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COMMON PRINCIPLES OF PUBLIC CONTRACTS IN THE UNITED STATES OF AMERICA

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1. INTRODUCTION

This essay is not an essay on comparative law. It is instead almost entirely devoted to the description of U.S. federal public procurement law, specifically its sources of authority and principles, to a foreign audience. And yet given that it written for inclusion in a volume mainly about various European nations' sources of authority and principles of procurement law, it seemed necessary to say a few words at the outset about how the U.S. system differs from the systems against which it will be juxtaposed.

1.1. Three Distinctions from European Public Procurement

The U.S. federal procurement regime, unlike the European Union (EU) system, is a domestic system. Its remit and objectives vary accordingly. Whereas international or supranational systems such as the EU's or the World Trade Organization's Agreement on Government Procurement (WTO GPA) are mainly devoted to ensuring access and equal treatment in procurement markets, domestic systems' goals are broader – operational as well as ordering.[3] As a WTO GPA signatory, the U.S. government must comply with the strictures of that agreement. But its procurement rules are far more detailed and cover far more subject matter than do the EU procurement directives or the WTO GPA.[4] Federal procurement's regulatory regime is in short a common code, not merely a framework.[5]

[3] P. TREPTE, *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation*, Oxford, Oxford University Press, 2004, p. 317.

[4] See S. ARROWSMITH, *Public Procurement: An Appraisal of the UNCITRAL Model Law as a Global Standard, Int'l Comp. L.Q.*, 2004, pp. 17, 19 (contrasting international procurement regimes such the WTO GPA, which only "prohibit discrimination and establish a procedural framework," from domestic procurement system which are far more detailed).

[5] Compare S. ARROWSMITH, *The Past and Future EC Procurement Law: From Framework to Common Code?*, 35 *Pub. Cont. L.J.*, 2006, p. 337.

Another important distinction with the U.S. federal procurement system is that it covers only the federal government's internal purchases.[6] In this way, it serves much like the EU's Financial Regulations. Unlike the EU Treaties and the procurement directives, the federal statutes, FAR, and case law do not control how sub-central government procurements are conducted in the United States.[7] This essay thus considers only federal procurement, even though an estimated two-thirds of America's procurement occurs at the state and local level.[8] Each state and perhaps many municipalities too would require essays of their own for similar treatment.

Federal procurement law also differs from most systems in that it covers contract formation and administration within one seamless regulatory regime.[9] Because the EU procurement directives cover only the former, this essay is also limited to that stage. Yet from an U.S. perspective, it seems strange not also to include contract administration within

[6] D.I. GORDON AND G.M. RACCA, *Integrity Challenges in the EU and U.S. Procurement Systems*, in *Integrity and Efficiency in Sustainable Public Contracts* (G.M. Racca and C.R. Yukins eds.), Brussels, Bruylant, 2014, pp. 117–18 (observing that because the U.S. procurement system applies to only one country, it avoids the horizonal and vertical problems that beset public procurement regulation in the EU).

[7] M. STEINICKE, *Public Procurement and the Negotiated Procedure: A Lesson to Learn from US Law?*, *Euro. Comp. L. Rev.*, 2001, pp. 331, 334; W.A. WITTIG, *A Brief Survey of U.S. Procurement Reform in the EU Context*, *Pub. Proc. L. Rev*., 2002, pp. NA33, NA33–34.

[8] K. DAWAR, study prepared at the request of the European Parliament, Directorate-General for External Policies, Policy Department, *Openness of Public Procurement Markets in Key Third Countries*, 2017, p. 10.

[9] J.I. SCHWARTZ, *United States of America*, in *Droit Comparé des Contrats Publics* (R. Noguellou and U. Stelkens eds.) Brussels, Bruylant, 2010, pp. 613, 617–19 (describing the "unusual breadth" of U.S. procurement law's coverage).

the same system because the two are complementary, and one informs the other:[10] the clauses entered into during formation determine the terms of the contract and remedies that are available during the administration phase.[11]

1.2. First Principles and the Common Law Tradition

The American founders adopted British common law, not only its precedents but also its mode of discovering or finding the law when questions arise. Especially in the nineteenth century, federal judges let parties create their own "spontaneous order" and generally recognized only the sort of customary law rooted in longstanding commercial practice.[12] In this sense, federal law was bottom-up or decentralized.[13] Absent precedent or a statute on point, judges made commercial practices the law of the land.[14] Finding common law in this way was consistent with contemporary English jurists, most famously with Lord Mansfield.[15]

[10] See FAR Subparts B–F, which govern the award process, and FAR Subpart G, which covers contract administration.

[11] *Ibid.*, Subpart H.

[12] R. BRIDWELL AND R.U. WHITTEN, *The Constitution and the Common Law: The Decline of the Doctrines of Separation of Powers and Federalism*, Lexington, Massachusetts, Lexington Books, 1977, pp. xiv., 4, 22, 66, 90, 114.

[13] R.D. COOTER, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant, U. Penn. L. Rev.*, 1996, pp., 1643, 1645 (distinguishing top-down and bottom-up lawmaking).

[14] L. LESSIG, *Erie Effects of Volume 110: An Essay on Context in Interpretative Theory*, *Harv. L. Rev.*, 1997, pp. 1785, 1788–95 (arguing that in *Swift v. Tyson*, 41 U.S. 1 (1842) the Supreme Court applied the "law merchant", or the customary law "constituted by the ordinary understandings of the parties to a commercial transaction" and "ratified by long practice" and observing that the Uniform Commercial Code adopts the customs of industry in a similar fashion).

[15] COOTER, *Decentralized Law for a Complex Economy*, *op. cit.*, pp. 1748–49 (describing how Mansfield "scrutinized business transactions and tried to identify and enforce the best practice" and how the study of his "elegant solutions" soon became a mainstay of Anglo-American legal pedagogy).

Hence, "Judges must find common law,"[16] historically doing so by looking to business practices already in effect.[17]

The common law's spontaneous order contrasted sharply with the centralized approach to lawmaking that came to the fore under Napoleon.[18] His code attempted to uproot medieval practices and replace them with a more rational system, in which laws could be derived from first principles in a Cartesian fashion.[19] The Napoleonic influence is palpable in continental legal systems down to the present. In fact, this project's effort to link public contracts regulations back to a few common principles can perhaps be traced to an intellectual heritage that seeks to rationalize and systematize the law in this manner. This tendency is at odds with the American legal tradition, which inclines to be more ad hoc – to draw rules up from the marketplace, rather than down from higher principles.

1.3. The Failure to Locate Procurement's Own Set of Values

Since the United States' decentralized legal system is generally characterized by spontaneous order, it is unsurprising that little thought has been devoted to identifying the principles that underlie its federal procurement system. In fact, this observation extends well

[16] J. DAVIES, *Le Primer Report des Cases et Matters en Ley Resolues Et Adiudges en les Courts del Roy en Ireland* (1615), reprinted in David Wooton (ed.), *Divine Right and Democracy: An Anthology of Political Writings in Stuart England*, Indianapolis, Hackett, 1986, pp. 131–42 (describing the medieval tradition of finding the common law).

[17] American jurists' reliance on the "law merchant" corresponds with legal positivism, arguably the dominant legal of theory from the late nineteenth century down to the present. A.J. SEBOK, *Legal Positivism in American Jurisprudence*, Cambridge, Cambridge University Press, 1998, pp. 2–3, 32, 41–47, 114. Positivism is characterized by two theses: that what counts as law is a matter of social fact; and that what the law is and ought to be are separate questions. BRIAN LEITER, "Hard Positivism, and Conceptual Analysis", *Legal Theory*, 1998, pp. 533, 534–35.

[18] COOTER, *Decentralized Law for a Complex Economy*, *op. cit.*, pp. 1650–51.

