

Red Tape or Accountability: Privatization, Public-ization, and Public Values

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Dannin, Ellen (2005) "Red Tape or Accountability: Privatization, Public-ization, and Public Values," *Cornell Journal of Law and Public Policy*: Vol. 15: Iss. 1, Article 3.

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RED TAPE OR ACCOUNTABILITY: PRIVATIZATION, PUBLIC-IZATION, AND PUBLIC VALUES

Ellen Dannin†

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INTRODUCTION

There are deep historical roots for virtually any form of privatization that now exists.¹ Even one of the most touted “new big things”—the public-private partnership—has roots that go back to at least 1819. In that year the Supreme Court decided *McCulloch v. Maryland*;² this case involved the creation of an institution that was owned twenty percent by the federal government and eighty percent by private investors.³

In the nineteenth century, a robust and virtually unregulated market failed so dismally that many services were eventually taken over by the government.⁴ In other words, what had been private services were “public-ized.” One reform that resulted from these market failures⁵—the merit system of public employment—was designed to ensure the proper delivery of public services by protecting public workers from political influence and thus preventing corruption.⁶

Today, strong pressures push in the opposite direction: to move services from the public to the private sector. This trend is forcing us to reexamine the continuing validity of solutions derived from nineteenth

¹ This article explores only one subset of privatization—subcontracting—and uses the two words interchangeably.

² 17 U.S. (4 Wheat.) 316 (1819).

³ It is interesting to note that in *McCulloch*, the Court decided that, even though only a small part of the ownership was federal, the nature of the entity as a whole was federal. *See id.* Contrast this with current doctrine related to state action, which requires entrenched government control of private actors before state action is found. As a result,

[there is no] constitutional protection against private conduct where the government has given private actors broad discretion over operation of government programs. . . . At the same time, current doctrine applies such protections when they are often least needed—that is, when governments exercise close supervision and thus constitutional norms can be enforced by targeting government action directly.

Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1371 (2003).

⁴ Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229–41 (2003); Moshe Adler, *The Origins of Governmental Production: Cleaning the Streets of New York by Contract During the 19th Century* (unpublished manuscript), http://archive.epinet.org/real_media/010111/materials/adler.pdf; *see also* Moshe Adler, *Why Do We Have Government Employees*, Statement Prepared for the General Accounting Office Commercial Activities Panel (June 11, 2001), <http://www.gao.gov/a76panel/adler1.pdf> (last visited March 14, 2006).

As many government functions as are contracted out are contracted back in. MILDRED WARNER & AMIR HEFETZ, *PRIVATIZATION AND THE MARKET ROLE OF LOCAL GOVERNMENT: SMALL GROWTH IN CONTRACTING UNDERSCORES DOMINANCE OF SERVICE PROVISION BY PUBLIC EMPLOYEES* (DEC. 2001), <http://government.cce.cornell.edu/doc/pdf/marketstruct.pdf>.

⁵ Harold W. Demone, Jr., *The Political Future of Privatization*, in 1 *THE PRIVATIZATION OF HUMAN SERVICES: POLICY AND PRACTICE ISSUES* 205, 215–16 (Margaret Gibelman & Harold W. Demone, Jr., eds. 1998); GERALD FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS* 176 (1999). (Frug suggests that in addition to problems of corruption, public city services were provided to promote the integration of immigrants and diverse populations).

⁶ *See* Paul Annee, *Policing the 21st Century City*, in *TO MARKET, TO MARKET: REINVENTING INDIANAPOLIS* 159, 166–67 (Ingrid Ritchie & Sheila Suess Kennedy eds., 2001).

and early twentieth century experience. Should some services be exclusively provided by the public sector, or can the private sector reliably provide them instead? Is regulatory oversight of government actions still necessary, or can we depend on market forces to provide accountability and discipline?

I. PRIVATIZATION AND ACCOUNTABILITY

The popular view is that the debate on privatization is about cost and efficiency. This was true at one time when most of the discussion involved battling theories concerning markets versus social and economic justice issues. At the extreme, those who advocated privatization argued that markets and competition could always be relied upon to provide the highest quality services at the lowest cost. They preferred letting individuals decide how best to meet their own needs, rather than ceding that role to politicians or bureaucrats.⁷ Unions and those concerned with economic and social justice issues often took a “just say no” approach to contracting out.

Today, it is easier to see that arguments for or against privatization are actually about accountability. This is not to say that markets, cost, efficiency, individual liberty, and social and economic justice are issues absent from today’s discussions; rather, it means that they are most often ways of talking about accountability. Those who prefer markets argue that markets best provide meaningful accountability. Those concerned about social and economic justice believe that those values are better protected by public rather than private methods of accountability.⁸ That this was the case has been somewhat obscured by the fact that the battleground over privatization has most often been on turf defined by the language, thoughts, and values of economics.

Today, our greater experience with privatization has altered the details of the debate. For example, the possibility of competition has spurred and, in some places, allowed public sector employees to reexamine how they provide services, make improvements, and demonstrate that public workers are often able to provide better services at lower cost. Federal employees won 90% of all competitions conducted under the regulations in Office of Management and Budget Circular A-76 in FY-2004 and FY-2003.⁹ If, when they are allowed to make improvements

⁷ Mark H. Moore, *Introduction*, 116 HARV. L. REV. 1212, 1212–13 (2003).

⁸ *Id.* at 1212.

⁹ *Contracting Out: IG: DOD Relies on Contractor Support To Conduct Public-Private Competitions*, 43 GOV’T EMPLOYEE REL. REP. (BNA) No.2095, at 155 (Feb. 15, 2005) [hereinafter *Contracting Out I*]; *Rise in Outsourced Government HR Reported; Move Is Driven by Complex Systems, Aging IT*, 42 GOV’T EMPL. REL. REP. (BNA) No.2072, at 793 (Aug. 24, 2004).

and compete, public sector employees have done well, then perhaps competition is a useful prod to delivering high quality services. In addition, these results suggest that the public sector is not inferior to the private sector when there is head-to-head competition.

In other words, there are arguably many winners in this process. The workers feel empowered by having a role in improving their working conditions. They have a greater sense of pride in their work when they know they have proven that they provide better, more efficient service. The public benefits because it has retained their expertise. As a result, competition has been a spur to providing the highest quality work at the lowest cost and it assures us that the government or contractor workers are providing the highest quality work at lowest possible cost.

However, this idealized scenario is not always achieved. Competitions are expensive in terms of money, disruption, and mistaken contracting. In some cases, work is contracted out without allowing government workers to compete, often for ideological reasons.¹⁰ The concern is that, otherwise, the government should win every competition because it has a natural advantage in providing a lower-cost service since it need not make a profit, pays no taxes, and has a lower cost of borrowing.¹¹ At least at the local level, competitive bidding is not the norm. In 2002, only 26.5% of local government public employees were allowed to compete for their work, down from 33.3% in 1997.¹² Another reason not to be sanguine about the impact and results of competition is the lack of experienced, trained personnel to conduct competitive bidding. The Department of Defense has responded to this experience deficit by contracting out the process of contracting out government work.¹³

¹⁰ The Bush Administration advocates "direct conversions" of government jobs, bypassing competitions. Federal unions contend that direct conversion is "theft, pure and simple, a way for the administration to reward contractor cronies with sole-source contracts." Melanie I. Dooley, *Contracting Out: Federal Unions Oppose OFPP Plan To Reinstate Direct Job Conversions*, 43 GOV'T EMPLOYEE REL. REP. (BNA) No.2094, at 128 (Feb. 8, 2005); Louis C. LaBrecque, *Contracting Out: NTEU Files Summary Judgment Motion To Stop IRS Mailroom Job Outsourcing*, 42 GOV'T EMPLOYEE REL. REP. (BNA) No.2082, at 1053 (Nov. 9, 2004).

¹¹ *Prepared Testimony of Gary D. Eugebretson, President, Contract Servs. Ass'n of Am. Before the House Comm. on Gov't Reform, Subcomm. on Gov't Mgmt, Info. & Tech.*, FED. NEWS SERV. (Mar. 16, 2000). On the other hand, private contractors may have an advantage if they are allowed to compete by lowering employee wages and benefits. See Melanie I. Dooley, *Contracting Out: Members of Congress Express Opposition To Health Insurance Comparability Repeal*, 43 GOV'T EMPLOYEE REL. REP. (BNA) No.2095, at 155 (Feb. 15, 2005).

¹² Mildred Warner & Amir Hefetz, *Pragmatism Over Politics: Alternative Service Delivery in Local Government, 1992-2002*, 71 THE MUN. Y.B. 8, 14 (2004).

¹³ OFF. OF THE INSPECTOR GEN. OF THE DEP'T OF DEF., DEF. INFRASTRUCTURE: DoD WORKFORCE EMPLOYED TO CONDUCT PUBLIC-PRIVATE COMPETITIONS UNDER THE DoD COMPETITIVE SOURCING PROGRAM, REP. NO. D-2005-028 (Feb. 1, 2005), <http://www.dodig.osd.mil/Audit/reports/FY05/05-028.pdf>; Melanie I. Dooley, *Personnel Management: Acquisition Workforce Issues Are Root Cause of Procurement System Problems*, Aide

In short, just as in the time of *McCulloch v. Maryland*,¹⁴ government services continue to be provided by a range of public and private suppliers.¹⁵ A recent survey of local government managers found that city, county, and township services are provided by a mix of government (57%), public-private (23%), private for-profit (18%), and private non-profit (8%) entities.¹⁶ This result might not have been predicted ten or twenty years ago because, starting in the early 1980's, enthusiasm for the market and for private over public provision of services created almost a presumption that most work would go to private providers.¹⁷

The reality of providing public services has proven to be far more complex than theory predicted. For example, there may be a lack of private providers. In 2002, 31% of local governments found that no private competitors provided a specific service.¹⁸ Even where there is not a total absence of potential private providers, there may be too few to create the competition that is supposed to provide market discipline. Our twenty-five year experiment with privatization has provided anecdotal evidence and data showing that a mixture of private and public provision of government services is the pattern that has persisted. There is no reason to doubt that this will continue to be the case. The important question is what forces lead to this result.

Experience has provided us with some answers. First, we continue to have privatization failures.¹⁹ These failures range from poor performance to outright misfeasance in privatized services. A recent example is the Custer Battles contract in Iraq. This contract appears to have led to

Says, 43 GOV'T EMPLOYEE REL. REP. (BNA) No.2092, at 73 (Jan. 25, 2005) [hereinafter DEF. INFRASTRUCTURE].

Some contractors who now decide competitions and award contracts are themselves employed by private contractors. Such contractors may not fully understand the work government agencies perform and the requirements involved, resulting in solicitations that put government workers at a disadvantage. *Contracting Out I*, *supra* note 9.

¹⁴ *McCulloch v. Maryland*, 17 U.S. 316 (1819).

¹⁵ Amir Hefetz & Mildred Warner, *Privatization and Its Reverse: Explaining the Dynamics of the Government Contracting Process*, 14 J. PUB. ADMIN. RES. & THEORY 171, 172 (2004).

¹⁶ Warner & Hefetz, *Pragmatism Over Politics*, *supra* note 12, at 8.

¹⁷ Hefetz & Warner, *Privatization and Its Reverse*, *supra* note 15; Minow, *supra* note 4, at 1252-53.

¹⁸ Warner & Hefetz, *Pragmatism Over Politics*, *supra* note 12, at 13; *See generally*, ELLIOTT D. SCLAR, YOU DON'T ALWAYS GET WHAT YOU PAY FOR: THE ECONOMICS OF PRIVATIZATION (The Century Foundation, Inc. 2000).

¹⁹ Recently the *New York Times* provided a shocking look at privatization failures in privatized medical care in jails and prisons. Paul von Zielbauer, *A Spotty Record of Health Care For Children in City Detention*, N.Y. TIMES, Mar. 1, 2005, at A1; Paul von Zielbauer, *Missed Signals in New York Jails Open Way to Season of Suicides*, N.Y. TIMES, Feb. 28, 2005, at A1; Paul von Zielbauer, *As Health Care in Jails Goes Private, 10 Days Can Be a Death Sentence*, N.Y. TIMES, Feb. 27, 2005, § 1 (Magazine), at 1. *See below* § A for a discussion of public service failures.

unperformed and misperformed work, few or no records or oversight, billings by shell companies, and fraud.²⁰ About 22% of local governments reported privatization failures.²¹ We have also seen evidence that lack of subcontracting oversight creates a danger of financial and other losses.²² At the same time that we know privatization failures exist, we also know that the lack of oversight means we do not have sufficient data to measure the extent of the problem. In other words, one consequence of the enthusiasm for private over public has been a presumption against exercising oversight or even systematically collecting data.

In the past, privatization successes or failures offered useful information for allocating services to the public or private arena. Now, however, overenthusiasm for privatization that has led to at least some unwise privatization, coupled with a lack of data to identify where this has occurred, suggests that we cannot rely that the current placement of a service as public or private is appropriate. If so, what factors can help us identify whether a service is better provided as a public or private service? History may be a helpful guide to answering this question. In the past, government has reacted to these failures by creating accountability mechanisms to guard against both market and agency failures. Therefore, accountability regulations may shed light on choosing the most appropriate provider.

If this insight is correct, the central issue for privatization is accountability.²³ That is, issues of accountability may subsume all arguments about the merits and wisdom of privatization. What, then, are the accountability arguments made by proponents and opponents of priva-

²⁰ T. Christian Miller, *Under Fire: The Rebuilding of Iraq*, L.A. TIMES, Mar. 12, 2005, at A1. For examples, see TO MARKET, TO MARKET: REINVENTING INDIANAPOLIS (Ingrid Ritchie & Sheila Suess Kennedy eds., 2001); Ellen Dannin, *To Market, To Market: Privatizing and Subcontracting Public Work*, 60 MD. L. REV. 249 (2001); Minow, *supra* note 4, at 1259–60.

The Department of Energy (DOE) pays 80–90 percent of its budget to private contractors and has a miserable record in terms of oversight and accountability. Joshua Wolf Shenk refers to this as a surrender of authority to the shadow government. Joshua Wolf Shenk, *The Perils of Privatization*, 27 WASH. MONTHLY 16, 17–18 (May 1995).

²¹ Warner & Hefetz, *Pragmatism Over Politics*, *supra* note 12, at 15. Areas in which services have most commonly moved from the private to the public sector were “commercial waste collection, public utilities, ambulance service, sanitary inspection, insect and rodent control, animal shelters, day care facilities, child welfare programs, prisons, tax assessing and processing, and title records,” suggesting market failure. *Id.* at 9.

²² DOD IG Finds \$32 Million Error Critical To Source Decision in A-76 Competition, 41 GOV'T EMPL. REL. REP. (BNA) No.2004, at 370 (Apr. 8, 2003) [hereinafter *DODIG Finds \$32 Million*]; see also OFF. OF THE INSPECTOR GEN. OF THE DEP'T OF DEF, *Infrastructure and Environment: Public/Private Competition for the Defense Finance and Accounting Service Military Retired and Annuitant Pay Functions* (D-2003-056) (Mar. 21, 2003); Walker Richmond, *Charter School Accountability: Rhetoric, Results, and Ramifications*, 12 VA. J. SOC. POL'Y & L. 330, 343–45, 353–55 (2004).

²³ See, e.g., U.S. GEN. ACCT. OFF., *PRIVATIZATION: LESSONS LEARNED BY STATE AND LOCAL GOVERNMENTS*, REP. NO. 97–48, at 18 (March 1997).

tization? What do private and public sector methods for ensuring accountability tell us about the allocation of providing services? Does public accountability have a deeper function than merely ensuring that value for money is received? If public provision and public accountability are part of the fabric of a participatory democracy, what then is the impact of removing those functions from public provision?

A. ACCOUNTABILITY ARGUMENTS BY PRIVATIZATION PROPONENTS

Privatization proponents see all functions as naturally part of a market economy. In their view, to the extent services are performed by the public sector, government has, in effect, misappropriated them. They see government as innately prone to failure: “flaws in private markets, significant though they may be, pale in comparison to the flaws associated with public provision or even public oversight of private actors.”²⁴ The failure of the public sector is commonly defined as an inability to provide high quality services efficiently and at a reasonable cost, and is attributed to the government’s being hamstrung by regulations.²⁵ What constitutes a pernicious regulation is most often not specified, but it seems to include all regulations, even those designed to prevent cronyism and corruption in choosing and buying technology, renting space,²⁶ or constructing public buildings.²⁷ Privatization proponents view government accountability requirements as no more than costly and unnecessary bureaucratic regulations that make it impossible to deliver services effectively and at a reasonable cost.²⁸ They argue that private contractors, freed of red tape, can provide better services at lower cost.²⁹

With less red tape and bureaucracy, private organizations are thought to provide incentive structures that minimize agency costs compared to the public sector. For example, proponents of privatization argue that it is easier for private organizations to hire, transfer, promote, or reward employees; make capital investments; and secure approval for innovations through fewer layers of

²⁴ Michael J. Trebilcock & Edward M. Iacobucci, *Privatization and Accountability*, 116 HARV. L. REV. 1422, 1422, 1435–41 (2003).

