use body shops to fill in the gaps where agencies are not permitted to hire staff. Upending these arrangements, therefore, would be burdensome—if not cataclysmic—to some agencies, who are unable to increase agency staff, quickly or at all. Cognizant of these limitations, we offer several prescriptions for amending administrative practice to be more responsive to the risks that regulatory body shops present.

A. Make Rulemaking Drafting Functions “Inherently Governmental”

In several other policymaking areas—legislative drafting, strategic planning, and performance plans—either Congress or OMB has placed “drafting” into the inherently governmental category, meaning it is reserved for agency staff. The drafting of rulemaking texts should be extended the same treatment.

The inherently governmental function test is vague as applied to rulemaking and other policymaking tasks. It includes “activities that require either the exercise of discretion in applying Federal Government authority or the making of value judgments in making decisions for the Federal Government, including judgments relating to monetary transactions and entitlements.”232 Grappling with what it means to “exercise” discretion or “make” decisions in this context, current policy imposes a bright line where it might not exist, given the reality of iterative decision-making that takes place as agency staff, and sometimes their contractors, hash out draft rulemaking documents. For rulemaking, it is “[t]he determination of the content and application of policies and regulations” that is inherently governmental.233 Meanwhile “[s]upport for policy development, such as drafting policy documents and regulations, performing analyses, feasibility studies, and strategy options” are closely associated with inherently governmental functions, meaning that they trigger the need for special management controls but can be outsourced to contractors.234

234. Id. at 56234.
The Federal Activities Inventory Reform Act is careful to note that information-gathering or providing “advice, opinions, recommendations, or ideas” to the government are not inherently governmental functions. But, there are some activities for which mere “drafting” is sufficient for a task to be inherently governmental. As part of the Government Performance and Results Act (“GPRA”), Congress required agencies to develop a variety of strategic plans and accountability metrics. Under GPRA, drafting strategic plans, performance plans, and performance reports are all deemed to be inherently governmental work reserved to federal employees. In 2011, as part of the GPRA Modernization Act, Congress deemed two additional functions inherently governmental: the drafting of performance updates and the “development” of agency priority goals.

OMB has also acted to move one form of drafting into the inherently governmental category. The drafting of “official agency proposals for legislation, Congressional testimony, responses to Congressional correspondence, or responses to audit reports from an inspector general, the Government Accountability Office, or other Federal audit entity” is inherently governmental. This interpretation was not proposed by OMB in its proposed policy letter; instead, it was inserted—without explanation—in the final policy letter.

In 1985, after studying how agencies compile what we now call regulatory impact analyses, ACUS recommended that “agencies should ensure that . . . [a]gency employees, not consultants, draft regulatory analysis documents.” Current policy, however, is not in sync with this recommendation. This discrepancy may be explained by the practical realities of the considerable labor required to conduct rulemaking; this labor includes analytical tasks (like RIA), the compilation of a factual record, and the need to manage and read

comments (potentially numbering into the millions), legal analysis, and program decisions, among the many other tasks that we have discussed above. These realities may encourage, on practical grounds, a narrower reading of “inherently governmental” as it applies to rulemaking. Drafting associated with the other carveouts we have mentioned—legislative documents, strategic plans, or performance materials—generally does not require this same kind of workload. As a result, walling these functions off from contractors could be viewed as less disruptive to agency workflow.

Yet, drafting legislative proposals is akin to regulatory drafting in that both activities culminate in binding law. The stakes of these substantive functions are more similar than not. Other forms of legislative drafting (such as congressional correspondence) can involve important separation of powers and constitutional authorities, but they can also be fairly routine, such that aspects of drafting could be handled by a contractor. This is similar to regulatory drafting, which, as this Article has shown, implicates a wide variety of tasks, ranging from the ministerial to the highly discretionary. In short, the substantive distinction between drafting legislative materials and drafting rulemaking materials is not immediately apparent.

Stepping back, in several policymaking areas, Congress and OMB have acted to make drafting an inherently governmental function. Whether this is an acknowledgment that certain kinds of drafting involve deep thinking and iterative decision-making, or that there are functions where an agency official’s sign-off is simply not enough to guarantee adequate agency consideration, rulemaking drafting deserves similar treatment.

