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# WHO PUTS THE PUBLIC IN THE PUBLIC GOOD?: A COMMENT ON CASS

CLAYTON P. GILLETTE\*

With characteristic comprehensiveness, Professor Ronald Cass has provided us with a compendium of mechanisms for privatization and a justification of their use.<sup>1</sup> Eschewing the easy lure of binary choices, he suggests that the decision to employ public or private avenues to accomplish optimal allocation of public goods and services must ultimately rest on a variety of factors. Captured within the rubric of comparative advantage, these factors demand that we assign any particular activity that affects the public interest to the sector that best navigates between the Scylla of rent-seeking and the Charybdis of agency costs.

I have little disagreement with this general approach to the issue of privatization. I want to focus, however, on some tendencies that might undermine initial assumptions about the advantages of private and public sectors in particular situations. Towards this end, I want to concentrate on the allocation function of government. Of the functions government serves, efficiently allocating resources would appear most susceptible to some measure of privatization. Government intervention in this area is largely intended to compensate for the failure of private markets to overcome problems of free riding and nonrival consumption. Only the most fanatical adherents to the theory of the night watchman state would deny a governmental role in this task. But one may be far more of a statist and still believe that government could satisfy its obligations to ensure optimal allocation of goods and services without direct involvement in their production.<sup>2</sup> Government may instead assign the relevant production task to private enterprise.<sup>3</sup> Alternatively, government may intervene to replace a failed market for production, but replicate private pricing mechanisms by charging beneficiaries of the service on a marginal or opportunity cost basis rather than financing the service through general tax revenues.<sup>4</sup> At the local level, both private service provision and market pricing are common-

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1. Cass, *Privatization: Politics, Laws, and Theory*, 71 MARQ. L. REV. 449 (1988).

2. See R. MUSGRAVE & P. MUSGRAVE, *PUBLIC FINANCE IN THEORY AND PRACTICE* 9 (4th ed. 1984).

3. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 545 (1985) (government can "[c]ontract out" by hiring private firms to provide the service . . . ).

4. See Gillette & Hopkins, *Federal User Fees: A Legal and Economic Analysis*, 67 B.U.L. REV. 795, 800-01 (1987).

place.<sup>5</sup> If there remain reasons for concern about privatization in the allocation area, all the more concern may be appropriate in the privatization of distributional functions that Professor Cass warily suggests might be attempted.

### I. THE REJECTION OF FORMALISM

Certainly, if we are concerned about optimal resource allocation, there seems little reason to assign one sector a monopoly based on formalistic conceptions of "public" and "private" that bear little relationship to fulfillment of that objective.<sup>6</sup> As Cass indicates, there is little principled basis on which to salvage any immutable dividing line between activities that must be retained within the governmental sphere and those susceptible to privatization. The demise of the governmental-proprietary distinction recognizes that any attempt to carve out a finite division between public and private activities is doomed to failure.<sup>7</sup> The Supreme Court's most recent foray into the realm of governmental powers, beginning with *National League of Cities v. Usery*<sup>8</sup> and mercifully abandoned in *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>9</sup> appeared to find particular hope in the purported certainties of "tradition" and "traditional governmental activities."<sup>10</sup> The inevitable failure of such a test is apparent from any historical perspective on the issue of governmental activity.<sup>11</sup> Far from being linear, the "tradition" of American government has been intermittent

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5. See Savas, *Policy Analysis for Local Government: Public vs. Private Refuse Collection*, 3 POL'Y ANALYSIS 49 (1977).

6. This is not necessarily to reject formalistic distinctions in all situations. Formalism may often times serve as a surrogate for conclusions reached intuitively, or may suggest certain shared concerns, or may be appropriate where having a rule is necessary to guide conduct notwithstanding that the rule thus derived may diverge from rules judged by some other standard, such as efficiency. See Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America* and *Dormant Commerce Clause Doctrine*; (II) *Extra-Territorial State Legislation*, 85 MICH. L. REV. 1865 (1987).

7. See Wells & Hellerstein, *The Governmental-Proprietary Distinction in Constitutional Law*, 66 VA. L. REV. 1073 (1980); see also *New York v. United States*, 326 U.S. 572 (1946).

8. 426 U.S. 833 (1976). While this line of cases nominally involved the scope of federal government activity under the tenth amendment, underlying the Court's analysis was the view of whether certain activities were susceptible to regulation or intervention by any level of government.

9. 469 U.S. 528, *reh'g denied*, 471 U.S. 1049 (1985).

10. See, e.g., *United Transp. Union v. Long Island R.R.*, 455 U.S. 678 (1982); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 284-89 (1981).

