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Privatization as Delegation

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PRIVATIZATION AS DELEGATION

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Recent expansions in privatization of government programs mean that the constitutional paradigm of a sharp separation between public and private is increasingly at odds with the blurred public-private character of modern governance. While substantial scholarship exists addressing the administrative and policy impact of expanded privatization, heretofore little effort has been made to address this disconnect between constitutional law and new administrative reality. This Article seeks to remedy that deficiency. It argues that current state action doctrine is fundamentally inadequate to address the constitutional challenge presented by privatization. Current doctrine is insufficiently keyed to the ways that privatization involves delegation of government power, and simultaneously fails to allow governments sufficient flexibility in structuring public-private relationships. This Article proposes instead a new constitutional analysis of privatization that reformulates state action in private delegation terms. Under the proposed analysis, the critical question is whether delegations of authority to private entities are adequately structured to enforce constitutional constraints on government power. Central to this approach is the recognition that mechanisms other than directly subjecting private entities to constitutional scrutiny can satisfy the demands of constitutional accountability, and can do so without intruding unduly on government regulatory prerogatives. Where such mechanisms are lacking, however, grants of government authority to private entities represent unconstitutional delegations. To implement this approach, the Article advocates a two-step inquiry that first singles out private delegations creating agency relationships between private entities and the government for special scrutiny, and then asks whether adequate alternative accountability mechanisms exist.

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INTRODUCTION

Privatization is now virtually a national obsession. Hardly any domestic policy issue remains untouched by disputes over the scope of private participation in government, with such disagreements surfacing most recently in proposals for Medicare drug prescription coverage.[1] Privatization is also endemic as a matter of administrative practice. Ours is a system in which private actors are so deeply embedded in governance that "the boundaries between the public and private sectors" have become "pervasive[ly] blurr[ed]."[2] The lack of a clear divide between public and private is in one sense not surprising, given modern government's extensive regulation of the "private" sphere.[3] Less acknowledged, however, is the extent of private involvement in the performance of government activities. Private entities provide a vast array of social services for the government; administer core aspects of government programs; and perform tasks that appear quintessentially governmental, such as promulgating standards or regulating third-party activities. While this kind of private involvement is longstanding, more significantly—and here reflecting contemporary political debate—it is expanding. Recent privatization efforts, particularly in health care and welfare programs, public education, and prisons, reveal a trend of greater discretion and broader responsibilities being delegated to private hands.[4]

Despite privatization's political and practical ubiquity, however, recognition of the extensive intermixing of public and private has failed to permeate thinking about U.S. constitutional law. A foundational premise

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1. See Robert Pear, Medicare Debate Focuses on Merits of Private Plans, N.Y. Times, June 9, 2003, at A1 [hereinafter Pear, Medicare Debate] (describing debate over potential role of private insurers in Medicare prescription drug coverage plans); see also Lizette Alvarez, From Bipartisan to All Partisan on Air Security, N.Y. Times, Nov. 3, 2001, at A1 (describing congressional battle over whether airport baggage screeners should become federal employees or remain employees of private contractors); Floyd Norris, Hard Talk, Softer Plans, N.Y. Times, July 10, 2002, at A1 (describing disagreement over whether new board regulating auditors should be composed of and funded by accountants or should be independent of accounting industry); P.W. Singer, Have Guns, Will Travel, N.Y. Times, July 21, 2003, at A15 (discussing privatized military forces); Richard W. Stevenson, Two Sides Rally to Shape Social Security Discussion, N.Y. Times, June 18, 2001, at A14 (describing debate over President Bush's proposal to add private investment accounts to social security).

2. Ralph M. Kramer, Voluntary Agencies and the Contract Culture: "Dream or Nightmare?", 68 Soc. Serv. Rev. 33, 35 (1994); see also Martha Minow, Partners, Not Rivals: Privatization and the Public Good 6–28 (2002) [hereinafter Minow, Partners] (noting use of private organizations, both religious and secular, in providing government-funded services); Jody Freeman, The Private Role in Public Governance, 75 N.Y.U. L. Rev. 543, 547 (2000) [hereinafter Freeman, Private Role] ("Virtually any example of service provision or regulation reveals a deep interdependence among public and private actors in accomplishing the business of governance.").

3. See Minow, Partners, supra note 2, at 29–30 ("[I]n an environment of pervasive governmental regulation . . . [t]he very identification of 'the private' involves governmental acts.").

4. See infra Part I.A.

of our constitutional order is that public and private are distinct spheres, with public agencies and employees being subject to constitutional constraints while private entities and individuals are not. Private involvement in government is addressed primarily through the state action doctrine, which inquires whether, in a particular context, ostensibly private parties should be considered "state (or federal) actors"[5] and thereby subject to the Constitution's strictures. The terms and rigor of state action analysis have varied over the years, but currently the usual linchpin for finding state action is identifying substantial government involvement in the specific private acts being challenged. The underlying presumption is that cases where private actors wield public power are rare and occur mainly when the government tries to hide behind private surrogates whom it controls. Current doctrine pays little attention to whether the government is, in fact, delegating power to private entities to act on its behalf. To the extent private delegations are considered, it is under the rubric of private delegation doctrine, which assesses whether the Constitution's separation of powers and due process requirements prohibit the government from delegating certain types of powers to private hands. But constitutional law makes no attempt to link the constitutionality of a private delegation to the risk that it will place government power outside of constitutional controls. Private delegations of government power are upheld without examining whether private actions taken pursuant to such delegations will come within the Constitution's purview.

Privatization can take a variety of forms. In some instances, privatization represents government withdrawal from a field of activity or from responsibility for providing services, as for example when government disbands a program altogether or sells off state-owned businesses. Privatization of this type raises few constitutional concerns because the Constitution rarely imposes affirmative obligations on government. The focus here, however, is on a different and more common model of privatization: government use of private entities to implement government programs or to provide services to others on the government's behalf. Rather than constituting government withdrawal, this form of privatization is characterized by a *sharing* of authority between public and private, with the government giving private entities significant control over and responsibility for government programs. This form of privatization is far more constitutionally troubling. By virtue of their role as stand-ins for the government, private entities often wield powers that I argue should

5. While the "state action" requirement is derived from the Fourteenth Amendment's express textual reference to state governments, see U.S. Const. amend. XIV, § 1 ("No State shall"; "nor shall any State"), the Court has interpreted other constitutional provisions as embodying a similar requirement of federal action, see, e.g., San Francisco Arts & Athletics, Inc. (SFAA) v. United States Olympic Comm., 483 U.S. 522, 542 n.21 (1987) (noting requirement of "federal action" lies implicit in Fifth Amendment). The term "state action" is often used to refer to this general requirement of government action in order for the Constitution to apply, rather than the Fourteenth Amendment's specific requirement of action by state governments, and is so used here.

be considered governmental in nature. These activities include not simply physical control over others or control over the content of regulatory standards, but also control over third parties' access to government resources and benefits.

This Article contends that constitutional law's current approach to privatization is fundamentally inadequate in an era of increasingly privatized government. Much of this inadequacy results from current doctrine's failure to appreciate how privatization can delegate government power to private hands. Admittedly, distinguishing between instances where private entities are acting on behalf of government and wielding government power, as opposed to instances where the government is simply purchasing private services or sponsoring independent private endeavor, is frequently difficult. But the current emphasis on government involvement in the specific act at issue is a very poor basis on which to rest such a distinction because—as an examination of recent instances of privatization and the Supreme Court's state action cases demonstrates—private entities can wield these powers alongside minimal government involvement.

Indeed, by assigning determinative weight to the presence vel non of government involvement in specific challenged acts, current state action doctrine arguably gets matters exactly backwards. Such a focus denies constitutional protection against private conduct where the government has given private actors broad discretion over operation of government programs. Under the view that control of access to government benefits and services represents an exercise of government power, however, this is precisely the point at which constitutional protections are most warranted. At the same time, current doctrine applies such protections when they are often least needed—that is, when governments exercise close supervision and thus constitutional norms can be enforced by targeting government action directly. Worse still, focusing on government involvement creates perverse incentives for governments to forego close oversight of their private partners, even though such oversight is an important means for ensuring that private actors adhere to constitutional requirements.

The legal academy increasingly has taken note of the phenomenon of expanding privatization.[6] But for the most part, that scholarship has not addressed the lack of fit between existing constitutional law and the

6. For example, a recent issue of the *Harvard Law Review* was devoted to the subject. See Symposium, Public Values in an Era of Privatization, 116 Harv. L. Rev. 1211 (2003) [hereinafter Symposium, Public Values]; see also The Province of Administrative Law (Michael Taggart ed., 1997); Freeman, Private Role, supra note 2; Symposium, The Implications of Privatization on Low-Income People, 35 Clearinghouse Rev. 491 (2002); Symposium, New Forms of Governance: Ceding Public Power to Private Actors, 49 UCLA L. Rev. 1687 (2002); Symposium, Redefining the Public Sector: Accountability and Democracy in the Era of Privatization, 28 Fordham Urb. L.J. 1307 (2001). Some instances of privatization, such as privatization in prisons, education, and welfare programs, have received particular attention. See sources cited infra Part I.A.

reality of modern governance, other than to conclude that privatization often removes government programs and activities from constitutional scrutiny, or to assess whether particular instances of privatization are constitutional.[7] Little effort is made to rethink the basic terms of constitutional analysis in the face of the disconnect between administrative reality and constitutional doctrine.[8] Instead, the focus is on reforming nonconstitutional law to better address accountability concerns raised by privatization, specifically the moral hazard problem: the danger that private actors will exploit their position in government programs to advance their own financial or partisan interests at the expense of program participants and the public.[9] In response, scholars have proposed reforming administrative statutes to improve public oversight of privatized programs, imposing greater regulation and contractual controls on recipients of government funds, or ensuring program participants' access to private law remedies.[10]

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7. Numerous articles address the Establishment Clause issues raised by government efforts to use private religious providers to implement programs and provide services. See generally David Cole, Faith and Funding: Toward an Expressivist Model of the Establishment Clause, 75 S. Cal. L. Rev. 559 (2002); Symposium, Beyond Separatism: Church and State, 18 J.L. & Pol. 7 (2002); Symposium, Public Values, supra note 6. Several scholars have also addressed whether private involvement in government violates separation of powers requirements and due process. See sources cited infra note 225; see also David J. Kennedy, Due Process in a Privatized Welfare System, 64 Brook. L. Rev. 231, 233 (1998) [hereinafter D. Kennedy, Due Process] (arguing that some forms of welfare privatization violate due process); Ira P. Robbins, The Impact of the Delegation Doctrine on Prison Privatization, 35 UCLA L. Rev. 911, 914–15 (1988) (assessing whether privately operated prisons violate nondelegation doctrine); Dru Stevenson, Privatization of Welfare Services: Delegation by Commercial Contract, 45 Ariz. L. Rev. 83, 105–11 (2003) [hereinafter Stevenson, Welfare Services] (arguing that welfare privatization may violate nondelegation doctrine).

8. There is, of course, a substantial body of commentary critiquing state action doctrine and advocating its demise, but most of this dates back several decades. See sources cited infra notes 147 and 152. For rare recent efforts to reform state action doctrine in light of privatization, see Daphne Barak-Erez, A State Action Doctrine for an Age of Privatization, 45 Syracuse L. Rev. 1169, 1189–92 (1994); Sbeila S. Kennedy, When is Private Public? State Action in the Era of Privatization and Public-Private Partnersbips, 11 Geo. Mason U. Civ. Rts. L.J. 203, 219–23 (2001) [hereinafter S. Kennedy, Private Public].

9. The question of whether privatization undermines or enhances programmatic accountability is, of course, a subject of great debate; privatization advocates maintain that, on the contrary, harnessing the profit motive of private actors and increasing competition in service provision improves the quality and efficiency of services. See sources cited infra note 135.

10. See generally infra Part III.B. For proposals to reform administrative statutes and oversight, see, e.g., Alfred C. Aman, Jr., Privatization and the Democracy Problem in Globalization: Making Markets More Accountable Through Administrative Law, 28 Fordham Urb. L.J. 1477, 1500–05 (2001). For proposals to expand conditions on funding, see, e.g., Minow, Partners, supra note 2, at 112–19, 142–50; 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, 1608–10 (2001); Jody Freeman, Extending Public Law Norms Through Privatization, 116 Harv. L. Rev. 1285, 1315–17 (2003) [hereinafter Freeman, Extending Public Law Norms]. For arguments on the

Developing such measures is surely a crucial part of coming to terms with the new reality of privatized government. Yet reexamining constitutional law's current approach to privatization is at least as essential. A central premise of U.S. constitutional law is that the Constitution imposes limits on the actions that governments can take. Critically, these limits apply to all exercises of government power, whether wielded by officially public or nominally private entities; in addition, individuals injured by exercises of government power can enforce these constitutional limits in court. This central premise is what I refer to in this Article as the principle of constitutional accountability. As used here, constitutional accountability is not the commonly-invoked idea of political or electoral accountability, nor the idea of programmatic accountability alluded to above, but rather the concept of legal accountability that is basic to our constitutional system. The inadequacies of current state action doctrine mean that private exercises of government power are largely immune from constitutional scrutiny, and therefore expanding privatization poses a serious threat to the principle of constitutionally accountable government. Where governments have adopted legislative or regulatory measures that offer substantial protection against private abuse of power, this constitutional accountability concern appears less pressing. But governments may be unwilling to incur the costs associated with such measures, particularly when the programs being privatized serve politically impotent groups. Addressing the disconnect between constitutional law and modern administrative reality is essential to ensure that basic constitutional protections exist across the board.

This Article attempts to rectify this deficiency in current scholarship and propose a new constitutional analysis of privatization. The central challenge posed by privatization is not just how to enforce the core principle of constitutional accountability, but how to do so without transferring the political branches' regulatory authority to the courts. While enforcing constitutional requirements frequently restricts the government's regulatory role, such a restriction is of particular concern in privatization contexts. The premise of the public-private divide in constitutional law is that the rules governing private actors should be politically rather than constitutionally determined. Moreover, preserving regulatory flexibility is especially important if governments are to successfully reap privatization's potential for greater efficiency and innovation while still guarding against private misuse of public power.

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importance of private law remedies, see, e.g., Jack M. Beermann, Administrative-Law-Like Obligations on Private[lzed] Entities, 49 UCLA L. Rev. 1717, 1721–24 (2002) (arguing that existing corporate law doctrines offer means of ensuring accountability); Jody Freeman, The Contracting State, 28 Fla. St. U. L. Rev. 155, 201–07 (2000) [hereinafter Freeman, Contracting State] (discussing ways to use government contracts to enhance accountability of privatized governance); Michele Estrin Gilman, Legal Accountability in an Era of Privatized Welfare, 89 Cal. L. Rev. 569, 635–39 (2001) (emphasizing potential of contractual third-party beneficiary approach to ensure accountability of privatized programs).

The answer to the constitutional challenge of privatization, I argue, is to take a middle way: to insist that private exercises of government power must comport with constitutional requirements, yet recognize that in the context of private delegations, the method of enforcing these requirements, as well as their substance, may differ from when government officials act alone. Under the standard model of constitutional adjudication, a finding of state action means that relief for constitutional violations often runs directly against the government's private partners. But direct application of constitutional limits to private actors is not necessary to achieve constitutional accountability. Such accountability requires that individuals be able to enforce constitutional requirements against specific private exercises of government power; it further demands that they ultimately be able to assert their challenges in court. Nothing in our constitutional structure or history, however, mandates that this enforcement take the form of judicial imposition of constitutional requirements directly against private actors, as opposed to judicial enforcement of these requirements through other means.

Under the approach advocated here, the crucial constitutional question is whether adequate accountability mechanisms exist by which to ensure that private exercises of government power comport with constitutional requirements. If such mechanisms are lacking, the appropriate judicial response is not subjecting private entities to direct constitutional scrutiny, but instead requiring that the government create such mechanisms as the constitutionally-imposed price of delegating government power to private hands. A central advantage of this approach is that it gives governments an incentive to adopt measures that protect against potential private abuses. Absent mechanisms that adequately substitute for direct constitutional review, delegation of government power to private entities would now be unconstitutional. Equally important, avoiding direct constitutional scrutiny of private actors allows the government greater flexibility because the government can choose among a variety of accountability mechanisms in structuring instances of privatization to meet constitutional demands.

Part I of this Article begins by presenting a brief overview of recent expansions of privatization in Medicare and Medicaid, welfare programs, public education, and prisons. This examination of recent privatization efforts provides a helpful backdrop for understanding why privatization poses a challenge for existing constitutional doctrine. These examples illustrate how privatization can represent a delegation of government power to private entities, with constitutionally-exempt parties gaining authority over government programs and program participants. Yet they also demonstrate the potential advantages of privatization and, more importantly, the government's need for flexibility in designing relationships with its private partners that can adequately guard against private abuse of power.

Part II assesses how well current constitutional law addresses the constitutional challenge of privatization. Examination of the Supreme Court's state action cases establishes that few instances of privatization are likely to trigger a finding of state action because current doctrine is largely unconcerned with the control over third parties that private entities gain as a result of their roles in government programs. This, in turn, makes current state action doctrine significantly underinclusive and a poor vehicle for preserving constitutional accountability under privatized government. Ironically, current doctrine is also overinclusive, unnecessarily restricting the government's regulatory flexibility by applying constitutional constraints directly to private actors when the exercise of government power is otherwise adequately constrained. The net effect is, perversely, to exacerbate constitutional accountability concerns by creating incentives for government to grant its private partners broad discretion over government programs and minimize its involvement in their actions.

Part II ends with a discussion of the other route through which constitutional law addresses privatization: private delegation doctrine. Despite occasional calls for a revival of limitations on the types of powers that government can delegate to private parties, the Court has not done so, for fear of inappropriately intruding on the regulatory prerogatives of the political branches. Yet the private delegation cases are instructive because of their suggestion that how a delegation is structured, and in particular whether the government retains a formal oversight role, affects its constitutionality. Equally noteworthy is the Court's failure to link the private delegation and state action analyses. Perhaps due to its reluctance to scrutinize private delegations closely, the Court does not condition a delegation's constitutionality on whether the private delegate's exercises of government power are subject to constitutional scrutiny; instead, this question is left solely for separate examination under state action doctrine.

Part III takes a step back from existing doctrine and examines prior academic commentary on state action doctrine and on privatization more generally. Over the years, legal scholars have leveled numerous criticisms at state action doctrine—some arguing for its complete demise, others advocating more modest internal reforms. While containing merit, both lines of criticism ultimately fail as realistic solutions to the problems with current state action doctrine. As noted above, substantial scholarship on privatization advocates developing nonconstitutional approaches to guard against private abuse of power. Many of these reforms offer important protections. But, in the end, they provide an incomplete solution to the inadequacies in constitutional law's treatment of privatization, in part because they depend on the government's willingness to restrict its freedom to rely on private partners. This governments may be reluctant to do, absent legal compulsion rooted in constitutional law.

Returning to the understanding of privatization as a delegation of government power, Part IV seeks to develop a new constitutional analysis of privatization by rethinking state action in private delegation terms. This Part begins by providing the normative case for a private delegation approach and then turns to the difficult questions involved in constructing such an analysis. A critical claim is that the analysis should focus largely on delegations that create an agency relationship between private entities and the government. This is because delegations that give a private entity authority to act on the government's behalf, particularly with respect to third parties, are the most likely to involve grants of government power. But private delegations of this nature should be fully constitutional if they are structured such that individuals have adequate means of enforcing constitutional limits, even though the private entities involved are exempt from direct constitutional scrutiny. Part IV discusses a variety of mechanisms that governments can employ to structure their delegations to meet constitutional accountability concerns. Possibilities include providing administrative complaint systems through which individuals can obtain government review of private decisionmaking, or contracting with multiple service providers so that no one provider has monopolistic control over program participants. Part IV also argues that, in general, the appropriate remedial response to inadequately structured delegations will be for a court to invalidate the delegation as unconstitutional.

The remaining sections of Part IV address the question of whether the private delegation analysis proposed here is any more likely to have practical impact than prior efforts at reform. The proposed analysis differs significantly from current state action doctrine, which no doubt limits its chances of judicial adoption. But current doctrine's inability to preserve constitutional accountability in the face of ever-expanding privatization may make courts increasingly willing to consider new approaches. Importantly, the proposed private delegation analysis accepts the constitutional premise of a public-private divide; moreover, it offers a judicially manageable approach to addressing state action issues that preserves the political branches' regulatory role. The final section of Part IV provides a more detailed look at what the private delegation analysis would mean in practice by applying it to the recent privatization initiatives discussed in Part I.

1. The Constitutional Challenge of Privatization

What is privatization and why does it merit close constitutional attention at this juncture? To answer this question, this Part begins with a detailed description of recent initiatives in four areas where privatization is particularly dominant: Medicare and Medicaid, welfare programs, public education, and prisons. These examples reveal that privatization commonly entails not a "retraction" in government but rather a different form of government, one in which private actors wield substantial power

over government programs and their participants. A central claim I make here is that as a result, government privatization often effectively serves to delegate government power to private entities.

Combined with private immunity from constitutional strictures, such delegations raise the danger that privatization will undermine constitutional accountability by preventing individual enforcement of constitutional constraints on government. Yet reflection shows that simply extending the constitutional norms applicable to government actors to cover the government's private partners is also constitutionally problematic. Doing so often simply transfers regulatory authority to the courts, and this transfer occurs in a context where the government particularly needs freedom to target the policy concerns and opportunities that privatization presents. The challenge is thus to develop a means of ensuring constitutional accountability while not impairing the legitimate regulatory prerogatives of the political branches.

A. *Contemporary Examples of Privatization*

Privatization is a word with many different meanings. On a social and cultural level, it implies an individual's withdrawal from civic life and reorientation towards the pursuit of self-interest.[11] In the context of government, the focus here, the term is conventionally understood to signify a transfer of public responsibilities to private hands.[12] Yet history demonstrates that increased privatization often goes hand in hand with expansion rather than contraction in public responsibilities. The government turns to private entities to provide the expertise and personnel it needs to fulfill its new tasks.[13] Moreover, privatization is not simply a neutral phenomenon; it carries inherent political and ideological implications. Ef-

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11. See Paul Starr, The Meaning of Privatization, 6 Yale L. & Pol'y Rev. 6, 9 (1988).

12. See, e.g., Stuart Butler, Privatization for Public Purposes, *in* Privatization and Its Alternatives 17, 17 (William T. Gormly, Jr. ed., 1991) ("Privatization is the shifting of a function, either in whole or in part, from the public sector to the private sector."); Martha Minow, Public and Private Partnerships: Accounting for the New Religion, 116 Harv. L. Rev. 1229, 1230 (2003) [hereinafter Minow, Public and Private Partnerships] ("[A] useful definition encompasses the range of efforts by governments to move public functions into private hands and to use market-style competition.").

13. See Joel F. Handler, Down from Bureaucracy: The Ambiguity of Privatization and Empowerment 85–86, 104 (1996) [hereinafter Handler, Down from Bureaucracy]; Freeman, Private Role, supra note 2, at 568–69; see also Paul C. Light, The True Size of Government 1 (1999) (noting number of full-time federal government employees increases by nearly 11 million if employees of private contractors and grantees are included). Perhaps the paradigmatic example of this is the War on Poverty, where the dramatic expansion in the federal government's social welfare role was accompanied by a similarly dramatic expansion in government contracting with nonprofits to provide services. See Stephen Rathgeb Smith & Michael Lipsky, Nonprofits for Hire: The Welfare State in the Age of Contracting 50–62 (1993); Kramer, supra note 2, at 34. Similarly, many of the measures that signaled the move to active federal regulation of the economy in the New Deal gave private industry groups a prominent role in setting and enforcing regulatory standards. See infra note 240 and accompanying text.

forts to privatize public programs frequently reflect a wish to limit the government's role and are often tied to particular substantive visions of government policies.[14] In addition, identifying an area of activity as purely private implies that it is not an appropriate subject for public regulation or collective responsibility.[15]

Further complicating the definitional challenge is the broad array of public-private relationships that the term "privatization" encompasses. As John Donahue has noted, "[t]wo concepts share the same word—*privatization*. The first concept . . . involves removing certain responsibilities, activities, or assets from the collective realm. . . . [T]he second . . . [involves] retaining collective financing but delegating delivery to the private sector."[16] Examples of the first type of privatization are the government selling off state-owned businesses or disbanding a government program altogether. In the United States, however, privatization overwhelmingly takes the second form.[17] Examples here include instances when government contracts with private entities to provide goods and services for itself or others, or provides vouchers or other subsidies that allow individuals to purchase such private goods or services on their own.

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14. See Matthew Diller, Form and Substance in the Privatization of Poverty Programs, 49 UCLA L. Rev. 1739, 1742–51, 1754–57 (2002) [hereinafter Diller, Form and Substance] (arguing that recent privatization in welfare context reflects explicit effort to reduce welfare rolls); see also Starr, supra note 11, at 38–41 (arguing that privatization undermines claims for public services and calls into question government's capacity for collective provision). But see Handler, Down from Bureaucracy, supra note 13, at 8–10 (noting claim that privatization in conjunction with decentralization can enhance democracy).

15. See Minow, Partners, supra note 2, at 34–35, 111–12 (noting that private provision of social services may undermine public commitment to such services); Carole Pateman, The Patriarchal Welfare State, *in* Democracy and the Welfare State 231, 236–38, 241 (Amy Gutmann ed., 1988) (arguing that seemingly neutral division between public and private masks patriarchal character of women's exclusion from public sphere).

16. John D. Donahue, The Privatization Decision: Public Ends, Private Means 215 (1989).

17. See id. at 6–7; see also Robert S. Gilmour & Laura S. Jensen, Reinventing Governmental Accountability: Public Functions, Privatization, and the Meaning of "State Action," 58 Pub. Admin. Rev. 247, 247 (1998) ("[F]ew government functions in America are simply abandoned altogether. . . . Privatization in the United States is . . . more likely to represent a change in form rather than function . . . ."). Contracting out is the dominant form of privatization in the United States. See Keon S. Chi & Cindy Jasper, Council of State Gov'ts, Private Practices: A Review on Privatization in State Government 13 (Michael J. Scott ed., 1998) (concluding that contracting out was method states used to privatize program or service in 78% of cases surveyed); U.S. Gen. Accounting Office, GAO/GGD-97-48, Privatization: Lessons Learned by State and Local Governments 22–23 (1997) [hereinafter GAO, Privatization] (describing privatization in United States as primarily contracting out); see also Freeman, Contracting State, supra note 10, at 164 (describing forms of private government contracts). On the other hand, the sale of state-owned businesses is a much less common form of privatization in the United States than abroad. For a discussion of one such divestiture in the United States, see Daniel Guttman, Public Purpose and Private Service: The Twentieth Century Culture of Contracting Out and the Evolving Law of Diffused Sovereignty, 52 Admin. L. Rev. 859, 879–81 (2000) (describing privatization of United States Enrichment Corporation).

In some privatization contexts, the government does not provide direct funding but nonetheless uses private entities to achieve its programmatic goals—for instance, by chartering private corporations to provide desired services or relying on private actors for the content and enforcement of government regulations.[18]

Private actors have long played central roles in government programs.[19] But, as other commentators have noted, contemporary government privatization is in important ways a new phenomenon. Recent years have witnessed an increase in the roles private actors play in government. Both the character and quantity of private involvement are changing. Governments are giving private actors greater discretion over the implementation of government programs than in the past and utilizing new types of private partners, particularly for-profit companies and religious organizations.[20] Privatization seems likely only to expand further in the near future, fueled by increasing belief in market-based solutions to public problems.[21]

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18. See GAO, Privatization, supra note 17, at 44–47 (defining different forms of privatization); Ronald A. Cass, Privatization: Politics, Law, and Theory, 71 Marq. L. Rev. 449, 456–62 (1998) (describing various forms of private involvement in government); Freeman, Private Role, supra note 2, at 551–55 (same); Steven L. Schwarcz, Private Ordering, 97 Nw. U. L. Rev. 319, 324–29 (2002) (classifying forms of private regulation by level of government involvement). For detailed descriptions of these different forms of privatization, see generally The Tools of Government (Lester M. Salamon ed., 2002).

19. See, e.g., Freeman, Extending Public Law Norms, supra note 10, at 1289; Minow, Public and Private Partnerships, supra note 12, at 1236, 1240–41; see also Neil Gilbert, Transformation of the Welfare State: The Silent Surrender of Public Responsibility 99–126 (2002) (describing reliance on private social welfare services and benefits in Europe). For historical overviews of the roles of nonprofits in social service delivery and government programs, see Lester M. Salamon, Partners in Public Service: Government-Nonprofit Relations in the Modern Welfare State 69–99 (1995) [hereinafter Salamon, Partners]; Smith & Lipsky, supra note 13, at 47–57.

20. See Minow, Partners, supra note 2, at 1–26 (arguing that third parties increasingly are involved in implementing and often managing government services); Freeman, Contracting State, supra note 10, at 160–64 (describing recent expansions in use of contracting out); H. Brinton Milward & Keith G. Provan, The Hollow State: Private Provision of Public Services, *in* Public Policy for Democracy 222, 223 (Helen Ingram & Steven Rathgeb Smith eds., 1993) (noting that governments are now contracting for administration and monitoring); Lester M. Salamon, The New Governance and the Tools of Public Action: An Introduction, *in* The Tools of Government, supra note 18, at 1, 1–3 [hereinafter Salamon, The New Governance] (noting government's increased reliance on third parties to deliver public services).

21. See Minow, Public and Private Partnerships, supra note 12, at 1240. Another force behind privatization's growth has been loss of faith in the government's ability to administer programs and solve social problems. See id. After the September 11th terrorist attacks, however, confidence in the government generally and in the military in particular has increased. See Elaine Ciulla Kamarck, The End of Government as We Know It, *in* Market-Based Governance 227, 227–31 (John D. Donahue & Joseph S. Nye, Jr. eds., 2002); Robin Toner, Trust in the Military Heightens Among Baby Boomers' Children, N.Y. Times, May 27, 2003, at A1. Whether this resurgence of faith in government will slow privatization's progress is unclear.

While private involvement in government has increased in many areas of government activity, it is particularly pronounced in social welfare programs and in government-run institutions. Four areas marked by notable expansions of privatization are Medicare and Medicaid, welfare programs, public education, and prisons. An examination of these areas is particularly instructive in demonstrating the trend towards greater privatization and how it impacts government programs.

1. *Medicare and Medicaid Managed Care.* — One example of the trend towards expanded privatization is Medicare and Medicaid managed care. Until recently, the basic model for both programs was fee-for-service, under which the government reimburses a doctor or other medical provider for each service provided to a beneficiary. By contrast, under managed care the beneficiary enrolls with a managed care organization (MCO), usually a for-profit enterprise, and the government pays the MCO a set amount over a given period (the "capitated rate") regardless of the medical services actually provided.[22] While enrollment in a MCO is optional for Medicare beneficiaries, it is mandatory for many participants in Medicaid.[23] The number of beneficiaries enrolled in managed care in the two programs has increased dramatically since 1990, with nearly 60% of Medicaid beneficiaries and 12% of Medicare beneficiaries being treated through MCOs in 2002.[24]

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22. For a description of how managed care operates, see Barry R. Furrow, Regulating the Managed Care Revolution: Private Accreditation and a New System Ethos, 43 Vill. L. Rev. 361, 372–76 (1998); see also Jennifer E. Gladieux, Medicare+Choice Appeal Procedures: Reconciling Due Process Rights and Cost Containment, 25 Am. J.L. & Med. 61, 61 nn.5–6, 62 nn.7–11 (1999) (describing different managed care organizational forms). Both Medicare and Medicaid offer less frequently used forms of managed care that pay more on a cost basis. See Pi-Yi Mayo, Medicare Health Maintenance Organizations, 39 S. Tex. L. Rev. 25, 27 (1997) (describing cost-based MCOs under Medicare); Maria A. Morrison, The Impact of *Grijalva v. Shalala* on the Medicare HMO Appeal Process and the Importance of Enforcing Appeal Process Regulations, 103 Dick. L. Rev. 735, 737 (1999) (same); Kaiser Comm'n on Medicaid and the Uninsured, Henry J. Kaiser Family Found., Key Facts: Medicaid and Managed Care 1 (Dec. 2001), available at http://www.kff.org/content/2001/206803 (on file with the *Columbia Law Review*) (describing non-risk-based forms of Medicaid managed care).

