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## Proceed with Caution: Avoiding Hazards in Toll Road Privatizations

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# PROCEED WITH CAUTION: AVOIDING HAZARDS IN TOLL ROAD PRIVATIZATIONS

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INTRODUCTION .....	352
I.FREEWAYS, TOLL ROADS, AND ROAD PRIVATIZATION IN THE UNITED STATES .....	355
II.PRIVATIZATION: BACKGROUND AND DEBATE .....	361
A. The Trend Towards Privatization .....	361
B. Rationales for Privatization.....	363
C. Best Cases for Privatization .....	364
D. Potential Hazards of Privatization.....	366
1. The Problems of Conflicting Goals.....	366
2. Challenges to Democratic Accountability .....	367
III.THE CASE OF PRIVATIZED TOLL ROADS: BENEFITS AND DRAWBACKS .....	369
A. Tensions Inherent in Conflicting Goals .....	370
B. How Privatized Toll Roads Challenge Democratic Values .....	374
1. Pre-Decision Accountability .....	375
2. Post-Decision Accountability .....	378
IV.PROPOSED SOLUTIONS TO CONCERNS RAISED .....	379
A. Contracting Tools .....	380
B. Legislative Tools.....	385
C. Potential Objections to Solutions Proposed .....	391
CONCLUSION.....	393

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## INTRODUCTION

On April 12, 2006, Indiana Governor Mitch Daniels leased the 157-mile Indiana Toll Road to ITR Concession Company LLC, a consortium composed of a Spanish and an Australian company.<sup>1</sup> Under the agreement, the private entity paid the State of Indiana \$3.8 billion and promised to operate and maintain the road for the next seventy-five years in exchange for various tax breaks and the right to collect toll revenues during that period.<sup>2</sup> As a result of the up-front payment, Indiana has funding sufficient to meet its transportation needs for the next ten years.<sup>3</sup> Nonetheless, the deal came under strong criticism, including from some of the 2008 contenders for Daniels' job,<sup>4</sup> in part because the lease agreement's terms gave the new operators rights to raise tolls, perhaps substantially. Though a state-commissioned financial analysis of the proposal assured the transportation department that the road's \$3.8 billion price tag exceeded what the state could have raised through traditional bond financing, a competing report alleged that the allowable toll increases under the new lease actually increased the road's value to \$11 billion,<sup>5</sup> suggesting that the state had accepted a price that greatly underestimated the current value of the road's future revenue stream.<sup>6</sup>

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<sup>1</sup> U.S. DEPT OF TRANSP. FED. HIGHWAY ADMIN., CASE STUDY: INDIANA TOLL ROAD, [http://www.fhwa.dot.gov/ppp/case\\_studies\\_indianatoll.htm](http://www.fhwa.dot.gov/ppp/case_studies_indianatoll.htm) (last visited Jan. 27, 2009).

<sup>2</sup> *Id.*; Daniel Schulman & James Ridgeway, *The Highwaymen: Why You Could Soon Be Paying Wall Street Investors, Australian Bankers, and Spanish Builders for the Privilege of Driving on American Roads*, MOTHER JONES, Jan.–Feb. 2007, at 49, 50.

<sup>3</sup> GOV'T PERFORMANCE PROJECT, THE PEW CENTER ON THE STATES, GRADING THE STATES: INDIANA 10 (2008), [http://www.pewcenteronthestates.org/uploadedFiles/PEW\\_WebGuides\\_IN.pdf](http://www.pewcenteronthestates.org/uploadedFiles/PEW_WebGuides_IN.pdf).

<sup>4</sup> Christin Nance Lazerus, *Gubernatorial Foes Slam Toll Road Lease*, MERRILLVILLE POST-TRIB., Apr. 16, 2008, at A4.

<sup>5</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, HIGHWAY PUBLIC-PRIVATE PARTNERSHIPS: MORE RIGOROUS UP-FRONT ANALYSIS COULD BETTER SECURE POTENTIAL BENEFITS AND PROTECT THE PUBLIC INTEREST 33 (2008) [hereinafter GAO REPORT].

<sup>6</sup> Another analysis estimated the value of the concession at \$5.35 billion. *Bonney v. Ind. Finance Auth.*, 849 N.E.2d 473, 478 n.2 (Ind. 2006); see Schulman & Ridgeway, *supra* note 2, at 50.

The Indiana deal is still the largest toll road concession agreement to date in the United States.<sup>7</sup> ITR formally assumed operational responsibility for the toll road on the same day a concession was signed for Virginia's Pocahontas Parkway,<sup>8</sup> and both followed on the heels of a 75-year concession for the eight-mile Chicago Tollway.<sup>9</sup> In November 2007, Colorado followed the trend, leasing a section of toll road northwest of Denver to a Portuguese toll road operator.<sup>10</sup> In 2008, Mississippi and Florida both issued requests for proposals for similar projects.<sup>11</sup> The governors of Pennsylvania and Texas attempted even more ambitious projects. On June 6, 2008, Pennsylvania Governor Ed Rendell accepted a \$12.8 billion bid to lease, repair, and operate the Pennsylvania Turnpike for seventy-five years to come; the deal eventually died after a failure to obtain legislative approval.<sup>12</sup> Texas Governor Rick Perry's original vision for the Trans-Texas Corridor, announced in 2002, would have included a \$175 billion system of 4,000 miles of corridors, many privately operated, crisscrossing the state.<sup>13</sup> Each corridor was to be one-quarter mile wide, accommodating toll roads, rail, and utility lines.<sup>14</sup>

These states' toll road lease plans did not arise in a vacuum. Recent road leases are part of a much larger privatization trend

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<sup>7</sup> Elizabeth Carvlin, *Indiana Toll-Road Lease Sets a High Bar for Public-Private Partnerships*, THE BOND BUYER, Dec. 28, 2006, at 40A.

<sup>8</sup> U.S. DEP'T OF TRANSP. FED. HIGHWAY ADMIN., CASE STUDY: POCAHONTAS PARKWAY, [http://www.fhwa.dot.gov/ppp/case\\_studies\\_pocahontas.htm](http://www.fhwa.dot.gov/ppp/case_studies_pocahontas.htm) (last visited Jan. 27, 2009).

<sup>9</sup> U.S. DEP'T OF TRANSP. FED. HIGHWAY ADMIN., CASE STUDY: CHICAGO SKYWAY, [http://www.fhwa.dot.gov/ppp/case\\_studies\\_chicago.htm](http://www.fhwa.dot.gov/ppp/case_studies_chicago.htm) (last visited Jan. 27, 2009) (noting that the City of Chicago signed its agreement on October 28, 2004).

<sup>10</sup> Nw. Parkway LLC, About Us, <http://www.northwestparkway.org/aboutus.htm> (last visited Jan. 27, 2009).

<sup>11</sup> Press Release, Fla. Dep't of Transp., Media Advisory (Aug. 26, 2008), available at [http://www.alligator-alley.com/Documents/PPP%20AA%20RFP%20Aug%2026%202008%20\\_2\\_.pdf](http://www.alligator-alley.com/Documents/PPP%20AA%20RFP%20Aug%2026%202008%20_2_.pdf); Miss. Dep't of Transp., Airport Parkway Project, <http://www.theairportparkway.com/Home.aspx> (last visited Jan. 27, 2009).

<sup>12</sup> Mark Scolforo, *Group Offers \$12.8B To Lease Pa. Turnpike: 75-Year Deal Largest Ever in Toll Road History*, PHILA. DAILY NEWS, May 20, 2008, <http://www.philly.com/dailynews/national/19092124.html>; Paul Nussbaum, *Consortium's Bid To Lease Pa. Turnpike Expires with No Deal*, PHILA. INQUIRER, Oct. 1, 2008, at B4.

<sup>13</sup> Rad Sallee, *Transport Network Proposed: Perry Wants Toll Roads, Rail To Cover State*, HOUSTON CHRON., Jan. 29, 2002, at A15.

<sup>14</sup> *Id.*

that has expanded from the 1980's through today.<sup>15</sup> Governments now look to the private sector to provide a wide range of goods and services that government itself used to provide.<sup>16</sup> In the face of a widely-recognized need for enormous infrastructure repairs and the fact that toll roads are ready income-producing assets capable of attracting investment, it is natural that states would turn to toll road leasing as one of the next large-scale moves in privatization.

Bankers and economists have presented often-conflicting analyses of the economic valuation of the contemporary toll road leases. Governments and citizens are understandably concerned that the up-front payment and the services to be performed by a toll road company accurately reflect the value of the lease, but in addition to valuation questions, the current crop of toll road leases raise two fundamental sets of concerns. First, privatization can raise tensions between conflicting goals within government programs and the potential for conflicts of interest between the goals of the public and private entities involved.<sup>17</sup> These concerns are magnified in the case of toll road privatizations, because the extraordinarily long lease terms lock the parties into agreements that may or may not serve the needs of the state in the distant future. Second, like prior privatization efforts, toll road privatizations run the risk of undermining democratic values, as opportunities for participation and accountability decline. Already, road privatization projects have been criticized for the perceived secrecy under which they came to be.<sup>18</sup>

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<sup>15</sup> See *infra* Part II.A.

<sup>16</sup> See Craig Anthony (Tony) Arnold, *Privatization of Public Water Services: The States' Role in Ensuring Public Accountability*, 32 PEPP. L. REV. 561, 562 (2005); Laura A. Dickinson, *Public Law Values in a Privatized World*, 31 YALE J. INT'L L. 383, 384–85 (2006) (discussing privatization of military support services); Matthew Diller, *Form and Substance in the Privatization of Poverty Programs*, 49 UCLA L. REV. 1739, 1739 (2002); Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1230–31 (2003) (describing school privatization efforts, including vouchers); David E. Pozen, *Managing a Correctional Marketplace: Prison Privatization in the United States and the United Kingdom*, 19 J.L. & POL. 253, 253 (2003).

<sup>17</sup> See *infra* Part II.D.1.

<sup>18</sup> Tony Hartzel, *Debate on Toll-Road Reliance in Texas Still Has Miles To Go: State Needs New Highways, But Is Privatization the Solution?*, DALLAS MORNING NEWS, Mar. 11, 2007, at 1A; Jim Ritchie & Brad Bumstead, *Turnpike Lease Process Tainted, Lawmakers Say*, PITTSBURGH TRIB. REV., Mar. 15, 2008, available at 2008 WLNR 5127671; see also GAO REPORT, *supra* note 5, at 58.

The sheer length of toll road lease terms heightens these concerns and calls for new solutions. Other scholars have proposed that potential problems posed by privatization can be resolved by legislation and the careful drafting of contracts. These tools work well for addressing many aspects of toll road privatization, and should be used. However, no contract can anticipate the transportation needs of a state ninety-nine years into the future. Thus, toll road privatization contracts should be structured to allow for periodic reconsideration and renegotiation of key terms in order to maintain a balance between the needs of the state and the private company.

Part I of this Article describes the current toll road phenomenon, and Part II provides background about the wider privatization trend. Part III examines the potential benefits of toll road privatizations, and the potential problems that may arise due to tensions between competing goals of the programs themselves and due to losses in democratic accountability. Part IV advances specific legislative reforms and contracting terms that have the potential for lessening negative impacts of toll road privatizations, and evaluates states' use of these tools to date.

#### I. FREEWAYS, TOLL ROADS, AND ROAD PRIVATIZATION IN THE UNITED STATES

Though common abroad,<sup>19</sup> privatizing toll roads has only recently gained momentum in the United States. So far, twenty-three states and Puerto Rico have passed laws to allow for road

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<sup>19</sup> See, e.g., FRANCK BOUSQUET, WORLD BANK, ANALYSIS OF HIGHWAY CONCESSIONS IN EUROPE (1999), [http://www.worldbank.org/transport/roads/tr\\_docs/hwy\\_conc.pdf](http://www.worldbank.org/transport/roads/tr_docs/hwy_conc.pdf); JOSÉ A. GÓMEZ-IBÁÑEZ & JOHN R. MEYER, GOING PRIVATE: THE INTERNATIONAL EXPERIENCE WITH TRANSPORT PRIVATIZATION 113–17, 123–28 (1993) (describing early road privatizations in France and Spain).

privatization.<sup>20</sup> Officials and legislatures in other states have considered the option.<sup>21</sup>

The disastrous Minneapolis bridge collapse on August 1, 2007<sup>22</sup> brought to the nation's attention a problem that had been growing for some time: Our nation's bridges and highways are quite literally crumbling. Unfortunately, Minnesota is not alone. An Oklahoma bridge forming part of Interstate 40 collapsed in 2002, killing fourteen people.<sup>23</sup> The American Association of State Highway Transportation Officials ("AASHTO") reports that the average age of bridges nationwide is 43 years—most built with a projected 50-year lifespan.<sup>24</sup> As a result of the inevitable deterioration of aging bridges, this year AASHTO rated "structurally deficient" approximately 80,000 of the nation's

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<sup>20</sup> Jurisdictions with toll road privatization enabling statutes are Alabama, Alaska, Arizona, California, Colorado, Delaware, Florida, Georgia, Indiana, Louisiana, Maryland, Minnesota, Mississippi, Missouri, Nevada, Oregon, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and the territory of Puerto Rico. See the Federal Highway Administration's website for links to each state's legislation. U.S. DEP'T OF TRANSP. FED. HIGHWAY ADMIN., STATE PPP LEGISLATION OVERVIEW TABLE (2007), [http://www.fhwa.dot.gov/ppp/tools\\_state\\_legis\\_table.htm](http://www.fhwa.dot.gov/ppp/tools_state_legis_table.htm). North Carolina repealed its road privatization statute in 2006. 2006 N.C. Sess. Laws 228.