11. See, e.g., O. HANDLIN & M. HANDLIN, *COMMONWEALTH: A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY: MASSACHUSETTS 1774-1861* (rev. ed. 1969). See also Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 WIS. L. REV. 83.

entwinement with private enterprise, not simply through regulation, but also through systematic subsidization and operation of commercial enterprises.<sup>12</sup> These relationships should not be viewed as historical anomalies. If we are at all solicitous of the view that state and local governments serve as laboratories for experiment, then one would endorse such a dynamic relationship between public and private enterprise.<sup>13</sup> That the experiment vacillates between governmental intervention into and government isolation from "essentially" private functions may reflect little more than alterations in social perceptions of the entity best capable of efficiently delivering desired services.

Indeed, the swings between privatization and intervention may constitute on a more global scale what Albert Hirschman has described as the "shifting involvements" of individuals between public and private activity as they find disappointment with their current state.<sup>14</sup> In the late nineteenth century, social shifts away from public funding of new enterprises, such as railroads, followed periods in which unkept promises of those who benefited from government largesse generated substantial tax burdens for the taxpaying public.<sup>15</sup> The subsequent *laissez faire* period gave way to renewed calls for government intervention when private markets appeared incapable of self-regulation and staving off economic depression. Current calls for privatization emerge from concern that public regulation has unduly catered to the interests of the regulated and interfered with market incentives.<sup>16</sup> These ideological shifts suggest that there is little sacrosanct in the allocation of specific functions to the public or private sector.<sup>17</sup> Instead, our selection of one sector rather than another may reflect our level of satisfaction (or dissatisfaction) with the performance of the last actor assigned the task.<sup>18</sup>

These historical shifts, however, send an ambiguous message. Advocates of privatization may receive substantial solace from the dilution of any dividing line between public and private activities because it removes the

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12. L. HARTZ, *ECONOMIC POLICY AND DEMOCRATIC THOUGHT: PENNSYLVANIA 1776-1860* (1948).

13. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

14. A. HIRSCHMAN, *SHIFTING INVOLVEMENTS: PRIVATE INTEREST AND PUBLIC ACTION* (1982).

15. See Gillette, *Reinterpreting "Public Purpose" — The Judiciary Strikes Back*, 6 *MUN. FIN. J.* 61 (1985).

16. See, e.g., Peltzman, *Toward a More General Theory of Regulation*, 19 *J.L. & ECON.* 211 (1976); Stigler, *The Theory of Economic Regulation*, 2 *BELL J. ECON. & MGMT. SCI.* 3 (1971).

17. On the ideology of shifts from public to private and back, see A. HIRSCHMAN, *supra* note 14, at 66-68, 121-30.

18. For a discussion of this "rebound effect," see *id.* at 80-82.

formidable barrier of "intrinsic" governmental functions. The disappearance of any inexorable dividing lines leaves the full array of activities currently occupied by government open to private takeover. But if private enterprise may act in areas previously occupied by government, then presumably — within nebulous constraints such as the guaranty clause<sup>19</sup> — government may reciprocate. Certainly, judicial approval of ventures running from state operation of banks<sup>20</sup> to state development of alcohol plants for energy generation<sup>21</sup> and the justification of new state ventures by reference to an expanding definition of "public purpose" expenditures,<sup>22</sup> suggests a relatively open-ended competition between public and private sectors to occupy any given activity. That, of course, raises all the more poignantly the question that Professor Cass has presented us: how are we to determine the appropriate occupant for any given activity?

As Cass recognizes, the elusive answer to that question must rest on some rough approximation of which group of actors will diverge least from a conception of optimal allocation. Without saying so directly, Professor Cass seems to be concerned with the issue of which sector will best serve the "public interest." That inherently ambiguous phrase promises little in our quest for a substantive standard of what government ought to be doing, or — in the context of privatization — not doing. But Cass implicitly adopts a proceduralist approach to the issue; his factors attempt to ensure that decisionmakers are acting in a manner that weds them to concerns that transcend narrow self-interest. Oddly, however, after properly rejecting formalistic distinctions for public and private activities, Cass invokes the same categories in his search for the ideal decisionmaking process. His discussion of the nondelegation doctrine reintroduces the public/private distinction that he has just rejected by suggesting that certain decisions must be made within the former realm. He thereby understates the real concern that informs the doctrine — the desire to place decisionmaking authority in

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19. Although it is a generally understood principle of state and federal constitutional law that governmental entities can spend funds only for "public purposes," the textual predicate of that requirement is often elusive. Some courts purport to locate the requirement in the due process clause of the state constitution. *See, e.g., State ex rel. State Reclamation Bd. v. Clausen*, 110 Wash. 525, 531, 188 P. 538, 541 (1920). The Wisconsin Supreme Court has discovered the public purpose requirement in the federal constitutional guarantee of a republican form of government. *See City of West Allis v. County of Milwaukee*, 39 Wis. 2d 356, 376, 159 N.W.2d 36, 46 (1968), *cert. denied*, 393 U.S. 1064 (1969) (citing *Heimerl v. Ozaukee County*, 256 Wis. 151, 158, 40 N.W.2d 564, 567-68 (1949)).

20. *Green v. Frazier*, 253 U.S. 233, 235 (1920).

21. *State ex rel. Douglas v. Thone*, 204 Neb. 836, 286 N.W.2d 249 (1979).