[19] *Ibid.*, citing P. DAWSON, *Provincial Magistrates and Revolutionary Politics in France, 1789–1795*, Cambridge, Harvard University Press, 1972, pp. 241–74.

beyond U.S. procurement law.[20] Remarking on this gap in the literature, an article written in 1962 said, "The federal government has been making contracts for as long as it has existed, yet little attempt has been made to rationalize this phase of governmental activity in its relation to the functions of government and to the person and firms with whom contracts are made."[21] Four decades later, Schooner observed that "no biblical stone tablets proclaim the desiderata of the Federal procurement system" and that "the literature is strangely silent" as to the system's fundamental values.[22] During a symposium held in 2001 at the George Washington University on drafting procurement laws for developing nations, one U.S. participant remarked on the value of this conversation to U.S. practitioners:

> "Maybe our system depends more than we realise on subtle traditions and tacit assumptions. We take these so much for granted, they almost defy expression. Having to explain our system to outsiders forces us back to the basics, so it's an educational process for us, too."[23]

[20] A.C.L. DAVIES, *The Public Law of Contracts*, Oxford, Oxford University Press, 2008, pp. 124–25 (observing that although procurement is flourishing both in practice in and the academy and clearly "has its own set of values," "there has been no particular attempt to locate them within a public law context").

[21] J.M. WHELAN AND EDWIN C. PEARSON, *Underlying Values in Government Contracts*, *J. Pub. L.*, 1962, p. 298.

[22] S.L. SCHOONER, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, *Am. U. L. Rev.*, 2001, pp. 629, 675. Failure to examine first principles is not the only problem. Given the importance of federal procurement to the U.S. economy, scholarly work in general is in short supply. See R.C. MARSHALL, M.J. Meurer, and J.F. RICHARD, *The Private Attorney General Meets Public Contract Law: Procurement Oversight by Protest*, *Hofstra L. Rev.*, 1991, pp. 2, 3 (observing that public contract law has received little attention from law and economic scholars).

[23] S.L. SCHOONER, *Introduction: The Symposium 'Drafting a Government Procurement Law': Lessons Learned from the United States*, *Pub. Proc. L. Rev.*, 2002, pp. 99, 102 (quoting attorney Joseph Petrillo).

In the intervening years, the paucity of scholarly treatment has to some extent been remedied with several essays and articles and one book summarizing the federal system, mostly for foreign audiences.[24] Yet these efforts have mostly described the system's scope, the legal rules, and sources of authority. Efforts to identify, define, and explicate the desiderata have been few.[25] And, as we will see, scholars have yet to reach a general

[24] SCHWARTZ, *United States of America*, *op. cit.*; DAVIES, *The Public Law of Contracts*, *op. cit.*, pp. 58–62; K.D. CARAVELLA ROBINSON, *U.S. Federal Government Procurement: Organizational Structure, Process, and Current Issues*, in *International Handbook of Public Procurement* (K.V. Thai ed.), Boca Raton, CRC Press, 2009, pp. 291–05; R.B. CLIFFORD, Jr., A.E. SHIPLEY, and S. LOCKE, *United States*, in *The Government Procurement Review* (J. Davey and J. Falle eds.), London, Law Business Research, 2013, pp. 243–69; L.K. MILLER, *United States*, in *International Public Procurement* (D. Campbell ed), Eagan, Minnesota, Thomson Reuters, 2015, Chapter 45, pp. 1–44; E.L. TOOMEY, *Federal Government Contracts: Overview* in *Practical Law*, Thomson Reuters, 2017; C.R. YUKINS, *The U.S. Federal Procurement System: An Introduction*, *Upphandlingsrättslig Tidskrift*, 2017, pp. 69–93; C.R. YUKINS, *US Government Contracting in the Context of Global Public Procurement*, in *The Internationalization of Government Procurement Regulation* (A. Georgopoulos, B. Hoekman, and P.C. Mavroidis), Oxford, Oxford University Press, 2017, pp. 264–87; P.T. MCKEEN, *États Unis/United States: Discretion, Oversight, and the Culture of Compliance in the US*, in *Contrôle et Contentieux de Contrats Public*/*Oversight and Challenges of Public Contracts* (L. Folliot-Lalliot and S. Torricelli eds.), Brussels, Bruylant, 2018. Several other sources have also provided valuable summaries, but these are, to varying degrees, dated. See WHELAN AND PEARSON, *Underlying Values inf Government Contracts*, *op. cit.*; R.P. SHEALEY, *The Law of Government Contracts*, New York, Ronald Press, 1919; C.E. MACK, *Federal Procurement: A Manual for the Information of Federal Purchasing Officers*, Washington, U.S. Government Printing Office, 1943; F.W. LAURENT, *Legal Aspects of Defense Procurement*, Madison, University of Wisconsin Press, 1962; M.J. GOLUB AND S.L. FENSKE, *U.S. Government Procurement: Opportunities and Obstacles for Foreign Contractors*, *Geo. Wash. J. Int'l L. and Econ.*, 1987, pp. 567–97; J.M. WHELAN, "An Introduction to the United States Federal Government System of Contracting," *Pub. Proc. L. Rev.*, 1992, pp. 207–28. For the authoritative history of U.S. federal procurement, see J.F. NAGLE, *History of Government Contracting*, 2nd edn, Washington, George Washington University Press, 1999. For a valuable if idiosyncratic history of the seminal cases that created the modern U.S. procurement system, see C.D. DEES, *The Development of Modern Government Contract Law: A Personal Perspective*, Philadelphia, Wolters Kluwer, 2016.

[25] Some of the most interesting works on the fundamental values were written in the aughts in response to the 1990s' reforms. See SCHOONER, *Fear of Oversight*, *op. cit.*; T.F. BURKE and C.S. DEES, *The Impact of Multiple-Award Contracts on the Underlying Values of the Federal Procurement System*, *Gov't Contractor*, 2002, 431; S.L. SCHOONER, *Commercial Purchasing: The Chasm Between the United States Government's Evolving Policy and Practice*, in *Public Procurement*, Vol. 1 (S. Arrowsmith and K. Hartley), Cheltenham, Elgar, 2002, pp. 137–69; S.L. SCHOONER, *Desiderata: Objectives for a System of Government Contract law*, *Pub. Proc. L. Rev.*, 2002, pp. 103, 104–09; L.A. PERLMAN, *Guarding the Government's Coffers: The Need for Competition Requirements to Safeguard Federal Procurement*, *Fordham L. Rev.*, 2008, pp. 3187–43; J.I. SCHWARTZ, *Perspectives on Public Procurement Reform in the United States*, in *Le Contrôle des Marches Publics* (G. Marcou, L. Folliot-Lalliot, D.I. Gordon, S.L. Schooner, and C. Yukins eds.), Paris, L'Institut de Recherche Juridique de la Sorbonne, 2009, pp. 99–124; S.L. SCHOONER, D.I. GORDON AND J.L. WHERRY, *Public Procurement Systems: Unpacking Stakeholder Aspirations and Expectations* (May 8, 2008), https://ssrn.com/abstract=1133234.

consensus about what these principles are.[26] Though we believe that such principles exist, as the passage quoted above suggests, they are taken for granted and have not been written down – much less subjected to thorough scholarly analysis. This is consistent with our more ad hoc common law tradition, but still leaves an unfortunate gap in our understanding about the reasons and purposes that underlie U.S. federal procurement's rules.

This essay attempts to address this gap. Section II. reviews the sources of law that comprise the U.S. federal procurement system. Section III. then describes the common principles that can be derived from these sources, and argues that, although they are not immutable, some enduring principles, which have stood the test of time, can be divined. This section also attempts to provide enough context so that the meaning and purpose of these principles can be appreciated.[27] And last, Section IV. will conclude with a few thoughts about the challenges with attempts to compare the seemingly common principles of U.S. and EU public contracts.

2. THE SOURCES OF U.S. FEDERAL PROCUREMENT LAW

Determining what, exactly, comprises U.S. government contracts law is a notoriously hard question.[28] Writing in 1993, Whelan observed that this system is "extraordinarily spacious," there is no "overall index", and "learning to make one's way about in it is . . .

[26] See below Section III.E.

[27] TREPTE, *Regulating Procurement*, *op. cit.*, pp., 3, 7 (arguing that the principles that animate procurement systems – e.g., efficiency, transparency, equal treatment, nondiscrimination – "merely describe the mechanisms used to achieve certain results but do not, in themselves, provide an adequate explanation of the precise results sought to be achieved in any given system of regulation" and that little work has been done examining objectives of such rules).