23. See Medicare+Choice Program, 42 C.F.R. §§ 422.50, 422.62 (2002); see also id. §§ 406.50, 407.10 (setting out eligibility conditions for fee-for-service Medicare). Most of the participants for whom Medicaid managed care is mandatory qualify for Medicaid on the basis of low income; states generally have not required that the elderly and disabled enroll in managed care. See James W. Fossett, Managed Care and Devolution, *in* Medicaid and Devolution: A View from the States 106, 111–13 (Frank J. Thompson & John J. DiIulio, Jr. eds., 1998) [hereinafter Fossett, Managed Care]. However, this might change if the Bush Administration's proposal for block-granting Medicaid is adopted. See Robert Pear, Medicaid Proposal Would Give States More Say on Costs, N.Y. Times, Feb. 1, 2003, at A1 [hereinafter Pear, Medicaid Proposal] (detailing Bush Administration's plan to block-grant Medicaid and "give states the same freedom they got to run their welfare programs in 1996").

24. Ctrs. for Medicare & Medicaid Servs., Dep't of Health & Human Servs., 2002 Medicaid Managed Care Enrollment Report: Medicaid Managed Care Penetration Rates by State (June 30, 2002), available at http://cms.hhs.gov/medicaid/managedcare/

Even under fee-for-service, both Medicare and Medicaid rely extensively on the private sector.[25] Private doctors, hospitals, nursing homes, and the like provide medical care; private intermediaries process the providers' claims for reimbursement; and review of the appropriateness of treatment decisions and quality of care is undertaken by private medical professionals sitting on peer review organizations or utilization review committees, as well as by accreditation organizations such as the Joint Commission on Accreditation of Healthcare Organizations (JCAHO).[26] What distinguishes managed care from these other instances of privatization is that the MCO exercises a monopoly over a beneficiary's access to health care. The MCO controls beneficiaries' access to health services, rather than their access to payment for already-provided health services,

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mmcss02.asp (on file with the *Columbia Law Review*) (identifying 23.1 million Medicaid beneficiaries, 57.6% of total beneficiaries, as enrolled in managed care); The Medicare Policy Project, Henry J. Kaiser Family Found., Medicare: Medicare+Choice Fact Sheet 1 (Apr. 2003), available at http://www.kff.org/content/2003/2052-06 (on file with the *Columbia Law Review*) [hereinafter Medicare+Choice Fact Sheet] (reporting that 5 million Medicare beneficiaries, 12% of total beneficiaries, were enrolled in Medicare managed care in 2002). The number of Medicare beneficiaries enrolled in managed care has declined since its high of 16% in 2000, Medicare+Choice Fact Sheet, supra, at 1, a decline attributed to a significant drop in managed care plans participating in Medicare, as well as to the fact that those plans remaining in Medicare are reducing benefits and increasing premiums, see Marsha Gold & John McCoy, Mathematica Policy Research, Inc., Monitoring Medicare+Choice Fast Facts No. 7: Choice Continues to Erode in 2002, at 2 (Jan. 2002), available at http://www.mathematica-mpr.com/PDFs/fastfacts7.pdf (on file with the *Columbia Law Review*). The emphasis on preferred provider plans in recent Medicare prescription drug coverage proposals may further increase managed care enrollment. See Pear, Medicare Debate, supra note 1, at A22.

25. This reliance on private entities is not happenstance; on the contrary, such reliance, in the case of Medicare at least, was essential to overcoming the American Medical Association's opposition and getting the program implemented. See Timothy Stoltzfus Jost, Governing Medicare, 51 Admin. L. Rev. 39, 82–94 (1999) [hereinafter Jost, Governing Medicare].

26. On the provision of services by private physicians, hospitals, and other eligible institutions, see, e.g., 42 U.S.C. § 1395x(e), (r) (2000) (defining physicians and hospitals eligible to provide services under Medicare). On the role of private intermediaries in claims processing, see Staff of Subcomm. on Health & Env't of the House Comm. on Energy & Commerce, 103d Cong., Medicaid Source Book: Background Data and Analysis 440–45 (Comm. Print 1993) [hereinafter Subcomm. on Health & Env't, Medicaid Source Book] (noting which states use fiscal intermediaries to process claims under Medicaid); Jost, Governing Medicare, supra note 25, at 82–88; Eleanor D. Kinney, Behind the Veil Where the Action Is: Private Policy Making and American Health Care, 51 Admin. L. Rev. 145, 161–62 (1999) [hereinafter Kinney, Behind the Veil]. On the role of peer review organizations, see Subcomm. on Health & Env't, Medicaid Source Book, supra, at 452–53; Timothy Stoltzfus Jost, Administrative Law Issues Involving the Medicare Utilization and Quality Control Peer Review Organization (PRO) Program: Analysis and Recommendations, 50 Ohio St. L.J. 1, 4–9 (1989). On the role of accreditation organizations and the JCAHO, see Subcomm. on Health & Env't, Medicaid Source Book, supra, at 446; Eleanor D. Kinney, Private Accreditation as a Substitute for Direct Government Regulation in Public Health Insurance Programs: When Is It Appropriate, Law & Contemp. Probs., Autumn 1994, at 47, 52, 55–63 [hereinafter Kinney, Private Accreditation].

as in the case of the private intermediaries who process reimbursement claims.[27] Moreover, beneficiaries enrolled in MCOs generally cannot obtain government payment for services they obtain outside of the MCO's network, whereas under fee-for-service one provider's refusal to provide services leaves a beneficiary free to obtain subsidized services from another.[28] Beneficiaries are limited in their ability to switch out of an MCO, and the MCO has the power to deny a desired service or procedure on the ground that it is not medically necessary or not covered under Medicaid or Medicare.[29]

The growth of managed care in Medicaid and Medicare, as well as in the context of private employer-provided health plans, reflects efforts to cut costs.[30] The capitated rate approach gives MCOs an incentive to control expenses and police against unnecessary treatments. Managed care can also result in improvements in health care quality: MCOs have a financial interest in providing preventative services[31]; they are also better positioned to ensure service coordination and enforce standards for

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27. See Gordon Bonnyman, Jr. & Michele M. Johnson, Unseen Peril: Inadequate Enrollee Grievance Protections in Public Managed Care Programs, 65 Tenn. L. Rev. 359, 369–70 (1998); Kinney, Behind the Veil, supra note 26, at 156 (discussing convergence of coverage and treatment decisions under managed care as different from fee-for-service). But see Laurie McGinley, Behind Medicare's Decisions, An Invisible Web of Gatekeepers, Wall St. J., Sept. 16, 2003, at A1 (describing how private intermediaries' ability to set local policy regarding Medicare coverage for particular treatments and procedures gives intermediaries significant power over beneficiaries' access to health care).

28. Some coverage for out-of-network expenses is available under preferred provider plans, but beneficiaries are subject to greater deductibles and copayments than under fee-for-service. See Reed Abelson, Private Plans Again Seen as Aid to Medicare, N.Y. Times, July 5, 2003, at A1.

29. See John T. Boese, When Angry Patients Become Angry Prosecutors: Medical Necessity Determinations, Quality of Care, and the Qui Tam Law, 43 St. Louis U. L.J. 53, 59 (1999); see also Daniels v. Wadley, 926 F. Supp. 1305, 1307–08 (D. Tenn. 1996) (detailing ways in which individual choice is limited by Tennessee's Medicaid managed care program), vacated on other grounds sub nom. Daniels v. Menke, 145 F.3d 1330 (6th Cir. 1998). While Medicare beneficiaries enrolled in managed care were initially allowed to transfer out of their MCOs at any time, starting in 2001 they are allowed to change plans only once annually. See 42 C.F.R. § 422.62 (2002).

30. For arguments that managed care is unlikely to yield financial savings for Medicare, see Barbara S. Cooper & Bruce C. Vladeck, Bringing Competitive Pricing to Medicare, Health Aff., Sept.–Oct. 2000, at 49; see also Abelson, supra note 28 (describing studies that suggest managed care is unlikely to yield financial savings for Medicare).

31. Debate exists over the extent to which MCOs' interest in avoiding future costs of treatment leads them to provide better access to preventative services. See Robert A. Berenson & Dean M. Harris, Using Managed Care Tools in Traditional Medicare—Should We? Could We?, Law & Contemp. Probs., Autumn 2002, at 139, 143–44 (noting some MCOs have adopted disease management programs); see also Lyle Nelson et al., Access to Care in Medicare HMOs, 1996, *in* Contemporary Managed Care 163, 167–68 (Marsha Gold ed., 1998) (reporting some groups of enrollees in Medicare managed care had greater access to preventative services). But see Sara Rosenbaum & Brian Kamoie, Managed Care and Public Health: Conflict and Collaboration, 30 J.L. Med. & Ethics 191, 193 (2002) (stating that managed care rarely covers significant preventative services).

care.[32] In the Medicare context, managed care allows beneficiaries the power to choose additional coverage or lower out-of-pocket expenses in exchange for restrictions on their choice of provider.[33] But there are also obvious hazards attached to the use of managed care, most significantly that MCOs also have strong financial incentives to deny coverage for medically needed but expensive treatments.[34] Concerns over such MCO abuse have led many states to enact legislation requiring independent review of MCO denials of treatment among other measures,[35] while the federal government has a detailed procedure providing for similar review of service denials by Medicare MCOs.[36]

2. *Welfare Privatization.* — Even more dramatic expansion in privatization is evident in the welfare context, which is also characterized by extensive and longstanding private involvement. Private organizations run homeless shelters and food banks; provide treatment services; operate Head Start programs; and work closely with child welfare agencies.[37]

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32. See James W. Fossett et al., Nelson A. Rockefeller Inst. of Gov't, Managing Accountability in Medicaid Managed Care: The Politics of Public Management 1 (1999) (noting potential for Medicaid managed care to enhance accountability over fee-for-service because managed care creates central organization responsible for providing care to beneficiaries); Boese, supra note 29, at 57 (arguing that fee-for-service creates incentives to overtreat that managed care avoids); Furrow, supra note 22, at 369–71 (arguing that integrated delivery of medical services can significantly benefit the chronically ill and that such integration is easier to achieve with managed care); see also Rosenbaum & Kamoie, supra note 31, at 196–97 (noting managed care treatment guidelines allow public health authorities to disseminate scientific standards quickly).

33. See Mayo, supra note 22, at 37 (noting that Medicare requires MCOs to provide additional services to beneficiaries); Christopher G. Gegwich, Note, Medicare Managed Care: A New Constitutional Right to Due Process for Denials of Care Under *Grijalva v. Shalala*, 28 Hofstra L. Rev. 185, 191–93 (1999) (arguing Medicare MCOs provide broader services than traditional fee-for-service, save beneficiaries the cost of Medigap insurance, and impose less administrative burden on federal government). But see Medicare+Choice Fact Sheet, supra note 24, at 1–2 (noting that most Medicare+Choice plans have reduced availability and scope of key supplemental benefits).

34. Jennifer L. Wright, Unconstitutional or Impossible: The Irreconcilable Gap Between Managed Care and Due Process in Medicaid and Medicare, 17 J. Contemp. Health L. & Pol'y 135, 169–70 (2000) (arguing that MCOs have financial incentive to refuse authorization where care exceeds fixed rate of compensation per enrollee); Bonnyman & Johnson, supra note 27, at 376–79 (contending that MCOs have the ability to deny beneficiaries needed medical treatment); Eleanor D. Kinney, Tapping and Resolving Consumer Concerns About Health Care, 26 Am. J.L. & Med. 335, 344–46 (2000) (same).

35. See, e.g., Ky. Ass'n of Health Plans v. Miller, 123 S. Ct. 1471, 1473–75 (2003) (upholding Kentucky statute limiting ability of health benefit plans to discriminate against qualified providers); Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, 361, 373–75 (2002) (upholding Illinois statute requiring independent review of HMO determinations that conflict with those of primary care physicians).

36. See 42 U.S.C. § 1395w-22(f)–(g) (2000); Medicare+Choice Program, 42 C.F.R. § 422.560–422.626 (2002). Federal legislation and regulations also provide procedures for review of care denials by Medicaid MCOs, but do not offer as extensive protections. See 42 U.S.C. §§ 1396a(a)(3), 1396u-2(b); 42 C.F.R. § 438.100, 438.400–438.424; infra note 227.

37. See Arnold Gurin, Governmental Responsibility and Privatization: Examples from Four Social Services, *in* Privatization and the Welfare State 179, 184–95 (Sheila B.

The 1996 welfare legislation, which replaced Aid to Families with Dependent Children (AFDC) with the Temporary Aid to Needy Families (TANF) program, paved the way for greater privatization by expressly permitting private administration of state TANF programs.[38] Moreover, TANF's mandate that certain percentages of a state's caseload must be engaged in a work activity means that many more welfare recipients are participating in privately run work programs or receiving services from private entities.[39] According to a recent report, state and local governments spent more than $1.5 billion in 2001 on contracts with private entities for TANF-related services.[40] The 1996 legislation also altered the nature of private involvement in welfare by authorizing states to provide welfare services through pervasively sectarian organizations and prohibit-

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Kamerman & Alfred J. Kahn eds., 1989); Salamon, Partners, supra note 19, at 75–99; Smith & Lipsky, supra note 13, at 3–5, 46–71. Moreover, programs such as Food Stamps and Section 8 housing assistance are privately implemented, in that the government makes subsidies available and sets overall eligibility requirements but leaves specific decisions regarding what food or housing is purchased to private decisions of beneficiaries, retailers, and landlords. For discussions of the structure of these programs, see Robert A. Moffitt, Lessons from the Food Stamp Program, *in* Vouchers and the Provision of Public Services 119, 120–23 (C. Eugene Steuerle et al. eds., 2000); George E. Peterson, Housing Vouchers: The U.S. Experience, *in* Vouchers and the Provision of Public Services, supra, at 139, 143–51. On the lengthy private involvement in public welfare programs, see Michael B. Katz, In the Shadow of the Poorhouse: A Social History of Welfare in America 45–47, 68–87, 112–13, 124, 160–63 (10th anniv. ed. 1996); see also Gilman, supra note 10, at 581–91 (providing historical overview of private involvement in welfare); John Fabian Witt, The Accidental Republic: Crippled Workingmen, Destitute Widows, and the Remaking of American Law, ch. 3 (forthcoming 2003) (discussing the way in which local private and quasi-private workingmen's mutual aid societies are critical building blocks of the early social insurance systems in Western democracies).

38. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) § 104, 42 U.S.C. § 604a(a)(1)(A) (2000) (authorizing implementation of welfare programs "through contracts with charitable, religious, or private organizations"). For descriptions of how PRWORA has led to increased privatization in welfare, see Pamela Winston et al., Privatization of Welfare Services: A Review of the Literature 3–6 (Mathematica Policy Research, Inc., Reference No. 8834-002, May 2002), available at http://www.mathematica-mpr.com/PDFs/privatization.pdf (on file with the *Columbia Law Review*); see also M. Bryna Sanger, The Welfare Marketplace: Privatization and Welfare Reform 2, 28–29 (2003) (tracing expanded privatization to the 1998 Workforce Investment Act (WIA) as well as PRWORA).

39. See, e.g., LaDonna Pavetti et al., The Role of Intermediaries in Linking TANF Recipients with Jobs, at v (Mathematica Policy Research, Inc., Reference No. 8543-400, Feb. 10, 2000), available at http://www.mathematica-mpr.com/PDFs/intermediaries.pdf (on file with the *Columbia Law Review*); Sanger, supra note 38, at 2, 15, 34–39; see also Demetra Smith Nightingale, Program Structure and Service Delivery in Eleven Welfare-to-Work Grant Programs 48–54 (Mathematica Policy Research, Inc., Reference No. 8550-121, Jan. 2001), available at http://www.mathematica-mpr.com/PDFs/wtwstructure.pdf (on file with the *Columbia Law Review*) (reporting that most Welfare-to-Work services, aimed at hard-to-place TANF recipients, were provided by nonprofit, community-based organizations).

40. U.S. Gen. Accounting Office, GAO-02-245, Welfare Reform: Interim Report on Potential Ways to Strengthen Federal Oversight of State and Local Contracting 8 (2002) [hereinafter GAO, Welfare Reform].

ing governments from discriminating against religious providers, popularly referred to as "charitable choice."[41]

Wisconsin provides the prime example of a government putting operation of its welfare system in private hands. Private contractors administer Wisconsin's welfare program—known as Wisconsin Works or W-2—in Milwaukee, which has approximately 75% of the state's welfare recipients.[42] In this role, private contractors remain responsible for substantial aspects of program administration, such as determining applicants' eligibility for benefits,[43] assessing their ability to work, developing employment plans, and sanctioning beneficiaries for noncompliance with program requirements.[44] Only a few counties have followed Wisconsin's

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41. See 42 U.S.C. § 604a; see also Freedom from Religion Found., Inc. v. McCallum, 179 F. Supp. 2d 950, 967–78, 982 (W.D. Wis. 2002) (holding that direct funding for drug treatment services through pervasively sectarian provider violates Establishment Clause, but declining to assess constitutionality of charitable choice provision of TANF). For analyses of the constitutional and policy issues involved in charitable choice, see sources cited supra note 6.

42. See Sheena McConnell et al., Privatization in Practice: Case Studies of Contracting for TANF Case Management 16 tbl.II.1, appx. at A23–A25 (Mathematica Policy Research, Inc., Reference No. 8834-008, Mar. 2003), available at http://www.mathematica-mpr.com/PDFs/privatize.pdf (on file with the *Columbia Law Review*); see also Thomas Kaplan, Wisconsin's W-2 Program: Welfare as We Might Come to Know It?, *in* Learning from Leaders: Welfare Reform Politics and Policy in Five Midwestern States 77, 85 (Carol S. Weissert ed., 2000) (discussing use of private contractors under W-2). See generally David Dodenhoff, Privatizing Welfare in Wisconsin: Ending Administrative Entitlements—W-2's Untold Story 3 (Wis. Policy Research Inst. Report No. 11:1, Jan. 1998), available at http://www.wpri.org/Reports/Volume11/Vol11no1.pdf (on file with the *Columbia Law Review*) (describing creation of W-2 and privatized programs in Milwaukee).

43. Some disagreement exists as to whether private W-2 employees determine applicants' initial eligibility for W-2 benefits. Compare McConnell et al., supra note 42, at 43, appx. at A24 (describing private contractors as performing initial eligibility and assessment functions in May 2002), with Sanger, supra note 38, at 43, 57 (stating that initial intake functions recently have been transferred back to public employees). According to Maximus, one of the private agencies implementing W-2 in Milwaukee, private employees continue to determine applicants' eligibility for W-2 benefits and have done so since the program's inception; however, public employees determine eligibility for food stamps and Medicaid, as required by federal law. Telephone Interview by Gillian E. Metzger, Associate Professor of Law, Columbia University School of Law with Jerry Stepaniak, Vice-President, Maximus (Sept. 4, 2003). On the other hand, the state agency responsible for overseeing W-2's implementation maintains that because the state uses the same computer system to process applications or W-2, Medicaid, and food stamps, only public employees are allowed to open an electronic application for W-2 benefits. See E-mail from Roger Kautz, Bureau of Partner Services, Milwaukee Regional Office of the Division of Workforce Solutions, Wisconsin Department of Workforce Development, to Gillian E. Metzger, Associate Professor of Law, Columbia University School of Law (July 31, 2003) (on file with the *Columbia Law Review*).

44. See Wis. Stat. Ann. §§ 49.143–51 (2003); Wis. Legislative Audit Bureau, Rep. 01-7, An Evaluation: Wisconsin Works (W-2) Program: Department of Workforce Development 3–9, 21–23 (2001) (noting discretion of W-2 agencies regarding placements, sanctions, and time limit extensions); Susan Gooden et al., Matching Applicants with Services: Initial Assessments in the Milwaukee County W-2 Program 3–6, 11–15 (MDRC, Nov. 2001),

initial lead and engaged in such wholesale privatization of welfare programs.[45] Increasingly, however, other governments are similarly contracting out case management functions,[46] as well as particular aspects of program administration, such as benefits delivery[47] and child support collection.[48] Workforce development, job training, and job placement services are especially likely to be privatized.[49]

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available at http://www.mdrc.org/publications/95/full.pdf (on file with the *Columbia Law Review*) (focusing on case manager's control over where applicants are placed in W-2's tiered structure, which determines requirements applicants must meet and services they will be provided by W-2 agency); McConnell et al., supra note 42, at 14–17, appx. at A23–A26 (describing private contractors' responsibilities under W-2).

45. Winston et al., supra note 38, at 11 (identifying counties in Arizona and Florida that have contracted out administration of all aspects of TANF); see also GAO, Welfare Reform, supra note 40, at 15 (reporting that private contractors determine eligibility for TANF cash assistance in four states and for other TANF-funded services in eighteen states). In addition, Florida has given responsibility for all TANF services other than eligibility determinations to a public/private corporation. See Robert E. Crew, Jr. & Belinda Creel Davis, Florida Welfare Reform: Cash Assistance as the Least Desirable Resource for Poor Families, *in* Managing Welfare Reform in Five States 25, 38–39 (Sarah F. Liebscbutz ed., 2000). The lack of more widespread privatization of all TANF administration is in part due to the federal government's conclusion that public employees must perform Medicaid and Food Stamp eligibility determinations. Winston et al., supra note 38, at 5; Sam Howe Verhovek, Clinton Reining in Role for Business in Welfare Effort, N.Y. Times, May 10, 1997, at A1.

46. See McConnell et al., supra note 42, at 2 (reporting that forty states have privatized some aspect of TANF case management); Richard W. Roper, A Shifting Landscape: Contracting for Welfare Services in New Jersey, Rockefeller Reps. (Nelson A. Rockefeller Inst. of Gov't, Albany, N.Y.), Dec. 23, 1998, at 5–11 (describing New Jersey's increasing reliance on private providers for welfare-related services). But see David Breaux et al., To Privatization and Back: Welfare Reform Implementation in Mississippi, *in* Managing Welfare Reform in Five States, supra note 45, at 43, 46–50, 53–54 (detailing initial rise of privatization and later return of case management and job placement functions to public hands).

47. See Henry Freedman et al., Uncharted Terrain: The Intersection of Privatization and Welfare, 35 Clearinghouse Rev. 557, 561 (2002) (reporting that Citigroup subsidiary has contracts to run electronic benefit systems in more than thirty states); see also David Barstow, A.T.M. Cards Fail to Live Up to Promises Made to the Poor, N.Y. Times, Aug. 16, 1999, at A1 (discussing problems with implementation of electronic benefit systems).

48. See Winston et. al, supra note 38, at 9–10; U.S. Gen. Accounting Office, GAO/HEHS-97-4, Child Support Enforcement: Early Results on Comparability of Privatized and Public Offices 4 (1996) (noting that fifteen states have fully privatized child support enforcement).

49. See Pavetti et al., supra note 39, at 1–3, 12–24 (describing predominant use of nonprofits in the provision of TANF employment services); GAO, Welfare Reform, supra note 40, at 14 ("Government entities contract out most often for services to facilitate employment."). Under the WIA, all workforce development activities are now overseen by boards dominated by representatives of the private sector and are run through one-stop career centers that are often privately operated. See 29 U.S.C. §§ 2821(b), 2832(b) (2000) (mandating that majority of state and local workforce investment board members come from business community); Winston, et al., supra note 38, at 9 (noting that offices coordinating workforce development services—"one-stop career centers"—are often privately operated); see also Sanger, supra note 38, at 29–30 (noting link between WIA and TANF programs).

As in the Medicare and Medicaid managed care context, privatization of welfare administration means that private contractors wield broad authority over welfare program participants. This is true even where basic eligibility and sanctioning decisions continue to be made by government officials; for example, a private contractor's policies as to whether beneficiaries are required to take any job offered, regardless of level of pay or work hours, can determine whether beneficiaries are referred to government agencies for sanctioning.[50] Two developments further enhance the power of private welfare contractors. One is a trend towards consolidating responsibility for managing programs and selecting providers in a few large contractors.[51] The other is increasing use of "performance management," under which the government sets performance goals and allows private entities broad discretion regarding how to achieve them.[52] These two developments have led, in turn, to increased reliance on for-profit contractors, as nonprofits often lack the capacity and financial resources to undertake such large-scale contracts, where payment is often significantly delayed and contingent on program outcomes.[53]

Not surprisingly, the same concern that private contractors will use their broad powers to advance their own interests at the expense of Medicare/Medicaid beneficiaries and the public also surfaces in the welfare context. For instance, under a performance-based system providing financial rewards for the number of successful job placements, private contractors have a visible incentive to try to serve only the most employable

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50. See Matthew Diller, The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government, 75 N.Y.U. L. Rev. 1121, 1145–63 (2000) [hereinafter Diller, Revolution]; see also Evelyn Z. Brodkin, Inside the Welfare Contract: Discretion and Accountability in State Welfare Administration, 71 Soc. Serv. Rev. 1, 5 (1997) ("How does a caseworker determine whether a recipient has 'good cause' to miss a day of work, or has made a good-faith effort to find suitable child care, or must accept the first available training position rather than wait?").

51. See Sanger, supra note 38, at 40, 55–69 (describing use of large contracts in New York City and elsewhere); Janet Quint et al., Big Cities and Welfare Reform: Early Implementation and Ethnographic Findings from the Project on Devolution and Urban Change 127–29 (MDRC ES-14, Apr. 1999) (reporting that Lockheed Martin received large contracts to supply employment services to TANF recipients in Miami-Dade County and then subcontracted with community-based organizations for services); William P. Ryan, The New Landscape for Nonprofits, Harv. Bus. Rev., Jan.–Feb. 1999, at 127, 131–34 (identifying large size and access to capital as advantages that for-profit entities have over their nonprofit counterparts).

52. See Harry P. Hatry, Urban Inst., Performance Measurement: Getting Results 3–10 (1999); McConnell et al., supra note 42, at 39–51 (discussing use of performance measures in six case studies of welfare privatization). While notable examples of performance-based contracting exist, most welfare contracts are still structured for cost reimbursement. See GAO, Welfare Reform, supra note 40, at 16–18, 53; see also Sanger, supra note 38, at 19–23 (discussing issues raised by performance-based contracting and its frequency); Diller, Revolution, supra note 50, at 1178–80 (discussing effects of increased emphasis on performance measurement under PRWORA).

53. See Sanger, supra note 38, at 55–69; see also McConnell et al., supra note 42, at 18–20.

beneficiaries, or to dissuade hard-to-employ individuals from continuing in programs by means of onerous participation requirements and sanctions.[54] But focusing solely on the potential for abuse from welfare privatization is again too one-sided. Government-run welfare programs are often characterized by abusive procedures designed simply to keep individuals off the rolls,[55] whereas privatization may mean services are provided by nonprofits with ideological commitments more allied with beneficiaries' interests.[56] In addition, the operational flexibility of private providers can make them better able to improve staff performance and tailor their programs to meet the needs of particular participants or employers.[57]

3. *Privatization of Public Education.* — Public education is a third area characterized by recent moves to greater privatization, with an accompanying shift of core educational responsibilities to private hands. Charter schools, private management of public schools by educational management organizations (EMOs), and voucher programs provide the main examples.[58]

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54. See Sanger, supra note 38, at 21–22, 42–43, 68–69, 104–06; Gilman, supra note 10, at 600–01 & 601 n.202; see also Stevenson, Welfare Services, supra note 7, at 105–11 (discussing financial incentives created under other contract approaches). For a discussion of concerns about such abuses in Wisconsin, see Wis. Legislative Audit Bureau, supra note 44, at 8–9 (reporting private agencies in Milwaukee had higher sanction rates and reversals of agency determinations than other W-2 agencies and were less likely to seek extensions of time limits for beneficiaries); see also Karyn Rotker et al., Wisconsin Works—for Private Contractors, That Is, 35 Clearinghouse Rev. 530, 530–39 (2002) (criticizing performance of private agencies running W-2 in Milwaukee County).

55. See Diller, Revolution, supra note 50, at 1145–80; see also Minow, Public and Private Partnerships, supra note 12, at 1258 (arguing that public failures support experimentation with privatization).

56. See Sanger, supra note 38, at 14–15, 65–71, 82–83 (describing potential benefits of nonprofits, although arguing that welfare privatization threatens nonprofits' distinctive character). For skepticism that nonprofit status will have a curbing effect on private welfare contractors, see Diller, Form and Substance, supra note 14, at 1748–49; Stevenson, Welfare Services, supra note 7, at 111–15. For discussions of the impact that government contracting may have on nonprofits, see infra note 132.

57. See Jason DeParle, For Caseworker, Helping Is a Frustrating Struggle, N.Y. Times, Dec. 10, 1999, at A1 (describing experiences of caseworker in private W-2 agency); see also Alice Lipowicz, Job Trainers Forge Close Ties to Firms to Aid Job Seekers, Crain's N.Y. Bus., Apr. 5, 1999, at 4 (describing nonprofit program that specifically tailors training to jobs at Salomon Smith Barney).

58. Private entities also offer discrete services, such as maintenance or transportation, to public schools. See Amy Stuart Wells & Janelle Scott, Privatization and Charter School Reform: Economic, Political and Social Dimensions, *in* Privatizing Education 234, 235–36 (Henry M. Levin ed., 2001); Henry M. Levin, The Public-Private Nexus in Education 8–9 (Nat'l Ctr. for the Study of Privatization in Educ., Teachers Coll., Columbia Univ., Occasional Paper No. 1, Mar. 2000), available at http://www.ncspe.org/publications_files/31_OP01.pdf (on file with the *Columbia Law Review*) [hereinafter Levin, Nexus].

Charter schools—the most significant of these initiatives to date[59]—are publicly-funded schools allowed to operate free from many of the rules governing traditional public schools. They are also least clearly an instance of privatization; in addition to being publicly funded, they are officially denominated public schools, come into existence as a result of government authorization (the grant of a charter), and are subject to the open admissions requirement applicable to traditional public schools.[60] Yet charter schools also embody substantial private involvement: private individuals or groups initiate the creation of the school; the schools are headed by private boards; and a significant number are managed by EMOs, usually for-profit entities.[61] EMOs also occasionally have won contracts to operate traditional public schools, in some cases managing all or many of a district's schools.[62] Under voucher plans, the government pro-

59. From 1992 to 2002, the number of charter schools grew from two to nearly 2,500, and thirty-eight states now authorize their creation. Pearl Rock Kane & Christopher J. Lauricella, Assessing the Growth and Potential of Charter Schools, *in* Privatizing Education, supra note 58, at 203, 203; Joe Nathan, A Charter School Decade, Educ. Wk., May 29, 2002, available at http://www.edweek.org/ew/newstory.cfm?slug=38nathan.h21 (on file with the *Columbia Law Review*). Yet the import of charter schools should not be exaggerated. Even with recent expansion, in the 2000–2001 school year, they still enrolled less than 1% of all school children. Stephen D. Sugarman & Emlei M. Kuboyama, Approving Charter Schools: The Gatekeeper Function, 53 Admin. L. Rev. 869, 871 (2001).

