2007

The Myth of "Privatization"

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Original Citation
Christopher Sagers, The Myth of "Privatization", 59 Administrative Law Review 37 (2007)

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INTRODUCTION

Among the most written-about topics in administrative and constitutional law these days is "privatization," an area that in a relatively short time has spawned an immense body of literature. The work has become so prevalent and has so captivated the attention of leading thinkers in these areas that its conception of the nature of governance—its portrait of "privatizing" arrangements as the key focus of concern in understanding our allegedly changing political institutions—has the potential to define the academic lawyer's very understanding of government. Unfortunately, as it will be the purpose of this Article to show, it is also fairly problematic.

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* Assistant Professor of Law, Cleveland State University. I welcome all feedback at csagers@law.csuohio.edu. Because working out the ideas in this paper has had a bit of the flavor of a torchless search for the way out of a damp echoing cave, it was possible only with the occasionally searing and immensely appreciated feedback of Ben Barton, Anita Bernstein, Cary Coglianese, Errol Meidinger, Pierre Schlag, Frank Snyder, Paul Verkuil, and Phil Weiser.

One central criticism drives this Article: The very idea that there is such a thing as "privatization" and that it is a meaningful subject of study implies a sociological claim, which may seem obvious and unexceptional, but in fact is importantly mistaken. It implies that there is some distinction between the performance of certain functions by government institutions and performance by private ones, and it implies that the distinction is both real and of very deep significance. A purpose of this Article is to show that this distinction does not exist, and that by employing it, the literature has described the world in an inaccurate way. To that extent this Article joins with critiques of conceptual public-private dichotomies that have been a part of academic criticism for at least 150 years,[1] though I hope it will add something new and worthwhile to them. Importantly, though, this Article is not an exercise in legal doctrine. It is ultimately an attempt to suggest an alternative sociological picture of institutions of control. That is, the purpose is not simply to deconstruct the public-private distinction as a tool used by courts, policymakers, and law professors, but to offer a picture of governance that can get along without it.

In short, I hope to show that the basic choice in the organization of society is not between organization by government bureaucracy on one hand, and markets on the other—a choice that is assumed in the privatization literature. Rather, the basic choice is between two kinds of bureaucracy, which really do not differ much at all. Indeed, the chief difference seems to be that one of them lacks even a nominal obligation toward the public interest.

While I believe the real problem in the literature is a deep conceptual one, it begins superficially as a problem of definition. Though it is not often explicitly defined, "privatization" normally means, roughly, some conscious choice by an entity of traditional "government" to provide a service or good by enlisting the aid of an entity that is not part of traditional "government." As a concept it appears to find its origin in a popular article by Peter Drucker from the late 1960s.[2] From there, it found its way into

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1. *See infra* notes 65-69 and accompanying text (discussing the history of the public-private critique).

2. *See* Peter F. Drucker, *The Sickness of Government*, 14 PUB. INTEREST 3 (1969). Drucker, a business school professor and management consultant, argued that structural features inherent in government made it competent only to "focus the political energies of society[,] . . . to dramatize issues[,] [and] . . . to present fundamental choices," *id.* at 17, whereas all other goods-and-services provisions then being performed by government should be "reprivatized" to the "new, nongovernmental institutions that . . . sprang up and [grew]" during the twentieth century, *id.* at 17-18. In such a model, government would remain "the central, the top institution," but would only preside over the actual performance of social functions by private entities, like an orchestral "conductor." Though "reprivatization" in Drucker's mind is not a question of "ownership" in the literal sense of which organizations should own the relevant productive assets, he nevertheless saw "a special role [for] business . . . ." *Id.* at 17-23. Drucker's paper is strewn with anecdotal

any number of guru-esque management bestsellers[3] and advocacy-oriented government reports,[4] though it has an important antecedent in a policy begun in the Eisenhower Administration.[5]

In any event, this new literature largely considers "privatization" to be a legally formalistic phenomenon. It is accomplished by deliberate delegation of authority, in the form of some legal instrument (a government contract, a regulation, a statute, perhaps the creation of some free-standing nominally private entity, or some less formal policy instrument) by a formally constituted entity of traditional government.

On one hand, the instinct driving this large literature seems obviously correct. Incidences in which traditionally defined government acquires a good or service from nominally private sources occur in numbers and in ways that are fascinating and perhaps alarming (and perhaps occur more frequently now, as is generally claimed in the privatization literature), and they should be part of legal academic inquiries into the nature of contemporary governance. But the larger significance of those transactions probably is not very well captured in the literature because of its formalistic model and the assumption it implies of fundamental differences between "traditional government" and "private" entities. The problem with a formalistic approach is that the literature's ultimate goal is, or ought to be,

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claims in support of his argument about government failings, and about the managerial superiority of "private" or "autonomous" institutions, but beyond that he gives little actual proof other than his own opinions.

Of course, the deeper theme in Drucker's paper—that private trade and business associations serve the public interest better than government—was already a century old in 1969, however much he might imply that it was a new idea. Sanctification of private enterprise and aspirations for a private associative state go back at least to the mid-nineteenth century in the United States, and were dominant in public policy between the turn of the twentieth century and the New Deal. *See infra* note 64.

3. In recent times the best known of these was DAVID OSBORNE & TED GAEBLER, REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR (1992), a book that fueled a furor for privatization and making government more "business-like" throughout the last four presidential administrations.

4. Several of the best known reports were released during the Reagan Administration. *See generally* OFFICE OF MGMT. & BUDGET, ENHANCING GOVERNMENTAL PRODUCTIVITY THROUGH COMPETITION: A NEW WAY OF DOING BUSINESS WITHIN THE GOVERNMENT TO PROVIDE QUALITY GOVERNMENT AT LEAST COST (1988); PRESIDENT'S COMMISSION ON PRIVATIZATION, PRIVATIZATION: TOWARD MORE EFFECTIVE GOVERNMENT (1988).

5. *See* BUREAU OF THE BUDGET, BULLETIN 55-4 (1955) ("[T]he Federal Government will not start or carry on any commercial activity to provide a service or product for its own use if such product or service can be procured from private enterprise through ordinary business channels."). The policy is still in force, and is now contained in OFFICE OF MGMT. & BUDGET, CIRCULAR A-76: PERFORMANCE OF COMMERCIAL ACTIVITIES (2003). It has been the subject of no small controversy. The fact that "privatization" has this long lineage, which in some minds lends it legitimacy, has not been lost on recent administrations. *See, e.g.*, Letter from David H. Safavian, Administrator, Office of Mgmt. & Budget, to Richard B. Cheney, President of the Senate (Jan. 25, 2005), *available at* http://www.whitehouse.gov/omb/procurement/comp_src/fy2004_summary_rpt.pdf (reporting the status of the current President's "competitive sourcing" program, and noting that its origins lie in Eisenhower policy from 1955).

to understand social phenomena as they exist, and those phenomena are not necessarily well characterized by the law's own distinctions and definitions. In short, while the literature is content to study one comparatively small set of transactions in which entities of traditional "government" engage, the bulk of the important choices in our society are made by a whole *world* of institutions[6] that are not entities of traditionally constituted "government."[7] To try to understand it only by looking into legally formal delegations of particular functions leads to a narrow and metonymical picture of social governance, and seems also likely to produce shallow historiographical explanations.

This Article is accordingly an exercise akin to the "new institutionalism" in the social sciences of late, insofar as its basic critique is that the literature fails to model or try to understand the range of institutions that arrange social phenomena, as those institutions actually exist.[8] The literature

6. For the most part I will use "institution" in a narrow sense, which may seem somewhat prosaic. I normally will use it to mean more or less formally organized associations of persons. I frequently will make reference to the very large range of more or less formal, more or less bureaucratic organizations in American society that have some power to engage in behavior that allocates social values. These entities include standard setting bodies, product design consortia, large corporations with respect to their personnel policies and large scale purchase and sales planning, law reform and policy advisory bodies, nominally "private" universities, non-profit corporations and unincorporated societies, churches, large voluntary social or professional organizations, and so on. I do this because the whole point of this Article is to show that not only is "privatization" not new or especially interesting, but for a long time American society has been virtually unique in the degree to which its important decisions have been in the hands of non-"government" bureaucracies. Thus, for the most part I will not much discuss other "institutions" that have influence in the arrangement of society, like custom or ethnicity. However, for an excellent critical review of the use of the term and its generally broader meaning in the social sciences, see Ronald L. Jepperson, *Insitutions, Institutional Effects, and Institutionalism*, *in* THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS 143 (Walter W. Powell & Paul J. DiMaggio eds., 1991) [hereinafter THE NEW INSTITUTIONALISM]. In any case, this world of essentially formal governance institutions to which I make reference is explored in a substantial secondary literature. *See generally* SAMUEL N. KRISLOV, HOW NATIONS CHOOSE PRODUCT STANDARDS AND STANDARDS CHANGE NATIONS (1997); HARM SCHEPEL, THE CONSTITUTION OF PRIVATE GOVERNANCE (2005); Christopher L. Sagers, *Antitrust Immunity and Standard Setting Organizations: A Case Study in the Public-Private Distinction*, 25 CARDOZO L. REV. 1393, 1398-1402 (2004) [hereinafter Sagers, *Case Study*] (discussing the prevalence and influence of a class of nominally private regulatory entities known as "standard setting organizations"); Christopher L. Sagers, *The Legal Structure of American Freedom and the Provenance of the Antitrust Immunities*, 2002 UTAH L. REV. 927, 951-57 [hereinafter Sagers, *Legal Structure*] (discussing means by which nominally private entities can allocate social values in ways indistinguishable from "government").

7. A difficult problem in this Article is the awkwardness of referring to entities that are "public" or "governmental," and those that are "private" or "non-governmental," since a major purpose is to show that distinctions between these terms are illusions and distractions from meaningful social inquiry. Thus, this Article uses terms such as "traditional government" or "nominally private" or the like, which indicate only the everyday meaning given such terms in legal discourse. The terms have no value for my purposes as descriptions of actual sociological reality, but only as descriptions of how people commonly think of that reality.

8. A very good summary of which is in Walter W. Powell & Paul J. DiMaggio, *Introduction*, *in* THE NEW INSTITUTIONALISM, *supra* note 6, at 1.

concerns itself almost exclusively with a narrow class of formal transactions and the discrete doctrinal problems they are thought to pose. These are the sorts of problems that other social sciences have overcome (or at least recognized and attempted to address).[9]

This Article aspires to a few discrete goals. First, it will show that the concept of "privatization" and the public-private divide on which it is based are not meaningful and cannot guide academic inquiry. Importantly, this argument is not simply about academic method. The public-private distinction plays an important legitimating role in society and its use not only frustrates academic inquiry, it also conceals prevalent and very significant maldistributions of power. In any case, as will be explained at length below, deconstructing this distinction in this context will require two steps. First, the distinction as a jurisprudential proposition—a claim that the public and private sectors can be meaningfully conceptualized and distinguished—must be taken apart and seen for what it is: a normative commitment or aspiration that lacks moral or sociological content and tends to disguise disparities in freedom and power. But the distinction as it appears in the privatization literature also implies an economic argument: Provision of services in "markets"—that is, services provided under the pressures and incentives thought to characterize the "private" sector—will be quite different than functions performed by government. This argument also turns out to be problematic.

As a second major goal, this Article will argue that without concepts of public and private to define itself, study of "privatization" can be seen as simply one aspect of a much larger body of work. This is so in two respects. On one hand, it turns out that a large and diverse range of scholarship in one way or another relates to the private doing seemingly public things and, therefore, even though no one may really think of it in this way, it really ought to be thought of as part of the same endeavor as "privatization." But a whole range of other work, going well back into the nineteenth century, happens to address the same broad issues of institutions of social control, even though it may be unconcerned with any discrete set

9. This Article therefore also finds company among the so-called "realists" of the founding generation of modern political science, whose chief endeavor was to see beyond the legally formalistic distinctions in which the study of government had been bound. *See generally* David Easton, *Political Science*, *in* 12 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 282, 289-90 (David L. Sills ed., 1968) (describing the change from legally formalistic to more holistic subjects of research during the late nineteeth century); Martin Landau, *The Myth of Hyperfactualism in the Study of American Politics*, 83 POL. SCI. Q. 378, 380-82 (1968) (describing the "realists"). As Easton says, a key development in this transition in political science was to insist "upon the need to abandon the habit of attributing causation to ideas and legal norms . . . ." Easton, *supra*, at 290.

of government transactions. Finally and most importantly, this Article concludes with a proposal for the sociological imagery with which the range of social control institutions might be better understood.

I. THE EXISTING "PRIVATIZATION" LITERATURE AND CERTAIN PRELIMINARY PROBLEMS

Perhaps the great scholarly interest in "privatization" reflects the recent zeal for it by politicians of all persuasions.[10] For instance, President George W. Bush began his first administration by promising no less than "[t]o . . . rethink [all of] government,"[11] and proposed privatization as a major tool for it.[12] No doubt scholarly concern also reflects the fairly brazen nature of some privatizing arrangements. We now have for-profit prisons whose owners are publicly traded corporations, and for-profit armies whose employees patrol, secure, interrogate, and kill foreign citizens, all while wearing U.S. deputy stars. Of all things, we came close to scrapping the National Weather Service in favor of a wholly private, for-profit system of weather information.[13] On its surface, in other words, the landscape of governance by nominally private institutions is gripping as much for those entities' power and ubiquity as for the fact that, to most Americans, they are all but invisible.

Most academics seem to think this "privatization" is happening much more than it once did. Many are fairly alarmed by it, though quite a few think that with appropriate corrections in policy or legal doctrine it can be harnessed as a force for good, and one that is well suited to our assertedly New Economy. Above all, virtually everyone seems convinced that it is *new* and that it is *very important.*

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10. "Privatization" agendas are hardly unpartisan, as they are often thought to be. *See infra* note 93 and accompanying text.

11. OFFICE OF MGMT. & BUDGET, THE PRESIDENT'S MANAGEMENT AGENDA FISCAL YEAR 2002, at 3 (2001) [hereinafter "BUSH MANAGEMENT AGENDA"].

12. He said it could help government harness the power of "innovation through competition." *Id.* at 4. Indeed, with a somehow endearing gumption the President explained that all of federal government reform could be "guided" by only "three principles"—that "Government should be: citizen-centered, not bureaucracy-centered; results-oriented; [and] market-based, actively promoting rather than stifling innovation through competition." *Id.*

13. In 2005, Senator Santorum of Pennsylvania introduced a bill that, while it would have preserved the Service, would have prohibited it from providing any information in competition with commercial information providers. *See* National Weather Services Duties Act of 2005, S. 786, 109th Cong. § 2 (2005); Maeve Reston, *Santorum Criticizes Weather Service, Has Sponsored Bill to Prevent Government Weather Notices, to Benefit Private Companies, Including Donor*, PITTSBURGH POST-GAZETTE, Sept. 10, 2005, at A6, *available at* http://www.post-gazette.com/pg/05253/569133.stm. Critics noted that a significant Santorum campaign contributor was a private weather information provider, and that still it would be taxpayer dollars generating weather information that would then become the sole re-saleable property of private companies. *Id.*

A. The Literature as It Exists

The resulting literature now includes a huge number of law journal articles,[14] quite a few of which are very long,[15] as well as an unusual number of law journal symposia[16] and many books.[17] Whether or not "privatization" is new, this literature to a large extent truly is—much of it dates from no earlier than 1990, and a surge of it began in about 2000,

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14. For a survey of which, see *infra* notes 22-41 and accompanying text. While by its nature this Article, for better or worse, must indulge in a certain sin—really long string-cite footnotes—it will make no attempt to list *all* the articles that have appeared, an effort that could itself consume a short law review article. Suffice it to say that there have been a *lot.* Online database searches identify several thousand articles that use the words "privatize" or "privatization" and more than 600 that contain these words in their titles.