[28] J.W. WHELAN, *Understanding Federal Government Contracts*, Chicago, Commerce Clearing House, 1993, p. 60 (observing that "the issue of what *is* the federal [law] to be applied to federal contracts is not free of difficulty").

difficult."[29] Two decades later, Schwartz said that summarizing this unwieldy system presents a "profound challenge".[30] Its size, however, is not the only problem with describing the system's sources of legal authority.

U.S. federal contracts lie at the intersection of public and private law.[31] When operating in the market, the government has a "dual personality," as sovereign and mere buyer.[32] Confusingly, the Supreme Court has sometimes held that government contracts are governed by the very same law as private contracts.[33] But federal contracts occupy a middle ground between "congruence" with private commercial law and "exceptionalism," under which special rules apply to the sovereign.[34] The public/private dichotomy fails to capture the complexity of this hybrid legal system.[35]

[29] *Ibid.*, p. 16. See also MARSHALL, MEURER, AND RICHARD, *The Private Attorney General Meets Public Contract Law*, *op. cit*, p. 34 ("The procurement process is hedged by a dense thicket of statutes and regulations.").

[30] SCHWARTZ, *United States of America*, *op. cit.*, p. 613; *ibid.*, p. 614 (observing that because the system has evolved over two centuries, "any relatively brief account . . . inevitably will be significantly incomplete and risks misleading any relative newcomer to the study of the US system").

[31] J.I. SCHWARTZ, *Liability for Sovereign Acts: Congruence and Exceptionalism in Government Contracts Law*, *Geo. Wash. L. Rev.*, 1996, pp. 633, 638.

[32] G.A. CUNEO, *Government Contracts Handbook*, Chicago, Machinery and Allied Products Institute, 1962, p. 252.

[33] For example, see *Lynch v. United States*, 292 U.S. 571, 579 (1832) ("When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."); *Union Pac. R.R. v. United States*, 99 U.S. 700, 719 (1878) ("The United States is as much bound by their contracts as are individuals.").

[34] SCHWARTZ, *Liability for Sovereign Acts*, *op. cit.*, pp. 638, 697–99; Schooner, "Commercial Purchasing", *op. cit.*, p. 158 (describing the "fundamental tension" between congruence and exceptionalism in U.S. federal procurement).

[35] C. TIEFER AND W.A. SHOOK, *Government Contract Law in the Twenty-First Century*, Durham, Carolina Academic Press, 2012, p. 3 (observing that government contracts law lies at the complex boundary between public and private law).

In this hybrid system, four sources of law govern. When a constitutional provision applies, that is the highest level of authority and of course trumps all else.[36] Next in line are the statutes, which as we will see are the foundation of most government contracts law yet are not comprehensive.[37] The Federal Acquisition Regulation (FAR) and its supplements are where most details are found, and these have the effect of law and stand behind only the Constitution and statutes in their authority.[38] Fourth is the "federal common law" of government contracts.[39]

An additional challenge with summarizing the sources of federal procurement law is that the relative weight of the various sources is often unclear. For example, statutes are numerous and their coverage is not comprehensive, whereas the FAR covers all federal purchases. Further, there is a tension between the system's extensive codification and its persistent reliance on the case law. Such tensions are explored in this section as we discuss these four sources of legal authority.

2.1. The U.S. Constitution

The power to contract goes unmentioned in the U.S. Constitution.[40] Yet case law established from early on that this capacity to enter into contracts is an inherent sovereign authority.[41] Further, a "small but significant portion" of federal procurement law originates

[36] SCHWARTZ, *United States of America*, *op. cit.*, p. 626.

[37] *Ibid.*

[38] *Ibid.*

[39] *Ibid.*, pp. 627–28.

[40] SCHWARTZ, *United States of America*, *op. cit.*, p. 623.

[41] *United States v. Maurice*, 26 F. Cas. 1211 (No. 15747) (C.C.D. Va. 1823); *United States v. Tingey*, 30 U.S. 115 (1831); *United States v. Corliss Steam-Engine Company*, 91 U.S. 321 (1875). See also CUNEO, *Government*

in the Constitution.[42] These provisions include the Due Process Clause of the Fifth Amendment,[43] the Equal Protection Clause also under the Fifth Amendment,[44] and the free speech guarantee under the First Amendment.[45] Because Schwartz has already written a good summary, we will not attempt another review here.[46]

Apart from these specific provisions, the overall *structure* of the government established in the Constitution also affects how the procurement system functions. In particular, the separation of powers divides the sovereign authority to contract between legislative and executive branches.[47] By design, this arrangement is an "invitation to struggle".[48] While Americans sometimes imagine that procurement is a purely mechanical function administered by rational, dispassionate agents using good business judgment to

Contracts Handbook, *op. cit.*, p. 3 (arguing that the government's authority to contract is traceable to the Constitution).

[42] SCHWARTZ, *United States of America*, *op. cit.*, p. 628.

[43] U.S. Const., amend. V.

[44] *Ibid.*

[45] *Ibid.*, amend. I.

[46] SCHWARTZ, *United States of America*, *op. cit.*, pp. 616–17 (describing the application of the Fifth Amendment Due Process Clause, Fifth Amendment Equal Protection Clause, and free speech under the First Amendment to government contracts in the federal case law).

[47] James Madison believed the nature of the federal government's purchasing function was both executive and judicial. J. GALES (ed), 1 *Annals of Congress*, 1789, p. 611.

[48] E.S. CORWIN, *The President Office and Powers*, New York, New York University Press, 1941, p. 200 (famously stating that "the Constitution, considered only for its affirmative grants of powers capable of affecting the issue, is an invitation to struggle for the privilege of directing American foreign policy"). This observation regarding a constitutionally grounded struggle also holds true for procurement, where the division of labor between the executive and legislature sows a similar institutional rivalry. J.W. WHELAN, *Reflections on Government Contracts Policy on the Occasion of the Twenty-fifth Anniversary of the Public Contract Law Section*, *Pub. Cont. L.J.*, 1990, pp. 1, 20 (noting that "what sticks out like sore thumb" about the U.S. federal procurement system are the "institutional confrontations" between the executive and legislative branches).

secure best value,[49] Congress has an outsized role throughout the process.[50] Its involvement ensures a close connection to popular opinion, which from a strictly technocratic standpoint has consequences both good and ill. For example, it is to the good that Congress serves as a watchdog and – consistent with Americans' deeply rooted attachment to anticorruption efforts[51] – seeks to eradicate fraud, waste, and abuse from government spending.[52] Of less certain value is Congress's tendency to interfere with the process by attempting to steer contracts to constituents and by pursuing various collateral objectives that sometimes stray far afield from the straightforward purchasing function.[53] Whatever one's opinion about the wisdom of Congress's involvement in government contracts (and we harbor some doubts, in some quarters), it is indisputable that such involvement was constitutionally ordained. And

[49] FAR 1.102(d) (establishing in a statement of guiding principles about U.S. federal procurement that buyers are "to exercise personal initiative and sound business judgment in providing the best value . . . to meet the customer's needs"). Compare S.L. Schooner, "Fear of Oversight: The Fundamental Failure of Businesslike Government", *Am. U.L. Rev*., 2001, pp. 627, 714–17 (addressing the myth that procurement is a purely administrative function that can be improved simply by modeling businesses practices from the private sector).

[50] SCHOONER, "Commercial Purchasing", *op. cit.*, p. 159 (observing that "legislative manipulation of the procurement process is a significant aspect or feature the system"); L.R.A. BUTLER, *Transatlantic Defence Procurement: EU and US Defence Procurement Regulation in the Transatlantic Defence Market*, Cambridge, Cambridge University Press, 2017, pp. 62–63 (observing that "Congress exercises a significant impact on all aspects of procurement").

[51] See generally Z. TEACHOUT, *Corruption in America: From Benjamin Franklin's Snuff Box to Citizens United*, Cambridge, Harvard University Press, 2014 (describing the demanding conception of government corruption that lies at the heart of the U.S. constitutional architecture and the nation's longstanding anticorruption efforts).