²⁵ See, e.g., Robert Melia, *Private Contracting in Human Services* (June 1997), <http://www.pioneerinstitute.org/research/whitepapers/wp03full.cfm>.

²⁶ *Id.*

²⁷ REASON PUB. POL’Y INST., *PRIVATIZATION 2001: THE 15TH ANNUAL REPORT ON PRIVATIZATION 24–25* (2001) [hereinafter *PRIVATIZATION 2001*]. See also William J. Curran, *Privatization and Human Services Contracting: A Legal Review*, in 2 *THE PRIVATIZATION OF HUMAN SERVICES: CASE STUDIES IN THE PURCHASE OF SERVICES* 183, 192 (Margaret Gibelman & Harold W. Demone, Jr., eds., 1998).

²⁸ See, e.g., Melia, *supra* note 25.

²⁹ See, e.g., *id.*

management. Thus, for any given task, a private organization would be expected to outperform a public one.³⁰

In economic theory, a purely competitive market is one in which the buyer determines how resources are allocated as a result of purchases, resulting in goods that are sold as cheaply as possible and at the largest quantity desired.³¹ Privatization proponents argue that we can rely on the market to provide all necessary oversight and controls in addition to lower cost and better quality products.³² If regulations do no more than decrease efficiency and increase cost, then subcontracting is an attractive and cost-free means to quickly achieve efficiency.³³

Privatization proponents argue that nearly all state and local government functions can be privatized. They maintain that having a government monopoly provide services leads to high costs, reduced quality, and stagnation (lack of innovation and flexibility). Proponents cite numerous examples whereby state and local governments have enjoyed savings after a service has been bid out to the private sector.³⁴

Proponents often speak as though private provision of services automatically creates the market classical economic theory relies upon. Relying on market theory, however, creates challenges for privatization proponents. For example, there is no market, and there can be no benefits from a market when a government service is transferred to a sole provider who faces no competition.³⁵ One can argue that even a sole pro-

³⁰ Darrell A. Fruth, *Economic and Institutional Constraints on the Privatization of Government Information Technology Services*, 13 HARV. J.L. & TECH. 521, 533 (2000) (citation omitted).

³¹ ROBERT HEILBRONER & LESTER THUROW, *ECONOMICS EXPLAINED: EVERYTHING YOU NEED TO KNOW ABOUT HOW THE ECONOMY WORKS AND WHERE IT'S GOING* 196 (rev. ed., 1994); see also Trebilcock & Iacobucci, *supra* note 24, at 1447–48.

³² For a summary of theory, see Trebilcock & Iacobucci, *supra* note 24, at 1447–48.

³³ Melia, *supra* note 25; PRIVATIZATION 2001, *supra* note 27. See also Curran, *supra* note 27.

³⁴ *Privatization—Background*, MICHIGAN IN BRIEF, Apr. 1, 1998, <http://www.michiganinbrief.org/edition06/text/issues/issue-48.htm>; See Lisa Vecoli, *The Politics of Privatization*, 15 HAMLINE J. PUB L. & POL'Y, 243, 246–49 (1994) (surveying the typical rhetoric of each side of the debate).

³⁵ For examples, see SCLAR, *supra* note 18, at 87–88.

Privatizing government services is founded on the idea that markets set the proper price, but when there is no market, as when government provides a service or when there is a monopoly, the price will be too high. However, there are a number of reasons why there may be no private market price. Most fundamentally, there may be no market to provide the sort of services that government does, because many government services are public goods. Even where analogous services are provided privately — the “yellow pages” test — they may not be fully comparable. Ostensibly similar services may in fact be different, because government may have different

vider faces market discipline resulting from its fear that new entrants could be induced to enter the market and compete. However, this is a difficult argument to make, even in theory, and suffers from an unscientific, almost talismanic, view of the market as perfect and fully self-regulating under all circumstances. A major problem privatization proponents face is moving from a quasi-scholastic exercise in logic to a controlled test of theory.³⁶ Some even argue that large monopolistic private contractors are particularly desirable. Alfred Aman, for example, says: "These efficiencies are even greater if a private unit, capable of operating in many jurisdictions at once, can count on minimal, or at least, certain kinds of uniform regulatory costs throughout the service area. So there is a pressure for harmonization, and many times market approaches harmonize more easily than complicated regulatory approaches."³⁷

In short, privatization proponents argue that contractors, disciplined by the market, will secure the public's well being.³⁸ The argument relies on the belief that there is no need to impose legal accountability on private contractors because powerful market pressures will punish them if they provide substandard services. In fact, they contend, imposing legal regulations will make it impossible for contractors to provide quality services at the lowest prices. Therefore, they argue, requiring any accountability other than the market is foolish and wasteful.

If it is indeed possible to achieve high quality services at low cost without traditional accountability this is certainly attractive. But although the argument hinges on market theory, it fails to account for the nonexistence of conditions critical to the existence of a market. First, market theory requires the existence of many small buyers and sellers acting with perfect information and equality of bargaining power. These conditions seldom, if ever, exist in the real world. To the extent that privatization proponents argue that lack of competition will have no impact on the results they promise from private provision, they have no justification based on market theory. To be valid, any theory must be informed by empirical evidence. Therefore, privatization proponents must face up to

goals than a private business. When there is no market for the services to be subcontracted, it becomes difficult to feel assured that a proper price has been set. Dannin, *To Market, To Market*, *supra* note 20, at 272 (citations omitted).

³⁶ This problem of over-reliance on theory and failure to use the methods of scientific research exists throughout economics. MICHAEL D. YATES, *NAMING THE SYSTEM: INEQUALITY AND WORK IN THE GLOBAL ECONOMY* 22–28 (2003); *see also* *THE HANDBOOK OF EXPERIMENTAL ECONOMICS* (John H. Kagel & Alvin E. Roth eds., 1995).

³⁷ Panel Discussion: *The Changing Shape of Government*, 28 *FORDHAM URB. L.J.* 1319, 1323 (2001) [hereinafter *The Changing Shape of Government*]. To some degree this tracks arguments that can be made about the wisdom of federal versus state laws. OSHA, for example, was enacted to promote uniform health and safety standards. 29 U.S.C. §§ 651, 667 (2000).

³⁸ For an example, *see* Trebilcock & Iacobucci, *supra* note 24.

real problems, such as market failures and natural monopolies and not simply fall back on faith in markets.

However, the reaction by privatization proponents has been to argue the “market” will nonetheless provide, essentially as a matter of faith. This is a weakness of ideology not open to self-criticism and improvement based on data. They need evidence supporting their claims under the conditions that actually exist. Privatization proponents suffer by a lack of experimentation designed to test the theories. Instead, they are satisfied with being vague on crucial details of the theory and relying on idiosyncratic anecdotes rather than rigorous testing. To be credible, privatization proponents need to account for phenomena, such as persistent evidence that government services are superior to those of private contractors on both cost and quality. For example, a study of private versus public collection of tax debt found that the government collectors were ten times more efficient (based on dollars collected to dollars expended in collection) and that taxpayers’ personal information was more secure with public collectors.³⁹ This significant difference in quality and cost cannot be explained only by the government’s cost advantage in not needing to make a profit.⁴⁰

Finally, privatization proponents often use labeling in place of disclosure. For example, while we are told that privatization frees the public from bureaucratic regulations, we are often not told exactly which regulations are considered bureaucratic. Without that detail, regulations such as those designed to prevent cronyism and corruption might be included even though they are not universally regarded as expendable.⁴¹ Privatization proponents have also argued that attention to due process, by requiring hearings and public access to information, is nothing but “a web of bureaucratic red tape driven by concerns over process and inputs and not outcomes.”⁴² But do they really believe that due process is not a value fundamental to our system?

B. ACCOUNTABILITY ARGUMENTS BY PRIVATIZATION OPPONENTS

Rather than focusing on theories, privatization opponents tend to rely on anecdotal evidence and studies that demonstrate the superiority of public provision of services. For example, they point to persistent problems of corruption and misfeasance that have plagued private con-

³⁹ *IRS, NTEU Trade Arguments at House Hearing on Privatizing Collections of Overdue Taxes*, 41 *GOV’T EMPL. REL. REP.* (BNA) No.2011, at 549 (May 27, 2003).

⁴⁰ Ellen Dannin, *To Market, To Market*, *supra* note 20, at 262.

⁴¹ Melia, *supra* note 25; *Privatization in Certification, Construction, and Management in Education*, in *PRIVATIZATION 2001*, *supra* note 27 at 24–25. See also Curran, *supra* note 27.

⁴² Trebilcock & Iacobucci, *supra* note 24.

tracting.⁴³ In addition, rather than making a theoretical challenge to criticisms of public accountability, they tend to provide examples where public services have been demonstrated to be superior to private provision.

When privatization opponents talk about the market, they argue that the market alone cannot provide sufficient oversight and that regulation is therefore necessary. Representative Christopher Shays pointed to a General Accounting Office report that cautioned: "any absence of robust competition, a lack of experience specifying contract results or a failure to monitor performance, can undermine privatization benefits and damage program quality."⁴⁴ In making this argument, privatization opponents present a view of the market not as an elemental force, but as a socially constructed institution. As with all social institutions, it is prone to failure and depends on rules and regulations to operate effectively. Thus, privatization opponents might agree that it can be more financially advantageous to operate with no rules other than competition for at least the short term. In the long term, however, other values, such as process values, also matter. It is therefore reasonable to trade-off some efficiency in order to ensure that the process is one that lends legitimacy to and satisfaction with the outcome. When rephrased this way, the argument is essentially one for democratic values.⁴⁵

There has been less discussion by privatization opponents about the components of accountability and the role each of these components plays. Potential components of accountability include regulations that are needed for the system's efficient operation. Others protect against or, at least minimize, the problem of agency failure. Yet others have independent utility in providing process values or in being consonant with the processes expected of a democracy. Put another way, accountability laws give the public advance knowledge about decision-making, effective input into the decision-making process, and protections from arbitrary and unfair actions. These protections are provided through state and federal

⁴³ Examples may be found in *TO MARKET, TO MARKET: REINVENTING INDIANAPOLIS* (Ingrid Ritchie & Sheila Suess Kennedy eds., 2001); Dannin, *To Market, To Market*, *supra* note 20, at 249; see also Demone, *supra* note 5, at 237 (showing that in 1994, about 70% of Pentagon contractors were under investigation for major improprieties).

⁴⁴ *Prepared Statement of Rep. Christopher Shays, Chairman, Before the House Gov't Reform and Oversight Comm. Human Res. Subcomm.*, FED. NEWS SERV., (Nov. 4, 1997). See also *PRIVATE AND PUBLIC PRISONS: STUDIES COMPARING OPERATIONAL COSTS AND/OR QUALITY OF SERVICE*, U.S. General Accounting Office Rep. No.96-158, at 36-37 (Aug. 1996); *Prepared Statement of Mark V. Nadel, Assoc. Dir. Income Sec. Issues, Health, Educ., and Human Services Div., United States Gen. Accounting Office, Before the House Comm. on Gov't Reform and Oversight Subcomm. on Human Res. and Intergovernmental Relations, on Child Support Enforcement Privatization: Challenges in Ensuring Accountability for Program Results*, FED. NEWS SERV., (Nov. 4, 1997); Dannin, *To Market, To Market*, *supra* note 20.

⁴⁵ Issues of accountability and democratic values are discussed *infra* Parts I (C)(5) and IV.

Freedom of Information Acts, Open Meetings Acts, Administrative Procedure Acts, and civil service regulations. These regulations protect the public welfare and purse at the point when government is considering services to be privatized; they ensure that government is accountable on the individual level; and they protect the public interest in fair treatment by the government.⁴⁶ Although there are many such regulations, some critics conclude they are not sufficiently comprehensive for the problems created when contracting out public services. For example, Congressman Albert Wynn (D-Md.) recently tried to address this issue by introducing the Truthfulness, Responsibility, and Accountability in Contracting Act (H.R. 3426) to ensure that the public-private competition process is “fair” and that agencies are held accountable for the results.⁴⁷

Experience suggests that managed competition can be seen as a new form of public accountability.⁴⁸ Allowing public sector workers to bid on or compete for their work has led to improved performance by public agencies.⁴⁹ It can be argued that but for the threat of losing work and jobs to the private sector, these improvements would not have happened. Does the public sector need an occasional threat in order to improve, or are there other means of achieving the same end of providing the best services at the best cost?⁵⁰

Managed competition is now a part of the federal government’s process set out in Circular A-76.⁵¹ The Government Accountability Office describes how managed competition functions at the federal level: “Under managed competition, a public-sector agency competes with private-sector firms to provide public-sector functions or services under a controlled or managed process. This process clearly defines the steps to be taken by government employees in preparing their own approach to

⁴⁶ Matthew Diller, *Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121, 1187 (2000).

⁴⁷ H.R. 3426, 108th Cong. (2003).

⁴⁸ Until recently, public sector work was contracted out without allowing the government workers who were performing the work to bid on their own jobs. The Freedom from Government Competition Act, S. Bill 314, introduced in 1997, and S. Bill 1724, introduced in 1996, required that each agency obtain its goods and services by procurement from “private sources” and thus virtually mandated contracting out and outsourcing. S. 314 3(a), 105th Cong. (1997); S. 1724 3(a), 104th Cong. (1996). Problems with—and criticisms of—this method of contracting eventually led to the process of managed competition we see today. For a description of this history, see Dannin, *To Market, To Market*, *supra* note 20, at 297–300. Recently, Circular A-76 § 6(h)(3), (4), <http://www.whitehouse.gov/omb/circulars/a076/a076.html>, included union officers and employees within the definitions of those with the right to challenge the contents of an agency’s Commercial Activities Inventory, but it is unclear whether this will allow full rights to challenge decisions.

⁴⁹ SCLAR, *supra* note 18, at 130–50.

⁵⁰ An example of another type of managed competition used to create a quasi-market is discussed *infra* Part I (B).

⁵¹ Available at <http://www.whitehouse.gov/omb/circulars/a076/a076.html>; see also <http://www.dla.mil/j-3/a-76/OMBCircularA-76New.html>.

performing an activity. The agency's proposal for providing the service, which includes a bid proposal for cost-estimation purposes, is useful in competing directly with private-sector bids."⁵² The winner of the competition is the "most efficient organization" and entitled to perform the work for a specific period.⁵³

C. QUESTIONS ABOUT PRIVATIZATION AND ACCOUNTABILITY

While almost all parties to the discussion say they support accountability,⁵⁴ they differ on whether that accountability is best provided by the market or by regulation. The debate is most often about processes. The procedural debate has focused on whether accountability is best achieved or is achievable at all through regulatory or contractual oversight rather than through unfettered market forces. Substantive issues have been less visible. They center on the liberty interest provided by a free market and less government involvement in our lives versus values of citizen participation in governance, equal protection, and due process.

Within these parameters is a far more nuanced and detailed discussion that should be taking place. That discussion should include the following issues: What do public sector accountability regulations provide as to the delivery of services? If regulation for accountability is necessary in the public sector, is it also necessary in the private sector? If so, are precisely the same regulations necessary? Does the sort of accountability vary based on factors such as the sort of services involved or those served? That is, are the same or different levels of accountability required for simple make or buy decisions versus the delivery of services for critical functions or to disadvantaged or disenfranchised populations? Could accountability requirements transform the private into the public, or would business models being advanced, as in the California Performance Review,⁵⁵ make the public and private sector indistinguishable? If so, is either desirable? Moreover, what are the questions and issues that can help us in answering these questions?

1. *Legitimate and Illegitimate Goals*

Are there illegitimate uses of privatization? Most would agree privatization should not be used as a tool to avoid being subject to the

⁵² U.S. GEN. ACCT. OFF., TERMS RELATED TO PRIVATIZATION ACTIVITIES AND PROCESSES, GAO/GGD-97-121, 17 (July 1997), <http://www.gao.gov/special.pubs/gg97121.htm>.

⁵³ *Id.* at 18.