15. Several of the leading articles in the area are in excess of 100 pages, for example, Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000) (132 pages); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003) (135 pages); and many of them are more than fifty pages.

16. *See* Symposium, *Public Values in an Era of Privatization*, 116 HARV. L. REV. 1211 (2003); Sidney A. Shapiro, *Outsourcing Government Regulation*, 53 DUKE L.J. 389 (2003) (exploring the economics of privatization for government agencies); Symposium, *New Forms of Governance: Ceding Public Power to Private Actors*, 49 UCLA L. REV. 1687 (2002) (explaining the need for a reconceptualization of administrative law due to globalization); Symposium, *Redefining the Public Sector: Accountability and Democracy in the Era of Privatization*, 28 FORDHAM URB. L.J. 1307 (2001) (exploring the means by which government should fulfill its functions effectively and efficiently); Agnes P. Dover, *Single Subject Issue, Privatization and Outsourcing*, 30 PUB. CONTRACT L.J. 551 (2001); Jody Freeman, *Private Parties, Public Functions, and the New Administative Law*, 52 ADMIN. L. REV. 813 (2000) [hereinafter Freeman, *New Administrative Law*] (exploring the new direction of administrative law in the face of privatization); Symposium, *Constitutionalism, Privatization, and Globalization*, 21 CARDOZO L. REV. 1063 (2000) (describing the effects of privatization in a globalized world); Project, *Privatization: The Global Scale-Back of Government Involvement in National Economics*, 48 ADMIN. L. REV. 435 (1996) (surveying privatization efforts around the globe); Symposium, *Comparative Models of Privatization: Paradigms and Politics*, 21 BROOK. J. INT'L L. 1 (1995); Ronald A. Cass, *Privatization: Politics, Law and Theory*, 71 MARQ. L. REV. 449 (1988) (exploring the possible challenges and benefits of privatization); *see also* Symposium, *Association of American Law Schools: Private Parties as Defendants in Civil Rights Litigation*, 26 CARDOZO L. REV. 1 (2004) (describing the need to address civil rights violations by private entities in the post-September 11th world).

17. *See, e.g.*, BRUCE L. BENSON, TO SERVE AND PROTECT: PRIVATIZATION AND COMMUNITY IN CRIMINAL JUSTICE (1998) (discussing privatization of prisons); TIMOTHY BESLEY & MAITREESH GHATAK, PUBLIC-PRIVATE PARTNERSHIPS FOR THE PROVISION OF PUBLIC GOODS: THEORY AND AN APPLICATION TO NGOS (1999); PIERRE GUISLAIN, THE PRIVATIZATION CHALLENGE: A STRATEGIC, LEGAL AND INSTITUTIONAL ANALYSIS OF INTERNATIONAL EXPERIENCE (1997); JEROLD S. KAYDEN, PRIVATELY OWNED PUBLIC SPACE: THE NEW YORK CITY EXPERIENCE (2000) (exploring the history of privately owned public space in New York City); MARKET-BASED GOVERNANCE: SUPPLY-SIDE, DEMAND-SIDE, UPSIDE AND DOWNSIDE (John D. Donahue & Joseph S. Nye, Jr. eds., 2002) (focusing on accountability as a method of maintaining good governance); MARTHA MINOW, PARTNERS, NOT RIVALS: PRIVATIZATION AND THE PUBLIC GOOD (2002) (discussing the phenomenon of public money funding private entities, such as private schools); OSBORNE & GAEBLER, *supra* note 3 (exploring the need to reinvent government by focusing on the specific causes of poor governance); ELLIOTT D. SCLAR, YOU DON'T ALWAYS GET WHAT YOU PAY FOR: THE ECONOMICS OF PRIVATIZATION (2000); THE PROVINCE OF ADMINISTRATIVE LAW (Michael Taggart ed., 1997) (discussing privatization as a result of worldwide export of economic liberalism).

perhaps in response to campaign rhetoric of that year.[18] This literature extends throughout a variety of social science fields, and it is especially voluminous in law. It is useful for its collection of a large amount of sociological raw data—namely, a large collection of individual instances of conscious choices by government entities to provide some good or service through a non-government entity. The literature is mostly subject-matter specific. That is, each individual book or article normally focuses on the conscious government choice to perform some specific function through a nominally private entity. Much of the work has focused on contracting out welfare and other social services,[19] health care,[20] law enforcement and corrections,[21] military functions,[22] and sometimes seemingly more

18. Of the law journal articles identified in online database searches, see *supra* note 16, nearly 200 have appeared since 2000, and nearly all have appeared since 1990. A large number of books have also appeared in that time. *See, e.g.*, *supra* note 17.

19. *See, e.g.*, Matthew Diller, *Form and Substance in the Privatization of Poverty Programs*, 49 UCLA L. REV. 1739 (2002) (exploring private, faith-based initiatives that replace public welfare programs); Marsha B. Freeman, *Privatization of Child Protective Services: Getting the Lion Back in the Cage?*, 41 FAM. CT. REV. 449 (2003); Michelle Estrin Gilman, *Legal Accountability in an Era of Privatized Welfare*, 89 CAL. L. REV. 569 (2001) (explaining how privatization of some aspects of welfare created accountability on the part of its recipients); Kathryn L. Moore, *The Effects of Partial Privatization of Social Security Upon Private Pensions*, 58 WASH. & LEE L. REV. 1255 (2001) (exploring the effect of partial privatization of the social security system on private pensions); Dru Stevenson, *Privatization of Welfare Services: Delegation by Commercial Contract*, 45 ARIZ. L. REV. 83 (2003) (discussing the discretion given to each agency to decide which services will be privatized and why); Luke Andrew Steven Demaree, Note, *"Tiny Little Shoes:" The Privatization of Child Welfare Services in Kansas*, 69 U. MO. KAN. CITY L. REV. 643 (2001) (summarizing the effect of privatization of child welfare services on the quality of that service).

20. *See, e.g.*, Sarah S. Bachman, *Why Do States Privatize Mental Health Services? Six State Experiences*, 21 J. HEALTH POL. POL'Y & L. 807 (1996); David M. Frankford, *Privatizing Health Care: Economic Magic to Cure Legal Medicine*, 66 CAL. L. REV. 1 (1992) (proposing that it is not useful to assess legal regulation of health care through a model of market competition); Jill R. Horwitz, *Why We Need the Independent Sector: The Behavior, Law, and Ethics of Not-for-Profit Hospitals*, 50 UCLA L. REV. 1345 (2003) (discussing the role of non-profit hospitals in providing services required by law and morality); Ronald L. Wisor, Jr., *Community Care, Competition and Coercion: A Legal Perspective on Privatized Mental Health Care*, 19 AM. J. L. & MED. 145 (1993) (exploring the possibility of privatization of mental health care providing better health care at a lower cost with a legal system that holds patient autonomy in high regard).

21. *See, e.g.*, BENSON, *supra* note 17; JOHN D. DONAHUE, THE PRIVATIZATION DECISION: PUBLIC ENDS, PRIVATE MEANS 150-78 (1989) (taking prison privatization as a case study); Alfred C. Aman, *Privatization, Prisons, Democracy and Human Rights: The Need to Extend the Province of Administrative Law*, 12 IND. J. GLOBAL LEG. STUD. 511 (2005) (addressing how administrative law in the United States can be used to correct human rights violations that arise from privatization, especially in the prison context); David Del Fiandra, Comment, *The Growth of Prison Privatization and the Threat Posed by 42 U.S.C. § 1983*, 38 DUQ. L. REV. 591 (2000) (exploring the effect of § 1983 on the expansion of privatized prisons); Dan M. Kahan, *Privatizing Criminal Law: Strategies for Private Norm Enforcement in the Inner City*, 46 UCLA L. REV. 1859 (1999) ("[P]rivatization . . . is essential to the future effectiveness of criminal law in our most crime-ridden communities, where it's clear that the state has neither an authoritative moral voice nor a monopoly on force, legitimate or otherwise."); Clifford J. Rosky, *Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States*, 36 CONN. L. REV. 879 (2004). Mark N. Ohrenberger, Note,

mundane functions.[23] Some privatization writers have been especially concerned about private performance of seemingly inherent government functions, such as adjudication[24] and policymaking, whether through

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Prison Privatization and the Development of "Good Faith" Defense for Private-Party Defendants to 42 U.S.C. § 1983 Actions, 13 WM. & MARY BILL RTS. J. 1009 (2005) (advocating a good faith defense to § 1983 actions).

22. *See, e.g.*, Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 WASH. U. L. Q. 1001 (2005); Steven L. Schooner, *Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government*, 16 STAN. L. & POL'Y REV. 549 (2005) (discussing the effect of the Abu Ghraib scandal on the success of privatization); P. W. Singer, *War, Profits and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT'L L. 521 (2004) (exploring the effect of privatized military firms on the way the United States conducts war); Nathaniel Stinnett, Note, *Regulating the Privatization of War: How to Stop Private Military Firms From Committing Human Rights Abuses*, 28 B.C. INT'L & COMP. L. REV. 211 (2005) (noting that the goal of privatizing military functions is to respond to the demand for temporary, highly-specialized military services).

23. *See, e.g.*, KAYDEN, *supra* note 17; Dan Kramer, *How Airport Noise and Airport Privatization Effect* [sic] *Economic Development in Communities Surrounding U.S. Airports*, 31 TRANSP. L.J. 213 (2004); Darrell A. Fruth, Note, *Economic and Institutional Constraints on the Privatization of Government Information Technology Services*, 13 HARV. J. L. & TECH. 521 (2000). One interesting vein is an ongoing debate among military lawyers about privatizing military base housing and utilities. *See, e.g.*, Maj. Jeff A. Bovarnick, *Can a Commander Authorize Searches & Seizures in Privatized Housing Areas?*, 181 MIL. L. REV. 1 (2004); Philip D. Morrison, *State Property Tax Implications for Military Privatized Housing Program*, 56 AIR FORCE L. REV. 261 (2005); Jeffrey A. Renshaw, *Utility Privatization in the Military Services: Issues, Problems and Potential Solutions*, 53 AIR FORCE L. REV. 55 (2002); Stacie A. Remie Vest, *Military Housing Privatization Initiative: A Guidance Document for Wading Through the Legal Morass*, 53 AIR FORCE L. REV. 1 (2002). To say that these matters *seem* mundane definitely does not mean that they are. Often the very obscurity of particular policies renders them doubly pernicious. Privatization as a proposed solution to shortages of water for human use, for example, is a matter that many authors see as a looming global crisis. Of special recent concern have been fears that corporate entities, if entrusted with water distribution, would have incentives at odds with the public good and in particular would disserve the needs of third-world populations, a debate that largely began with the privatized water experiment of the government Chile in the 1980s. *See* CARL J. BAUER, AGAINST THE CURRENT: PRIVATIZATION, WATER MARKETS, AND THE STATE IN CHILE (1998). The Chilean experiment and other water privatization has been the subject of numerous legal works. *See, e.g.*, Craig Anthony (Tony) Arnold, *Privatization of Public Water Services: The States' Role in Assuring Public Accountability*, 32 PEPP. L. REV. 561 (2005); David J. Hayes, *Privatization and Control of U.S. Water Supplies*, 18 NAT. RES. & ENV. 19 (2003); Jennifer Naegele, *What Is Wrong With Full-Fledged Water Privatization?*, 6 J. L. & SOC. PROBS. 99 (2004); Robert Vitale, *Privatizing Water Systems: A Primer*, 24 FORD. INT'L L.J. 1382 (2001); Matthew S. Tisdale, Note, *The Price of Thirst: The Trend Towards the Privatization of Water and Its Effect on Private Water Rights*, 37 SUFFOLK U. L. REV. 535 (2004).

24. *See, e.g.*, Chris A. Carr & Michael R. Jencks, *The Privatization of Business and Commercial Dispute Resolution: A Misguided Policy Decision*, 88 KY. L. REV. 183 (2000); Christopher R. Drahozal, *Privatizing Civil Justice: Commercial Arbitration and the Civil Justice System*, 9 KAN. J. L. & PUB. POL'Y 578 (2000); Steven J. Eagle, *Privatizing Urban Land Use Regulation: The Problem of Consent*, 7 GEO. MASON L. REV. 905 (1999); Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521 (2005); Margaret L. Moses, *Privatized "Justice,"* 36 LOY. U. CHI. L. J. 535 (2005); Steven J. Ware, *Default Rules From Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703 (1999).

advisory consulting services,[25] drafting model codes,[26] or regulating directly through standard setting and certification.[27] Political trends also periodically focus attention on particular matters, like the privatization of Social Security[28] or education.[29] Finally, a number of articles have focused on special, doctrinal problems of privatized functions, like whether privately promulgated codes can be copyrighted,[30] whether private code-makers should enjoy antitrust immunity,[31] or whether delegates of public functions should be subject to open government statutes.[32]

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25. *See, e.g.*, DANIEL GUTTMAN & BARRY WILLNER, THE SHADOW GOVERNMENT (1976); Paul R. Verkuil, *The Nondelegable Duty to Govern* (Cardozo Legal Studies Research Paper No. 149, 2005), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=871455.

26. *See, e.g.*, Kathleen Patchel, *Interest Group Politics, Federalism, and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code*, 78 MINN. L. REV. 83 (1983); Seven L. Schwarcz, *A Fundamental Inquiry Into the Statutory Rulemaking Process of Private Legislatures*, 29 GA. L. REV. 909 (1995); Robert E. Scott, *The Politics of Article 9*, 80 VA. L. REV. 1783 (1994); David V. Snyder, *Private Lawmaking*, 64 OHIO ST. L.J. 371 (2003).

27. Strictly speaking, people writing about standards and certification do not normally conceive their project as involving "privatization," and "privatization" scholars normally give little thought to standard setting. Presumably this is so because standard setting frequently occurs without any overt, de jure appointment by governments of standard setting bodies. In any case, the rise of private consortia and trade groups in high technology industries have fueled interest in this area, particularly in antitrust and intellectual property. Standard setting and its various problems are detailed extensively in two exceptionally thoughtful and comprehensive recent books: KRISLOV, *supra* note 6, and SCHEPEL, *supra* note 6.

28. *See, e.g.*, Patricia E. Dilley, *Taking Public Rights Private: The Rhetoric and Reality of Social Security Privatization*, 41 B.C. L. REV. 975 (2000); Richard L. Kaplan, *Enron, Pension Policy, and Social Security Privatization*, 46 ARIZ. L. REV. 53 (2004) (arguing that the Enron disaster helped derail attempts at Social Security privatization); Kathryn L. Moore, *Partial Privatization of Social Security: Assessing Its Effect on Women, Minorities, and Lower-Income Workers*, 65 MO. L. REV. 341 (2000). *See generally* Symposium, *Public Policy for Retirement Security in the 21st Century: Assuring the Future of Social Security: Privatization and Other Reforms*, 65 OHIO ST. L.J. 1 (2004).

29. *See* MINOW, *supra* note 17, at 1; Lewis D. Solomon, *Edison Schools and the Privatization of K-12 Public Education: A Legal and Policy Analysis*, 30 FORD. URB. L.J. 1281 (2003). *See generally* Symposium, *The Educational Divide: Gauging the Impact of Legal Challenges to School Vouchers and Parental Choice on America's Children*, 45 HOW. L.J. 247 (2001); David J. D'Agata, Comment, *School Privatization and Student Rights: A Comparison of Canadian and American Law Regarding Searches and Seizures Conducted in Privatized Schools*, 34 U. MIAMI INTER-AM. L. REV. 314 (2003) (explaining the legal implications of school privatization in the context of searches and seizures).