22. *See, e.g., Massachusetts Home Mortgage Fin. Agency v. New England Merchants Nat'l Bank*, 376 Mass. 669, 382 N.E.2d 1084 (1978) (tracing history of state government involvement in housing area over previous century).

the hands of those most likely to consider all the costs and benefits that emerge from the process.<sup>23</sup>

Certainly this objective motivates the delineation of those factors that Cass subsequently relies on to allocate responsibility; agency costs and rent-seeking are problematic only insofar as they induce decisionmakers to ignore external costs in the pursuit of self-interest. That this is our real concern in designating decisionmaking authority in the area of resource allocation seems apparent from the legal constraints on decisionmakers who wish to abdicate their function. Prohibitions against delegation do not arise, as Cass suggests, from a concern for "assigning functions from government to private parties. . . ."<sup>24</sup> Nor is the anti-delegation argument necessarily predicated on "a notion of . . . functions that are essentially governmental. . . ."<sup>25</sup> Rather, the concern is that decisionmakers have sufficient incentives to consider all the effects of their decision. It may be irrelevant whether those incentives arise from political accountability (decisionmakers who face voters at subsequent elections) or from market mechanisms (decisionmakers who face consumers or employees). Where decisions are made by those unaccountable — either through the private or the political market — to those potentially adversely affected, there is little reason to believe that the interests of those parties have been considered in the decision.<sup>26</sup>

If internalization of externalities is the concern that undergirds constraints on delegation, the public/private dichotomy plays no particular role in defining the application of the doctrine. Neither public nor private sector decisionmakers have a monopoly over decisions that fail to consider all adverse effects. Thus, we would be no more confident (and perhaps less so) if decisions for the city of Boston concerning electricity supply were made by the public officials of the city of Seattle than if they were made by the private officials of the Boston Edison Company. When, for instance, the Supreme Court of Washington invalidated contracts in which municipalities had deputized another entity to exercise substantial discretion over matters that significantly affected municipal resources, it did so notwithstanding that the deputy was another political division of the state. It was

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23. I mean this criticism to suggest little more than an oversight. That Professor Cass recognizes the importance of selecting a decision maker who can best internalize all costs and benefits is not only implicit in the work under discussion, but also explicit in his own writing. See Cass, *Damage Suits Against Public Officers*, 129 U. PA. L. REV. 1110, 1135-38 (1981).

24. Cass, *supra* note 1, at 497.

25. *Id.* at 498.

26. See, e.g., Buchanan & Faith, *Entrepreneurship and the Internalization of Externalities*, 24 J.L. & ECON. 95 (1981).

sufficient that the municipalities had abdicated their own position as custodians for the welfare of their own residents.<sup>27</sup> The interests of the delegate could not be expected to coincide with those of the residents who would be affected by the decision. Notwithstanding the controversial setting of that case,<sup>28</sup> it incontrovertibly acknowledges the vitality of the nondelegation doctrine at the state and local level.<sup>29</sup> If the doctrine's survival is predicated on a deeper reluctance to entrust decisions to those with insufficient incentives to consider the adverse effects of their conduct, it has no necessary implication for privatization. Should private providers succeed in overcoming our hesitation, for example, by acting in areas where negative externalities are likely to be minimal, doctrinal rigidity should not serve as a further obstacle to a delegation defensible on allocative grounds.

## II. THE RISK OF TOO MUCH PRIVATIZATION

The search for ideal decision processes, then, is appropriately concerned less with formalism than with neutralizing the opportunistic or strategic behavior of decisionmakers. Presumably the sector that promises best to neutralize self-interest (embodied in agency costs and rent-seeking) is the one to which we should commit any task intended to further public interest. Cass' analysis to reach that point, however, seems incomplete. His inquiry is directed solely at the implementation stage, that is, whether the private or public sector, *once assigned a particular function*, will implement it in a manner that coincides most closely with public interest. If we recognize the importance of behavioral biases, however, we must also ask how self-interest induces divergence from public interest in the initial decision to reassign a government function to the private sector. Here, self-interest suggests that an inordinate (from the public interest perspective) number of assignments will be made to the private sector. The reason should be clear from traditional literature concerning collective action and public goods. That learning indicates how tendencies to free ride, high information costs, and incentives for expropriation cause particular goods and services to be over-supplied or undersupplied. In short, on such matters the market will deliver to us "the back of the invisible hand."<sup>30</sup>

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27. *Chemical Bank v. Washington Pub. Power Supply Sys.*, 99 Wash. 2d 772, 666 P.2d 329 (1983).

28. The case involved the invalidation of contracts that supported bonds issued by the Washington Public Power Supply System, then the largest issuer of municipal bonds in the country. *Id.*

29. See, e.g., *Smith v. Spring Garden Township*, 34 Pa. D. & C.2d 54 (1964); *Thompson v. Smith*, 119 Vt. 488, 129 A.2d 638 (1957).