⁵⁴ For some examples of those who oppose accountability, see *infra* text accompanying notes 187-89.

⁵⁵ <http://cpr.ca.gov/>.

law. Yet, a natural result of privatization is the loss of constitutional restraints and rights, because they apply only to governmental actors.⁵⁶

In other words, the price for increased efficiency may be the removal of many rights we value. Most fundamentally, privatization may deny or infringe on due process rights. For example, a proposal to permit child support to be collected by private collection agencies with the power to “intercept tax refunds, seize bank accounts, and trigger passport denials” may mean decisions are made without the due process standards now imposed on decision-making and by denying recourse to those injured by those decisions, unless contractors are held accountable in the same way as is the government.⁵⁷

A judge recently wrote, “contracting out is a troubling way of circumventing having to deal with federal government employees and their unions,” but case law protects the government’s ability to engage in this practice.⁵⁸ Do we want government to avoid complying with collective bargaining, due process rights, and First Amendment rights protecting speech, freedom of association, and barriers between church and state, or to infringe on citizens’ privacy rights by contracting with a private company to manage selected pieces of the civic enterprise?⁵⁹ Are we willing to shed these rights as the quid pro quo for cost savings?⁶⁰ Are we comfortable with contracting out when it allows government to write itself

⁵⁶ Constitutional rights only exist where there is state action. See Harold J. Sullivan, *Privatization of Public Services: A Growing Threat to Constitutional Rights*, 47 PUB. ADMIN. REV. 461 (1987) for a quick overview of the state action doctrine. See also Steve Hitov & Gill Deford, *The Impact of Privatization on Litigation*, 35 CLEARINGHOUSE REV. 590 (2002) (discussing issues involving state action and privatization). Gillian Metzger notes that state action presumes that few private actors will be given governmental powers. Metzger, *supra* note 3, at 1370.

There have been some instances in which contractors have been held to government standards:

That is, privatized groups such as private prisons, for example, often are treated just as if they are government, and so they are held to the due process and cruel and unusual punishment norms to which government prisons are held. And they are even worse off because, according to the Supreme Court, their officials are not entitled to the immunities that government employed officials would have. So there is that kind of constraint.

Remarks by Jack M. Beermann at Panel Discussion: *Public Oversight of Public/Private Partnerships*, 28 FORDHAM URB. L.J. 1357, 1361 (2001) (citing to *West v. Atkins*, 487 U.S. 42, 56 (1988) and *Richardson v. McKnight*, 521 U.S. 399 (1997)).

⁵⁷ S.1882, 106th Cong. (1999); HR. 467b, 106th Cong. (1999). See also S.685, 107th Cong. (2001); H.R. 1471, 107th Cong. (2001).

⁵⁸ *Jones v. United States*, Case No. Civ. A.02-10775 (D. Mass. Mar. 11, 2003), <http://www.pubklaw.com/rd/courts/02-10775.pdf>.

⁵⁹ Alex J. Luchenitser, *Casting Aside the Constitution: The Trend Toward Government Funding of Religious Social Service Providers*, 35 CLEARINGHOUSE REV. 615 (2002); Minow, *supra* note 4, at 1267–68.

⁶⁰ Sheila Suess Kennedy, *Accountability: The Achilles Heel*, in TO MARKET, TO MARKET: REINVENTING INDIANAPOLIS 139, 145 (Ingrid Ritchie & Sheila Suess Kennedy eds., 2001) [hereinafter *Accountability*].

out of the coverage of the laws—in effect, privatizing the legislative process?⁶¹

Within these concerns are the following questions: first, what is government versus what is not government, and second, how does privatization blur that line? There is an unexamined assumption that delivery of a service by a private entity is a business act. Privatization proponents contend that government must adopt business methods, language, and goals. So citizens become customers, and governments speak of their “core competencies.”⁶² There is an assumption that, when a service is delivered by a private company, all the qualities of market competition exist. This, and other assumptions about how public agencies operate, may be or have already been contradicted by credible studies.⁶³

Add to this the problem that, when a service is contracted out, the contractor acts as the agent of government and therefore the terms and limits of its agency cannot legally exceed the government’s power.⁶⁴ In addition, the contractor’s decisions, even when they are not constrained by the principal, nonetheless become governmental decisions.⁶⁵ AFSCME argues: “Governments cannot contract out their ‘accountability’ and will remain ultimately responsible for a contractor’s mistakes.”⁶⁶ If the contractor has the ability to impose some degree of liability on the government, then government has ceded to it discretion over the expenditure of government funds⁶⁷ and has actually taken on more responsibility—not shed it.

How we feel about government regulation—red tape or accountability—can affect where we would place the burden of proof as to whether

⁶¹ Shane Harris, *Watching People on Behalf of Uncle Sam*, GOV’T EXECUTIVE, Mar. 16, 2004, at 30; Robert O’Harrow Jr., *In Age of Security, Firm Mines Wealth Of Personal Data*, WASH. POST, Jan. 20, 2005, at A-1.

⁶² See Gerald H. Goldberg, Address to the California Performance Review Commission (Aug. 27, 2004), http://cpr.ca.gov/updates/archives/pdf/08_27_2004/GOLDBERG.pdf.

⁶³ See, e.g., Hefetz & Warner, *supra* note 15, at 171; Mildred Warner & Amir Hefetz, *Applying Market Solutions to Pubic Service: An Assessment of Efficiency, Equity, and Voice*, 38 URB. AFF. REV. 70 (2002).

⁶⁴ However, there are certainly examples where this has been done, most recently with the Department of Homeland Security’s use of private contractors to evade laws on collection of data. See *infra* text accompanying notes 138–39.

⁶⁵ See Sullivan, *supra* note 56, at 462. Indianapolis’ experience with privatization during the Goldsmith years provides many examples of the liability privatization can impose on the public, see Kennedy, *supra* note 60, at 143–44.; see also, Richmond, *supra* note 22, at 346–47.

⁶⁶ American Federation of State County and Municipal Employees, *AFSCME Fact Sheet—Power Tools for Fighting Privatization: Legislative Approaches to Responsible Contracting 1-2*, <http://www.afscme.org/private/tools05/htm> (revised 2/2005).

⁶⁷ See Ronald C. Moe, *Exploring the Limits of Privatization*, 47 PUB. ADMIN. REV. 453, 457 (1987) (quoting Lester Salamon). Cf. *Hunt v. Mo. Dep’t of Corr.*, 297 F.3d 735 (8th Cir. 2002) (nurses employed by a temporary agency can sue the state prison system where they were placed for violations of Title VII).

a regulation is arbitrary and unreasonable or exists for a purpose.⁶⁸ Strong privatization advocates presume that government regulation serves no useful purpose. It is therefore legitimate to avoid them by any means. But a presumption of government failure means willfully being blind to how regulation functions. Historical and current experience shows that regulations were enacted to further values most Americans support. It may be that a regulation may no longer operate to further that goal, but reaching that conclusion requires a fair-minded examination.

2. *Protecting Vulnerable Populations*

A major concern of accountability is the need to protect those who are the most vulnerable, those without political power who also rely heavily on government services. Those who oppose regulation contend that markets are best at protecting vulnerable populations.⁶⁹ Privatization opponents view the matter differently. Professor Elliott Sclar observes:

[W]hen you deal with public decision-making, there is more than one right answer, but some right answers are more beneficial for some groups and some right answers are more beneficial for other groups. So the problem is we ultimately cannot avoid the politics of that. It is a large gray area.

As an urban planner, if I said, "We are going to build a parking lot by the beach to make the beach more accessible," the people who live in the town say, "Well, you have now made it less accessible to us."

So really there is no easy answer to that, and you have to try and put your values out and talk about which things you are trying to maximize, because, as I said, both sides have warts and pimples.⁷⁰

Critics of privatization are particularly concerned that the impact of the transformation of the American welfare state has not received adequate attention:

[E]ntrusting the most vulnerable citizens and the most delicate service tasks to private agencies is not simply a matter of choice between "making" or "buying" services. This might be the case when one considers contracting out for pencils, computer services, or strategic weapons. But when it comes to purchasing the care and

⁶⁸ See, e.g., Annee, *supra* note 6, at 159.

⁶⁹ See, e.g., Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984).

⁷⁰ *The Changing Shape of Government*, *supra* note 37, at 1349.

control of drug addicts, the safety and nurturing of children, the relief of hunger and the regulation of family life (through child protective activities) from private agencies, other values than efficiency are at stake.⁷¹

Among those who might think that contracting out is a good idea in general are some who would be concerned that certain areas should nonetheless remain in public control. For example, proposals to contract out the regulation of drug approval might endanger the public if the private agency lacks sufficient scientific knowledge, relevant experience, and independence of judgment.⁷² Of course, recent experience with approvals of VIOXX and other drugs shows that agencies may also fail in their missions.⁷³

3. *Public Servants Versus Employees*

Today we see a dramatic transformation of citizen attitudes toward important symbols of our country. Some refuse to display or honor the flag. Others are openly hostile to "big government." Whereas once our public buildings were palaces of democracy, now they are unattractive structures built on the cheap. These changes reflect the public's loss of esteem for public institutions and for public servants. These attitudes color views on the delivery of public services. At the same time, if what I see in the popular press reflects public opinion, popular admiration for entrepreneurs and commerce seems high.

These popular sentiments may affect feelings about privatization, but have little relevance to the issues involved in deciding whether public services should be provided directly or through private contractors:

First, public employees generally have less incentive to behave opportunistically than external suppliers, who can capture profits from cutting corners. Thus, all other things being equal, governments will need to expend greater effort monitoring private contractors than their own employees. Second, since governments do not control the internal operation of the private firm as they do in the public sector, they have less information about the activities for which they are contracting. This lack of information becomes especially important because agency-cost economics assumes not only that contracting parties will have conflicting interests, but also that they will pursue the interests through guile, such as calculated ef-

⁷¹ STEVEN RATHGEB SMITH & MICHAEL LIPSKY, *NONPROFITS FOR HIRE* 11 (1993).

⁷² Curran, *supra* note 27, at 185–86.

⁷³ <http://www.fda.gov/cder/drug/infopage/COX2/default.htm>.

forts to mislead and confuse. Accordingly, governments must again devote more resources to overcome this form of opportunistic behavior than they would if negotiating with their employees. Thus, contracting out often may create more costs, in the form of increased monitoring and negotiation, than it is likely to save.⁷⁴

4. *Citizens or Customers?*

Governments at all levels are trying to model themselves after the private sector, as evidenced by the use of “customer” to describe those whom public agencies serve.⁷⁵ The substitution of the term customer for citizen signifies a radical reworking of the relationship between the people and their government. It moves us far from a country that is still founded on these values: “We the people of the United States, in Order to form a more perfect Union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of our posterity, do ordain and establish this Constitution for the United States of America.”⁷⁶ It transforms this relationship into one in which government becomes essentially a holding company whose purpose is to funnel money and the delivery of services to customers.⁷⁷ If the public is no more than customers, then government’s only role is to perform quality control, that is, to ensure that value is received for money spent. On the contrary, when the public is viewed as citizens, then their relationship to their government is not just about providing services. It is part of the act of governing and is therefore more complex and nuanced.

5. *Oversight as a Reflection of Democratic Values*

What are the appropriate and meaningful levels of monitoring of and accountability for how services are provided? The level of monitoring needed by a complex organization as well as the full impact of ensuring accountability may not be obvious.⁷⁸ For example, the General

⁷⁴ Fruth, *supra* note 30, at 533–34.

⁷⁵ See e.g., THE CAL. PERFORMANCE REV: CREATING THE FIRST 21ST CENTURY GOVERNMENT IN AMERICA, <http://cpr.ca.gov/> (last visited Sept. 29, 2005) [hereinafter THE CAL. PERFORMANCE REV]; Richmond, *supra* note 22, at 352–54; *One Stop Reporting: Linking Employers to Child Support Customer Service*, http://www.policy-studies.com/markets/child_support/elink_sub.asp; Official Nebraska Government Website, <http://www.hhs.state.ne.us/svc/employeroutreach/qa.htm>. See discussion *infra*, part III. See also Sheila Sues Kennedy, *Governing a City: Thirty-Two Years*, in TO MARKET, TO MARKET: REINVENTING INDIANAPOLIS 63, 71 (Ingrid Ritchie & Sheila S. Kennedy eds., 2001); Minow, *supra* note 4, at 1253–54.

⁷⁶ U.S. CONST. PMBL.

⁷⁷ MATTHEW A. CRENSON & BENJAMIN GINSBERG, *Downsizing Democracy: How America Sidelined Its Citizens and Privatized Its Public* 198–233 (2004).

⁷⁸ Demone, *supra* note 5, at 228–29.

Accounting Office has recommended against fully privatizing any service, because effective accountability means government must retain enough in-house competence to monitor or retrieve the work if necessary.⁷⁹ The problem is more complex than merely losing work to a competitor. Government is not just an actor in the market. Being unable to monitor work or retrieve it may mean a loss of functions necessary to the act of governing.

Another way to look at privatization and its impact on democratic values is the issue of costs and benefits. It is easier to see accountability and regulation as a cost, rather than as a benefit, to the public. Regulation and oversight slow decision-making and narrow the range of options. However, if government services are provided by a democratic government, their delivery should be infused with democratic values, such as voice, due process, equal protection, inclusiveness, and checks on the improper exercise of power.⁸⁰

Proponents of privatization say they are not against accountability; rather, they differ as to where, when, and how accountability takes place. In short, accountability in the private sector may not take the same form as in the public sector but, nonetheless, be wholly sufficient. They want to use the market to bring efficiency and cost savings to the provision of government services. The problem, however, is how do we preserve democratic values? Can and should private contractors be held accountable through means in addition to the market? Is there true accountability that differs from the way government is held accountable? If not, and contractors must be held to the higher standard imposed on government, how can this be accomplished? Finally, what is the impact of contracting out on the polity, on citizenship in a democracy, and on membership in a democratic community?

To answer these questions, we need first to examine the role of government regulation for the delivery of services. Second, if regulation is valuable in the public sector, is it needed when a service is delivered by a private agent? Third, if so, are there alternate mechanisms to achieve desirable results in the private sector?

II. ACCOUNTABILITY AND THE DELIVERY OF PUBLIC SERVICES

Accountability may seem to be no more than mere technicalities, but accountability actually raises issues that go to the heart of citizenship and democracy. It includes “the power relationships between the parties—public or private—and the kinds of information flows that we, as

⁷⁹ *Id.* at 209.

⁸⁰ Kennedy, *Accountability*, *supra* note 60, at 144–45.

citizens, need to understand whether our public functions are being carried out in humane and effective ways.”⁸¹ There are many ways in which these issues could be explored. Here, they are divided into pre-decision and post-decision—or impact—accountability. Pre-decision accountability includes timely and full access to information that a decision is being considered, information as to the nature of the decision, and participation in the decision-making process as an interested party, witness, or decision-maker. Post-decision—or impact—accountability focuses on the point at which an adverse result may occur. It includes information about the quality of a service that has been delivered and the opportunity and ability to effectively hold the decision-maker accountable.

Accountability has both substantive and procedural elements that are designed to prevent agency failure. One of the great contributions of United States law has been elevating fair and open procedures to rights of constitutional status. Laws that provide public input into decision-making when policy is set are intended to ensure that government officials do not abuse their power and that they comply with laws and standards; to prevent secret government; and to encourage the exercise of discretion in a rational manner.⁸² It is easy to see and value substantive outcomes; they are more visible, especially when the focus is solely on cost. In this country, learning to appreciate the value of process is an important part of a lawyer’s and a citizen’s education.

Substance and procedure are linked in providing accountability. For example, public access to decision-making not only provides a basis for influencing decisions and challenging them after they are made, it also creates evidence and provides information that can be used in the course of those processes. Alternatively, consider the poster child for privatization: the time-serving government bureaucrat who is protected by civil service laws. Putting aside whether the stereotype is accurate, protecting government workers can protect the public welfare by ensuring public employees are shielded from inappropriate pressure.⁸³ Public workers are forbidden from having conflicts of interest with their jobs;⁸⁴ they may be fired for conduct that harms the mission of their agency⁸⁵ but may not be fired unless the dismissal promotes the efficiency of the service.⁸⁶ They are protected from pressure to support a particular politician or political

⁸¹ *The Changing Shape of Government*, *supra* note 37, at 1321.

⁸² Matthew Diller, *Going Private—The Future of Social Welfare Policy?* 35 CLEARINGHOUSE REV. 491, 503 (2002).