30. *See, e.g.*, Katie M. Colendich, *Who Owns "the Law"? The Effect on Copyrights When Privately-Authored Works Are Adopted or Incorporated by Reference Into Law*, 78 WASH. L. REV. 589 (2003); Shubha Ghosh, *Copyright as Privatization: The Case of Model Codes*, 78 TUL. L. REV. 653 (2004); Daniel J. Russell, Note, Veeck v. Southern Building Code Congress International, Inc.: *Invalidating the Copyright of Model Codes Upon Their Enactment into Law*, 5 TUL. J. TECH. & INT. PROP. 131 (2003).

31. *See* Sagers, *Case Study*, *supra* note 6.

32. *See, e.g.*, Craig D. 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).

Most of this literature concerns privatizing policies of the United States federal and state governments. This is not really parochialism, because "privatization" in the United States is in some sense different than "privatization" in most of the rest of the world.[33] However, a subset of the literature takes a comparative approach[34] or focuses purely on privatizing in foreign regions.[35] Finally, not all work in this area is subject-specific. Some takes a more abstract, theoretical view,[36] though often the articles generalize mainly by collecting more than one subject-specific case study.[37]

While this literature is often as much journalistic as it is theoretical or constructive, it normally offers some suggestion for legislative or case law correction. Most of the policy-talk, oddly enough, begins with a presumption in favor of the status quo. Even the more careful analyses tend to take the current state of public-private relations—and even

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33. Namely, in most other places extensive state ownership of industry was common until at least the mid-twentieth century, and therefore "privatization" in most of the world literally means the transfer of state-owned *assets* to non-state entities. This obviously is the case in the former Soviet states, but is so even in Western Europe, a result of the early twentieth century success of socialist political programs, which only began to unravel in recent decades. In the United States, by contrast, government entities have almost never directly owned productive assets and have controlled significant industrial functions only in times of war. Therefore, "privatization" here can only mean the giving away of seemingly governmental *functions*. *See generally* DONAHUE, *supra* note 21, at 5-7.

34. *See, e.g.*, Kristen V. Campana, Comment, *Paying Our Own Way: The Privatization of the Chilean Social Security System and Its Lessons for American Reform*, 20 U. PA. J. INT'L ECON. L. 385 (1999).

35. *See, e.g.*, BESLEY & GHATAK, *supra* note 17; GUISLAIN, *supra* note 17; Bernard Black, Reinier Kraakman & Anna Tarassova, *Russian Privatization and Corporate Governance: What Went Wrong?*, 52 STAN. L. REV. 1731 (2000); Lisa Philips, *Taxing the Market Citizen: Fiscal Policy and Inequality in an Age of Privatization*, 63 J.L. & CONTEMP. PROBS. 111 (2000) (discussing "privatizing" effects and their impact on Canadian tax policy).

36. *See, e.g.*, DONAHUE, *supra* note 21, at 4; Harold I. Abramson, *A Fifth Branch of Government: The Private Regulators and Their Constitutionality*, 16 HASTINGS CONST. L.Q. 165, 167 (1989); Freeman, *New Administrative Law*, *supra* note 16, at 816 (urging that administrative law scholarship broaden its focus from delegation and agency legitimacy, which prevents those in the legal profession from appreciating the extent of private participation in governance and grappling with its implications for democracy); Dan Guttman, *Governance by Contract: Constitutional Visions; Time for Reflection and Choice*, 33 PUB. CONT. L.J. 321 (2004) [hereinafter Guttman, *Governance by Contract*]; Sheila S. Kennedy, *When Is Private Public? State Action in the Era of Privatization and Public-Private Partnerships*, 11 GEO. MASON U. CIV. RTS. L.J. 203 (2001) [hereinafter Kennedy, *Private Public?*]; Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. REV. 62 (1990); Metzger, *supra* note 15; David Schneiderman, *Constitutional Approaches to Privatization: An Inquiry into the Magnitude of Neo-Liberal Constitutionalism*, LAW & CONTEMP. PROBS., Autumn 2000, at 83; Shapiro, *supra* note 16. *See generally* Symposium, *Constitutionalism, Privatization, and Globalization*, *supra* note 16. Some of these works, indeed, are extensive, highly abstract theoretical treatments, at least within particular areas. This is true especially of the outstanding work on private standard setting by Krislov and Schepel. *See* KRISLOV, *supra* note 6; SCHEPEL, *supra* note 6.

37. *See, e.g.*, Freeman, *supra* note 15, at 544-45; Chris Reeder, *Regulation by Contractors: Delegation of Legislative Power to Private Entities in Texas*, 5 TEX. TECH. J. TEX. ADMIN. L. 191 (2004).

perceived changes in the state of things, which sometimes are said to have produced "hybrid markets" or "hybrid public-private entities"—as pretty much satisfactory.[38]

B. Preliminary Problems Throughout the Literature

Several basic weaknesses affect this body of writing. They are important to this Article because they all in their own way contribute to the literature's fundamental problem, which is its assumption of a meaningful public-private divide. First, though it may seem to be a fairly superficial weakness, most of the large body of recent writing neglects prior work on non-state governance, going back at least to the 1920s.[39] Again, a purpose of this Article is to show the breadth of the issues raised by the very idea of "privatization" as an important focus of concern. For whatever reason, current literature has neglected much of the older material even though

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38. For example, Jody Freeman's large and influential output has gone farther than most in stressing that we must revise the way we currently see things—that we must understand the mechanisms of "governance" to comprise both public and private players. From that point on, however, her work seems to comprise mainly an optimistic defense of the status quo, along with a curious affinity for taking the middle way in all matters of doctrinal controversy that the status quo might pose. Her habit of presenting this as a matter of seemingly neutral, practical policy conceals what is in effect quite a conservative perspective. *See, e.g.*, Freeman, *New Administrative Law*, *supra* note 16, at 819 ("How and under what conditions we ought to constrain private actors depends . . . on the advantages they offer and the threats they pose . . . ."). Likewise, Alfred Aman believes the world to be so radically different than commonly perceived that an essentially new administrative law is required, which would be appropriate to the "complex nature of the hybrid markets that privatized governmental services create." Alfred C. Aman, Jr., *Privatization and the Democracy Problem in Globalization: Making Markets More Accountable Through Administrative Law*, 28 FORDHAM URB. L.J. 1477, 1500 (2001) [hereinafter Aman, *Democracy Problem*]. However, his work appears largely to argue that the primary policy matter of concern is how to make modest procedural and open-government rules apply to "hybrid" entities. *See, e.g.*, *id.*; Alfred C. Aman, Jr., *The Limits of Globalization and the Future of Administrative Law: From Government to Governance*, 8 IND. J. GLOBAL LEGAL STUD. 379 (2001).

39. *See, e.g.*, JOHN J. CORSON, BUSINESS IN THE HUMANE SOCIETY (1971); CLARENCE H. DANHOF, GOVERNMENT CONTRACTING AND TECHNOLOGICAL CHANGE (1968); GUTTMAN & WILLNER, *supra* note 25; JOHN D. HANRAHAN, GOVERNMENT BY CONTRACT (1983); DON K. PRICE, THE SCIENTIFIC ESTATE (1965); Robert L. Hale, *Law Making by Unofficial Minorities*, 20 COLUM. L. REV. 451 (1920); Kurt L. Hanslowe, *Regulation by Visible Public and Invisible Private Government*, 40 TEX. L. REV. 88 (1961); Louis L. Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201 (1937); Mark V. Nadel, *The Hidden Dimension of Public Policy: Private Governments and the Policy-Making Process*, 37 J. POL. 2 (1975). The United States government itself also has maintained a lively interest in these matters for several decades. Notably, the Government Accountability Office (GAO) (formerly the General Accounting Office) has issued reams of widely read reports over a long period, often quite cautionary in tone. *See, e.g.*, GENERAL ACCOUNTING OFFICE, CIVIL SERVANTS AND CONTRACT EMPLOYEES: WHO SHOULD DO WHAT FOR THE FEDERAL GOVERNMENT? (1981). Likewise, the Office of Management and Budget during the Kennedy Administration roundly criticized the influence of federal contractors in its influential "Bell Report," so named for that office's director of the time. *See* BUREAU OF THE BUDGET, REPORT TO THE PRESIDENT ON GOVERNMENT CONTRACTING FOR RESEARCH AND DEVELOPMENT (1962).

much of it is directly relevant. Interestingly, some of that prior work was to the effect that previous fetishes for privatization or making government more "business-like" were so much snake oil.[40]

Other weaknesses, moreover, seem more serious. To be fair, some of the problems to be discussed here are matters of jurisprudential first philosophy characteristic of much legal scholarship, in that the literature adopts the traditional model of the law professor as an uninvited amicus curiae.[41] They are nevertheless relevant because they help explain how the literature has misconceived its own subject matter.

As a consequence of the amicus model much of the work remains basically atheoretical, consisting mainly of extensive, more or less journalistic reporting on the wide range of arrangements said to "privatize" government functions. It often fails even to consider the plainest issues of *legal* theory raised by these arrangements (like whether there is a meaningful distinction between "public" and "private," or whether private ordering can be said to be meaningfully different from "law"), and it is not much given to social or political abstraction. Its main substantive contribution typically is to suggest some doctrinal correction to some existing legal rule that is relevant in some way, which assertedly will address the relevant concerns.[42] It assumes away the slim likelihood that

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40. *See, e.g.*, GUTTMAN & WILLNER, *supra* note 25; Charles T. Goodsell, *Reinvent Government or Rediscover It?*, 53 PUB. ADMIN. REV. 85 (1993) (reviewing DAVID OSBOURNE & TED GAEBLER, REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR (1992)); Jerry L. Mashaw, *Reinventing Government and Regulatory Reform: Studies in the Neglect and Abuse of Administrative Law*, 57 U. PITT. L. REV. 405 (1996).

41. To call this a problem has itself been the subject of hot debate, and it is an artifact of the unspecified means and ends of legal scholarship. Under these circumstances, it can be hard even to say what seems wrong with an existing body of work, and it can seem unfair to blame anyone for writing it in one way rather than another. I report with relief that I am not the only one who thinks these things, and one need consult neither radicals nor skeptics to find agreement on them. *See, e.g.*, Deborah L. Rhode, *Legal Scholarship*, 115 HARV. L. REV. 1327, 1330 (2002) ("The legal profession has no shared vision of what kinds of scholarship are most valuable or even most valued by the academy.... Any adequate assessment of the state of legal scholarship needs some working definition of its mission.").

42. Frequent topics include how and whether nominally private entities should be made subject to civil rights obligations. *See, e.g.*, Abramson, *supra* note 36; Kennedy, *Private Public?*, *supra* note 36; Paul Howard Morris, Note, *The Impact of Constitutional Liability on the Privatization Movement After* Richardson v. McNight, 52 VAND. L. REV. 489 (1999). The non-delegation rule is another frequent topic. *See, e.g.*, Krent, *supra* note 36; Metzger, *supra* note 15. The amicus model also provides some judicially manageable distinction between "public" and "private." *See, e.g.*, Metzger, *supra* note 15, at 1388-89. Again, this is not to say that contributions of legal theory have somehow been necessarily *bad*. Metzger's and Krent's papers on the non-delegation rule, for example, both seem very thoughtful and interesting. The problem is that they ask *only* those narrow questions of doctrinal theory, and do not inquire any further into the rich field of social and jurisprudential theory posed by "privatization." Admittedly, some doctrinal contributions have been more expansive. Alfred Aman probably has gone farther than anyone, urging disposal of "state-centered notion[s] of... public law," in favor of a "non-state focused approach to procedure" that would in effect "privatize the Administrative Procedure Act."

this advice will be welcomed by its intended recipients,[43] and for that matter the complex and problematic question whether, even if courts were to take any advice, changes in the rules they apply would have any effect on larger social phenomena. Even the most general, theoretically informed inquiries often merely offer practical advice to policymakers,[44] and sometimes the work really suggests no solutions or theoretical observations at all.[45]

Aman, *Democracy Problem*, *supra* note 38, at 1500. Aman so desires because "[w]here powerful institutions control important aspects of individuals' lives, there should be a legal commitment to a level of process necessary to assure transparency in the decision-making process regardless of the label we place on the entities involved." *Id.* Much of his background discussion is very interesting; in particular, his suggestion that "market democracy" may be sufficient assurance of "transparency" in many private arrangements, and his technical corrections to public contracting (which essentially would re-model contracting-out decisions as something quite seperate from contracts) are very thoughtful and commendable. But again, notice that although he does not say so explicitly, Aman's argument in effect boils down entirely to a purportedly more appropriate determination of whether a particular entity should be treated in the same way that government is treated, or whether, under the circumstances, it should not be. For reasons of political expediency he suggests this be done by a new federal statute modeled on the APA, rather than through case law. His primary suggestion is merely a doctrinal tweak to the public-private distinction. *See id.* at 1501.

43. The courts are unlikely to take direction on these matters from academic books and law review articles. As to the public-private distinction, for example, their approach is one of rigid and knee-jerking formality, and they have been using it for a long time with only rare deviation. They do so notably in applying the "state action" rule in civil rights cases. *See, e.g.*, NCAA v. Tarkanian, 488 U.S. 179 (1988); Flagg Bros., Inc. v. Brooks, Inc., 436 U.S. 149 (1978). *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1698-1703 (2d ed. 1988) (describing contemporary state action case law as the search for a distinction between "government" and "private" actors, and ultimately as the search for a "rule subject to constitutional scrutiny [that can] be restated at the decisionmaking level at which a government actor is responsible for its formulation"). Another notable area in which the distinction is applied very rigidly is in antitrust immunity for political conduct. *See, e.g.*, Mass. School of Law at Andover v. Am. Bar Ass'n, 107 F.3d 1026, 1036 (3d Cir. 1997) (holding the American Bar Association (ABA) immune from antitrust liability for its law school accreditation activities, on the theory that the "private" ABA had done no more than submit its opinion of plaintiff law school to state governments). Courts sometimes employ the distinction in areas like Establishment Clause cases. *See, e.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98, 115 (2001) (asking whether in-school religious conduct violates the First Amendment by asking whether it was genuinely the conduct of the public school defendants). Most obviously for present purposes the courts have applied the public-private distinction in cases alleging unconstitutional delegations of regulatory power to private parties. *See* Krent, *supra* note 36, at 69 n.17. The exception that proves the rule is virtually an orphan in the Supreme Court's jurisprudence and is more than fifty years old. *See* Shelley v. Kraemer, 334 U.S. 1 (1948). The courts are abetted in this rigidity by the advice of many legal thinkers that the autonomy and "private" status of non-government associations is important to protecting individual liberty and constraining government abuses. *See, e.g.*, Roderick M. Hills, Jr., *The Constitutional Rights of Private Governments*, 78 N.Y.U. L. REV. 144 (2003); Robert K. Vischer, *The Good, the Bad and the Ugly: Rethinking the Value of Associations*, 79 NOTRE DAME L. REV. 949 (2004).

44. *See, e.g.*, DONAHUE, *supra* note 21 (offering transaction cost-based guidance as to which "public" functions can safely be contracted out and which should be retained in government control); Aman, *Democracy Problem*, *supra* note 38 (urging a revised conception of administrative law designed to cope with "hybrid" public-private governance entities).