30. R. HARDIN, *COLLECTIVE ACTION* 6 (1982).

If government seeks to cure market failures in the allocation of public goods and services, then it is important to recognize that government itself exhibits characteristics of a public good.<sup>31</sup> As Derek Parfit phrases it, political problems constitute a "Contributor's Dilemma" in which cooperative solutions are required.<sup>32</sup> However, since noncontributors are able to share the benefits of the political solution along with contributors (even though they incur none of the commensurate costs), personal incentives are skewed toward noncontribution. Initially, one might infer from this analysis that political solutions are undersupplied and that we are likely to have too little governmental intervention rather than too much. This counterintuitive result suggests a problem with the theory. Deeper reflection, however, indicates that governmental intervention in particular activities may be motivated by altruists, political entrepreneurs, or client groups, whose net effect is production of even greater than optimal levels of governmental activity.<sup>33</sup> Certainly Professor Cass' concern for rent-seekers suggests such a possibility, as those with access to the government apparatus will attempt to appropriate it for their own welfare rather than that of the public at large. Thus, it may be that even if we have an excessive quantum of government, we have too little of it that is motivated by public interest.

If privatization is portrayed as a response to rent-seeking through government largesse, it may also be that the same phenomenon affects the initial decision to privatize. If privatization reduces agency costs and rent-seeking within government, it (like government) exhibits characteristics of a public good. As such, the incentive of any member of the public to assist in achieving the appropriate level of privatization appears minimal. As with other public goods, the beneficiary will be equally well-off allowing others to strike the balance, *assuming* that others are willing to do so. Indeed, from each potential contributor's perspective, any contribution is exclusively a cost enterprise, since marginal benefits from individual contributions are nil. Thus, the rational, self-interested beneficiary will do nothing to encourage appropriate instances of privatization or discourage inappropriate ones. Of course, the force of the Prisoner's Dilemma lies in its pre-

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31. See Krier & Gillette, *The Un-Easy Case for Technological Optimism*, 84 MICH. L. REV. 405 (1985).

32. D. PARFIT, *REASONS AND PERSONS* 64 (1984).

33. See, e.g., Kalt & Zupan, *Capture and Ideology in the Economic Theory of Politics*, 74 AM. ECON. REV. 279 (1984); H. MANNE, *INDIVIDUAL CONSTRAINTS AND INCENTIVES IN GOVERNMENT REGULATION OF BUSINESS, IN INTERACTION OF ECONOMICS AND LAW* (B. Siegan ed. 1977); Peltzman, *supra* note 16.



diction that all potential beneficiaries will believe and behave similarly and thus first-best political solutions will fail.<sup>34</sup>

Failure to achieve the optimal solution, however, is not the result of universal inaction; rather, it results from action by those few for whom the benefits of privatization exceed the commensurate costs. These, of course, are likely to be the discrete, "privileged" industries that are likely to profit from taking over functions formerly performed by government.<sup>35</sup> If those actors were influenced solely by altruistic tendencies that coincided perfectly with public interest, there would be no divergence between the level of optimal privatization and that actually provided. This utopian solution, however, cannot be reconciled with Cass' assumption that rent-seeking and agency costs generate the problem in the first place. In our current context, the upshot of the problem is that the firms that can expect to replace government under a regime of privatization have substantial incentives to lobby for that course. If those adversely affected constitute the public at large — diffuse in scope, with little to lose individually, notwithstanding substantial aggregate loss — they are unlikely to incur the cost of resisting governmental disinvestment.

It is possible that particular groups with substantial access to governmental decisionmaking about privatization could resist that process because they receive substantial and discrete benefits from governmental involvement in the activity. Employees of a governmentally run commercial enterprise, for instance, might have substantial interest, not shared with the public at large, in the continuation of government involvement.<sup>36</sup> However, I am not arguing that privatization will always occur due to disincentives for collective action. I am only suggesting the presence of a systematic bias in favor of privatization — a bias that will generate skews from an ideal assignment to the public and private sectors. Even where there does exist a discrete group opposing privatization, its very existence suggests interests divergent from those of the public at large, that is, the receipt of substantial

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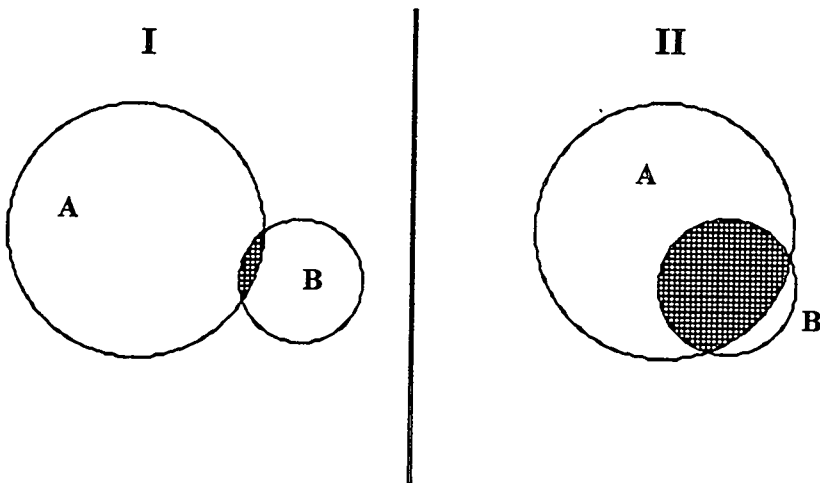
34. See R. AXELROD, *THE EVOLUTION OF COOPERATION* (1984) for both a statement of the problems and mechanisms for resolution in repeat-play situations. On the latter, see Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 *STAN. L. REV.* 623 (1986).