60. See Sugarman & Kuboyama, supra note 59, at 873–76, 896. Further, most charter schools are state-created entities, in that they either did not exist prior to the grant of a charter or formerly were public schools. See U.S. Dep't of Educ., The State of Charter Schools 2000: Fourth Year Report 14–15 (2000) [hereinafter State of Charter Schools 2000] (noting that, by 1999, 72% of charter schools were newly created, 18% were preexisting public schools, and 10% were preexisting private schools). For descriptions of the chartering process and particular states' approaches, see Kane & Lauricella, supra note 59, at 210–21; Sugarman & Kuboyama, supra note 59, at 880–902; State of Charter Schools 2000, supra, at 12–13, 46–48.

61. See Kane & Lauricella, supra note 59, at 219–20 (describing responsibilities and composition of charter school boards); Sugarman & Kuboyama, supra note 59, at 875, 896–97 (noting that private groups can manage charter schools and that some states allow EMOs to apply directly for a charter). Estimates of the number of charter schools operated by EMOs vary, but appear to be on the order of 10–20% of all charter schools. See Alex Molnar, Calculating the Benefits and Costs of For-Profit Education, 9 Educ. Pol'y Analysis Archives 15, ¶ 9, at 3 (Apr. 24, 2001), at http://epaa.asu.edu/epaa/v9n15.html (on file with the *Columbia Law Review*); see also F. Howard Nelson & Nancy Van Meter, What Does Private Management Offer Public Education?, 11 Stan. L. & Pol'y Rev. 271, 272 (2000) (reporting that EMOs operated nearly 13% of charter schools in 1999–2000).

62. See Henry M. Levin, Studying Privatization in Education, *in* Privatizing Education, supra note 58, at 3, 3–5, 6–7 [hereinafter Levin, Studying Privatization]. But see Abby Goodnough, Scope of Loss for Privatizing by Edison Stuns Officials, N.Y. Times, Apr. 3, 2001, at B4 (detailing rejection of NYC Board of Education's plan to contract with Edison Schools to manage five schools). The largest EMO, Edison Schools, currently has a contract to manage twenty schools in Philadelphia. See Diana B. Henriques, Administrator of Schools Predicts Profit by Late June, N.Y. Times, May 15, 2003, at C4. In the early 1990s, nine Baltimore schools and all of Hartford's schools were privately managed. See Nelson & Van Meter, supra note 61, at 271. Often, however, concerns regarding for-profit EMOs' performance have led school districts to cancel or not renew contracts. See Nelson & Van Meter, supra note 61, at 271–72; see also Carol Ascher et al., Hard Lessons: Public Schools

vides a set amount of public funding per student to help cover tuition at private or out-of-district public schools. Overwhelmingly, students obtaining vouchers enroll in sectarian schools.[63] Until recently, only a few publicly-funded voucher plans had been implemented.[64] But voucher use seems likely to increase in light of the Supreme Court's recent decision in *Zelman v. Simmons-Harris*, which upheld Cleveland's voucher plan against an Establishment Clause challenge.[65]

In all three instances, private entities wield broad control over state-funded education. Charter school boards and EMOs operating charter schools possess considerable latitude over curriculum, discipline policies, and most aspects of school operation—indeed, providing this autonomy is the underlying rationale of the charter school movement.[66] EMOs often exercise similarly broad powers when they manage public schools.[67]

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and Privatization 43–59, 76–82 (1996) (offering critical assessment of the Baltimore and Hartford contracts).

63. In part, this is a reflection of the religious character of most private schools and, but it is also explained by the low subsidies provided under these plans, which generally are only sufficient to cover tuition at religious schools. See Stephen P. Broughman & Lenore A. Colaciello, Nat'l Ctr. for Educ. Statistics, U.S. Dep't of Educ., NCES 2001-330, Private School Universe Survey: 1999–2000, at 5 tbl.1 (Aug. 2001) (reporting that only 22% of private schools were nonsectarian); Zelman v. Simmons-Harris, 536 U.S. 639, 704–05 & 705 n.15 (2002) (Souter, J., dissenting) (noting tuition discrepancies); see also Milton Friedman, The Market Can Transform Our Schools, N.Y. Times, July 2, 2002, at A21 (calling for increase in voucher amounts as means of increasing number of non-religious schools participating in voucher programs).

64. The contemporary voucher movement dates back to the 1950s, when Milton Friedman advocated vouchers as a means of encouraging competition in public education. See Isabel V. Sawhill & Shannon L. Smith, Vouchers for Elementary and Secondary Education, *in* Vouchers and the Provision of Public Services, supra note 37, at 251, 253–60, 282 (providing a history of voucher proposals since 1950s); Levin, Nexus, supra note 58, at 12–13 (noting publicly-funded voucher programs exist in Cleveland and Milwaukee and privately funded plans have operated in San Antonio, New York, and Indianapolis).

65. 536 U.S. at 639. However, political and state law obstacles to vouchers remain. See, e.g., Frank R. Kemerer, The Legal Status of Privatization and Vouchers in Education, *in* Privatizing Education, supra note 58, at 39, 49–52 [hereinafter Kemerer, Legal Status] (describing state constitutional prohibitions on funding private and religious schools); see also James E. Ryan & Michael Heise, The Political Economy of School Choice, 111 Yale L.J. 2043, 2050, 2078–85 (2002) (arguing that voucher plans will be limited by suburban unwillingness to open suburban schools).

66. See Kane & Lauricella, supra note 59, at 219–20; Sugarman & Kuboyama, supra note 59, at 875–77.

67. See Levin, Studying Privatization, supra note 62, at 7 ("EMOs are given authority to staff and manage the school, set curriculum and instructional strategies, sponsor professional development, establish school policies, and, in some cases, determine pay scales and working conditions as well as performance incentives."). This control often means mandating adherence to company-scripted lesson plans and strict disciplinary procedures. See Henry M. Levin, Potential of For-Profit Schools for Educational Reform 1–2 (Nat'l Ctr. for the Study of Privatization in Educ., Teachers Coll., Columbia Univ., Occasional Paper No. 47, June 2002), available at http://www.ncspe.org/publications_files/179_OP47.pdf (on file with the *Columbia Law Review*); Jacques Steinberg, Buying in to the Company School: Edison's Reach Extends as Districts Try to Save Poor Performers, N.Y. Times, Feb. 17, 2002, at A24.

Schools participating in voucher programs often are subject to only minimal qualifying requirements, and few regular mechanisms for public oversight exist.[68] Further enhancing the power of these private entities are the significant practical obstacles that limit students' ability to transfer schools, particularly during the school year.[69] Moreover, here too exist concerns that the schools' interests may not align with those of students; for example, schools receive a set amount per student, thus creating incentives for them to avoid or expel students who require more expensive educational services.[70] An additional danger, particularly with regard to charter schools and voucher programs, is that the schools' general freedom from oversight may lead to public funds being used to foster educational agendas that the public has refused to support.[71]

Complicating the picture, however, is the factor of choice. Enrollment in charter and voucher schools is voluntary, and students have the option of remaining in their regular neighborhood or district school or perhaps attending public school in another district. Moreover, students usually are given the ability to transfer to another public school if their school becomes privately managed, as are teachers.[72] The main effect of

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68. The Cleveland voucher program, for example, is open to any private school located in the district that meets educational standards and agrees to the program's nondiscrimination requirements, with accountability largely ensured through the private decisions of parents. See *Zelman*, 536 U.S. at 645–46, 653 (describing requirements for private schools participating in Cleveland's program). Accreditation by private organizations offers an additional form of oversight of private schools. See Sawhill & Smith, supra note 64, at 263.

69. See Amy Wells et al., UCLA Charter School Study: Beyond the Rhetoric of Charter School Reform 6, 44–47 (1998), at http://www.gseis.ucla.edu/docs/charter.pdf (last modified Nov. 19, 1998) (on file with the *Columbia Law Review*) ("Without transportation, faced with sometimes demanding parent contracts, and with limited access to information about the practices of charter schools, some parents face serious constraints on any choice they might make."); Molly S. McUsic, The Law's Role in the Distribution of Education: The Promises and Pitfalls of School Finance Litigation, *in* Law and School Reform: Six Strategies for Promoting Educational Equity 88, 123–25 (Jay P. Heubert ed., 1999) (noting limited supply of high quality public and private schools); Minow, Public and Private Partnerships, supra note 12, at 1251 (noting importance of convenience and familiarity to parents in choosing schools and that good schools do not expand easily).

70. See State of Charter Schools 2000, supra note 60, at 36–37 (reporting that charter schools serve lower percentage of disabled students than ordinary public schools); Kane & Lauricella, supra note 59, at 223 (discussing concerns that charter schools may engage in discriminatory practices); Martha Minow, Reforming School Reform, 68 Fordham L. Rev. 257, 267, 283, 287 (1999) [hereinafter Minow, Reforming School Reform] (discussing incentives to screen for most talented, least costly students); Note, The Hazards of Making Private Schooling a Public Business, 112 Harv. L. Rev. 695, 700–702 (1999) (discussing concerns that EMOs counsel out problem students).

71. See Bruce Fuller, The Public Square, Big or Small? Charter Schools in Political Context, *in* Inside Charter Schools: The Paradox of Radical Decentralization 12, 33–34 (Bruce Fuller ed., 2000) (noting anecdotal examples of abuses in Michigan and Washington, D.C.); Timothy Egan, Failures Raise Questions for Charter Schools, N.Y. Times, Apr. 5, 2002, at A15 (detailing same in Arizona, California, and Texas).

72. See Paul T. Hill & Robin J. Lake, Charter Schools and Accountability in Public Education 4–5 (2002). However, this option may become unavailable in practice when the

these privatization initiatives, from another perspective, is to empower parents and students, particularly given the prevalence of charter schools and voucher programs in urban areas with perennially failing public schools.[73] Interestingly, however, parental choice also represents yet a further way in which these measures privatize public education; decisions about educational content and quality become a personal rather than collective responsibility, thereby creating schools that, in essence, are private communities of like-minded families.[74]

4. *Private Prisons.* — My fourth example, private prisons, is one of the most remarked-upon examples of government privatization.[75] Extensive privatization characterized incarceration in the nineteenth century, with private entrepreneurs and companies managing prisons and indeed "leasing" convicts from the state. By 1940, however, this sort of private involvement had all but disappeared, largely in response to exposure of the extremely harsh conditions under which inmates were being held by their private jailors.[76] Over the last two decades, pressures on governments to house expanding prison populations and improve prison condi-

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EMO manages many schools in a district. See Ascher, supra note 62, at 76–81 (discussing privatization of entire Hartford school district).

73. See Ryan & Heise, supra note 65, at 2076–85 (detailing prevalence of charter schools and voucher programs in urban school districts). Indeed, these moves to greater privatization in public education arise out of the school choice movement, which argues that private decisions by parents, rather than democratic accountability, should determine the shape of public education and that market competition is needed to improve public schools. See John E. Chubb & Terry M. Moe, Politics, Markets, and America's Schools 32–33 (1990); see also Minow, Reforming School Reform, supra note 70, at 263–72 (discussing assumptions behind school choice movement); Howard Gardner, Paroxyms of Choice, N.Y. Rev. of Books, Oct. 19, 2000, at 44–45 (describing roots of charter schools in school choice). See generally Hill & Lake, supra note 72, at 24–46, 63–84 (discussing external and internal dimensions of charter school accountability). For cautions regarding extent of choice and impact on accountability, see Minow, Public and Private Partnerships, supra note 12, at 1249–50; see also Mark Schneider, Information and Choice in Educational Privatization, *in* Privatizing Education, supra note 58, at 72, 78 (arguing that information on schools may not be accessible to all parents).

74. See Minow, Public and Private Partnerships, supra note 12, at 1253–55; Fuller, supra note 71, at 59–65. Notwithstanding statutory requirements of open admission, schools can in practice select their students to some extent by imposing parent volunteer requirements, pre-admission interviews, and publicizing the school's operation in a targeted fashion. See Fuller, supra note 71, at 30; Wells & Scott, supra note 58, at 250–54; Wells, supra note 69, at 44.

75. For a thorough overview of the extensive literature on prison privatization, see Sharon Dolovich, The Ethics of Private Prisons (Nov. 1999) (unpublished manuscript, on file with the *Columbia Law Review*).

76. See David Shichor, Punishment for Profit: Private Prisons/Public Concerns 34–44 (1995); David M. Oshinsky, "Worse than Slavery": Parchman Farm and the Ordeal of Jim Crow Justice 35–37, 40–42, 55–84 (1996) (noting reprehensible treatment of African American prisoners in convict leasing programs after Civil War); Alexis M. Durham III, Origins of Interest in the Privatization of Punishment: The Nineteenth and Twentieth Century American Experience, 27 Criminology 107, 108–09 & 109 n.2 (1989). See generally Matthew J. Mancini, One Dies, Get Another: Convict Leasing in the American South, 1866–1928 (1996) (describing history of convict leasing in several southern states).

tions without substantially increasing costs kindled a rebirth of interest in private prisons. Governments turned to private entities not only to build prison facilities but to operate them. In 2001, 12.3% of all federal prisoners and 5.8% of all state prisoners, approximately 92,000 inmates, were housed in private prison facilities.[77] Private prisons tend to be medium and low security facilities, and many community-based facilities (such as group juvenile homes and halfway houses) are also privately run.[78]

Private prison operators exercise enormous coercive powers over the inmates in their custody.[79] While their contracts with public prison authorities set out detailed requirements regarding prison conditions and operation, incarceration by its nature entails exercise of substantial discretion in closed environments with little public visibility.[80] Given their extreme dependence and vulnerability, prisoners face a particularly acute

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77. See Paige M. Harrison & Allen J. Beck, Bureau of Justice Statistics, U.S. Dep't of Justice, Bulletin NCJ195189, Prisoners in 2001, at 1 (July 2002); see also Douglas McDonald et al., Abt Assocs. Inc., Private Prisons in the United States: An Assessment of Current Practice 4–7 (1998), available at http://nicic.org/pubs/1998/014789.pdf (on file with the *Columbia Law Review*) [hereinafter McDonald et al., Private Prisons] (describing recent history of prison privatization and noting number of inmates in privately operated prison facilities increased from 3,000 in 1987 to more than 85,000 in 1996); Brief of Amicus Curiae United States at 2–5, *Malesko* (No. 00-860) (discussing Federal Bureau of Prisons' reliance on private entities to run community corrections centers).

78. See James Austin & Garry Coventry, Bureau of Justice Assistance, U.S. Dep't of Justice, Bulletin NCJ 181249, Emerging Issues on Privatized Prisons 40–43 (2001) [hereinafter BJA]; McDonald et al., Private Prisons, supra note 77, at 4–5, 23–24. Private entities play numerous other roles in prison operation: private companies supply a variety of goods and services to publicly run prisons, such as food or medical care; private firms employ prison labor; and private groups set standards for prison operation through accreditation. See Freeman, Private Role, supra note 2, at 627–29 (documenting examples); Dolovich, supra note 75, at 25–34.

79. For arguments that these coercive powers and the nature of punishment make private prisons morally inappropriate, see John J. Dilulio, Jr., The Duty to Govern: A Critical Perspective on the Private Management of Prisons and Jails, *in* Private Prisons and the Public Interest 155, 172–77 (Douglas C. MacDonald ed., 1990); Dolovich, supra note 75, at 97–116.

80. See Dilulio, supra note 79, at 176; David N. Wecht, Note, Breaking the Code of Deference: Judicial Review of Private Prisons, 96 Yale L.J. 815, 821–22 (1987). While this closed atmosphere is also present with regard to public prisons, the opportunities for general public oversight of private prisons are even more restricted. Private prison corporations are not generally subject to open government laws or other measures designed to prevent and expose government malfeasance, such as civil service and conflict of interest rules, or inspector general oversight. See Brief for the Legal Aid Society as Amicus Curiae at 18–22, *Malesko* (No. 00-860) (describing differences in oversight mechanisms and legal requirements applicable to private and public prisons); Nicole Càsarez, Furthering the Accountability Principle in Privatized Federal Corrections: The Need for Access to Private Prison Records, 28 U. Mich. J.L. Reform 249, 268–291 (1995) (arguing that courts will likely hold that disclosure requirements of federal Freedom of Information Act (FOIA) disclosure requirements do not apply to private prisons or to records generated by private prisons); see also J. Michael Keating, Jr., Public Over Private: Monitoring the Performance of Privately Operated Prisons and Jails, *in* Private Prisons and the Public Interest, supra note 79, at 130, 132–54 (describing mechanisms for oversight of private prisons).

potential for harm from abuse of these powers. Moreover, most private prisons are run or owned by for-profit corporations, which have a financial incentive to cut costs—for example, by hiring inexperienced and therefore cheaper personnel, understaffing, or failing to provide adequate medical care and other services. Such practices can lead to violation of inmates' rights.[81] But the case against private prisons is easy to overstate, given the widespread problems and deficiencies in many public prisons.[82] Indeed, factors such as private prisons' greater exposure to damage awards and contractual obligations arguably make them in some ways more accountable than public prisons.[83]

B. *Privatization as Delegation of Government Power*

The foregoing examples demonstrate that privatization is poorly characterized as government withdrawal or disinvolvement from an area of activity.[84] That description fails not only because privatization so often accompanies an expansion in government responsibilities, but more im-

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81. See Shichor, supra note 76, at 189–208; Dolovich, supra note 75, at 48–54. Anecdotal evidence of such abuses certainly exists. See Brief for the American Civil Liberties Union as Amicus Curiae at 14 n.6, *Malesko* (No. 00-860) (listing newspaper articles documenting abuse at some private prisons). An analysis of studies and data on private prisons by the Bureau of Justice Assistance concluded that while in general, "private facilities do not differ substantially from publicly operated facilities," private facilities on average have a staff-to-inmate ratio 15% below public prisons, private prisons lack comparable management information system capabilities, and private prisons have a higher rate of major incidents. See BJA, supra note 78, at 52.

82. See Developments in the Law: The Law of Prisons, 115 Harv. L. Rev. 1868, 1870–71 (2002). There are few reliable studies comparing costs and quality of private and public prisons. For overviews of existing studies, see BJA, supra note 78, at 2–38. For contrasting assessments of existing data, compare U.S. Gen. Accounting Office, GAO/GGD-96-158, Public and Private Prisons: Studies Comparing Operational Costs and/or Quality of Service 3–4, 7–10 (1996) (claiming little reliable evidence exists regarding cost savings or improvements in quality due to private management), and McDonald et al., Private Prisons, supra note 77, at appx. 2 (same), with Geoffrey F. Segal & Adrian T. Moore, Weighing the Watchmen: Evaluating the Costs and Benefits of Outsourcing Correctional Services Part II: Reviewing the Literature on Cost and Quality Comparisons 9–14 (Reason Pub. Policy Inst. Policy Study No. 290, Jan. 2002), available at http://www.rppi.org/privsl.html (on file with the *Columbia Law Review*) (arguing studies indicate cost savings without quality decline), and Developments in the Law: The Law of Prisons, supra, at 1870 (stating evidence "give[s] reason to be cautiously pleased with private prison performance").

83. For arguments that greater liability may foster accountability, see Developments in the Law: The Law of Prisons, supra note 82, at 1879–86 (offering liability argument as reason why private prisons may be more accountable than public prisons); see also Richardson v. McKnight, 521 U.S. 399, 405–13 (1997) (denying private prison guards qualified immunity under 42 U.S.C. § 1983). But see *Malesko*, 534 U.S. at 74 (denying *Bivens* action against private prison corporation operating federal prison facility). For the argument that contracts can provide greater accountability and that privatization may lead to innovation, see Freeman, Private Role, supra note 2, at 630, 634–36. But see DiIulio, supra note 79, at 162–63, 171–72 (discussing limitations of contractual mechanisms and expressing skepticism at innovation claims).

84. For such a definition of privatization, see Cass, supra note 18, at 451.

portantly because it misses privatization's core dynamic. In many instances of privatization, the overall context remains one of significant government endeavor; as in the examples above, the government provides the funds, sets programmatic goals and requirements, or enacts the regulatory scheme into which private decisionmaking is incorporated. But the government relies on private actors for actual implementation. Rather than government withdrawal, the result is a system of public-private collaboration, a "regime of 'mixed administration'" in which both public and private actors share responsibilities.[85]

Viewing privatization in this way highlights how it serves to delegate power over government programs and regulation to private actors. Indeed, "in many cases *the* major share . . . of the discretion over the operation of public programs routinely comes to rest not with the responsible governmental agencies, but with the third-party actors that actually carry the programs out."[86] The recent move to expanded privatization, with grants of even greater discretionary authority to the government's private partners, enhances the extent of delegated authority. More importantly perhaps, these delegations of discretion are unavoidable because the power to implement and apply rules is inseparable from the power to set policy. While some contend that government can privatize implementation while retaining control over governance and policy management,[87] in practice such a divide rarely exists. "Executive action that has utterly no policymaking component is rare . . . ."[88] Close government oversight or specification of policies and procedures can limit the extent of discretionary authority delegated to private actors, but cannot eliminate it.[89]

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85. Jody Freeman, Private Parties, Public Functions and the New Administrative Law, 52 Admin. L. Rev. 813, 816 (2000) [hereinafter Freeman, Private Parties] (quoting Mark Aronson, A Public Lawyer's Responses to Privatisation and Outsourcing, *in* The Province of Administrative Law, supra note 6, at 40, 52); see Donahue, supra note 16, at 7 (arguing that in the United States, privatization means "enlisting private energies to improve the performance of tasks that would remain in some sense public").

86. Lester M. Salamon, The New Governance and the Tools of Public Action: An Introduction, *in* The Tools of Government, supra note 18, at 1, 2; see also Handler, Down from Bureaucracy, supra note 13, at 6–7 (maintaining that privatization represents delegation of authority over government programs); Smith & Lipsky, supra note 13, at 11, 13 ("Contracting gives away responsibility for important authoritative decisions about vulnerable people. . . . [Nonprofit agencies] 'deliver' public policy to citizens, and their private coping behaviors, invented to make often impossihle jobs manageable, may be said to 'add up' to be, in effect, whatever policy is actually put into the field.").

87. See David Osborne & Ted Gaebler, Reinventing Government: How the Entrepreneurial Spirit Is Transforming the Public Sector 26–48 (1992) (distinguishing between "steering" and "rowing," and arguing that government can retain control over former while contracting out responsibility for latter). But see Guttman, supra note 17, at 892–93 (criticizing Osborne & Gaebler's distinction between steering and rowing).

88. Printz v. United States, 521 U.S. 898, 927 (1997).

89. As Michael Lipsky detailed in his classic work, *Street-Level Bureaucracy*, "in important ways [public policy] is actually made in the crowded offices and daily encounters of street-level workers." Michael Lipsky, Street-Level Bureaucracy xii (1980); see also Freeman, Private Parties, supra note 85, at 824 ("Even where agencies retain the authority

Moreover, if anything there seems to be a move towards expanding the discretionary powers of front-line workers, both public and private, with many scholars condemning the rule-bound and centralized character of contemporary regulatory regimes and urging greater flexibility in implementation.[90]

Through their control over government programs, private actors necessarily obtain control over program participants. As the examples above illustrate, this control is enhanced when private entities have a monopoly or quasi-monopoly over access to government-subsidized services or broad powers over how government institutions operate. Another factor enhancing private power over participants is that privatization frequently occurs in contexts marked by relations of dependence, in particular social welfare and human service programs. Those implementing such programs, whether public or private, gain power over program participants by virtue of their control over vital resources, as well as their greater knowledge and expertise.[91] Dependency in turn reinforces the discretionary powers of service providers, as often the services provided in dependent contexts defy easy or clear specification.[92]

A central claim underlying this Article is that the powers exercised by private entities as a result of privatization often represent forms of government authority, and that a core dynamic of privatization is the way that it can delegate government power to private hands. Identifying what constitutes government power is a notoriously hazardous enterprise, and

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to accept or reject rules proposed by the private provider, the provider interprets and puts into operation those rules, giving them their practical meaning and blurring the line between the policy making and implementing functions.").

90. See Diller, Revolution, supra note 50, at 1145–63 (describing return to administrative systems emphasizing discretionary decisionmaking under TANF programs); Michael C. Dorf & Charles F. Sabel, A Constitution of Democratic Experimentalism, 98 Colum. L. Rev. 267, 371–88 (1998) (describing increased use of self-regulation in environmental programs); see also Ian Ayres & John Braithwaite, Responsive Regulation: Transcending the Deregulation Debate 4–6 (1992) (advocating expansion of grassroots discretion in regulatory enforcement). For a discussion of possible pitfalls with increased ground-level discretion, see Jerry L. Mashaw, Reinventing Government and Regulatory Reform: Studies in the Neglect and Abuse of Administrative Law, 57 U. Pitt. L. Rev. 405, 413–15 (1996) (raising concerns regarding loss of legal and political control that expanded ground-level discretion entails).

91. See Yeheskel Hasenfeld, Power in Social Work Practice, *in* Human Services as Complex Organizations 259, 260–64 (Yeheskel Hasenfeld ed., 1992); see also Joel F. Handler, Dependency and Discretion, *in* Human Services as Complex Organizations, supra, at 276, 276–84; Minow, Partners, supra note 2, at 97, 99 (arguing that individuals in desperate need of benefits will likely be willing to accept constraints on their religious freedom).

92. See Joel F. Handler, Dependent People, the State, and the Modern/Postmodern Search for the Dialogic Community, 35 UCLA L. Rev. 999, 1020 (1988) [hereinafter Handler, Dependent People] (observing that "relationships between dependent people and bureaucratic systems are, for the most part, not governed by tight or closely drawn rules"); see also Brodkin, supra note 50, at 24–25 (arguing that welfare recipients' ability to force states to provide assistance "will be suboptimal in a context in which rights are uncertain, 'voice' is risky and 'exit' means forgoing basic income support.").

little agreement exists on where the boundaries of government power as opposed to private power lie.[93] Interestingly, however, the powers at issue in many instances of privatization are those we conventionally think of as governmental. Few deny that private prisons are wielding government power, given that the right to physically constrain and coerce others is ordinarily reserved for the state.[94] When private regulators determine the content and enforcement of standards governing a field of activity, their decisions similarly represent government power in the form of nonconsensual exercises of authority over others.[95] The claim that privatization leads to private exercises of government power also seems relatively noncontentious when private entities function much like government employees, merely applying government-generated policies and requirements over which they exercise little or no independent judgment.[96]

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93. Or, indeed, whether such boundaries exist at all. See infra Part III.A.1.

94. See, e.g., Street v. Corr. Corp. of Am., 102 F.3d 810, 814 (6th Cir. 1996) (holding operation of prison to be a public function); Giron v. Corr. Corp. of Am., 14 F. Supp. 2d 1245, 1248–50 (D.N.M. 1998) (same); see also DiIulio, supra note 79, at 175–76 (arguing that operating a prison is so intrinsically tied to the government and the collective that it can only be legitimately undertaken by government). But see George v. Pacific-CSC Work Furlough, 91 F.3d 1227, 1230–32 (9th Cir. 1996) (holding private corrections facility not a state actor with regard to its personnel decisions). Seemingly in contrast, courts have uniformly held that involuntary committal to a mental hospital is not a public function sufficient to transform private doctors and hospitals into state actors for constitutional purposes, see, e.g., Okunieff v. Rosenberg, 996 F. Supp. 343, 349 (S.D.N.Y. 1998) (collecting cases), aff'd, 166 F.3d 507 (2d Cir. 1999), notwithstanding that such committals involve subjecting individuals to physical coercion and that the Supreme Court has characterized commitment to a mental hospital as "a massive curtailment of liberty . . . [that] requires due process protection," Vitek v. Jones, 445 U.S. 480, 491–92 (1980) (internal citations omitted). This tension is probably best explained by the fact that states impose mandatory procedures on both private and public committals and courts subject involuntary committal statutes to close due process analysis. See, e.g., Project Release v. Prevost, 722 F.2d 960, 971 (2d Cir. 1983) (upholding New York's mental health law against facial challenge).

95. See David M. Lawrence, Private Exercise of Governmental Power, 61 Ind. L.J. 647, 647–48 (1986) (arguing that "we do recognize certain powers as essentially governmental: rulemaking, adjudication of rights, seizure of person or property, licensing and taxation" and tracing such characterizations to the exercise of coercion over others, not grounded in property or contract); see also A. Michael Froomkin, Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution, 50 Duke L.J. 17, 94–105, 141–42 (2000) (arguing that private corporation charged with responsibility for internet domain name registration pursuant to a contract with federal government exercises substantial control over third parties and is performing a policymaking function). But see D.L. Cromwell Invs., Inc. v. NASD Regulation, Inc., 279 F.3d 155, 162–63 (2d Cir. 2002) (holding NASD's control over securities traders does not transform its investigatory hearings into state action).

96. See, e.g., Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 614 (1989) (stating that Fourth Amendment applies if "private party act[s] as an instrument or agent of the Government"). Examples include private intermediaries who process claims for Medicare and Medicaid. See 42 C.F.R. § 421.5 (2002) (allowing fiscal intermediaries under Medicare to act on behalf of federal government); Schweiker v. McClure, 456 U.S. 188, 190 (1982) (assessing whether procedures used by intermediaries comport with due process without analyzing whether federal action sufficient to trigger the Constitution was

On the other hand, it is less evident that government power is involved where private entities are undertaking tasks they traditionally have performed and over which the government allows them substantial discretion.[97] Instead, private entities' ability to shape government programs in such contexts seems just an indirect side-effect of their autonomous determinations, often made pursuant to independent professional standards.[98] One argument as to why private actors are wielding government power even in these contexts is that their positions in government programs give them control over program participants. Yet private actors often wield similar powers when they act independently of government; for example, MCOs exercise the same control over access to health care for participants whose coverage comes privately, through employers or individually purchased health insurance, as they do for those whose coverage is publicly subsidized.[99] Thus, the fact that private actors exercise power over vulnerable third parties, absent more, would be insufficient to distinguish the powers being exercised in these contexts as uniquely governmental.

In many instances of privatization, however, something more *is* involved. Private providers and regulators do not simply wield power over others, but they also control third parties' access to government benefits and resources.[100] By virtue of their role in government programs, therefore, private entities gain a distinct "mantle of authority" that enhances their ability to cause harm.[101] This control over access to government benefits is sometimes clear and direct; for example, when private actors

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present); see also Downey v. State Farm Fire & Cas. Co., 266 F.3d 675, 679–80 (7th Cir. 2001) (holding that private insurance companies issuing and administering flood risk policies under National Flood Insurance Program are acting essentially as government proxies), reh'g denied, 276 F.3d 243 (7th Cir. 2001).

97. The Supreme Court has so concluded. See, e.g., Blum v. Yaretsky, 457 U.S. 991, 1004–05 (1982); see also Med. Inst. of Minn. v. Nat'l Ass'n of Trade & Technical Schs., 817 F.2d 1310, 1313 (8th Cir. 1987) (holding that "privately made decisions which affect individuals' eligibility for government benefits" are not state action under *Blum*).