45. For example, Professor Minow argues that healthy apportionment of public and

Yet more serious are certain philosophical precommitments generally shared in this literature. First, the literature states or implies a strong presumption of relatively stable definitional boundaries, and thus shares a metaphysical realism about legal institutions. Law deploys generalizations whose extensionality is thought to be meaningful and metaphysically "real"—in short, law *is* distinctions—and the privatization literature takes for granted that the distinctions are not subject to radical deficiencies of epistemology or metaphysics. Thus, it is presumed, things are *different*, in ways we can identify with confidence, and important policy consequences can be made to depend on the differences. Accordingly, the literature remains uncritically hung up on purely formal, conceptual distinctions between juridical entities, which assertedly exist and are assertedly distinct from one another.

Second, the literature systematically exaggerates (or at least leaves unexamined) the significance of legal doctrine itself. The over-emphasis seems based neither on any practical evidence nor on any serious theoretical examination, but rather it reflects a shared socialization among law school graduates. By our traditional approach to questions of policy, in which all lawyers are trained, we assume that law in application necessarily bears a close relationship to the social phenomena it purports to regulate. We should recall that we are also mostly socialized to identify law in the manner of the Holmesian "bad man"—that is, we perceive legal doctrine as a prediction of the future behavior of the particular appendage of government that is the courts.[46] Accordingly, our basic approach to policy is to assume that the behavior of the courts correlates closely with the social phenomena in question, but that assumption is rash.[47] Its relevance

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private roles can only be reached through public debate, performed according to a list of the proper values, which she specifies. This is essentially her only proposal. *See* MINOW, *supra* note 17, at 45-46.

46. *See* O. W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459, 461 (1897) ("If you want to know the law and nothing else, you must look at it as a bad man . . . . [Under that perspective, the 'law' is] [t]he prophecies of what the courts will do in fact, and nothing more pretentious . . . ."). Because Holmes' "bad man" has been the subject of much discussion, see, e.g., Frederick Schauer, *Prediction and Particularity*, 78 B. U. L. REV. 773, 773 n.2 (1998) (collecting and discussing perspectives and critiques), let me be clear that what I mean by the "bad man" model is that law is nothing more than a prediction of the future behavior of a particular institution.

47. The character of the relationship is an empirical question, and indeed, a body of modern jurisprudence indicates that there is no strong relationship. Famously both law and economics and critical legal studies are said to share with a common predecessor, legal realism, a skepticism about the real significance of legal doctrine. In particular the Coasean tradition in law and economics and also much of the private ordering literature are to the effect that legal rules are often secondary at best to results actually observed in practice. Moreover, while the question remains one of untested empiricism, the astonishing infrequency of actual litigation in contemporary America must attenuate this relation even further. *Cf.* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEG. STUD. 459 (2004) (documenting the decline in the number of cases that are resolved in court).

to this Article is that legally formal delegations to "private" entities and the issues of administrative and constitutional law they seem to raise seem significant only because the range of quite formal, bureaucratized social management functions already long in the hands of "private" entities—which dwarfs those recently "privatized"—is invisible if one looks for policy problems only in the positive "law." Thus, what makes more sense as a broad sociological analysis of institutions has remained narrowed in focus on the particular behavior of American bureaucrats over just the past several years.

Perhaps a resulting problem is that much of the privatization literature seems to have a poor grasp of its own historical background. As suggested at several points already, the legally formalistic definition of "privatization" normally excludes a significant range of social phenomena that are not substantively distinct from the government relationships under review. It also causes most writers to take for granted that "privatization" has become much more frequent in just the past several years.[48] Even the most thorough analyses, even when they acknowledge prior instances of conscious government delegation, typically claim that "privatization" as it now exists really began sometime around the advent of Thatcherism and was transported here only during the Reagan Administration.[49]

This raises several problems. First, even on the narrow definition of "privatization," it is false. Instances of privatization in the United States are not only old,[50] but have occurred in profusion for a long time.[51]

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48. Incidentally, with a disappointing predictability, the literature often explicitly or implicitly associates this "new" privatization with the "new" economy of the internet, globalized commerce, mass communications, and so on, with the underlying claim often being that privatization is a natural or at least inevitable thing, because traditional government neither can nor should perform all the complex social ordering that is now required. A certain cautionary history surrounds this sort of thing. *See, e.g.*, CHARLES P. KINDLEBERGER, MANIAS, PANICS AND CRASHES (4th ed. 2000); CHARLES MACKAY, EXTRAORDINARY POPULAR DELUSIONS AND THE MADNESS OF CROWDS (1841). Probably "privatization" authors should be more careful about leaping from the apparent affinity with high technology to the conclusion of novelty, especially in light of the recent cottage industry in professional critique of New Economy eschatology. *See, e.g.*, JEAN GADREY, NEW ECONOMY, NEW MYTH 3 (2003); Robert J. Gordon, *Does the "New Economy" Measure Up to the Great Inventions of the Past?*, 14 J. ECON. PERSP. 9 (2000) (downplaying the relative importance of recent technological advances).

49. *See, e.g.*, DONAHUE, *supra* note 21, at 4-6.

50. *See* HANRAHAN, *supra* note 39, at 79-80 (discussing military contracting at the time of the Revolutionary War); DONALD F. KETTL, SHARING POWER: PUBLIC GOVERNANCE AND PRIVATE MARKETS 6-7 (discussing the early growth of United States contracting practices).

51. *See* Guttman, *Governance by Contract*, *supra* note 36, at 322-23 & n.1. Even if it made sense to focus only on formal, conscious acts of government delegation, the existing literature's account of it is not very good, for that kind of "contracting out" was hugely employed by the federal government for four decades prior to the Reagan Administration. The United States military began a tradition of reliance on nominally private research entities and "management" consultants starting at about the time of World War II. This tradition expanded quite dramatically throughout the Great Society years, and resulted in the expenditure of billions of dollars, throughout the 1960s, through an agency within the

Elsewhere, private service of nominally public ends has occurred extensively and for many centuries.[52] The narrow account is also misleading to the extent it suggests that United States governments once managed some much larger range of social functions than they now do. On the contrary, Americans have long left much more to the private sector than other Western nations,[53] and prior to the 1960s American governments regulated much less of society than is now commonly perceived.[54]

It appears that a key piece of the evidence for "newness," whether explicitly acknowledged or not, has been that politicians talk about privatization, claim they have accomplished it, and congratulate themselves for it a *lot.* But political rhetoric must be among the most misleading hearsay, and in this particular case it has been very bad evidence of reality. For one thing, prevailing rhetoric has caused privatizing to be commonly thought of as a conservative policy, but that is not the case.[55] Also quite

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Department of Health, Education and Welfare called the Office of Economic Opportunity. *See* GUTTMAN & WILLNER, *supra* note 25.

52. A large body of literature shows how many pre nation-state princes relied upon nominally private entities for undertakings large and small. *See* Guttman, *Governance by Contract, supra* note 36, at 322 n.1; Franklin G. Snyder, *Sharing Sovereignty: Non-State Associations and the Limits of State Power*, 54 AM. U. L. REV. 365 (2004).

53. Americans regularly carry out an unusual range of important social functions through nominally non-state associations. Tocqueville famously observed that:

> Americans of all ages, all stations in life, and all types of disposition are forever forming associations . . . [They are] of a thousand different types—religious, moral, serious, futile, very general and very limited, immensely large and very minute. . . . In every case, at the head of any new undertaking, where in France you would find the government or in England some territorial magnate, in the United States you are sure to find an association.

ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 513 (J.P. Mayer ed., George Lawrence trans., Doubleday Anchor Books 1969) (1839). Indeed a number of these privately organized functions render the United States virtually unique in the industrialized world. For example, the United States is the only industrialized nation other than South Africa to retain a wholly private system of health care, resulting in very high administrative costs that consume a significant slice of the nation's entire gross domestic product. The attempt to socialize some healthcare functions has been among the most intensely fought political battles of the twentieth century. *See generally* DONALD L. BARLETT & JAMES B. STEELE, CRITICAL CONDITION: HOW HEALTH CARE IN AMERICA BECAME BIG BUSINESS—AND BAD MEDICINE (2004). Likewise, major functions of U.S. monetary policy remain in the hands of nominally private entities, not necessarily because it was better to do it that way, but because political compromise was needed to create the Federal Reserve. The Reserve's powerful Federal Open Market Committee (FOMC) directs the government's efforts to control the money supply through purchase and sale of its own securities. Krent, *supra* note 36, at 85. The private members of the FOMC are elected by the boards of directors of the Federal Reserve Banks, which are themselves nominally private; though the Executive Branch has some hand in peopling the Federal Reserve system, it has no direct involvement in the appointment or removal of the FOMC's private members. *Id.* at 84-85 & n.66.

54. *See generally* Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189 (1986) (detailing the rise of the formal regulatory state in the United States in the twentieth century).

55. The much ballyhooed Clinton-Gore "Reinventing Government" initiative had much in common with both the current president's agenda and with proposals of the Reagan Commission on Privatization. *See* BARRY D. FRIEDMAN, REGULATION IN THE REAGAN-BUSH ERA: THE ERUPTION OF PRESIDENTIAL INFLUENCE 176-77 (1995) (noting the similarity of

misleading can be politicians' self-congratulation and their recriminations. For example, despite the fanfare of its promises and the fears it engendered, the Reagan Administration's privatization agenda was much less successful than is commonly thought,[56] and the Clinton Administration failed to acknowledge that much of the downsizing for which it took credit was an inevitable side-effect of the "peace dividend" that followed the end of the Cold War.[57] Finally, one might remember the general predilection of politicians for faddish policy trends—what Jerry Mashaw calls "the management fraternities' panaceas *du jour*."[58] Those fads often are most remarkable for the speed with which they are first idolatrized and then forgotten, and the recent fetish for "privatization" is driven by them. Their lack of rigor degrades the reliability of the politicians' talk that they inform.

So is there anything actually *new*, or at least unique, about "privatization" as the literature has defined it? Surely it is *real* in some sense. Tax revenues can be expended through various channels that differ from one another institutionally, and presumably those different payment streams produce outcomes that differ from one another in various qualities.[59] Also, it is "important" in some sense, in that on a superficial political level it makes sense for voters to care about how some particular public service is provided. Likewise, it seems that while politicians frequently exaggerate their own privatizing efforts, political actors do in fact sometimes modify the personnel and streams of payments by which

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Clinton's regulatory agenda to his predecessors', including their privatization efforts); 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 (2000) [hereinafter Guttman, *Public Purpose*] (noting that the various means offered by the Clinton-Gore initiative had long been in use by the federal government). Likewise, Jimmy Carter's antigovernment theme of the mid-1970s may have been less strident than Ronald Reagan's, but it was nevertheless central to his electoral success. *See* DONAHUE, *supra* note 21, at 3.

56. *See generally* COMPTROLLER GENERAL, REPORT TO THE CONGRESS: CIVIL SERVANTS AND CONTRACT EMPLOYEES: WHO SHOULD DO WHAT FOR THE FEDERAL GOVERNMENT? 26-28 (1981) (complaining that outsourcing efforts between 1955 and 1981 had been largely ineffective); KETTL, *supra* note 50, at 47-51. As Kettl notes, by far the bulk of the Office of Management and Budget (OMB) Circular A-76 cost comparisons actually carried out during the Reagan Administration occurred within the Department of Defense (DOD), which along with three other agencies accounted for 96% of all of the alleged "savings." *See id.* at 49. All federal agencies other than DOD, the General Services Administration, and the Departments of Transportation and Commerce—either performed very few A-76 cost comparisons or ignored the directive entirely. *See id.* at 48.

57. *See* Paul C. Light, *Outsourcing and the True Size of Government*, 33 PUB. CONT. L.J. 311, 312-13 (2004).

58. Mashaw, *supra* note 40, at 408.

59. Notable examples include the varying incentives of actors within those channels and the consequences of the resulting differences in agency costs and productive efficiencies. *See* DONAHUE, *supra* note 21, at 79-98, 215-23.

government treasury expenditures lead to policy outcomes. It may even be that instances of this behavior have become statistically more frequent, and certainly they are more talked about than they once were.

But does that mean anything has *really* changed? Is this evidence that the world is changing, or just its decor?

In any case, as one final problem, the literature's formalistic definition of its own topic and the resulting failure to appreciate the larger picture has kept it isolated from other schools of thought to which it has obvious theoretical affinities. For example, privatization authors seem uninterested in the recent vein on the governmental role of non-state voluntary associations[60] or the historical literature on American associationalism generally.[61] Likewise they have neglected the older but still-thriving tradition that concerns "private ordering,"[62] the critique of private property

60. In the legal literature, most of this work is to the effect that private groups, like families, social clubs, and churches, perform a function of such purely *social* significance in society that they should be understood as essentially governmental or sovereign. Its thrust is that these groups are fundamental to individual freedom and actualization and therefore deserve special legal status. *See, e.g.*, Hills, *supra* note 43 (arguing that such organizations should have the right to govern their own members); Snyder, *supra* note 52, at 399; Vischer, *supra* note 43. Interestingly, neither the American "privatization" work nor the "voluntary associations" work in the law reviews appears to be aware of the strong relevance of the political theory of Jürgen Habermas, and the general significance of private associations in European thought. At least one work, however, has given the matter extensive thought. *See* SCHEPEL, *supra* note 6, at 11-21.

61. A large literature recounts the rise and influence of private associations in American history, meaning in particular trade and professional associations. *See, e.g.*, ELLIS W. HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY 1-71 (1966) (chronicling the rise of business associationalism at the turn of the twentieth century, which culminated in the National Industrial Recovery Act in 1933); ROBERT F. HIMMELBERG, THE ORIGINS OF THE NATIONAL RECOVERY ADMINISTRATION: BUSINESS, GOVERNMENT AND THE TRADE ASSOCIATION ISSUE, 1921-1933 (2d ed. 1993); JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES 84-88 (1956) (noting the dramatic increase in the formation and activities of private political and trade associations beginning in the 1860s, and arguing that the trend reflected growing concern over concentration of capital and political power in private hands; as Hurst says, "[t]heir development reflected pervasive unease and dissatisfaction with emerging patterns of power and the lack of defined policy toward emerging issues"); BRADFORD SMITH, A DANGEROUS FREEDOM (1963) (chronicling the history of American associationalism and the constitutional right of assembly); Ellis W. Hawley, *Herbert Hoover, the Commerce Secretariat, and the Vision of an "Associative State," 1921-1928*, 61 J. AM. HIST. 116 (1974).

62. Work on "private ordering" is diverse. It has its roots in part in Coase, as much of it concerns the arrangements people make with one another in the absence or in spite of law, see, for example, ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991), but also reflects legal realist concern for the power of private influence. *See* Margaret Jane Radin & R. Polk Wagner, *The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace*, 73 CHI.-KENT L. REV. 1295, 1295-99 (1998). Interest in these matters remains lively. *See, e.g.*, Avitai Aviram, *Regulation by Networks*, 2003 BYU L. REV. 1179; Yochai Benkler, *An Unhurried View of Private Ordering in Information Transactions*, 53 VAND. L. REV. 2063 (2000); Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms and Institutions*, 99 MICH. L. REV. 1724, 1725 (2001); Jonathan R. Macey, *Public and Private Ordering and the Production of Legitimate and Illegitimate Legal Rules*, 82 CORNELL L. REV. 1123 (1997);

and contract of the legal realists,[63] and the even older critique of public-private dichotomies on which the realists appear to have drawn.[64]

II. DECONSTRUCTING PUBLIC AND PRIVATE

Again, each of these preliminary problems, in their own way, contributes to a deeper problem—the assumption that there is a meaningful difference between the government bureaucracies from which functions are "privatized" and the private delegates that receive them. In other words, the very idea that there is "privatization" or that it is importantly different from other institutional arrangements implies a commitment to some fairly strong public-private distinction.[65]

Public-private dichotomies are very old, and the idea that there is some meaningful and administrable difference between public and private affairs, as a jurisprudential proposition, is central to liberal political philosophy.[66] They are also omnipresent and come in a variety of guises—we perceive separate public and private spheres relating to our personal and family lives, sexual morality, spiritual and civic affairs, economic activity, and no doubt many other areas. But as mentioned above, the two respects in which it is important to address the distinction here are in its role as a conceptual jurisprudential proposition and in its role as an economic argument—in which it assumes that markets are importantly different from government bureaucracies.