B. Require Additional Contracting Transparency

Apart from making drafting functions off-limits to contractors, another option is to increase the transparency of contracting arrangements. Increased internal transparency could improve managerial oversight within the agency by flagging contractor-generated materials. Practically, it could prove challenging to identify contractor contributions to a rulemaking document that was truly coauthored between agency and contractor staff. Would merely flagging that contractors were part of the rulemaking team help with this internal oversight?

On the one hand, increased external transparency would provide sunlight and allow for more awareness about the role of contractors.
On the other hand, it could promote litigation—perhaps even frivolous litigation with dilatory or strategic intent—along the lines of what we discussed above. This would tend to destabilize agency rulemakings, especially in the short term but also in the long term because, even with a concerted effort, agencies that need these services are unlikely to be able to reverse their reliance on contractors on a dime. Disclosure is not a panacea for problems in government. Often those tasked with overseeing agencies face the problem of too much, not too little information; this statement applies equally well to managers internal to an agency charged with overseeing a rulemaking and overseers external to the agency, be they the media, the public, members of Congress, etc. In the context of a general information cacophony, adding additional disclosure around regulatory body shops, for example, might serve as a distraction, rather than a true form of oversight. Thus, it is worth carefully considering the design features surrounding rulemaking contractor disclosure before adopting disclosure for disclosure’s sake.241

C. Identify Less Risky Ways to Augment Capacity

Contractors are not the only recourse for agencies seeking additional rulemaking support; our ACUS report compiled information on other avenues agencies can pursue to add capacity. At the most basic level, agencies might entirely avoid the principal-agent problems introduced by contractors performing rulemaking work by hiring more agency staff. While this solution may appear direct and simple, in reality it is anything but. The federal hiring process is notoriously cumbersome and slow. Additionally, funds for agency full-

241. Professor Wendy Wagner highlights the importance of making information from disclosure useful or, as she puts it, “comprehensible.” Wendy Wagner & Will Walker, Incomprehensible! 6–7 (2019). She explains:

The law is unilaterally focused on the enlightening power of information – more is almost always better. Yet in their zeal for transparency and complete information, legal architects neglect the equally important, dual objective of ensuring that information is also comprehensible to its target audience. By erring on the side of too much information – without any provisions for ensuring that the information is meaningful – the functioning of many legal programs is deeply compromised.

Id. at 6. In the context of rulemaking contracts, this might mean that disclosure should involve more than releasing the associated contracting documents. While doing so might be instructive to some external parties, contracting documents are highly technical and are likely to be burdensome to many observers trying to ascertain contractors’ roles. Instead, disclosure should be geared towards being readily accessed by interested parties, with the onus of comprehensible disclosure placed on the agency.
time equivalent ("FTE") employees are carefully tracked in agency budgets, and budgetary planning for FTEs, which includes benefits and other overhead costs, typically spans many years—an unattractive feature in a time of ongoing budgetary uncertainty characterized by sequesters, government shutdowns, and continuing resolutions. These strictures seriously limit agencies’ maneuverability when it comes to hiring additional agency staff. Further, while increasing rulemaking staff might be a one-off solution to remedy a body shop situation at a particular agency, it is far from a viable solution government-wide.242

Given the ideological and feasibility constraints associated with hiring additional agency staff, another option stands as a more immediate remedy to the regulatory body shop problem. In interviews for our study, some respondents mentioned that their agency relied on a Federally Funded Research and Development Center ("FFRDC") to assist with rulemaking projects.243 FFRDCs are a special kind of entity that is sponsored by a government agency but operated by a contractor.244 In essence, FFRDCs operate in a manner akin to body shops but with stronger protections in place to guard against conflicts of interest and other ethical quandaries. Under the FAR, FFRDCs cater to a “special long-term research or development need which cannot be met as effectively by existing in-house or contractor resources.”245 They are required “to operate in the public interest with objectivity and independence, to be free from organizational conflicts of interest, and to have full disclosure of its affairs to the sponsoring agency.”246