<sup>21</sup> Pennsylvania Governor Ed Rendell introduced enabling legislation after accepting the Turnpike proposal in 2008; the legislation did not pass. H.B. 2593, 92d Gen. Assem. (Pa. 2008). The governors of New Jersey, New York, and Massachusetts have also expressed interest in leasing the turnpikes of those states. Ken Belson, *Toll Road Offers New Jersey a Fiscal Test Drive*, N.Y. TIMES, Apr. 13, 2008, at A29; Casey Ross, *Deval Eyes Road to Lea\$ing; More Tolls on Way if Private Companies Take Over*, BOSTON HERALD, Sept. 11, 2007, at 7; see also Michael Gormley, *Following Other States, New York May Lease Assets*, ASSOCIATED PRESS, Oct. 3, 2008, available at [http://nl.newsbank.com/nl-search/we/Archives?p\\_action=list&p\\_topdoc=21](http://nl.newsbank.com/nl-search/we/Archives?p_action=list&p_topdoc=21) (listing state highways among the assets "[u]nder consideration for leasing" by New York Governor David Paterson). New Jersey Governor Jon Corzine later withdrew his privatization plan and, instead, proposed solving his state's budget problem with toll increases while leaving the turnpikes under state control. Craig R. McCoy, *Corzine Calls for 50% Toll Increase; It Would Begin in 2010 and Aim to Cut State Debt*, PHILA. INQUIRER, Jan. 9, 2008, at A1. Alternate versions of the plan are still under discussion. Joe Donohue, *Lawmakers Consider Private Lanes on N.J. Turnpike*, STAR-LEDGER (Newark, N.J.), Jul. 8, 2008, [http://www.nj.com/news/ledger/topstories/index.ssf/2008/07/lawmakers\\_consider\\_private\\_lan.html](http://www.nj.com/news/ledger/topstories/index.ssf/2008/07/lawmakers_consider_private_lan.html).

<sup>22</sup> Libby Sander & Susan Saulny, *Bridge Failure in Minnesota Kills 7 People*, N.Y. TIMES, Aug. 2, 2007, at A1.

<sup>23</sup> Eric Kelderman, *The State of the Union—Crumbling*, STATE OF THE STATES 40, 41 (2008), available at <http://www.stateline.org/live/publications/pdf-request>.

<sup>24</sup> AM. ASS'N OF STATE HIGHWAY & TRANSP. OFFICIALS, BRIDGING THE GAP: RESTORING AND REBUILDING THE NATION'S BRIDGES 2 (2008) [hereinafter AASHTO REPORT], available at <http://www.transportation1.org/BridgeReport/docs/BridgingtheGap.pdf>.

590,000 bridges.<sup>25</sup> Pennsylvania offers a particularly serious case: In 2005, a fifty-foot, 125-ton section of an overpass collapsed onto Interstate 70 in western Pennsylvania, forcing officials to seal off the highway and raze the bridge.<sup>26</sup> And in March 2008, the Pennsylvania Department of Transportation abruptly closed a section of Interstate 95, a major artery carrying 190,000 cars a day into and out of Philadelphia, to perform emergency repairs to a steel-reinforced concrete column displaying a crack “[four] feet long and several inches wide.”<sup>27</sup> In Massachusetts, where over fifty percent of the bridges are rated “structurally deficient,”<sup>28</sup> residents also have to be concerned about tunnels. In 2006, they learned that the Sumner and Callahan Tunnels, the two major routes from Boston’s Logan Airport into the city, had flaws including a badly deteriorated concrete liner atop one of the tunnels.<sup>29</sup>

In 1956, President Dwight D. Eisenhower signed the first Federal Highway Act, launching the Federal Interstate Highway System, an ambitious network of free roads designed to connect the growing nation.<sup>30</sup> These highways would come to shape patterns of development, means of travel, and channels of commerce throughout the country for generations to come. The massive project cost an estimated \$128.9 billion, ninety percent of that funded directly by the federal government.<sup>31</sup> President Eisenhower’s highways followed in the tradition of Franklin Roosevelt’s vast public works projects built during the New Deal, which included public buildings, bridges, roads, airports, schools, hospitals, national parks, sewage treatment plans, viaducts, and dams, most notably the Hoover Dam.<sup>32</sup>

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<sup>25</sup> *Id.* at 18.

<sup>26</sup> Michael Hasch, *Beam Collapse onto I-70 Hurts 2*, PITTSBURGH TRIB. REV., Dec. 28, 2005.

<sup>27</sup> Edward Colimore, *PennDot Closes a Section of I-9: Emergency Repairs May Keep It Closed for Days*, PHILA. INQUIRER, Mar. 18, 2008, at A1.

<sup>28</sup> See AASHTO REPORT, *supra* note 24, at 19.

<sup>29</sup> *Long Road Ahead To Repair Tunnels*, BOSTON HERALD, Sept. 26, 2006, at 18.

<sup>30</sup> Richard F. Weingroff, *Federal-Aid Highway Act of 1956: Creating the Interstate System*, PUBLIC ROADS (Summer 1996), available at <http://www.tfrc.gov/pubrds/summer96/p96su10.htm>.

<sup>31</sup> 50th Anniversary of the Interstate Highway System—Frequently Asked Questions, <http://www.fhwa.dot.gov/interstate/faq.htm> (last visited Jan. 27, 2009).

<sup>32</sup> Adam Cohen, *Public Works: When ‘Big Government’ Plays Its Role*, N.Y. TIMES, Nov. 13, 2007, at A28.



Today, as the expected useful life of much of the Interstate Highway System approaches expiration, a new set of economic pressures and political assumptions will shape how we address the challenge. State budgets are strained, and the federal deficit is greater than at any prior point in history.<sup>33</sup> The primary sources of highway funding, federal and state motor fuel taxes,<sup>34</sup> are not keeping up with the costs of maintaining roads.<sup>35</sup> The federal gas tax, for example, is set at a flat, per-gallon rate not indexed to inflation and has not been raised since 1993, despite the soaring costs of highway construction.<sup>36</sup> Yet raising the tax is a politically unpopular move few care to risk. In fact, in the face of rising gas prices, presidential candidates even proposed eliminating the federal gas tax for the summer of 2008,<sup>37</sup> despite simultaneously acknowledging a nationwide need for massive road and infrastructure improvements.<sup>38</sup> Additionally, it may no longer be wise policy for the government to foot the bill for a road project of such scope, given the consequences of the fuel-intensive, car-centric culture that resulted from the success of the Interstate Highway System.

For several of these reasons, the federal government has gradually expanded the extent to which states may use toll roads, and more recently, toll roads operated by private companies, to meet transportation needs. In the initial decades following the Federal Highway Act, federal law prohibited states from imposing tolls on federal-aid highways other than limited

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<sup>33</sup> Robert Pear & David M. Merzenhorn, *White House Predicts Bush Will Leave \$482 Billion Deficit*, N.Y. TIMES, Jul. 29, 2008, at C1.

<sup>34</sup> BENJAMIN PEREZ & STEVE LOCKWOOD, PB CONSULT, CURRENT TOLL ROAD ACTIVITY IN THE U.S.: A SURVEY AND ANALYSIS 19 (2009), [http://www.fhwa.dot.gov/ppp/pdf/2008\\_toll\\_activity\\_white\\_paper.pdf](http://www.fhwa.dot.gov/ppp/pdf/2008_toll_activity_white_paper.pdf) (showing how federal, state, and local motor-fuel taxes accounted for \$85 billion in revenues used for highways in 2006, by far the largest portion of the total of \$165 billion).

<sup>35</sup> See AASHTO REPORT, *supra* note 24, at 6, 12–13.

<sup>36</sup> John M. Broder, *Democrats Divided Over Gas Tax Break*, N.Y. TIMES, Apr. 29, 2008, at A1.

<sup>37</sup> S. 2890, 110th Cong. § 1 (2008); S. 2971, 110th Cong. § 1 (2008) (“gas tax holiday” legislation sponsored by Senators McCain and Clinton, respectively).

<sup>38</sup> David J. Lynch, *Clinton's Goals for Economy? Big Change; U.S. Needs To Pick Its Priorities, She Says*, USA TODAY, Apr. 3, 2008, at 1B. As Americans become conscious of fuel economy and use less gas, fuel-tax revenue—which is based on the gallon, not the dollar, of gas consumed—may actually decline. Nicholas J. Farber, Note, *Avoiding the Pitfalls of Public Private Partnerships: Issues To Be Aware of When Transferring Transportation Assets*, 35 TRANSP. L.J. 25, 29 (2008).

high-cost projects like bridges and tunnels.<sup>39</sup> However, starting with a pilot program in 1987, states may now establish publicly operated toll roads on federal-aid highways that are not part of the Interstate Highway System.<sup>40</sup> In 1991, the law expanded the program to all states and also began to encourage private investment, permitting the combination of private and federal funds.<sup>41</sup> Although a pilot program since allowed construction of new toll highways on the Interstate Highway System itself,<sup>42</sup> that practice was again prohibited in 2007.<sup>43</sup>

More than half of the states have moved to take advantage of the changes, launching 235 state-operated toll road projects between 1992 and 2009.<sup>44</sup> Thus far, toll revenues have been used more to create new roads or lanes than to repair existing ones.<sup>45</sup> California began its experiments with road privatization in 1993 when it accepted a private toll road operator's proposal to construct and lease dedicated lanes of an already-existing Los Angeles area freeway.<sup>46</sup> In keeping with the project's stated goal of relieving traffic congestion, the new lanes were to be free to cars with three or more occupants and otherwise tolled at rates that increased during times of peak usage.<sup>47</sup> The lease was for thirty years; however, due to a dispute arising out of a non-competition clause that prevented the state from developing or expanding nearby roads, California bought back the lease in 2002.<sup>48</sup>

States started entering into wholesale leases of entire roadways only in 2004 with the privatization of the Chicago Tollway, a ninety-nine-year concession to operate a busy

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<sup>39</sup> 23 U.S.C. § 301 (2000); Pub. L. 85-767 (1958).

<sup>40</sup> 23 U.S.C. § 129(a) (2000); Pub. L. 100-17 § 120 (1987).

<sup>41</sup> 23 U.S.C. § 129(a); Pub. L. 102-240 § 1012(a) (1991).

<sup>42</sup> Pub. L. 105-178 § 1216(b), 112 Stat. 107, 212-14 (1998). *Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users*, Pub. L. No. 109-59, § 1604(c), 119 Stat. 1144, 1253-54 (2005).

<sup>43</sup> Pub. L. 110-60, 2007 H.R. 2674, § 197.

<sup>44</sup> PEREZ & LOCKWOOD, *supra* note 34, at 1.

<sup>45</sup> *Id.* at 2.

<sup>46</sup> GAO REPORT, *supra* note 5, at 36.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*; Daniel Yi & Jack Leonard, *O.C. Set To Buy Tollway Along 9: Transit Agency Agrees To Pay the Private Operator \$207 Million for the Express Lanes*, L.A. TIMES, Apr. 21, 2002, Part 2, at 1.

7.8-mile connector highway in exchange for \$1.8 billion.<sup>49</sup> Two years later, Indiana entered into the largest toll road concession to date.<sup>50</sup> The day after Indiana signed its agreement, Virginia leased its 8.8-mile Pocahontas Highway to an Australian investment consortium for ninety-nine years.<sup>51</sup> In 2007, another such concession was signed for a roadway near Denver, Colorado.<sup>52</sup> In 2008, Pennsylvania considered and ultimately rejected a \$12.6 billion lease for its Turnpike.<sup>53</sup> Florida and Mississippi are at various stages of the bidding and leasing process for their own toll road deals.<sup>54</sup>

Texas has had a more complicated experience. The Texas legislature gave its approval for Governor Perry's Trans-Texas Corridor Project in 2003, starting a round of negotiations which has so far resulted in several development agreements but only one active toll road concession agreement.<sup>55</sup> In the face of rising opposition, the Texas legislature issued a moratorium on new privatization projects and commissioned a study to determine the benefits and disadvantages of privatization.<sup>56</sup>

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<sup>49</sup> U.S. DEP'T OF TRANSP. FED. HIGHWAY ADMIN., CASE STUDY: CHICAGO SKYWAY, available at [http://www.fhwa.dot.gov/ppp/case\\_studies\\_chicago.htm](http://www.fhwa.dot.gov/ppp/case_studies_chicago.htm).

<sup>50</sup> See U.S. DEP'T OF TRANSP. FED. HIGHWAY ADMIN., CASE STUDY: INDIANA TOLL ROAD, available at [http://www.fhwa.dot.gov/ppp/case\\_studies\\_indianatoll.htm](http://www.fhwa.dot.gov/ppp/case_studies_indianatoll.htm).