Barak D. Richman, *Firms, Courts, and Reputation Mechanisms: Towards a Positive Theory of Private Ordering*, 104 COLUM. L. REV. 2328 (2004); Steven L. Schwarcz, *Private Ordering*, 97 NW. U. L. REV. 319 (2002); Steven L. Schwarcz, *Private Ordering of Public Markets: The Rating Agency Paradox*, 2002 U. ILL. L. REV. 1, 1-2 (2002); Barak D. Richman, *Community Enforcement of Informal Contracts: Jewish Diamond Merchants in New York* (Harvard John M. Olin Center Discussion Paper No. 384, 2002), *available at* http://www.law.harvard.edu/programs/olin_center/papers/pdf/384.pdf. An interestingly similar perspective is discussed in Neel P. Parekh, *When Nice Guys Finish First: The Evolution of Cooperation, the Study of Law, and the Ordering of Legal Regimes*, 37 U. MICH. J. L. REFORM 909 (2004).

63. Examined at length in BARBARA FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ-FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT (2001). The realist critique seems germane because the very idea of a donation of functions by "government" to "private" entities poses a public-private distinction of which several realists spent whole careers dissecting.

64. See, for example, Neil Duxbury's work on Rodolf von Jhering and Jhering's possible influence on the realists. Neil Duxbury, *Jhering's Philosophy of Authority*, 27 OX. J. LEG. STUDIES (forthcoming 2007), *available at* http://ojls.oxfordjournals.org or http://www.law.manchester.ac.uk/aboutus/staff/neil_duxbury/default.htm (discussing Jhering's critique of the public-private distinction and the affinity of his views with those of various realists).

65. A related discussion, which develops some of these same issues in more detail and raises others not discussed here, appears in Chris Sagers, *Monism, Nominalism and Public-Private in the Work of Margaret Jane Radin*, 54 CLEV. ST. L. REV. 219, 225-30, 240-47 (2006).

66. *See generally id.* at 225-30 (discussing the history and political significance of the public-private distinction).

A. The Public-Private Distinction as a Proposition of Sociology or Positive Law

An obvious challenge for scholarship in this area is that the line-drawing problem of the public-private distinction must be addressed by some doctrinal means by any proposed policy correction to privatization problems. More sophisticated scholarly efforts normally acknowledge the distinction's difficulty,[67] as its use in the courts has been among the most criticized doctrinal issues in modern times.[68] However, in privatization and elsewhere, legal academics frequently go on to assert that it nevertheless can be handled through some second-best or heuristic alternative.[69] Some of these efforts seem surprisingly formal and uncritical,[70] and even more

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67. *See, e.g.*, MINOW, *supra* note 17, at 29 (the distinction is "notoriously complex"); Metzger, *supra* note 15, at 1400 ("Line-drawing [in this connection] is . . . very difficult."); Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397, 402-21 (2006) (discussing the distinction in history and theory).

68. Charles Black famously described the Supreme Court's "state action" jurisprudence as "a conceptual disaster area" that "has the flavor of a torchless search for a way out of a damp echoing cave," Charles L. Black, Jr., *The Supreme Court, 1966 Term—Foreward: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967), and even the doctrine's defenders believe that in application in the lower federal courts it has been something of a disaster. *See, e.g.*, Ronald J. Krotoszynski, Jr., *Back to the Briarpatch: An Argument in Favor of Constitutional Meta-Analysis in State Action Determinations*, 94 MICH. L. REV. 302, 321-34 (1995) (arguing that problems in the doctrine stem not from the Supreme Court's jurisprudence, but from formalistic application by lower courts of talismanic slogans rather than pragmatic case-by-case applications intended by the Supreme Court). For further discussion, including elaboration on the many, routine, daily situations in which the distinction proves grossly inadequate, see Sagers, *supra* note 65, at 242-47.

69. *See, e.g.*, Aman, *Democracy Problem*, *supra* note 38, at 1491 (noting that Aman "[r]efus[es] to treat the public/private distinction as an either/or discourse . . . [because] . . . [b]right lines between markets and regulation . . . are . . . neither necessary nor desirable"); Margaret Jane Radin, Machine Rule: The Latest Challenge to Law 2 (Jan. 31, 2005) (unpublished manuscript, on file with author).

> I am a pragmatist about the public/private distinction, meaning that in my view it is not a conceptual or formal distinction, an either/or that is easy to deconstruct, but rather a contextual characterization that tends to work in practice most of the time. Most of the time, that is, what is public and what is private has been capable of being sorted out in a way that is functionally understood, in spite of the difficult borderline cases.

Id.; *cf.* RICHARD RORTY, CONTINGENCY, IRONY AND SOLIDARITY 84-85, 198 (1989) (identifying the public-private split as a well-established "practical measure" to "distinguish public from private questions" and thereby to protect private institutions important to personal life); Frank Michelman, *Private Personal But Not Split: Radin versus Rorty*, 63 S. CAL. L. REV. 1783, 1783-84 (1990) (discussing Rorty's position). A fairly common insight is that, while the distinction has no judicially administrable *legal* meaning, it remains meaningful in understanding governance, and as a concept in political debate and decisionmaking. *See, e.g.*, MINOW, *supra* note 17, at 22-32. Occasionally, for various reasons, an author will urge that the distinction does not matter. *See, e.g.*, Steven L. Schwarcz, *Private Ordering*, 97 NW. U. L. REV. 319, 324 n.25 (2002) (arguing that because his paper dealing with the legitimacy of "commercial private ordering" considers only public perceptions of legitimacy and not the actual location of regulatory power, he need not engage the distinction itself).

70. For example, Professor Freeman, who has produced an otherwise thoughtful and voluminous body of work, committed one of the most telling slips in this entire literature.

thorough efforts can be unsatisfying,[71] though often they can be quite subtle.[72] They are all understandable; one sometimes senses that these authors, consciously or unconsciously, are really struggling to avoid confrontation of a Marxist instinct, which under current circumstances would be quite unfashionable.

While she evidently distrusts legal formalisms and any bright lines between government and private sectors, she decries arguments either that "there is no such thing as 'public' and 'private'" or that "there is no such thing as an agency." She then adds that: "There is *clearly* such a thing as the Environmental Protection Agency, the Securities and Exchange Commission, or the Internal Revenue Service. You can visit their headquarters in Washington." Freeman, *supra* note 15, at 572 (emphasis added). Surely the fact that a particular brick-and-mortar building exists in a particular city is the most unimportant of sociological facts, so long as the question is the existence of some organization of human individuals and the delimitability of its "boundaries." Those phenomena seem to have little to do with any tangible object—if indeed they are real phenomena to begin with. Perhaps Professor Freeman meant this only as a shorthand way of implying that we can make use of our instincts heuristically, despite penumbral uncertainty, because of the obviousness of core cases. But the existence of an institution and its attributes are not made "clear" even by thorough, case-specific analysis of directionalities of power, flows of money, information and resources, allegiance to constituencies, or any number of non-legal norms—analysis of a sort largely absent from this literature.

71. For example, as mentioned above, see *supra* note 45, Professor Minow has suggested that public and private concepts have to be retained, and she thinks that appropriate lines between them can be set, apparently without much difficulty, but only through a process of public debate and not through legislation or adjudication. She says that debate can find workable solutions so long as it considers a list of appropriate values, which she supplies. She takes this view because, like most other thoughtful thinkers on the matter, she acknowledges the difficulty of the public-private distinction, and thinks its problems would make it too hard to come up with a priori doctrinal solutions to public-private partnership problems. "The lines themselves are historical inventions," she says, each being merely "a fiction, a convention of speech." MINOW, *supra* note 17, at 22, 29. Tellingly, however, and even aside from the radical problem of moral epistemology behind her list of appropriate values (how does she know they are the right ones?), her list contains such an evenly balanced collection of opposing ideals as to be thoroughly indeterminate. *See id.* at 45-46. Moreover, even having admitted its difficulties, she proceeds as if the "line" is meaningful and administrable, and can be a part of purely rational public exchange. For example, she takes as a chief purpose to show that there have been "crossing[s] [of] boundaries," a phrase she uses at least once every few pages, and ultimately she asserts that "the underlying concerns that the[] words ['public' and 'private'] signal should guide debate and decision." *Id.* at 33. Accordingly, she is comfortable, despite the distinction's "notorious[] complex[ity]," announcing that religious hospitals should not be considered "public" even when they are dominant in a community and predominantly federally funded. *Id.* at 29, 35. Her reasons consist only of her view that "[p]reserving their status as private entities is vital to promote freedom" and "[t]he simple receipt of public dollars does not convert a private entity into a public one." *Id.* at 35. To this extent, having acknowledged doctrinal indeterminacy and having tried to patch it with public debate, Professor Minow is left with a moral relativism characteristic of all apologetic defenses of democracy—and one inconsistent with the moral undercurrent running throughout her work and most of the privatization literature. Winding up in that position also betrays the public-private distinction's lack of any moral or sociological content.

72. *See, e.g.*, Metzger, *supra* note 15, at 1462-63 (suggesting a "private delegation" doctrine to judge the constitutionality of privatizations, as a means of properly differentiating exercises of governmental from non-governmental power; Metzger's test essentially depends on agency concepts, insofar as it asks whether the private deputy acts on "behalf" of government); Radin, *supra* note 69; *see also* Verkuil, *supra* note 67, at 402-21 (extensively discussing the history and current content of the distinction).

However, I believe that, even for their apparent reasonableness, these approaches are all quite wrong, and that it is useful to move a step beyond.[73] Indeed, with a little thought, one of the commonly made claims in the "privatization" literature can seem bizarrely false. It is not so that most cases posed under the distinction are obvious "core cases," and that, except in rare cases at the periphery, the distinction can be easily employed on some commonsense basis. On the contrary, though its failings are often hard to see (because belief in the distinction is so firmly embedded), they are omnipresent. In particular, as a proposition of legal doctrine the distinction frequently calls for different legal treatment of entities that are substantially similar. By generally rendering the laws that impose public-regarding obligations inapplicable to "private" entities, the distinction creates what may be a very large sphere of social action—in which major allocations of social goods are made—that is freed from our basic frameworks designed to ensure that those allocations are made in the common interest.

The critique can be stated more formally. In one standard version, the analysis begins with the Hohfeldian view that every "right" necessarily limits countervailing freedoms.[74] Because "rights" in our system are themselves laws given by our government, backed by official coercion, the seemingly private exercise of any such right in fact entails the exercise of public power.[75] Therefore, no difference seems left between public and private action that will robustly resist counterexamples.[76]

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73. To be clear, this Article does not aspire to doctrinal critique as such, and prescribes no doctrinal medicine. However, careful analysis of this one point of doctrine is useful to the larger conceptions of governance institutions discussed here and to why existing talk about "privatization" seems misdirected.

74. Wesley Hohfeld long ago observed that "rights" necessarily imply limits on countervailing freedoms. But as later theorists observed, this insight could prove to be quite subversive to traditional liberal accounts of our legal order. *See* FRIED, *supra* note 63, at 51-55 (discussing the logical end-point of the Hohfeld-inspired Progressive critique of "rights"); Sagers, *supra* note 65, at 236 n.62 (discussing this insight and Fried's interpretation of it).

75. Progressives in the early twentieth century were quick to seize on these implications of Hohfeld's work, particularly in their attack on liberty-of-contract case law (though Hohfeld may neither have agreed nor anticipated their view). As Barbara Fried notes, Hohfeld's views were recognized immediately by Progressives for their "seditious implications." *See* FRIED, *supra* note 65, at 53, 103-04.

76. One obvious difference might seem to be that an individual and a government official are differently *incentivized*, insofar as the individual's exercise of rights are necessarily personal. But are they really so different? While having no fealty personally to public choice doctrine, I would suggest that one undeniably appealing insight is its observation that government agents necessarily serve their own interests at least some of the time, and at least sometimes service of those interests is amplified through the agent's discretionary exercise of official power. Metzger's view that a "private" actor becomes in some sense "public" when it acts as government's "agent," see *supra* note 15, is not actually apt because it is not so much a defense of the distinction as it is a means of employing a distinction that is already presumed to exist and to be usable. After all, should she really be understood to argue that there is an important and robustly defensible difference between a

The distinction remains ubiquitous, however, and it will be useful to examine the several defenses made of it. First, the purely formal, institutional positivism often driving it is quite weak. For example, imagine that a standard-setting body composed of representatives of an industry promulgates a model standard for the design of their products, and then state and local governments adopt that standard as law through an unreflective rubber-stamp.[77] In no meaningful way did any body of traditional government formulate the underlying policy, even though in some superficial sense it would be easy to say so, and even though the public-private distinction would cause most lawyers to think it.[78] Recognizing the misleading character of this sort of formalism, most legal thinkers prefer the more nuanced distinction that, unlike private actions, the state's pronouncements are backed by legitimate coercion and, in particular, that the state may employ ultimate forms of violent coercion.[79] While maybe more intuitively appealing, this too turns out to seem quite weak. A wide array of nominally private associations can impose fines, expulsion, and other sanctions,[80] and to insist that the coercion open to state actors is importantly different from these sorts of penalties would be to insist that, say, a civil antitrust enforcement action is not "law" because it is not enforceable by death. Very similarly, it is not useful to distinguish

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"government agent" and the "agent" of a corporation that is itself an "agent" of the government?

77. This happens with *astonishing* frequency. *See* Sagers, *Case Study*, *supra* note 6, at 1398-1400 & n.15.

78. That this approach is weak has hardly prevented the courts from adopting it. *See* Mass. School of Law at Andover, Inc. v. Am. Bar Ass'n, 107 F.3d 1026, 1027 (3d Cir. 1997) (holding the ABA immune for law school accreditation activities, finding them to be merely appeals to government to deny bar admission to graduates of non-accredited law schools); Sanjuan v. Am. Bd. of Psychiatry & Neurology, Inc., 40 F.3d 247, 250 (7th Cir. 1994) (holding that although defendant psychiatric certification board's decisions were the basis of granting certain state benefits, the board was not a "state actor"); Sessions Tank Liners, Inc. v. Joor Mfg., Inc., 17 F.3d 295, 299-300 (9th Cir. 1994) (immunizing deliberate misrepresentations to a standard setting organization as valid attempts to influence government action); Lawline v. Am. Bar Ass'n, 956 F.2d 1378, 1383 (7th Cir. 1992) (holding the ABA immune for promulgation of model ethical rules); Sherman College of Straight Chiropractic v. Am. Chiropractic Ass'n, Inc., 813 F.2d 349 (11th Cir. 1987) (holding a chiropractic trade association immune for school accreditation activities); Zavaletta v. Am. Bar Ass'n, 721 F. Supp. 96 (E.D. Va. 1989) (holding the ABA immune).

79. Weber stated this argument explicitly in 1918. *See* MAX WEBER, *Politics as a Vocation*, *in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77-78 (H.H. Gerth & C. Wright Mills, trans. 1958) ("Ultimately one can define the modern state sociologically only in terms of the specific *means* peculiar to it, as to every political association, namely, the use of physical force. . . . [A] state is a human community that (successfully) claims the *monopoly of the legitimate use of physical force.*"). Arguably it appears in slightly different form in Austin's "command" theory of law in the early nineteenth century. *See* 1 JOHN AUSTIN, LECTURES ON JURISPRUDENCE 178 (London, John Murry 1830) ("Laws properly so called are a species of commands.").