35. See M. OLSON, *THE LOGIC OF COLLECTIVE ACTION* 48-52 (1980); see also R. HARDIN, *supra* note 30, at 38-49 (1982). I am not suggesting that only these privileged groups are capable of overcoming obstacles to collective action. See M. TAYLOR, *THE POSSIBILITY OF COOPERATION* 8-13 (1987). I am suggesting that they have an easier time of accomplishing that task.

36. See, e.g., S. BUTLER, *PRIVATIZING FEDERAL SPENDING: A STRATEGY TO ELIMINATE THE DEFICIT* 79 (1985) (rent-seeking induces Amtrak employees to favor governmental role in operation).

rents, and thus even those situations will not be characterized by an optimal mix of public and private participation.

Whether or not it is worth taking the risk that privatization might be oversupplied depends on issues that defy easy answers. Professor Cass suggests that our resolution of the public/private mix requires knowledge only about ordinal rankings — which sector is more likely to neutralize opportunism. But the uncertainty of oversupply suggests that deviation from ideal resource allocation may also have an important cardinal component. If a deviation by one of the sectors is substantial, though unlikely, while that of another sector is minor, though more likely, our willingness to gamble with “public interest” might be affected. There is a danger of reading Cass as ignoring the issue of “expected divergence” (degree of divergence times probability of divergence). Rent-seeking, on this view, consistently generates total divergence between private and public interests. Indeed, if that were the case, and rent-seeking could be minimized through privatization in some form, the case for the latter would be difficult to resist. Private interests that rent-seekers vindicate through government action, however, may substantially overlap with those of the public. A diagrammatic illustration may best make the point.



Assume two cases, I and II, in each of which a group of actors is assigned the task of addressing part of a public problem. In each case, conduct that would satisfy the public interest is defined by circle A; circle B represents conduct that would satisfy the private interest of the particular assignee. Assume, for instance, that the area occupied by A in each case is that quintessential public good — national defense — and that the private party that defines B in each case is the manufacturer of a particular type of

aircraft that is being considered by the military for purchase. Assume further that the optimal number of such aircraft from the perspective of public interest would be 200. That is to say, if the decision to produce were being made by publicly interested officials who are unaffected by rent-seeking, agency costs, or the private interest of contractors, these officials would order 200 of the aircraft. Nevertheless, the optimal level of manufacturing for the industry that constitutes circle B diverges from public interest. If the decision about how many aircraft to construct is placed in the hands of the manufacturer, who is presumably motivated by self-interest, it will settle on the number represented by B. In each situation, there is some overlap between the two — private, self-interested action confers both private and public benefits. Yet cases I and II are dramatically different from the perspective of tolerating rent-seeking. The shaded area of overlap in situation I is miniscule; perhaps the manufacturers would reach optimal production at 1000 airplanes and are able to influence governmental decisionmakers to order that number. In case II, however, there is substantial overlap — perhaps optimal production for manufacturers would be 210 airplanes.

Certainly rent-seeking exists in both cases. But, given the costs of privatization and the tendencies for over-privatization discussed above, its existence alone is not the issue. More important is the extent of overlapping private and public interests. If case I describes the standard case, it is conceivable that, even given Professor Cass' concerns, governmental provision might be superior. Where private interest overlaps only incidentally with public interest, a superior social strategy may be to leave decisions of provision and production solely in governmental hands.

If, on the other hand, we were confident that case II described most situations of privatized rent-seeking, then the expected costs of over-privatization may be small enough to bear the risk. Society might achieve a more efficient level of provision by allowing private firms to produce and entrusting to government the obligation of monitoring performance to ensure compliance with particular specifications.

### III. PUBLIC MONITORING AND PUBLIC COMPLAINING

The possibility of a government role limited to monitoring ultimately leads us to Professor Cass' prescription. He, too, believes that systematic tendencies pervade the allocative function of government. For him, these tendencies raise concerns about the capacity of government actors to monitor performance. For Cass, government actors possess insufficient incentives to serve this function, and even the most benevolent suffer because ambiguous definition of government goals beclouds the standard of success. I believe there is some merit in this position. The adverse effects that Cass

stresses, however, are not limited to the public realm. Both public and private actors, for instance, are likely to skew their decisions to short-term benefits, notwithstanding the consequent generation of excessive long-term costs. Public officials will do so because they must produce results for their constituents prior to the next election, notwithstanding potentially adverse long-term effects on the public treasury.<sup>37</sup> Private sector decisionmakers are similarly concerned with quarterly or annual results in order to satisfy immediate superiors, irrespective of potentially adverse effects on the maximum value of shares.<sup>38</sup> But Professor Cass seems to suggest that as a general matter the private sector enjoys an advantage at least in the specific respects he discusses.