98. See, e.g., Healey v. Thompson, 186 F. Supp. 2d 105, 117–21 (D. Conn. 2001) (distinguishing between home health agency's determination of eligibility for services under Medicaid and Medicare and its treatment decisions in providing those services, and holding that constitutional protections only apply to the former).

99. The argument that private entities often wield coercive power over others was famously made by the Legal Realists. See Robert L. Hale, Coercion and Distribution in a Supposedly Non-Coercive State, 38 Pol. Sci. Q. 470, 472–74 (1923); see also Logiodice v. Trs. of Me. Cent. Inst., 296 F.3d 22, 30 (1st Cir. 2002) ("The reality is that we are all dependent on private entities for crucial services and, in certain key areas, competition may not furnish protection."), cert. denied, 537 U.S. 1107 (2003).

100. See Smith & Lipsky, supra note 13, at 14 ("In short, private workers now play roles of social control with respect to public rights and claims of citizenship."); Salamon, The New Governance, supra note 86, at 2 (describing new forms of privatization as "involv[ing] the sharing with third-party actors of a far more basic governmental function: the exercise of discretion over the use of public authority and the spending of public funds").

101. NCAA v. Tarkanian, 488 U.S. 179, 192 (1988).

determine whether an individual is eligible for government-funded services. More commonly, however, this control is exercised indirectly, through the private entities' policies regarding the substance of the services they provide or their decisions with respect to a particular participant's needs. Whether private actors are applying government-specified criteria or instead making independent determinations affects the direct or indirect character of their control, but does not alter the underlying dynamic. Thus, denials of medical services by Medicare and Medicaid MCOs control beneficiaries' access to government-subsidized health care even where these denials rest on professional medical standards rather than government rules regarding covered procedures. Private contractors similarly exercise control over access to publicly funded services when they assess a welfare participant as not needing additional job training, as do private schools in voucher programs when they suspend participating students for disciplinary infractions.

When exercised by public actors, control over government resources is commonly thought of as government authority, and transfer of such control to private individuals and entities does not inherently change the nature of the power at issue. Of course, in some instances the transition from public to private performance does impact the nature of the power being exercised. It seems intuitively implausible that decisions by job placement counselors at a nonprofit organization are exercises of government authority simply because the organization's job placement services are funded by a government grant. Instead, whether such private counselors wield government authority turns on their relationship to the government. Public-private relationships range across a wide continuum, to use Martha Minow's helpful image.[102] Insofar as the government funds the nonprofit simply to foster provision of job placement services in a community, then the private counselors' activities appear genuinely independent and nongovernmental. But if the government uses the nonprofit to implement its welfare program—for instance, requiring that welfare beneficiaries participate in the nonprofit's job placement program as a condition for receipt of income assistance—then the distinction between the private counselors and their public counterparts in the state welfare department begins to disappear. Another way to put this point is that in the former case, the government is not using the nonprofit to control third parties' access to government benefits; instead, the nonprofit itself is the direct and intended recipient of government aid.

The expanding privatization documented above means that government increasingly is using private actors to operate government programs in its stead, and, as a result, private entities are wielding even greater power over participants' access to government resources. Simultaneously, however, the broad discretion granted to private entities also supports seeing the underlying program as being one where the government

102. Minow, Public and Private Partnerships, supra note 12, at 1255–56.

seeks to foster independent private action. Line-drawing is thus very difficult. One point to emphasize, however, is that individuals' entitlement to government benefits or to participate in a particular program has no determinative significance on the question of whether privatization involves a delegation of government power. For example, the conclusion that a hospital has no entitlement to participate in Medicare does not, in and of itself, preclude finding that the government has delegated government power if it makes JCAHO accreditation decisions determinative of the hospital's eligibility to participate.[103] Such entitlements are relevant, to be sure, but primarily in terms of what they demonstrate about the government's intent in engaging in privatization; the absence of an entitlement is one factor that may suggest the government is seeking to foster purely independent private action rather than rely on private entities to more directly serve its own programmatic goals. But it is the use the government makes of the private entities involved, rather than the rights or status of beneficiaries and other program participants, that is the ultimate focus.

C. *Preserving Constitutional Accountability and Regulatory Flexibility in Privatized Government*

Modern privatized government does not fit easily within the paradigms of U.S. constitutional law. A fundamental tenet of constitutional law posits an "essential dichotomy" between public and private, with only public or government actors being subject to constitutional restraints.[104] With rare exception, the Constitution "erects no shield against merely private conduct, however discriminatory or wrongful."[105] The reigning constitutional paradigm thus strictly compartmentalizes society into public and private spheres, and does not acknowledge any substantial blurring between the two.

As a result, the move to greater government privatization poses a serious threat to the principle of constitutional accountability. Although not often articulated, this principle also lies at the bedrock of U.S. constitutional law. To begin with, it embodies the core idea of constitutional supremacy and constitutional government, namely that the Constitution imposes restrictions on government that the political branches lack ability to alter.[106] Crucially, these restrictions apply not only when the formal organs of government act, but also whenever government power is exer-

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103. Cf. Cospito v. Heckler, 742 F.2d 72, 79–82, 86–89 (3d Cir. 1984) (noting that patients generally have no protectable property interest in being able to obtain government benefits through particular facility, yet proceeding to assess patients' separate claim that Medicare statute unconstitutionally delegated government power to private accrediting organization).

104. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620 (1991) (quoting Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172 (1972)).

105. Shelley v. Kraemer, 334 U.S. 1, 13 (1948).

106. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803).

cised. This broad scope of application reflects the proposition that the Constitution encompasses all "actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken," coupled with the recognition that "the abstract thing denominated a State" can exert its powers only through the actions of persons.[107] Restricting the Constitution's ambit to apply only when the government formally acts would avoid the difficulties in determining whether a private entity is wielding government power; doing so might also yield programmatic benefits, in that private entities and government could pursue the most efficient and effective forms of program operation unconcerned with constitutional requirements. But such an approach would significantly eviscerate the concept of a constitutionally constrained government.[108] Adequately guarding against abuse of public power requires application of constitutional protections to every exercise of state authority, regardless of the formal public or private status of the actor involved: "It surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form" and thereby transferring operation of government programs to private hands.[109]

Constitutional accountability's second dimension centers on how these restrictions are enforced. Accountability is often defined in political terms, as the accountability of officials to the electorate. Political accountability is certainly one way of enforcing constitutional limitations, with those who ignore fundamental constitutional constraints being ejected from office.[110] But there is also legal accountability, the focus here, which is concerned with individual enforcement of constitutional restrictions in court through judicial review.[111] A defining characteristic of the U.S. constitutional order is the authority it gives to judges to en-

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107. Ex Parte Virginia, 100 U.S. 339, 346–47 (1879); see also The Civil Rights Cases, 109 U.S. 3, 11, 13 (1883) (asserting that purely private action is exempt from constitutional requirements but these requirements apply to "acts done under State authority" and "State action of every kind").

108. See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001) ("If the Fourteenth Amendment is not to be displaced, . . . its ambit cannot be a simple line between States and people operating outside formally governmental organizations . . . .").

109. Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 397 (1995); see also Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 679 (1996) (stating that "[d]etermining constitutional claims on the basis of . . . formal distinctions, which can be manipulated largely at the will of the government agencies concerned, . . . is an enterprise that we have consistently eschewed" in holding that independent government contractors, like public employees, enjoy First Amendment protections).

110. See, e.g., Rebecca Brown, Accountability, Liberty, and the Constitution, 98 Colum. L. Rev. 531, 534–35 (1998) (describing accountability, defined solely in such political terms, as "a structural feature of the constitutional architecture").

111. See Gilmour & Jensen, supra note 17, at 248 (similarly distinguishing between political and legal accountability); see also Minow, Public and Private Partnerships, supra note 12, at 1267–69 (discussing different models of accountability).

force constitutional constraints against other government officials at the instance of private individuals claiming injury from unconstitutional action.[112] As famously stated by Chief Justice Marshall in *Marbury v. Madison*,

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. . . .
>
> . . . [I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.[113]

To say that individual enforceability is basic to our constitutional system, however, is not to say that full remediation is. Immunity doctrines and the Court's growing reluctance to imply *Bivens* actions make obtaining damages for constitutional violations increasingly difficult.[114] These barriers to damages may lead to underenforcement of constitutional norms, but the principle of effective constitutional accountability is preserved by the availability of injunctive and declaratory relief.[115]

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112. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803). Interestingly, while there is increasing criticism of the courts' role as the "sovereign" enforcers of constitutional requirements, only a few deny that an individual should be able to obtain judicial redress for a violation of her constitutional rights; instead, the complaint is with the Supreme Court's monopolization of constitutional interpretation at the expense of other branches of government. See, e.g., Larry D. Kramer, The Supreme Court, 2000 Term—Foreword: We the Court, 115 Harv. L. Rev. 4, 7–8 (2001).

113. 5 U.S. (1 Cranch) at 163 (citation omitted).

114. See John C. Jeffries, The Right-Remedy Gap in Constitutional Law, 109 Yale L.J. 87, 87–90 (1999).

115. See Richard H. Fallon, Jr. & Daniel J. Meltzer, New Law, Non-Retroactivity, and Constitutional Remedies, 104 Harv. L. Rev. 1731, 1736, 1787–91 (1991) (proposing that "a general structure of constitutional remedies adequate to keep government within the bounds of law" is more important than individual redress); Henry Paul Monaghan, The Supreme Court, 1995 Term—Comment: The Sovereign Immunity "Exception," 110 Harv. L. Rev. 102, 126–32 (1996) (arguing that continuing availability of prospective injunctive relief preserves state accountability in federal court for violations of federal law); see also Verizon Md. Inc. v. Pub. Serv. Comm'n, 535 U.S. 635, 645–46 (2002) (reasserting availability of injunctive and declaratory relief against state officials under *Ex Parte Young* doctrine). But see Daryl J. Levinson, Rights Essentialism and Remedial Equilibration, 99 Colum. L. Rev. 857, 884–89 (1999) (arguing that rights and remedies are inseparable because range of available remedies determines scope and existence of constitutional rights).

A more significant threat to constitutional accountability is presented by the most difficult conundrum of federal courts: the extent to which Congress may withdraw all federal and state jurisdiction over certain classes of claims. See Richard H. Fallon, Jr. et al., Hart & Wechsler's The Federal Courts and The Federal System 330–61 (5th ed. 2003) [hereinafter Hart & Wechsler's]. More striking for purposes of establishing the fundamental nature of the constitutional accountability principle, however, is the courts' deep reluctance to read congressional statutes as doing so. See, e.g., INS v. St. Cyr, 533 U.S. 289, 298–300, 314 (2001) (emphasizing "strong presumption" in favor of preserving judicial review and allowing challenges of permanent resident alien removal orders through habeas petitions); Zehner v. Trigg, 133 F.3d 459, 461–63 (7th Cir. 1997) (noting potential limitation of courts' ability to remedy constitutional violations that would

The danger is that handing over government programs to private entities will operate to place these programs outside the ambit of constitutional constraints, given the Constitution's inapplicability to "private" actors. The four examples of contemporary privatization help explain what this could mean in practice. The administrative agency that handles Medicare claims is subject to constitutional due process requirements; accordingly, it cannot deny requested services without providing some minimum opportunity to be heard.[116] Theoretically, a private MCO is free from such constraints.[117] Similarly, government welfare offices are strictly limited in their ability to consider a welfare recipient's race or religion, and cannot drug-test program participants without basis to suspect drug use.[118] However, private welfare contractors theoretically are not so circumscribed by the Constitution.[119] While public schools must respect the First Amendment rights of teachers and students,[120] private schools theoretically can fire employees and expel students who question how the school is run.[121] Public prisons are bound by the Eighth Amendment to provide adequate medical care to those in their custody,[122] but theoretically private prisons are free to refuse to provide medical care at all.[123]

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otherwise exist in reading § 1997e(e) of the Prison Litigation Reform Act as preserving access to injunctive and declaratory relief, notwithstanding its limits on money damages).

116. Mathews v. Eldridge, 424 U.S. 319, 332–33 (1976).

117. E.g., Blum v. Yaretsky, 457 U.S. 991, 1002–05, 1012 (1982) (holding due process requirements do not apply to care determinations by private nursing homes).

118. See, e.g., Grutter v. Bollinger, 123 S. Ct. 2325, 2337–38 (2003) (holding government use of race subject to strict scrutiny and only constitutional if narrowly tailored to serve a compelling government interest); Larson v. Valente, 456 U.S. 228, 244–46 (1982) (holding that denominational preferences trigger strict scrutiny); Marchwinski v. Howard, 113 F. Supp. 2d 1134, 1139–41 (E.D. Mich. 2000) (holding that government's groundless drug testing of welfare beneficiaries violates Fourth Amendment), aff'd by an equally divided en banc court, 60 Fed. Appx. 601 (6th Cir. 2003).

119. See, e.g., San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 542–47 (1987) (holding that government-chartered corporation overseeing all amateur sports is not subject to Fifth Amendment equal protection guarantees); United States v. Jacobsen, 466 U.S. 109, 113–15 (1984) (holding that Fourth Amendment does not apply to searches and seizures by private individuals); see also Nina Bernstein, The Lost Children of Wilder 41–60, 112–13 (2000) (describing history of not-for-profit foster care agencies in New York City providing assistance only to children of particular races and faiths).

120. Pickering v. Bd. of Educ., 391 U.S. 563, 571–73 (1968) (holding that speech by public school teacher on matter of public concern that does not affect teacher's job performance or school's operation falls within protections of First Amendment).

121. Rendell-Baker v. Kohn, 457 U.S. 830, 840–843 (1982) (rejecting application of First Amendment to private school that received substantial public funds and provided services pursuant to contracts with local school communities).

122. Estelle v. Gamble, 429 U.S. 97, 103–04 (1976).

123. Cf. Wade v. Byles, 83 F.3d 902, 905–07 (7th Cir. 1996) (holding that private security guard at public housing complex is not subject to constitutional protections against use of excessive force). But see West v. Atkins, 487 U.S. 42, 55–57 (1988) (holding that Eighth Amendment protections apply to private doctor providing medical care to state prison inmates).

"Theoretically" is an important qualification here. On rare occasions, courts may hold that such nominally private action in fact constitutes state action for constitutional purposes.[124] More frequently, the actions described may run afoul of legislative, regulatory, or contractual requirements, and the government may itself police the conduct of its private partners to ensure they adhere to constitutional prohibitions. Tort law also may provide a basis for recourse against some private actions.[125] In light of such alternative protections, some might contend that constitutional accountability fears regarding privatization are misplaced. On this view, preserving a private actor's nongovernmental status arguably better ensures accountability because it offers more opportunities for individuals to recover money damages, from which public entities and employees are frequently immune.[126] Yet caution is needed so as not to exaggerate the extent to which private law offers equivalent or greater protection of individuals' rights than is available through constitutional means.[127] Statutory and regulatory measures or contractual provisions may offer more extensive protections, but these protections exist as a

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124. See, e.g., Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 614–16 (1989) (holding that although Fourth Amendment does not ordinarily apply to private entities, the government's strong encouragement of drug testing by private railroads transformed such testing into state action for constitutional purposes); *West*, 487 U.S. at 55–57 (holding that treatment decisions by private doctor providing medical care to state prison inmates constitute state action, trigger constitutional protections, and thus are subject to Eighth Amendment requirements). The likelihood that private entities will be found to be state actors for constitutional purposes *is* the focus of Part II.A.

125. See, e.g., David A. Sklansky, The Private Police, 46 UCLA L. Rev. 1165, 1183–87 (1999) (noting that private police typically lack tort and criminal immunity enjoyed by public officials, although noting practical obstacles to recovery when private defendant acts in good faith).

126. See, e.g., Will v. Mich. Dep't of State Police, 491 U.S. 58, 66–67, 71 & n.10 (1989) (holding that Eleventh Amendment prevents award of money damages against state officer sued in official capacity); Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982) (finding that executive officials are in general entitled to qualified immunity).

127. Common law tort equivalents for constitutional rights may not exist: for example, as a post-deprivation remedy, a tort action is by definition unable to offer notice and opportunity to be heard before injury occurs, and thus cannot substitute for a due process claim where such pre-deprivation procedures are constitutionally mandated. Similarly, courts may be unwilling to impute third-party enforcement rights into government contracts if such rights are not expressly provided, as they rarely are. See Freeman, Contracting State, supra note 10, at 176; see also infra note 230 (discussing availability of third-party beneficiary enforcement of government contracts). Moreover, as a practical matter, finding private entities to be state actors for constitutional purposes does not automatically translate into restrictions on access to money damages. While private actors subject to constitutional scrutiny are in theory eligible for the same immunities as public employees, the Court so far has refused to extend such protections. See Richardson v. McKnight, 521 U.S. 399, 412 (1997) (denying private prison guards qualified immunity); Wyatt v. Cole, 504 U.S. 158, 161–63, 167–69 (1992) (refusing to provide qualified immunity to private defendants who invoke state replevin, garnishment, or attachment statutes); see also Sklansky, supra note 125, at 1186 (noting that private police typically lack tort and criminal immunity enjoyed by public officials, although noting practical obstacles to recovery when private defendant acts in good faith).

matter of legislative or executive grace, and thus largely can be rescinded or limited where governments see fit. As a result, these forms of protection standing alone do not substitute for constitutional constraints, in the way that constitutional constraints function in U.S. constitutional law, as requirements beyond the power of government to alter and which individuals have the power to enforce.

A second objection to viewing the absence of constitutional constraints on privatization as problematic emphasizes the voluntary status of many privatized government programs. Generally speaking, the Constitution does not impose affirmative duties on government. Or to put the point more starkly: Those "who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them," and the purpose of the Fourteenth Amendment was similarly to "protect Americans from oppression by . . . government, not to secure them basic governmental services."[128] Why should it matter whether government programs become exempt from constitutional constraints as a by-product of the government transferring these programs to private hands? Is this situation so constitutionally different from one in which the government remained uninvolved from the outset, presuming that private charity would meet social needs? Arguably, providing a blanket constitutional exemption for inaction while simultaneously holding that privatization raises constitutional concerns simply penalizes the government for affirmatively addressing social problems. This is not an attractive postulate for a sensible system of constitutional law.

This objection has force, especially when joined with the idea that government should have a freer hand when spending public resources than when regulating.[129] Notably, however, the lack of an affirmative

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128. Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983); see also Harris v. McRae, 448 U.S. 297, 316–18 (1980) (holding that while government may not erect obstacles in the path of individuals seeking to exercise their constitutional rights, "it need not remove those not of its own creation"). The two principles—that the Constitution does not impose affirmative duties and that it applies only to public action—are linked. See Louis Michael Seidman, The State Action Paradox, 10 Const. Comment. 379, 396–97 (1993) [hereinafter Seidman, State Action] (describing link as being that state action requirement "identifies a discretionary realm where governments are free to act or not as they choose"); Cass R. Sunstein, Lochner's Legacy, 87 Colum. L. Rev. 873, 886–90 (1987) (arguing that state action doctrine and lack of affirmative constitutional duties rest on similar baseline common-law assumptions regarding natural and desirable functions of government). The legal reality is more nuanced than a bald rejection of affirmative constitutional obligations suggests, in that a variety of constitutional protections have been read as imposing such positive duties on government in particular contexts. See, e.g., David P. Currie, Positive and Negative Constitutional Rights, 53 U. Chi. L. Rev. 864, 872–86 (1986) (discussing instances in which existing constitutional doctrine imposes affirmative duties on government); David A. Sklansky, Quasi-Affirmative Rights in Constitutional Criminal Procedure, 88 Va. L. Rev. 1229, 1233–38 (2002) (arguing that criminal provisions of the Constitution impose numerous "quasi-affirmative rights: affirmative constitutional conditions on actions that, realistically, the government cannot entirely forego").

129. This idea is one that constitutional law has increasingly embraced. See, e.g., United States v. Am. Library Ass'n, 123 S. Ct. 2297, 2307–09 (2003). Compare, e.g., Rust v.

government obligation to act has not meant that when the government does act, it can do so outside of the Constitution's purview. This distinction merits emphasis, for as discussed above, most instances of privatization are poorly described as simply a return to government inaction. Far from it. Instead, they usually represent a change in the form of government action, with discretionary authority over government resources and programs being transferred to private hands. That private entities play a central role in a program's implementation may well counsel for application of different constitutional requirements, but the danger is that privatization will remove what are essentially government programs from all judicial constitutional review. The question thus becomes whether it is possible to preserve *both* the principle of constitutionally constrained, accountable government and constitutional law's public-private divide in the face of the move to privatized governance.[130]

Yet the threat to constitutional accountability represents only part of the constitutional equation. Applying constitutional norms to the government's private partners could solve this problem, but at a significant cost. One effect would be to intrude on private autonomy, as constitutional constraints limit the ability of private entities to operate as they see fit. These autonomy concerns might seem less pressing in privatization contexts, given that private entities are reaching out to interact with the state and take on roles in government programs. But the concern is not with preserving a particular entity's freedom so much as ensuring the independence and vitality of a private civic sphere writ large. Such a sphere not only provides a needed space for individuals to define their own identities, but also fosters development of institutions that offer a potent check against overreaching government.[131] At a minimum, autonomy

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Sullivan, 500 U.S. 173, 193–94, 196 (1991) (sanctioning content and viewpoint discrimination regarding speech when government is spending its funds to achieve public goals), with Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 115–17 (1991) (holding First Amendment precludes government from imposing content-based financial burdens on speech through regulation).

130. See Frank I. Michelman, W(h)ither the Constitution, 21 Cardozo L. Rev. 1063, 1081 (2000) (remarking that "[t]he pressures of massive privatization . . . might cause . . . some or much of [what is now thought of as society and not the state to come within] . . . reach of the Bill of Rights," but "with equal logic . . . [might] result . . . in a practical contraction" of the Bill of Rights' application).

131. See Minow, Partners, supra note 2, at 30–31 (arguing that "abandoning a distinct private sphere would diminish, not strengthen, human freedom and dignity" and would destroy "a vibrant, pluralist society"); Roderick M. Hills, Jr., The Constitutional Rights of Private Governments, 78 N.Y.U. L. Rev. 144, 178–88 (2003); Louis Michael Seidman, Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law, 96 Yale L.J. 1006, 1019–26 (1987) [hereinafter Seidman, Public Principle]; see also Steven Rathgeb Smith, The New Politics of Contracting: Citizenship and the Nonprofit Role, *in* Public Policy for Democracy 198, 213–16 (Helen Ingram & Steven Rathgeb Smith eds., 1993) (describing effect that government contracting has on both citizen democratic participation and citizenship rights as nonprofits' mediating role is narrowed).

concerns counsel for caution so as not to apply constitutional constraints where constitutional accountability concerns are otherwise addressed.

Of course, governments could—and do—impose significant restrictions on private entities, particularly as a condition for receipt of government funds.[132] Thus, perhaps more telling than individual autonomy concerns is the effect that extending constitutional requirements to private actors has on the government's regulatory prerogatives. "Constitutionalizing" the government's private partners effectively transfers the power to decide what rules should bind these private actors from the political branches of government to the federal courts.[133] This separation of powers concern with expansion of the judiciary's regulatory role is a central justification for retaining the public-private divide in constitu-

132. See Julian N. Eule & Jonathan D. Varat, Transporting First Amendment Norms to the Private Sector: With Every Wish There Comes a Curse, 45 UCLA L. Rev. 1537, 1548–49 (1998) (arguing that political branches' broad regulatory powers undermine individual autonomy as justification for constitutional public-private divide); see also *Am. Library Ass'n*, 123 S. Ct. at 2998 ("Congress has wide latitude to attach conditions to the receipt of federal assistance to further its policy objectives . . . ." (citations omitted)). Some commentators express concern about the effect that dependence on government funds has already had on the independence of private organizations. For example, Steven Smith and Michael Lipsky maintain that "[t]he rise of contract income in the support of nonprofit organizations has transformed nonprofit organizations, literally, into agents of the state. Most nonprofits today expect to conform their operations to public purposes and priorities and to come under the partial control of public officials." Smith & Lipsky, supra note 13, at 72. But see Lester M. Salamon, Partners in Public Service: Government-Nonprofit Relations in the Modern Welfare State 104–06 (1995) (arguing that "the preponderance of empirical evidence casts doubt" on view that government contracts significantly undermine nonprofits' independence); Freeman, Extending Public Law Norms, supra note 10, at 1314–17 (arguing for greater use of conditions on government grants and contracts as one means of extending public law norms to private entities participating in government programs). Concerns about the effect that collaboration with government may have on private autonomy have surfaced with particular strength in debates on charitable choice. See Charles L. Glenn, The Ambiguous Embrace: Government and Faith-Based Schools and Social Agencies 39–41 (2000) (noting ways in which participation in government programs may undermine service providers' religious character); Melissa Rogers, The Wrong Way to Do Right: Charitable Choice and Churches, *in* Welfare Reform and Faith Based Organizations 61, 70–75 (Derek Davis & Barry Hankins eds., 1999) (opposing charitable choice because of similar concerns).

133. Richard S. Kay, The State Action Doctrine, the Public-Private Distinction, and the Independence of Constitutional Law, 10 Const. Comment. 329, 340 (1993) (arguing that abolishing state action doctrine threatens our understanding of constitutional law as distinct and limited body of law and would involve "a very substantial transfer of power from the ordinary law-making agencies to the constitutional decision-making procedure of the courts"); Seidman, State Action, supra note 128, at 397–99 ("[A] state action requirement is essential to prevent every policy question from becoming an issue for constitutional interpretation."). In addition, the potential of being held responsible for private conduct forces the government to take an active role in overseeing the private actors or assuming their responsibilities, and thus denies the government the option of inaction. See Seidman, State Action, supra note 128, at 399.

tional law,[134] and it applies no less strongly in the government privatization contexts.

Indeed, the four examples discussed above indicate that preserving the political branches' regulatory flexibility in privatization contexts is particularly important. Privatization holds the potential to yield more efficient and innovative government programs, by allowing the government to harness private expertise, flexibility, and market competition to its advantage.[135] Yet privatization can also lead to abuse and exploitation, because the financial incentives of private companies and organizations often run counter to the public interest and the interests of program participants.[136] Difficult policy choices are involved in deciding whether to impose particular requirements on how private providers and regulators operate; for example, procedural protections for program participants may guard against private exploitation, but also may translate into higher costs and lessened flexibility, thereby undermining the programmatic benefits obtained from privatization.[137] The government's ability to tailor regulatory structures to address identified abuses while exploiting private strengths is likely to be pivotal to successful reliance on privatization.[138] Equally important will be allowing governments room to experiment with different approaches to privatization, so that practical

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134. See infra Part III.A.1.

135. Deep disagreement exists among scholars and advocates over whether in fact privatization will have this result. For useful overviews of the dominant arguments for and against privatization, see Diller, Form and Substance, supra note 14, at 1743–51; Freeman, Extending Public Law Norms, supra note 10, at 1291–1314. For contrasting economic arguments on privatization, compare E.S. Savas, Privatization: The Key to Better Government 288–91 (1987) (characterizing privatization as effective tool for improving productivity in delivery of public services), and Michael J. Trebilcock & Edward M. Iacobucci, Privatization and Accountability, 116 Harv. L. Rev. 1422, 1422–24, 1435–43 (2003) (asserting that public choice and agency problems are worse in public sector), with Donahue, supra note 16, at 217–23 (discussing reasons why benefits of privatization may be minimal and emphasizing need to carefully select which areas to privatize). See also Donald F. Kettl, Sharing Power: Public Governance and Private Markets 37–40, 193–97 (1993) (arguing that privatization threatens accountability unless government invests in capacity to evaluate private contractor performance); Elliott D. Sclar, You Don't Always Get What You Pay For: The Economics of Privatization 9–11, 18–19, 92–93, 155 (2000) (arguing that privatization often fails to yield economic benefits because of lack of competition, government need for difficult-to-specify services, and costs of supervision).

136. In addition to these conflict of interest concerns, problems may arise because of limited competition—for example, due to few contractors with sufficient capacity or the need for continuing relationships in service delivery—and because the services at issue defy easy measurement, making informed choices among private providers difficult. See Kettl, supra note 135, at 29–37; Minow, Public and Private Partnerships, supra note 12, at 1248–53.

137. See Trebilcock & Iacobucci, supra note 135, at 1448–51.

138. See Freeman, Private Role, supra note 2, at 594–664 (describing ways in which government could exploit benefits of privatization but also guard against potential abuses in several program contexts); Minow, Partners, supra note 2, at 117–19 (describing potential approaches to preserving constitutional accountability under charitable choice).

experience can inform regulatory choices and governments can address new problems as they emerge.[139]

Federalism concerns are also at stake here. As the examples above suggest, much of the turn to privatization is happening at the state and local level or in programs (such as Medicaid or TANF) that are joint federal-state endeavors.[140] Extending constitutional requirements to the government's private partners thus portends significant federal court intrusion into the administrative decisions of state and local governments.[141] Again, the federal government's ability to impose requirements on state governments, particularly as a condition of federal funding, somewhat limits the force of this federalism objection.[142] But federalism concerns may counsel against judicial imposition of constitutional commands on private actors notwithstanding congressional and executive powers to regulate state and local governments.[143]

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139. On the importance of experimentation with service delivery, see Dorf & Sabel, supra note 90, at 283–89, 314–23.

140. See, e.g., GAO, Welfare Reform, supra note 40, at 8–14 (describing state and local contracts for TANF services); Sanger, supra note 38, at 23–27 (discussing increases in privatization at state and local levels); Harrison & Beck, supra note 77, at tbl.9 (reporting that approximately 73,000 state prisoners were held in private facilities in 2001); see also Freeman, Contracting State, supra note 10, at 161–62 (noting how devolution of responsibilities from federal to state governments has contributed to expansions in privatization).

141. See Seidman, State Action, supra note 128, at 395–96 (describing the Court's initial imposition of state action requirement in the *Civil Rights Cases* as turning on federalism concerns); see also Lugar v. Edmondson Oil Co., 457 U.S. 922, 936–37 (1982) (describing state action requirement as protecting states against unfair ascriptions of responsibility for constitutional violations). The federalism basis of the state action doctrine might seem to call into question the Court's failure to distinguish between "state" and "federal" action analyses, see supra note 5. On the other hand, this failure accords with the Court's increasing emphasis on the state action doctrine as resting less on general federalism concerns and more on specific federalism and separation of powers concerns regarding the appropriate role of the federal courts. See Seidman, State Action, supra note 128, at 395–98.

142. See Eule & Varat, supra note 132, at 1547–48; see also Erwin Chemerinsky, Rethinking State Action, 80 Nw. U. L. Rev. 503, 543–47 (1985) (arguing that federalism arguments for state action doctrine rest on outdated dual sovereignty presumptions). On the government's power to impose conditions on state and local governments as conditions of federal funding, see South Dakota v. Dole, 483 U.S. 203, 207–11 (1987).