⁸³ Annee, *supra* note 6, at 167. Some laws currently require that certain functions be performed by employees protected by merit or civil service systems. *See, e.g.*, AFSCME Fact Sheet, *supra* note 66.

⁸⁴ Moe, *supra* note 67, at 456.

⁸⁵ *Rankin v. McPherson*, 483 U.S. 378 (1987).

⁸⁶ 5 U.S.C. §§ 7503(a), 7513(a) (1994).

party.⁸⁷ Nondiscrimination provisions, which have historically mandated that government seek members of disadvantaged groups,⁸⁸ have helped raise the living standards of those groups' members. They have also made this more a government of the people, whose employees understand the needs of diverse constituents.

A. PRE-DECISION ACCOUNTABILITY

Pre-decision accountability includes rights to information, access, and influence over governmental decisions.⁸⁹ It ensures that someone can be held accountable and provides accountability by giving access to the decision-making process.

1. *Who is Accountable?*

We cannot have accountability unless we know who is to be held accountable and to whom they are accountable.⁹⁰ Knowing the identity of who makes decisions about public services is linked to the execution of nondelegation laws that forbid governments from delegating governmental power.⁹¹ Gillian Metzger observes that the Constitution's separation of powers and due process requirements prohibit the government from delegating certain types of powers to private hands and that private delegation risks placing government power outside constitutional controls⁹² and can ultimately subvert constitutional duties and rights. If it is impossible to determine who is providing a service, then it is impossible

⁸⁷ *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990); 5 U.S.C. §§ 1501–1508, 7321–7327, 7324(a)(2) (1994).

⁸⁸ Curran, *supra* note 27, at 195–196.

⁸⁹ For those who want more detailed information on each of the laws discussed, many useful articles and books that discuss laws on public accountability can be found in the citations in this article.

⁹⁰ See generally, Richmond, *supra* note 22, at 344–347.

⁹¹ Colorado law demands considering whether privatizing a particular service would mean the improper delegation of a state function, see COLO. REV. STAT. §24-50-503(1)(f)(II) (2004); Daniel Guttman, *Public Purpose and Private Service: The Twentieth Century Culture of Contracting Out and the Evolving Law of Diffused Sovereignty*, 52 ADMIN. L. REV. 859, 861 (Summer 2002); Dru Stevenson, *Privatization of Welfare Services: Delegation by Commercial Contract*, 45 ARIZ. L. REV. 83, 94–95 (2003). “Delegations of governmental power in general must function within certain parameters and limitations, embodied in the nondelegation doctrine and the Due Process Clause.” *Id.* at 94 (citation omitted). “When a legislature delegates authority to an administrative agency, the separation of powers doctrine will most likely be brought to bear on the analysis of the delegation.” *Id.* at 94 n.50 (citation omitted). “Delegations from a state to municipalities can implicate the state constitutional scheme for municipal charters, a state constitutional ‘ripper clause,’ which is a state-constitution clause restricting the relationship between state and municipal governments, found in Pennsylvania, California, Colorado, Montana, New Jersey, South Dakota, Utah, and Wyoming” *Id.* at 95 n.51 (citation omitted).

⁹² Metzger, *supra* note 3, at 1370.

to know whether nondelegation laws have been violated and constitutional rights are being denied.

More than we may realize, decisions we think of as governmental are being made by private entities.

Asked by Senator David Pryor (D-Arkansas) if other government contractors were performing “inherently governmental functions”—deciding where and how to spend taxpayer money and exercising judgment on matters of due process—a GAO report responded with a resounding yes. In just a few agencies it found dozens of examples.⁹³

The government agency responsible for specific functions is a matter of public record. Normally, it is easy to find the names of city council members and the personnel running public agencies, their office addresses, phone numbers, and other contact and oversight information. But government itself can be arranged so as to disguise the identity of agencies and thus deny public access and thwart accountability. As part of his privatization and reorganization of Indianapolis, Mayor Goldsmith renamed departments in such a way as to make their responsibilities unclear and engaged in such constant reorganization, that it was difficult to locate responsibility.⁹⁴

Contracting out public services allows the contractor to hide behind a government front. The fact that government is not performing a function may not be publicized or even easily discovered. For example, what appears to be a government webpage may actually be controlled and operated by a private contractor. This includes not only static information pages, but also web pages the public must use to communicate with the government.⁹⁵ Nothing about the page reveals that private information is being given to anyone but the government. As a result, this leaves the

⁹³ Shenk, *supra* note 20, at 19.

⁹⁴ William Blomquist, *Organizational Change as a Management Tool: Mayor Goldsmith's Approach*, in *TO MARKET, TO MARKET: REINVENTING INDIANAPOLIS* 77, 81–82 (Ingrid Ritchie & Shelia Suess Kennedy eds., 2001).

⁹⁵ If you want to register your vehicle on-line in Arizona, you may actually be dealing with IBM, who “operates the program on its own servers, in exchange for \$1 per transaction and 2 percent revenues.” Lisa Snell & Adrian Moore, *E-Government*, HEARTLAND INST., (Nov/Dec 1999), <http://heartland.org/archives/ia/novdec99/privatization.htm>; *see also*, Melia, *supra* note 25; Ellen Dannin, *Privatizing Information and Information Technology-Whose Life is it Anyway?* 22 J. MARSHALL J. COMPUTER & INFO. L. 375, 376 (2004); PSI Link, *One Stop Reporting: Linking Employers to Child Support Customer Service*, http://www.policy-studies.com/markets/child_support/elink_sub.ap (n.d.).

To see such a system in action, go to <http://www.cortidesignhost.com/maximus/childsupport/links.htm>, and play with the links. They will take you to pages that appear to be official government pages. But are they?

public with no information about who is providing the services.⁹⁶ If a private contractor revealed the private information it had collected, an injured member of the public would have limited recourse, as a practical matter. Not only would the citizen lack the information necessary to hold that wrongdoer accountable, it would appear that the government caused the injury.

2. *Pre-Decision Accountability Through Procedural Access*

Public agencies are subject to a web of laws and constitutional duties that mandate that they give notice and information of contemplated actions and an opportunity for the public to respond and participate.⁹⁷ Government actors must make decisions in ways that do not violate constitutional requirements in the Bill of Rights. This obligation is enforceable through a § 1983 suit, due process notice and hearing requirements, federal and state administrative procedure acts requiring notice and comment rule making, and fair procedures plus judicial review of agency action;⁹⁸ federal and state freedom of information acts;⁹⁹ and open records and open meeting or “sunshine” acts.¹⁰⁰

These laws mean that when government provides a service, the public may participate in deciding how the service will be provided and in evaluating how it was provided by serving on a committee or board, by testifying at a public hearing, or by providing other evidence to decision-makers.¹⁰¹ Testimony also creates a record that can be held up to public scrutiny once a decision is made,¹⁰² thus establishing a basis for the effective exercise of substantive rights. Decision-makers who have access to information such as this may be saved from making costly errors. While participation may affect the substance of decisions, fostering a sense of citizen empowerment may be even more important.

⁹⁶ Cf. Barbara L. Bezdek, *Contractual Welfare: Non-Accountability and Diminished Democracy in Local Government Contracts for Welfare-to-Work Services*, 28 *FORDHAM URB. L. J.* 1559, 1560 (2001) (describing how the welfare state separates sources responsible for collecting and dispensing information).

⁹⁷ Diller, *Revolution in Welfare Administration*, *supra* note 46, at 1128.

⁹⁸ See *id.* State Administrative Procedure Acts (APA) restrain arbitrary, unilateral, or illegal acts, and give rights to hearings when substantial interests are affected by agency action. APA also prohibits adopting vague policies or ones contrary to law or unsupported by competent evidence. Cindy Huddleston & Valory Greenfield, *Privatization of TANF in Florida: A Cautionary Tale*, 35 *CLEARINGHOUSE REV.* 540, 541 (2002); Moe, *supra* note 67, at 456.

⁹⁹ See Moe, *supra* note 67, at 456.

¹⁰⁰ Phyllis E. Bernard, *Privatization of Rural Public Hospitals: Implications for Access and Indigent Care*, 47 *MERCER L. REV.* 991, 1019–24 (1996).

¹⁰¹ Privatization proponents denigrate the value of attention to process, such as hearings, as “a web of bureaucratic red tape driven by concerns over process and inputs and not outcomes.” Trebilcock & Iacobucci, *supra* note 24, at 1449.

¹⁰² See Kennedy, *Accountability*, *supra* note 60, at 142 (citations omitted).

Despite the advantages access provides by ensuring wise decisions and government accountability, some states, nonetheless, limit the voices they will hear regarding decisions to contract out. A study of state statutes found that accountability during contracting out was often expressly limited.¹⁰³ The statutes limited information that could be considered to that which favored privatization,¹⁰⁴ limited those who could make decisions about contracting out to proponents of privatization,¹⁰⁵ or even mandated contracting out.¹⁰⁶

No one argues for regulation purely for its own sake. Rather, historically, serious problems with contracting led to regulation. Yet we seem to have forgotten those lessons today. The federal government, for example, has been excluding knowledgeable and interested parties from raising concerns before services are contracted out or from challenging decisions. Such federal laws permit and even encourage abuse.

For example, the Defense Department awarded a contract to a private contractor based on a \$31.8 million calculation error.¹⁰⁷ The decision to contract out assumed savings of \$1.9 million, when, in fact, it would have been \$29.9 million cheaper for government to have kept the work in-house.¹⁰⁸ There were also inadequate standards in seven of ten performance requirements that made it impossible to evaluate the contractor's performance and hold it accountable for deficiencies. Ironically, much of the blame was due to errors by a private consultant.¹⁰⁹ According to the American Federation of Government Employees (AFGE) President, Bobby L. Harnage, the "blunder would have been brought to light sooner if the affected federal employees and their union had been given the same legal standing already enjoyed by contractors to take their grievances to the General Accounting Office and the Court of Federal Claims."¹¹⁰ Without processes that can be used to bring the error to light, taxpayers might have continued to be overcharged had it not been for

¹⁰³ Dannin, *To Market, To Market*, *supra* note 20, at 302-07.

¹⁰⁴ *Id.* at 302-03.

¹⁰⁵ *Id.* at 304-05.

¹⁰⁶ *Id.* at 263. Recently, Chris Jahn, president of the Contract Services Association of America, criticized federal privatization competitions as being defective on the ground that under those rules, 98% were won by the public sector workers. Jahn said the rules were "a process to do nothing." *Defense Department HASC Agrees to Close Competitive Sourcing 'Loopholes' for Streamlined A-76 Process*, 42 GOV'T EMPL. REL. REP. (BNA) No.2059, at 465 (May 18, 2004).

¹⁰⁷ *DOD IG Finds \$32 Million*, *supra* note 22. See also OFF. OF THE INSPECTOR GEN. OF THE DEP'T OF DEF., *Infrastructure and Environment: Public/Private Competition for the Defense Finance and Accounting Service Military Retired and Annuitant Pay Functions* (D-2003-056), *supra* note 22.

¹⁰⁸ *DOD IG Finds \$32 Million*, *supra* note 22.

¹⁰⁹ *Id.*; see also DEF. INFRASTRUCTURE, *supra* note 13.

¹¹⁰ *DOD IG Finds \$32 Million*, *supra* note 22.

three congressional representatives who applied pressure to re-examine the contract.¹¹¹

Despite this experience, one year later, the same defective process was still in place, and nothing had been set up to prevent fraud and error. In this case, the government had planned to contract out security jobs at an Agricultural Department research center without holding a formal competition. It finally was persuaded that the law required it to run at least a streamlined competition. Even then, contracting out was almost assured, because the government based the existing costs of security on double the number of security jobs actually used at the facility. This meant that any contractor's bid would certainly be far lower.¹¹² Again, this fraud was uncovered and challenged only because employees and their union asked Senators to intervene and request an investigation. The procedures then in Circular A-76 gave federal employees and their unions no regular procedure to challenge the contracting process.¹¹³

Some might argue that events in both these cases demonstrate that unions and workers do not need regulation to ensure that the right decision is ultimately made. They can, instead, go to a sympathetic representative or senator whose pressure will expose fraud, incompetence, and waste. It is unlikely that such a simplistic argument would be made, because it is obvious that relying on such a haphazard procedure places the public purse, public welfare, and national security at too great a risk. The public is much more likely to demand effective processes to prevent and catch abuse, and only systematic procedures can do this.

¹¹¹ *Id.* On April 19, the General Accounting Office dismissed five protests involving decisions to contract out work to the private sector under OMB Circular A-76, on the grounds that no representative of an in-house competitor can be considered an "interested party" eligible to protest a decisions to contract out. Michael P. Bruno, *Collins Offers Bill Giving Federal Workers Right to Protest A-76 Actions to GAO*, 42 GOV'T EMPL. REL. REP. (BNA) No.2060, at 491 (May 25, 2004).

¹¹² Louis C. LaBrecque, *USDA Office of Inspector General Is Auditing Decision to Outsource Research Site Security*, 42 GOV'T EMPL. REL. REP. (BNA) No.2056, at 398 (Apr. 27, 2004). On April 19, 2004, the General Accounting Office ruled that unions and individual federal employees do not have the right to protest agency outsourcing decisions to the GAO. *In re Dan Duefrene*, GOV'T ACCT. OFF. Case No.B-293590.2 (Apr. 19, 2004); *Federal Unions Dealt Blow as GAO Dismisses A-76 Outsourcing Protests*, 42 GOV'T EMPL. REL. REP. (BNA) No.2056, at 397 (Apr. 27, 2004).

¹¹³ *In re Dan Duefrene*, *supra* note 112; *Federal Unions Dealt Blow as GAO Dismisses A-76 Outsourcing Protests*, *supra* note 112. See LaBrecque, *supra* note 112. The Senate responded to these problems by passing legislation on June 14, 2004, that gave two Defense Department officials—the agency tender official (ATO) and the representative chosen by the affected federal employees, the most efficient organization (MEO)—the right to challenge agency decisions to contract out work under OMB Circular A-76. The House, however, had no correlated bill pending. *Senate Backs GAO Protest Rights for Feds, Bans DOD Streamlined A-76 Competitions*, 42 GOV'T EMPL. REL. REP. (BNA) No.2064, at 595 (June 22, 2004). This issue has been the subject of discussion but has yet to be adequately resolved.

Furthermore, having to undo errors is far more costly than not making them in the first place. In each of these cases there were costs involved in time spent lobbying members of Congress, who, in turn, had to spend time making demands on the executive branch to investigate. In addition to the cost of the investigation, there is a cost to restore the status quo ante. None of this takes into account the personal toll on employees who wrongfully lost jobs. In the first case, adequate post-decision accountability procedures would have caught serious errors. In the second, the lack of accountability, coupled with the money involved, may itself have encouraged fraud.¹¹⁴

Long experience has shown that when temptations to shirk or defraud exist, we need a binding web of laws to ensure accountability. Yet, despite this painfully acquired knowledge, many are committed to keeping the contracting out process secret and preventing participation, thus depriving the public of access at the critical moment. "For example, as a means of fostering competition, the National Association of State Procurement Officials (NASPO) recommends that bids be considered confidential until the bidding period is closed and that all information about the evaluation of bids and bidders be treated as confidential until an award is made. Even after opening, disclosure obligations may be qualified by a desire to preserve bidders' proprietary information."¹¹⁵

¹¹⁴ On June 2, 2004, Sen. Edward Kennedy (D-Mass.) offered an amendment to curb the Defense Department's competitive sourcing initiative by all but eliminating use of the streamlined process under Circular A-76. In addition, the amendment would:

require a public-private competition under the revised circular before outsourcing for any DOD function performed by 10 or more civilian employees, including a most efficient organization plan; require the private sector to beat the government's bid by 10 percent, or \$10 million, whichever is less; prevent contractors from scaling back or not offering health benefits to become more cost-competitive, so that comparative savings resulting from "inferior" health benefits would not count toward the cost difference of the bids; and prohibit DOD from modifying, reworking, updating, or otherwise changing a function so that it is technically performed by fewer than 10 workers so as to meet streamlined conversion rules.