I believe that in this critique Cass paints the comparative defects of government with too broad of a brush. For him, the monitoring of government performance by recipients of a service is likely to fail either because of traditional free-riding problems or because response to official defalcation is too costly. Hence, "[m]oving out of even a relatively small jurisdiction is considerably more costly than selling shares of stock . . . ."<sup>39</sup> Certainly, this view of public reactions to deviations from optimal service levels is too restrictive. The consumer-recipients of some government services, such as trash collection or water service, in which opportunities for free-riding are minimal and the value of the service makes complaints cost effective, are likely to complain about inefficiency regardless of the supplier. Others will not complain if the public works department does not remove a large tree limb from one's property; if my water service is unsatisfactory, there is still less reason to ride free on the clamor of others who share my plight because the value of improving such an essential service may be worth the cost of complaint, even discounting for the possibility of a free-ride.

Indeed, the entire area of governmental services supported by user fees (itself a halfway house towards privatization) is predicated on the availability of an "identifiable beneficiary" who receives particular advantages from the service.<sup>40</sup> One would expect that the recipient of a benefit sufficiently distinct and substantial to support a benefit-based user fee would also possess significant incentives to monitor the delivery of those services, notwith-

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37. See Gillette, *Fiscal Federalism and the Use of Municipal Bond Proceeds*, 58 N.Y.U. L. REV. 1030, 1059-62 (1983).

38. See Hayes & Abernathy, *Managing Our Way to Economic Decline*, HARV. BUS. REV. July-Aug. 1980 at 67; Robinson, *Probabilistic Causation and Compensation for Tortious Risk*, 14 J. LEGAL STUD. 779, 784-85 (1985).

39. Cass, *supra* note 1, at 482.

40. See, e.g., *Central & S. Motor Freight Tariff Ass'n*, 777 F.2d 722 (D.C. Cir. 1985); *Electronics Indus. Ass'n v. F.C.C.*, 554 F.2d 1109 (D.C. Cir. 1976).

standing the absence of "freely transferable property rights"<sup>41</sup> equivalent to that of shareholders. Thus, permitting government to produce goods or services, but shifting payment mechanisms from taxes (fraught with cross-subsidies) to user fees could actually increase public monitoring of government action.

Nor does Cass accurately capture the range of alternatives open to the public when he implies that constraints on exit outside the Tiebout world do not, as he implies, condemn recipients of governmental services to resigned silence. Instead, much as the case when consumers are bound to particular products in the private market, deterioration of services may give rise to an equally effective ameliorative of vociferous complaint, that is as effective of an ameliorative as exit.<sup>42</sup> Indeed, it is because exit is rendered difficult that we can expect public monitoring and complaint to increase. For those locked into jurisdictional boundaries by family, employment, or other obligations, the only alternative to complaint is to deny one's state of dissatisfaction. While that route may satisfy some, there can be little doubt that others, similarly situated, will resolve to improve the situation.<sup>43</sup> It is this expectation that residents will share the perceptions and proposed solutions to problems — that residents will have monitored the situation — that induce the "takeover" attempts by political opponents. Presumably those attempts would not be initiated if opposition political entrepreneurs did not believe that public monitors would "sell" votes to them at the next election. Thus, even if public managers *may* have less incentive to monitor performance than their private counterparts, there is little reason to believe that consumers cannot substantially narrow the gap.

Similarly, some governmental services may be less susceptible to the ambiguity of goals that Professor Cass suggests can increase agency costs in the public sector. There will, of course, be substantial debate within the National Park Service about whether the proper governmental goal is preservation of wilderness areas (reducing admissions and development regardless of willingness to pay by potential users), maximum availability (allow in all who can fit on a first-come, first-serve basis), or efficiency (admit those

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41. See Cass, *supra* note 1, at 481.

42. See A. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 305 (1970); Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 837, 883-84 (1983). For a discussion of the legal effects of constraints imposed in the non-Tiebout world, see Gillette, *Equality and Variety in the Delivery of Municipal Services* (Book Review), 100 HARV. L. REV. 946, 956-61 (1987).