143. Such a distinction between federalism controls on the courts versus the political branches accords with the political safeguards argument used to justify federal court abstention from federalism disputes in San Antonio Metro. Transit Auth. v. Garcia, 469 U.S. 528, 550–56 (1985); Eule & Varat, supra note 132, at 1548 n.32; see also Robert F. Nagel, Separation of Powers and the Scope of Federal Equitable Remedies, 30 Stan. L. Rev. 661, 667–81 (1978) (arguing that separation of powers and federalism are interrelated concepts that both limit federal courts' powers to remedy constitutional violations by state governments). Notably, while the Supreme Court's recent jurisprudence interpreting Section 5 of the Fourteenth Amendment suggests greater equating of federalism limits on the courts and Congress, the Court continues to cite restrictions on the appropriate role of the courts as cautioning against broad expansion of U.S. constitutional requirements to private actors. See United States v. Morrison, 529 U.S. 598, 620–22, 625–27 (2000)

Some might argue that adherence to a constitutional system requires that primacy be given to preserving constitutional limits on government power, regardless of the policy tradeoffs involved. This argument is plainly too facile, however, as the individual autonomy, separation of powers, and federalism concerns articulated above also stand as constitutional limits on government power. The argument also errs to the extent that it ignores the way that privatization can enhance constitutional accountability by improving government functioning. If private prisons lead to improved prison conditions and services, that is hardly irrelevant from an Eighth Amendment standpoint.[144] Private professional norms and independent judgment can offer individuals important assurances of fair treatment that meet due process requirements.[145] More simply put, constitutionally-embedded values lie on both sides of the balance. The constitutional challenge posed by privatization is devising a means to preserve constitutional accountability without sacrificing government regulatory flexibility and its associated benefits.

II. State Action Doctrine and Current Constitutional Law on Privatization

The threat to constitutional accountability from the public-private divide is not new, and the judicial response has been to develop the state action doctrine as a means of holding ostensibly private actors to constitutional requirements. A finding of state action is, in essence, a judicial determination that a challenged action either could not be truly privatized for constitutional purposes, because of the power or function it represents, or was insufficiently privatized, because of the government's continuing involvement.

State action doctrine remains the primary tool courts use to ensure that private actors do not wield government power outside of constitutional constraints. Thus, a central question is how well current state action doctrine succeeds in ensuring constitutional accountability in a

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(emphasizing need to preserve "the Framers' carefully crafted balance of power between the States and the National Government" in holding that provision subjecting private individuals to damages was outside of Congress' section 5 power).

144. See Malcolm M. Feeley & Edward L. Rubin, Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons 162–71, 371–72 (1998) (noting that federal courts' efforts at reforming prisons to cure constitutional violations led to widespread reliance on standards set in part by private accrediting bodies and associations, such as the American Correctional Association). See also supra notes 79–83 and accompanying text (discussing question of whether private prisons offer better or worse facilities than public prisons).

145. See, e.g., Parham v. J.R., 442 U.S. 584, 607–08 (1979) (holding that due process requires only independent professional medical assessment before a child is involuntarily committed, not a judicial or administrative hearing); Gail B. Agrawal, Resuscitating Professionalism: Self-Regulation in the Medical Marketplace, 66 Mo. L. Rev. 341, 380 (2001) (arguing that greater enforcement of professional norms curbs threats from managed care).

world of privatized government. In what follows, I argue that current doctrine is fundamentally ill-suited to this task, because it ignores the way that privatization gives private actors control over government programs and resources, focusing instead on identifying government involvement in specific private acts. As a result, current doctrine is a very poor measure of when government power is being exercised. Moreover, this emphasis on government involvement both unnecessarily restricts regulatory flexibility and creates perverse incentives for government to privatize without adequate supervision.

I close this section with a brief examination of another constitutional route to dealing with the concerns raised by privatization—private delegation doctrine—which addresses whether and when it is constitutionally permissible for government to delegate certain powers to private actors. In terms of federal constitutional law, private delegation doctrine represents the road not taken. While there have been occasional hints of constitutional restrictions on private delegations, the nature and scope of such potential restrictions remain largely unexplored.[146] In the end, perhaps the most interesting aspect of the private delegation cases is not their lack of development, but rather their failure to link issues relating to the constitutionality of private delegations to the question of whether a private delegation allows the government to evade constitutional constraints.

A. *The Absence of State Action Under Privatization*

State action doctrine, once at the fore of academic commentary,[147] now rarely provokes sustained interest. This is not because the Supreme Court developed a coherent and persuasive approach to state action questions. On the contrary, despite general agreement on the terms of the state action inquiry, the Court's application of that inquiry continues to be beset by inconsistency and disagreement.[148]

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146. Indeed, the paucity of cases on point makes it difficult to claim that anything so established as a private delegation doctrine exists. A similar question arises in the state action context, with seemingly inconsistent Supreme Court decisions supporting the view that state action "doctrine" is simply an accumulation of fact-specific and at times conflicting decisions. See, e.g., Laurence H. Tribe, American Constitutional Law § 18-1, at 1690 (2d ed. 1988) (arguing that state action cases do not demonstrate "a body of state action 'doctrine,' a set of rules for determining whether governmental or private actors are to be deemed responsible for an asserted constitutional violation"). But see Mark Tushnet, *Shelley v. Kraemer* and Theories of Equality, 33 N.Y.L. Sch. L. Rev. 383, 406 (1988) (claiming "persistence of the state action doctrine can be explained because it *is* a doctrine, that is, an expression of the understanding of the social order held by certain agents of the government").

147. So much so that Charles Black began his famous Foreword with "'State action again?'" The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14, 81 Harv. L. Rev. 69, 69 (1967).

148. See, e.g., Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 378 (1995) ("It is fair to say that our cases deciding when private action might be deemed that of the state have not been a model of consistency." (internal quotations omitted)). But see Laurence

The Court frequently describes state action analysis as having two prongs: first, whether "the [challenged] deprivation . . . [was] caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible"; and second, whether "the party charged with the deprivation . . . [is] a person who may fairly be said to be a state actor."[149] The nub of the inquiry is at this second step, often alternatively characterized as determining whether "there is a sufficiently close nexus between the State and the challenged action."[150] The Court also considers a consistent set of criteria in assessing whether this nexus exists: whether the private party is performing a public or government function; whether the government compelled or significantly encouraged the challenged action; whether the government jointly participated in the action; and whether there is symbiotic interdependence between the government and the private party.[151] At times, however, the Court adopts a highly restrictive and formalistic stance in applying these criteria, treating them as distinct "tests" that represent the exclusive grounds for finding state action. On other occasions, the Court applies a flexible, fact-sensitive, and pragmatic approach, identifying these criteria as factors to consider in reaching an overall gestalt sense of whether the private actor should be viewed as government.

Placing the Court's state action jurisprudence in historical perspective certainly reduces some of the inconsistency in state action doctrine. The flexible approach epitomized state action decisions occurring at the height of the civil rights struggle. Faced with concerted efforts to preserve racial segregation by transferring responsibilities to private hands, the Court took an expansive view of when private acts triggered constitu-

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H. Tribe, Constitutional Choices 248 (1985) [hereinafter Tribe, Constitutional Choices] (asserting that claims of inconsistency in state action doctrine are greatly exaggerated).

149. Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982); see also Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 49–50 (1999). As a practical matter, *Lugar*'s first prong usually is easily satisfied—for example, the fact that the private party acted "with knowledge and or pursuant to" a state statute will suffice. *Sullivan*, 526 U.S. at 50 (internal quotations omitted).

150. *Sullivan*, 526 U.S. at 52 (internal quotations omitted). Earlier cases treat the question of whether such a "close nexus" exists as one of the factors or tests to be applied in determining if a private party is a state actor, rather than as a description for the entire inquiry. See, e.g., *Lugar*, 457 U.S. at 939.

151. See *Sullivan*, 526 U.S. at 52–58; Edmonson v. Leesville Concrete Co., 500 U.S. 614, 621–22 (1991); *Lugar*, 457 U.S. at 939; see also Ronald J. Krotoszynski, Jr., Back to the Briarpatch: An Argument in Favor of Constitutional Meta-Analysis in State Action Determinations, 94 Mich. L. Rev. 302, 314–21 (1995) (dividing the Court's frequent combination of the criteria into three tests: exclusive state function test, symbiotic relationship test, and nexus or compulsion test). Although the Court initially identified joint participation with interdependence in Burton v. Wilmington Parking Authority, 365 U.S. 715, 725 (1961), joint participation now signifies significant government involvement in the challenged action. See, e.g., *Lugar*, 457 U.S. at 942; see also Tulsa Prof'l Collection Servs. v. Pope, 485 U.S. 478, 486 (1988). There is an obvious overlap among these criteria; government compulsion, for example, is really a particular instance of joint participation.

tional protections.[152] But as state action issues began to surface in administrative contexts and involve procedural due process claims, the Court became significantly more unwilling to find state action and hold private individuals to constitutional requirements.[153] Correspondingly, it began to engage in a far more formalistic analysis.

Historical retrenchment is an incomplete explanation, however, as a survey of results in the Court's more recent state action decisions suggests. Private nursing homes providing long-term care to Medicaid beneficiaries are not state actors, even though they too operate under contract with the government and make need determinations authorized by statute.[154] Nor are private schools with which the government contracted to fulfill its statutory obligation to provide education to special needs students.[155] Yet a private doctor treating prisoners pursuant to a contract with a prison is a state actor, as are private employers implementing government rules authorizing drug testing of transportation employees.[156] Similarly, the United States Olympic Committee (USOC), a corporation created by federal statute and given control over U.S. participation in the Olympics as well as exclusive oversight of private amateur sports organizations participating in international competition, is not a state actor, and neither is the National Collegiate Athletic Association (NCAA).[157] But a private organization overseeing nearly all public and private high school

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152. See Michael J. Phillips, The Inevitable Incoherence of Modern State Action Doctrine, 28 St. Louis U. L.J. 683, 732–34 (1984); Ronna Greff Schneider, State Action—Making Sense Out of Chaos—An Historical Approach, 37 Fla. L. Rev. 737, 739–43 (1985). For examples of the Court's expansive approach, see, e.g., Evans v. Newton, 382 U.S. 296, 301–02 (1966) (arguing that operation of a park is a public function); *Burton*, 365 U.S. at 723–25 (holding racial discrimination by private restaurant constituted state action where restaurant leased space in public building). The Court's expansive approach to state action appears motivated in part by the difficulty involved in showing that the states were intentionally seeking to avoid application of the Fourteenth Amendment by delegating responsibilities to private actors. See, e.g., *Evans*, 382 U.S. at 300 n.3 (holding that the Court need not reach question of whether state facilitated establishment of racially segregated parks).

153. See, e.g., Jackson v. Metro. Edison Co., 419 U.S. 345, 358–59 (1974). Another factor, emphasized by Schneider, is the reemergence of federalism concerns. See Schneider, supra note 152, at 743. As Laurence Tribe has argued, some of the inconsistency in the Court's approach to state action can be explained by plaintiffs' failures to properly target the state action involved, by erroneously suing private defendants in federal court when they should instead have sued government officials or sued in state court. See Tribe, Constitutional Choices, supra note 148, at 248, 255–57. But this does not adequately explain decisions like *Blum v. Yaretsky*, where the Court rejected state action claims even where plaintiffs sued only government officials and challenged the government's practice of terminating public benefits based on private decisions. See 457 U.S. 991, 996, 1005 (1982).

154. See *Blum*, 457 U.S. at 1008.

155. See Rendell-Baker v. Kohn, 457 U.S. 830, 837–43 (1982).

156. See West v. Atkins, 487 U.S. 42, 54–58 (1988); Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 615–16 (1989).

157. See San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 542–47 (1987); NCAA v. Tarkanian, 488 U.S. 179, 191–99 (1988).

athletic events is, according to the Supreme Court's decision two terms ago in *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n.*[158]

These decisions demonstrate that the line of division separating state and private action remains far from straight. The continuing disagreement regarding how to conduct state action analysis is starkly apparent in a comparison of the Court's two most recent state action decisions, *American Manufacturers Mutual Insurance Co. v. Sullivan* and *Brentwood Academy*. In *Sullivan*, the Court held that private insurance companies providing workers' compensation benefits were not state actors.[159] Obviously, the two cases differ in their underlying facts and particularly in the relationship of the private entities involved with the government. While the government created and closely regulated the workers' compensation system, the duty to provide benefits lay by statute with employers; the government did not participate in the private insurers' refusals to pay benefits other than to authorize such refusal prior to a hearing.[160] By contrast, the Court emphasized the numerous connections between the Tennessee Secondary School Athletic Association and the state in finding the Association to be a state actor, in particular the fact that a substantial majority of Association members were Tennessee public schools and that public school officials "overwhelmingly perform all but the purely ministerial acts by which the Association exists and functions."[161]

Even so, a striking difference in analytic style exists between the two decisions. *Sullivan* is in many ways the apogee of a formalistic state action inquiry, with the Court insisting upon state involvement in "the specific conduct of which the plaintiff complains" and not just background connections to the private entity.[162] The Court also reiterated other limiting rules and maxims developed in earlier cases that significantly narrow the scope of the state action inquiry, such as that "[t]he mere fact that a business is subject to state regulation" or "the mere approval or acquiescence of the State" in a private entity's actions do not create state action.[163] In *Brentwood Academy*, by contrast, the majority opinion took an avowedly flexible, pragmatic, and situation-specific approach, focusing on the "practical certainty . . . that public officials will control operation of the Association";[164] the Court stated that "[w]hat is fairly attributable [to the state] is a matter of normative judgment, and the criteria lack rigid sim-

158. 531 U.S. 288, 291 (2001).

159. 526 U.S. 40, 51 (1999).

160. The Court expressly distinguished *West* on this ground, noting that under Pennsylvania law, employers, not the state, bore the obligation to provide medical treatment and benefits. See id. at 55–56.

161. 531 U.S. at 298–302; see also id. at 296–97 (identifying other cases where constitutional constraints were applied because private entity was controlled by public officials).

162. 526 U.S. at 51.

163. Id. at 52 (alteration in original, citation omitted).

164. 531 U.S. at 298, 301 n.4.

plicity."[165] Moreover, it was precisely the background connections between the Association and the state—in the Court's words, "pervasive entwinement"—rather than state involvement in specific Association decisions that formed the basis for the Court's finding of state action.[166]

Quite clearly, such differing approaches make hazardous any confident prediction of the effect of ever-increasing privatization on state action doctrine. Yet notwithstanding the seeming trend toward a more flexible and perhaps expansive state action inquiry in *Brentwood Academy*, the pervasive thrust of the Court's recent decisions strongly suggests that privatization is likely to result in a denial of state action. Nor is this outcome surprising when the rules of current state action doctrine are compared to the practical realities of privatization.

One key factor leading to denials of state action is the Court's restriction of what satisfies the public function test to functions that are traditionally and exclusively performed by government.[167] Taken literally, this formulation excludes most of the tasks commonly performed by government today. Private organizations played a central role in distributing assistance to the poor prior to the New Deal,[168] while private prisons and

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165. Id. at 295. This flexible approach was the target of Justice Thomas' dissent, which underscored the absence of formal ties between the state and the Association and criticized the Court for deviating from existing "tests" for state action. See id. at 306–08, 312–14 (Thomas, J., dissenting). A flexible approach to state action is also evident in *Edmonson*, where the Court emphasized that a finding of state action turned on examination of factors such as "the extent to which the actor relies on governmental assistance and benefits," "whether the actor is performing a traditional governmental function," and "whether the injury caused is aggravated in a unique way by the incidents of governmental authority." Edmonson v. Leesville Concrete Co., 500 U.S. 614, 621–22 (1991).

166. 531 U.S. at 291. Indeed, in accepting background involvement to be sufficient for finding state action, *Brentwood Academy* seems more of a piece with the 1961 decision in Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961)—once described as "the high-water mark in a tide of state action doctrine that has since been almost constantly at ebb," Tribe, Constitutional Choices, supra note 148, at 251—than recent state action decisions.

167. See Barak-Erez, supra note 8, at 1184. Significantly, *Brentwood Academy* appeared quite willing to adopt this narrow understanding of what constitutes a public function. 531 U.S. at 302–03 (referring to requirement that function must be "exclusively and traditionally public" to qualify). The Court's acceptance of this narrow formulation of the public function test in *Brentwood Academy* is particularly noteworthy given that it appeared to be relaxing the requirements for a public function in *Edmonson*, there stating that performance of a "traditional governmental function" was sufficient. 500 U.S. at 621; see also id. at 640 (O'Connor, J., dissenting) (criticizing looser standard). But see UAW v. Gaston Festivals, Inc., 43 F.3d 902, 907 n.2 (4th Cir. 1995) ("[W]e do not believe the Supreme Court would have attempted to change radically the government function standard . . . through the transparent puerilism of simple omission.").

168. See, e.g., Katz, supra note 37, at 66–80 (discussing scientific charity movement and efforts to end most public forms of poor relief); Smith & Lipsky, supra note 13, at 47–57 (discussing role of nonprofit organizations and private charities in provision of social welfare services from eighteenth century onward).

private police similarly have a longstanding pedigree.[169] More importantly, the Court has relied on this narrow formulation to reject the claim that private entities are performing a public function for state action purposes when they are fulfilling duties ultimately borne by the government. Instead, private provision of services on the government's behalf only constitutes a public function if the services are ones that the government is required to provide directly.[170]

The overall effect of this approach is to remove one of the strongest arguments for finding state action in contexts of government privatization. Admittedly, instances exist where the government itself must remain directly responsible for the duties involved. *West v. Atkins* appears to be such a case; there, the private doctor held to be a state actor was fulfilling the state's Eighth Amendment obligation to provide adequate medical care to prisoners, an obligation that by virtue of the public-private divide runs only against the government.[171] But governments rarely are subject to such direct provision requirements. Instead, it is expected that governments will often meet their obligations to provide services by relying on private providers, and the activities involved are frequently far removed from historically core government functions.

As a consequence, the only grounds generally available for finding state action will be the government's connections or interaction with the private entity. Here, the obstacle to finding state action in government privatization contexts is the requirement, reiterated in *Sullivan*, that gov-

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169. See Sklansky, supra note 125, at 1171–83, 1193–1221, 1229–30 (describing current practice and history of private policing and noting that private security guards are not held to be state actors unless deputized); supra text accompanying note 76; see also Andrea Elliot, In Stores, Private Handcuffs for Sticky Fingers, N.Y. Times, June 17, 2003, at A1 (describing claims that department store security guards are using coercive practices against accused shoplifters). The restrictive effects of the current public function test are particularly evident in the civil commitment context, where courts have relied on a history of substantial private involvement to reject the claim that involuntary commitment of the mentally ill is a public function. See Rockwell v. Cape Cod Hosp., 26 F.3d 254, 258–60 (1st Cir. 1994); see also Ruhlmann v. Ulster County Dep't of Soc. Servs., 234 F. Supp. 2d 140, 166–67 (N.D.N.Y. 2002) (holding that involuntary commitment is not a public function under Supreme Court's current test and criticizing test's emphasis on tradition of government control of activity).

170. See Blum v. Yaretsky, 457 U.S. 991, 1011–12 (1982) (rejecting claim that nursing homes were performing a public function in providing services that states were required to provide under Medicaid because statute did not require states to provide the services themselves and "decisions made in the day-to-day administration of a nursing home are [not] the kind of decisions traditionally and exclusively made by the sovereign for and on behalf of the public"); Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982) (rejecting claim that private schools were performing a public function in providing education to special needs students on behalf of school districts because public funding "in no way makes these services the exclusive province of the State").

171. 487 U.S. 42, 55–56 (1988) (expressing concern that not finding state action would allow states to avoid constitutional duties simply by dint of contracting out). In addition, the doctor's actions were integrally tied to the state's exercise of its power to incarcerate, a core government function that satisfies the traditional and exclusive function requirements. See id. at 55 (noting connection to incarceration power).

ernment participation must be present in the specific action being challenged; absent such participation, only government compulsion or formal control of the private actor will suffice.[172] Public control of a private entity or participation in specific actions is unlikely to be present in a great many instances of privatization. As decisions such as *West* demonstrate, situations will arise where a private actor operates within and is an integral part of an institution controlled by the government.[173] But more often privatization means handing over program implementation in its entirety to separate private entities or, increasingly, giving private actors responsibility for running what formerly were public institutions, such as a prisons, schools, or hospitals. This is particularly true in social welfare programs, where the government relies on private entities to provide services to large numbers of beneficiaries. Private providers regularly make day-to-day decisions on their own; public involvement is limited to issuing general requirements that providers must meet (through regulations or contractual terms) and conducting periodic reviews.[174] Indeed, taking advantage of private freedom from public control—identified as exemption from civil service provisions, bureaucratic rules, or substantive programmatic requirements—is often the main impetus behind efforts to privatize.[175]

The question then becomes to what extent *Brentwood Academy* has altered the Court's prime insistence on government involvement in specific challenged acts. Clearly, background involvement that reaches the

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172. Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 50–55 (1999); Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 614 (1989) ("Whether a private party should be deemed an agent or instrument of the Government for Fourth Amendment purposes necessarily turns on the degree of the Government's participation in the private party's activities . . . ."). The Court's frequent failure to consider the cumulative effect of connections between the state and the private entity is further evidence of the reluctance to find state action based on background involvement. See, e.g., *Rendell-Baker*, 457 U.S. at 848 n.1 (Marshall, J., dissenting) (criticizing majority for "analyzing the various indicia of state action separately, without considering their cumulative impact"); see also *Blum*, 457 U.S. at 1013–14 (Brennan, J., dissenting) (criticizing majority for engaging in "a pigeonhole approach to the question of state action"). Such a cumulative assessment was part of state action doctrine under Burton v. Wilmington Parking Authority, 365 U.S. 715, 721–26 (1961), and seems to have been somewhat revived by Brentwood Academy v. Tennessee Secondary School Ass'n, 531 U.S. 288, 298–302 (2001). On the importance of cumulative assessment, see Krotoszynski, supra note 151, at 335–46.

173. 487 U.S. at 55–56 (noting that physician worked at hospital within prison and underscoring that state officials controlled inmates' access to other physicians); see also Edmonson v. Leesville Concrete Co., 500 U.S. 614, 621–24 (1991) (emphasizing close government involvement in private litigant's use of peremptory challenges).

174. See supra Part I.A (using specific examples to illustrate the way in which privatization delegates responsibility for program implementation to private hands); see also *Blum*, 457 U.S. at 993–95 & 1006 n.15, 1007 n.16 (describing Medicaid scheme under which federal and state governments specify factors relevant to determining need for long-term care but leave assessment of particular beneficiary's needs to private nursing homes and pbysicians).

175. See supra note 135 and accompanying text (detailing arguments offered in support of privatization).

level of "pervasive entwinement" is now a potential ground for finding state action. However, in holding that such pervasive entwinement was present, the Court placed particular weight on the participation of public officials in the Association, noting that these officials "do not merely control but overwhelmingly perform all but the purely ministerial acts by which the Association exists and functions . . . ."[176] Again, instances where government officials control or constitute private entities are hardly the norm; moreover, *Brentwood Academy* went out of its way to indicate that less extreme forms of government involvement might not suffice, stating that government purchases of contract services "do not convert the service providers into public actors."[177] Notably, in making this point *Brentwood Academy* cited *Rendell-Baker v. Kohn* with approval. In *Rendell-Baker*, the Court held that a private school was not a state actor, notwithstanding that the school received nearly all of its students through contracts with local or state authorities, was heavily regulated by the state, and relied on state payments for the vast majority of its operating budget.[178] If such extensive government involvement does not suffice to create state action, claims of pervasive entanglement will rarely succeed.

What frequently is present in instances of privatization is a formal delegation of authority from the state to the private entity, whether by contract[179] or by governing statutes and regulations.[180] However, these delegations have little significance under current state action doctrine.[181]

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176. *Brentwood Acad.*, 531 U.S. at 300; see also id. at 300–01 (noting that State Education Board members served as ex officio members of key Association committees, and Association rules, including no recruitment rule at issue, had been reviewed and approved by State Board). This involvement was important because it served to distinguish NCAA v. Tarkanian, 488 U.S. 179 (1988), and made the Association akin to Amtrak, a private corporation which the Court nonetheless held was subject to constitutional requirements in part because the President appointed a majority of its directors. See *Brentwood Acad.*, 531 U.S. at 296–98; see also Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 400 (1995) (holding that corporation is part of government where "[g]overnment creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors").

177. 531 U.S. at 299.

178. Rendell-Baker v. Kohn, 457 U.S. 830, 831–33, 840 (1982). *Brentwood Academy*'s citation to *Rendell-Baker* for the point that public contracting does not create state action is also significant because in *Rendell-Baker* the Court broadly rejected the proposition that a finding of state action could rest on a private entity's status as a government contractor. 457 U.S. at 840–41.

179. See, e.g., West v. Atkins, 487 U.S. 42, 44 & n.1 (1988); *Rendell-Baker*, 457 U.S. at 832 n.1.

180. See, e.g., *Brentwood Acad.*, 531 U.S. at 300–01; San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 542–43 (1987); Blum v. Yaretsky, 457 U.S. 991, 994–95, 1007–10, 1008 n.18 (1982).

181. For example, in *Blum*, the Court gave little weight to the way that the government had delegated responsibility to nursing homes to ensure that Medicaid beneficiaries received the appropriate level of care. See 457 U.S. at 1006–08 (noting that government required nursing homes to assess extent of beneficiaries' needs for care but concluding homes' discretion over individual assessments precluded finding state action on this basis). Similarly, the only reference to the way that local school committees had

Brentwood Academy is again a good example. There, the majority noted that for twenty-five years Tennessee maintained a regulation expressly designating the Association as the entity responsible for supervising all high school athletics in the state.[182] Interestingly, however, the Court treated this designation as further evidence of the state's entwinement and close relationship with the Association, instead of suggesting that delegation of authority may on its own form a basis for finding state action. To the extent that consideration of whether the government has delegated authority exists, it usually arises in determining whether the public function test is satisfied. But in this context, the analysis focuses on the nature of the task being delegated rather than on the act of delegation, with little consideration given to how the delegation may affect the private delegate's powers. Indeed, if anything, the Court's decisions indicate that a broad delegation of power actually serves as a basis for denying the existence of state action, because a private delegate's exercise of independent judgment and discretion is taken as strong evidence that significant government control and involvement is lacking.[183]

Hence, it seems quite unlikely that state action will be found in most instances of government privatization, at least under current state action doctrine.[184] A survey of lower court decisions addressing a variety of privatization contexts supports this conclusion, as overwhelmingly these

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delegated their statutory responsibilities to the private school in *Rendell-Baker* came in a footnote stating there was no evidence that the committees had done so to avoid constitutional constraints. 457 U.S. at 842 n.7. The one occasion on which the Court emphasized the significance of delegation per se is *NCAA v. Tarkanian*, where the Court stated that the ultimate question in state action analysis is "whether the State provided a mantle of authority that enhanced the power of the harm-causing individual actor." 488 U.S. at 192; see also id. at 195 (acknowledging that "a State may delegate authority to a private party and thereby make that party a state actor"). But the Court ultimately found no state action in *Tarkanian*, id. at 199, and it has not developed this suggestion that delegation matters in subsequent cases.

182. 531 U.S. at 292; see also id. at 301 (characterizing State's repeal of regulation as meaning that the State "once freely acknowledged the Association's official character but now does it by winks and nods"). The Court also noted that public schools who were members of the Association delegated their authority to charge admission at athletic events to the organization. Id. at 299.

183. See, e.g., *SFAA*, 483 U.S. at 545–46 & 544 n.27 (emphasizing government's lack of control over USOC in denying state action); *Blum*, 457 U.S. at 1008–09 (underscoring private actors' reliance on independent professional standards in denying state action); *Rendell-Baker*, 457 U.S. at 841–42 (stressing lack of government involvement in school personnel decisions in concluding state action not present).

184. For similar conclusions, see Barak-Erez, supra note 8, at 1183; Freeman, Private Role, supra note 2, at 575–80; Gilman, supra note 10, at 623. For suggestions that the Court may respond to privatization by expanding state action analysis, see Clayton P. Gillette & Paul B. Stephan III, Constitutional Limitations on Privatization, 46 Am. J. Comp. L. 481, 487 (Supp. 1998); see also Michelman, supra note 130, at 1081 (suggesting that privatization will either expand state action analysis or restrict scope of constitutional oversight of government activities).

decisions reject state action claims.[185] No doubt, the Supreme Court will clamp down when it perceives an effort by government to evade its constitutional obligations.[186] But privatization decisions rarely exhibit clear evidence of constitutional bad faith. Is privatizing to avoid the cumbersome, bureaucratic processes that come with government an illegitimate effort to bypass procedural due process, or is it instead an admirable attempt to inject innovation and beneficial flexibility into government programs?[187]

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185. See, e.g., Logiodice v. Trs. of Me. Cent. Inst., 296 F.3d 22, 26–30 (1st Cir. 2002) (private school operating in lieu of public high school for town residents is not a state actor), cert denied, 537 U.S. 1107 (2003); D.L. Cromwell Invs., Inc. v. NASD Regulation, Inc., 279 F.3d 155, 162–63 (2d Cir. 2002) (private self-regulatory organization not a state actor notwithstanding role in enforcing federal securities regulation); Dowe v. Total Action Against Poverty, 145 F.3d 653, 658–60 (4th Cir. 1998) (private organization administering Head Start program is not a state actor); McKeesport Hosp. v. Accreditation Council for Graduate Med. Educ., 24 F.3d 519, 524–26 (3d Cir. 1994) (private organization that accredited medical training programs not a state actor even though state based its licensing determinations on organization's reviews); Spencer v. Lee, 864 F.2d 1376, 1378–79 (7th Cir. 1989) (en banc) (private medical providers not state actors when involuntarily committing individuals under state statute).

One interesting deviation from this pattern is in regard to the provision of government-subsidized medical services, where several courts have found state action. See Grijalva v. Shalala, 152 F.3d 1115, 1120 (9th Cir. 1998) (private MCOs participating in Medicare are state actors in making coverage decisions because federal government jointly participated in such decisions by requiring MCOs to follow certain procedures in denying coverage and by providing broad appeal rights from such denials), vacated, 526 U.S. 1096 (1999); Catanzano v. Dowling, 60 F.3d 113, 119–20 (2d Cir. 1995) (private agencies are state actors when their decisions on whether to provide home health care services in short-term situations were not reviewed by state officials and were not purely medical judgments made pursuant to professional standards); Healey v. Thompson, 186 F. Supp. 2d 105, 117–21 (D. Conn. 2001) (holding home health care agencies operating under Medicare are state actors in making eligibility decisions but not treatment decisions); Daniels v. Wadley, 926 F. Supp. 1305, 1311 (M.D. Tenn. 1996) (private MCOs participating in Medicaid are state actors), vacated on other grounds sub nom. Daniels v. Menke, 145 F.3d 1330 (6th Cir. 1998).

186. See West v. Atkins, 487 U.S. 42, 56 & n.14 (1988) (expressing concern that states not be able to evade their constitutional duties to prisoners by contracting out prison medical care); *Rendell-Baker*, 457 U.S. at 842 n.7 (noting, in course of rejecting state action claims, absence of evidence suggesting "the State has attempted to avoid its constitutional duties by a sham arrangement which attempts to disguise provision of public services as acts of private parties"). The Court has been willing to play this policing role in the past, as it did when southern states attempted to preserve the white primary through resort to private Democratic clubs. See Terry v. Adams, 345 U.S. 461 (1953); see also supra text accompanying notes 151–152.