242. DiIulio proposes to add one million career civil servants to the federal bureaucracy to replace contractors and rightsize the federal government. DIIULIO, supra note 20, at 98. Verkuil describes pitching this proposal to today’s Congress as “a quixotic venture.” PAUL R. VERKUIL, VALUING BUREAUCRACY 50 (2017). Meanwhile, political scientist Francis Fukuyama’s take is even more bleak: “while it may be desirable in theory to follow John DiIulio’s advice and hire a million new federal bureaucrats, this is very unlikely to happen. We are going to continue to rely on contractors because of dysfunctions in the existing, seemingly unfixable civil service system.” Francis Fukuyama, The Intrinsic Functions of Government, in PUBLIC SERVICE AND GOOD GOVERNANCE FOR THE TWENTY-FIRST CENTURY 118 (James L. Perry ed., 2020).
243. DOOLING & POTTER, ACUS REPORT, supra note 6, at 60.
244. FAR 35.017 (2001); MARCY E. GALLO, CONG. RSCH. SERV., R44629, FEDERALLY FUNDED RESEARCH AND DEVELOPMENT CENTERS (FFRDCS): BACKGROUND AND ISSUES FOR CONGRESS (2020).
245. FAR 35.017(a)(2) (2001).
246. Id.
Compared to traditional contracting relationships, FFRDCs offer several advantages to rulemaking agencies. Because they are embedded within agencies (although not typically in a physical sense), they can hit the ground running; there is often not the same kind of ramp-up period that agencies experience when bringing contractors on board.\(^{247}\) Additionally, they are designed to do work that is “inherently governmental” in nature;\(^{248}\) as one respondent explained, because of the protections in place, agencies can share with them pre-decisional information about their rules that could be used for financial gain, information that should not be shared with contractors.\(^{249}\) In light of these benefits, respondents in our ACUS report that used FFRDCs to help with rulemaking expressed considerable confidence in them, noting that they “are here for the mission and for the long run.”\(^{250}\)

FFRDCs do have their limits. Some have pointed out that while these entities were born out of a need to bring scientific and technical expertise to the government in wartime, their missions have slowly expanded over time, raising red flags about potential mission creep and conflicts of interest.\(^{251}\) Additionally, not all agencies have an associated FFRDC; Congress must establish these relationships, and there may reasonably be hesitance to create these for every agency across the government. However, for agencies facing a regular volume of confidential rulemaking projects—where regulatory body shops might tend to be particularly attractive—FFRDCs are a potential solution.

### CONCLUSION

Rulemaking is the primary way that agencies make law, but they do not do it alone. The reality, as revealed by the empirical findings from our ACUS report, is that contractors are involved in just about every aspect of the rulemaking process. This finding runs counter to

\(^{247}\) Dooling & Potter, ACUS Report, supra note 6, at 60.

\(^{248}\) As part of their unique status, FFRDCs have “access, beyond that which is common to the normal contractual relationship, to Government and supplier data, including sensitive and proprietary data, and to employees and installations equipment and real property.” FAR 35.017(a)(2) (2001).

\(^{249}\) Dooling & Potter, ACUS Report, supra note 6, at 59.

\(^{250}\) Id. at 60 (quoting Interview with Interviewee 21 (interview notes on file with authors)).

commonly held understandings of how the rulemaking process functions, understandings that center agencies and bureaucrats as the heart of the rulemaking labor force. However, even though contractors are present in many aspects of rulemaking today, we argue that not all rulemaking contracts are created equal. We offer a typology of three rulemaking contracts that we observed in our study: ministerial contractors, who perform administrative work with relation to rules; expertise contractors, who provide discrete scientific and technical inputs into rules; and regulatory body shops. This typology offers a nuanced view of how collaboration between contractors and agency employees works in practice. Each type of contracting arrangement poses different risks across ethical, capacity, and doctrinal domains. However, regulatory body shops present the most serious risks to agencies and their rules.

In an era where the administrative state continues to take on a critical regulatory function while facing hard staff-capacity limits, rulemaking contractors—and regulatory body shops in particular—are likely here to stay. Acknowledging the permanence of regulatory body shops underscores the necessity for robust governance frameworks to manage their downside risks. To fortify the agency’s decision-making role, we offer three recommendations to mitigate these risks. Specifically, we propose two legal changes to address regulatory body shops, as well as administrative workarounds that can be employed when the risks of regulatory body shops are simply unavoidable. These options provide potential management solutions to the regulatory body shop problem and enable the administrative state to move forward in an ethical, accountable, and transparent fashion.