[52] M. CANCIAN, *Acquisition Reform: It's Not as Easy as It Seems*, *Acquisition Rev. Q.*, 1995, pp. 189, 191–92 (describing Americans' mistrust of military procurement and Congress's exercise of its fiduciary duties based on the popular belief that "without explicit guidance and close scrutiny the [Department of Defense] will waste money").

[53] DAVIES, *The Public Law of Contracts*, *op. cit.*, p. 60 (contrasting U.S. federal and English procurement systems and arguing that a distinguishing feature of the U.S. system is the "greater influence of pressure groups over the political process" and "the greater tendency to use procurement for political goals"); Cancian, *Acquisition Reform*, *op. cit.*, p. 191 (observing that the socioeconomic goals that often influence the procurement process "are often regarded as illegitimate by people inside the system because they have no direct bearing . . . on acquisition").

we note in passing that the academic treatment of such constitutional features is sorely lacking.[54]

2.2. Federal Procurement Statutes

Second only to the Constitution in terms of authority, federal procurement is also governed by a "constantly changing patchwork of statutes".[55] These statutes are the foundation of the whole federal procurement system.[56] The first of these was passed in 1792.[57] Procurement legislation accelerated during the Civil War,[58] and many of these statutes remained largely unchanged until the Second World War.[59] The basic framework for the modern system is established in the Armed Services Procurement Act of 1948 (ASPA)[60] and the Federal Property and Administrative Services Act of 1949 (FPASA).[61] The

[54] BUTLER, *Transatlantic Defence Procurement*, *op. cit.*, 317 (observing that constitutional features of the U.S. federal procurement system have not been considered in detail).

[55] Schooner, *Fear of Oversight*, *op. cit.*, p. 675.

[56] 1 Report of the Commission on Government Procurement, 1972, p. 15 ("Statutes provide the foundation for the whole framework of Government procurement.")

[57] MACK, *Federal Procurement*, *op. cit.*, p. 9, citing 1 Stat. 280, sec. 5, May 8, 1792 (reporting that this statute was the first law that Congress passed regulating federal purchases); 1 Commission on Government Procurement, *op. cit.*, p. 164 (likewise reporting that the first federal procurement statute was passed on May 8, 1792).

[58] NAGLE, *History of Government Contracting*, *op. cit.*, pp. 191–98.

[59] For example, see 4 Commission on Government Procurement, *op. cit.*, p. 164 (observing that the statute mandating the use of sealed bidding was passed in 1861 and remained in force for nearly a century).

[60] 10 U.S.C. §§ 2302–2339b.

[61] 41 U.S.C. §§ 3101–3106.

former is amended annually with the National Defense Authorization Act, but the latter is infrequently modified. While the two acts were briefly brought into alignment in 1984,[62] they have since diverged.[63] Another act with nearly government-wide application is the Office Federal Procurement Policy Act (OFFPA).[64] Yet these three statutes are but the tip of the iceberg.[65] The procurement function is affected by several statutes that control the federal agencies and define their organizational structures.[66] Other prominent statutes are listed in a footnote below.[67]

Strikingly for a statutory system, no integrated statute governs the whole. In 1986, the President's Blue Ribbon Commission recognized the problems presented by a system composed of such a hodgepodge of laws:

[62] Pub. L. No. 98-369.

[63] The Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, and the Clinger-Cohen Act of 1996, Pub. L. 104-106, brought the ASPA and FPASA into conformity. Since then, however, the two have continued to diverge. J. CIBINIC, JR., R.C. NASH, JR., AND C.R. YUKINS, *Formation of Government Contracts*, 4th edn, Riverwoods, Illinois, Wolter Kluwer, 2011, p. 27.

[64] 41 U.S.C §§ 1101, et seq.

[65] 1 Commission on Government Procurement, *op. cit.*, pp. 31, 33 (lamenting a "burdensome mass and maze" of both procurement and procurement-related statutes and regulations).

[66] For example, 5 U.S.C. § 101 defines the organizational elements for the executive departments (e.g., Departments of State, Treasury, and Defense); 5 U.S.C. § 102 does the same for the military departments (e.g., Departments of the Army, Navy, and Air Force); and 41 U.S.C. § 133 does the same for the executive agencies.

[67] The Anti-Deficiency Act, 31 U.S.C. § 1341; the Contract Disputes Act of 1978, 41 U.S.C. §§ 601 *et seq.*; the Administrative Procedure Act, 5 U.S.C. § 551ff; Bribery, Graft and Conflicts of Interest, 18 U.S.C. §§ 201 *et seq.*; the Brook Act (Architect-Engineer Services), 40 U.S.C. §§ 541 *et seq.*; the Buy American Act, 41 U.S.C. §§ 8301–05; the Davis-Bacon Act, 40 U.S.C. §§ 276a–276a-5; the Defense Production Act, 50 U.S.C. §§ App. 2062ff; the False Claims Act, 31 U.S.C. §§ 3279 *et seq.*; the Procurement Integrity Act, 48 C.F.R. § 3.104-1 to -11; the Small Business Act, 15 U.S.C. §§ 631 et *seq.*; the Truth in Negotiations Act, 10 U.S.C. § 2306a, 41 U.S.C. § 254(d).

> Congress and DoD have tried to dictate management improvements in the form of ever more detailed and extensive laws and regulations. As a result, the legal regime for defense acquisition is today impossibly cumbersome. . . . For these reasons, *we recommend that Congress work with the Administration to recodify federal laws government procurement in a single, consistent, and greatly simplified procurement statute*.[68]

To date, however, no such consolidated statute has been enacted.[69] This is significant because, unlike private contracts, which were originally derived from common law, government contracts are primarily creatures of statute.[70] It is surprising that a system that is so reliant on statutes lacks a single, unified code – and also that the commentary has yet to provide a comprehensive index.[71] In sum, statutes are the authoritative and immutable law for U.S. procurement, but this regime is a confusing, incomprehensive mess – and locating all of the applicable statutes is no mean feat.

As we will see in the next section, the FAR is more detailed than the procurement statutes and is thus generally more relevant to the daily activities of agency officials operating

[68] President's Blue Ribbon Commission on Defense Management, *A Quest for Excellence – Final Report to the President*, June 1986, pp. 54–55, available at https://babel.hathitrust.org/cgi/pt?id=mdp.39015014775566&view=1up &seq=11 (emphasis added). See also 1 Commission on Government Procurement, *op. cit.*, pp. 15–18 (recommending a merger of the ASPA and FPASA into a single statute, and noting that the "present statutory foundation is a welter of disparate and confusing restrictions and of grants of limited authority to avoid the restrictions").

[69] CIBINIC, Nash, and Yukins, *Formation of Government Contracts*, *op. cit.*, p. 27.

[70] 1 Commission on Government Procurement, *op. cit.*, p. 15.

[71] Whelan, *Understanding Federal Government Contracts*, *op. cit.*, p. 16.

in this field. We also will see in the next section that agencies may supplement the FAR and may issue individual and class deviations to the FAR.[72] This marks a crucial distinction between statutes and regulations. A statute is firmly and immutably the law unless Congress revokes or amends the statute, or by its own express terms the statute authorizes exceptions[73] or waivers.[74] Thus, if procurement statutes are incomplete in their coverage, when they do apply, their legal effect is manifest and conclusive.

[72] See below notes 81–87 and accompanying text.

[73] For example, see 41 U.S.C. § 10a(b)(4), which makes an exception to the Buy American Act for acquisitions made by the intelligence community.