<sup>51</sup> Jerome R. Corsi, *U.S. Parkway Leased to Aussie Firm: Opponents See Tie to Feds' Sell-Off of Infrastructure to Foreigners*, WORLD NET DAILY, Jan. 18, 2007, [http://www.worldnetdaily.com/news/article.asp?ARTICLE\\_ID=53825](http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=53825).

<sup>52</sup> Jeffrey Leib, *Lease Signed for NW Parkway*, DENVER POST, Nov. 20, 2007, at B1; Nw. Parkway LLC, About Us, <http://www.northwestparkway.org/aboutus.htm> (last visited Jan. 27, 2009).

<sup>53</sup> See Nussbaum, *supra* note 12.

<sup>54</sup> Airport Parkway Home Page, <http://www.theairportparkway.com/Home.aspx> (last visited Jan. 27, 2009) (providing links to Mississippi bid documents); see also Press Release, Fla. Dep't of Transp. (Aug. 26, 2008), available at [http://www.alligator-alley.com/Documents/PPP%20AA%20RFP%20Aug%2026%202008%20\\_2\\_.pdf](http://www.alligator-alley.com/Documents/PPP%20AA%20RFP%20Aug%2026%202008%20_2_.pdf) (announcing Florida bid).

<sup>55</sup> TEX. TRANSP. CODE ANN. §§ 223.010–223.2b (Vernon 2008) (enabling legislation); see also Tex. Dep't of Transp., Comprehensive Development Agreements, <http://www.txdot.gov/business/partnerships/cda.htm> (last visited Jan. 27, 2009) (providing links to existing development agreements); [http://www.txdot.gov/business/partnerships/sh\\_130.htm](http://www.txdot.gov/business/partnerships/sh_130.htm) (providing links to existing concession agreements and exhibits).

<sup>56</sup> TEX. TRANSP. CODE ANN. § 223.210 (Vernon 2008).

## II. PRIVATIZATION: BACKGROUND AND DEBATE

### A. *The Trend Towards Privatization*

The modern movement towards privatization began in the mid-1970s and has continued to grow since.<sup>57</sup> Privatization refers to any of variety of processes that transfer government functions and responsibilities in whole or in part to the private sector.<sup>58</sup> For example, deregulating formerly regulated industries, transferring assets by lease or sale of income-producing government assets, contracting out government services, and using voucher programs to allow citizens to purchase housing or education from the private market are all forms of privatization.<sup>59</sup> In the United States, the most common form of privatization is contracting out. While government agencies have long contracted to procure goods or services that the government will use, privatization differs from ordinary procurement in that the subject of the contract is a service that had previously been performed by the government itself. The array of privatized services is vast. A municipality might contract out its trash collection, its parks maintenance, or its information technology services. A state might privatize its welfare program or hire private companies to operate some of its prisons.<sup>60</sup> Federal government agencies working overseas, including the Department of Defense, hire private contractors to feed troops, to train and arm foreign military forces, to interrogate suspected terrorists, or to provide security for U.S.

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<sup>57</sup> E.S. SAVAS, *PRIVATIZATION AND PUBLIC-PRIVATE PARTNERSHIPS* 15 (2000).

<sup>58</sup> See Carol M. Rose, *Privatization—The Road to Democracy?*, 50 ST. LOUIS U. L.J. 691, 691 (2006) (stating that privatization “generally refers to governmentally sponsored efforts to move assets and economic decision-making away from the political arena and into the hands of individuals or private corporations”).

<sup>59</sup> See MARTHA MINOW, *PARTNERS, NOT RIVALS: PRIVATIZATION AND THE PUBLIC GOOD* 34–35 (2002); Jack M. Beermann, *Privatization and Political Accountability*, 28 FORDHAM URB. L.J. 1507, 1520–21 (2001) (describing divestiture of government assets and government enterprises as a form of privatization). Throughout this article, I use the word “public” to refer to both free roads and toll roads owned and managed by government agencies or authorities, financed through traditionally governmental means including taxation and bond financing, and the word “private” to refer to toll roads financed, leased, and managed by private, for-profit corporations. The terms are used thus for convenience, though imagining a universal and rigid dichotomy between government as “public” and for-profit industry as “private” would be misleading in many other contexts.

<sup>60</sup> See Diller, *supra* note 16, at 1751–57; Pozen, *supra* note 16, at 253–54.

personnel.<sup>61</sup> These and other forms of privatization have become common. Contractual arrangements in which the government hires a private entity to implement a program or provide a good or service to the public while retaining some ownership or role in the endeavor are known as Public-Private Partnerships (“PPPs”).<sup>62</sup> The phrase suggests shared benefits and responsibilities and is preferred by privatization proponents; one author has noted that “public-private partnership” also raises less controversy than the word “privatization.”<sup>63</sup> Nevertheless, PPPs are one form of privatization.<sup>64</sup>

Governments are increasingly also turning to private industry to design, build, manage and operate infrastructure. Several models exist for these arrangements. Under one model, the private company designs and builds the asset and then turns it over to the government entity for operation.<sup>65</sup> These “design-build” contracts resemble procurement contracts more than service contracts in that the private company does not bear any responsibility for providing an ongoing service to the public. Conversely, a lease or concession agreement for an existing infrastructure asset, or a “design-build-finance-operate” contract for a new facility, turns over to a private company the management or operation of an infrastructure asset, typically for terms of ten years or more.<sup>66</sup> These may provide for the private company to be paid directly by the users of the service, through user fees or charges.<sup>67</sup> Municipal water systems and wastewater treatment are increasingly provided by private entities through

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<sup>61</sup> See Dickinson, *supra* note 16, at 385, 390–91.

<sup>62</sup> See Minow, *supra* note 16, at 1236.

<sup>63</sup> SAVAS, *supra* note 57, at 3–4.

<sup>64</sup> *Id.*

<sup>65</sup> U.S. DEP'T OF TRANSP. FED. HIGHWAY ADMIN., DESIGN-BUILD EFFECTIVENESS STUDY (2006), available at <http://www.fhwa.dot.gov/reports/designbuild/designbuild.pdf> [hereinafter DESIGN-BUILD EFFECTIVENESS STUDY].

<sup>66</sup> See Douglas Herbst & David Seader, *Providing Public Services Through Long-Term Service Agreements*, in LOCAL GOVERNMENT INNOVATION 105, 113 (Robin A. Johnson & Norman Walzer eds., 2000) (indicating a typical range of ten to twenty years for municipal water supply contracts); see also *id.* at 106–12 (providing a history of PPP use in water and wastewater management); SAVAS, *supra* note 57, at 241–47 (describing a spectrum of PPP arrangements used in infrastructure contracts).

<sup>67</sup> See SAVAS, *supra* note 57, at 88–89 (providing a chart depicting Savas' taxonomy of ten different arrangements for the provision of goods and services, from wholly public to wholly private, including various types of PPPs).

arrangements like these.<sup>68</sup> More recently, some U.S. cities have leased or plan to lease their airports under agreements similar to toll road privatizations.<sup>69</sup>

Toll road privatizations emerge as a curious hybrid between asset transfers and service contracts. They resemble service contracts in that the company agrees to provide a specified service to the contract, and in that states typically retain ownership of the asset as well as a good deal of oversight and control of the service to be provided. One marked difference between toll road privatizations and other service contracts, and even other infrastructure privatizations, is the length of the lease terms. At up to ninety-nine years, the highway lease terms represent a full monetization of the asset—as would the sale or long-term lease of an asset over which the government no longer chose to exercise control.<sup>70</sup>

### *B. Rationales for Privatization*

A political sentiment that government has expanded too much, and would better be confined to a more limited role, has been a large part of the driving force behind the modern privatization trend.<sup>71</sup> This represents a major perceptual shift from recent generations. Government agencies are now seen as inefficient, unresponsive, and rife with opportunities for fraud, abuse, and failure of oversight.<sup>72</sup> Legislatures, in turn, are viewed as beholden to special interests and out of touch with the public good. Even cultural markers of our time indicate this shift. The men and women we once called “public servants” we are more likely to label “bureaucrats.” Government buildings have also undergone a devolution during this time, from the

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<sup>68</sup> See Herbst & Seader, *supra* note 66, at 107–14; Arnold, *supra* note 16, at 569.

<sup>69</sup> Casey Andrew Burton, Comment, *An Analysis of the Proposed Privatization of Chicago's Midway Airport*, 72 J. AIR L. & COM. 597, 597–98, 600–01 (2007).

<sup>70</sup> NW FINANCIAL GROUP, LLC, THE CHICAGO SKYWAY SALE: AN ANALYTICAL REVIEW 1 (2006) [hereinafter CHICAGO SKYWAY SALE], available at <http://www.nwfinancial.com/pdf/thechicagosalereport.pdf>. An example of an asset transfer accomplished by long-term lease would be a mineral lease.

<sup>71</sup> Ronald A. Cass, *Privatization: Politics, Law, and Theory*, 71 MARQ. L. REV. 449, 451–52 (1988).

<sup>72</sup> See, e.g., Gary Peller, *Public Imperialism and Private Resistance: Progressive Possibilities of the New Private Law*, 73 DENV. U. L. REV. 1001, 1005 (1995) (describing public schools in such terms); Freeman, *supra* note 87, at 1317 (indicating that government agency oversight is often ineffective).

gleaming marble edifices of the mid-twentieth century to the uninspiring utilitarian boxes of today.<sup>73</sup>

In contrast, during this same period, business and entrepreneurship have enjoyed an upswing in esteem, with confidence shifting from the government to the markets. In this light, governments are further distrusted for having a monopoly on the goods and services they provide, and thus, having no incentive to improve quality.<sup>74</sup> As for any concerns about democratic accountability, privatization advocates assure us that the market democratizes itself as consumers and shareholders “vote with their feet,” or their dollars, to promote quality goods and services.<sup>75</sup>

This broad political shift shapes the assumptions underlying the specific justifications for allowing private business to take over some government functions. An oft-cited reason for privatization is efficiency. By privatizing a service, government can take advantage of efficiency gains that come with private business, such as management structures, specialized expertise, and innovation. Private for-profit companies, the reasoning goes, have an incentive to invest in cost-saving improvements and to eliminate wasteful spending—the government does not. A private company may also have the ability to attract investment, which is especially important in areas like infrastructure, which require large up-front infusions of cash. In tough economic times, an infrastructure privatization can simultaneously provide a funding source for a needed upgrade and an infusion of additional revenue to the government. Finally, privatization might allow government to allocate some financial and political risks to the private sector.<sup>76</sup>

### C. *Best Cases for Privatization*

As privatization has become accepted, a rough consensus has emerged about the kinds of government functions best suited for

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<sup>73</sup> Ellen Dannin, *Red Tape or Accountability: Privatization, Public-ization, and Public Values*, 15 CORNELL J.L. & PUB. POL'Y 111, 127 (2005).

<sup>74</sup> SAVAS, *supra* note 57, at 122–24.

<sup>75</sup> Alfred C. Aman, Jr., *Privatization and the Democracy Problem in Globalization: Making Markets More Accountable Through Administrative Law*, 28 FORDHAM URB. L.J. 1477, 1493–94 (2001) (internal quotation marks omitted) (describing this phenomenon as a justification for airline deregulation).

<sup>76</sup> SAVAS, *supra* note 57, at 252–54 (citing the ability to relieve government of involvement in rate-setting as a beneficial reallocation of a political risk).

privatization. The best candidates are those services which stand to gain from the advantages of private business without running aground on problems that arise from conflicting goals or from failures in accountability.

Services most likely to reap private sector advantages are those for which the private sector has greater expertise than the public sector, particularly those with existing competition within the private sector.<sup>77</sup> In transportation, design-build contracts offer a good example of this. Various engineering and construction teams compete with each other in bidding to design and build infrastructure projects, bringing the benefits of engineering expertise, industry knowledge, and the ability to mobilize construction teams as necessary to complete projects in a timely manner. Design-build contracts have therefore become common in new highway construction.<sup>78</sup> In addition, areas with a potential for increased efficiency or value through innovation are good cases for privatization. An example for this may be information technology services such as software or website development. Finally, projects that need an up-front investment of capital—raised more easily by private investment—and projects that are subject to risks that the private sector is best able to bear, are good cases for privatization.<sup>79</sup>

Government programs and services least likely to run into the accountability problems this Article has outlined are those services that are the easiest to define with specificity and that do not entail much discretion on the part of the contracting party.<sup>80</sup> Where the goals of a program are not contentious and the contractor is performing a task with no policymaking discretion, the need for public input into the contracting process lessens. More problematic candidates for privatization are government functions that have serious potential to implicate individual

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<sup>77</sup> See JOEL F. HANDLER, *DOWN FROM BUREAUCRACY: THE AMBIGUITY OF PRIVATIZATION AND EMPOWERMENT* 86–87 (1996).

<sup>78</sup> DESIGN-BUILD EFFECTIVENESS STUDY, *supra* note 63, at i–ii (stating that, between 1990 and 2002, 300 projects in 32 states were proposed for design-build contracting, and of those 140 projects were completed).