80. Obvious examples include religious excommunication, expulsion from a trade group for violation of membership or conduct rules, denial of licensure or certification, or money penalties.

subjection to state versus non-state authority based on its "voluntariness." At least in our society, subjection to many forms of state authority is voluntary to some meaningful extent, and subjection to many forms of non-state authority is only "voluntary" in the same formal sense as was implied in the liberty of contract case law.[81]

A subtler approach might be to say that only those acts publicly perceived to be "legitimate" acts of government should be considered "public." Legitimacy might be an important element of government power in that it enables the authorities to rule with minimal coercion.[82] The problem is that allegedly "private" entities hold influence that is popularly legitimized in ways not meaningfully distinct from the legitimization of government. For example, Americans do not commonly question the coercive power of organized business entities over their employees. No one would seriously doubt that such power exists, and most would not doubt its legitimacy.[83]

Indeed, the most important critique of the distinction may be one that is brought into sharp relief by the subject of this Article. Though it is not often stated, a difference presumed to exist between the "public" and "private" is that, in the former, allocations of social values can be made in a *generalized* manner; whereas, in the latter, they are conceptualized as only the aggregate of individual transactions—namely, as (often somewhat mystically) idealized transactions of "market exchange." But this is also incorrect. Among the range of non-state entities making important allocations in American society, there are literally thousands—including standard setters, product design consortia, large corporations, voluntary professional associations, and so on—that are capable of making large

81. *See* Sagers, *supra* note 65, at 243-44 & n.93; *see also* Snyder, *supra* note 52, at 378 (providing a persuasive argument on this point along with several illustrations).

82. *Cf.* DAVID EASTON, A SYSTEMS ANALYSIS OF POLITICAL LIFE 352-62 (1965); Nadel, *supra* note 39, at 18-19 (discussing this aspect of Easton's definition of "public" policy). Strictly speaking, this actually differs from Easton's definition of the subject matter of political science—the "authoritative allocation of values for a society . . . ." He says an allocation can be "authoritative" so long as it is likely to be accepted within a society, even it if is perceived to be illegitimate. *See* Easton, *supra* note 9, at 286-87.

83. The "legitimacy" here is driven by the logic of property. The proprietor may hire, fire, discipline, impose institutionalized norms, and socialize workplace behaviors (including whole attitudes, moralities, and personalities) because the proprietor *owns* the productive assets at issue and its revenues. By characterizing the coercive potential of property as simply a private right of ownership, the common view renders the employee's subjection voluntary and therefore, in the popular perspective, fair. Thus, property and "privateness" are themselves agents to legitimize otherwise contingent and debatable allocations of coercive influence. *See* Sagers, *supra* note 65, at 245-46 & n.100 (developing this argument and relating it to the larger concept of "power" generally).

allocations by generalized fiat. The effectiveness of these gestures does not depend on whether the acting entity is a "public" one, but only on whether it has *power* of some nature over some class of persons.[84]

Ultimately, the public-private distinction, like many other rules of law, is merely a normative commitment that happens to appear as an identification of pre-existing nature. Common defenses of this distinction do not explain its durability. In fact, the only clear explanation, and the only sense in which the distinction even approaches some meaningfully real metaphysical status rather than that of raw, normative politics, is from the view of the Holmesian bad man. The distinction has content neither as a proposition of morality nor as a description of sociological reality, but it does to some extent explain how courts decide cases.[85] Courts are institutionally constrained to enforce binding government statements, but not, for instance, pronouncements of the president of General Motors. But the distinction is hollow and uninteresting as a description of anything *except* for what the courts will do. As Mark Nadel says, "[w]hen we say that a member of the school board in Sheboygan, Wisconsin, is part of 'the authorities' but the president of General Motors is not, we cannot go very far in understanding political behavior or public policy."[86]

What remains might be the explanation behind this explanation—that is, the reason that such a seemingly feeble, clumsy and arguably harmful little doctrinal trick could enjoy such tenacious longevity. The apparent answer is not theorizable or systematic, and seems at least in part political. To some extent the distinction appears convenient to preserve a particular normative conception of the arrangement of society—that is, it is literally conservative. Moreover, it is easy to overlook the distinction's significance in setting the terms and limits of our political consciousness. While one surely can find strong statements of its *value* to liberal society,[87] there is perhaps less conscious awareness these days of its role in justifying the going order of things, and rendering fundamental criticisms of that order implausible, despite what otherwise might seem to be its ugliness. Indeed, though we give it little thought, whether the distinction has some

84. For example, as even the Supreme Court has recognized, standard setting groups can have real power not only when their standards are adopted by actual governments, but also when standards are merely of their own independent effect. *See* Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 498 n.2 (1988).

85. Though, indeed, the distinction is problematic even as a bad-man prediction. Courts frequently give (often outcome-determinative) weight to the government-like acts of nominally "private" entities. *See, e.g.*, Robert W. Hamilton, *The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health*, 56 TEX. L. REV. 1329 (1978) (noting the influence of privately set safety and design standards in tort litigation); Sagers, *supra* note 65, at 244 & nn.94-95.

86. Nadel, *supra* note 39, at 19.

87. *See, e.g.*, Verkuil, *supra* note 67, at 405 ("[T]he [public-private] line is fundamental—it ultimately distinguishes liberal society from its despotic alternatives.").

meaningful reality goes to the very moral legitimacy of the liberal capitalist order. To the extent that the legitimating function in this respect is to disguise unequal distributions of power, this is again a Hohfeldian insight and one familiar from the work of some realists and critical legal theorists. Though legal discourse largely denies it, formal "rights" and "duties" are in practice vessels to be filled with the substance of prior endowments—endowments of skill, social position, wealth, or other phenomena that give substantive value (or lack thereof) to their holders.[88]

Importantly, however, defense of the distinction is not ideologically specific; indeed, critics and proponents of "privatization" both require the distinction as basic to their positions. Despite its weaknesses and the instinct of many to attack it in certain circumstances, there is no across-the-board political will to dispense with it.[89] Advocates on both left and right make use of the distinction in different contexts, and its invocation appears to be mainly a matter of political convenience.

B. Markets as Institutional Alternative to Government: The Public-Private Distinction as an Economic Argument

A second major theoretical critique is required. It is very commonly assumed that our two basic choices for organization of society are government bureaucracy and markets.[90] Thus, it is commonly taken for

88. In this vein Professor Fried recalls a delicious observation of Anatole France: "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges . . . ." FRIED, *supra* note 63, at 42.

89. *See* Sagers, *supra* note 65, at 230 (discussing the distinction's appeal across the political spectrum).

90. This is often said by social scientists. *See, e.g.*, CHARLES E. LINDBLOM, POLITICS AND MARKETS: THE WORLD'S POLITICAL-ECONOMIC SYSTEMS (1977); Douglass C. North, *A Transaction Cost Theory of Politics*, 2 J. THEORETICAL POL. 355, 361 (1990) ("[T]he basic separation between polity and economy has always, even amongst the most confirmed libertarians, left a residual of activities to be undertaken by government."); Oliver E. Williamson, *The Theory of the Firm as Governance Structure: From Choice to Contract*, 16 J. ECON. PERSP. 171, 174-75 (2002) (discussing comparative advantages of ordering by markets and government bureaucracy). Law professors do this as well. *See, e.g.*, Einer Elhauge, *Making Sense of Antitrust Petitioning Immunity*, 80 CAL. L. REV. 1177, 1195-98 (1992) (arguing that the rules making up the so-called *Noerr-Pennington* doctrine in antitrust law serve to ensure that resource allocations will be made either by democractically accountable actors or by markets kept healthy through antitrust); Einer Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 668, 696-97 (1991) (arguing that the same rationale explains the so-called "state action immunity" in antitrust). The distinction is more or less basic in rhetoric surrounding "deregulation." *See* Peter C. Carstensen, *Evaluating 'Deregulation' of Commercial Air Travel: False Dichotomization, Untenable Theories, and Unimplemented Premises*, 46 WASH. & LEE L. REV. 109, 115-16 (1989) (criticizing facile use of the distinction). It has surfaced in interesting ways in judicial opinions. *See, e.g.*, Richardson v. McKnight, 521 U.S. 399, 410-11 (1996) (refusing to grant a private prison guard defendant in a § 1983 action the same immunity as would be enjoyed by traditional government prison employees, and basing the distinction on the "market" influences that govern private prisons but do not govern public ones). Indeed, this basic distinction and the mutual exclusivity of the two options is sometimes taken for granted even by sharp critics of neoclassical orthodoxy. *See, e.g.*, Herbert A. Simon, *Organizations and Markets*, 5 J. ECON.

granted in the privatization literature that when government cedes a function to the private sector, market forces will regulate it.[91] This plays a very important role in rhetoric and research on privatization because it is taken for granted that a systematic and fundamental difference between the two spheres is that actors within them are differently incentivized. However, though it may sound surprising to some, investigation remains highly incomplete of the aggregate of self-serving, essentially pecuniary instincts that, if left unfettered, are believed to orchestrate much of society's workings. The actual prevalence of such markets and the impact that other social institutions may have on them are questions of empirical sociology that remain almost completely unanswered.

It is worth observing first that the critique here need make no recourse to the well-known and contested sub-genre that critiques law and economics and price theory generally.[92] We may assume that price theory remains fully wholesome and above reproach in its own sphere—as a deliberately abstracted description of genuinely individuated transactions, incentivized by personal human desires, and constrained by competitive demand for scarce resources. The claim here is that price theory has little or nothing to say about at least some certain classes of social ordering decisions, and that

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PERSP. 25 (1991); *cf.* Herbert Simon, *Rationality as Process and as Product of Thought*, 68 AM. ECON. REV. 1, 6-7 (1978) (asserting that individuals make decisions based more on qualitative analysis of "discrete structural alternatives" than on quantitative analysis of equilibrium at the margins).

91. *See, e.g.*, Aman, *Democracy Problem*, *supra* note 38, at 1488-91.

92. Critique of the movement is hardly new, but there has recently emerged something of a small cottage industry in it. *See* AMITAI ETZIONI, THE MORAL DIMENSION: TOWARD A NEW ECONOMICS 1-87 (1988) (attacking the commitment of neoclassicism to individual utility maximization); NICHOLAS MERCURO & STEVEN G. MEDEMA, ECONOMICS AND THE LAW: FROM POSNER TO POST-MODERNISM (1997); Anita Bernstein, *Whatever Happened to Law and Economics?*, 64 MD. L. REV. 303 (2005); Gregory Scott Crespi, *The Mid-Life Crisis of the Law and Economics Movement: Confronting the Problems of Non-Falsifiability and Normative Bias*, 67 NOTRE DAME L. REV. 231 (1991); Reza Dibadj, *Beyond Facile Assumptions and Radical Assertions: A Case for "Critical Legal Economics,"* 2003 UTAH L. REV. 1155; Eric M. Fink, *Post-Realism, or the Jurisprudential Logic of Late Capitalism: A Socio-Legal Analysis of the Rise and Diffusion of Law and Economics*, 55 HASTINGS L.J. 931 (2004). More familiar, older works would include Guido Calabresi, *The Pointlessness of Pareto: Carrying Coase Further*, 100 YALE L.J. 1211 (1991); Mark Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement*, 74 VA. L. REV. 199 (1988); Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1980); Duncan Kennedy & Frank Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711 (1980); Donald N. McCloskey, *The Rhetoric of Law and Economics*, 86 MICH. L. REV. 752 (1988); Pierre Schlag, *An Appreciative Comment on Coase's* The Problem of Social Cost: *A View From the Left*, 1986 WIS. L. REV. 919; Pierre Schlag, *The Problem of Transaction Costs*, 61 S. CAL. L. REV. 1661 (1989). Now seemingly hoary old classics in this line would include Arthur Alan Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974), and A. Mitchell Polinsky, *Economic Analysis as a Potentially Defective Product: A Buyer's Guide to Posner's* Economic Analysis of Law, 87 HARV. L. REV. 1655, 1671-81 (1974).

no one knows how much of society is governed by them.[93] As I hope is obvious at this point, the aim of this critique is that that world of which I have been speaking—the range of more or less formal and bureaucratized entities making important allocations in society—is to some greater or lesser degree exempt from market forces.

The common picture of "markets," in short, is that of economics as neoclassical price theory or as a science of human choice. Namely, in all sectors of human behavior not directly and effectively controlled by government, the dominant category of social ordering conduct is believed to be atomized, bilateral transactions between individuals, firms, or both. "Firms" in this picture, while seemingly out of place in a model of individuated market transactions, are really only contractual compromises occasionally needed to align incentives and reduce costs that arise in messy reality. Moreover, while it is recognized that certain other practical realities frustrate the *perfect* functioning of this system, it has so far seemed to triumph on the argument that the exogeneity of those market frailties leaves the basic *theoretical* account of markets intact, and still a useful depiction of society and guide for policy.[94]

Now, only the most prosaic idolater of free markets is surprised that real-world markets tend to accrete rules, standards and institutions, and courts and economists now largely believe such things are actually quite healthy.[95]

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93. Thus the following criticism may seem a little straw-mannish, in that it may seem to attack a model economists themselves do not adopt—economics does not necessarily model "markets" as free-standing institutions analogous to government agencies or business firms. Indeed, economists do not seem to think much about what "markets" are, and rather just assume their existence. In fact, it is probably quite wrong to claim that economists think of them that way, as it confuses self-serving instincts themselves with the collection of rules, standards, and structures needed in messy reality to make voluntary exchange work. Again, though, the criticism here is not a criticism of price theory, but rather of the sociological assumption that matters not constrained by traditional government are necessarily regulated by market forces. Admittedly, some tension exists between this Article and that body of economics arguing that many or all "non-market" transactions are explainable by price theory. *See, e.g.*, Jack Hirshleifer, *The Expanding Domain of Economics*, 75 AM. ECON. REV. 53 (1985) (discussing "imperialist" economic forays into a range of non-market interactions; introducing some criticisms, but finding ultimately that "[t]here is only one social science" and that eventually "economics," as improved by integrations from other disciplines, will "constitute the universal grammar of the social sciences."). Indeed, an explicit claim here will be that price theory, as a model of individual choices, cannot explain or predict events that occur under the influence of formally non-market social institutions. The basic prediction in this Article is that in fact a *huge* range of social choices are now made under such circumstances.

94. *See* Herbert A. Simon, *Organizations and Markets*, 5 J. ECON. PERSP. 25, 26 (1991) ("[Neoclassical price theory usually treats] [a]ccess to information, negotiation costs, and opportunities for cheating . . . as exogenous variables that do not themselves need to be explained . . . [Their] exogeneity . . . allow[s] the theory to remain within the magical domains of utility and profit maximization.").

95. Since the 1970s the courts have made clear that privately devised market rules and market-facilitating institutions will be given wide latitude under antitrust and other law, at least where they are needed or useful to the healthy functioning of markets. *See, e.g.*, Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284 (1985)

However, even admitting this as a regrettably necessary concession to the costs of transactions, many social scientists seem to take for granted that markets together comprise basically an atomistic universe of individualized, efficiently incentivized, and predominantly low-cost person-to-person transactions, which orchestrate society through interactions between persons and firms and govern the internal organization of firms themselves.