[74] For example, there is a waiver provision in the Truth in Negotiations Act for "exceptional case[s]", but the head of the procuring activity must provide a written justification for the waiver. 10 U.S.C. § 2306(a)(1)(C). There are several waiver provisions contained in the Small Business Act: 15 U.S.C. 636(a)(32)(E)(ii) (granting that administrators may waive fees on covered energy efficiency loans); 15 U.S.C. 636(33)(E)(ii) (authorizing waiving fees for loan to small businesses owned by veterans or their surviving spouses); 15 U.S.C. 636(8)(B) (authorizing administrators to waive caps on disaster loans); 15 U.S.C. § 637(a)(17)(B)(iv) (granting authority to waive the rule that the small business reseller must purchase its wares from a small business manufacturer); 15 U.S.C. § 637(a)(21)(B) (allowing that administrators may waive the rule that small business concerns whose owners relinquish their ownership shall be terminated for convenience). And though the Department of Labor lacks authority to grant waivers to the Davis-Bacon Act's requirements regarding wage rates and conditions for construction contracts, the funding statutes for particular projects may provide for such waivers. See Department of Labor, *Field Operations Handbook*, Chapter 15, "Davis-Bacon and Related Acts and Contract Work Hours and Safety Standards Act", p. 22, https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FOH_Ch15.pdf .

2.3. The Federal Acquisition Regulation and Its Supplements

Though a consolidated statute has yet to be enacted, Congress mandated the establishment of a *consolidated regulation* with passage of the OFFPA of 1974.[75] Such a unified regulation was eventually codified in the form of the FAR.[76] The Federal Acquisition Regulation implements the statutory provisions in the ASPA and FPASA, and establishes uniform policies and procedures for all executive agency acquisitions.[77] Thus, while procurement statutes constitute the foundation of most U.S. government contracts law, pertinent details necessary to the daily operations of the procurement function are found in the FAR.[78] Most of the controlling law in the U.S. system thus works on the basis of a complex relationship between myriad statutes that are dispositive but noncomprehensive and a single regulation (FAR) that is of general applicability but, as we will see in the next paragraph, subject to various deviations.[79]

[75] 41 U.S.C. § 405(a) (designating the FAR as "the single Government-wide procurement regulation"). See also S.W. Feldman, *Government Contract Guidebook*, 4th edn., Egan, Minnesota, Thomson Reuters, p. 16 (maintaining that "[g]overnment procurement is essentially procurement by regulation").

[76] GOLUB AND FENSKE, *Opportunities and Obstacles*, *op. cit.*, p. 568.

[77] See *15A Federal Procedure, Lawyer's Edition*, Egan, Minnesota, Thomson Reuters, 2020, § 39.1 (citing FAR 1.101); Tiefer and Shook, *Government Contract Law*, *op. cit.*, p. 3 (emphasizing the "overriding importance of statutes, regulations, and standard clauses").

[78] See DAVIES, *The Public Law of Contracts*, *op. cit.*, p. 58 (observing that although federal procurement is governed by two main statutes, "the main source of detailed rules governing procurement is the [FAR]").

[79] See GORDON AND RACCA, *Integrity Challenges*, *op. cit.*, p. 117, n.1 (observing that the U.S. procurement system is "based on a detailed statutory and regulatory scheme").

In 1974, the OFPP Act mandated promulgation of a comprehensive regulation that would encompass the procurement activities of all executive agencies – the FAR, which came into effect ten years later in 1984.[80] Yet the agencies are not without recourse when the FAR's policies and procedures are inappropriate to their unique requirements. Deviations are available under FAR Subpart 1.4, and those deviation can include adopting policies inconsistent with the FAR, omitting or modifying required clauses, and authorizing lesser or greater limitations on the use of solicitation provisions.[81] Such deviations are available for individual contract actions[82] and for whole classes of contract actions.[83] Further, the agencies may even create standard policies and procedures that vary somewhat from the FAR,[84] but only insofar as variations are necessary to specific agency needs.[85] Accordingly, each federal agency publishes its own FAR supplement.[86] However, the OFPP has the authority to strike down supplements that exceed the agencies' remit.[87]

[80] 41 U.S.C. § 1121 (b) (establishing that the OFPP may prescribe policies "in a single Government-wide procurement regulation called the Federal Acquisition Regulation").

[81] FAR 1.401.

[82] FAR 1.403.

[83] FAR 1.404.

[84] FAR Subpart 1.3.

[85] FAR 1.302. See also R.C. Nash, Jr., K.R. O'BRIEN-DEBAKEY, AND S.L. SCHOONER, *The Government Contracts Reference Book*, 4th edn., Riverwoods, Illinois, Wolters Kluwer, 2013, pp. 229–30 (explaining how the FAR and its supplements interact in the federal acquisition regulation system).

[86] CIBINIC, NASH, AND YUKINS, *Formation of Government Contracts*, *op. cit.*, pp. 36–37 (listing 31 "selected principal federal agency acquisition regulations").

[87] 41 U.S.C. § 1121(e).

If the FAR lacks the fully settled character of statutory law in that agencies may supplement and deviate from it in various ways, at the same time it also has the full "force and effect of law" as a properly promulgated substantive agency regulation.[88] This is another aspect of the complex relationship between the statutes and regulations that govern federal procurement. The FAR is more relevant to the practitioner because it is both more detailed and comprehensive, and – though not as firmly settled as statutory law – it is, by force and effect, *law* in its own right.[89]

2.4. Administrative and Judicial Case Law

Whereas review procedures were first introduced in several EU Member States following issuance of the classic Remedies Directive in 1989,[90] U.S. procurement has a long history with bid protests.[91] Though their origin is murky,[92] what may have been the first bid challenge went directly to the President in 1853.[93] Protests were later heard before the U.S.

[88] See *Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979) (citing *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977)).

[89] Compare P.E. MORRIS, "Legal Regulation of Contract Compliance: An Anglo-American Comparison", *Anglo-Am. L. Rev.*, 1990, p. 87 (lamenting that the United Kingdom lacked a distinct law of government contracts to provide a framework to monitor compliance). There can be no doubt, however, that the U.S. system has such a common code in the form of the FAR.

[90] Directive 89/665/EEC, Article 1.

[91] GORDON AND RACCA, *Integrity Challenges*, *op. cit.*, p. 117, n.1.

[92] R.S. METZGER AND D.A. LYONS, "A Critical Reassessment of the GAO Bid-Protest Mechanism", *Wisconsin L. Rev.*, 2007, pp. 1225, 1228.

[93] 4 Commission on Government Procurement, *op. cit.*, p. 36, citing 6 Op. Att'y Gen. 226 (1853) (reporting that an 1853 complaint about a disputed Department of the Interior award was perhaps the first bid protest).

Court of Claims,[94] which was established in 1855[95] and a century and a half later was split into the U.S. Court of Appeals for the Federal Circuit (which inherited the Court of Claims' appellate function) and the U.S. Court of Federal Claims (COFC) (which inherited the trial function).[96] Yet protests in their modern form began not with a judicial forum but at the General Accounting Office (GAO).[97] The first GAO protest involved a procurement to support of the Panama Canal, and was decided in 1926.[98] The Court of Claims later asserted similar protest authority under the Tucker Act in 1956, and later the Court of Federal Claims' protest jurisdiction was regularized by the Administrative Dispute Resolution Act of 1996 (ADRA).[99] The U.S. Court of Appeals for the District of Columbia Circuit had ruled that bid protests could be brought in federal district courts under the Administrative Procedure Act in 1970,[100] but that jurisdiction "sunsetted" under Section 12 of the ADRA in 2001.[101] Since then protests have been heard before the agencies,[102] the GAO, and the COFC, the latter being

[94] *Schneider v. United States*, 19 Ct. Cl. 547 (1884); *United States v. Ellicott*, 223 U.S. 524 (1912); *Schillinger v. United States*, 24 Ct. Cl. 278 (1889).

[95] C.D. SWAN, "Government Contracts and the Federal Circuit: A History of Judicial Remedies Against the Sovereign", *J. Fed. Circ. Hist. Soc'y*, 2014, pp. 105, 107.

[96] 3 *Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations*, 2019, p. 347.

[97] The GAO was established in 1921. The Budget and Accounting Act of 1921, Pub. L. No. 67-13, 42 Stat. 20, codified at 31 U.S.C. § 701. The GAO inherited the powers and duties of the Comptroller General, which until then resided in the Department of the Treasury. D.I. Gordon, *In the Beginning: The Earliest Bid Protests Filed with the U.S. General Accounting Office*, Pub. Proc. L. Rev., 2004, p. NA149. The GAO was renamed the General *Accountability* Office effective July 7, 2004. GAO Human Capital Reform Act of 2004, Pub. L. 108-271, 118 Stat. 811 (2004).