187. Similar difficulties with identifying illegitimate efforts to bypass procedural constraints are evident in several administrative law contexts. See, e.g., Heckler v. Campbell, 461 U.S. 458, 467–68 (1983) (noting that rulemaking helps ensure uniformity and avoids unnecessary administrative burdens and concluding agency legitimately used rulemaking, notwithstanding statutory hearing requirement); Peter L. Strauss et al., Gellhorn and Byse's Administrative Law: Cases and Comments 710–11 (10th rev. ed. 2003) (noting that agencies' use of interpretative rules and policy statements could be seen either as providing useful guidance or as avoiding notice-and-comment rulemaking requirements).

Additional support for the conclusion that state action will rarely be found comes from the transformation over the last two decades in the animating concerns of state action doctrine. *Brentwood Academy* aside, few of the Court's state action decisions even identify—let alone emphasize—the importance of ensuring that exercises of government power do not escape constitutional constraints as an underlying imperative of state action doctrine. Far more common of late is for cases to underscore the values at stake in *not* finding state action, expressing concern that state action holdings threaten individual autonomy, federalism, and the regulatory prerogatives of elected government.[188] Particularly given the current Court's emphasis on protecting these values in other jurisprudential areas,[189] it seems unlikely that it will adopt a more expansive approach to state action in response to increased privatization.

B. *The Inadequacies of Current State Action Doctrine*

In our system of constitutional government, the absence of state action in most instances of privatization should cause alarm. This absence results not because privatization removes responsibilities from the sphere of government endeavor, but because current state action doctrine is significantly underinclusive and ill-equipped to identify and thereby control private exercises of government power. Simultaneously, however, current doctrine is also overinclusive, because it makes private actors directly subject to constitutional constraints even when an instance of privatization does not raise the specter of unaccountable government power. These flaws combine to create perverse incentives for governments to delegate greater discretionary power over government programs to private actors,

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188. One frequently quoted version states: "Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed." Lugar v. Edmondson Oil Co., 457 U.S. 922, 936 (1982). See United States v. Morrison, 529 U.S, 598, 620 (2000) (insisting that state action doctrine serves "to prevent the Fourteenth Amendment from obliterating the Framers' carefully crafted balance of power between the States and the National Government"); Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 52 (1999) ("Faithful application of the state-action requirement . . . ensures that the prerogative of regulating private business remains with the States and the representative branches, not the courts.").

189. See, e.g., Alexander v. Sandoval, 532 U.S. 275, 286–87 (2001) (emphasizing restrictions on federal judicial role in refusing to imply private right of action); Boy Scouts of Am. v. Dale, 530 U.S. 640, 656–59 (2000) (holding that application of state's public accommodation law to require private association to accept openly gay scout leader violated constitutional protections of associational freedom); *Morrison*, 529 U.S. at 602 (invalidating portions of the Violence Against Women Act as an attempted exercise of legislative power reserved to states); see also Thomas W. Merrill, The Making of the Second Rehnquist Court, 47 St. Louis U. L.J. 569, 574–76, 584–87 (2003) (describing and offering explanations for Rehnquist Court's focus on constitutional federalism issues since 1994).

which ultimately worsen the threat to constitutional accountability posed by privatization.

1. *Inadequate Tests of Government Power.* — One important standard against which to measure the success of current state action doctrine is the extent to which it preserves constitutional controls on the exercise of government power. After all, the only reason to consider applying the Constitution outside of formal government institutions is to prevent the public-private divide from eviscerating the fundamental requirement of constitutional accountability. On this measure, current state action doctrine comes up short.

The complaint that current doctrine represents a very poor gauge of government power necessarily goes beyond an internal critique of current Supreme Court doctrine, in that it presupposes an understanding of what constitutes the exercise of such power that differs from the view evidenced in the Court's state action decisions. Yet, it does not require a very robust or expansive understanding of government power in order to make the point that current state action doctrine is underinclusive. Instead, all that is needed is acceptance of the claim that control over third parties' access to government resources, specifically government benefits and government-subsidized services, represents government power.[190] The Court's state action decisions demonstrate that current doctrine is largely unconcerned with government power in this form or, more generally, with the control over third parties that private entities gain as a result of their roles in government programs.[191]

Blum v. Yaretsky provides perhaps the starkest example of this lack of concern.[192] The case arose out of private nursing homes' provision of long-term care to Medicaid beneficiaries. The government required the homes to ensure that beneficiaries received an appropriate level of care. Upon notification from a skilled nursing facility that a beneficiary no longer needed intensive services, the government would inform the beneficiary that she must transfer to a less-skilled facility or lose her Medicaid benefits. In short, the nursing home's determination served to control the beneficiary's eligibility for skilled nursing services under Medicaid. The Court acknowledged the effect that the nursing homes' care deter-

190. See supra text accompanying notes 95–99.

191. The one occasion where the Court did stress a private actor's control over individuals' access to government services is *West*, where it emphasized that a state prisoner could not obtain medical care except through the private doctor who had contracted to provide medical care for the prison. But again, *West* is distinguishable from most privatization contexts both because of its institutional setting—the doctor worked at the state prison—and because the constitutional duties the doctor fulfilled are exceptional in attaching directly to the state. See supra notes 171 and 173 and accompanying text; see also Logiodice v. Trs. of Me. Cent. Inst., 296 F.3d 22, 29 (1st Cir. 2002) (emphasizing that in *West*, plaintiff was "a captive to whatever doctor the state provided" and "the state had an affirmative constitutional obligation to provide adequate medical care to its prisoners"), cert. denied, 537 U.S. 1107 (2003).

192. 457 U.S. 991 (1982).

minations had on beneficiaries' access to such services. But it denied that this effect made a difference to the state action inquiry: "That the State responds to [the homes' decisions to discharge or transfer patients to lower levels of care] by adjusting benefits does not render it *responsible* for those actions."[193] The critical factor for the Court was not that the government allowed the private homes' decisions to have this effect on program beneficiaries, but rather that the transfer decisions "ultimately turn[ed] on medical judgments made by private parties according to professional standards that are not established by the State."[194]

Blum is by no means an outlier. In *Rendell-Baker*, the Court recognized that local school committees were using a private school to provide benefits that the state government was required to provide, in this case a free education for students with special needs.[195] Yet in holding that the school was not subject to constitutional constraints in making employment decisions, the Court never considered the impact that the school's resultant freedom might have on the services students received. Instead, the Court analogized the school to other "private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships, or submarines for the government," thereby making clear that the fact that the school was charged with providing services *to others* played no role in its analysis.[196] The same inattention to the powers that private entities exercise over third parties is evident in state action decisions addressing private regulation. For example, in *San Francisco Arts & Athletics, Inc. (SFAA) v. United States Olympic Committee (USOC)*, the Court rejected the claim that the USOC was a state actor, holding that oversight of amateur sports was not a public function and that the government's involvement in chartering, authorizing, and funding the USOC did not suffice to create state action.[197] Notably, in reaching this conclusion the Court ignored the way that Congress' grant to the USOC of exclusive oversight powers significantly enhanced the USOC's authority over all individuals and organizations participating in amateur sports and enabled it to perform a coordination role that prior consensual arrangements had failed to achieve.[198]

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193. *Blum*, 457 U.S. at 1005.

194. Id. at 1008.

195. Rendell-Baker v. Kohn, 457 U.S. 830, 832 n.1, 842 (1982); see also id. at 849 (Marshall, J., dissenting) (emphasizing that under Massachusetts law, "the State is *required* to provide a free education to all children, including those with special needs").

196. Id. at 840–41.

197. See 483 U.S. 522, 543–45 (1987).

198. Id. at 553–54 (Brennan, J., dissenting). This lack of attention to the authority that private regulators wield over others is also evident in cases addressing the state actor status of self-regulatory organizations in the securities industry, such as NYSE and NASD. Notwithstanding that these organizations are given a significant role in federal securities regulation—they are required by statute to enforce compliance with federal securities laws by their members and their rules and enforcement proceedings are subject to approval by the Securities and Exchange Commission—several courts have held that rulemaking and enforcement decisions by the organizations do not represent state action. See, e.g., D.L.

More generally, the Court's treatment of close government involvement as essentially a prerequisite for finding state action is fundamentally misguided, because such involvement is a very poor litmus test for determining when a private entity should be viewed as wielding government power. This emphasis surfaces both in *Sullivan*'s requirement of government involvement in specific challenged acts and in *Brentwood Academy*'s concern with involvement so extensive that it amounts to pervasive entanglement. Focusing on government involvement seems logical enough; where the government is closely involved in the actions of its private partners, it is more likely that the private actors are serving as conduits for government decisions and policies rather than as independent decisionmakers.[199] As a result, these are appropriately viewed as instances of private exercise of government power. But this gets at only part of the state action concern that which addresses whether the government is trying to hide behind private action.[200] It omits any inquiry into the nature of the powers exercised by private entities, as well as into whether the government is responsible for enhancing the authority these entities wield over others.[201] Such an inquiry is essential given the way that privatization often not only enhances private actors' power over others, but provides them with forms of authority conventionally understood to constitute government power—such as control over government resources, programs, and regulation.

Once the focus shifts to assessing the powers wielded by private entities and away from identifying surreptitious government action, the inadequacy of tying the state action inquiry to identifying close government involvement becomes apparent. The extent of government power exercised by private actors is likely to vary inversely rather than directly with government involvement. Some minimal government involvement in the form of delegation of responsibilities to private actors is needed; but beyond that, the less the government is involved, the more discretion and power private entities have. This inverse relationship is evident in a recent First Circuit decision, *Logiodice v. Trustees of Maine Central Institute*, which held that a private school serving as the high school for a school district was not a state actor in a suit by a student who claimed that his suspension violated due process.[202] In reaching this conclusion, the

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Cromwell Invs., Inc. v. NASD Regulation, Inc., 279 F.3d 155, 162–63 (2d Cir. 2002) (holding that NASD investigatory hearings are not state action); Duffield v. Robertson Stephens & Co., 144 F.3d 1182, 1201 (9th Cir. 1998) (concluding that rules of private organizations controlling security exchanges are not state action at least insofar as compliance with rules is not required by federal law). See generally Richard L. Stone & Michael A. Perino, Not Just a Private Club: Self Regulatory Organizations as State Actors When Enforcing Federal Law, 1995 Colum. Bus. L. Rev. 453.

199. See *Blum*, 457 U.S. at 1009–10.

200. See supra note 186 (providing instances where the Court has focused on "smoking out" illegitimate uses of privatization to evade constitutional constraints).

201. NCAA v. Tarkanian, 488 U.S. 179, 192 (1988).

202. 296 F.3d 22 (1st Cir. 2002).

court emphasized that the school district was neither generally involved in running the school nor involved in the specific activity at issue, imposition of discipline. Writing for the majority, Judge Boudin noted that "the school district could have framed the contract to dictate in detail the disciplinary procedures to be followed or could have insisted on participating in such decisions." But, "wisely or not," the school district had not done so, and instead "day-to-day operations, including discipline, are in the hands of [the private school]."[203]

The inverse relationship between the extent of government involvement and private authority means that current doctrine has it nearly exactly backwards. Private actors given broader discretion in their exercise of government power are less likely to be subject to constitutional constraints than those who operate under close government supervision and whose potential for abusive action is thus more curtailed. Indeed, this ill fit suggests that the Supreme Court has refocused state action doctrine away from ensuring constitutional accountability of government power and towards ensuring constitutional accountability of government proper. That is, the Court uses state action doctrine to police against intentional evasion and bad faith by those who are indisputably government actors, but it does not view the doctrine as a safeguard against private actors wielding government power outside of constitutional constraints.

Notably, however, government involvement is also an inadequate metric even from the perspective of policing government. Government need not be closely involved in the specific decisions of a private entity in order to wield substantial influence over its actions. Instead, government can impose performance incentives or general requirements that as a practical matter mean that its private partners will follow particular courses of action, even though they remain free in theory to do otherwise.[204] Government may also informally influence private actors through its power to award contracts and grants.[205] To the extent that current state action doctrine requires government involvement in the specific acts being challenged and ignores background involvement un-

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203. Id. at 28. To the *Logiodice* court's credit, it recognized that the real issue was the school's control over students' access to "the only free secondary education in town," id. at 29, and therefore assessed whether use of private contract schools posed a serious threat to Maine school children's access to education. See id. at 30–31 (concluding that no evidence existed "that contract schools in Maine are disciplining students in an outrageous fashion and leaving Maine children without an education" and that "state law provides protection against serious abuse"). However, as discussed, this concern with the extent to which private schools controlled students' access to government benefits is at odds with current doctrine—a point Judge Boudin acknowledged, noting that holding a private school to be a state actor because of its control over free education would create a new "ad hoc" exception to current state action analysis. Id. at 29–30.

204. See Diller, Revolution, supra note 50, at 1178–85 (describing impact of performance incentives on both publicly administered and privatized welfare programs).

205. See Smith & Lipsky, supra note 13, at 72–73, 103–11, 144–46 (arguing that government contracts have significantly altered how nonprofits operate).

less it rises to the level of pervasive entanglement, the doctrine allows governments to exercise broad authority over a private entity's actions without triggering constitutional protections.[206]

2. *Unnecessary Intrusion on Government Regulatory Prerogatives.* — At the same time, however, current state action doctrine is also overinclusive. Under standard analysis, private entities are held fully subject to constitutional constraints if they are found to be state actors, even when imposing such liability on private actors is not needed to preserve constitutional accountability.

A good example of this overinclusivity comes from a vacated 1998 Ninth Circuit decision, *Grijalva v. Shalala*.[207] There, MCOs' decisions denying Medicare beneficiaries' requests for medical services were found to constitute government action. According to the appeals court, detailed federal requirements for the procedures MCOs must use and the services they must cover, along with the presence of a government appeals process for service denials, meant that the MCOs and the federal government were joint participants in implementing Medicare.[208] From a constitutional accountability perspective, holding the MCOs to be state actors seems unnecessary and purely the result of doctrinal rules. The plaintiffs sued only the Secretary of Health and Human Services (HHS), not the MCOs, their goal being to force the Secretary to do a better job at policing the procedures used by MCOs in making coverage decisions. The Secretary, in turn, had disclaimed responsibility for the MCOs' actions, arguing that they were unrelated private entities. State action doctrine thus served as a bridge that allowed the federal government to be charged with responsibility for the MCOs' actions even though the government did not directly participate in specific coverage denials until the appeals level. Surely, however, making the leap from private to public responsibility in this type of situation should not be difficult, given that the government had given the MCOs responsibility for providing services under Medicare notwithstanding the MCOs' inadequate procedures.

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206. See, e.g., Blum v. Yaretsky, 457 U.S. 991, 1005–10 (1982) (denying state action where government inspected nursing homes, imposed financial penalties for providing deficient care to Medicaid beneficiaries, required homes to inform government of their care determinations regarding beneficiaries' needs for nursing services, and mandated use of government-devised form in assessing beneficiaries' needs). The extreme approach of *Blum* in this regard was not followed in *Skinner v. Railway Labor Executives' Ass'n*, where the Court held that statutes encouraging and removing obstacles to drug testing of railroad employees sufficed to turn the drug tests into state action. 489 U.S. 602, 615–16 (1989). But continuing citations to *Blum* as governing authority suggest that the Court views the cases as distinguishable. See, e.g., Am. Mfrs. Mut. Ins. v. Sullivan, 526 U.S. 40, 51–52 (1999).

207. 152 F.3d 1115 (9th Cir. 1998), vacated, 526 U.S. 1096 (1999).

208. The Supreme Court vacated the Ninth Circuit's decision and remanded for consideration of new regulations issued by the Department of Health and Human Services and the intervening decision in *Sullivan*. However, several other lower court decisions, pre- and post-dating *Grijalva*, share its reasoning and conclusion. See cases cited supra note 185.

More importantly, once that leap is made and the government is liable for private acts, constitutional accountability is assured. Extending constitutional constraints to the private entities or individuals involved gives plaintiffs additional defendants, but not additional substantive protection against constitutional violations.[209] Such an extension, however, severely intrudes upon the government's ability to tailor relationships with private partners so as to maximize the benefits of privatization. Instead, as *Grijalva* demonstrates, regulatory control is transferred to the courts. The district court's order contained detailed requirements governing MCO coverage denials as well as the government's appeal process.[210] Such a judicially prescribed procedural code is a fairly standard consequence of finding a due process violation.[211] Yet the net effect was to prevent the government from determining how best to achieve the constitutional demands of due process without undermining the feasibility and benefits of MCO participation in Medicare.[212] Given the federal

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209. It is true, however, that applying constitutional constraints directly to private actors is more likely to result in payment of money damages for constitutional violations, which may translate into greater enforcement of constitutional norms, because private entities are less likely to enjoy the protections of qualified immunity, see infra note 220. But see supra text accompanying notes 114–115 (discussing why constitutional accountability does not demand full remediation for constitutional violations).

210. See Grijalva v. Shalala, No. CIV 93-711, 1997 WL 155392, at *1–*3 (D. Ariz. Mar. 3, 1997). This specification was affirmed on appeal. See *Grijalva*, 152 F.3d at 1123 n.4 (rejecting government's claim that appropriate remedy was remand to government to produce new regulations that comport with due process); see also infra text accompanying notes 414–416 (discussing the substance of the district court's due process analysis).

211. To be sure, courts often are hesitant to impose detailed procedural mandates on government, but this hesitancy generally takes the form of a refusal to hold that the government has violated due process rather than an effort to defer to the government's regulatory role in remedying identified violations. See, e.g., Mathews v. Eldridge, 424 U.S. 319, 339–49 (1976) (finding due process does not require oral hearing prior to termination of disability benefits); see also *Sullivan*, 526 U.S. at 60–61 (denying property interest in workers' compensation benefits for medical treatment if treatment not yet deemed reasonable and necessary); Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 322–26 (1985) (emphasizing that legislatures are to be allowed "considerable leeway" and not "forced to conform to a rigid constitutional code of procedural necessities" in upholding limitation on attorneys' fees in veterans' benefits applications against due process challenge); Cynthia R. Farina, Conceiving Due Process, 3 Yale J.L. & Feminism 189, 221 (1991) (noting that current due process doctrine defers to government's view regarding which interests should trigger due process protections, but not with regard to "the process appropriate to implement those interests"). Similarly, while a court may stay its judgment for a period to allow the government to rectify constitutional violations, see, e.g., Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 88–89 (1982), such equitable deference is rarely invoked.

212. See Morrison, supra note 22, at 758–59 (detailing concerns that *Grijalva* holding would "pressure [the government] to micromanage every aspect of an HMO's operation"); see also James F. Blumstein & Frank A. Sloan, Health Care Reform Through Medicaid Managed Care: Tennessee (TennCare) as a Case Study and Paradigm, 53 Vand. L. Rev. 125, 219 (2000) (arguing that finding MCOs to be state actors would impose "complexity, red tape, and inflexibility," expose MCOs to financial liability, and deter entry of MCOs into Medicaid MCO market). In recent years, large numbers of MCOs have exited

courts' lack of expertise in the complex policy issues presented by managed care, responsibility for designing constitutionally adequate MCO procedures seems best left in the first instance to HHS, subject to judicial review.[213]

A particularly notable point about *Grijalva* is that the very features used by the Ninth Circuit in finding the MCOs to be state actors also served to limit the potential that MCOs would abuse their powers. Both the government's detailed regulations and the appeals process (which involved independent review of coverage denials and the option of a hearing before an administrative law judge if that review affirmed the MCOs' decision) limited MCOs' ability to make self-interested coverage denials. From a constitutional accountability perspective, what matters is that the overall combination of MCO decisionmaking procedures and the government's review system satisfy due process, not that MCO procedures do so standing alone.[214] But the court never considered whether these alterna-

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Medicare, limiting the availability of the managed care option for Medicare beneficiaries. See Gold & McCoy, supra note 24, at 1. Some commentators contended that *Grijalva* would encourage others to leave the program to avoid having to provide costly appeals procedures. See Morrison, supra note 22, at 759 (reporting arguments); see also Gladieux, supra note 22, at 101–02 (noting danger that costly regulatory standards will cause MCOs to leave Medicare, but arguing that MCOs also have a vested interest in ensuring adequate grievance and appeals procedures are provided); Gegwich, supra note 33, at 214–15 (arguing that *Grijalva* decision may be a "double-edged sword" for beneficiaries as it may force HHS to drop noncompliant HMOs, thereby leaving some beneficiaries without access to their established physicians).

213. The difficulties in determining appropriate procedures are evident in the aftermath of the *Grijalva* litigation, which was eventually settled after the Supreme Court vacated the Ninth Circuit's decision. *Grijalva*, 152 F.3d at 1115, vacated, 526 U.S. 1096 (1999). The district court had required that all beneficiaries receive detailed notices describing: the basis for the MCO's decision; the type of additional evidence that would support the beneficiary's claims; regular and expedited appeal procedures; and informal reconsideration mechanisms. *Grijalva*, 1997 WL 155392, at *1. In its recent rulemaking on Medicare managed care notice and appeals procedures, initiated as part of the settlement agreement, HHS refused to require that MCOs provide such detailed notice for every reduction or termination in services, arguing that detailed notices are burdensome for MCOs. Moreover, consumer surveys had revealed that Medicare beneficiaries preferred to receive information specific to their needs at a given time. Instead, HHS opted for a two-track system under which beneficiaries would receive largely generic notices of appeal rights on reduction or termination of services, with additional detailed and personalized notices being sent to beneficiaries who choose to appeal. Medicare Program; Improvements to the Medicare+Choice Appeal and Grievance Procedures, 68 Fed. Reg. 16,652, 16,656–57 (Apr. 4, 2003) (to be codified at 42 C.F.R. pts. 422, 489) [hereinafter Medicare Program, Improvements].

214. *Grijalva* specifically targeted the government's oversight of MCOs, and the decision therefore indicates that the Ninth Circuit found such adequate overall constraints lacking. 152 F.3d at 1122. But the court dismissed out of hand the suggestion that constitutional accountability might not require the same procedures in a privatized context as when the government acts directly. Id. at 1121. It also rejected the option of putting greater responsibility on government to ensure accountability if the government chooses to privatize by upholding the district court's decision to decide what procedures

tive controls on MCOs should preclude rather than produce a finding of state action.

In its disregard for the effect that alternative accountability mechanisms might have on state action determinations, *Grijalva* is on a par with other decisions.[215] In *Brentwood Academy*, the Court rejected the Association's claim that alternative protections obviated the need to subject the Association to constitutional scrutiny, without examining whether the mechanisms identified by the Association offered adequate protection. According to the Court, the availability of alternative routes for redress was simply irrelevant given the strength of the case for the Association's state actor status.[216] The Court is equally indifferent to whether adequate nonconstitutional controls exist in cases where it fails to find state action. In *Blum*, for instance, the Court stressed that the nursing homes' care determinations were based on independent professional standards in order to demonstrate the absence of state involvement; it did not consider whether such standards were sufficient to obviate the need for constitutional protections.[217]

Another major culprit causing state action's overinclusivity, as *Grijalva* indicates, is the use of government involvement as the linchpin for state action determinations. When the government is intimately involved with a private entity or the challenged private action, constitutional constraints can be enforced directly against the responsible government officials. Accordingly, applying constitutional constraints directly to the private entity as well is unnecessary to ensure constitutional accountability. Moreover, targeting government alone in such situations seems particularly appropriate because close government involvement limits the extent of authority wielded by private actors and thus in turn limits their culpability for constitutional violations. This point holds even more strongly when the government is not simply "involved," but in fact

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Medicare MCOs must employ in handling coverage requests, rather than leaving that remedial question to the agency to address in the first instance. See id. at 1123–24.

215. One recent exception is *Logiodice v. Trustees of Maine Central Institute*, where the First Circuit put great weight on the fact that students expelled from private contract schools had "alternative means of redress"—specifically, the ability to enforce their rights to free education against their school districts in state court—in finding the private schools were not state actors. 296 F.3d 22, 29–30 (1st Cir. 2002), cert. denied, 537 U.S. 1107 (2003).

216. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 304–05 (2001).

217. Blum v. Yaretsky, 457 U.S. 991, 1009 (1982). Subsequently in *West v. Atkins*, the Court made clear that acting in accordance with professional discretion and judgment is irrelevant to the state action inquiry except insofar as it demonstrates that the government was not involved in the actions at issue. 487 U.S. 42, 51–52 & 52 n.10 (1988). Similarly, in *SFAA*, the Court did not mention the procedural requirements imposed by statute on the USOC in rejecting the claim that the USOC was a state actor. See San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 543–45 (1987); see also 36 C.F.R. §§ 220,509, 220,527–29 (2000) (setting out procedures USOC must follow in reviewing complaints and resolvi[illegible] disputes).

strongly encourages or compels the challenged action.[218] For example, if the government insists on quick placement or specifically dictates the procedures that private job trainers must follow in providing services to welfare beneficiaries, it seems unfair to hold the providers monetarily liable if these procedures are declared unconstitutional.[219] The impact on private actors is made more severe by existing immunity doctrines which make private entities and individuals particularly desirable defendants in actions for damages based on constitutional violations.[220]

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218. Other commentators have made this point with regard to cases in which private individuals are held to be state actors because they relied on unconstitutional statutes, the implementation of which involved joint participation or compulsion by state officials. The blame for the constitutional violation in such cases is primarily—if not wholly—the state's; nonetheless, private individuals find themselves constitutionally liable for invocation of state statutes. See, e.g., Barbara Rook Snyder, Private Motivation, State Action and the Allocation of Responsibility for Fourteenth Amendment Violations, 75 Cornell L. Rev. 1053, 1067–69, 1076 (1990). For this reason, in *Sutton v. Providence St. Joseph Medical Center*, the Ninth Circuit held that government compulsion, absent more, is insufficient to transform a private entity into a state actor. See 192 F.3d 826, 838–39 (9th Cir. 1999) (arguing that effect of opposite conclusion "would be to convert every [private actor] . . . into a governmental actor every time it complies with a presumptively valid, generally applicable law"). Whatever its analytic appeal, the Ninth Circuit's argument in *Sutton* is at odds with the Court's repeated statements that government compulsion creates state action. See, e.g., *Brentwood Acad.*, 531 U.S. at 296 ("A challenged activity may be state action when it results from the State's exercise of 'coercive power.'" (quoting *Blum*, 457 U.S. at 1004)); Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 614 (1989) (holding that where private entity complies with regulation "by compulsion of sovereign authority, . . . the lawfulness of its acts is controlled by the Fourth Amendment"). *Sutton* also conflicts with the Court's reluctance to separate the question of government responsibility for private actions from the private entity's state actor status. See infra text accompanying notes 221–223.

219. Subjecting private providers to injunctive relief in this context is less disturbing, given the likelihood that government officials would intervene to defend a challenged measure's constitutionality. See 28 U.S.C. § 2403 (2000) (providing that where constitutionality of a federal or state statute is brought into question in private lawsuit, federal courts must inform relevant government's attorney general and allow attorney general to intervene). But if government officials are participating in the case, requiring even nominal participation by private entities is difficult to justify. More importantly, injunctive relief that goes beyond enjoining a challenged measure to stipulating the procedures or requirements private entities must follow, as in *Grijalva*, is arguably more intrusive than simply granting damages and leaving it to the private entities and the government to determine how best to ensure constitutional rights are protected. See Peter H. Schuck, Suing Government: Citizen Remedies for Official Wrongs 14–16 (1983).

220. The Eleventh Amendment bars suits seeking damages from the government or government officials in their official capacity in federal court, while rules of qualified immunity protect such officials in their individual capacity except for violations of clearly established constitutional and statutory rights. U.S. Const. amend. XI; see, e.g., Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Private individuals have no such blanket exemption from liability, although they may be protected by grants of immunity or good faith exceptions in particular contexts. See Richardson v. McKnight, 521 U.S. 399, 412–14 (1997); Wyatt v. Cole, 504 U.S. 158, 168–69 (1992). While contractual clauses may allow private actors to pass along the cost of judgments against them to government, they still face the burden of defending against suit. More to the point, these are damage recoveries

A solution to this problem of overkill would be to separate the question of government responsibility for private acts from a private entity's direct liability for constitutional violations.[221] Thus, Medicare MCOs would be state actors in a suit against the Secretary, but not if sued directly, even if the identical conduct, coverage denials, were involved in both suits. But this proposed solution runs up against another trait of current doctrine, namely the all-or-nothing character of state action determinations. Judicial decisions treat private liability for constitutional violations as following inexorably from state actor status: If state action is found, constitutional requirements directly apply in full force to the private entity. Occasionally, courts do limit their state action determinations by noting that such determinations do not subject the private entities involved to constitutional requirements in all contexts.[222] But they rarely distinguish between private and government liability for constitutional violations by private actors.[223]

The all-or-nothing approach makes state action doctrine a very blunt instrument with which to address the constitutional problems associated with privatization. At the same time that it leads to overinclusiveness in the ways described above, the all-or-nothing approach also reinforces the underinclusiveness of current doctrine by creating a bright-line distinction between instances where private actors are wielding government power and those where they are not. The effect is to increase the harm done by inadequate tests for government power, since failure to recognize the roles played by private actors and the ways that government can influence their behavior serves to put many instances of privatization

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that plaintiffs might well not be able to obtain, in federal or state court, were it not for the serendipitous presence of a private actor alongside the government official.

221. See, e.g., Larry Alexander & Paul Horton, Whom Does the Constitution Command? 115 (1988) (noting that nonstate actor status of the nursing homes in *Blum* and the private school in *Rendell-Baker* does not preclude possibility that states acted unconstitutionally by funding these private entities "and then permitting them to discharge employees and patients without hearings and for opinions voiced"). Michelle Gilman suggests a different solution: separating government responsibility for unconstitutional statutes and regulations, as well as for private conduct attributable to these authorizations, from private entities' responsibility for harms caused by their own acts. But this approach would not adequately address state action's overinclusiveness, as it retains private liability for constitutional violations in many contexts, including *Grijalva*. See Gilman, supra note 10, at 617–18, 622–23.

222. See, e.g., George v. Pacific-CSC Work Furlough, 91 F.3d 1227, 1230 (9th Cir. 1996); Air Line Pilots Ass'n v. Dep't of Aviation, 45 F.3d 1144, 1150 (7th Cir. 1995); see also Milonas v. Williams, 691 F.2d 931, 939–40 (10th Cir. 1982) (holding that private school providing government-funded services pursuant to government contracts that fulfill government's statutory responsibilities was a state actor in suit by students, even though *Rendell-Baker v. Kohn* forestalled such a result in suit by teachers). But see Robert S. v. Stetson Sch., Inc., 256 F.3d 159, 168 (3d Cir. 2001) (holding that *Rendell-Baker*'s rejection of state action applies as well to suits by students).

223. For the rare exception, see *Sutton*, 192 F.3d at 836–41 (distinguishing between government and private liability for constitutional violations in contexts of government compulsion).

wholly outside of constitutional controls. The all-or-nothing approach also leads to underprotection of constitutional rights by ramping up the import of finding state action. Courts are more reluctant to make such a finding when doing so serves to make private actors fully and directly liable for constitutional violations.

3. *The Perverse Incentives of Current State Action Doctrine.* — That current doctrine ignores the way government power is exercised in the modern administrative state and leads to the unnecessary "constitutionalization" of private actors is perhaps indictment enough. Yet an additional basis for concern exists. The combination of these two features means that current doctrine creates perverse incentives that encourage governments to privatize and to do so in a fashion that allows private entities to exercise government-enhanced power with very little accountability.