<sup>79</sup> SAVAS, *supra* note 57, at 252–54.

<sup>80</sup> Jody Freeman, *Extending Public Accountability Through Privatization: From Public Law to Publicization*, in PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS AND EXPERIENCES 83, 105 (Michael W. Dowdle ed., 2006) (discussing tasks of various degrees of specificity).



rights,<sup>81</sup> particularly if one of the government's reasons for the privatization effort is a desire to evade legal accountability mechanisms now in place.<sup>82</sup> Finally, privatizing government services works best where there is a credible threat of replacement for the contracting party; otherwise, privatization may carry with it a danger of entrenchment.<sup>83</sup> Entrenchment brings risks of poor service or the possibility of overcharging the government or the users.<sup>84</sup>

#### D. Potential Hazards of Privatization

##### 1. The Problems of Conflicting Goals

The first concern raised by any privatization effort is the potentially conflicting goals of the public and private sectors. Privatization proceeds under the assumption that the participants already agree what the proper goals are, and that the only debate is about finding the best, or the most economical, means to achieve them.<sup>85</sup> For some services, agreement on goals is relatively easy: The goal of municipal trash collection is to pick up the trash at regular intervals. However, it is often difficult to reach agreement about the underlying goals of a government program. For example, the mass privatization of welfare programs in the "welfare-to-work" transition of the 1990s was hailed as a success from the point of view of reducing the number of people on the welfare rolls, but may have been less successful at the goal of bringing mothers and children out of poverty.<sup>86</sup>

Tensions can also arise from conflicts between the public goals of a program and the profit-oriented goals of the private

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<sup>81</sup> Private prisons have been criticized on these grounds, though the availability of judicial recourse for prisoners has somewhat served to allay these concerns. *See, e.g., Aman, supra note 75, at 1489–91; Gillian E. Metzger, Privatization as Delegation, 103 COLUM. L. REV. 1367, 1393–94 (2003); Pozen, supra note 16, at 276–81.*

<sup>82</sup> Freeman, *supra note 80, at 108–09.*

<sup>83</sup> HANDLER, *supra note 77, at 85.*

<sup>84</sup> "[T]he choice between profit seekers and civil servants depends on whether . . . contractors can be replaced . . ." *Id.*

<sup>85</sup> Cass, *supra note 69, at 452.*

<sup>86</sup> Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121, 1123 (2000).

entity running it.<sup>87</sup> As private companies strive to achieve the cost savings that are often the goal of any privatization, the profit motive may create incentives for the private company to achieve those costs savings at the expense of quality or amount of services to be provided. The profit motive might also lead companies to overcharge the government for services, or to charge excessive user fees.<sup>88</sup> At worst, lack of transparency may provide opportunities for poor quality, inefficiency, fraud, or graft.<sup>89</sup> Commentators have pointed to such abuses in a wide range of privatizations such as military support services, Medicare, municipal water services, and parks management.<sup>90</sup>

## 2. Challenges to Democratic Accountability

The second major set of concerns arising out of privatizations is the potential to undermine essential public law values of democratic participation and accountability when activities migrate from the public to the private sphere.<sup>91</sup> A core value in any democratic form of government is the participation of the governed in the act of governing. Accountability, in turn, stands for the degree to which the policies and activities of governance are subject to monitoring through the political process.<sup>92</sup> Citizens

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<sup>87</sup> Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1339 (2003); Metzger, *supra* note 81, at 1408; Minow, *supra* note 16, at 1248–49.

<sup>88</sup> See John J. DiIulio, Jr., *Government by Proxy: A Faithful Overview*, 116 HARV. L. REV. 1271, 1282–83 (2003) (explaining how profit motive can conflict with public motive); see Arnold, *supra* note 16, at 584–85 (describing private water companies' opportunities to exploit monopoly position by charging excessive rates).

<sup>89</sup> Dannin, *supra* note 73, at 136 (“[W]hen temptations to shirk or defraud exist, we need a binding web of laws to ensure accountability.”).

<sup>90</sup> *E.g.*, Ellen Dannin, *To Market, to Market: Legislating on Privatization and Subcontracting*, 60 MD. L. REV. 249, 252 (2001) (detailing how a contractor hired to operate California state parks reservation system absconded with nearly \$1 million); *id.* at 253 (detailing the corruption and waste in California Department of Transportation engineering contracts); *id.* at 254 (detailing how a company managing a municipal water system in Georgia falsified water quality records); see, *e.g.*, GOMEZ-IBANEZ & MEYER, *supra* note 19, at 70 (citing an example of reduced-quality bus services due to use of lower-paid, and lower-skilled, drivers); see also Dickinson, *supra* note 16, at 399 (citing examples of inefficiency, fraud, and graft in military support services in Iraq). See generally Michele Estrin Gilman, *Legal Accountability in an Era of Privatized Welfare*, 89 CAL. L. REV. 569 (2001) (citing abuses in the administration of welfare-to-work programs).

<sup>91</sup> For the purpose of this article's analysis, I accept as normative values these ideals of democracy and accountability. See *infra* Part IV.C.

<sup>92</sup> Beermann, *supra* note 59, at 1507.

should have access to enough information about the government's actions to hold elected officials responsible for their consequences. Thus, both "pre-decision accountability" in the form of participation and "post-decision accountability" in the form of monitoring are key democratic values.<sup>93</sup>

Recently, many scholars have described challenges to these democratic values that emerge as governments increasingly partner with the private sector to provide public services.<sup>94</sup> For democratic participation to take place prior to a major governmental decision, affected citizens need access to information about the decision and a means for registering their comments. Therefore, one concern about privatizations is a lack of opportunity for the public to obtain information regarding proposals and to comment on them prior to their enactment, even when the program shift has the potential for broad impacts. The procurement rules that apply to government purchases have been designed to guard against fraud and graft, but they neither anticipate the need for nor allow public input into the policy decisions implicated.<sup>95</sup> Because privatization of government services differs from ordinary procurement, the existing laws are not a good fit.

Another concern is that lack of access to information hampers public monitoring, diminishing post-decision transparency that would allow citizens to assess the quality of the privatized service and to hold agencies and officials accountable after the fact. Where a government entity contracts out a function, laws designed to increase governmental transparency and accountability, including the Freedom of Information Act and most corresponding state open records acts, generally do not apply to the private entities.<sup>96</sup>

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<sup>93</sup> I borrow these terms from Ellen Dannin. See Dannin, *supra* note 73, at 130.

<sup>94</sup> See, e.g., Arnold, *supra* note 16; Beerman, *supra* note 59, at 1520 ("[O]nce an asset becomes private, its use is likely to be subject to less government supervision than when it was under public ownership, so an accountability issue does exist."); see also Barbara L. Bezdek, *Contractual Welfare: Non-Accountability and Diminished Democracy in Local Government Contracts for Welfare-to-Work Services*, 28 *FORDHAM URB. L.J.* 1559 (2001).

<sup>95</sup> Bezdek, *supra* note 94, at 1569–70.

<sup>96</sup> 5 U.S.C.A. §§ 552(j)–(l) (West 2007); Aman, *supra* note 75, at 1501; Bezdek, *supra* note 94, at 1560, 1569–70; Beermann, *supra* note 59, at 1553–54; 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, 37–43 (1999). Though some state open records laws have been extended to some private actors,

### III. THE CASE OF PRIVATIZED TOLL ROADS: BENEFITS AND DRAWBACKS

States have three basic options for providing and maintaining roadways: publicly operated roads, free to users and paid for by taxes; publicly operated toll roads, typically financed with bonds repaid through user fees in the form of tolls; and privately financed and operated toll roads.<sup>97</sup> At this point, the vast majority of U.S. highways are publicly-financed roads, free to the public.<sup>98</sup> A growing minority of roads are toll roads, most of those operated by public authorities.<sup>99</sup> As states consider the relative newcomer, privatized toll roads, they should do so with an eye to both the potential advantages to be gained and hazards to be avoided. Keeping these considerations in view will help states make the best decision between the options that are available.

Many aspects of the operation of a road make it appear exactly the sort of task ideally suited to private contracting: The risk of some potential hazards is low, and some potential benefits are evident. The quality of the road, the level of maintenance, and other similar terms can be determined and agreed to in advance with great levels of specificity by contract, which eliminates much of the risk of poor quality that can happen in the privatization of less-concrete services. Similarly, the privatization of toll roads does not bear much risk of serious

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this is the exception rather than the rule. Patience A. Crowder, "Ain't No Sunshine": *Examining Informality and State Open Meetings Acts as the Anti-Public Norm in Inner-City Redevelopment Deal Making*, 74 TENN. L. REV. 623, 641–42 (2007); see also *id.* at 641–46 (discussing the applicability of state open meetings acts to public-private partnerships).

<sup>97</sup> States may also consider improvements to cycling infrastructure or turn to rail and other forms of public transportation to meet a portion of their mobility needs.

<sup>98</sup> In 2006, there were 4,033,012 miles of federal-aid highways in the United States. U.S. DEP'T OF TRANSP. FED. HIGHWAY ADMIN., FEDERAL-AID HIGHWAY LENGTH (2006), <http://www.fhwa.dot.gov/policy/ohim/hs06/pdf/hm14.pdf>. In contrast, as of 2007, there were just 2,908 miles of toll roads on the Interstate System and 1,938 miles of non-Interstate toll roads. U.S. DEP'T OF TRANSP. FED. HIGHWAY ADMIN., TOLL MILEAGE TRENDS: 2007 TOLL FACILITIES IN THE UNITED STATES, available at <http://www.fhwa.dot.gov/ohim/tollpage/mile trends.htm#table2>.

<sup>99</sup> See U.S. DEP'T OF TRANSP. FED. HIGHWAY ADMIN., FEDERAL-AID HIGHWAY LENGTH (2006), available at <http://www.fhwa.dot.gov/policy/ohim/hs06/pdf/hm14.pdf>; U.S. DEP'T OF TRANSP. FED. HIGHWAY ADMIN., TOLL MILEAGE TRENDS: 2007 TOLL FACILITIES IN THE UNITED STATES (2007), available at <http://www.fhwa.dot.gov/ohim/tollpage/mile trends.htm#table2>.

infringement of personal rights, because toll road operators will not have direct control over the lives of vulnerable individuals, as do prison operators and Medicare providers.

In addition, the potential for certain advantages is high. States can benefit from innovations offered by private operators. The companies bidding on these contracts have enormously more experience operating toll roads than do state governments. Large multinational corporations building toll roads around the world can offer the latest innovations in safety systems and toll-collection technology, can achieve economies of scale by using these technologies for more than one project, and can leverage funds to finance up front large-scale projects that state governments would otherwise pay for over a period of many years.

#### A. *Tensions Inherent in Conflicting Goals*

Toll road privatizations, however, also raise conflicts between the various state goals and the goals of the toll road concessionaire—conflicts that can ultimately undermine state goals and potentially harm the public. From a state government's point of view, the primary reason for leasing a toll road is financial. States seeking ways to fund repairs and upgrades to transportation infrastructure see a welcome solution in the concessionaire's promise to maintain the toll road and its upfront payment of cash to fund other transportation needs. Beyond that, state toll road enabling laws present an array of reasons for the practice. Congestion relief is often cited,<sup>100</sup> along with goals related to efficiency,<sup>101</sup> safety,<sup>102</sup> economic development,<sup>103</sup> and expedited delivery of completed roadways.<sup>104</sup> No statute offers a more sweeping range of reasons for privatization than the Pennsylvania bill proposed in 2008, which added to these goals promises of "abating environmental pollution, advancing energy efficiency and conservation,

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<sup>100</sup> See, e.g., DEL. CODE ANN. tit. 2, § 2001(d)(3) (2008); VA. CODE ANN. § 56-558(A)(1) (2008).

<sup>101</sup> See, e.g., DEL. CODE ANN. tit. 2, § 2001(d)(1); VA. CODE ANN. § 56-558(A)(1).

<sup>102</sup> See, e.g., FLA STAT. § 334.30 (2008); VA. CODE ANN. § 56-558(A)(1).

<sup>103</sup> See LA. REV. STAT. ANN. § 48:2072(A) (2008) (describing transportation as essential to Louisiana's "economic growth"); OR. REV. STAT. § 383.001(1) (2008) (describing transportation as essential to the "economic well-being" of the people of Oregon).