[98] *Letter to the Governor, the Panama Canal*, 5 Comp. Gen. Dec. 712, 713 (1926).

[99] *Heyer Products Co. v United States*, 140 F. Supp. 409 (Ct. Cl. 1956), modified, 177 F. Supp. 251 (Ct. Cl. 1959). The Administrative Dispute Resolution Act was enacted as Public Law No. 104-320.

[100] *Scanwell Laboratories, Inc. v Shaffer*, 424 F.2d 859 (D.C. Cir. 1970).

[101] The Administrative Dispute Resolution Act of 1996 (ADRA), 5 U.S.C. §§ 571–84.

[102] Informal agency protests had long been available, but until the 1990s government-wide procedures were lacking. Such procedures are now found in FAR Part 33. See generally C.R. Yukins, "Agency-Level Protests",

the only remaining judicial forum. Decisions of the COFC may be appealed to the Federal Circuit, and from there potentially to the U.S. Supreme Court.

We have recounted this abridged history of U.S. protests to give a sense of the volume of precedent that has been generated. It is extensive.[103] Indeed, though government contracts are driven more by statute and regulation (unlike private contracts, which were at first creatures of the common law), an understanding of federal procurement would be incomplete without the case law.[104] As was noted in the leading treatise on the formation government contracts, "general rules of [government] contract law are most frequently found in the judicial decisions where fundamental contracts law issues are raised."[105] Not only are the general rules found there, but because federal procurement entails "an entirely different culture," it "requires the contextual richness of cases to effectively transmit understanding."[106] Case law is also perhaps the best resource for keeping abreast of developments in federal procurement.[107] Finally, suppliers who are inexperienced with the

https://publicprocurementinternational.com/agency-level-bid-protests/ (website gathering materials for a project on agency-level bid protests launched by the Administrative Conference of the United States).

[103] P. MCKEEN, *United States*, *op. cit.*, p. 349 (observing that there is an extensive body of case law reviewing agency actions throughout the acquisition cycle); SCHWARTZ, *United States of America*, *op. cit.*, p. 629 (stating that a "complex and highly articulated body of law governs the formation of federal procurement contracts"); Laurent, *Legal Aspects of Defense Procurement*, *op. cit.*, pp. 3, 114, 208-09 (describing a large and complex body of federal common law that bears on the formation of government contracts).

[104] SCHWARTZ, *United States of America*, *op. cit.*, pp. 621–22 (explaining that "important principles," that are derived from the case law, "govern U.S. federal government contracts" and that these judge-made rules "do not fit within the procurement contract regulatory system").

[105] CIBINIC, NASH, AND YUKINS, *Formation of Government Contracts*, *op. cit.*, p. 2.

[106] TIEFER AND SHOOK, *Government Contract Law*, *op. cit.*, p. 4.

[107] D.I. GORDON, *Dissecting the GAO's Bid Protest 'Effectiveness Rate'*, 56 *Gov't Contractor*, 2014, p. 1, available at https://ssrn.com/abstract=2387799.

U.S. system and lack specialized counsel will be in trouble if they are unaware of doctrines in the case law that are nowhere to be found in the statutes or regulations.[108]

Not only does the federal common law of contracts fill gaps where the statutes, regulations, and government contracts case law are silent.[109] When a *further* gap in the federal case law exists, precedent suggests that the federal courts borrow from the states' common law of contracts rather than creating a new rule from whole cloth.[110] Such borrowing is a rarity,[111] in part because the statutes, the FAR, and case law that is specific to government contracts have almost entirely exhausted the field.[112] Thus, if the common law of private contracts lay at the foundation of U.S. government contracts and still carries some sway,[113] its influence is waning.[114]

[108] See F.T. VOM BAUR, "Differences Between Commercial Contracts and Government Contracts", A.B.A. J., 1967, pp. 247, 249 (citing *G.L. Christian and Associates v. United States*, 312 F.2d 418 (Ct. Cl. 1963) (observing that the "Government contractor lands, like a man coming down in a parachute, in a foreign country of new and novel remedies that require specialized knowledge.").

[109] See *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943).

[110] See *United States v. Kimball Foods, Inc.*, 440 U.S. 715, 727–28 (1979).

[111] SCHWARTZ, *United States of America*, *op. cit.*, p. 627–28 (explaining that federal courts rarely borrow from state courts for *procurement* contracts, though they still sometimes do so for commercial, non-procurement contracts; thus, he concludes, "almost never does a federal court borrow state law to resolve a matter concerning federal government *procurement* contracts" (emphasis added)).

[112] *Ibid.*, p. 629 (observing that the ASPA, FPASA, and FAR, and case law interpreting these laws and regulations, "comprise the overwhelming bulk of US public procurement law" and that "they collectively blanketed the field of federal procurement law so that there is almost never a gap").

[113] DAVIES, *The Public Law of Contracts*, *op. cit.*, p. 54, 58–59 (suggesting that U.S. government contracts share with English government contracts law a similar reliance on the common law of private contracts); Laurent, *Legal Aspects of Defense Procurement*, *op. cit.*, pp. 208–09 (listing the states' common law of private contracts among the sources that comprise the federal common law of government contracts).

[114] WHELAN, *Understanding Federal Government Contracts*, *op. cit.*, pp. 63–64 (concluding from a review of the cases where federal courts have applied the Uniform Commercial Code of private contracts to government contracts

3. THE PRINCIPLES OF FEDERAL PROCUREMENT LAW

As we have seen, government contracts are unmentioned in the Constitution; to the extent that underlying principles exist, they have not been written down; and, partly due to its common law legacy, the U.S. procurement system tends to be more ad hoc than continental counterparts.[115] And there is an even more remarkable lacuna in the commentary.[116] To the extent that scholars have attempted to extrapolate from the available evidence and hypothesize about what such first principles may be, their conclusions have been tentative, conflicting, and ultimately incomplete.[117] This section, in particular, attempts to fill that gap.

3.1. "Unwritten" Principles of Federal Procurement Law

that the private law of contracts is at most persuasive authority). See also C.C. TURPIN AND J.W. WHELAN, *The London Transcript: A Comparative Look at Public Contracting in the United States and the United Kingdom*, Washington, DC, American Bar Association, Section of Public Contract Law, 1971, p. I-8 (explaining that "if there is not governing federal statute . . . then a court (or other interpreter) will follow the State law, including the Uniform Commercial Code as a guiding statement of law, but not a binding one").

[115] See 1 Commission on Government Procurement, *op. cit.*, p. 1 ("All too often, the attention has focused on individual abuses rather than on the overall system.").

[116] As noted above in Section I.C., there has been a marked failure to locate public procurement's own set of governing principles in the United States. See DAVIES, *The Public Law of Contracts*, pp. 124–25; WHELAN AND PEARSON, "Underlying Values in Government Contracts", *op. cit.* 298.

[117] For example, see P. BOURDON, *Le Contrat Administratif Illégal*, Dalloz, Nouvelle Bibliotheque de Thèsis, Vol. 131, 2014, pp. 183–84 (juxtaposing the various principles that U.S. government contracts scholars have proposed and demonstrating that no scholarly consensus has been reached).

In Charles Dickens's *Our Mutual Friend*, John Podsnap voiced a parochial Briton's opinion about the distinct virtues of English government to an unfortunate Frenchman dining with him: "We Englishmen are very proud of our constitution, sir. It was bestowed upon us by providence. No other country is so favored as this country."[118] We Americans have a similar tendency to this sort of podsnappery, and even feel ourselves slightly superior to our British cousins for having a constitution that is *written*.[119]

In the realm of federal government contracts, however, the U.S. Constitution is mostly silent. Unlike the European Union, where basic principles of public procurement derive from the Treaties, are expanded upon in the procurement directives, and are elucidated in the Court of Justice opinions, the principles that underlie U.S. government procurement – and we submit that they *do* exist – are "unwritten". They are not entirely unwritten, of course. They are written in, or least can be derived from, the statutes, regulations, and the case law that together compose the law of U.S. government contracts. They are unwritten in that they cannot be found on the centuries-old Constitution housed in the National Archives.