Kennedy Offers Amendment to Curb DOD Competitive Sourcing, Promote Fed Workers, 42 GOV'T EMPL. REL. REP. (BNA) NO.2062, at 541 (June 8, 2004). The amendment does not include a provision, included in a house bill, that both DOD civilian and contractor employees should enjoy "comparable treatment" throughout the competition, including access to relevant data and legal standing before the General Accounting Office and the U.S. Court of Federal Claims. *See id.* Senate Governmental Affairs Committee Chairman Susan Collins (R-Maine) May 19 introduced legislation that would grant certain federal employees the right to protest federal agencies' public-private competition results at the General Accounting Office. *See Bruno, supra* note 111. Michael Wynne, acting undersecretary of defense, opposed giving federal employees equal rights with private sector contractors to challenge public-private work competitions held pursuant to Office of Management and Budget Circular A-76. *See DOD Opposes Acquisition Workforce Cuts, Federal Worker Full A-76 Protest Rights*, 42 GOV'T EMPL. REL. REP. (BNA) NO.2059, at 466 (May 18, 2004).

¹¹⁵ Diller, *Revolution in Welfare Administration*, *supra* note 46, at 1200.

With no access to information, it is impossible to make a successful challenge and even more impossible to know whether or not a challenge should be made. If those most knowledgeable, such as the workers whose work is being contracted out, cannot participate in the process of decision-making, who else will be motivated and competent to participate and ensure decisions are not made on faulty information or for bad motives?

In addition to barring public employee participation, courts have limited standing to challenge decisions.¹¹⁶ Standing builds in accountability by ensuring that those who are involved in lawsuits have a real interest in the case and will thus prosecute their positions vigorously. A court may find that the harm a plaintiff alleges is not a legally protected interest because it is not concrete and particularized or is not actual or imminent. However, these standing requirements are being used to bar even interested litigants from bringing genuine lawsuits on matters that affect the public interest. These rulings have virtually made decisions to contract unchallengeable.

In *Jones v. United States*,¹¹⁷ the court held that four civilian employees and their union could not challenge the Air Force's decision to contract out the civil engineering function at Hanscom Air Force Base because they lacked standing.¹¹⁸ The court found no standing to challenge a decision to contract out their own jobs, because the plaintiffs were not deprived of any constitutionally protected property interest: (1) government regulations in Circular A-76 and Air Force Pamphlet 26-12 stated that employees had no property rights in their jobs and (2) it was not certain that the employees would lose their jobs if the work were contracted out, and unless they did, they could not prove they were injured.

On April 4, 2003, National Park Service Director Fran Mainella stated that the National Park Service would have to reduce visitor services and make other cutbacks in order to meet the Bush administration's goals for holding public-private competitions for federal jobs. The jobs to be contracted out included maintenance and administrative positions and hundreds of archaeologists, biologists, and historians.¹¹⁹ Two thou-

¹¹⁶ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) requires that a plaintiff show standing by demonstrating the plaintiff has suffered an 'injury in fact.' An injury in fact is defined as an invasion of a legally protected interest. This interest must be (1) concrete and particularized and (2) actual or imminent. The plaintiff must also show a causal connection between the injury and the complained-of conduct.

¹¹⁷ *Jones v. United States*, No. 02-10775-NG (D. Mass. Mar. 11, 2003), <http://www.pubklaw.com/rd/courts/02-10775.pdf>.

¹¹⁸ *Id.*; see also *Air Force Employees, Union Lack Standing To Contest Del-Jen Contract, Court Rules*, 41 GOV'T EMPL. REL. REP. (BNA) No.2003, at 455 (Apr. 29, 2003).

¹¹⁹ *Park Service May Cut Operations to Fund Outsourcing Plan, Director Says in Memo*, 41 GOV'T EMPL. REL. REP. (BNA) No.2007, at 447 (Apr. 29, 2003).

sand jobs were potentially involved, but the workers currently holding them had no standing to challenge the decision under the reasoning of *Jones v. United States*. The decision also might affect Park Service efforts to ethnically diversify its workforce¹²⁰ and may lessen park visitors' quality of experience in the absence of the park archaeologists, biologists, and historians. But under the straitened interpretation given to standing, neither the incumbent employees, their union, those wanting to prevent lost workforce diversity, nor past or potential future visitors would have standing to challenge the decision. Who then can enforce accountability?

The services being contracted out are often so complex that expert, motivated input must be included in order to protect the public's interests. Consider recent plans to privatize the collection of federal taxes. In early 2003, Internal Revenue Service Commissioner Mark Everson told the House Ways and Means Oversight Subcommittee that the IRS planned to use private collection agencies to collect tax debts.¹²¹ The IRS employees' union, National Treasury Employees Union (NTEU), opposed the plan on the ground that it would cost taxpayers more money than having the work done by IRS employees and would jeopardize the rights and privacy of thousands of taxpayers. The NTEU cited an IRS study that had estimated that spending an additional \$296 million to hire more IRS compliance employees to focus on accounts receivable would result in additional collections of \$9.47 billion in known tax debts per year—a return of \$31 for every dollar spent—in comparison with private contracting collection efforts that would cost \$3.25 billion to collect \$13 billion—a return of \$3 for every dollar spent.¹²² In addition, a 1996 pilot test of private tax debt collection found that contractors had violated the Fair Debt Collection Practices Act and failed to protect the security of sensitive taxpayer information.¹²³

¹²⁰ *Id.*

¹²¹ *IRS, NTEU Trade Arguments at House Hearing on Privatizing Collections of Overdue Taxes*, *supra* note 39. On June 17, 2004, the House approved hiring private tax collectors, despite objections that it would be wiser to allocate adequate money to allow the IRS to hire tax collectors. *House Approves Export Tax Measure Allowing Private Contractor Tax Collection*, 42 *GOV'T EMPL. REL. REP.* (BNA) No.2064, at 597 (June 22, 2004).

¹²² *IRS, NTEU Trade Arguments at House Hearing on Privatizing Collections of Overdue Taxes*, *supra* note 39, at 550.

¹²³ *Id.* On March 22, 2005, six former employees of Mellon Financial Services were indicted on charges they had destroyed federal tax returns and payments so that their employer, a private contractor, would appear to have met its performance deadlines. They first hid, and then destroyed, the 80,000 unprocessed federal tax returns, documents, and checks worth more than \$1 billion in an attempt to conceal failure to meet an IRS deadline for processing taxpayer returns, payments, and vouchers. The missing tax returns and payments were discovered when taxpayers began calling the IRS to find out why their checks had not yet been cashed. *NTEU Says Mellon Case Evidences Problems In Outsourcing Federal Tax Administration*, 43 *GOV'T EMPL. REL. REP.* (BNA) No.2102, at 325 (Apr. 5, 2005).

These studies identify serious concerns affecting citizen financial and personal well being. In contrast, a study that was limited only to the cost of the private contractor's service versus money returned to the treasury would find that the private service could pay for itself. It would, however, have missed the more important fact that the government collection was far more efficient and could return ten times more money to the Treasury as compared to the cost of collection. It would also have overlooked serious misfeasance. If the federal employees and their unions are barred from presenting a fuller version of the facts, an inadequate decision that failed to protect the public purse might be made. Unfortunately, no one may have standing even to introduce this information under current law, except a contractor who loses a bid.¹²⁴

It should be no surprise that standing and the ability to challenge contracting decisions are limited. Until recently, government contracted for more limited sorts of products and services, so scrutiny during the bidding process could be adequate with only controls against fraud. This crabbed view of accountability may not be adequate, though, when the procurement is for more complex services.

Rules governing public procurement are principally directed to protect the integrity of the competitive process. They have never been designed to solicit public input in creating the policy. They do not ask to what jobs the program is leading people, or what the indicators are that training in these welfare-to-work vendor contracts actually increases employment levels. Procurement procedures generally fail as a vehicle for public participation in the development of contract specifications, the selection of contractors, or the enforcement of contract terms.¹²⁵

Increasingly, the quality of accountability may be affected by the degree to which those who have an interest in challenging contracting decisions are barred from doing so. Some might argue that there is no point in eliciting the views of public employees, because they will predictably be obstructionist. However, Representative John L. Mica (R-

Mellon, the private contractor, has now paid a fine of \$18.1 million and its tax processing center has been closed. *Id.*

¹²⁴ Clayton P. Gillette & Paul B. Stephan, *Constitutional Limitations on Privatization*, 46 AM. J. COMP. L. 481, 491 (1998). Gillette and Stephan suggest that giving public employees the right to challenge these decisions is one way to give them rights that approximate WARN Act rights in the public sector. *Id.* at 491-92. Recent changes in standing under Circular A-76 are discussed, *infra* note 126.

¹²⁵ Remarks by Barbara L. Bezdek at Panel Discussion: *Public Oversight of Public/Private Partnerships*, *supra* note 56, at 1366-67 (2001); Bezdek, *Contractual Welfare*, *supra* note 96.

Fla), then chairman of the House Government Reform and Oversight Subcommittee on Civil Service, contended that federal employees should have the chance to challenge cost-saving claims.¹²⁶ Challenging claims in such a context and forcing claimants to provide good information is a vital way to protect the public interest. Certainly, no one has greater knowledge of the details of how work is performed than those who do that work. The incumbent employees are therefore those best suited to notice missing or incorrect information.

B. POST-DECISION OR IMPACT ACCOUNTABILITY

Regulations provide many tools for post-decision accountability, but when it comes to privatization, many of these are lost. As discussed above, there are virtually no formal processes to challenge decisions to contract out once made. This void essentially leaves only the market mechanisms of competition to ensure outcomes once a service is privatized.¹²⁷ Privatization proponents claim that the market's neutral, impersonal forces improve the delivery of public services through "market forces [that] often compel private firms to act as though governed by public accountability rules."¹²⁸

This theoretical construct is intriguing and attractive, but in reality its essential premises often do not exist. For example, a private contractor may not actually be subject to market discipline in even the most basic sense. This is most common when a service will be or can only be provided through a single entity, and most problematic when complex services are to be provided through that single entity. One solution that has been pursued is using managed competition to mimic a market. When San Diego County privatized its welfare-to-work program, it divided the work to be performed among San Diego County, Catholic Charities, Lockheed Martin, and Maximus. Each was assigned a specific geographic part of the county, each of which differed in significant ways from the others.¹²⁹ This design meant that the various players were not competing with one another, since customers were not selecting from whom they purchased goods or services. Welfare recipients could not shop around for the best welfare-to-work service vendor. While it might be argued that the vendors were aware that their performance would be measured against their "competitors," this was not real competition. The

¹²⁶ *Unions Say Contracting Out Cuts Services, Saves No Money*, 191 DAILY LAB. REP. (BNA) A9 (Oct. 2, 1997).

¹²⁷ Trebilcock & Iacobucci, *supra* note 24, at 1447-48.

¹²⁸ *Id.* at 1448.

¹²⁹ Roland Zullo, *In Search of the Silver Lining: The Privatization of Welfare-to-Work Services in San Diego County* (unpublished paper, on file with The Cornell Journal of Law and Public Policy). See also Roland Zullo, *Confronting the Wicked Witch and Exposing the Wizard: Public-Sector Unions and Privatization Policy*, 6 WORKING USA 9, 24-28 (2002).

populations, geography, and infrastructure of the different regions were varied enough to render meaningful comparison difficult and expensive. This also meant that if a vendor was to be disciplined at all, that discipline could only come through imposed oversight and accountability, not the market. The nature of that oversight depended on the content of the criteria used, the methods by which they were imposed, and the skill of the regulators. In short, while the work was being performed in the private sector, it was not subject to anything resembling market forces.

The San Diego study also found that, in order to create a substitute for the market, complex and expensive recordkeeping requirements, essentially feedback loops, had to be created. The study noted:

These are complex services that are difficult to monitor and therefore create high transaction costs. Attempts so far at creating a competitive model and monitoring the work of private vendors has exacerbated the demand for paperwork, reduced the amount of professional contact with clients, and eroded the professional status of caseworkers. Moreover, the contract operations division, and other departments within the County, are increasingly devoting staff time to negotiate contracts, ensure contract compliance, dealing with contractor contingencies, processing payments, and so forth. This is driving up the administrative costs linked to this model.¹³⁰

The study also found “significant conversion costs associated with managed competition, including the upgrade of the County information system, the loss of skilled employees, organizational start-up and employee training costs for private vendors,” and perverse incentives to disqualify clients for aid.¹³¹

The best evidence was that no data showed that the private vendors were more cost efficient than the public sector and some data showed that the private vendors had average higher costs per job placement. The average ratio of job placements to total clients was higher in the public sector, and the proportion of job takers in unsubsidized employment was higher in the public sector. Disqualification of welfare recipients was significantly higher for private vendors, and most private vendors used former County employees, thus failing to introduce new expertise to the

¹³⁰ Roland Zullo, *In Search of the Silver Lining*, *supra* note 129.

¹³¹ *Id.* at 14 (explaining that the true costs of the service were not used in assessing the results of the study, but if they had been, would have included “conversion costs related to the transfer of assets and personnel, in addition to the transaction costs associated with the contract operations division, the added paperwork,” and other oversight functions that would not have been necessary under public operation).

delivery of services.¹³² Even more troubling, given these findings, was the difficulty the investigator had in gaining access to data connected with the program. San Diego County took more than a year to comply with data requests. Ensuring accountability is difficult if interested parties cannot “have access to data to allow for competing interpretations of these policies and full public disclosure.”¹³³

The experience with the San Diego program was not unique, except that it received the attention of a skilled and determined researcher. Decades into the movement for privatization, basic problems with oversight and accountability occur at every level. For example, a survey of local governments found that, in 2002, fewer than half had used systematic evaluations of private service delivery. In those that did, cost was the most common criterion (87%), while attention to citizen satisfaction—the substitute for a market’s customers—was only used as a criterion 30% of the time.¹³⁴ Cost may have been the focus because it is easier and less expensive to measure than qualitative criteria. However, when cost is the only focus, it fails to ensure that value has been received for the money.¹³⁵

If accountability matters, we should be concerned that most states lack any regularized oversight of contracting.¹³⁶ Some privatization proponents acknowledge that “privatization sometimes leads to abuse, but they argue that improving the contracting process and better monitoring can eliminate most problems.”¹³⁷ But if privatization does not intrinsically offer market discipline, then what does it offer? One advantage private contractors have is that they can take actions that laws—a/k/a red

¹³² See *id.*

¹³³ See *id.*

¹³⁴ See Warner & Hefetz, *supra* note 12, at 15.

¹³⁵ See *OMB Says 17,595 Jobs Studied in FY 2003, Saving \$1.1 Billion; Unions Dispute Figures*, 42 GOV’T EMPL. REL. REP. (BNA) No.2061, at 517 (June 1, 2004) (explaining that the Office of Management and Budget concluded that there were savings in FY 2003 of \$1.1 billion by estimating that the federal government pays approximately \$77,000 per civilian FTE in salary and benefits, and that the government would save about \$12,000 per FTE over the next three to five years. The cost of the competitions was \$5000 per FTE. Unions challenged these figures on the grounds that they did not fully account for the costs of running competitive sourcing studies; did not factor in time in-house staff spent working on job competitions; did not consider the cost of diverting employees from performing their agencies’ missions in order to comply with the privatization mandate; were based on projections and not on experience; and grossly overestimated the pay for a government FTE, because most federal work being considered for privatization is performed by lower-paid, blue-collar employees whose average yearly salary and benefits come to less than \$77,000); see also *OMB to Provide Competitive Sourcing Summary*, 42 GOV’T EMPL. REL. REP. (BNA) No.2059, at 466 (May 18, 2004) (anecdotal reporting on privatization).

¹³⁶ See Dannin, *To Market, To Market*, *supra* note 20, at 254.

¹³⁷ See *Privatization—Background*, *supra* note 34. See also Vecoli, *supra* note 34, at 246–248 (giving a brief survey of the typical rhetoric on each side of the debate).

tape—forbid public entities from taking.¹³⁸ For example, the Department of Homeland Security and three dozen other federal agencies have used ChoicePoint's services to gather information on private citizens that federal law bars them from collecting.¹³⁹

Privatization provides an escape hatch that has allowed government agencies to contract out of the law. If we do not want laws enforced, then we should repeal them and not permit backdoor evasions of law. Are we less concerned by the harms these laws were meant to prevent just because they are farmed out to the private sector? If we do not want to rebalance public versus private interests when services are contracted out,¹⁴⁰ we may need to apply laws that were put in place to regulate government to private contractors.¹⁴¹ A need for this may already exist in cases that are far more subtle. For example, a contractor may determine who will receive what level of tax funded services without having to follow the due process of law requirements of the Fifth or Fourteenth Amendments. At the same time, should employees of such agencies dare publicly to challenge their practices, First Amendment free speech rights will not protect them from summary dismissal. If due process requirements governing eligibility determinations for government-delivered services appear to produce inefficiencies, lifting them entirely through reliance on private service delivery may produce unacceptable inequities. If protections for whistle blowers in the public sector sometimes prove inadequate, it must be remembered that in the private sector no such protections exist.¹⁴²

Some might argue that privatization will make public officials more accountable by making cost and quality more visible through the contracting process. This contention is based on the idea that privatization requires government to set and reveal performance goals and measurement criteria. However, private contractors advocate for laws that protect the details of their bids from public disclosure,¹⁴³ thus styming oversight by limiting access to relevant information. Governments have also used the privatization process to hide costs and quality defects¹⁴⁴ from a public who might express displeasure at the next election if it had access to

¹³⁸ See *The Changing Shape of Government*, *supra* note 37, at 1323–24.