<sup>104</sup> See LA. REV. STAT. ANN. § 48:2072(C); VA. CODE ANN. § 56-558(A)(3).

improving homeland security, increasing capacity . . . and [raising] revenues available for public transportation purposes.”<sup>105</sup>

However, several of the asserted goals of road privatization may be in conflict with each other, and with the private operator’s profit motive. The chief point of tension between public and private ends lies in the potential for excessive user fees in the form of tolls, which can rise substantially under a lease or concession. An examination of such toll-cap provisions in existing toll road concession agreements led the U.S. Government Accountability Office to conclude that “the public could pay higher tolls than those that would more appropriately reflect the true costs of . . . maintaining the facilities, including earning a reasonable rate of return.”<sup>106</sup>

The Chicago Tollway concession agreement provides the initial model.<sup>107</sup> The agreement sets forth a specific schedule for toll increases over the first ten years of the lease, then allows annual increases equal to the greater of two percent, the percent increase in per capita gross domestic product (“GDP”), or the percentage increase in the consumer price index.<sup>108</sup> Future toll caps are therefore uncertain, since no one can predict what the GDP will be over the next ninety-nine years; in fact, the Government Accountability Office’s own figures only project GDP for forty years.<sup>109</sup> However, GDP has historically risen much more sharply than wages.<sup>110</sup> If a similar pricing scheme had been applied to the Pennsylvania Turnpike from 1940 to 2007, the cross-state toll would have risen to \$553, instead of the actual rate of \$22.75.<sup>111</sup> Therefore, the steadily increasing caps on prices, over time, will likely leave ample room for the toll road company to set rates at whatever the market will bear.

Inextricably tied to toll setting are the other dominant goals of mobility improvement and congestion relief. Toll roads operate according to the basic laws of supply and demand: As the price increases, fewer users use the roads. A California

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<sup>105</sup> H.B. 2593, 190th Gen. Assemb., Reg. Sess. (Pa. 2008).

<sup>106</sup> GAO REPORT, *supra* note 5, at 32.

<sup>107</sup> *See id.* at 31.

<sup>108</sup> *See id.* at 31–32.

<sup>109</sup> *See id.* at 31.

<sup>110</sup> Farber, *supra* note 38, at 36.

<sup>111</sup> *See id.*

concession used a strategy called "congestion pricing," whereby travelers paid more to use the roads at high-demand times than during off-peak hours.<sup>112</sup> Because a smaller segment of the population could reasonably afford to pay the tolls, the new lanes led to charges of elitism and prompted detractors to refer to them as "Lexus lanes."<sup>113</sup>

Beyond the charges of elitism, however, are even greater public concerns about how the sorting effect of tolling will affect overall regional traffic patterns. The ideal price from the point of view of a toll road operator may not be the same as the ideal price for regional congestion management.<sup>114</sup> Typically, if a private toll road concessionaire can achieve greater revenues from fewer users at a higher price than they can from more users at a lower price point, it will act in accordance with this economic incentive. To illustrate the point, imagine that, when a segment of road is priced at one dollar, the number of cars using that route during a particular hour will be 5,000, generating \$5,000 of revenue. If that same road will still attract 3,000 users when the toll is tripled to three dollars, bringing in \$9,000 during that same hour, then an operator with the ability to charge the higher toll has every incentive to do so, regardless of what level of usage represents the optimal use of the road. While a high-priced toll lane might provide a speedy commute for the driver willing and able to pay for it, as the price goes up, other drivers will divert to local routes. Therefore, concession agreements that give operators wide latitude for toll setting within a potentially generous cap may result in less than optimal use of the roads, as drivers unable or unwilling to pay the increased fees will clog surrounding roads.<sup>115</sup> The externalities associated with this shift affect local communities, not just the potential toll road users. More crowded local routes increase vehicle emissions pollution caused by cars idling in traffic, and could also diminish rather than enhance overall road safety as a greater proportion of

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<sup>112</sup> Alan Sipress, *Paying for Space in the Fast Lane: Md. Plan Targets Congestion*, WASH. POST, May 18, 1999, at A01.

<sup>113</sup> Amy Argetsinger & Steven Ginsberg, *Lessons of California's Toll Lanes: Appeal and Hazards Offer Glimpse of Va. Beltway To Come*, WASH. POST, June 20, 2005, at A01 (internal quotation marks omitted).

<sup>114</sup> See GAO REPORT, *supra* note 5, at 7.

<sup>115</sup> See Ellen M. Erhardt, Note, *Caution Ahead: Changing Laws To Accommodate Public-Private Partnerships in Transportation*, 42 VAL. U. L. REV. 905, 952 (2008).

accidents take place on non-access-controlled roads. In short, an inflated toll structure has the potential to undermine several of the major goals that states have identified as reasons to pursue road privatization efforts in the first place.

Another related potential source of conflict between a state and a toll road operator arises from the operator's desire to limit competition with the toll road. A private company naturally wants to see a return on its large up front investment, and does not want to see its project underused due to competition from improved free roads.<sup>116</sup> Therefore, concessionaires typically ask state transportation departments to agree not to widen or construct roadways within a certain distance of the toll road.<sup>117</sup> The cautionary tale of highway non-competition clauses arose from the Riverside Freeway (SR-91) in California. There, the state agreed to allow a private company to lease the median of this Southern California freeway in order to build four tolled lanes, two in each direction.<sup>118</sup> The project was innovative in that the lanes functioned both as high-occupancy vehicle lanes ("HOV lanes"), allowing passenger cars with three or more occupants to pass through toll-free, and as an experiment in congestion pricing, with greater tolls at high-use times.<sup>119</sup> The lease also restricted the state's right to expand or improve the adjacent lanes, which led to a lawsuit under which the concession company sued the State of California for making improvements prohibited by the contract.<sup>120</sup> The issue was resolved only when the state ended the concession agreement prematurely, paying

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<sup>116</sup> Non-competition clauses for toll roads are not new; they have typically been included as a prerequisite to public financing as well. The Interstate System Construction Toll Pilot Program prohibits non-competition agreements in PPPs only on toll roads that form part of the Interstate System. See Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, 119 Stat. 1144, 1253 (2005).

<sup>117</sup> See GAO REPORT, *supra* note 5, at 35–36.

<sup>118</sup> See Glen Creno, *New Transit Plan May Call for New Sources of Funding*, ARIZ. REPUBLIC, Dec. 9, 2007, at 19; Scott Powers, *Tolls Can Ease I-4 Woes—at a Price: Some Support the Idea, but Critics Said Pay Lanes on Freeways Only Benefit Rich Drivers*, ORLANDO SENTINEL, Sept. 28, 2003, at B1.

<sup>119</sup> See Carl B. Williams, *Are HOV Lanes Alone Effective?*, ENGINEERING NEWS-REC., Sept. 23, 1996, at 111.

<sup>120</sup> GAO REPORT, *supra* note 5, at 35–36; David Danelski, *Highway 91 Toll Lanes Go Public: COMMUTING: Officials Are Still Unsure Whether the Ownership Change Will Reduce Fares for Drivers*, PRESS ENTERPRISE, Jan. 4, 2003, at B01.



the company \$207.5 million to buy back the lease only eight years into its planned thirty-year term.<sup>121</sup>

The extraordinary length of toll road leases only enhances potential tensions between toll levels and traffic mitigation goals. The long terms of the agreements arise in part from the economic benefit that the toll road company gets by claiming accelerated depreciation for tax purposes.<sup>122</sup> In order for the concessionaire to qualify as an owner eligible to deduct depreciation, the lease term must exceed the useful life of the asset.<sup>123</sup> Of course, concessionaires also want long leases for another reason as well: Longer leases provide a longer future income stream to the concessionaire. The state's own budget pressures may also cause governors and transportation departments to favor longer terms, because toll road operators can offer a higher up-front price, allowing the state to count on more years of income. Therefore, long lease terms have become an essential part of the financial structure of any toll road privatization deal.

However, each decade these agreements extend into the future multiplies the uncertainties about the extent of toll increases and the changing transportation needs of the state, therefore increasing the likelihood of conflict between the public goals of the program and the profit motive of the company. Continuing to allow long lease terms without building in any protective mechanisms runs the risk of deal terms that will place an unacceptable burden on future generations.

### *B. How Privatized Toll Roads Challenge Democratic Values*

This section will examine the harms to the core values of democracy and accountability that can occur, and in some cases, have occurred, in the privatization of toll roads.

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<sup>121</sup> GAO REPORT, *supra* note 5, at 35–36; Danelski, *supra* note 118.

<sup>122</sup> Memorandum from the Subcomm. on Highways and Transit Staff to the Members of the Subcomm. on Highways and Transit, Hearing on Public-Private Partnerships: Innovative Financing and Protecting the Public Interest 7 (Feb. 12, 2007), available at <http://transportation.house.gov/Media/File/Highways/20070213/ssm.pdf>.

<sup>123</sup> See 26 U.S.C.A § 168(g)(5) (2008); Memorandum from the Subcomm. on Highways and Transit Staff to the Members of the Subcomm. on Highways and Transit, Hearing on Public-Private Partnerships: Innovative Financing and Protecting the Public Interest 7 (Feb. 12, 2007), available at <http://transportation.house.gov/Media/File/Highways/20070213/ssm.pdf>; see also GAO REPORT, *supra* note 5, at 26.

## 1. Pre-Decision Accountability

For democracy to function in any society, institutions and practices must be in place to “support democratic engagement and participation by individuals and groups in the tasks of self-government.”<sup>124</sup> Citizens cannot be mere recipients or purchasers of government services; they must also participate in the act of governance itself.<sup>125</sup> When toll roads are privatized, there are few opportunities for interested citizens to voice their preferences during the process leading to the initial lease decision. Individuals do, in a sense, “purchase” the opportunity to drive on the roadway through the payment of user fees in the form of tolls. The shift from a participatory role to a consumer role changes the role of individuals vis-à-vis their government from one of citizens to one of consumers. This itself erodes the ideals of a democratic society.<sup>126</sup>

Certainly not all government actions provide equal opportunity for participation. For example, the disposition of government assets is generally presumed to have little impact on the public and takes place free from many of the procedural constraints that govern other agency actions.<sup>127</sup> Nevertheless, toll road leases involve more than a series of financial transactions with drivers or the disposition by lease of a government asset. Toll road operators also become responsible for providing an essential governmental service that will affect the greater community, with impacts on commerce, the environment, and the state budget that will be felt for generations to come. The privatization decision itself is a significant act of governance that should be made in a way that supports democratic values. When a government agency considers pursuing a major privatization effort, affected parties should have meaningful access to information about the proposal and the opportunity to voice their opinion.<sup>128</sup> In the case of toll

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<sup>124</sup> MINOW, *supra* note 59, at 46.

<sup>125</sup> Dannin, *supra* note 73, at 157.

<sup>126</sup> See Aman, *supra* note 75, at 1504; see also Dannin, *supra* note 90, at 263.

<sup>127</sup> See Harold J. Krent & Nicholas S. Zeppos, *Monitoring Governmental Disposition of Assets: Fashioning Regulatory Substitutes for Market Controls*, 52 VAND. L. REV. 1705, 1708 (1999). The authors argue for procedural protections even in asset disposition. See *id.*

<sup>128</sup> See Beermann, *supra* note 59, at 1509; Dannin, *supra* note 73, at 121–22; Minow, *supra* note 16, at 1248–50.

roads, this would include the ability of the public to review facts about privatization proposals, bids, and contracts.<sup>129</sup>

Those affected by toll roads include, of course, the roads' potential users. They also include residents of communities near the route who may have concerns about traffic or environmental problems arising from cars using local roads to avoid tolls and local jurisdictions whose own development plans will be affected by any new road or changes in road access points or usage. State officials and legislative committees responsible for transportation planning and fiscal oversight also have an interest in toll road privatizations. All of these potential stakeholders should have an opportunity to examine and consider any preliminary plan before the proposal is put out to bid. If a proposal arises out of an unsolicited bid, then the key terms of that proposal should be subject to examination and review before the proposal is put out for competing bids. The process should also include mechanisms for public comment and for the agency to respond to these comments, and should require some analysis of competing proposals that have been offered.

It is crucial that notice and comment come early in the decision-making process. In Texas, the state had already substantially negotiated several deals prior to holding hearings required by the state's road privatization statute.<sup>130</sup> Those public hearings mobilized huge opposition to Trans-Texas Corridor projects, particularly in rural areas,<sup>131</sup> immediately positioning the state government and its rural citizens as opponents instead of as partners in governing. Meanwhile, the Texas Department of Transportation ("TxDOT") released a request for detailed proposals in the middle of the first round of hearings.<sup>132</sup> Then, while support for a legislative moratorium on toll road privatizations was growing, TxDOT quietly entered into a concession agreement for a section of State Highway 130, not even issuing a press release following the event.<sup>133</sup> The

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<sup>129</sup> See Feiser, *supra* note 96, at 29.

<sup>130</sup> TEX. TRANSP. CODE ANN. § 227.013 (Vernon 2008).

<sup>131</sup> See Roger Croteau, *Rural Areas Wary of Trans-Texas Plan*, SAN ANTONIO EXPRESS-NEWS, May 16, 2005, at B1.