3.2. The Protean Nature of Federal Procurement's Principles

Ironically for a country so proud of its written Constitution, having an unwritten constitution in this field means that the principles and objectives of U.S. procurement are somewhat protean. It has been said that a defining feature of the British constitution is its

[118] C. DICKENS, *Our Mutual Friend*, London, Chapman and Hall, 1865, p. 101.

[119] See L.H. TRIBE, *The Invisible Constitution*, New York, Oxford University Press, 2008, p. 13 ("Much is made, and rightly so, of the United States having a single, uniquely identifiable, *written* Constitution. It's very writtenness makes our Constitution stand apart from what people mean when they speak, for instance, of 'the constitution' of a nation like the United Kingdom.").

plasticity, where parliament reigns supreme and government is adapted to the times, the prevailing circumstances and popular opinion.[120] U.S. federal procurement is similarly plastic. This is perhaps one of the main reasons that a consensus is still lacking among U.S. scholars about what the principles undergirding federal procurement are. Federal procurement is responsive to popular sentiment, and it has adapted to the exigencies of the times; a straight line cannot be drawn from 1789 to the present. Three examples illustrate this plasticity.

From colonial times, the United States has exhibited a longstanding commitment to the transparency and competition associated with open procedures, or what in U.S. parlance is called sealed bidding. Yet despite the rhetoric, use of sealed bidding ebbed and flowed for the first century and a half of the republic. In times of war, preference for sealed bidding gave way to necessity and expediency, and officials were allowed to use various procurement methods that were less competitive. And, ultimately, the U.S. government largely gave up on sealed bidding, in favor of the competitive negotiations that dominate modern federal procurement.[121]

Another protean principle is rooted in enforcement of the rule of law. Americans have long prided themselves in a culture of litigation, and this has extended to federal procurement, where disgruntled bidders' protests are the primary monitoring mechanism. Yet reforms in the 1990s sought to curb such litigation and instead to model government

[120] *Ibid.*, p. 14.

[121] See, e.g., C.R. YUKINS, *A Versatile Prism*, *op. cit.*, pp. 79–83.

procurement on best practices from the private sector – practices grounded in cooperation, not litigation.[122]

Yet another shifting principle has come in the U.S. commitment to open markets. Although the United States is fundamentally a free market economy and is sometimes unfairly caricatured as the home of a Darwinian form of *laissez faire* capitalism, the U.S. commitment to free trade in public procurement has been capricious.[123] Nowhere is this tendency so clearly on display as in defense, to which far more than half of federal procurement dollars are consistently devoted.[124] As early as the War of 1812, when the United States fought another bitter war with the United Kingdom as the young nation jockeyed to protect its sovereignty, the United States learned that it could not rely on foreign sources of supply in times of war; developing domestic sources was critical to survival.[125] That narrow exception to free trade principles, for "security of supply" in times of war, was radically exceeded in the twentieth century, for example with the Buy American Act of 1933 (which sought generally to protect jobs in the United States) and the Small Business Act (which was expanded to embrace an industrial policy of advancing small business). President Trump's"Buy American" initiative, grounded in economic nationalism, was an even more pronounced step away from the principles of free markets.

[122] See, e.g., C.R. YUKINS, *US Government Contracting in the Context of Global Public Procurement*, *op. cit.*, p. 271.

[123] Perhaps most famously, the Buy American Act of 1933 required the U.S. government to favor U.S.-made goods during the Great Depression. Pub. L. No. 72-428, codified at 41 U.S.C. §§ 8301–05.

[124] Spending analysis can be done at www.usaspending.gov, by agency and object class (e.g., contracts).

[125] Adam Smith anticipated this in "The Wealth of Nations" (1776), when he wrote that one of the rare "cases . . . in which it will generally be advantageous to lay some burden upon foreign, for the encouragement of domestic industry" is "when some particular sort of industry is necessary for the defence of the country."

These three examples clearly illustrate what one might charitably call the *flexibility* of the federal procurement system. One could argue that a willingness to abandon competition, transparency, and free markets exhibits a cavalier disregard for principle. Yet we submit that these policy shifts do not prove that the United States is completely without principles. Instead, we would argue that this is a confusion of the *objectives* of the U.S. procurement system with the *mechanisms* by which those objectives are carried out.[126] We will argue in the next section that although the U.S. public procurement system is characterized by considerable flexibility of execution, its bedrock principles, such as they are, stand unyielding.

3.3. Some (Nearly) Immutable Principles in Federal Procurement

Writing in 1972, Turpin asserted that although the UK system of public contracts lacked a fixed regulatory framework like the one that undergirds U.S. federal procurement, there nonetheless was a "series of settled administrative guidelines which are so entrenched and influential that they represent a de facto regulatory regime, albeit one lacking legal recognition."[127] We would argue that something similar can be said about the principles and objectives of U.S. federal procurement. Although the U.S. procurement system's desiderata and policy mechanisms have changed over time, certain bedrock principles "are so entrenched and influential" that they constitute the de facto objectives to which it is aligned. From a thorough review of the sources and the literature, we have identified three core objectives. The first two of these, we will argue, collapse into one, and this leaves us with two overriding objectives that have stood the test of time.

[126] See TREPTE, *Regulating Procurement*, *op. cit.*, pp., 3, 7, arguing the commonly expressed procurement desiderata – e.g., efficiency, transparency, equal treatment, nondiscrimination – are mechanisms, not objectives.

[127] C. TURPIN, *Government Contracts*, Harmondsworth, Penguin, 1972, pp. 72–73.

The first objective is best value. This has been called the "prime function" of the system.[128] Best value is the pursuit of the best quality for the money spent.[129] Often competition is listed as an objective in itself, but that is not the case. Competition is the handmaiden of best value – the solution for the intermediary purchasing official's indifference (as an agent) to procurement outcomes – rather than a goal with its own intrinsic value.[130] In the 1972 Report of the Commission on Government Procurement that provided many of the recommendations later adopted in the Competition in Contracting Act of 1984, the report offered a "concluding thought" about the *savings* to the taxpayer that would accrue from enacting its prescriptions.[131] Savings and value are central to the U.S. system.

[128] Whelan and Pearson, *Underlying Values in Government Contracts*, *op. cit.*, p. 302 (observing that the system is obviously designed to file one "prime function", namely that government contracts "are vehicles for the acquisition or disposal of property, performance of services or other governmental ends as may involve the use of promissory obligations").

[129] See FAR 1.102(a) ("The vision for the Federal Acquisition System is to deliver on a timely basis the value product or service to the customer, while maintaining the public's trust in fulfilling public policy objectives."); C.R. YUKINS, *Anti-Corruption Internationally: Challenges in Procurement Markets Abroad–Part I: Coordinating Compliance and Procurement Rules in a Shrinking World: The Case for a Transatlantic Dialogue*, in *West Government Contracts Year in Review Covering 2012, Conference Briefs*, Washington, West, 2013, pp. 2-1, 2-4–2-5 (contrasting America's emphasis on best value and ensuring tax dollars are spent wisely with the EU's procurement directives, where value for money is not an enumerated objective); M.K. LOVE, *Public v. Private Procurement: Your Tax Dollars at Work, American Bar Association Section of Public Contract Law Annual Meeting*, 1997, pp., 1, 2 (arguing the fundamental goal of federal procurement is "supplying best value for the procurement dollar").

[130] STEINICKE, *Public Procurement and the Negotiated Procedure*, *op. cit.*, p. 336 (contrasting the European system, where competition is the end, with the U.S. system where competition is only a means to an end and explaining that competition is favored in the United States primarily because it "produces better results for the purchasing authority"). See also SCHOONER, "Desiderata", *op. cit.*, p. 105 (explaining that the United States value competition because the government thereby "receives its best value in terms of price, quality, and contract terms and conditions"); YUKINS, "A Versatile Prism", *op cit.*, p. 68-69 (discussing principal-agent problem which undermines procurement outcomes, and benefit of competition to keep agent (procurement official) from straying from best value).

[131] 1 Commission on Government Procurement, *op. cit.*, p. 7.