¹³⁹ See Harris, *supra* note 61. See also O'Harrow Jr., *supra* note 61. In 2000, the State of Florida wrongfully disenfranchised 8000 people because ChoicePoint provided false information that they were felons. See Harris, *supra* note 61.

¹⁴⁰ See *The Changing Shape of Government*, *supra* note 37, at 1330–31.

¹⁴¹ Oddly, Melia says that private companies that contract to perform child support enforcement must obey the same rules and federal regulations as the state agencies that have contracted out the work. Melia, *supra* note 25.

¹⁴² Sullivan, *supra* note 56, at 466.

¹⁴³ Diller, *Revolution in Welfare Administration*, *supra* note 46, at 1200.

¹⁴⁴ Fruth, *supra* note 30, at 525–26.

the facts.¹⁴⁵ The problems with contracting out under A-76 procedures are not limited to those described above.

[In privatization,] government officials lose the ability to respond to public accountability when they have tied their hands through contractual agreements. The contract memorializes an agreement that may be expensive to break.

Governments also may use the contractor as a scapegoat to avoid accountability. Even without explicitly trying to pass blame, government may appear less connected with the provision of the service when private companies dole out government service, because the public may be less likely to associate the government with the service. Privatization also poses a danger to accountability by fragmenting the government into an array of contracts. Critics have noted if government were reduced to mere contracts, it would lose its capacity to learn and adapt. Taken together, these considerations suggest that increasing accountability should not be considered a major driver in the privatization field.¹⁴⁶

In addition to serious problems such as outright fraud, providing services always entails some element of interpretation and discretion that may cause the execution to differ from what was intended.¹⁴⁷ For example, employees may have idiosyncratic procedures, be more or less effective, be biased against certain people or groups of people, or even be incompetent. Staffers can alter the very nature of a service by the manner in which they dispense or withhold advice, encouragement, or understanding of clients' needs. At their extreme, this can create a de facto denial of service.¹⁴⁸ As a result, effective review of the ways in which services are provided entails ensuring accountability for subtle deviations and recognizing that a service has not been provided and that, as a result, there is an adverse impact that requires redress.¹⁴⁹

¹⁴⁵ See Kennedy, *Accountability*, *supra* note 60, at 140.

¹⁴⁶ Fruth, *supra* note 30, at 525–26.

¹⁴⁷ *The Changing Shape of Government*, *supra* note 37, at 1353–54.

¹⁴⁸ Bezdek, *supra* note 96, at 1564–65. In Florida, the private welfare provider made it difficult for clients to exercise rights because it did not give recipients notice of procedures, written notice of decisions, or the opportunity to request a hearing to contest decisions. See Huddleston & Greenfield, *supra* note 98, at 540–42. See also Nicole B. Casarez, *Furthering the Accountability Principle in Privatized Federal Corrections: The Need for Access to Private Prison Records*, 28 U.MICH. J. L. REFORM 249 (1995) (reporting that the Freedom of Information Act, 5 U.S.C. 552 (2000) fails to permit access to documents created and maintained by private prisons).

¹⁴⁹ Cf. *The Changing Shape of Government*, *supra* note 37, at 1338. The right to sue a public entity may not necessarily be as expansive as might be otherwise imagined. Govern-

Effective oversight is difficult. It has consistently been found to be the weakest part of contracting out government work.¹⁵⁰ One way to look at the problem is to say that we have a formalistic dichotomy into private and public. “[A]dministrative acts and public information laws generally do not apply to private contractors.”¹⁵¹ Under this view, mere labeling affects whether accountability obligations apply. As a result, when services are contracted out, all public regulations are automatically lost. In general, public sector accountability laws will only apply to the private sector if a judge finds that there is sufficient entwinement of state and private functions for there to be state action.¹⁵²

A more rational way to approach this problem would be to use a functional distinction. If we are concerned about ensuring that a government program provides adequate disease control, that concern is not lost just because a private contractor provides the service. Yet, as things stand now, when a service is privatized, we, in effect, lose our concern about needing to be pessimistic about human behavior and therefore needing to protect ourselves.

Given that our legal system is built on a formalistic rather than a functional dichotomy and that laws governing the public sector do not

ments can only be sued when they have waived their sovereign immunity to suit, and lower bodies of government may not have the power to waive that immunity. *See, e.g., Mack v. Detroit*, No. 118468 (Mich. July 31, 2002).

¹⁵⁰ *See Contract Management: Improving Services Acquisitions: Hearing Before the Subcomm. on Tech. and Procurement Policy Comm. on Gov't Reform*, GAO-02-179T 1 (2001) (statement of William T. Woods, Acting Director, Acquisition and Sourcing Management).

Both private and public employers have serious problems when they outsource work, according to a recent study by Deloitte Consulting. Deloitte found that 70% of employers reported negative experiences with outsourcing. These results were reported by experienced managers who collectively managed about \$50 billion in contracts. Deloitte found problems that include vendor underperformance, loss of control, greater costs, loss of knowledge, compromised security of intellectual property, breaches of confidentiality, hidden costs, governance issues, vendor employee turnover and training, loss of flexibility, and locked in contracts that lead to loss of bargaining power. DELOITTE CONSULTING, CALLING A CHANGE IN THE OUTSOURCING MARKET — NEW STUDY REVEALS OUTSOURCING FALLING FROM FAVOR, <http://www.deloitte.com/dtt/research/0,1015,sid%253D1013%2526cid%253D80376,00.html> (last visited on Oct. 25, 2005).

¹⁵¹ Remarks by Barbara L. Bezdek at Panel Discussion: *Public Oversight of Public/Private Partnerships*, *supra* note 56, at 1366–67. *See also* Bezdek, *Contractual Welfare*, *supra* note 96. Access to information, a crucial aspect of accountability, differs materially in the private and public sectors. The FOIA does not apply to the private sector, so crucial information needed to assess a contractor's performance may not exist or be available to those outside the firm.

¹⁵² *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 291, 295, 302 (2001); Diller, *Going Private*, *supra* note 82, at 503–04. *See also* *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 63, 71–72 (2001) (holding that, under *Bivens*, there is no right to sue a private corporation running a prison); *Richardson v. McKnight*, 521 U.S. 399, 406, 407, 412–13 (1997) (explaining that, in the case of private prisons, they are not entitled to assert immunities available to the government.); Remarks by Barbara Bezdek at Panel Discussion: *Public Oversight of Public/Private Partnerships*, *supra* note 125.

apply once services are contracted out, are there ways to ensure that privatized programs perform? If this is possible, should it be done? Does the value of accountability outweigh its costs in the private sector?

III. MECHANISMS TO PROVIDE ACCOUNTABILITY IN THE PRIVATE SECTOR

Theoretically, there are several routes that could be used to create accountability for privatized services. We could impose existing public sector accountability requirements on private contractors. We could create private sector accountability processes that are comparable to those in the public sector or create altogether new mechanisms specific to the private sector. Finally, if we conclude that regulating contractors is infeasible, additional accountability requirements could be imposed on government to ensure it engages in responsible contracting and oversight,¹⁵³ in a sense regulating contractors indirectly.

All these alternatives use public sector accountability methods to construct private sector accountability. Those methods mean that we could create private analogues to Administrative Procedure Acts to provide accountability in decision-making, in adjudicating whether those decisions are valid, and in deciding whether they have been legitimately applied. We could have private sector Freedom of Information Acts, Administrative Procedure Acts, and Open Meetings or Sunshine Acts to provide information as to operations and as a basis to overturn and redress defective decisions. We could install private sector due process, equal protection, or other constitutional rights. We would have oversight when contracting out is being considered and during the life of the contract, rather than today's situation where, when a service moves from the public to the private sector, recourse become less available or may not even exist.

While such a transfer of oversight—public-ization—may sound attractive, creating such a system is quite complicated in reality. On the one hand, there is the technical question of how to create private analogues of public accountability. Even more important: is it in our interest to make private and public provision indistinguishable? Even those who support accountability may not agree that this blurring is wise. In addition, some will strongly oppose such a move, because “accountability provides a weak rationale for direct public intervention in markets. The same merits of private markets also argue against significant oversight of private providers . . . [P]ublic oversight mechanisms . . . will be expensive and often either irrelevant or counterproductive.”¹⁵⁴ In short, they

¹⁵³ Cf. Bezdek, *Contractual Welfare*, *supra* note 96, at 1564–65.

¹⁵⁴ Trebilcock & Iacobucci, *supra* note 24, at 1422, 1423–24.

argue that it is in our interest to retain different ways of providing society's goods and services.

A. MAKING THE PRIVATE MORE LIKE THE PUBLIC?

Everyone agrees that private contractors should be held accountable, but disagrees as to what that means. For those who put their faith in the unregulated market and consider all regulation to be red tape, accountability is accomplished when services move from public to private provision. For those who oppose all privatization, there should be no contracting out and thus no need to consider making the private sector accountable for providing public services. For the rest, the form of accountability depends on its purpose. For example, problems of agency failure differ from the need to support public values. Related to these questions is whether the level at which government is held accountable is a desirable level for all or some private contractors? If not, what is the appropriate level and means, and how do we decide the optimal levels and means? Finally, are there feasible mechanisms to create that accountability in the private sector?¹⁵⁵

There are essentially three ways to create private contractor accountability for a class or individually—legislation, contract, and judicial interpretation. Either laws or individual contracts could mandate procedures comparable to those in the public sector, such as access to information on decisions or performance “through reporting requirements and various ways in which citizens could petition to have contracts amended if they do not appear to be working properly.”¹⁵⁶ Standing could be created or defined, either through legislation, contract, or judicial interpretation, to include a wider class of potential litigants, including ones with the staying power, money, and stake in the issues to enhance accountability.¹⁵⁷ Statutes could incorporate or courts could adopt broader definitions of key terms, for example, “agency” and “agency record,” in order to ensure access to information.¹⁵⁸ States could legislate that contractors be treated as state actors for the application of all or at least some of the laws that control government action and provide rights of access and accountability to the public.¹⁵⁹ Finally, legislation can directly subject

¹⁵⁵ This is a task that Jody Freeman is exploring at length. See Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285 (2003).

¹⁵⁶ *The Changing Shape of Government*, *supra* note 37, at 1354.

¹⁵⁷ Procedural tools such as intervention of right and permissive intervention could also be used to permit some level of access to lawsuits. FED. R. CIV. P. 24.

¹⁵⁸ See generally Craig Feiser, *Privatization and the Freedom of Information Act: An Analysis of Public Access to Private Entities under Federal Law*, 52 FED. COMM. L.J. 21 (1999).

¹⁵⁹ See Diller, *Going Private*, *supra* note 82, at 504; Matthew Diller, *Introduction: Redefining the Public Sector: Accountability and Democracy in the Era of Privatization*, 28 FORDHAM URB. L.J. 1307, 1310–11 (2001).

contractors to public accountability laws. For example, Workforce Florida was made explicitly subject to Florida's public records and sunshine laws.¹⁶⁰ Laws can require that any or all regulations that apply to government will apply when government functions are privatized.

Another route is for courts or legislatures to expand the application of existing private sector laws and common law doctrines less directly. Private service providers could be made accountable through tort or contract remedies; professional licensing and accreditation standards; and laws controlling corporate governance and not-for-profit organizations.¹⁶¹ They could create or expand tort rights for wrongful discharge in violation of public policy in order to give private workers standing and the backbone to contest actions that harm the public. New laws could be enacted that are designed to create tort-like or contract-like rights. Rather than imposing accountability standards by law, legislation could proscribe contracting out unless either contractors agree to be treated as state actors or agree to the application of designated laws that control government action and provide rights of public access and accountability and sufficient insurance to fully cover injuries.¹⁶²

Legislation and contract may be used separately or together to achieve accountability. To some degree, it is helpful to think of contract terms in a privatized regime as equivalent to governing law that has been voluntarily assumed by the parties to apply to a discrete relationship. However, it is impossible to demand that certain contract terms always be achieved.¹⁶³ Therefore, there will be more certainty if those terms are generated by statutes that impose privatization accountability as the price of winning the contract.

When listed this way, the ability to impose public standards on private contractors seems feasible and even attractive. However, beyond these broad outlines lie many difficult issues.¹⁶⁴ Is it possible to keep

¹⁶⁰ Huddleston & Greenfield, *supra* note 98, at 544. The Florida sunshine law prohibits Workforce Florida from issuing binding rules or taking binding actions without a public meeting, requires promptly recorded accessible minutes, and bars actions that would unreasonably restrict public access. *Id.* at 544–45.

¹⁶¹ Diller, *Going Private*, *supra* note 82, at 504.

¹⁶² See Diller, *Introduction*, *supra* note 159; See also Diller, *Going Private*, *supra* note 83, at 504.

¹⁶³ See Diller, *Introduction*, *supra* note 159.

¹⁶⁴ Questions can range far beyond those we think of as coming under the umbrella of accountability laws: Are private entities that perform public work through subcontracts or as agents of the government to be treated as private and therefore subject to state taxation and state incorporation laws if they are also quasi-public because they have been subject to regulations such as those under the Freedom of Information Act or the Administrative Procedures Act? Moe, *supra* note 67, at 455–56. State Administrative Procedure Acts restrain arbitrary, unilateral or illegal acts and give rights to hearings when substantial interests are affected by agency action. They prohibit adopting vague policies or ones contrary to law or unsupported by competent evidence. Huddleston & Greenfield, *supra* note 98.

from freezing outdated terms or standards into contract or law, essentially recreating bureaucracy? If state and federal laws are to be applied to contractors, does their language make sense? Have laws kept pace with changes in the way government does business and are the records created or maintained by contractors accessible?¹⁶⁵ Must decisions be made in accord with “open meeting” or “sunshine” acts,¹⁶⁶ and, if so, must corporation law be revised? Will the Federal Privacy Act apply to proscribe disclosure of confidential information? If public decision-making laws are to apply, how will this mesh with corporation doctrines and with the role of corporate officers? Will corporations be required to admit the public to their decision-making processes? Must they provide relevant documents upon a FOIA request, or will these documents only be produced through discovery after a lawsuit is filed? In short, “are there opportunities along the way for the public to intervene and express their views?”¹⁶⁷ What will be the effect of a double layer of accountability on rights and procedure, such as whether a claimant has standing to prosecute a particular claim? All these issues and more will remain uncertain until judges have interpreted the laws.

We also need to ask: Is employment to be at will, or will employees have quasi-civil service and whistleblower protections, Fourth Amendment, and privacy rights?¹⁶⁸ Is the contracting agency bound by nondiscrimination provisions, and thus mandated to seek out members of disadvantaged groups?¹⁶⁹ Are managers subject to public laws forbidding conflicts of interest, or are they liable under corporation law for acts that are *ultra vires* or a breach of fiduciary duty?¹⁷⁰ There are fundamental differences in the purposes of the two sorts of laws and rights. Public rights that protect public employees often do so in order to protect the

¹⁶⁵ Greg Bass & Harry Hammitt, *Freedom of Information Act Access to Documents of Private Contractors Doing the Public's Business*, 35 CLEARINGHOUSE REV. 607 (2002). In general, to be accessible, records must be agency records and in the possession of an agency. Thus, the Smithsonian is not an agency because it did not fit into the FOIA's definition. *Id.* at 607–08. Some states have defined contractors to be covered by FOIA if it is determined that they are performing a function the government would have to do in absence of the nongovernmental body or if “the outside entity exists solely to perform a function for the benefit of the governmental body.” Some have looked at the source of funding so that an entity that derives some percentage of its funding from the state or local government may be covered. *Id.* at 609.

¹⁶⁶ Workforce Florida was made explicitly subject to Florida's public records and sunshine laws. Huddleston & Greenfield, *supra* note 98, at 544–45. The Florida sunshine law prohibits Workforce Florida from issuing binding rules or taking binding actions without a public meeting, requires promptly recorded accessible minutes, and bars actions that would unreasonably restrict public access. *Id.*

¹⁶⁷ *The Changing Shape of Government*, *supra* note 37, at 1353.