43. See J. KRIER & E. URSIN, POLLUTION AND POLICY: A CASE ESSAY ON CALIFORNIA AND FEDERAL EXPERIENCE WITH MOTOR VEHICLE AIR POLLUTION, 1940-1975, 52-57 (1977) (describing citizen action taken to alleviate pollution in California).

willing to pay admission prices based on opportunity costs for the land or market prices, such as fees charged at Disney World).<sup>44</sup> If no single policy objective achieves primacy within a public agency, then monitoring the disparate goals of public actors does become problematic. But that is a very different point from one with which it is easily confused, that is, that government objectives are inherently less susceptible to measurement than the dominant private sector objective of profit maximization. If a primary goal does emerge from intra-agency debate, the fact that the successful objective pursues suboptimal allocation of the relevant goods in favor of "mushier" goals (such as "fairness") does not necessarily render performance immeasurable or more difficult to monitor. Those alternative goals must often be translated into programs that permit service recipients to determine whether implicit or explicit objectives are being satisfied. If, for instance, a local government seeks to equalize service outcomes among neighborhoods, even at the expense of maximum aggregate service outcomes, achievement of that goal is discernible and its desirability can be reflected in political markets.<sup>45</sup>

Additionally, government's allocative functions seem particularly susceptible to privatization precisely because (unlike the situation just hypothesized) they typically involve public goods but do not otherwise implicate strong redistributive claims that require approval in political markets. Governmental intervention in this sphere is predicated on a belief that centralized provision is useful to ensure efficient production of the relevant goods. The upshot, however, is that government performance in a variety of these areas — such as leases of grazing land, check collection through the federal reserve system, provision of electricity by public power agencies<sup>46</sup> — is driven by a goal (efficiency) as singular as that of the private market.

But if the most one can say is that the comparative advantage of private firms in monitoring and goal definition is less demonstrable than Cass suggests, a more fundamental issue must be addressed. If governmental vulnerability to monitoring is similar to that of the private sector and if governmental objectives can be as precise as those of profit-maximizing en-

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44. See J. SAX, *MOUNTAINS WITHOUT HANDRAILS* (1980); UNITED STATES GOVERNMENT ACCOUNTING OFFICE, *PARKS AND RECREATION: RECREATIONAL FEE AUTHORIZATIONS, PROHIBITIONS, AND LIMITATIONS, REPORT TO THE CHAIRMAN, SUBCOMMITTEE ON PUBLIC LANDS, RESERVED WATER AND RESOURCE CONSERVATION, COMMITTEE ON ENERGY AND NATURAL RESOURCES, UNITED STATES SENATE* (May 1986).

45. Behrman & Craig, *The Distribution of Public Services: An Exploration of Local Government Preferences*, 77 AM. ECON. REV. 37 (1987).

46. See, e.g., PRESIDENT'S PRIVATE SECTOR SURVEY ON COST CONTROL, REPORT ON USER CHARGES (1983).

terprises, why is government involved in the activity at all? It is hardly a recommendation of public production to say that it will be no worse than private. One would hope instead for some affirmative endorsement, particularly given current predilection for private supply. Some possibilities rush to mind, but none is convincing. Natural monopolies, such as the airwaves, could be auctioned rather than operated by or with the intervention of government. Even in those situations that attract government participation because of substantial start-up costs, there seems little doctrinal reason for government to remain involved once those costs have been incurred.

My own search for a proper dividing line between public and private functions, therefore, is hopelessly incomplete. Obviously, once we reintroduce the redistributive role of government into the picture, the case for widespread privatization becomes more problematic. If we wish to deviate from allocative goals to accomplish some alternative objectives, government can be expected to respond more adequately than firms that have defined their function in terms of profit-maximization. This is the lesson of Professor Cass' conclusion that public enterprise possesses a comparative advantage in effecting wealth transfers. But that step is too easy an obstacle to privatization. I wish instead to suggest a "public" component inherent even in the allocation function that raises a caveat about too much privatization.

Government provides a common target, a focal point for many of our concerns about matters that affect our lives. That we discuss government in our daily lives and engage in public conversation, participation, and decisionmaking reveals a desire to assert some measure of control over these matters.<sup>47</sup> We are expected to converse and complain publicly about government misconduct and to seek redress through public channels. Thus, governmental action generates a unique language of politics ("entitlements," "rights") not readily applied to private conduct. The efficiency gains of public discussion should not be understated. Our discourse, by virtue of being public, provides information to others that gives them a standard by which they can judge their relative satisfaction with the provision of public goods. It is, indeed, the ability to generate information in this manner that underlies my faith in the capacity for public monitoring, discussed above.

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47. I am not suggesting that everyone participates and certainly not that all participate on all issues. I am suggesting that the availability of opportunities to participate and the occasional use of those opportunities signal that we consider both public discourse and the subject of that discourse to be important. See Manin, *On Legitimacy and Political Deliberation*, 15 *POL. THEORY* 338 (1987).