The second objective is to eliminate fraud, waste, and abuse.[132] This has been called the hallmark of U.S. federal procurement – a persistent reminder that the United States see itself as a participatory democracy, in which every citizen-taxpayer has a voice and a stake.[133] Accountability and the right in challenge waste are said to be "[w]oven like heavy cable" throughout various procurement statutes and regulations.[134] In reality, however, anticorruption is not so much a separate objective as it is a complement or restatement of the first: fraud, waste, and abuse are *betrayals* of the federal government's fiduciary duty of best value to the taxpayer.[135] Thus, the system is designed to minimize corruption in order maximize best value to the taxpayer.

And the third objective is the pursuit of diverse collateral objectives. Not only do Americans mistrust their government generally, they are particularly skeptical about its

[132] J.L. MASHAW, *The Fear of Discretion in Government Procurement*, *Yale J. on Reg.*, 1991, pp. 511, 514 (describing the United States' particular aversion to fraud and waste in procurement and observing that the system concentrates on these types of corruption because "they reinforce a distrust of government operations that is so central to our constitutional heritage as to function almost as a civic religion"). See also GORDON AND RACCA, "Integrity Challenges", *op. cit.*, pp. 138–39 (explaining that transparency and accountability have deep roots in U.S. federal procurement going back two centuries); Schooner, "Desiderata", *op. cit.*, p. 104 (listing transparency and integrity among three pillars of the U.S. federal procurement system); Schooner, "Commercial Purchasing", *op. cit.*, p. 161 (also listing transparency and competition).

[133] S.L. SCHOONER and N.S. WHITEMAN, *Purchase Cards and Micro-Purchases: Sacrificing Traditional United States Procurement Policies at the Altar of Efficiency*, *Pub. Proc. L. Rev.*, 2000, p. 148, 160 (observing that "innumerable" laws and regulations seek to eliminate not only impropriety even the appearance of impropriety).

[134] See WHELAN, "Reflections on Government Contracts", *op. cit.*, p. 15.

[135] For example, a 1983 Senate Report neatly combined these two objectives, stating that the primary aim of procurement regulation requiring competition is "securing the most advantageous contract for the government and lessening the opportunity for favoritism." Senate Comm. on Governmental Affairs, Competition in Contract Act of 1983, S. Rep. No. 50, 98th Cong., 1st Sess., 1983, p. 2. Similarly, "avoidance of favoritism has been a central procurement objective since the 19th century" precisely because favoritism is associated with poor value for money. See A. MAYER, *Military Procurement: Basic Principles and Recent Developments*, *Geo. Wash. J. Int'l L. and Econ.*, 1987, pp. 165, 183. And procurement regulation insists upon competition to curtail collusion between government buyers and private sellers, and thus safeguard the public fisc. PERLMAN, "Guarding the Government's Coffers", *op. cit.*, p. 3187.

purchasing function.[136] That mistrust arguably spurs the socioeconomic requirements that are superimposed on the federal procurement system: much as Americans mistrust government officials to achieve best value in a narrowly economic sense, so too do Americans (and their representatives in Congress) doubt that purchasing officials will adequately account for broader social and economic goals (what Europeans might call "sustainability goals") when making purchases. To correct course – to ensure that procurement officials purchase "best value" in a broader sense, to include shared social and economic goals – U.S. society expects that the procurement regime will be freighted with extensive socioeconomic requirements.

The federal procurement system is designed consistent with the United States' constitutional order and national values.[137] The means imposed by the regulatory regime – the competition, anti-corruption and trade measures that can seem to swerve in contradictory directions – draw together behind Americans' deep beliefs in best value and accountability, beliefs grounded in U.S. values as a participatory democratic. Because these beliefs are more perspectives than principles, they do not lend themselves in an elegant, Cartesian sense to lawmaking – indeed, the raucous contradictions in U.S. procurement law over the centuries arguably prove that these "principles" provide little or no binding guidance for lawmaking. That said, by being rooted in a shared outlook as a participatory, accountable democracy, the

[136] J. BESSELMAN AND A.A. PATRICK LARKEY, *Buying in Businesslike Fashion – And Paying More?*, *Pub. Admin. Rev.*, 2000, pp. 421, 423 (calling procurement "the most reviled, reviewed, and reformed function" of the U.S. government).

[137] See CANCIAN, "Acquisition Reform", *op. cit.*, p. 189 (arguing that far from being "broken", "the current system is well-designed to accomplish the goals that the nation values"); MASHAW, "Fear of Discretion", *op. cit.*, pp. 511, 515 (arguing that "the procurement system we have is not some silly aberration brought about by the lack of bottom line accountability" but is instead "responsive both to our constitutional heritage and to the day to day politics of a system structured to produce continuous oversight").

U.S. federal procurement system remains an integral part of a constitutional democracy that is highly responsive to popular sentiment.[138]

4. CONCLUSION

Writing 30 years ago, the most prominent of a previous generation of scholars suggested that forming a grand theory of U.S. government procurement may be impossible.[139] We are more sanguine. We believe, following Trepte, that efforts by our colleagues to identify the principles that underlie U.S. federal government contracts have foundered on a simple confusion of the ends and means.[140] Listing the desiderata was a necessary first step.[141] But the desiderata are ephemeral because they are instrumental: because they are more means than a code of principles, Americans are prepared to discard them if they do not serve their purpose. We believe that the U.S. federal procurement system's first-order principles can be summarized as a pursuit of best value (which also entails anticorruption) and second as a readiness to subordinate best value to social policies that the body politic may dictate. The give and take of these two competing principles – the one immutable, the other ineluctably modal[142] – capture the essence of the last two and a half centuries of U.S. government procurement. The two are surely contradictory and cannot be reconciled, and we make no attempt to do so here. Thus U.S. federal procurement stands

[138] See H.L. MENCKEN, *A Little Book in C Major*, New York, John Lane Co., 1916, p. 19 ("Democracy is the theory that the common people know what they want, and deserve to get it good and hard.").

[139] R.C. NASH AND J. CIBINIC, *The Procurement System of the Future, Nash and Cibinic Report*, 1991, ¶9 ("Perhaps there's no single, dominant principle upon which we can hang the entire procurement process.").

[140] See TREPTE, *Regulating Procurement*, *op. cit.*, pp., 3, 7.

[141] SCHOONER, *Desiderata*, *op. cit.*, pp. 104–10, naming transparency, integrity, and competition.

[142] We adapted this from Stephen Dedalus's famous "ineluctable modality," or in plain language, *inescapable change*. See J. JOYCE, *Ulysses*, Oxford, Oxford University Press, first published 1922, 1992 edn. (J. Johnson, ed.), p. 37. *Ibid*, p. 783, noting that this phrase most likely comes from Joyce's translation of a passage from Aristotle.

equipoised between unstated and unwritten principles whose objective is to secure best value, and myriad laws and regulations that to some extent undermine that objective in pursuit of assorted socio-economic objectives.

Abstract. *U.S. federal public procurement law is governed by public law, and this separate body of procurement law diverges from private contract law in important ways. Though public procurement law goes unmentioned in the Constitution, some principles of public contracts derive from this highest form of national law. A patchwork of statutes constitutes the foundation, but no single statute governs the whole system. Instead, under the Office of Federal Procurement Policy Act, Congress designated the Federal Acquisition Regulation (FAR) as "the single Government-wide procurement regulation." The FAR thus has the force and effect of law. In the United States' common law system, case law plays an interpretative role, and procurement law is no exception. This intricate web of precedent includes protest litigation at the General Accountability Office (GAO) and the Court of Federal Claims (COFC), disputes before the various Boards of Contract Appeals (BCAs) and COFC, and also precedent developed over decades in forums whose jurisdiction Congress has since withdrawn. When all else fails, these forums may look to the law of private contracts as persuasive authority. None of this, of course, presents a common body of principles to govern U.S. procurement; if anything, this contradictory bundle of laws suggest a deeper truth, which is that the U.S. procurement system is defined less by classic principles and more by an abiding sense of the need for best value, integrity, and a very politicized accommodation of critical social and economic goals.*