¹⁶⁸ Moe, *supra* note 67, at 456.

¹⁶⁹ Curran, *supra* note 27, at 195–96; see also Puerto Rico Ports Authority Not ‘Employer’ of Licensed Harbor Pilots, First Circuit Rules 42 GOV'T EMPL. REL. REP. (BNA) No.2061, at 524 (June 1, 2004).

¹⁷⁰ Moe, *supra* note 67, at 456.

public by insulating public workers from improper influence. Corporate obligations extend to the shareholders. What would happen if obligations to operate in the public interest conflicted with shareholder rights?

Finally, making changes of this breadth depends on a highly optimistic vision of the power of legal tinkering. While all this is possible, theoretically speaking, the reality is that no obligations can be created if a contractor is unwilling to assume them. Therefore, we must ask: Do governments want to lose willing contractors? Consider also decisions that are subcontracted which violate the non-delegation doctrine and due process.¹⁷¹ Accountability procedures alone may be insufficient to forestall these problems. One writer asks: Is government outsourcing avoiding the responsibility to engage in decision-making by “the simple act of giving [its] troubles to someone else.”¹⁷²

Current examples are not hard to find, including California’s decision to outsource its networks and Pennsylvania’s intention to outsource its data centers. But top honors must go to Connecticut, which is attempting to give all its IT functions to some lucky vendor. While many states are larger, none had previously stepped up to outsource everything.¹⁷³

Even if accountability is imposed, the undermining of intent in administering a service can be subtle and elude notice. Matthew Diller describes how a goal of reducing welfare rolls by a certain percent may be implemented in such a way that it defeats the larger intent of moving people into well-paid employment. The hours offices are open, their locations, the number of visits that must be made to qualify, and the amount and nature of paperwork all can make it more difficult to qualify for welfare. Even more subtly, the length of waiting time once in an office, the availability and comfort of furniture, and the unavailability of foreign language interpreters can have a similar effect.¹⁷⁴ These decisions can be devolved to the individual caseworker or clerk level. For example, they could be rewarded (or not punished) for reducing case

¹⁷¹ See Guttman, *supra* note 91; see also Dru Stevenson, *supra* note 91.

¹⁷² Gary Swindon, *Outsourcing Decision-Making* (Mar. 16, 1998), http://www.fcw.com/civic/articles/1998/CIVIC_031698_22.asp (last visited Oct. 25, 2005).

¹⁷³ *Id.* In the end, Connecticut chose not to do so, William Welsh, *Connecticut’s Rowland Pushes IT Modernization*, WASHINGTON TECH. (June 6, 2001), <http://www.washingtontechnology.com/cgi-bin/udt/im.display.printable?client.id=wtdaily-test&story.id=16654> (last visited Oct. 25, 2006), but many other state and local governments have. Edward McKenna, *Outsourcing Efforts Gather Steam Among Federal Agencies: States Towns Progress Despite One Dead*, WASHINGTON TECH. (Mar. 20, 2000), http://www.washingtontechnology.com/news/14_24/tech_features/1153-2.html (last visited Oct. 25, 2005).

¹⁷⁴ Indeed, there are strong financial incentives in welfare reform to cut welfare rolls and little incentive to examine how that happens. See Diller, *Revolution in Welfare Administration*, *supra* note 46, at 1177–83; Roland Zullo, *In Search of the Silver Lining*, *supra* note 129.

levels, but to do so the workers must provide services in a way that discourages applicants, for example, by actively mishandling cases to deny eligible applicants.¹⁷⁵ The means for doing this range from overt acts like misinformation, failure to provide information, and failure to return phone calls to subtler acts like being rude and condescending. Programs that tout devolving decision-making are letting governmental decisions be made at the lowest level possible,¹⁷⁶ and that makes enforcing accountability more difficult.

B. DO WE WANT TO PUBLIC-IZE THE PRIVATE SECTOR?

Jody Freeman, for one, is engaged by the idea of using privatization “as a mechanism for expanding government’s reach into realms traditionally thought private.”¹⁷⁷ She asks: Is there any way in which legislation or contract can overcome the separation of public from private to ensure accountability?¹⁷⁸ As discussed above, this is a theoretically fascinating exercise. But the theoretical ability to erase or blur the lines between private and public does not mean we should, and, perhaps, can. Our society may function best with private and public spheres that operate with different rules to achieve different ends. Even more important, the players in this area do not want any blending and will vigorously oppose it. Given this, the question is not how to make contractors accountable, but, rather, does the issue of accountability help us understand how a service should be provided.

Understanding the role and challenges of creating accountability may help us decide between private or public provision. We know we can provide at least some services publicly and privately, while they remain fundamentally different with regard to methods of accountability. If so, what about providing services is intrinsic to the nature of governance and citizenship and what is not? Put another way, do we want the differences between public and private to be lost? If the administration of services—whether done by government or private contractors—is policy making, who should be making those policies, for which services, and why and how?

More important than the philosophical issues of governance is the fact that powerful people do not want accountability. Imposing accountability removes a motive to privatize: relief from or evasion of regulation.

¹⁷⁵ Diller, *Revolution in Welfare Administration*, *supra* note 46, at 1130–31. David Shieler describes the complexity of the processes with which welfare recipients must comply and the opportunities these create for individual arbitrary actions. DAVID K. SHIELER, *THE WORKING POOR: INVISIBLE IN AMERICA* 228–30 (2004).

¹⁷⁶ For examples, see Diller, *Revolution in Welfare Administration*, *supra* note 46, at 1120–1131.

¹⁷⁷ See Freeman, *supra* note 155.

¹⁷⁸ See *id.*

The Bush Administration is demanding “direct conversions”—contracting out jobs without any competition or evidence that a private contractor can better perform the work.¹⁷⁹

Private contractors are hardly clamoring for oversight and regulation. They may tolerate some oversight, but they are saying that at some point oversight and accountability will be a deal breaker. They point out that there is always risk in contracting and say that terms to ensure that contracted-for services are provided at the cost agreed upon add to that risk, especially since it is difficult to write precise contracts when human services are involved.¹⁸⁰ Indeed, some contractors and privatization proponents are rebelling against oversight.¹⁸¹ They reject the notion that they should be bound by contract to make the government or public whole when the contractor fails to live up to its obligations.

This is a retreat from prior arguments in favor of privatization—that the contractor and not government would bear full responsibility for failure. As recently as 1998, an argument for privatization was framed thus:

Perhaps the most attractive feature of performance contracting is that risks don’t fall so heavily on government but are shared more equitably between the agency and winning vendor. The vendor can be paid if and when the contracted-for objectives are achieved (e.g., more efficient revenue collections, lower unit service costs). Because of this, vendors are motivated to work closely with the agency to develop solutions that most quickly and feasibly deliver the outputs and outcomes sought. When both parties pursue the same goal and face risks together, they can work better together to create success.¹⁸²

Starting in about 2001, privatization proponents began to argue that contractors should be made less responsible for problems with their contractual performance. They contend that contractors are being asked to assume too much liability for performance problems and even to act as insurers of success. They say this burden will lead private companies to forgo opportunities, leading to less competition for projects.¹⁸³ Some

¹⁷⁹ Dooley, *supra* note 10.

¹⁸⁰ See, e.g., Melia, *supra* note 25.

¹⁸¹ One aspect of contractors’ resistance to oversight is the effort to make bid terms nondisclosable, see *supra* text accompanying note 114; restricting information about the bidder restricts oversight and regulation.

¹⁸² Jerry Mechling & Victoria Sweeney, *Finding and Funding IT Projects*, Part 3: Performance Contracting (1998), http://www.ksg.harvard.edu/taubmancenter/pdfs/reports/entire/report_1998.pdf.

¹⁸³ Douglas Herbst & David Mackenzie, *Unlimited Irrevocable, Unreasonable Liability: An Idea Whose Time Has Gone*, Privatization 2001, *supra* note 27, at 16, 17. See also MAXIMUS, *PRIVATIZATION CONTRACTS THAT WORK*, 8-15 (2001), <http://cortidesignhost.com/max->

privatization proponents express concern over having to provide guarantees or indemnification when problems arise with contracts. For example, Douglas Herbst, vice-president of CH2M HILL and chair of the National Council for Public-Private Partnerships, and David Mackenzie, an international transaction specialist, argue:

It's clear that this trend toward over-the-top guarantees can't continue as is. On future deals, contractors will negotiate harder, perhaps even walking away from terms they once accepted. Once this happens, the marketplace will have to adjust accordingly. The time when private companies push themselves away from the client's table because of unnecessary, excessive, and meaningless guarantee requirements may be near. And they need to be willing to do just that - if that's what it takes to deliver the message.¹⁸⁴

Maximus, a large contractor, makes similar arguments. A guide to privatization's pro's and cons on Maximus' website advises agencies not to make "the mistake of placing a contractor under the same restrictions, red tape, and bureaucratic constraints of your government agency" ¹⁸⁵

Of course, one person's red tape is another's accountability. When privatization proponents say that there should be no rules to determine what is permissible and no obligations to abide by contract terms, then constructing meaningful accountability schemes will be an enormous battle. Private contractors will not voluntarily take on these obligations. If any accountability at all—certainly accountability at levels akin to that binding government—is to be imposed on contractors, the only route will be by legislation or through activist courts willing to overturn precedent on state action and standing.¹⁸⁶

imus/childsupport/MAX26_PrivRev5.2.pdf (last visited on Oct. 26, 2005); U.S. GEN. ACCT. OFF., CONTRACT MANAGEMENT: TAKING A STRATEGIC APPROACH TO IMPROVING SERVICE ACQUISITIONS (Statement of William T. Woods, Acting Director, Acquisition and Sourcing Management), GAO-02-499T 7 (Mar. 7, 2002). Some have suggested using "share-in-savings" contracting so that contractors fund a project in return for a percentage of savings actually achieved. U.S. GEN. ACCT. OFF., CONTRACT MANAGEMENT: IMPROVING SERVICE ACQUISITIONS (Statement of William T. Woods, Acting Director, Acquisition and Sourcing Management), GAO-02-179T 5 (Nov. 1, 2001).

¹⁸⁴ Herbst & Mackenzie, *supra* note 183.

¹⁸⁵ See Maximus, *supra* note 183, at 4. Public sector union concerns are mentioned only as problems that must be dealt with, as opposed to legitimate alternate points of view. See *id.* at 6.

¹⁸⁶ Imposing accountability obligations through judicial interpretations has its own disadvantages. Judicial law making is case-by-case and after-the-fact. As a result, the parties to the case before the court may have been unable to anticipate the outcome and to protect them-

Imposing accountability, by legislation or otherwise, is not cost-free.¹⁸⁷ Contracting with government is voluntary, so a government that wants accountability may find itself with few bidders or agreeing to contract prices that will guarantee profits.¹⁸⁸ For companies, as well as citizens, not all costs are monetary. Many contractors may not want to open their bank accounts to public review.¹⁸⁹ When regulation means prices rise to a level at which a contractor cannot make a profit and perform the work for less than government workers can, there is no point in privatizing. The only exception may be those companies for whom government work constitutes such a large part of their functions they would collapse if they no longer took it on.

The complexity and importance of accountability suggest that contracting should not take place in instances in which accountability, greater than is provided by the market and basic contract terms, is important.¹⁹⁰ To look at it another way, it may be important to consider what

selves. Other potential parties will have to draw their own conclusions as to whether the law will apply to them.

¹⁸⁷ Costs related to imposing accountability average nearly 20% of contract costs. Hefetz & Warner, *supra* note 15, at 175. Of course, the process of privatization is not without its own costs. The National Park Service was concerned that complying with federal requirements to determine which jobs should be contracted out would cost \$3,000 for each full-time equivalent job. To cover this cost, the Park Service estimated that it would have to cut visitor services and seasonal operations. Another cost was the potential loss of diversity in the workforce. *Park Service May Cut Operations to Fund Outsourcing Plan, Director Says in Memo, supra* note 119. Other agencies have raised this concern. See generally U.S. GEN. ACCT. OFF., COMPETITIVE SOURCING: GREATER EMPHASIS IS NEEDED ON INCREASING EFFICIENCY AND IMPROVING PERFORMANCE, GAO-04-367 (Feb. 2004), <http://www.gao.gov/new.items/d04367.pdf> (describing the challenges various federal agencies face in implementing competitive sourcing, including lack of staff and funding).

¹⁸⁸ Daniel Sorid, *Colorado Highway "Slowdown" Sparks Debate on Toll Roads*, Reuters (Aug. 11, 2005), available at http://www.rednova.com/news/general/205287/colorado_highway_slowdown_sparks_debate_on_toll_roads/.

The documents, analysis, and additional details on noncompete agreements may be found at the blog, unbossed. See, e.g., Shirah, *E-470 - A Model Road, According to the Federal Government*, <http://www.unbossed.com/index.php?itemid=324> (Aug. 9, 2005) (establishing a geographic non-compete zone vital for the success of public-private highway partnerships according to a U.S. Department of Transportation Report to Congress on Public-Private Partnerships (Dec. 2004), <http://www.fhwa.dot.gov/reports/pppdec2004/#appd2>); Bob in Loveland, *Hidden Costs of Toll Roads*, <http://www.unbossed.com/index.php?itemid=318> (Aug. 8, 2005); Shirah, *Colorado Toll Roads—Trying to Follow the Money*, <http://www.unbossed.com/index.php?itemid=321> (Aug. 9, 2005); Shirah, *Toll Roads, Privatization, and Taxes—Connect the DOTs—Part II*, <http://www.unbossed.com/index.php?itemid=276> (July 20, 2005); Shirah, *Toll Roads, Privatization, and Taxes—Connect the DOTs—Part I*, <http://www.unbossed.com/index.php?itemid=274> (July 19, 2005).

¹⁸⁹ See Minow, *supra* note 4, at 1247.

¹⁹⁰ Ronald Moe argues: "The public and private sectors may be alike in the nonessentials, but it is in the essentials where they differ, and these distinctions cannot be glossed over or taken lightly." Moe, *supra* note 67, at 454. Or as David Reimer puts it:

And in the final analysis, all embrace not just the same end but the same means. Every combatant in the privatization debate believes in a "mixed" system for achiev-

are the advantages of different sorts of accountability mechanisms in particular situations.¹⁹¹

Does privatization lead to the undermining of traditional controls, in terms of either requirements or methods for participation in government decisions, because the entities that were providing government services are now outside of those regimes? Or, does it actually provide, for example, an opportunity to increase accountability by bringing private citizens into government and developing new methods of delivering services and in other ways transcending the public/private divide?¹⁹²

Problems in achieving access and accountability with a private contractor suggest limiting contracting to tasks that (1) are well-defined, (2) involve a minimum of discretion, (3) have little chance of affecting the public welfare, (4) are not critical to the undergirding of our well being, and (5) involve circumstances where failure would not be devastating.¹⁹³ If this roughly defines the divide, we should not, as we now do, see the delegation of discretion and broad responsibility to private providers in public health and welfare programs, public education, government information and information technology, and prisons, oddly enough, areas now seen as prime candidates for privatization.¹⁹⁴

IV. CONTRACTING OUT, ACCOUNTABILITY, CITIZENSHIP, DEMOCRACY, AND COMMUNITY

Accountability in the process of public provision of services is more than just a tool to safeguard against corruption and cronyism. It can foster substantive public input and participation in public life.¹⁹⁵ This vision of a link between accountability and citizenship stands in stark contrast with that of those who advocate large-scale privatization. "One marked

ing accountability in which governmental rules create the overarching framework and government employees enforce the framework, but individuals applying their private values and preferences exercise huge amounts of discretion. How can this be? How can those who champion government as administrator favor (whether they acknowledge it or not) private decision-making? How can the supporters of privatization embrace (whether they know it or not) the need for government control?

David R. Riemer, *Government as Administrator vs. Government as Purchaser: Do Rules or Markets Create Greater Accountability in Serving the Poor?*, 28 *FORDHAM URB. L.J.* 1715, 1720 (2001).

¹⁹¹ See *id.* at 1718.

¹⁹² *The Changing Shape of Government*, *supra* note 37, at 1319.

¹⁹³ This would be in addition to commonly accepted reasons for public provision—primarily issues of public goods and positive externalities.

¹⁹⁴ Dannin, *supra* note 95, at 382–83; Metzger, *supra* note 3, at 1369; Hefetz & Warner, *supra* note 15, at 182.