This all seems increasingly implausible. First, a little-recognized but in fact profound empirical question goes normally unasked: Is it simply not known how many choices in society are made through market processes?[96] The answer is that it is not. It finally has begun to be suggested, in the face of centuries of orthodoxy, that individuated market transactions may be neither all that common nor all that important in the actual organization of society.[97] Admittedly, neoclassical thought has devised a means by which apparently non-market, intra-firm transactions can be brought within the theory. As a commonplace of the so-called "neoinstitutional" or

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(upholding restrictive membership rules of a retailer purchasing cooperative against antitrust attack, noting that they were necessary to the cooperative arrangement, and that the cooperative itself was useful to competition); Broad. Music, Inc. v. Columbia Broad. Sys., 441 U.S. 1, 18-23 (1979) (upholding a scheme of blanket licensing of the intellectual property of songwriters against antitrust attack, and noting that the arrangement alleviated otherwise prohibitive transaction costs and created the possibility of a market that otherwise would not exist); Rothery Storage & Van Co. v. Atlas Van Lines, 792 F.2d 210 (D.C. Cir. 1986) (upholding trade restraining terms in a contractual arrangement among household moving companies, and finding it to be a net efficiency-enhancing "integration" of a number of firms "by contract"); *cf.* Board of Trade of Chicago v. United States, 246 U.S. 231 (1918) (concerning trading rules of a commodities exchange).

96. Of course, one easy, knee-jerk response is that they all are because choice always necessarily implies the agency of individual human decisionmakers, and even if in some particular transaction the individual does not formally represent his own interest, he still will serve his own self-interested psychological instincts, perhaps at the expense of his principal's interests. *See, e.g.*, Simon, *supra* note 94, at 26 (characterizing the basic neoclassical argument as "that a proper explanation of an economic phenomenon will reduce it to maximizing behavior of parties who are engaged in contracting, given the circumstances that surround the transaction"); Oliver E. Williamson, *The Theory of the Firm as Governance Structure: From Choice to Contract*, 16 J. ECON. PERSP. 171 (2002) (asserting that the science of contract, in which parties align incentives and craft governance structures attuned to their exchange needs, is another means to study economic phenomena). But that is the whole point of the discussion here. The response is easy only if one first assumes that no matter how complex some world of institutionalized decisionmaking becomes, it can be explained by examining the individual motivations of some hypothesized contracting parties who created it.

97. *See, e.g.*, Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOCIOLOGICAL REV. 147 (1983); Hanslowe, *supra* note 39, at 130 ("[I]t is plain that substantial proportions of economic activity are presently not governed by rules that come anywhere near approximating the power-neutralizing, classical, atomistically individualistic, liberal, competitive model."); Ronald L. Jepperson & John W. Meyer, *The Public Order and the Construction of Formal Organizations*, *in* THE NEW INSTITUTIONALISM, *supra* note 6, at 204; Simon, *supra* note 94, at 25 ("Counted by the head, most of the actors in a modern economy are employees."); *see also* ALFRED DUPONT CHANDLER, THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS (1977).

"transaction-cost" economics, when a firm resolves its make-or-buy choice in favor of "make," it nevertheless makes the resulting, internal hierarchical decisions exclusively as functions of negotiated contracts, which themselves are driven by individual incentives of the contracting parties who create or work within those firms, and are constrained only by exogenous material circumstances. In other words, the same socially optimizing forces that drive market transactions will drive the structure and behavior of firms and all other private entities. Therefore, a theory of even hegemonic firms in highly concentrated industries, which arrange some very large portion of society's basic decisions through internal fiat directives, can preserve almost undisturbed the centrality of markets and exchanges.[98]

It was only natural that this model of formal organizations, driven by rational choice theory, would be adapted to describe political decisions and to public bureaucracies in particular,[99] and that the posited "privatization" choice would be modeled as the government's own "make-or-buy" decision.[100]

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98. *See* Simon, *supra* note 94, at 26-27. It is worth noting explicitly that most transaction cost theorists see their theory of the firm as essentially an application of neoclassical theory; this fact often seems to be misunderstood. *See, e.g.*, OLIVER E. WILLIAMSON, MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS 1 (1975) (describing his work as "complementary to, rather than a substitute for, conventional analysis"); *see also* Terry M. Moe, *The New Economics of Organization*, 28 AM. J. POL. SCI. 739, 750 (1984) (describing most transaction cost theorists this way).

99. *See generally* Moe, *supra* note 98, at 758-66 (charting the then-nascent rise of transaction-cost applications to politics and public bureaucracy, while being cautiously optimistic about the movement's promise, despite concerns that important differences exist between political organizations and the profit-motivated firms that were the traditional subject of transaction-cost models).

100. Despite the general critique to follow, I think several recent works applying transaction cost approaches offer important and promising insights. In particular, political scientist John Donahue set out an encyclopedic tour of empirical evidence comparing public and private service providers, see DONAHUE, *supra* note 21, at 57-78, 101-212, along with careful analysis of their comparative institutional advantages, see *id.* at 79-98, 215-23, and the observation that the make-or-buy decision for government service boils down to consideration whether a particular function requires an input-based specification of public needs (i.e., provision by civil servants) or could adequately be gotten by output-based specification (i.e., from private sector providers), see *id.* at 45. A few other works have begun the task of applying the make-or-buy analysis, including one article by Oliver Williamson himself, see Oliver E. Williamson, *Public and Private Bureaucracies: A Transaction Cost Economics Perspective*, 15 J.L. ECON. & ORG. 306 (1999), and work by Professor Shapiro, see Sidney A. Shapiro, *Outsourcing Government Regulation*, 53 DUKE L.J. 389 (2003) (noting that the government has increasingly relied on the private sector to make and implement regulatory policy); Sidney A. Shapiro, *Matching Public Ends and Private Means: Insights from the New Institutional Economics*, 6 J. SMALL & EMERGING BUS. L. 43 (2002) (explaining that mechanisms to ensure private sector accountability are limited). These works are more preliminary, however, and they are also somewhat problematic. Namely, they fail to heed a warning from Terry Moe—that different sorts of organizations might differ in several fundamental respects that render simple application of transaction cost models ill-advised. *See* Terry Moe, *Politics and the Theory of Organization*, 7 J.L. ECON. & ORG. 106, 120-28 (1991). For example, despite his familiarity with Moe's work, Professor Shapiro explicitly chose to "assume that agency officials will

This approach has some serious problems. The most overwhelming and obvious problem is the profound number, range and complexity of institutions the model would attempt to explain as the conscious design of rationally maximizing individuals.[101] But maybe a larger problem conceptually is the model's implicit assumption that any formal association can be understood to have or serve some comparatively simple purpose, which by implication of the model necessarily maximizes the interests of those who form the organization. This might sometimes make some sense, as in a profit-maximizing business firm or an ad hoc product design consortium established by competing manufacturers. Very often, however, it will not. Often, the activities of a formal association will pose only highly uncertain or ambiguous welfare payoffs for its participants. Often, the various participants will have highly differing motives with respect to the organization's activities. Indeed, frequently individual participants may come to understand their interests in the organization only during the course of participation, and therefore could hardly maximize those goals during some period of contractual formation.[102] It also would seem simply inaccurate to characterize the evolution and accretion of all social entities with decisionmaking power as deliberate creations of individuals or firms. Institutions arise too organically for them all to be characterized as creatures of contract, even broadly defined. As a separate matter, price theoretic explanations of individual behavior will have little explanatory power of the behavior of actors within many formal institutions. Actors

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adopt institutional arrangements that promote legislative goals at the lowest transaction cost," and adopts as his purpose "to identify[] how transaction cost analysis would assist an administrator who seeks to determine in good faith when it is advisable to involve private parties in the implementation of regulation." Shapiro, *Outsourcing Government Regulation*, *supra*, at 399-400. The remainder of his article consists of "a typology of government-private relationships," many of which already exist, and an argument that "these choices constitute the same type of make-or-buy decision that economic actors confront . . . ." *Id.* at 400. Professor Williamson, for his part, argues that in evaluating privatization choices, governments must weigh "probity" along with more straightforward efficiency concerns. However, he too seems to take government "purposes" as essentially simple and unambiguous. Incidentally, both Shapiro's and Williamson's works arguably are fairly duplicative of Donahue's earlier and more comprehensive work; Shapiro distinguishes it by arguing that Donahue focused only on non-regulatory functions, whereas Shapiro is concerned with the outsourcing of actual regulation. *See id.* at 414-15 & n.92. However, the analysis Shapiro sets out still resembles Donahue's quite closely, insofar as it merely analyzes relative institutional advantages as between public and private regulatory work. Williamson seems to have been unaware of Donahue's work.

101. Admittedly, transaction-cost approaches attempt to accommodate the imperfection of human ability to contract—indeed, it assumes as a basic premise that all contracts are incomplete as a result of human bounded rationality. *See, e.g.*, Williamson, *supra* note 100, at 311. A great proportion of work in this area is devoted to strategies for organizational design that better addresses contracting inadequacies.

102. *See* Herbert A. Simon, *Human Nature in Politics: The Dialogue of Psychology with Political Science*, 79 AM. POL. SCI. REV. 293, 295 (1985) (noting that under realistic models of human problem solving, actors may even discover what their goals are in the course of the problem-solving process).

within those bureaucracies act subject both to restraints of the institutions' rules and norms, and they only rarely will exercise authority within their institutional roles solely for their own unambiguous benefit. Therefore, price theoretic models of individual or firm choice seem unlikely to explain either the "contractual" constraints of social decisionmaking institutions or the behavior of actors within them.

Finally, such a view again would have to remain uncritically committed to purely formal distinctions, this time between different "firms." "Firms" need not be understood, as they commonly are in both price theory and neoinstitutionalist economics, as hermetically differentiated entities that relate to one another only through unmediated market transactions. Indeed, deciding which components make up an "organization," however obvious it may seem in any particular case, is to some extent a bit of a nonsense exercise and an unnecessary one. Situations are easy to imagine in which purportedly distinct firms cooperate or interact so as to be no more than formally distinct, at least as to particular transactions.[103] Indeed, antitrust, administrative, and constitutional law now broadly permit private regulation of nearly the whole range of human affairs—even by collaborations of horizontal trade competitors—and the United States economy has been pervasively so governed for a long time.[104] Thus, "markets," such as they are, in fact are regulated directly through layers of bureaucracy that differ from "government bureaucracy" only in the legal instruments by which they are constituted and constrained, and in their permissible incentives. Bureaucratization is accomplished not only by the oligopolistic fiat of large firms in concentrated industries, but also by collaborations of firms, including standard-setting ventures or product design consortia. Moreover, even where the law would prohibit direct market constraints by distinct "firms" acting in horizontal coalition, nominally distinct firms often can accomplish the same thing by consolidation or joint venture.

Thus, even the one area of significant market activity left open to most human individuals—frequent small and infrequent large retail purchases of consumer goods and services—is in fact mediated not only by our system's

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103. Simon understated it in a pioneer work when he said that

> [i]n complex enterprises the definition of the unit is not unambiguous—a whole agency, a bureau, or even a section in a large department may be regarded as *an* organization . . . . [T]he smallest multi-person units are the primary groups; the largest are institutions (e.g., 'the economic system,' 'the state') and whole societies.

Herbert A. Simon, *Comments on the Theory of Organizations*, 46 AM. POL. SCI. REV. 1130, 1130 (1952).

104. *See* Sagers, *Legal Structure*, *supra* note 6, at 952-53 (discussing the legal treatment undercurrent law of nominally private entities with regulatory functions); *cf.* Sagers, *Case Study*, *supra* note 6, at 1398-1402 (discussing the range of "standard setting" activities by which nominally private organizations currently regulate much of human activity).

large number of official laws, but by a whole shadowy universe of constraints imposed hierarchically within firms and collaboratively across formal institutions of various kinds. None of this "private" regulation could be modeled to fit the neoclassical vision of atomized market conduct without substantially multiplying the number of assumptions needed for the theory to remain genuinely a work of price theory.[105] Therefore, it is increasingly hard to see how there even are such things as "markets" as traditionally understood.

In other words, the critique here is that "markets" can be understood as a meaningful regulatory alternative to traditional "government" only if we assume that the structure and behavior of all nominally "private" institutions with power over social choices can be explained by examining the personal choices of the individuals who create them by contract (thus analogizing them to "firms" in neoinstitutionalist economics). In light of the range and complexity of such institutions, however, this must sooner or later seem hopeless even to very conservative economic thinkers.

This critique is not entirely new. It builds not only on Herbert Simon's careful critique of neoinstitutionalist economics[106] and on the recent "new institutionalism" in sociology and organization theory,[107] but it was also important to the original American Institutionalists to examine the actual organs of economic decisionmaking, even to the extent they accepted price theory for its own sake.[108]

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105. Moreover, in addition to all of these more formal constraints, even the most individuated of consumer market transactions are mediated by hugely well funded and well researched marketing efforts that, as a major purpose of their very being, exploit market dysfunction and systematic consumer irrationalities. But this and other observations about demand and rationality really go to price theory itself as a psychological model of individual choice.

106. *See supra* notes 96, 100, 102, 104, 108-09.

107. *See* Jepperson, *supra* note 6, at 1 (charting the development of this movement and its general critique of atomistic, rational-actor models of social phenomena, its general disregard for the importance of institutions, and its confidence in the intentionality of organizations).

108. *See, e.g.*, Allan G. Gruchy et al., *Discussion*, 47 AM. ECON. REV. 13, 13-15 (1957) (summarizing the main goals of the Institutionalists). It may be that the Institutionalists have been fairly criticized for lack of analytical rigor. *See* Kenneth E. Boulding, *Institutional Economics: A New Look at Institutionalism*, 47 AM. ECON. REV. 1, 9-10 (1957) (asserting that the original institutionalists offered correct criticisms of contemporary economic thought, but not the correct answers).

III. AN ALTERNATIVE ACCOUNT OF THE MACROSOCIAL *WHAT* AND THE HISTORIOGRAPHICAL *WHY*; ALSO, ALAS, A BIT OF ABJECT MALTHUSIANISM

There remains, then, a need for an alternative theoretical account of the current world of human governance, to which the preceding arguments have all been leading. First, there looms the question of the macrosocial *what*—how exactly it is that values are apportioned in society—and the question of just how that phenomenon might be changing. I think the picture generally adopted of these matters, both in the privatization literature and more generally, is inaccurate.

The conventional vision of governance and how it is changing appears to be something like this: Traditional "government," composed of entities created through authoritative legal instruments, makes and enforces policy through authoritative announcements ("law") and through provision of goods and services. Individuals and non-state associations participate in various ways, some of which may be unwholesome, but actions of government ultimately are institutionally distinct from outside influence. Forces also exist in society outside this public sphere. A comparatively minor, non-theorizable component of non-state social ordering consists of social values, norms, customs, and rules of voluntary associations; these phenomena have some complex but essentially subordinate relationship to state ordering. A much more important aspect of non-state ordering, which regulates most human behavior that is not directly controlled by the state, is the world of market transactions. The market is unlike other non-state forces in that it is not very formally institutionalized in itself, it does not reflect any malleable, historically contingent social development, and it is not likely to be consciously varied in its operations through mere human intervention. Rather, the market is the cumulative product of inalienable human physical and psychological attributes and it operates automatically. It is the invisible hand.

On this view of human governance, a conscious choice by a government actor to provide a good or service via some nominally private entity is interesting mainly in that it might result in inefficiencies or defects in democratic desiderata.