<sup>132</sup> See *id.*

<sup>133</sup> The only indication that an agreement had been signed was an update to a web page listing "Comprehensive Developments Agreements," which changed the project's listed status from "negotiations ongoing" to "Date Signed: March 22, 2007." Tex. Dep't of Transp., Comprehensive Development Agreements,

Department's timing indicated that it had little interest in incorporating any public comment into its decision-making.<sup>134</sup>

TxDOT also created enemies within the state government. The Texas Sunset Advisory Commission, a legislative committee that recommends whether agency enabling statutes should be renewed, released to the legislature a scathing critique of the bidding process, stating that "distrust permeated most of TxDOT's actions" and determined that "it could not be an effective state transportation agency if trust and confidence were not restored."<sup>135</sup> The Commission's recommendations included a reworking of the planning and development process and utilizing "[consistent and] meaningful public involvement."<sup>136</sup> The backlash eventually led to the redesign of some projects, the abandonment of others, and a complete overhaul of the state's road privatization enabling statute.<sup>137</sup>

In Pennsylvania, the governor and his financial advisors planned, collected bids for, and negotiated a complete contract for the lease of the Pennsylvania Turnpike, largely behind closed doors, before the legislature had even considered enabling legislation to allow the practice.<sup>138</sup> Some lawmakers naturally bristled at this turn of events, and the proposed legislation did

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<http://www.txdot.gov/business/partnerships/cda.htm> (last visited Jan. 27, 2009); see *TxDOT Secretly Signed Toll Concession at the Height of the Moratorium Furore*, TOLL ROADS NEWS, Mar. 29, 2007, <http://www.tollroadsnews.com/node/65>.

<sup>134</sup> See Tex. Dep't of Transp., TTC-35 Project Milestones, available at <http://ttc.keeptexasmoving.com/projects/ttc35/milestones.aspx>. TxDOT held its first round public hearings, introducing the project and soliciting public comments, from April to June 2004 and issued a request for proposals in April. *Id.* The final round of public hearings, gathering comments about possible routes, took place from February through the end of March 2005, and the comprehensive development agreement was signed on March 11. *Id.*

<sup>135</sup> SUNSET ADVISORY COMM'N, TEX. DEP'T OF TRANSP., STAFF REPORT 1 (2008) (on file with *St. John's Law Review*).

<sup>136</sup> *Id.* at 35.

<sup>137</sup> Act of June 11, 2007, ch. 264, 2007 Tex. Sess. Law Serv. 458 (West), (substantial revision to the state's toll road privatization statute, described in detail *infra* Part IV.B); see Rad Sallee, *Trans-Texas Corridor Plans Take a Detour: State Rules Out Building Roads Through Rural Areas and Now Says It Will Stick to Major Highways*, HOUSTON CHRON., June 11, 2008 ("The Texas Department of Transportation . . . abandoned plans to build [new roadways] through rural areas [as part of TTC-69] . . ."); *Feds Order TxDOT Halt on US281 Toll Lanes Work North of San Antonio*, TOLL ROADS NEWS, Jan. 12, 2006, <http://www.tollroadsnews.com/node/1411> (describing how TxDOT plans for US-281 project were cancelled after public lawsuits led to withdrawal of FHWA approval).

<sup>138</sup> See Scoloro, *supra* note 12.

not pass in time for the deal to go through.<sup>139</sup> Thus, a lack of transparency may well have contributed to the demise of the two largest toll road privatizations planned to date.

Given that one major goal of privatization is the injection of market competition into areas formerly under the sole purview of governments, it makes sense that public agencies should be included among the entities who submit bids for work to be contracted out.<sup>140</sup> In effect, public employees should be afforded the opportunity to compete for their jobs.<sup>141</sup> Although up until now, public entities have not been able to participate in bidding once a privatization decision is made, the Federal Highway Administration is currently considering amending its rules in order to allow the practice.<sup>142</sup> The amendment would allow a public entity to either submit a bid for itself or join a team with other entities to submit a bid.<sup>143</sup> The rule change is important in order to allow the greatest possible competition at the only competitive phase in a lease process. Once a contract has been awarded, the state is bound to one provider for the term of the lease. This leaves citizens with only the barest of consumer choices with respect to the privatized service: Buy it, or forgo it.<sup>144</sup>

## 2. Post-Decision Accountability

With no opportunity for either exit or amendment, the current structure of toll road leases leaves state governments with few ways of holding toll road companies accountable for the service they provide. Post-decision accountability requires that government officials who enter into contracts for the provision of public services be held responsible for the consequences.<sup>145</sup> The

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<sup>139</sup> Nussbaum, *supra* note 12.

<sup>140</sup> See Janna J. Hansen, Note, *Limits of Competition: Accountability in Government Contracting*, 112 YALE L.J. 2465, 2470, 2504 (2003).

<sup>141</sup> See *id.* at 2504.

<sup>142</sup> Notice of Proposed Rulemaking, 73 Fed. Reg. 58,908, 58,909–10 (Oct. 8, 2008).

<sup>143</sup> *Id.* at 58,910.

<sup>144</sup> A citizen may not have the luxury of forgoing the service if his or her residence, particularly in a remote area, renders use of the toll road an unavoidable necessity.

<sup>145</sup> Minow, *supra* note 16, at 1266 (“The polity must ensure that governments, as representatives of the public, retain the option to exit relationships with private entities, the means to express disagreements with the ways in which the private

maintenance of an opportunity for exit is part of the legitimization of any public action.<sup>146</sup> The length of current toll road leases eliminates this fundamental democratic value, as states can only “buy back” leases at prohibitively high prices under terms of default. Public entities should also retain the opportunity to amend contracts in the future.<sup>147</sup> Yet current toll road leases in the United States lack any meaningful opportunity to amend. All of the clauses affecting tolls, congestion, and competition are decided in advance, to remain in effect for the duration of the lease. Again, a measure of accountability is thereby lost. Without either the opportunity to exit or amend agreements, a government has little way of managing future tensions between competing goals in toll road leases and no way of holding the toll road company accountable for problems that arise from those conflicts.

Future generations directly affected by the privatization decision will have no opportunity to hold any elected official accountable for the decision. Where, as in toll road leases, the public is bound to a contract for three or more generations, it is unlikely that the original parties to the agreement will still be living—never mind still be in office—when its repercussions are still being felt. This is political buck-passing. One generation of politicians reaps the benefit of an up-front cash payment today, leaving future citizens to live under a state government with no control over the toll rates on its roads and no right to the revenues generated.

#### IV. PROPOSED SOLUTIONS TO CONCERNS RAISED

Given that the financial benefits of toll road privatization will likely continue to attract the interest of state governments, it makes sense to look for solutions to problems raised by this new form of highway management. In order to increase sunshine and accountability in privatizations, some academics urge expansion of laws such as the Freedom of Information Act and the Administrative Procedures Act to reach private sector companies

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entities proceed, and the capacity to remain with the private entity as a vote of confidence.”).

<sup>146</sup> See Ilya Somin, Note, *Revitalizing Consent*, 23 HARV. J.L. & PUB. POL’Y 753, 761 (2000).

<sup>147</sup> Aman, *supra* note 75, at 1502 (urging “[n]egotiation, flexibility, feedback and opportunit[y] to amend” approaches to social policy issues).

that contract to provide public services<sup>148</sup> or argue that certain constitutional constraints should apply in cases of privatizations.<sup>149</sup> Others have pointed out that privatization actually affords an opportunity to expand, rather than curtail the scope of public law values.<sup>150</sup> Jody Freeman and others have suggested that through the careful use of tools including legislation and specific contracting, privatizations can be structured in ways that support accountability.<sup>151</sup> These tools are particularly appropriate here. As they enact or amend laws to enable toll road privatizations and negotiate agreements with toll road operators, states have already begun to wrestle with the promise and potential problems in road privatizations, testing and implementing a variety of solutions. This Part will propose specific laws and contract terms to strengthen accountability and to resolve the major tensions arising from the conflicting goals of toll road privatizations. It will also evaluate legislation and contracts that states have employed up to this point, in light of these goals.

#### A. *Contracting Tools*

In toll road privatizations, as in other forms of privatization, a contract has the potential to promote social policies and public law values.<sup>152</sup> For agreements that will bind the state for forty or more years, it is vital that contract provisions adequately protect the interests of both parties and the affected constituencies from potential problems arising from conflicting goals and diminished accountability. States can address key terms at one of three stages in the contracting process: They can incorporate mandatory contract provisions into their enabling laws, specify contract terms in their requests for proposals, or negotiate for them in the bidding and negotiation process. At one of these three stages, states should use their contracts to anticipate and balance the competing goals of revenue collection on the one

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<sup>148</sup> *Id.* at 1500–01; Crowder, *supra* note 96, at 624–25.

<sup>149</sup> Metzger, *supra* note 81, at 1456–71 (proposing that private delegation doctrine be restructured to subject to special scrutiny those types of privatization most likely to threaten constitutional accountability).

<sup>150</sup> Freeman, *supra* note 87, at 1285.

<sup>151</sup> *See id.* at 1285–86; Arnold, *supra* note 16, at 602–03 (pertaining to water infrastructure); Dickinson, *supra* note 16, at 385 (pertaining to foreign affairs contracts).

<sup>152</sup> Dickinson, *supra* note 16, at 401.

hand, and overall traffic mitigation on the other. Yet thus far, toll road leases and concession agreements in the United States have not built in adequate terms to protect the future interests of the states and their citizens.

States do use their toll road contracts to specify the level of service the toll road operator should provide. Contracting for performance targets is easier on specific, concrete issues. The toll road concessions to date generally do a good job addressing issues of safety, construction quality, environmental protection, and service levels. For example, the proposed Pennsylvania Agreement consists of a 132-page contract plus over 500 pages of attached schedules.<sup>153</sup> Schedule 8, Mandatory Capital Improvements, lists by name and location all of the bridges to be repaired, the on-ramps to be reconstructed, the toll plazas to be upgraded, and the lanes to be widened during the first ten years of the lease term.<sup>154</sup> Schedule 1 is an extensive operations manual, with such detailed terms as a protocol for response to “animal incidents,” including a mandated time frame for the removal of any resulting animal carcasses—eight hours.<sup>155</sup> Addressing public safety, all of the concession agreements to date contain provisions describing the state police’s jurisdiction over the roadway and arrange for police protection, usually with corresponding compensation from the toll road operator to the state. If states wish to impose specific, concrete terms of operation on a private partner, contracts can certainly contain the level of detail necessary to do so.

Some needs are harder to anticipate and address by contract, but it can be done. States should tackle the other issues, such as congestion relief and competition, through new contract provisions, better designed to address future needs. The foremost difficulty lies in the length of the lease agreements themselves. Already, the United States has seen toll road agreements running up to ninety-nine years in length.<sup>156</sup> Some states attempt to address this issue squarely by capping term

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<sup>153</sup> See PA. DEPT OF TRANSP., PENNSYLVANIA TURNPIKE CONCESSION AND LEASE AGREEMENT, DOC. NO. 1408172.43, available at <ftp://ftp.dot.state.pa.us/public/Bureaus/Press/PA%20Turnpike%20Concession.pdf> [hereinafter LEASE AGREEMENT].

<sup>154</sup> See *id.* sched. 8.

<sup>155</sup> See *id.* sched. 1, vol. 1, §§ J.3.3, J.4.4.

<sup>156</sup> See, e.g., *Northwest Parkway in Colorado Concessed to Brisa for \$603m—Lease Signed Today, Closing by Oct*, TOLL ROADS NEWS, Aug. 29, 2007, <http://www.tollroadsnews.com/node/3110>.



limits via their enabling legislation, with ceilings ranging from thirty to seventy-five years.<sup>157</sup> One option states should consider is limiting all toll road concession agreements to the term required for the private company to fully depreciate the asset for tax purposes. But even up to thirty, forty, or fifty years, states should proceed with extreme caution. As discussed in detail earlier, the long lease terms of currently drafted contracts increase the potential for a costly exchange of up-front financial benefits at the expense of future harms.<sup>158</sup>

Some states seek to manage the potential harms with rate caps. Pennsylvania attempted to avoid Indiana's shortsightedness by removing the GDP-indexed option from the toll cap equation in its proposed contract, but it also raised the basic "floor" increase cap from 2 percent to 2.5 percent.<sup>159</sup> In the long term, this arrangement could prove even more insidious. One analyst explained that because the toll road increases do not need to fall, or even stay steady in times of recession, the existing formulae do not result in the kind of "leveling out" we would see in most economic sectors during times of recession.<sup>160</sup> One analyst concluded that applying the maximum permitted toll increases under the Chicago Skyway lease to New York's Holland Tunnel over its first seventy years of operation would have resulted in a permitted toll as high as \$185 by 2007.<sup>161</sup> This was in large part because the "floor" provision would have permitted toll increases during the Great Depression, compounding the increases achieved during boom times.<sup>162</sup> Only time will tell whether the Indiana formula, with its inclusion of a GDP-indexed option, or the Pennsylvania formula, with its higher "floor" cap, will allow for greater increases.

Other states intend to limit potential abuses by limiting the investor's annual rate of return. A few states approach this with contract provisions that limit the company's rate of return on investment to a specified amount, with excess profits either folded back into the project or paid to the state.<sup>163</sup> This could

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<sup>157</sup> See FLA. STAT. § 334.30 (2008) (seventy-five-year limit).

<sup>158</sup> See *supra* Part III.B.2.

<sup>159</sup> LEASE AGREEMENT, *supra* note 153, sched. 2, § 3(a)(iii).