At present, state action analysis gives the government the following choices: It can directly implement a program, providing both services and regulatory oversight itself, in which case constitutional constraints are fully applicable. It can also hand over implementation to private entities but remain closely involved in supervising service provision and in program management. As *Grijalva* demonstrates, the latter choice will mean not only that the government's own actions and oversight decisions are subject to constitutional constraints, but also that its private partners may be drawn into the Constitution's orbit. Alternatively, the government can cede direct implementation to private entities and eschew close supervision. Pursuing this route makes it less likely that the government will be held responsible for failing to ensure that its private partners adhere to constitutional constraints or that these partners will be held subject to such constraints if sued independently. Moreover, avoiding constitutional liability under this third option does not require the government to surrender all control over programs. Instead, the privatization cases suggest that the government need only forego involvement in specific day-to-day decisions as well as formal institutional control over the private entities to whom implementation responsibilities are given. The government can still "safely" employ general oversight measures and independent accountability mechanisms to ensure that private providers and regulators deliver promised services and serve the public interest.

Current doctrine clearly creates an incentive for government to take this third option, to privatize and police private providers and regulators from afar. The actual operational power of this incentive will, of course, vary greatly across different program areas. Where government programs are popular and perceived abuses readily trigger public outcry, the incentive effects of current state action doctrine likely will be minimal. The government can exercise more certain control by keeping programs in-house or—as in *Grijalva*—creating a detailed regulatory structure to guide implementation decisions by private parties. It may also view the potential inapplicability of constitutional restraints as a detriment, for example out of a fear that this would make program participants vulnerable

and private contractors less accountable. But at times, freedom from constitutional scrutiny may well prove a powerful consideration. Much of the impetus of privatization comes from a desire to minimize costs and to enhance efficiency and flexibility—goals that are threatened if the government's private partners are found to be state actors. Such a finding exposes governments to passed-on liability for private constitutional violations, to the need to devote resources and personnel to supervision, and to significant limitations on private entities' procedural and operational autonomy; it may also deter private entities from contracting with the government, thereby undermining competition in privatized programs.[224] The 1996 federal welfare legislation, which explicitly provided that welfare benefits are not an entitlement in an effort to avoid triggering due process protections, is evidence that governments occasionally try to inoculate their programs against constitutional restraints.[225] The welfare law is also instructive because it suggests that the government may be particularly inclined to delegate without oversight when programs are unpopular and participants lack the ability to defend their interests politically.[226] Further evidence to this effect is the fact that managed care is often mandatory for low-income individuals receiving benefits through Medicaid, a means-tested program, but remains optional under Medicare, a more universal, contributions-based program whose participants wield substantial political clout.[227]

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224. See Sclar, supra note 135, at 11–13 (noting costs attached to government supervision of private contractors and emphasizing importance of competition to successful privatization); Freeman, Private Role, supra note 2, at 587–88 (noting that expanding procedural protections to private entities will impose bureaucratic burdens); Trebilcock & Iacobucci, supra note 135, at 1451 ("[I]t is fundamental to acknowledge that the imposition of legal accountability or other constraints on the private sector may entail costs in terms of reduced competition, innovation, and flexibility . . . ."; see also supra note 212 (discussing arguments regarding effect of *Grijalva*'s finding Medicare MCOs to be state actors). As the First Circuit put the point in *Logiodice*, "There are costs (rigidities, law suits), and not just benefits in inflicting constitutional standards wholesale upon privately governed institutions." Logiodice v. Trs. of Me. Cent. Inst., 296 F.3d 22, 30 (1st Cir. 2002), cert. denied, 537 U.S. 1107 (2003).

225. PRWORA, 42 U.S.C. § 601(b) (2000); see Richard J. Pierce, Jr., The Due Process Counterrevolution of the 1990s?, 96 Colum. L. Rev. 1973, 1990–91 (1996) [hereinafter Pierce, Due Process]. But see Cynthia R. Farina, On Misusing "Revolution" and "Reform": Procedural Due Process and the New Welfare Act, 50 Admin. L. Rev. 591, 618–33 (1998) [hereinafter Farina, On Misusing Revolution] (stating that 1996 Act prevents due process challenges to substantive state policies that restrict benefits, but does not remove welfare receipt from all procedural due process protections).

226. See, e.g., Sheryll D. Cashin, Federalism, Welfare Reform, and the Minority Poor: Accounting for the Tyranny of State Majorities, 99 Colum. L. Rev. 552, 582–91, 594–611 (1999) (arguing that middle class suburban interests are likely to dominate over those of urban poor when control of welfare policy is devolved to states).

227. See, e.g., Fossett, Managed Care, supra note 23, at 111–13, 125–29 (noting individuals most likely to be required to enroll in MCOs under Medicaid are low-income individuals who lack political influence); Theda Skocpol, Social Policy in the United States: Future Possibilities in Historical Perspective 250–74 (1995) (arguing that programs not targeted to the poor have greater political power). Federal law also grants Medicaid

Moreover, the incentive effects of current state action doctrine may be amplified by the fact that privatization can take the operation of government programs outside of most established mechanisms for ensuring judicial scrutiny of government action. Basic statutes, such as administrative procedure acts and freedom of information laws, are limited to "agency action" or "agency records," terms usually interpreted not to cover private organizations implementing government programs.[228] Instead, the main administrative regime applicable to privatization contexts is public contracting rules, which are focused on preventing fraud rather than providing a means for challenging administrative action.[229] Further, the courts are increasingly unlikely to find implied private rights of action in federal statutes,[230] and recent efforts to block-grant federal so-

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beneficiaries enrolled in managed care fewer procedural protections than are granted to Medicare beneficiaries similarly enrolled. Compare 42 U.S.C. §§ 1395w-22(f)-(g), with id. §§ 1396a(a)(3), 1396u-2(b). For example, under current regulations, Medicare MCOs are ordinarily accorded fourteen days to process appeals and beneficiaries have a right to request fast-track independent review, whereas Medicaid MCOs ordinarily are allowed up to forty-five days to process appeals; moreover, Medicare MCOs generally must continue coverage during fast-track review of a decision to terminate services. Compare Medicare Program, Improvements, supra note 213, at 16,653–55 with Medicaid Program; Medicaid Managed Care: New Provisions, 67 Fed. Reg. 40,989, 40,991–92 (June 14, 2002) (to be codified in scattered parts of 42 C.F.R.). These differences reflect not just the relative political impotency of low-income Medicaid beneficiaries, but in addition the fact that Medicare is administered solely by the federal government, whereas Medicaid is a joint federal-state program. Thus in the Medicaid context the federal government is also concerned with preserving state flexibility.

228. See Forsham v. Harris, 445 U.S. 169, 184–86 (1980) (holding that "agency record" refers only to records within government's custody and control, and does not cover records generated by private grantee that were never reviewed by the government); Freeman, Private Role, supra note 2, at 586–87. One exception is New York's Freedom of Information Law, which the New York Court of Appeals has held extends to records in a private entity's possession, provided the records are kept or held for a government agency. Encore Coll. Bookstores, Inc. v. Auxiliary Serv. Corp., 663 N.E.2d 302, 306 (N.Y. 1995).

229. See Bezdek, supra note 10, at 1569–72.

230. See, e.g., Alexander v. Sandoval, 532 U.S. 275, 293 (2001) (refusing to find private right of action to enforce agency regulations implementing Title VI of the Civil Rights Act, 42 U.S.C. § 2000d). On a number of occasions, courts have allowed participants in government programs to enforce government contracts with private entities on third-party beneficiary grounds, even when an implied right of action under the governing statute is lacking. See Melvin Aron Eisenberg, Third Party Beneficiaries, 92 Colum. L. Rev. 1358, 1406–12 (1992); Anthony Jon Waters, The Property in the Promise, 98 Harv. L. Rev. 1109, 1176–92 (1985). Such third-party beneficiary claims are hard to square with current administrative law doctrines—not just the current refusal to imply private rights of action, but in addition the reluctance to interfere with administrative enforcement discretion. See Heckler v. Chaney, 470 U.S. 821, 837–38 (1985) (holding that agency enforcement decisions are presumptively unreviewable); see also Oil, Chem. & Atomic Workers Int'l Union v. Richardson, 214 F.3d 1379, 1381–82 (D.C. Cir. 2000) (arguing that *Chaney* forecloses suit by union to enforce labor provisions in contract between government and private contractor). This disconnect between the rules that apply to government-as-regulator and government-as-contractor has arisen in other contexts, see United States v. Winstar Corp., 518 U.S. 839, 910 (1996) (holding that federal government was liable for damages incurred by savings and loans institutions resulting

cial welfare programs remove another major source of constraint on program operation.[231] In short, by avoiding application of constitutional requirements, governments may be able to remove one of the few remaining bases for judicial review of implementation decisions.[232]

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from new regulatory scheme), and perhaps the courts will view the government's exposure to such private law suits as a legitimate effect of the government's decision to privatize its programs. See Gilman, supra note 10, at 635–39 (arguing that third-party beneficiary suits hold promise as means of enforcing accountability in privatized welfare programs). But a more likely result would seem to be a retraction in the Court's willingness to allow such third-party claims, at least outside commercial contexts, given the separation of powers and federalism concerns that animate recent decisions refusing to imply private rights of action. See *Sandoval*, 532 U.S. at 286–87, 291 (emphasizing that power to create private remedy lies with Congress, not federal courts or administrative agencies); see also Gonzaga Univ. v. Doe, 536 U.S. 273, 280 (2002) (emphasizing need for clear statement of individual entitlements in spending legislation as basis for finding such rights enforceable under § 1983). In any event, courts often impose restrictive conditions that substantially limit the availability of third-party beneficiary claims in practice, such as requiring proof that the government intended to allow for third-party enforcement. See Restatement (Second) of Contracts §§ 302, 313 (1981) (requiring either express provision for third-party enforcement or evidence of intent to allow for third-party enforcement); Lori A. Alvino, Note, Who's Watching the Watchdogs? Responding to the Erosion of Research Ethics by Enforcing Promises, 103 Colum. L. Rev. 893, 916–17 (2003) (discussing use of sections 302 and 313 of the Restatement (Second) of Contracts in limiting third-party beneficiary rights); see also Gilman, supra note 10, at 637–38 (noting difficulties that Section 8 participants have faced in recovering on third-party beneficiary claims).

231. See Pear, Medicaid Proposal, supra note 23 (describing Medicaid block-grant proposals); see also Jerry L. Mashaw & Dylan S. Calsyn, Block Grants, Entitlements, and Federalism: A Conceptual Map of Contested Terrain, 14 Yale L. & Pol'y Rev. 297, 301–06 (1996) (noting effects of block grants on beneficiaries' ability to obtain federal court review of state administrative action). The Court's increased reluctance to allow individuals to enforce spending program requirements through § 1983 further weakens federal oversight of state administrative choices. See *Gonzaga*, 536 U.S. at 280–82 (noting that since 1981 "only twice have we found spending legislation to give rise to enforceable rights").

232. However, the Court's recent Eleventh Amendment and qualified immunity jurisprudence may create a counterincentive to keep programs in-house. Decisions such as Alden v. Maine, 527 U.S. 706 (1999), and Board of Trustees of University of Alabama v. Garrett, 531 U.S. 356 (2001), indicate that the Eleventh Amendment and state sovereign immunity may combine to make it difficult to collect damages from states when they violate federal law. On the other hand, in *Richardson v. McKnight* the Court held that private prison guards are not eligible for qualified immunity under § 1983. 521 U.S. 399, 412–14 (1997). The Eleventh Amendment decisions may weigh against privatization because the Eleventh Amendment only applies to state government and to entities deemed arms-of-the-state. See, e.g., Fresenius Med. Care Cardiovascular Res., Inc. v. P.R. & The Caribbean Cardiovascular Corp., 322 F.3d 56, 61–68 (1st Cir. 2003) (setting out governing analysis for determining if an entity is an arm-of-the-state). The incentive effects of *Richardson* are harder to predict, because any liability under § 1983 rests on a court finding that the defendant acted "under color of state law," which in regard to private actors is the same as finding state action. See West v. Atkins, 487 U.S. 42, 48–49 (1988); Lugar v. Edmondson Oil Co., 457 U.S. 922, 935 (1982). Hence, while *Richardson* might lead governments to forego privatization, it could alternatively reinforce the incentive to privatize without close supervision, since a finding of state action may mean not only that the government's private partners are subject to suit for constitutional violations, but

By creating such an incentive to privatize without close supervision—and a corresponding disincentive for governments to adopt cooperative models of privatization, where programs are jointly implemented by private and public entities—current state action doctrine raises seemingly indefensible obstacles to effective and accountable use of privatization. Several scholars studying privatization emphasize the importance of close government involvement and cooperation with private entities. Such involvement allows the government to benefit from private expertise and innovation, while preserving public control of government programs and guarding against self-interested private decisionmaking.[233] Close oversight is particularly important when market failure or abuse of power is most likely: where providers hold a monopoly on provision of particular services; the services at issue are complex and difficult to specify ab initio; competitive pressures are minimized by difficulties in exit or lack of information; and recipients are relatively powerless.[234] Even more relevant to the discussion here, close government involvement is the best means for ensuring constitutional accountability. Agency officials are likely to be more familiar with constitutional requirements than are private entities, and they also may be more concerned with acting in accordance with those requirements.[235] And perhaps most importantly, the presence of

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further that such suits could result in costly verdicts whose burdens the government ultimately may bear. See *Richardson*, 521 U.S. at 422–23 (Scalia, J., dissenting).

233. See Michael C. Dorf & Charles F. Sabel, Drug Treatment Courts and Emergent Experimentalist Government, 53 Vand. L. Rev. 831, 865–68 (2000) (discussing monitoring of treatment providers by drug courts); Freeman, Private Role, supra note 2, at 608, 623–25, 634–36 (noting value of close government supervision through contract managers and detailed contractual provisions as protections in privatization contexts); see also Sclar, supra note 135, at 121–29 (emphasizing importance of government adopting collaborative approach where goals of privatization are carefully specified); Kettl, supra note 135, at 39, 179–211 (stressing need for close government monitoring of its private partners but also noting that too much interdependence undermines government's ability to control its private partners). But see Trebilcock & Iacobucci, supra note 135, at 1435–42 (arguing that agent motivation problems and rent-seeking undermine public provision and oversight).

234. See Kettl, supra note 135, at 39–40 ("Careful public management . . . requires zealous public oversight, particularly of the public-private relationships that are most likely to be troublesome—the relationships with the greatest market imperfections."); Minow, Public and Private Partnerships, supra note 12, at 1248–51 (describing obstacles to competition and informed parental choice in school context); Freeman, Extending Public Law Norms, supra note 10, at 1343–48 (arguing for imposition of public law norms on private providers when services involved are highly discretionary, of fundamental importance, and received by vulnerable populations); see also Trebilcock & Iacobucci, supra note 135, at 1443–51 (acknowledging that limited government intervention may be appropriate in such contexts provided it ensures adequate room for private profit motives to operate).

235. See, e.g., Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (holding that government officials do not qualify for immunity when their discretionary actions violate "clearly established" rights); Feeley & Rubin, supra note 144, at 40–41 (noting that prison systems and individual prisons hire attorneys to ensure compliance with detailed constitutional requirements regarding prison conditions); Minow, Partners, supra note 2,

agency officials working in partnership with private providers or regulators minimizes the difficulty in enforcing constitutional obligations, since then no need exists to invoke the state action doctrine against private entities; instead, constitutional claims can be brought against the government officials involved.

Thus, current state action doctrine may be fundamentally counterproductive, to the extent that it is intended to preserve constitutional accountability for private exercises of government power, as the incentives the doctrine creates may have precisely the opposite effect. Hints of this counterproductive aspect can be garnered from *Grivalja*. The federal government carefully detailed the services MCOs must provide, and it mandated internal and external appeals procedures precisely to protect against the danger that the financial interests of MCOs might lead to improper coverage denials. This detailed regulatory structure was then used as a basis for holding the government responsible for the MCOs' actions.[236] While the government responded to the *Grijalva* decision by expanding procedural protections for Medicare MCO participants rather than by decreasing its involvement,[237] in other contexts the government might instead repeal its regulations entirely—at a minimum, leaving beneficiaries without their most effective remedial options, and perhaps setting the stage for a retraction of constitutional protections as well.

C. *The Road Not Taken: Private Delegation Doctrine*

Private delegation doctrine takes over where state action leaves off. Rather than asking whether ostensibly private actors should be considered public for constitutional purposes, it accepts their private status and asks instead whether the Constitution prohibits governments from delegating certain powers to private actors. These prohibitions vary somewhat according to the level of government involved. When it is state government, the constitutional textual basis is the Fourteenth Amendment's Due Process Clause,[238] and the underlying concern is that public power may be abused to achieve particular private aims instead of the public interest. This same due process concern exists in the federal context, but

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at 37–41 (describing how concerns of religious providers may conflict with antidiscrimination norms).

236. Grijalva v. Shalala, 152 F.3d 1115, 1120 (9th Cir. 1998), vacated, 526 U.S. 1096 (1999). The Supreme Court's decision to remand *Grivalja* after its *Sullivan* decision may suggest that mechanisms allowing appeal to government agencies at least will not trigger state action. But the broader principle—that governments risk exposing themselves to constitutional liability for the acts of their private delegates by trying to constrain those delegates' discretion through close regulation—remains, and stands as a potentially major impediment to guarding against private abuse through government oversight.

237. See Medicare Program, Improvements, supra note 213, at 16,652–54 (noting procedures government provisionally agreed to require of MCOs as part of *Grijalva* settlement).

238. U.S. Const. amend XIV, § 1.

here separation of powers constitutes an additional potential barrier to delegation of power to private actors.

The story of constitutional law's treatment of privatization is not complete without discussion of private delegation doctrine, although the most salient characteristic of current private delegation doctrine is its dormant status. A variety of private delegations came before the Supreme Court in the period from the end of the nineteenth century to the beginning of the twentieth.[239] The New Deal gave sharp focus to the private delegation doctrine, as reliance on private regulation and corporatism represented cornerstones of President Roosevelt's early efforts to revive the national economy.[240] At first, the Supreme Court responded with hostility to the incorporation of private actors into public regulation. In *Carter v. Carter Coal Co.*, the Court invalidated legislation making wage and hour agreements entered into by a majority of miners and large coal producers in a particular region binding on all miners and producers in that area.[241] According to the Court, "in the very nature of things, one person may not be entrusted with the power to regulate the business of another," and allowing a majority of private participants in an industry to do so therefore constituted "clearly arbitrary" interference with the minority's personal liberty and property in violation of due process.[242] But

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239. Most of these were upheld, such as: an ordinance prohibiting billboards except upon permission of a majority of neighboring property owners, see Thomas Cusack Co. v. City of Chicago, 242 U.S. 526, 531 (1917); a statute authorizing a private railway association to establish standard drawbar heights, see St. Louis, Iron Mountain & Southern Railway Co. v. Taylor, 210 U.S. 281, 287 (1908); and a statute making rules developed by miners binding on all mining claims, see Butte City Water Co. v. Baker, 196 U.S. 119, 125–27 (1905), and Erhardt v. Boaro, 113 U.S. 527, 535–36 (1885). In two cases, both involving zoning ordinances that allowed property owners to impose restrictions on neighboring property, the delegations were struck down as violating due process. Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 121–22 (1928); Eubank v. City of Richmond, 226 U.S. 137, 143–44 (1912). In none of these cases did the Court articulate a standard by which the constitutionality of private delegations would be judged. Early on the Court also upheld using government-chartered corporations to perform critical policy roles, such as stabilizing the U.S. money supply. See Osborn v. United States, 22 U.S. (9 Wheat.) 738, 860–70 (1824).

240. The prime example was the National Industrial Recovery Act (NIRA), which allowed trade and industry groups to develop codes of fair competition that, upon approval by the President, would become binding on all engaged in that trade or industry. See A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 521–23 & 525 n.4 (1935). For discussions of NIRA's enactment and the problematic tenure of the administrative apparatus it created, see Donald R. Brand, Corporatism and the Rule of Law: A Study of the National Recovery Administration 81–124 (1988); 2 Arthur M. Schlesinger, Jr., The Age of Roosevelt: The Coming of the New Deal 87–176 (1958).

241. 298 U.S. 238, 311 (1936).

242. Id. In *A.L.A. Schechter*, the Court's hostility to private delegations took a separation of powers form. 295 U.S. at 537 ("Such a delegation of legislative power is unknown to our law and is utterly inconsistent with the constitutional prerogatives . . . of Congress."); id. at 553 (Cardozo, J., concurring) (emphasizing that under the statute "anything that Congress may do within the limits of the commerce clause for the betterment of business may be done by the President upon the recommendation of a trade

the Court soon effectively reversed course. In *Currin v. Wallace*, it sustained a regulatory scheme under which the Secretary of Agriculture was authorized to impose uniform tobacco standards binding on all tobacco sales in an area if two-thirds of the growers voted in favor of such regulation.[243] Similarly, in *Sunshine Anthracite Coal Co. v. Adkins*, the Court upheld a later incarnation of the Bituminous Coal Act which allowed local coal producers sitting on local coal boards to set rules governing the sale of coal, with these rules being subject to approval, disapproval, or modification by the government's Bituminous Coal Commission.[244]

In neither *Currin* nor *Sunshine* did the Court overrule *Carter*. Instead, it held that, unlike *Carter*, these cases did not involve delegation of legislative power to private actors: in *Currin*, because public officials determined the substantive content of the regulations and private individuals were limited to deciding only whether these regulations would go into effect; and in *Sunshine*, because the statute required public officials to review and place an official imprimatur upon the privately devised regulations.[245] The Court's distinguishing of *Carter* has empirical support; rather than wholesale delegation of regulatory power to unsupervised private actors, later New Deal measures embodied private involvement in public regulatory structures.[246] In subsequent decisions, the Court has continued to emphasize the presence of government review of private decisionmaking in upholding private delegations.[247] Moreover, several lower courts have suggested that private delegations may violate due process, at least absent government supervision,[248] and the Court itself has

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association by calling it a code. This is delegation running riot.") The constitutionality of private delegations was also raised but not addressed in Highland Farms Dairy, Inc. v. Agnew, 300 U.S. 608, 612 (1937).

243. 306 U.S. 1, 19 (1939).

244. 310 U.S. 381, 393–401 (1940).

245. *Currin*, 306 U.S. at 15 ("[T]he required referendum does not involve any delegation of legislative authority. Congress has merely placed a restriction upon its own regulation by withholding its operation as to a given market 'unless two-thirds of the growers voting favor it.'"). See *Sunshine*, 310 U.S. at 399 (holding private delegation valid because "members of the code function subordinately to the Commission").

246. See 2 Bruce Ackerman, We the People: Transformations 302 (1998); Alan Brinkley, The End of Reform: New Deal Liberalism in Recession and War 31–64 (1995) (describing disagreements over regulatory strategies within Roosevelt administration and tracing decline of corporatist or associationalist strategies after 1938 and World War II).

247. See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 188 n.4 (2000) (holding civil penalty provision under which private individuals could instigate suit for violations of Clean Water Act does not violate Article II or separation of powers because of federal government's control over such private suits); Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 592–93 (1985) (relying in part on provisions for judicial review, including review of constitutional claims, in upholding statute delegating authority to determine compensation of private arbitrators); see also Todd & Co. v. SEC, 557 F.2d 1008, 1012–14 (3d Cir. 1977) (emphasizing SEC oversight of national security exchanges' enforcement of securities laws).

248. See, e.g., Gen. Elec. Co. v. N.Y. State Dep't of Labor, 936 F.2d 1448, 1458–59 (2d Cir. 1991) (holding New York's prevailing wage law would constitute an unconstitutional

occasionally echoed *Carter*'s concern about the potential for abuse associated with private delegations.[249]

Yet while *Carter*'s constitutional prohibition on private delegations thus remains alive in theory, it is all but dead in practice. Almost all private delegations are upheld. Courts are satisfied by formal provision for government ratification, however perfunctory.[250] The private delegations

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private delegation if the state failed to investigate whether the collective bargaining agreements from which wage rates were derived were collusive); Geo-Tech Reclamation Indus., Inc. v. Hamrick, 886 F.2d 662, 664–66 (4th Cir. 1989) (noting possibility that statute authorizing denial of landfill permit due to community opposition represents a prohibited private delegation, but holding statute unconstitutional because of the absence of standards to measure such opposition); see also City of Dallas v. FCC, 165 F.3d 341, 357–58 (5th Cir. 1999) (concluding that FCC rule allowing open video system providers to discriminate among cable operators "is a delegation of regulatory authority to impose a cost on another regulatory entity and, hence, violates general principles of administrative law").

249. See, e.g., Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 802–09 (1987) (concluding that prosecutor's duty to remain disinterested, combined with limited scope of judicial oversight, meant private attorney who represented beneficiary of court order could not prosecute violation of that order); Fuentes v. Shevin, 407 U.S. 67, 93 (1972) (holding that state law allowing creditor to obtain a writ of replevin based solely on ex parte allegations "abdicate[d] effective state control over state power"); see also Nike, Inc. v. Kasky, 123 S. Ct. 2554, 2567 (2003) (Breyer, J., dissenting from dismissal of certiorari) (arguing that California's system of false advertising regulation is likely unconstitutional because it "delegat[es] . . . state authority to private individuals" in a manner that "threatens to impose a serious burden on speech"); Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 698–99 (1994) (Souter, J., plurality opinion) (striking down legislation creating school district as unconstitutional delegation of political power to a group on the basis of religion); Larkin v. Grendel's Den, Inc., 459 U.S. 116, 122–27 (1982) (avoiding question of whether power to veto liquor license applications can be delegated to nongovernmental entities because delegation of such power to religious entities violates Establishment Clause). But see *Thomas*, 473 U.S. at 590 ("Removing the task of valuation from agency personnel to civilian arbitrators, selected by agreement of the parties or appointed on a case-by-case basis by an independent federal agency, surely does not diminish the likelihood of impartial decisionmaking, free from political influence.").

250. See, e.g., *Thomas*, 473 U.S. at 592 (sustaining requirement of private arbitration of compensation claims notwithstanding that government limited to reviewing for fraud, misconduct, misrepresentation, and constitutional error); *Sunshine*, 310 U.S. at 399–400 (emphasizing Secretary's power to review privately derived regulations but not inquiring into whether meaningful review occurred); Cospito v. Heckler, 742 F.2d 72, 88–89 (3d Cir. 1984) (emphasizing government's power to deem hospitals eligible to participate in Medicare even if denied accreditation by private association but not inquiring into whether government had ever done so); R.H. Johnson & Co. v. SEC, 198 F.2d 690, 695 (2d Cir. 1952) (noting simply that governing statute provides for government review of rules and determinations of private associations in upholding delegation to the association of power to enforce securities laws). For rare instances in which a court required the government to exercise meaningful oversight of its private delegates, see *Todd*, 557 F.2d at 1014–15 (holding that government must independently review private securities associations' determinations and ensure compliance with governing rules); *Gen. Elec.*, 936 F.2d at 1458–59 (holding that government's acceptance without review of wages set by private collective bargaining agreements as prevailing wages would create an unconstitutional delegation).

that have been sustained often involve substantial direct control over third parties;[251] even seemingly limited delegations that simply grant private entities the power to trigger government action, such as the ability to force an administrative hearing or commence a civil penalty action, can be quite significant.[252] Interestingly, many decisions examining private delegations at the federal level use essentially the same framework as is applied to "public" delegations—that is, legislative grants of power to the executive branch—thereby suggesting that the Court sees such private delegations as presenting nothing beyond ordinary separation of powers issues.[253]

While the Court has been faulted for paying insufficient attention to the separation of powers and due process concerns presented by private delegations,[254] the cause of the desuetude of federal private delegation

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251. See, e.g., *Thomas*, 473 U.S. at 589–94 (upholding binding private arbitration mechanism for pesticide manufacturers' compensation claims); Friedman v. Rogers, 440 U.S. 1, 17–19 (1979) (upholding Texas' law limiting membership on optometry board, charged with enforcing restrictions on commercial optometry, to independent optometrists); see also City of Eastlake v. Forest City Enters., 426 U.S. 668, 670, 679 (1976) (holding city charter provision requiring approval by referendum of land use changes adopted by city council is not a private delegation).

252. See, e.g., *Friends of the Earth*, 528 U.S. at 209–10 (2000) (Scalia, J., dissenting) (arguing that citizen suit provision authorizing private individuals to sue for civil penalties on government's behalf "entirely deprived [elected officials] of their discretion to decide that a given violation should not be the object of suit at all, or that the enforcement decision should be postponed"); New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 118–23 (1978) (Stevens, J., dissenting) (arguing that California law allowing franchisees to force administrative hearing before auto manufacturers could establish or relocate dealerships essentially gave private franchisees power to delay new dealerships for many months).

253. See, e.g., *Thomas*, 473 U.S. at 585–91 (analyzing statutory scheme requiring private arbitration in same manner as a delegation of adjudicatory power to an administrative agency); Currin v. Wallace, 306 U.S. 1, 16 (1939) (sustaining delegation to private tobacco farmers by analogizing to delegation of power to alter tariffs to President).

254. See James O. Freedman, Delegation of Power and Institutional Competence, 43 U. Chi. L. Rev. 307, 331 (1976) (arguing that the Court has failed to produce "a satisfactory theory of the principles governing the delegation of power to private parties"); see also Harold I. Abramson, A Fifth Branch of Government: The Private Regulators and Their Constitutionality, 16 Hastings Const. L.Q. 165, 192–94 (1989) (reaching same conclusion on ground that the Supreme Court has failed to adequately consider different degrees of public accountability of private and public regulators); George W. Liebmann, Delegation to Private Parties in American Constitutional Law, 50 Ind. L.J. 650, 652–54 (1975) (stating that while "it is tempting to conclude the doctrine [against private delegations] is slumbering in largely deserved desuetude . . . indications [suggest] that the doctrine remains with us, masquerading under various aliases"). Not all scholars agree that this criticism is deserved. See Neil Kinkopf, Of Devolution, Privatization, and Globalization: Separation of Powers Limits on Congressional Authority to Assign Federal Power to Non-Federal Actors, 50 Rutgers L. Rev. 331, 333–36 (1998) (arguing that the Supreme Court has developed coherent separation of powers doctrine that allows delegations to states or to private actors). For the claim that private delegations present separation of powers problems, see *Friends of the Earth*, 528 U.S. at 209–10 (2000) (Scalia, J., dissenting); Harold J. Krent, Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government, 85 Nw. U. L. Rev. 62, 71–80, 99–101, 105–06,

doctrine is not difficult to discern. The Court's new tolerance for private delegations in *Currin* and *Sunshine* occurred simultaneously with its greater acceptance of economic and social regulation.[255] It also coincided with the Court's sanctioning of broad congressional delegations of power to the Executive Branch.[256] Invalidating private delegations, particularly when such delegations are subject to some form of administrative oversight, inevitably entails judicial second-guessing of legislative policy determinations concerning the appropriateness of different regulatory structures.[257] In the post-*Lochner* era, this courts became quite

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109–12 (1990); John C. Yoo, The New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause, 15 Const. Comment. 87, 114–16 (1998). For a discussion of the due process issues raised by private delegations, focusing in particular on state court decisions where private delegation doctrine is more rigorously enforced, see Lawrence, supra note 95, at 659–62, 672–95.