In fact, a very different story can be told, using very different imagery. Traditionally constituted entities of "government" might constitute one and perhaps quite a small component of a (very roughly) horizontal, heterarchical range of focused points of influence. It exercises influence in part through legal pronouncements that work in the bad-man manner—they constrain the behavior of judges who act as gatekeepers on official coercion. Those pronouncements have at best a complicated relationship

with other social phenomena. Acting along with government in this heterarchical range is a limitless array of human associations and institutions, which exist along a continuum from the unorganized and even unconscious to the highly organized and government-like. Among the powers they represent are matters beyond law-like or regulatory prescriptions, including peculiar agenda-setting phenomena that are themselves a source of power.[109] Finally, acting among these influences are forces of systematic self-service that in the aggregate have some resource allocational influence. However, such "market" influences, to the extent that they exist, must be understood at a minimum to be highly mediated by state and non-state constraints. That is, given a range of options left open after other forces in society have already limited the possible options (and possibly modified the range of choices *psychologically* by modifying demand and limiting perceived options), an actor still may choose the behavior that maximizes its own welfare. The "market" on this view seems less like an independent, largely autonomous player in a vertically arranged hierarchy of governance bodies, and more like a piecemeal collection of interstitial influences weaving their way here and there through constraints set in other ways.

Within this alternative model of governance, "privatizing" changes that occur within traditionally constituted government entities could also be described differently than in the more familiar version. One of the more surprising insights in this study arises at this point.

First, it was mentioned above that United States governments have not actually given away some large range of functions they once performed, as is implied in much privatization rhetoric.[110] What has not yet been observed is that in fact United States governments have in some sense come to be responsible for inestimably *more* of society's functions than they once were, and most of that development has occurred in just the past few decades of allegedly ubiquitous privatization. This has occurred in some part because of the well-known expansion of federal regulation beginning in the 1960s, but more importantly it has occurred through the

109. Among government actors, the agenda-setting process was described in the influential JOHN KINGDON, AGENDAS, ALTERNATIVES AND PUBLIC POLICIES (1995). As for the "power" implied in agenda-setting, Peter Bachrach and Morton Baratz observed in a set of studies in the 1960s that a source of social authority is the power to designate some topics the proper subject of controversy and rule others off the table. *See* Peter Bachrach & Morton S. Baratz, *Decisions and Nondecisions: An Analytical Framework*, 57 AM. POL. SCI. REV. 632 (1963); Peter Bachrach & Morton S. Baratz, *Two Faces of Power*, 56 AM. POL. SCI. REV. 947 (1962). To that end, they quote Schattschneider: "All forms of political organization have a bias in favor of the exploitation of some kinds of conflict and the suppression of others because *organization is the mobilization of bias.* Some issues are organized into politics while others are organized out." *Id.* at 949 (quoting E. E. SCHATTSCHNEIDER, THE SEMI-SOVEREIGN PEOPLE 71 (1960)).

110. *See supra* notes 50-54 and accompanying text.

enormous growth of the government's contract bureaucracy. Whatever sense in which it seems that functions given to contractors have been "privatized" is purely semantic. While it may be true that government treasuries now funnel a larger proportion of tax dollars through formally non-state vessels, they remain tax dollars distributed nominally under the supervision of oath-taking and government-paid bureaucrats and for purposes specified by bodies that in theory are democratically accountable.[111] This is an example of the problem this Article has explored: If one disregards the critique of the public-private distinction, it can be said that "government" no longer provides these outsourced functions. But that formulation reduces away most of the sociological reality here that is really interesting.

Second, this evolving institutional structure of traditional government has been a "conscious" phenomenon only in the most attenuated sense. In part, it occurred through a disaggregated collection of generally unrelated policy initiatives scattered throughout United States law and adopted throughout the twentieth century, almost all of which were invisible to the public and were visible in government only to those directly involved in specific programs.[112] In even larger part, it reflects the expansion of the

111. Despite the ethos of "shrinking government" in which privatization rhetoric is wrapped, no one within government could really believe that government has gotten smaller. On the contrary, as many within the Beltway acknowledge, the rhetoric of "shrinking government" is tremendously misleading. The body of workers paid directly or indirectly via federal tax revenues or required by unfunded mandates is *enormous* and has grown much larger just since the late 1990s. The best regarded study concerning the true size of the government—co-sponsored by the Brookings Institution and the Wagner School of Public Service at New York University—shows that while politicians have continually congratulated their own efforts to shrink the government, the true size of the federal work force has actually grown substantially, especially since about 1999. While the formal, on-paper civil service has shrunk, the actual number of jobs for which the federal government and tax dollars are responsible—including jobs required by contracts, grants, and those state and local jobs required by federal mandates—is estimated at about 17 million. *See* Light, *supra* note 57, at 311-13.

112. These initiatives are numerous, sundry, and not much connected to one another. They include: (1) OMB Circular No. A-76, a policy dating to the Eisenhower Administration under which the federal government is theoretically barred from competing with the private sector in the provision of "commercial" goods or services, see *supra* note 5; (2) the Federal Activities Inventory Reform (FAIR) Act of 1998, Pub. L. No. 105-270, 112 Stat. 2382 (1998), (presently codified at the note following 31 U.S.C. § 501 (2000)), or "FAIR Act," which requires an annual accounting of all government functions that are "commercial," and is at least theoretically given teeth by the injunction of OMB Circular No. A-76 that agencies out-source commercial functions; and (3) a lengthy, century-long series of loosely connected federal policy steps to encourage private standard setting and to keep government entities out of the regulation of safety and design, including the government's role in nurturing the nominally private but very powerful American National Standards Institute, and adoption of the Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374 (1980) (presently codified at 15 U.S.C. § 57a(a)(1)(B) (2000)), which among other things shielded standard setting entities from a proposed FTC rulemaking. Among the most surprising of these steps might be the National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113, 110 Stat. 775 (1996), codified at 15 U.S.C. § 272 note, and implemented through OMB Circular No. A-

contract bureaucracy, and to this extent it occurred as a default or compromise, and again was not part of any overall plan. To some limited extent, it was part of a fairly conscious Cold War effort of the federal government to grow its defense capacities while escaping public attention,[113] but in recent years it appears much more commonly to have occurred as a last resort of front-line government managers simultaneously facing dwindling resources, public outcry against alleged "waste," and legislative demands for more services.[114] Contracting out can allow the bureaucrat to satisfy performance demands with expenditures that are much less publicly visible.[115] In any event, while government has largely lacked any overall vision of these events,[116] their practical effect has been greatly to expand the range of nominally private entities that are able to exploit bilateral power asymmetry.[117]

It seems likely that these trends will bear regrettable fruit. As is increasingly acknowledged by representatives of traditional government and others, government in recent decades literally has begun losing its ability to perform its own nominal functions. Its own contract bureaucracy has grown unmanageably large (to the extent that several federal agencies now admit they no longer know how many contractors they oversee), while government's own in-house managerial capacity has been decimated.[118]

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119. *See* 63 Fed. Reg. 8546 (Feb. 10, 1998). The NTTAA mandates that federal agencies use appropriate private standards both in procurement and regulation, *every* time such a standard exists.

113. *See generally* Guttman, *Governance by Contract*, *supra* note 36. Congressional desire in this respect is easy to understand—any politician, of any persuasion and with any constituency, can benefit by providing better services and can suffer by causing increased taxes. The executive desire is more interesting—it appears to have arisen not from any executive desire for power or political favor. Rather, front-line bureaucrats have, since at least the 1940s, found themselves faced simultaneously with ever-increasing congressional demands for service provision, on the one hand, and ever tighter controls on expenditures, on the other. *See* GUTTMAN & WILLNER, *supra* note 25.

114. *See generally* GUTTMAN & WILLNER, *supra* note 25.

115. Government can grow itself without accountability in this way because government contractor employees are not normally counted in tallies of the federal workforce and because there is no easily accessed means for accounting even for how many government contracts are in existence. Thus, an agency could take on additional responsibilities performed by civil service protected agency employees only with easy public accountability. By contracting the work out, however, the agency can claim to have provided additional public services without increasing the civil service workforce and without easily traceable public expenditures. *See* GUTTMAN & WILLNER, *supra* note 25.

116. The Government Accountability Office has tried to fill that gap. *See* GAO, COMPETITIVE SOURCING: GREATER EMPHASIS NEEDED ON INCREASING EFFICIENCY AND IMPROVING PERFORMANCE (2004); GAO, CIVIL SERVANTS AND CONTRACT EMPLOYEES: WHO SHOULD DO WHAT FOR THE FEDERAL GOVERNMENT? (1981).

117. For example, under the NTTAA, discussed, *supra* note 112, a standard setting body can constrain the behavior of its members and the industries or conduct within its purview not only through the persuasive power of its opinion but also because its opinion will be incorporated both in government regulatory rules and in government procurement specifications.

118. A bitter irony of recent downsizing efforts is that they have simultaneously

But the more important point, again, is that even this story is only one comparatively small piece of the overall picture of governance. Even those "private" entities whose social allocational influence comes from some legally formal relationship with government are only a portion of the overall complex of social ordering.

Thus, a picture of the macrosocial *what* could be adduced that is quite different from the picture of things contained in ordinary privatization talk. Again, in the popular imagination a sharp distinction divides "bureaucracy" and individualized market transactions. "Privatizing," especially in recent political rhetoric, means removing a function from "bureaucracy" and ceding it to the self-optimizing world of atomistic, highly incentivized competition. A better picture of the basic choice for allocation of social goods is between one kind of bureaucracy (government) or a different kind of bureaucracy (business organizations and other non-state rationalizing entities, some of which have some formal tie to traditional "government," but most of which do not). "Privatization" on this view is merely a shifting of personnel and flows of resources. It may rearrange incentives and alliances, but it is not a fundamental change in metaphysical character.

In any event, this leaves the matter of the historiographical *why*—why institutions have evolved in this manner and why both public and academic visions of them seem so misleading. This question seems much more speculative. As for the practical question of why institutions have evolved as they have, the location of social rationalization exclusively in bureaucracies seems mainly a compromise with brute practical circumstances—bounded human rationality, scarce resources, and expansions both in population and technology. The fullest and best theoretical treatment of this phenomenon is by sociologists Paul DiMaggio and Walter Powell, who argue that "the engine of organizational rationalization has shifted" from the desire for efficient markets to "individual efforts to deal rationally with uncertainty and constraint," efforts that take place within organizations of "key suppliers, resource and product consumers, regulatory agencies, and other organizations that produce similar services or products."[119] Moreover, they argue that these social institutions—these "efforts to deal rationally" with circumstances—seem to grow more similar over time, which reflects something important

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demanded: (1) reduction of civil service employees, including procurement officials, and (2) outplacement of the formerly civil service government services through procurement contracts. In other words, at the same time that government has been laying off its procurement officers, it has hugely increased the burden of oversight work *that is supposed to be done by procurement officers. See* Steven L. Schooner, *Competitive Sourcing Policy: More Sail Than Rudder?*, 33 PUB. CONT. L.J. 263, 284-85 (2004).

119. DiMaggio & Powell, *supra* note 97, at 147-548. Another excellent source is Marc A. Olshan, *Standards-Making Organizations and the Rationalization of American Life*, 34 SOC. Q. 319 (1993).

about society. Admitting that some of this "isomorphism" of organizations could be explained by competitive forces, as has been suggested elsewhere,[120] DiMaggio and Powell argue that much institutional isomorphism has become disconnected from the rationalizing influence of market competition. A larger implication of their work is that as institutions themselves come to have greater independent rationalizing force—as they grow in their bilateral power asymmetry vis-à-vis natural persons and other organizations—they increasingly displace the regulatory importance either of traditional government institutions or market pressures.

As for the psychological—the historiographical question of why people seem so reluctant to discard the image of governance divided between government bureaucracy and free markets—this too is mysterious and contested. Among historians, explanations abound for our domestic romance of the private; chief candidates are the Framers' fear of royal power[121] and their experience as colonists and pioneers in a new world.[122] But again it also must reflect very basic perceptions and political desires of contemporary Americans, which are ambiguous and not ideologically specific. To doubt a robust distinction of public and private and the would-be corollary of free markets obviously threatens conservative or libertarian individualism, but it also threatens progressive confidence in regulatory

120. That is, in commercial markets firms are pressured by competition to choose organizational forms that give the greatest productive efficiency, and over time will tend toward the form that is most efficient. Notably, Alfred Dupont Chandler argued that organizational efficiencies explained the rise of managerial bureaucracy and the so-called "great merger movement," see CHANDLER, *supra* note 97, and economists of various stripes have made essentially similar arguments, see, e.g., FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991); Williamson, *supra* note 100. The origin of these arguments is Coase. *See* R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 398-401 (1937).

121. *See* FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION (1985). Historiographical debate has raged recently over whether the *founding* generation was genuinely individualistic in this sense, and it is said that in fact they held "republican" or some other generally communal views up until the turn of the nineteenth century. Explanations vary for founding-era republicanism, centering mainly on the philosophical predilections of the Founders, see, e.g., J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION (1975), or the religion of the mass of Americans, see BARRY ALAN SHAIN, THE MYTH OF AMERICAN INDIVIDUALISM: THE PROTESTANT ORIGINS OF AMERICAN POLITICAL THOUGHT (1994). However, no serious disagreement exists that sometime in the early nineteenth century American political desiderata turned predominantly individualist and liberal in nature, and that we have never as a people turned back.

122. Daniel Boorstin describes a pragmatic individualism even in colonial America that led, among other things to a confidence in individual industry and distrust of the highly theorized European mercantilism of the day. *See* DANIEL J. BOORSTIN, THE AMERICANS: THE COLONIAL EXPERIENCE 152-58 (1958). He attributes the rise of this thinking to the "self evidence" of American experience in the colonies, during which population and material well-being expanded at great speed and for long periods. The colonists' ongoing success through self-reliant private industry made them skeptical of Old World models of government. *See id.*

oversight by democratic and public-regarding government institutions. In short, the vision of governance built into the privatization literature is a moral aspiration, not an empirical observation. That it might also happen to be false would not prevent it from seeming indispensable to most.

CONCLUSION

In summary, then, while it seems difficult to explain exactly why, the contemporary relationship of "public" and "private" seems quite different than that normally implied in "privatization" talk. If anything is meaningfully changing in society, the change is neither recent nor contained in the favored institutional arrangements of American bureaucrats of the late twentieth century. Rather, it seems much larger than those policy predilections and older—indeed *much* older—in that it reflects matters dating to the origins of Western capitalism in, say, the fifteenth century. The ancient and ongoing change is embodied in two very broad propositions, which I have been at pains to stress in this Article: First, that to the extent that they ever had even heuristic meaning, the distinctions between "public" and "private," and the corollary distinction between "law" and "non-law," are increasingly irrelevant. Second, that to the extent that they ever existed, it is increasingly the case that "free" markets no longer exist.

The consequence of these two propositions is that under the current state of human governance, the location of influence and decisionmaking for allocation of social goods normally must be within either one kind of bureaucracy (traditional government) or another (business firms or other non-state organizations). The only robust and meaningful difference between them is that one of them lacks even a nominal obligation to the public interest.

None of this is necessarily, unequivocally bad. Rationalization of social goods through non-state associations, however they happen to be organized, is not necessarily worse than rationalization through government direction or through markets and efficiently incentivized firms. However, that such a state of affairs has come to pass might suggest something about the material orientation of our development as a society. For whatever reason—one perhaps overly obvious explanation would involve technological change and population growth—our governance institutions have come to be organized in a way quite at odds with all aspects of the liberal individualism that has been our core political philosophy since at least the presidency of Thomas Jefferson. We have evolved to a state in which neither the individual franchise nor individual buying and selling decisions have any real significance at all, and all individual decisions are constrained by an astonishing array of restrictions set in ways that are

neither democratic nor efficiently incentivized. That such a thing has evolved, and that it has come about *despite* human intentions, might suggest that a complicated society with advanced technology and a large population is simply ill-suited for democratic capitalism.