<sup>160</sup> See CHICAGO SKYWAY SALE, *supra* note 70, at 2.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> See, e.g., DEL. CODE ANN. tit. 2, § 2006 (2008).

have the effect of keeping tolls at a reasonable level, while providing the toll operator with the ability to make financial projections well into the future. However, it may also prevent the toll road operator from achieving an appropriate investment return at a time of economic prosperity. Florida requires that concession agreements include a formula for revenue sharing between the concessionaire and the state.<sup>164</sup> Thoughtfully structured, a revenue-sharing formula could provide a better incentive than an inflexible cap on rate of return: If the operator's share of the pie decreases as its revenues increase, there is less to be gained from revenues in excess of optimal usage.

Legislation to address planning for congestion problems is much less common. After its sour experience with SR-91, California amended its legislation to ban noncompetition clauses.<sup>165</sup> The federal government also bans noncompetition clauses in leases affecting the Interstate Highway System.<sup>166</sup> Texas, in its 2007 amendments, also banned noncompetition clauses;<sup>167</sup> Florida has a similar ban.<sup>168</sup> California and Texas allow some compensation to be given back to the toll road operator for toll revenues lost due to competition.<sup>169</sup> Merely limiting, or putting a price tag on, noncompetition agreements, however, does not address the problem of pricing.<sup>170</sup> Nor do toll cap provisions or even rate-of-return caps provide adequate assurance that the operators will set tolls at anywhere near the optimal level from the point of view of congestion relief, and the

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<sup>164</sup> FLA. STAT. § 334.30(2)(e) (2008). The Texas State Highway 130 Concession employs revenue sharing. TEX. DEP'T OF TRANSP., FACILITY CONCESSION AGREEMENT: SH 130 SEGMENTS 5 AND 6 FACILITY, DOC. NO. 324869\_12, § 5.1.2 (2007), available at [ftp://ftp.dot.state.tx.us/pub/txdot-info/tta/sh130\\_cda/facil\\_concession\\_agmt.pdf](ftp://ftp.dot.state.tx.us/pub/txdot-info/tta/sh130_cda/facil_concession_agmt.pdf); *id.* exhibit 7, pt. B, available at [ftp://ftp.dot.state.tx.us/pub/txdot-info/tta/sh130\\_cda/exhibit\\_7.pdf](ftp://ftp.dot.state.tx.us/pub/txdot-info/tta/sh130_cda/exhibit_7.pdf).

<sup>165</sup> See GAO REPORT, *supra* note 5, at 45.

<sup>166</sup> See Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, § 1604(c), 119 Stat. 1144 (2005).

<sup>167</sup> See Act of June 11, 2007, ch. 264, 2007 Tex. Sess. Law Serv. 458, 483, § 371.103 (West).

<sup>168</sup> See FLA. STAT. § 337.251 (2008).

<sup>169</sup> See CAL. STS. & HIGH. CODE § 143(d)(3) (West 2008); GAO REPORT, *supra* note 5, at 4.

<sup>170</sup> For contract terms that could serve to address this issue, see *infra* this Part.

extraordinarily long terms of the concession agreements make peering into the future difficult.<sup>171</sup>

A better potential solution is to require some renegotiation at intervals throughout the term of the contract. As suggested by Alfred C. Aman, privatization contracts are best not ossified.<sup>172</sup> They “should be seen as part of an evolving process of governance, not the final culmination of private negotiations.”<sup>173</sup> Instead, states should write contracts to anticipate competing goals and provide a framework for future amendment.

This route is not entirely unprecedented. Spain, for one, has incorporated a “rebalancing” concept into contracts with some of its toll road concessionaires, requiring the government and the concessionaire to sit down every five years to negotiate the structure of tolls and noncompetition agreements, including possible repayments from the government to the private entity should the optimal balance result in economic losses.<sup>174</sup> Of course, requiring a complete renegotiation of a concession agreement mid-term would so reduce the value of the toll road asset that it would likely become difficult to attract a concessionaire under such terms. However, careful contracting can provide a framework for something similar to Spain’s “rebalancing.”

Despite the tax-driven necessity of long lease terms, contracts should be constructed as flexibly as possible to address future concerns. The toll pricing provisions of toll road concessions should balance the concessionaire’s expected return on investment against state’s goals of transportation access and regional traffic mitigation, rather than simply employing rate caps that adjust for economic growth and recession. Some states attempt to balance competing economic goals by mandating either a maximum rate of return or some form of profit-sharing. Although this may prove useful, it still does not directly address

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<sup>171</sup> In addition to the issues discussed herein, one state legislature has recently addressed foreign ownership of toll road operators, and one has specified that tolling automatically be suspended during a state of emergency when the road is a designated evacuation route. See TENN. CODE ANN. § 54-3-106 (2008) (requiring any private partner to be more than 50 percent U.S.-owned); MISS. CODE ANN. § 65-43-3(5) (2008) (requiring the cessation of toll collection on an evacuation route during an emergency).

<sup>172</sup> See Aman, *supra* note 75, at 1502.

<sup>173</sup> *Id.*

<sup>174</sup> See GAO REPORT, *supra* note 5, at 47 (internal quotation marks omitted).

the potential for a concessionaire to raise rates to a point that will reduce road traffic beyond optimal levels. True balancing of the concerns of the state, its road users, and the concessionaire would take into account the level of road usage. For example, toll rates might adjust in accordance with traffic studies to achieve rates that would result in ideal usage of both the tollway and the surrounding roads while allowing for an investment return for the operator. Tolls should be set high enough that, in areas of traffic congestion, users will experience some savings of time from using the toll roads but low enough that the congestion on the nearby roads will not undermine the state's transportation goals.

### *B. Legislative Tools*

Because federal law does not mandate the detailed level of review that toll road privatization decisions need, states should embed such review into their enabling legislation. State legislation must address both the substantive and procedural concerns that arise in toll road privatizations. Existing state enabling statutes vary widely in the degree of public involvement required in the decision-making process,<sup>175</sup> some of which serve serving as models other states should follow. States, however, impose fewer requirements affecting the substance of the lease agreement itself.<sup>176</sup> In order to insure that the terms discussed above are incorporated in lease agreements, state legislatures should consider adding a framework for inclusion of such terms in their road lease agreements.

Federal law imposes few public-process requirements onto toll road privatizations with federal involvement. Where a road project will involve federal funding or will affect the Interstate

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<sup>175</sup> Compare, e.g., 605 ILL. COMP. STAT. 10/7.5 (2008) (allowing public input at board meetings), with IND. CODE ANN. § 8-15.7-4-6 (2008) (allowing the department to keep information confidential).

<sup>176</sup> Several states do not, by legislation, impose any specific contract provisions such as the rate of return caps, revenue sharing provisions, noncompetition clauses, or lease term limits. See, e.g., ALA. CODE §§ 21-1-80, 23-1-81 (2008) (authorizing county officials to "license any . . . legal entity to establish or to operate toll roads, toll bridges, ferries, or causeways and authorize the licensee to establish and fix the rates of toll," but imposing no requirements on the term of such license); GA. CODE ANN. § 32-2-80(a) (2008) (exempting toll road contracts from state public bidding requirements, and only requiring that they "be in compliance with all other applicable federal and state laws").

Highway System, environmental and other notice and comment requirements apply.<sup>177</sup> Federal laws do not impose any review process, however, for the lease of already-existing roadways that are not part of the Interstate Highway System where federal funding is not used.<sup>178</sup> States also impose environmental review requirements, which vary from state to state.<sup>179</sup>

States should not wait for a mandatory federal—or state—required environmental review process to seek citizen input on a decision as important as a road privatization. States should address the substantive concerns of toll-setting, congestion relief, and noncompete agreements in their legislation, and many have made attempts to do so. Fewer states, however, address the need for a public process for citizen input. Such legislation should require meaningful public and legislative input in decision making and a broader range of stakeholders represented, which could enable a more public contracting process, allowing a wider range of stakeholders a seat at the table.<sup>180</sup>

Even absent sweeping changes to federal laws such as the Freedom of Information Act, states can amend their own enabling statutes to make any toll road bidding and leasing process more public and inclusive and to address the potential conflicting goals that arise in toll road privatizations. As scholars have suggested in other privatization contexts, states can use their enabling legislation to expand the reach of public law norms to the private sector by embedding into their privatization laws tools for enhancing democracy and accountability.<sup>181</sup> This Subpart examines both the Federal

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<sup>177</sup> See 42 U.S.C. § 4332(C) (2000); 40 C.F.R. § 1503.1(a)(4) (2008) (requiring through the National Environmental Policy Act (“NEPA”) and corresponding regulations an environmental impact statement and comments from the public and interested groups for “major [f]ederal actions significantly affecting the quality of the human environment”); see also 23 U.S.C. § 128 (2000) (requiring states planning federal-aid highway projects or projects on the Interstate Highway System to hold public hearings).

<sup>178</sup> See GAO REPORT, *supra* note 5, at 59–60.

<sup>179</sup> Only seventeen states, plus D.C., Guam, and Puerto Rico, even have a NEPA-equivalent statute. See Council on Env'tl. Quality, State Environmental Planning Information, <http://ceq.hss.doe.gov/nepa/regs/states/states.cfm> (last visited Jan. 29, 2009).

<sup>180</sup> Louise G. Trubek, *Making Managed Competition a Social Arena: Strategies for Action*, 60 BROOK. L. REV. 275, 282–84, 299 (advocating citizen participation at the bidding stage of contracts).

<sup>181</sup> See Freeman, *supra* note 87, at 1339.

Highway Administration's Model Statute and the existing state road privatization enabling statutes to see how they fare in addressing the issues, then proposes specific legislation and contracting terms that states should consider.

The Federal Highway Authority ("FHWA") has produced draft model legislation as a guide for states to use in crafting their own road privatization statutes.<sup>182</sup> As written, the FHWA's model statute could serve as a "model" for a lack of democratic participation and transparency.<sup>183</sup> It covers such issues as bidding, reversion of the highway to the state at the end of the lease term, remedies upon default, bonds, federal financing, property tax exemptions, and police powers.<sup>184</sup> At the same time, it closes off any existing avenues for public accountability.<sup>185</sup> A state following the model legislation would first specify that the state's normal procurement procedures do not apply,<sup>186</sup> then leave all discretion in road privatization decisions to the state's executive branch,<sup>187</sup> providing for no information sharing with either the legislature or the public. For determining which material from bids should be public and which should remain "confidential," the FHWA proposes two alternatives, both involving only the transportation department and the private company, with no third-party review or oversight.<sup>188</sup>

States' laws show considerable variety in addressing accountability concerns. Many toll road privatization statutes follow the model statute in leaving all decision-making power in the hands of the executive branch and offering very little in the way of notice, comment, or review by either the legislature or the public.<sup>189</sup> A few states require that any toll road concession negotiated by the transportation department also receive

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<sup>182</sup> MODEL PUB. PRIVATE P'SHIPS LEGISLATION (U.S. Dep't of Transp. Fed. Highway Admin., Working Draft), [http://www.fhwa.dot.gov/ppp/pdf/legis\\_model.pdf](http://www.fhwa.dot.gov/ppp/pdf/legis_model.pdf).

<sup>183</sup> See *id.* §§ 1-102(d)(5), (g)(1)-(5), 1-103(c)(2)-(7) (allowing, despite limited input from the public, the government, and the private entity to keep crucial information private).

<sup>184</sup> *Id.* §§ 1-106 to -109, -111.

<sup>185</sup> See *id.* §§ 1-102(d)(5), (g)(1)-(5), 1-103(c)(2)-(7).

<sup>186</sup> See *id.* § 1-102(a).

<sup>187</sup> See *id.* § 1-102(b).

<sup>188</sup> *Id.* § 1-102(g).

<sup>189</sup> See, e.g., ALA. CODE §§ 23-1-80-81 (2008); COLO. REV. STAT. § 43-1-1204 (2008); GA. CODE ANN. §§ 32-2-79-80 (2008); MO. §§ 227.600-69 (2008). The Missouri statute specifies that an agreement becomes an open record only after its execution. *Id.* § 227.627.

approval from the state legislature.<sup>190</sup> Some states require some notice to or approval from local governing entities<sup>191</sup> or notice to the public before a toll road privatization decision.<sup>192</sup> Arizona's statute mandates both: It requires public notice and comment and also allows local governmental jurisdictions to review toll road applications, requiring local approval of the engineering design of any connections to local roads.<sup>193</sup> California mandates that the lease be submitted to the legislature, along with comments from at least one public hearing and permits a legislative veto within sixty days.<sup>194</sup>

Washington State has an unusually broad scheme for involving a wide range of stakeholders in the decision-making process. Among its stated legislative purposes is a declaration that any transportation PPP "shall be implemented in cooperation, consultation, and with the support of the affected communities and local jurisdictions."<sup>195</sup> The statute mandates the creation of a "local involvement committee," including representatives of any groups formed in opposition to the project and further allows an advisory vote by road users and area residents.<sup>196</sup> Washington also stipulates that if more than 5,000 signatures are gathered in opposition to a project, the transportation department must then consider alternatives and vote for their preference.<sup>197</sup>

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<sup>190</sup> DEL. CODE ANN. tit. 2, § 2003(b) (2008); TENN. CODE ANN. § 54-3-102(b) (2008) (requiring approval of general assembly); *see also* UTAH CODE ANN. § 72-6-118(3) (2008) (requiring legislative approval to toll existing free roads, but no approval needed to lease or transfer already-tolled roads).