¹⁹⁵ Diller, *Introduction*, *supra* note 159.

difference from past thinking is that organized business groups now view governmental activities as potential profit centers.”¹⁹⁶ This has generated a thriving business promoting privatization through lists of opportunities,¹⁹⁷ master websites with links to other privatization websites,¹⁹⁸ and websites to promote legislation enabling contracting out. On the other hand, unions and professional associations that are hostile to the privatization movement also maintain websites that track these initiatives.¹⁹⁹

This divide in vision as to our relation as citizens to government is reflected in language. As government services move into the private sector, the language of governance becomes that of commerce. One county government decided to eliminate the word “government” from letterhead, business cards, and cars because the word was seen as “arrogant” and “off-putting.”²⁰⁰ Indianapolis Mayor Stephen Goldsmith, a well known supporter of privatization, referred to the citizens he represented as “customers.”²⁰¹ In a sense, these linguistic shifts imply that the public and private sectors are alike in the essentials, and that these essentials are cost and level of service.²⁰² Sheila Suess Kennedy observes that privatization “ideology rests largely on a view of government as primarily a provider of services for ‘customers’ rather than a shared enterprise of citizens.”²⁰³ Indeed, empirical evidence shows that privatization impels the shift in status from citizen to customer by focusing almost solely on cost.

Under privatization, governments give priority to
efficiency concerns and diminish their attention to voice.
However, consumer citizens do not act as though effi-

¹⁹⁶ Michael Glanzer, *Union Strategies in Privatizations: Shakespeare-Inspired Alternatives*, 64 ALB. L. REV. 437, 453 (2000).

¹⁹⁷ See <http://www.bidders.com> (listing privatization opportunities at the state and local level) (last visited Sept. 4, 2005); <http://www.in.gov/ai/bidwatch/> (last visited Sept. 29, 2005); <http://www.privatization.org/database/providerdirectory.html> (last visited Sept. 29, 2005).

¹⁹⁸ <http://www.indygov.org> (providing links to other privatization sites) (last visited Sept. 4, 2005).

¹⁹⁹ See, e.g., *Is Education Wall Street's Next High-Flyer Industry?*, PRIVATIZATION ALERT, Winter 1997 (noting that private teaching companies' stock substantially increases when they get their foot in the public system's door, illustrating that education is a prime target for the investing industry); <http://www.afscme.org/private/index.html> (last visited Sept. 4, 2005); *Stop Wasting America's Money on Privatization*, <http://www.aflcio.org/aboutus/thisistheaflicio/ecouncil/ec08052003b.cfm> (last visited Sept. 4, 2005).

²⁰⁰ Demone, *supra* note 5, at 224.

²⁰¹ Kennedy, *supra* note 75, at 71. See also Minow, *supra* note 4, at 1254; THE CAL. PERFORMANCE REV., *supra* note 75.

²⁰² The City of San Diego has taken an apolitical stance. It has, in practice, tended to keep services public or to contract back in services once privatized. Yet, it contends: “The Competition Program operates under the premise that taxpayers are not concerned with who provides a service; they care about the level and cost of that service.” <http://www.sannet.gov/competition/competition.shtml>. (on file with author)

²⁰³ Kennedy, *Accountability*, *supra* note 60, at 140 (citation omitted).

ciency is the only currency running through their markets. Preferences based on race, income, and other factors that undermine diversity also have strong currency. For providers in private markets, profit considerations can outweigh social values. Thus, privatization may provide an avenue to increase efficiency, but the limitations of markets prevent it from adequately addressing the full range of community and regional needs.²⁰⁴

The language of the California Performance Review captures this change in values from citizenship to “customership” when it describes its goals:

California must pursue a customer-focused transformation in government operations . . . Staff needs to transform the fundamental conception of the interactions between government departments and members of the public. Simply put, government needs to treat all members of the public as customers of government services to promote and become a customer-centric culture.²⁰⁵

Some privatization proponents see contracting out as promoting democratic values because they equate private enterprise and the free market with democracy.²⁰⁶ However, a robust democracy requires that citizens participate in the act of governance itself, not just in “buying” services.²⁰⁷ Customers or consumers of services play only a passive role by “voting” with their dollars; “consumer voice and citizen voice are not the same.”²⁰⁸ This economic model of a country populated by self-interested rent seekers who are cynically mistrustful about involvement in civic life would leave us with no one able to challenge corruption and bad policies.²⁰⁹

²⁰⁴ Warner & Hefetz, *Applying Market Solutions to Public Services*, *supra* note 63, at 85. A failure to listen to citizen voice is a major cause of contracting services back into public provision. Hefetz & Warner, *supra* note 15, at 175.

²⁰⁵ THE CAL. PERFORMANCE REV., *supra* note 75.

²⁰⁶ See, e.g., PRIVATIZATION 2001, *supra* note 27.

²⁰⁷ Governments “generate a unique political discourse by which the public can judge its satisfaction with the provision of public goods. Responding to private organizations does not create the same effect on the public.” Fruth, *supra* note 30, at 535 (summarizing Clayton P. Gillette, *Who Puts the Public in the Public Good?: A Comment on Cass*, 71 MARQ. L. REV. 534, 547–48 (1988)).

²⁰⁸ Warner & Hefetz, *Applying Market Solutions to Public Services*, *supra* note 63, at 85.

²⁰⁹ Elinor Ostrom, *A Behavioral Approach to the Rational Choice Theory of Collective Action*, Presidential Address at the American Political Science Association (1997) in 92 AM. POL. SCI. REV. 1, 3 (1998) (discussing pedagogical approaches in the political science classroom).

The linguistic shift from citizen to customer reflects the fact that privatization on a large scale entails (and is intended to create) a reordering of society that is about far more than how we provide services. One of the strongest proponents of privatization says:

Privatization is more a *political* than an *economic* act. Long-term, incrementalist tactics are needed to implement a privatization strategy, with a research and public relations effort to press for internal and external support respectively, tax reforms to encourage it, legislation to allow it, and strong coalitions of stakeholders—some newly converted—to support it.²¹⁰

Privatization as a political act, as a method of reordering society, often goes unseen amidst a focus on the minutiae employed to debate the merits of privatization: Does it provide better services at less cost? And if it does, is this because of market forces, lack of proper accounting for costs, or lowering pay and removing benefits for workers? Are failures limited to technical matters of breach of contract, poor oversight, or other problems?²¹¹

Indeed, the debates over cost savings and efficiency often fail to distinguish between savings that are net efficiency gains and those that represent transfers from one segment of society to another. In privatizing a state-owned enterprise or contracting out, for example, costs may be reduced in part by shedding excess staff or by cutting wages. If the excess staff members have no other prospects for employment, their release is not necessarily a savings for society as a whole because the workers are still not engaged in productive activity; rather the layoffs may be viewed largely as a transfer from the employees, who are now not paid, to taxpayers or customers of the enterprise, who now pay less in subsidies or prices, respectively.²¹²

In other words, what appear to be purely economic decisions are actually a social and political reordering that affects the relationship between citizen and government. “[I]f government is more than a service

²¹⁰ E.S. SAVAS, *PRIVATIZATION AND PUBLIC-PRIVATE PARTNERSHIPS* 144 (2000).

²¹¹ See, e.g., Margaret Gibelman, *Theory, Practice, and Experience in the Purchase of Services*, in 1 *THE PRIVATIZATION OF HUMAN SERVICES: POLICY AND PRACTICE ISSUES* 1, 17–18 (Margaret Gibelman & Harold W. Demone Jr. eds., 1998); see also, e.g., Margaret Gibelman & Harold W. Demone Jr., 1 *THE PRIVATIZATION OF HUMAN SERVICES: POLICY AND PRACTICE ISSUES* at xii (1998).

²¹² JOSÉ A. GÓMEZ-IBAÑEZ & JOHN R. MEYER, *GOING PRIVATE: THE INTERNATIONAL EXPERIENCE WITH TRANSPORT PRIVATIZATION* 5 (1993).

provider, if it is an important generator of social capital . . . then efforts at privatization will be measured against a different set of criteria.”²¹³ Ideology is more than a set of ideas or attitudes: ideology creates social life.²¹⁴ For example, all aspects of the provision of public services—from the decision to take on the service to how it is administered—embody policy choices and policy-making that will affect society.²¹⁵ The essential political nature of decisions around providing services seems to be commonly overlooked by focusing on economic issues or the technical details of provision.²¹⁶

Contracting out shifts our focus from valuing the process by which decisions are made to one that focuses on only those churlish and limited ends that can be measured so that competition can take place.²¹⁷ Put in simple terms, we risk losing sight of the fact that what we can count may not matter and what matters may not be countable.

Some have found that privatization’s dollar democracy leads to a loss of human democratic participation.

In Indianapolis, the civic leaders who used to play an important role in our public life, whose motives for participation were founded on a sense of duty rather than a potential for profit, have all but disappeared. There are many reasons for that phenomenon; but privatization has been identified as one culprit. . . .

. . . When “discretionists” hire “experts” and eschew public participation, the sense of connectedness, of “ownership” essential to the building of community, suffers.²¹⁸

A study of local government contracting found that only one-third measured citizen satisfaction or monitored citizen complaints.²¹⁹ The authors concluded:

²¹³ Kennedy, *Accountability*, *supra* note 60, at 140 (citations omitted).

²¹⁴ Christine B. Harrington & Sally Engle Merry, *Ideological Production: The Making of Community Mediation*, 22 L. & SOC’Y REV. 709, 711 (1988).

²¹⁵ Cf. Curran, *supra* note 27, at 189–90 (arguing that the “contract mechanism should be recognized as clearly a part of policy-making”).

²¹⁶ See, e.g., Gibelman & Demone eds., *supra* note 211, at xii.

²¹⁷ Privatization can be seen as the logical conclusion of the new model. In essence, government cedes tremendous power over how a program will be administered, with the belief that competition and performance incentives will spur the contractor to produce the desired outcomes. Privatization becomes an attractive alternative when ends are viewed as more important than means and where the ends sought can be specified in advance and measured.

Diller, *supra* note 46, at 1182.

²¹⁸ Kennedy, *Accountability*, *supra* note 60, at 142–43 (citations omitted).

²¹⁹ Hefetz & Warner, *supra* note 15, at 181; Warner & Hefetz, *Applying Market Solutions to Public Services*, *supra* note 63, at 78–80.

Privatization . . . no longer shows responsiveness to citizen voice. Theoretically, one might expect stronger responsiveness to citizen voice under privatization. However, most privatized local government services do not involve vouchers given directly to a consumer citizen. Rather, they are contracts between government and private providers. Avenues for citizen voice in contract negotiation and oversight are limited. Opportunities for voice may be greatest in the initial contract negotiation stage.²²⁰

More disturbing, some have found that support for privatization tracks distrust in government.²²¹ It is hard to know which is the cause and which the effect. It seems possible that anti-government sentiments would be exacerbated by the tendency of pro-privatizationists to denigrate government, which then results in a loss of enthusiasm for politics.²²²

There is a danger that people will lose contact with their government when dealing with an intermediary who often appears in the guise of government, as when private contractors hide behind what appear to be government websites.²²³ In these cases, people who are misled about the entity they are dealing with will be affected by a private entity's commercial values and conflate them with governance. This is likely to lead to a different interaction than when the services are provided with those who operate from an ethos of public service,²²⁴ an ethos that is a part of what distinguishes government from commerce.²²⁵ Furthermore, when the contractor is a large national corporation, as many are, this moves decision-making power—and money—away from the local level,

²²⁰ Warner & Hefetz, *Applying Market Solutions to Public Services*, *supra* note 63, at 83.

²²¹ Demone, *supra* note 5, at 219–27.

²²² Ellen J. Dannin, *To Market, To Market: Caveat Emptor*, in *TO MARKET, TO MARKET: REINVENTING INDIANAPOLIS* 3, 3–4 143 (Ingrid Ritchie & Sheila Suess Kennedy eds., 2001); Kennedy, *Accountability*, *supra* note 60, at 143 (citations omitted).

²²³ On the other hand, one form of quasi-privatization, charter schools, may be a force for democratic action on a small scale by harnessing “the shared commitment and energies of the internal actors—administrators, teachers, parents, and students—who choose to become part of the school and who share a common educational goal.” Richmond, *supra* note 22, at 331, 355–61. The negative side of this is that the goal is accomplished by exiting from and therefore losing commitment to the shared goals of a public education system.

²²⁴ See Demone, *supra* note 5, at 219–27. In ALISTER BARRY, *SOMEONE ELSE'S COUNTRY: THE STORY OF THE NEW RIGHT REVOLUTION IN NEW ZEALAND* (Community Media Trust 1996), the last director of the N.Z. Forestry Service before it was corporatized and eventually privatized discusses his feelings about holding the public's investments in their forests as a sacred trust. He also comments that he had valued being a public servant and working for an agency that had the word “service” in its very name.

²²⁵ For a summary of ways the two can be distinguished, see Kennedy, *Accountability*, *supra* note 60, at 149–50.

creating distance between those who receive services and those who decide how those services will be administered, and leaving them with fewer revenues to provide them.

Contracting out thus can create a shadow government that is not or cannot be held accountable by the contracting agency, nor by those it is supposed to serve. In the first instance, accountability and public input is lost when the contractor exercises discretion as to how it delivers public services. Unlike government decision-making, there are no open meetings requirements, no obligation to provide documents upon request, no procedures imposed to ensure that due process and equal protection rights are protected, and no ability to change policy through election or lobbying the legislature.

Privatization, if pursued too aggressively, minimizes the contacts citizens have with their government. When functions that were previously handled by government are contracted out to private companies, fewer committees and boards are needed. Fewer public hearings are held, because "experts" rather than citizens are driving the decision-making processes. . . . Contracting thus substantially reduces the points of contact between citizen and city and with that reduction comes an attenuation of civic ownership, the sense of shared enterprise that characterizes a workable and working *polis*.²²⁶

Those most likely to lose and to be unable to present their case and have the ear of the decisionmakers will be the least powerful. For example, if subsidies such as those for public transportation are lost, this will mean that those who depend on subsidized public transportation will have suffered a material loss with privatization.²²⁷ While this does not exactly amount to a taking and does not necessarily implicate due process rights, there will be a loss that, perhaps, deserves being taken into account through some access to the decision-making process. That access is more difficult to achieve when a private contractor delivers the services.

Even worse may be distrust and cynicism about a government that cannot be held accountable.²²⁸ As aggrieved persons seek to hold a contractor accountable, the locus of government will ultimately devolve to the courts. The courts will have to decide who, if anyone, should be responsible, in what ways they should be responsible, and what actions must be taken to make amends when legal responsibilities have not been

²²⁶ *Id.*

²²⁷ GÓMEZ-IBÁÑEZ & MEYER, *supra* note 212 at 9.

²²⁸ Kennedy, *Accountability*, *supra* note 60, at 149.

met.²²⁹ This injects the courts into an area of governance not intended to be given to them by the division of powers in the Constitution. "Privatization does threaten constitutional rights,"²³⁰ Harold Sullivan observes.

If the constitutional restrictions governing the relationship between private service providers and their employees and clients were the same as those governing the relationship between government and its employees and clients, the debate over privatization might logically be limited to concerns of cost and efficiency and conflicting views concerning the proper size of government.²³¹

Think of this another way: If public safety or public security are reasons not to subcontract a service, we need to understand what exactly are the components of public safety or public security, that is, what makes us safe and what makes us secure? Gerald Frug constructs a compelling analysis of city services, not as mere commodities, but, rather, as one important component of knitting diverse people and communities together to become one country.²³² Frug argues:

Concerns about the quality of public schools and violent crime cross city boundary lines throughout America's metropolitan regions, as do concerns about commuting and the environmental damage caused by suburban growth. These concerns have the potential of uniting different kinds of people rather than dividing them if metropolitan residents come to realize that the ever-increasing centrifugal dynamic that now affects metropolitan regions throughout the country aggravates urban problems for a majority of Americans, not just the residents of central cities. This does not mean that cities have to abandon totally the consumer-oriented focus adopted by public goods theorists. But it does mean that the conception of city services that stresses self-protection and fragmentation has to be replaced with one that builds on the notion that the ability to live in a diverse society is inextricably dependent on the welfare of others.²³³

²²⁹ Sullivan, *supra* note 56, at 462.

²³⁰ *Id.* at 461.

²³¹ *Id.*

²³² FRUG, *supra* note 5, at 167–79.

²³³ *Id.* at 175. See also Warner & Hefetz, *Applying Market Solutions to Public Services*, *supra* note 63, at 85 (explaining Frug's argument).

By commodifying government service—acting as though government is no more than a poor relative of business—we may be losing that which makes us truly safe and secure.