These opportunities to share information and to seek public redress for inadequacies in public service provisions might not readily be replicated if these same services were provided solely through private markets. Private conduct, or misconduct, triggers alternative sources of redress that are more individualized and atomized. We are not accustomed to collective complaint for private defalcation; disagreements between consumer and private provider are typically handled through self-help rather than cooperation with others. This is not to say that we could not create collective responses to private misconduct. It is only to say that the current attitude of private redress and absence of a forum for complaint creates comparative disadvantages for public monitoring of private activity. The assumption seems to be that private monitoring through market transactions will be sufficient and that individuals disappointed with privately supplied goods will signal their dissatisfaction by shifting their support to producers of substitutes.<sup>48</sup> However successful this explanation may be where private goods are concerned, it becomes less forceful in the area of public goods where free riding can be expected to undermine efficient leads of withdrawal and the presence of monopoly providers can be expected to render exit more difficult. If the presence of private providers induces the withdrawal of public monitors who would otherwise participate for the consumption benefits involved in public life, the monitors who remain are likely to be those with intense and special interests, not necessarily consonant with those of the public at large.<sup>49</sup>

#### IV. EFFICIENCY AND PARTICIPATION IN THE PROVISION OF PUBLIC GOODS

The existence of a public forum in which complaint against government conduct is common suggests an additional, perhaps more ephemeral, difficulty with privatization. In serving as a target for public discussion and dissatisfaction, government typically provides the forum that facilitates criticism. Public hearings or more informal public gatherings create a mechanism for the exercise of the voice option I alluded to earlier.<sup>50</sup> It is this solicitude for "public space," in which individuals joined to share common concerns, that undergirded Hannah Arendt's concern for substantial partic-

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48. See A. HIRSCHMAN, *supra* note 42, at 221-29 (1970).

49. Hence a recent finding that contracting out of social services in Massachusetts not only failed to decrease financial outlays, but led to the creation of interest groups that focussed on creating political support and stable financial relationships with the state rather than on the issues for which state social services were created. See S. Smith and D. Stone, *The Unexpected Consequences of Privatization* (1986) (unpublished manuscript).

50. See Home Rule Debate Stirs Vermoras. *N.Y. Times*, Nov. 1, 1987 at 60 col. 4.



ipation by the public.<sup>51</sup> Opportunity for participation in public life similarly lies at the root of the "public happiness" that Jefferson viewed as the foundation of republican thought.<sup>52</sup> I believe that the desire for a public forum also underlies some of the resistance to the ongoing search for private dispute resolution mechanisms to relieve the courts.<sup>53</sup>

Here, too, the private sector is at a disadvantage, if only because private suppliers rarely provide an active forum for the expression of consumer voice. Shareholder meetings do not serve as a surrogate. Their timing is dictated by corporate and statutory requirements rather than salient events that demand response. Their agenda attends to the interest of owners, not consumers of the services the corporation provides. From the perspective of allocative efficiency, shareholder meetings may be sufficient, as owners' concerns for profit maximization must ultimately internalize the effects of corporate conduct on consumers. My present concern, however, is more on the personal effects of participation than the efficiency of the service provided. If we obtain some benefit in having a role in the process, in gathering to complain, then a procedure that facilitates that function may be superior to one that does not, even if the ultimate quality and quantity of service provided is the same in either regime.<sup>54</sup>

One might contend that participatory values can compensate for some consequent loss of efficiency, insofar as the process of participating either fosters the autonomy of individuals or enhances their sense of community.<sup>55</sup> Notwithstanding some personal sympathy for those objectives, I do not want to rely on them alone for my current argument. There may be occasions in which the desirability of such a trade-off should be contemplated. But my current argument is somewhat more heroic; it suggests that the

51. H. ARENDT, *ON REVOLUTION* 249 (1981).

52. *Id.* at 248-55, A. HIRSCHMAN, *supra* note 14, at 122.

53. See Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

54. There is vast and burgeoning literature on the effects of participation. A good survey of the classic literature can be found in C. PATEMAN, *PARTICIPATION AND DEMOCRATIC THEORY* (1970). For more recent works, see Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980); Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

Carol Rose has recently made a related argument involving legal rules. She suggests that rules of disparate levels of precision may blend together in their ultimate legal effect, and thus become largely indistinguishable. Nevertheless, they retain an important rhetorical significance that "bear sharply divergent didactic messages." Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 610 (1988). My argument here suggests that if public and private agencies provide roughly equal levels of service, our selection of a particular provider still says a great deal about our desire for a public role in monitoring services.

55. See Bachrach, *Interest, Participation, and Democratic Theory*, in J. PENNOCK & J. CHAPMAN, *NOMOS XVI: Participation in Politics* 39 (1975).

objectives may work in tandem. Participation may advance Professor Cass' goals of reducing rent-seeking and enhancing efficiency. As Cass makes clear, efficient delivery of services assumes a decisionmaking process that internalizes the interests of all affected parties. If participatory processes inform the interests of the recipients or provide them with opportunities to effect those interests, one would imagine that such processes would augment other incentives for internalization.<sup>56</sup> If, therefore, we are seriously concerned with rent-seeking political actors, perhaps we should consider the capacity of increased participation to create offsetting interest groups. If the public sector more readily makes those avenues available, perhaps we ought to consider whether that role alone justifies governmental involvement in the allocation of public goods.

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56. *See id.* at 44, 49-50.