<sup>191</sup> DEL. CODE ANN. tit. 2, § 2003(e)(2) (2008) (requiring approval by the "directly affected metropolitan planning organization[s]"); MINN. STAT. § 160.85 subd. 3 (2008) (granting veto right to affected jurisdictions); OR. REV. STAT. § 383.013(2), § 383.015(2)(a) (2008) (requiring department to "solicit . . . recommendation[s]" from and consider the "opinions and interests" of affected jurisdictions); VA. CODE ANN. § 56-563(A)-(B) (2008) (requiring notice to affected jurisdictions).

<sup>192</sup> These four states are Arizona, Tennessee, Virginia, and Washington. ARIZ. REV. STAT. ANN. § 28-7701(E)-(F) (2008); TENN. CODE ANN. § 54-3-113(d)(1) (requiring public hearings); VA. CODE ANN. § 56-573.1:1; WASH. REV. CODE § 47.46.040(8)-(9) (2008).

<sup>193</sup> ARIZ. REV. STAT. ANN. § 28-7701.E (requiring a public hearing and allowing submission of comments by the public); *id.* § 28-7746 (requiring local jurisdiction approval).

<sup>194</sup> CAL. STS. & HIGH. CODE § 143(b)(3) (West 2008).

<sup>195</sup> WASH. REV. CODE § 47.46.010.

<sup>196</sup> *Id.* § 47.46.030(3), (6)(a).

<sup>197</sup> *Id.* § 47.46.030(6), (11).

More recently, in June 2007, Texas passed a sweeping overhaul to its own road privatization legislation.<sup>198</sup> Widely noted for its two-year moratorium on new toll road privatization projects, the 2007 bill also represents an attempt to shine light into the decision-making process by imposing a range of new accountability requirements. In reaction to the secrecy of the processes prior to that point, the legislature directed that TxDOT “seek to achieve transparency” and mandated several reforms.<sup>199</sup> TxDOT must now provide public access to information about proposed projects and must submit regular updates to the legislature, the state comptroller, and others.<sup>200</sup> It must also publish certain financial data, including projected toll levels at the end of the contract term.<sup>201</sup> Following financial disclosures, TxDOT must hold public hearings that include a mechanism for responding to questions and contracts prior to entering into any final contract.<sup>202</sup> Within ten days after signing any final contract, TxDOT must post the full contract on its website.<sup>203</sup>

Increased transparency and democratic participation are likely to yield the advantage of greater public support. The relative secrecy of toll road negotiations to date is doubtless due to a perception that too much attention will only fan the flames of public outcry. In fact, the exact opposite is true: Secrecy breeds suspicion, as recent experiences in Texas and Pennsylvania illustrate. State leadership should instead present the case for any proposed toll road lease from the outset, soliciting input about the proposal and its alternatives from financial experts, affected jurisdictions, environmental and trade groups, and affected citizens. Should the privatization option turn out to be the most beneficial to the state, citizens will have had an opportunity to examine this and the state will have had the opportunity to incorporate suggested improvements. To be sure,

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<sup>198</sup> See generally Act of June 11, 2007, ch. 264, 2007 Tex. Sess. Law Serv. 458 (West).

<sup>199</sup> TEX. TRANSP. CODE ANN. § 227.005 (Vernon 2008).

<sup>200</sup> *Id.* § 227.005(b).

<sup>201</sup> *Id.* § 371.151.

<sup>202</sup> *Id.* § 371.153.

<sup>203</sup> *Id.* § 223.210 (describing a two-year moratorium); *id.* § 227.005 (setting forth various transparency provisions); *id.* § 227.006 (describing web posting requirements).



some opposition will remain—but to conduct negotiations in secret is a virtual guarantee for such opposition.<sup>204</sup>

Texas' new public disclosure requirements should serve as a model to other states. The laws mandate a level of disclosure, notice, and comment appropriate for a democratic form of government. In addition, states should employ a provision like that in California, where the legislature has a reasonable window of time in which to veto the proposed arrangement if it does not serve the public interest.<sup>205</sup> Using a transparent and participatory public process prior to a toll road privatization decision, the transportation department and the legislature can act with the benefit of knowledge about the proposal and any alternative proposals, informed by the input of a variety of perspectives and interests. This process would fully reflect the values of a democratic republic where the elected executive and elected legislators must ultimately come together and agree on governance issues.

Additional process like that required by Washington State will probably prove unworkable.<sup>206</sup> In particular, administering an election to obtain the "advisory" position of "users and residents in the affected project area" could prove unworkable, needlessly hindering the decision-making process. States should neither impose a blanket ban on privatizations nor permit an unworkable process to do so. Texas lawmakers in both Washington, D.C. and Austin, meanwhile, continue to consider how they might curb further toll roads and toll road privatizations.<sup>207</sup> This backlash may be due, in part, to the

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<sup>204</sup> See David S. Levine, *Secrecy and Unaccountability: Trade Secrets in Our Public Infrastructure*, 59 FLA. L. REV. 135, 177–87 (2007) (applying this principle to other infrastructure privatizations).

<sup>205</sup> CAL. STS. & HIGH. CODE § 143(b)(3) (West 2008).

<sup>206</sup> WASH. REV. CODE §§ 47.46.030(6), (11), 47.46.040(8)–(9) (2008).

<sup>207</sup> Several members of Texas' U.S. congressional delegation have expressed opposition to Governor Perry's proposed Trans-Texas Corridor. Bennet Roth & Stuart Powell, *TxDOT Repairing Political Bridges*, HOUSTON CHRON., May 25, 2008, at A1. U.S. Senator Kay Bailey Hutchison inserted into an appropriations bill a ban on tolling existing roads; the bill passed. Pub. L. 110-61, 207 H.R. 2674, § 197. State Senator Kim Nichols approved of Hutchison's measure and also floated the idea of a ban on foreign investment in Texas roads, which would considerably restrict any potential pool of bidders. Robert Nichols, *The Good, the Bad, & the Ugly: Part 2, Nichols Opposes Converting Existing Roads to Toll Roads*, Sept. 17, 2007, available at <http://www.senate.state.tx.us/75r/senate/members/dist3/pr07/p091707a.htm>; Fort Worth Star Telegram, *Officials: Corridor a Bad Word, But Need Real*, Mar. 28, 2008,

manner in which the governor and his financial advisors pursued the initial plan. And yet, a ban on toll road privatizations, whether imposed by legislative enactment or by excessive procedural hurdles, might not best serve the interests of a state. A de facto ban on road privatizations would at least take one transportation financing option off the table at a time when states are trying to find an option that works.

In many privatizations, scholars have also noted the importance of building increased post-decision monitoring and oversight into agreements.<sup>208</sup> State laws addressing post-decision management of the conflicting goals inherent in these kinds of privatizations are rare. Two states do require a public hearing before any toll increases,<sup>209</sup> while Washington prohibits toll increases before its “citizen advisory committee” has had a chance to review them.<sup>210</sup> No state addresses the need to balance terms such as rate of return and competition into the future.

States can improve accountability during the term of the lease itself by requiring periodic review of the lease and a rebalancing of interests between the private toll road operator and the public affected by transportation infrastructure. Rather than employ a review process that addresses only the narrow issue of toll increases, state laws should mandate a review process that considers the investor’s rate of return and the traffic mitigation, mobility, and environmental needs of the state.

### C. *Potential Objections to Solutions Proposed*

Many privatization proponents do not fear the erosion of accountability that troubles some legal scholars. They advise that in privatizations, market accountability will prove superior to traditional democratic accountability regimes.<sup>211</sup> In this view,

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available at <http://nl.newsbank.com/nl-search/we/Archives>; see also Kristin Edwards, *Kolkhorst: There Are Other Road Options*, HUNTSVILLE ITEM, Jan. 31, 2008, available at [http://www.itemonline.com/archivesearch/local\\_story\\_031010347.html](http://www.itemonline.com/archivesearch/local_story_031010347.html) (describing State Representative Lois Kolkhorst’s opposition to toll road privatizations).

<sup>208</sup> Ellen Dannin, *supra* note 90, at 258, 270; Donald G. Featherstun et al., *State and Local Privatization: An Evolving Process*, 30 PUB. CONT. L.J. 643, 652 (2001).

<sup>209</sup> CAL. STS. & HIGH. CODE § 143(e)(2) (West 2008); MISS. CODE ANN. § 65-43-3(4) (2008).

<sup>210</sup> WASH. REV. CODE § 47.46.090 (2008).

<sup>211</sup> See Michael J. Trebilcock & Edward M. Iacobucci, *Privatization and Accountability*, 116 HARV. L. REV. 1422, 1448 (2003).

as market accountability extends into a realm of privatized services, the need for legal accountability will then diminish.<sup>212</sup> For example, airline deregulation has allowed consumers and shareholders to "vote with their feet," resulting in a kind of consumer and market "democracy" that is ultimately more responsive to the public's needs than is government regulation.<sup>213</sup> In this view, legal mechanisms for accountability amount to so much "red tape" that serves as a barrier to efficiency and fails to achieve the substance of democratic process.<sup>214</sup>

This argument is not persuasive in the context of toll roads. Here, the only market competition occurs at the selection of the winning bidder. To date, state transportation agencies select concessionaires with limited input from the people who will eventually use the roads. At no point does the citizen, the person ultimately affected by the decision to privatize, ever influence the decision. In the toll road context, this weakens arguments that favor the accountability of the market over democratic accountability.<sup>215</sup> The operator who wins the concession essentially purchases a seventy-five-year monopoly. After the lease decision, it is certainly true that users can avoid the roads since there is generally a parallel route. But because some number of consumers will pay a very high premium to travel the toll road, the incentives of the market are not properly balanced with the incentives of industry. Additionally, the individual users are not the only people affected; surrounding communities might see greater congestion. These factors make the pre-decision accountability mechanisms outlined here crucial.

Other critics might contend that accountability regimes serve little purpose in reality. Given the citizenry's actual lack of participation in politics, these authors see governance as driven by various self-seeking groups, with results that do not reflect a general public good.<sup>216</sup> This argument, however, does not

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<sup>212</sup> *See id.*

<sup>213</sup> Aman, *supra* note 75, at 1493-94 (internal quotation marks omitted).

<sup>214</sup> Erhardt, *supra* note 115 (proposing relaxed environmental review processes for private toll road operators in order to maximize efficiency in highway privatizations); Trebilcock & Iacobucci, *supra* note 211, at 1448-49; *cf.* Dannin, *supra* note 73, at 117-20.

<sup>215</sup> Diller, *supra* note 16, at 1745.

<sup>216</sup> Edward Rubin, *The Myth of Non-Bureaucratic Accountability and the Anti-Administrative Impulse*, in PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS AND

diminish the importance of democratic accountability in this context. In reality, the amalgam of pressures and interests that produce any act of governance is likely to be a synthesis of the interests of community members as well as those of interest groups and the personal interests of those in power.<sup>217</sup> Given this reality, those affected by governance must be afforded at least some opportunity to be informed of and express their views regarding government decisions.

A final objection, particularly from industry, is that overly-specific contracting terms will undermine the initial goals of privatization, especially the goals of raising funds and taking advantage of innovations offered by the private sector.<sup>218</sup> In this view, the less interference the better, beyond what is necessary to prevent fraud and abuse.<sup>219</sup> But where potential for abuse exists, including abuse in the form of excessive user fees, specific contracting is still necessary. Even with rebalancing provisions and careful public oversight, toll road leases can leave plenty of room for innovation. For example, toll road operators have already developed innovations in automated toll collection, traffic management, and accident response processes.

Private entities may not stand to gain as much financially from these toll road deals if we rein in their wide latitude to raise tolls and to stifle competition. With less to gain, toll road operators may be reluctant to invest large sums up front. Ultimately, these dollar losses need to be balanced against the public interests retained. If the deal will not be worth it to a future generation, then we should not be willing to enter into it for the sake of dollars today.

#### CONCLUSION

State governments face potential benefits and risks from toll road privatizations. In order to maximize the benefits and control the risks, state legislatures can first amend their enabling legislation to allow toll road privatizations only after a transparent and participatory public process. They should also consider embedding term limits into their legislation and should

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EXPERIENCES, *supra* note 80, at 57–59 (noting that few people even know the names of their local elected officials, much less the policies they stand for).

<sup>217</sup> See generally Cass, *supra* note 71, at 471–80.

<sup>218</sup> GOMEZ-IBANEZ & MEYER, *supra* note 19, at 74.

<sup>219</sup> *Id.*

incorporate provisions into lease agreements that require a periodic reexamination of critical public issues. State governors and transportation departments, in turn, should negotiate contracts that allow for flexibility with respect to the future needs of the state.

The consequences of faulty toll leases will be real and long lasting. Once an agreement is signed, it essentially grants a long-term monopoly to a critical public asset. The contract should not compromise core democratic values in the process. Even if new contract provisions result in a reduced expected income for the toll road company and, therefore, a reduced up-front payment to the state, it is critical to balance the public interests against the private in toll road deals. Some values should not be up for bid.