255. See, e.g., West Coast Hotel Co. v. Parrish, 300 U.S. 379, 396–98 (1937) (holding that minimum wage laws for women fall within state's police power); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 34–41 (1937) (holding that regulation of employers engaged in production of goods falls within the federal commerce power). The traditional view is that in 1937 the Court made "a switch in time to save nine," radically altering its approach to government regulation in response to President Roosevelt's Court-packing plan. Recent historical scholarship has questioned this view, arguing that although the Court was significantly more accepting of regulation in 1937 than at the turn of the century, its change in approach emerged gradually over the intervening decades and resulted from doctrinal development rather than external political events. See, e.g., G. Edward White, The Constitution and the New Deal 13–32 (2000) (describing current debate). See generally Barry Cushman, Rethinking the New Deal Court: The Structure of a Constitutional Revolution 33–105 (1998).

256. See, e.g., Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 397–400 (1940) (upholding delegation to the National Bituminous Coal Commission of power to set prices for coal); *Currin*, 306 U.S. at 16–18 (upholding Congress' delegation of power to set tobacco standards to Secretary of Agriculture); see also Yakus v. United States, 321 U.S. 414, 423–26 (1944) (upholding broad delegation to executive officials of power to fix prices).

257. Cf. Richard J. Pierce, Jr., Political Accountability and Delegated Power: A Response to Professor Lowi, 36 Am. U. L. Rev. 391, 395–98 (1987) (arguing that whether the potential for producing public goods associated with a delegation is outweighed by production of private goods is inherently a value-laden question and that the government may legitimately seek to produce private goods). The same point can be made regarding the claim that private delegations at the federal level violate separation of powers requirements. While the Court has retained a far more active role in the separation of powers area than in enforcing most constitutional limits on economic regulation, it is similarly deferential to congressional judgments where it concludes a measure does not represent an effort by Congress to aggrandize its own powers. See Peter L. Strauss, Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?, 72 Cornell L. Rev. 488, 488–89 (1987); see also Rebecca L. Brown, Separated Powers and Ordered Liberty, 139 U. Pa. L. Rev. 1513, 1522–24 (1991) (describing the Court's variation in approach to separation of powers questions). Unitary executive theorists, who believe that the Court's current approach allows unconstitutional intrusions on the executive power, tend to be the most critical of the Court's acceptance of private delegations. See, e.g., *Friends of the Earth*, 528 U.S. at 209–10 (Scalia, J., dissenting); Yoo, supra note 254, at 105–16; see also Steven G. Calabresi & Kevin H. Rhodes, The Structural Constitution: Unitary Executive, Plural Judiciary, 105 Harv. L. Rev. 1153, 1165–68 (1992) (setting out unitary view).

reluctant to do.[258] Reinforcing this reluctance is acceptance of the contention that almost every instance of economic and social legislation could be seen as a private delegation of power. In the words of Louis Jaffe:

> [T]he great complexes of property and contract which constitute our modern industrial machine, the monopolistic associations of capital, labor, and the professions which operate it, exert under the forms and sanctions of law enormous powers of determining the substance of economic and social arrangement, in large part irrespective of the will of particular individuals. Participation in law-making by private groups under explicit statutory "delegation" does not stand then in absolute contradiction to the traditional process and conditions of law-making; it is not incompatible with the conception of law. It exposes and brings into the open, it institutionalizes a factor in law-making that we have, eagerly in fact, attempted to obscure.[259]

Legal Realists accompanied this point with the claim that it was impossible to draw a neutral or objective line between public and private for constitutional purposes.[260] The Supreme Court has not gone so far, as the continued vitality of state action doctrine demonstrates. However, its private delegation cases signal the Court's acceptance of the difficulty in singling out a category of private delegations for special constitutional scrutiny. For instance, in *New Motor Vehicle Board v. Orrin W. Fox Co.*,[261] the Court rejected a challenge to a regulatory scheme that allowed an existing auto dealership to demand a hearing by the state motor vehicle board before a manufacturer could open a new dealership within the existing dealer's market area. According to the Court, if this regulatory arrangement were seen as an unconstitutional private delegation, "[a]lmost any system of private or quasi-private law could be subject to the same objection."[262]

An additional cause of the Court's failure to develop private delegation doctrine is the rise of the state action doctrine as the Court's preferred method of analyzing whether certain powers go beyond those that

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258. This reluctance continues today. Noting that the strong citizen suit provision at issue in *Friends of the Earth* represented Congress' belief that private enforcement would serve the Clean Water Act's goals, Justice Ginsburg's majority opinion stated that "[t]his congressional determination warrants judicial attention and respect." 528 U.S. at 185; see also United Farm Workers v. Ariz. Agric. Employment Relations Bd., 727 F.2d 1475, 1479–80 (9th Cir. 1984) (en banc) (upholding statute creating agricultural board with representatives of agricultural employers and agricultural employees as a "reasonable experiment" by which the legislature could seek to gain benefit of industry participants' knowledge).

259. Louis L. Jaffe, Law Making by Private Groups, 51 Harv. L. Rev. 201, 220–21 (1937).

260. See, e.g., American Legal Realism 98–129 (William W. Fischer III et al. eds., 1993).

261. 439 U.S. 96 (1978).

262. Id. at 109.

the Constitution allows truly private entities to exercise.[263] Rather than linking the possibility that a private delegation will lead to government authority evading constitutional constraints to the delegation's constitutionality, this concern is addressed separately by determining whether the private entities involved should be considered state actors for constitutional purposes. *Flagg Bros. v. Brooks* is a prime example.[264] The central issue in *Flagg Bros.* was presented as whether a warehouser's sale of property pursuant to a state statute authorizing such "self-help" for creditors constituted state action.[265] If so, under the Court's jurisprudence on creditor remedies, due process would require the government to review the private warehouser's claims to property before it could be sold.[266] Another way of understanding this due process claim, however, is to argue that the power to resolve disputes on a nonconsensual basis, even subject to later state court review, is one that government cannot delegate to private actors without preserving some opportunity for prior review.[267] By holding that the private entity was not a state actor, the Court in essence rejected both arguments, although it considered the latter private delegation claim only implicitly, in assessing whether nonconsensual resolution of disputes was a public function.[268]

Of greatest importance, the Court has never considered how well state action doctrine functions as a surrogate for direct private delegation analysis. Indeed, whatever questions may exist about the contours of existing private delegation analysis, one seemingly indisputable point is that the Court does *not* view the constitutionality of a private delegation as turning on whether the private delegate is subject to constitutional constraints. In none of the cases is this question even raised.[269] This failure

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263. See Liebmann, supra note 254, at 653–54.

264. 436 U.S. 149 (1978).

265. The majority, holding it did not, rejected the plaintiffs' claims, id. at 163, while the dissent argued that the warehouser was a state actor because it performed the core government function of nonconsensual transfer of property, id. at 171–76 (Stevens, J., dissenting).

266. See, e.g., N. Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 607–08 (1975); Fuentes v. Shevin, 407 U.S. 67, 96 (1972).

267. See Tribe, Constitutional Choices, supra note 148, at 254 (noting that given earlier cases holding that due process required the state to reserve greater "control over the coercive use of force, it would be perverse for the Court . . . [to] allow . . . deprivation of property to happen purely in the private sphere").

268. See 436 U.S. at 159–60.

269. Interestingly, commentators largely have followed the Court and also ignored this issue. A significant exception is Liebmann, supra note 254, at 653–54, 656–57 (noting that several state action decisions could be viewed as nondelegation decisions); see also Abramson, supra note 254, at 167, 203–08, 212–14 (noting danger that private agencies may be free from constitutional restraints and discussing whether private regulators qualify as state actors). The Court's failure to link private delegation and state action questions is also notable because of substantive parallels in its approach to both. In particular, the Court's private delegation decisions suggest it is particularly troubled by delegations that allow private entities to control government institutions or exercise powers that formally appear uniquely governmental. See, e.g., Young v. United States ex rel. Vuitton et Fils S.A.,

to consider the essential dichotomy between public and private delegates is more than passing strange. While some private delegations may appear simply to be realignments of private parties' rights, thereby making private delegates' constitutional exemption unproblematic, many clearly involve grants of government power. *Friends of the Earth*, for example, involved delegation of the power to decide to seek civil penalties on behalf of the United States for violations of law.[270] Private delegates' exemption from constitutional constraints means that they can wield these government powers in ways that raise serious abuse of power concerns. Imagine, for example, an individual who commences a meritless suit for civil penalties against a company out of spite or because its owners are African American.[271] Given this danger, it is remarkable that the Court has never seen fit to link the constitutionality of private delegations to the constitutional status of the delegate.

III. The Inadequacies of Prior Proposals for Reform

Existing scholarship offers two responses to the inadequacies in constitutional law's approach to privatization. One consists of proposals to improve state action doctrine; the other, proposals for regulatory reforms that avoid the need to rely on constitutional protections to ensure accountability. These proposals have considerable merit. But on close examination, both fail to confront the fundamental constitutional concerns at stake. In both cases, moreover, they face substantial practical problems: The doctrinal reforms fail to offer solutions that are judicially administrable or that stand any chance of judicial adoption; the regula-

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481 U.S. 787, 802 (1988) (prohibiting court from delegating power to prosecute for contempt of court to private party involved in the litigation); *Fuentes*, 407 U.S. at 93, 96 (requiring state to exercise some review before allowing private individuals to invoke state's power of replevin).

270. Qui tam statutes have the same effect. Although the Court held that federal qui tam suits do not violate Article III of the Constitution, it expressly left open whether such suits would raise separation of powers problems under Article II. See Vt. Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 778 n.8 (2000); see also United States ex rel. Stone v. Rockwell Int'l Corp., 282 F.3d 787, 804–07 (10th Cir. 2002) (holding federal qui tam statute does not violate Article II); Riley v. St. Luke's Episcopal Hosp., 252 F.3d 749, 753, 757 (5th Cir. 2001) (en banc) (same).

271. While mechanisms exist to ensure individuals are not subjected to frivolous civil penalty or qui tam litigation, such as summary disposition or imposition of sanctions, see United States ex rel. Stillwell v. Hughes Helicopters, Inc., 714 F. Supp. 1084, 1091–92 (C.D. Cal. 1989), these mechanisms do not protect individuals from having to defend against claims that may have merit but are brought—in the name of the United States—for unconstitutional reasons. Cf. United States ex rel. Stevens v. Vt. Agency of Natural Res., 162 F.3d 195, 228–29 (2d Cir. 1998) (Weinstein, J., dissenting) (arguing that even where government succeeds in intervening and settling a qui tam lawsuit, a defendant still bears burden of having to defend itself in court up until that point), rev'd, 529 U.S. 765 (2000). Indeed, allowing the government to profit from actions brought out of "personal ill will" was an avowed purpose of the False Claims Act. Hughes Aircraft Co. v. United States ex rel. Schumer, 520 U.S. 939, 949 (1997) (internal quotations omitted).

tory proposals fail to take account of the role of constitutional principles in forcing governments to adopt adequate accountability measures.

A. *Prior Efforts to Reform State Action Doctrine*

Over the years, numerous scholars have bemoaned the inadequacies of current state action doctrine and proposed alternative approaches. Two very different lines of criticism are evident in the literature. The first argues that the concept of a distinction between state action and private action is fundamentally flawed, and that courts should cast it aside as a threshold inquiry in constitutional litigation. The second takes a more moderate tack, seeking to reform the current doctrine from within by targeting particular aspects of the way the Court determines if private action should be deemed public for constitutional purposes.

1. *Foregoing the Public-Private Divide in Constitutional Law.* — The claim that no principled distinction exists between government power and private power follows logically from the Legal Realist insistence that all property and contract rights are created and supported by the state. As a result, what at first might superficially seem to be purely private action—such as an employer's refusal to tolerate employee advocacy of unions or a homeowner's refusal to sell her home to minorities—are in fact also instances of state action because these private actors are exercising state-granted rights.[272] Moreover, state involvement is always even more immediately present, in that judicial sanction of private exercises of these rights is plainly state action that can itself be subject to constitutional challenge.[273] Many constitutional law scholars have therefore concluded that the state action doctrine is theoretically indefensible—a "conceptual disaster area."[274] Worse, by treating determination of the public or private character of challenged action as a threshold inquiry separate from application of substantive constitutional norms, the doctrine operates to illegitimately shield such instances of state action from constitutional review. The better approach, according to these scholars, would be for courts to do away with any threshold state action inquiry and instead take

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272. See supra note 259 and accompanying text.

273. See N.Y. Times v. Sullivan, 376 U.S. 254, 264 (1964) (holding that state courts' application of state law in private lawsuit constitutes state action subject to First Amendment requirements); Shelley v. Kraemer, 334 U.S. 1, 19–20 (1948) (holding state courts' enforcement of private racially restrictive covenant on property constitutes state action that violates equal protection); Tribe, Constitutional Choices, supra note 148, at 264–65.

274. Black, supra note 147, at 95; see also Paul Brest, State Action and Liberal Theory: A Casenote on *Flagg Brothers v. Brooks*, 130 U. Pa. L. Rev. 1296, 1301, 1315–22 (1982); Tushnet, supra note 146, at 385–86; Jerre S. Williams, The Twilight of State Action, 41 Tex. L. Rev. 347, 367 (1963). Contra Snyder, supra note 218, at 1061–62 (contending that obligation of government officials to act in the public interest marks a significant difference between public and private action).

account of the values underlying the state action requirement in determining the substantive import of constitutional requirements.[275]

These arguments are compelling in demonstrating the artifice and theoretical incoherence of the constitutional public-private divide. But the further step of dispensing with a threshold state action limitation does not necessarily follow; that step requires consideration of additional issues, the merits of which are more debatable. One core question concerns the potential impact of casting aside a threshold state action inquiry in favor of direct judicial balancing of constitutional values.[276] At first glance, such a move seems well suited to address the constitutional challenges posed by privatization, with the flexibility inherent in balancing allowing courts to better target the accountability dangers presented by different public-private relationships. But, significantly, this requires courts to balance incommensurable values against one another—for example, weighing privacy and autonomy losses against due process gains. The absence of a common metric makes such balancing particularly unconstrained, and the result could just as easily be further erosion of individuals' ability to enforce constitutional rights against private actors, or a narrowing of the substantive content of such rights,[277] rather than enhanced constitutional protections. Indeed, the retraction of state action doctrine over the last three decades suggests that erosion and narrowing are the more likely outcomes.[278]

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275. See, e.g., Black, supra note 147, at 95–107 (arguing that courts should recognize that state failure to address racial discrimination constitutes state action and give weight to individual privacy concerns in determining whether equal protection requirement has been violated); Chemerinsky, supra note 142, at 519–50 (arguing that state action doctrine rests on outdated assumptions, is incompatible with existing theories of rights, and is counterproductive to stated purposes); Louis Henkin, *Shelley v. Kraemer*: Notes for a Revised Opinion, 110 U. Pa. L. Rev. 473, 481, 492–93 (1962) (arguing for replacing state action test with an inquiry into state responsibility, with individual privacy rights delimiting the realm of state responsibility); Harold W. Horowitz, The Misleading Search for "State Action" Under the Fourteenth Amendment, 30 S. Cal. L. Rev. 208, 208–09, 213–15, 221 (1957) (analyzing whether state involvement in various instances of private racial discrimination should be considered a denial of equal protection); William W. Van Alstyne & Kenneth L. Karst, State Action, 14 Stan. L. Rev. 3, 5–17 (1962) (arguing that state action analysis cannot be separated from interests at stake in particular Fourteenth and Fifteenth Amendment claims).

276. There is also the historical question as to whether the framers of the Fourteenth Amendment meant it to apply to these unavoidable forms of state involvement in private action (and if not, the interpretive issue of whether that should matter). See Henry Paul Monaghan, Commentary: The Constitution Goes to Harvard, 13 Harv. C.R.-C.L. L. Rev. 117, 121–25 (1978).

277. See William P. Marshall, Diluting Constitutional Rights: Rethinking "Rethinking State Action," 80 Nw. U. L. Rev. 558, 562–67 (1985) (arguing that discarding state action doctrine would lead to a retraction in the scope of individual rights); Seidman, State Action, supra note 128, at 392–94 (arguing that part of the value of state action doctrine is that it protects the possibility of individual rights).

278. In this regard, it is worth noting that calls for a dismantling of state action doctrine were at their strongest in the decade from the late 1950s to late 1960s, when the

Yet perhaps the most powerful argument for preserving an initial threshold state action inquiry comes from considering the institutional effect of the alternative. Doing away with the public-private divide, artifice though it may be, would make every question of government policy a potential constitutional issue and thus ultimately subject to judicial scrutiny and resolution. Judicial intrusiveness in the ordinary workings of the political order would rise to the level of unbearability.[279] This danger provides a cogent descriptive and normative account of why the public-private divide persists; in a democracy, even a constitutional democracy, courts are and should be unwilling to assume so large a role. The federalism concern that such policymaking powers would be exercised by federal courts at the expense of state and local governments only reinforces the extent to which this approach is at odds with our system of government.

For my purposes here, however, a far more prosaic and pragmatic point will suffice. Despite academic attacks on the theoretical coherency of current state action doctrine, "the Supreme Court persists in invoking a state action doctrine that it purports to treat as prior to and independent of substantive constitutional law."[280] The public-private divide is here to stay; to have any chance of judicial adoption, an attempt at doctrinal reform must work within this fundamental constitutional construct. Simply insisting on the divide's incoherence purchases theoretical purity at the price of offering little practical assistance in addressing the very real threat that increasing privatization poses to the fundamental requirements of constitutional accountability.

2. *Reforming State Action Doctrine from Within.* — Faced with the Court's refusal to cast aside the state action inquiry, some scholars have sought to reform current doctrine so that it better reflects the reality of government privatization. One obvious candidate for such reform is expanding the public function test. Daphne Barak-Erez, for example, advocates finding private entities to be state actors when they are the sole providers of public services, defining those services in terms of contempo-

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Court was taking its most expansive approach to state action. See Black, supra note 147, at 84–91.

279. See Seidman, State Action, supra note 128, at 396–99 (describing simultaneous expansion of federal government's regulatory powers and transformation of state action doctrine into a limitation specifically on federal courts); see also Tushnet, supra note 146, at 404–06 (describing state action doctrine as serving the institutional needs of the courts by enabling a gradualist approach to constitutional interpretation).

280. Tushnet, supra note 146, at 383. Moreover, state action adherents include not just those members of the Court who have been most hostile to attributions of state actor status to private individuals, but also those Justices who were willing to make such attributions far more frequently. See Henry C. Strickland, The State Action Doctrine and the Rehnquist Court, 18 Hastings Const. L.Q. 587, 644–56 (1991) (describing different Justices' approaches to state action).

rary shared understandings of government responsibilities rather than traditional practice.[281]

The Court seems uninterested in such an approach. That fact aside, the difficulty with attempting to update the public function test in this manner is the absence of such shared understandings regarding what constitutes a government responsibility.[282] Barak-Erez argues that providing health care, education, and welfare benefits are all now accepted as part of the government's role.[283] Recent proposals for retraction in Medicaid coverage,[284] however, suggest that many take a different view of the government's role in providing health care. Moreover, what is the effect of TANF's time limits, under which families are restricted to no more than five years of federal income assistance?[285] Does this mean that providing income assistance is now a public function simply for the period during which a family is entitled to government-subsidized benefits? To give yet another example, the federal government and many state governments always have disclaimed responsibility to support impoverished "able-bodied" single adults, while offering assistance to poor families. Is providing income support to poor individuals therefore not a public function, while providing such support to poor families is? Not surprisingly, the Court has concluded that judicial appraisal of whether a given activity represents a core government function is "unsound in principle and unworkable in practice," and has renounced such an inquiry in other constitutional contexts.[286]

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281. See Barak-Erez, supra note 8, at 1190–91.

282. For a similar criticism of Barak-Erez, see Gilman, supra note 10, at 610 n.259; see also San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35–36 (1973) (refusing to find fundamental right to education under the Constitution); U.S. Gen. Accounting Office, GAO/GGD-92-11, Government Contractors: Are Service Contractors Performing Inherently Governmental Functions? 4–5 (1991) (noting that "the concept of 'government functions' is difficult to define"); Gilmour & Jensen, supra note 17, at 250, 254 (arguing that political branches should develop lists of nondelegatable core government functions).

This claim that agreement does not exist over the government's proper responsibilities is not at odds with the argument, made above in Part I.B, that control over government resources and benefits is conventionally understood to be government power. The critical difference is that finding such control to be government power has no implications for the government's freedom to cease supplying benefits, whereas the option of cessation is precluded if a particular government undertaking, such as providing education or health care, is determined to be an inherent government responsibility.

283. Barak-Erez, supra note 8, at 1190.

284. See Pear, Medicaid Proposal, supra note 23 (describing Bush administration proposal to give states "vast new powers" to reduce coverage for approximately one-third of Medicaid recipients).

285. See 42 U.S.C. § 608(a)(7) (2000). Under federal law, states are allowed to exempt 20% of their welfare caseload from the five-year cap. See id. § 607(a)(7)(C)(ii).

286. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546–47 (1985); see also Franchise Tax Bd. v. Hyatt, 123 S. Ct. 1683, 1689 (2003) (quoting *Garcia* in refusing to interpret the Full Faith and Credit Clause as mandating inquiry into whether one state is interfering with another's "core sovereign responsibilities"); New York v. United States, 326 U.S. 572, 580, 583–84 (1946) (abandoning governmental-proprietary distinction as basis for determining scope of state immunity from federal taxation); Michael Wells & Walter

One attempt to give meaning to the public function test without exceeding appropriate judicial limits involves viewing the public function test in positivistic terms. On this account, the measure of what constitutes a public function should be those responsibilities the government itself has affirmatively undertaken by statute or regulation.[287] Yet this approach is not as deferential to democratic decisionmaking as might appear at first blush; it allows governments to make a choice about whether to undertake responsibility for a field of activity, but not to decide the form that such government responsibility will take. More specifically, government subsidization of private actors is ruled out, as the government's assumption of responsibility for providing a service would mean that its private partners were performing a public function and thus subject to constitutional requirements. While this approach would cure current doctrine's underinclusiveness, it would do so at the price of dramatically worsening its overinclusiveness. Indeed, this solution is oddly subject to the same complaint lodged at the current public function test: Both are too insensitive to the multiple roles that modern government plays and the constitutional accountability issues that different public-private partnerships present.

A seemingly more moderate proposal would be to hold that private entities perform a public function when they make decisions affecting eligibility for government benefits. This seems to be a relatively narrow amendment to the current test, one that addresses the transfer of core government responsibilities to private entities without significantly intruding on these entities' freedom to exercise professional judgment. Suggestions of such an approach are found in *Grijalva*, which although ultimately having rested on the presence of extensive government involvement, stated that MCO decisions are more accurately described as "coverage decisions—interpretations of the Medicare statute—rather than merely medical judgments."[288] Justice Brennan's *Blum* dissent sug-

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Hellerstein, The Governmental-Proprietary Distinction in Constitutional Law, 66 Va. L. Rev. 1073, 1136 (1980) (arguing that the governmental-proprietary distinction lacks fixed content and can only be understood in reference to the purposes it serves in different contexts).

287. Shades of such an account lie in Justice Marshall's dissent in Rendell-Baker v. Kohn, 457 U.S. 830, 848–49 (1982) (Marshall, J., dissenting), although Justice Marshall used performance of a state responsibility more as evidence of a close nexus to the state than as suggesting performance of a public function. See also Strickland, supra note 280, at 665–66 (advocating that the Court "recognize a separate 'delegation' variant of the government function theory" that would look at whether activities "are performed pursuant to an express governmental directive or delegation"). While Barak-Erez emphasizes the importance of contemporary understandings of the government's role, her limitation of state action to those providing services for the state suggests a similar positivistic spin. See Barak-Erez, supra note 8, at 1191–92.

288. Grijalva v. Shalala, 152 F.3d 1115, 1120 (9th Cir. 1998), vacated, 526 U.S. 1096 (1999); see also Catanzano v. Dowling, 60 F.3d 113, 119 (2d Cir. 1995) ("[U]nlike in *Blum*, the decisions made by [private certified home health care agencies] are not purely medical judgments made according to professional standards. Instead, . . . decisions of the CHHAs

gests caution, however. He argued that doctors treating patients under Medicaid should not be considered state actors simply because their treatment decisions determine how much and what kinds of benefits Medicaid participants receive.[289] In other words, almost any decision by a private entity—whether to provide certain medical treatments, whether to recommend a job training program or instead require a beneficiary to work off her welfare benefits in community service, whether to require a child to repeat a grade—in fact qualifies as determining eligibility for government benefits when private entities are providing services on the government's behalf.

A separate approach to reforming current state action doctrine foregoes the effort to delineate a more contemporary understanding of public function and instead focuses on techniques that foster more nuanced assessments of government-private interactions. Ronald Krotoszynski argues that the current doctrine's inadequacies stem from the Court's shift away from a careful sifting of the underlying facts in state action cases and toward a seriatim application of the different state action tests. His solution requires that courts conduct an overall assessment to determine whether sufficient elements of these tests are satisfied, even though none is met in full, to justify finding state action.[290] This is very close to *Brentwood Academy*, where the Court focused on the cumulative connections between the Association and the state rather than on whether the separate established tests for state action were satisfied.[291]

To its credit, emphasis on cumulative assessment correctly identifies the indeterminacy inherent in the state action inquiry. But history teaches that an emphasis on cumulative ties and the need for fact-sensitivity is unlikely to cure the ills of state action doctrine. In the hands of courts hostile to state action conclusions and wary of open-ended discretion, simply requiring a cumulative assessment will have little effect on state action's underinclusive character. Moreover, such an emphasis does nothing to address the overinclusive character of current state action doctrine.[292] On the contrary, a cumulative assessment approach worsens the

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'effectively' deny or reduce care. In this way, the state has delegated its power to deny services to the CHHAs . . . ."); Healey v. Thompson, 186 F. Supp. 2d 105, 117–21 (D. Conn. 2001); Daniels v. Wadley, 926 F. Supp. 1305, 1311 (M.D. Tenn. 1996) (holding that private agencies are state actors in determining eligibility for home health services under Medicare), vacated on other grounds sub nom. Daniels v. Menke, 145 F.3d 1330 (6th Cir. 1998).

289. Blum v. Yaretsky, 457 U.S. 991, 1014 (1982) (Brennan, J., dissenting).

290. See Krotoszynski, supra note 151, at 335–47.

291. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295–300 (2001) (describing "host of facts that can bear on the fairness" of attributing private conduct to the state and finding "pervasive entwinement of public institutions and public officials in [the Association's] composition and workings"); see also id. at 308–12 (Thomas, J., dissenting) (arguing that none of the established tests for state action were met).

292. By contrast, curing overinclusiveness is the goal of Barbara Rook Snyder's effort to redirect state action doctrine to target government responsibility. See Snyder, supra note 218, at 1063–65, 1076–81 (suggesting analysis that would distinguish between

threat that current doctrine poses to the government's regulatory prerogatives, for it gives the political branches little guidance about how to structure relationships with private entities to avoid transforming those entities into state actors.[293] Or to put the point differently, the majority and dissent in *Brentwood Academy* were both half right, and half wrong, in their characterizations of the essential elements of a viable state action analysis. To adequately balance constitutional accountability and government regulatory flexibility, both sensitivity to facts *and* a formal, structured inquiry are required.

B. *Targeting Privatization Through Regulatory Reforms*

These efforts to rethink constitutional law's approach to privatization and improve state action doctrine presuppose that constitutional rules applicable to privatization actually matter. But is this presupposition true? Lack of information, lack of resources—both financial and personal, such as confidence in dealing with government bureaucracy—and dependence upon government agencies mean clients often do not assert their rights even when programs are implemented by government.[294] Moreover, particularly in the context of government benefit programs, the substance of individuals' constitutional rights may be so thin that they offer little defense against abuse of power.[295] Constitutional rights may assure baseline protections—for example, against arbitrary termination of benefits—but are far less useful in obtaining more effective programs. From this perspective, nonconstitutional regulatory reforms represent the better route for addressing the potential dangers of privatization than critiquing or reforming constitutional law.[296]

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situations where the state merely confers a benefit to a private party and when the state encourages or compels further action by that party). Other scholars have articulated similar approaches. See, e.g., Kay, supra note 133, at 342–49 (arguing that the Constitution should be viewed as applying only to the lawmaking power of the state). These approaches are subject, however, to the same criticisms as current state action doctrine, in that they ignore the way that private actors may wield government power pursuant to government delegations. While the delegation itself may not be unconstitutional, that does not mean the private delegate should not be held to constitutional constraints. See supra Part II.B.1.

293. See Brest, supra note 274, at 1325 (describing an earlier insistence on "sifting facts and weighing circumstances" in Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961), as "differ[ing] from Justice Stewart's famous 'I know it when I see it' standard for judging obscenity mainly in the comparative precision of the latter"); Strickland, supra note 280, at 662–63 ("Such an approach provides little more guidance than saying that the private entity's conduct is state action because it ought to be deemed state action.").

294. See Handler, Dependent People, supra note 92, at 1019–23.

295. See Farina, On Misusing Revolution, supra note 225, at 600–18 (arguing that procedural due process protections are fairly minimal).

296. See Freeman, Private Role, supra note 2, at 606–07, 666 (arguing that focusing on constitutional concerns raised by privatized governance fails to address the real accountability concern, which is achieving high quality services).

Much of the recent academic scholarship on privatization has centered on identifying regulatory measures that will assure accountability under systems of privatized governance. Commentators have advocated a range of measures, such as expanding the scope of open government laws to better cover privatized government programs,[297] imposing procedural safeguards on privately run programs,[298] and requiring community participation in oversight of private contractors.[299] Alternatively, some argue for better use of private law remedies, such as expanding the availability of third-party beneficiary suits against government contractors,[300] or extending the categories of private actors who are subject to public law values under the common law.[301] Others have emphasized that public funding should come with substantial strings attached, and they have advocated using government contracts with private entities as a means of expanding those entities that are subject to public law values.[302] In particular, Jody Freeman, who offers a detailed analysis of several instances of privatization, argues that the availability of multiple methods for controlling private actors means that beneficiaries may have greater ability to

297. See, e.g., Bezdek, supra note 10, at 1608 (arguing that basic documents relating to contracted-out welfare services, including the underlying contracts and performance evaluations, should be easily accessible); 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, 55–62 (1999) (advocating for expansion of FOIA's definitions of "agencies" and "agency records" to include "private entities controlling information of interest of the public").

298. See, e.g., Aman, supra note 10, at 1500–05 (proposing extension of Administrative Procedure Act to cover "private entities exercising substantial power with wide ranging social effects"); Louise G. Trubek, Informing, Claiming, Contracting: Enforcement in the Managed Care Era, 8 Annals Health L. 133, 138–41, 144–45 (1999) (noting potential benefits from enhanced grievance procedures in the managed care context and describing procedures required under Wisconsin's Managed Care Consumer Protection Act).

299. See, e.g., Bedzek, supra note 10, at 1609 (arguing for "expand[ing] the stakeholder table to include the citizens experienced with TANF and its work-related programs" and in other ways involving affected communities in the procurement process); Louise G. Trubek, Making Managed Competition a Social Arena: Strategies for Action, 60 Brook. L. Rev. 275, 282–85 (1994) (advocating greater community participation in tbe bidding process, enhanced state-level oversight of local contracting, and better public access to information).

300. See, e.g., Freeman, Contracting State, supra note 10, at 201–07; Gilman, supra note 10, at 635–39.

301. See, e.g., Michael Taggart, The Province of Administrative Law Determined, *in* Province of Administrative Law, supra note 6, at 1, 3–4, 6–17 (describing "public law values" of "openness, fairness, participation, impartiality, accountability, honesty and rationality" and their potential application to private actors by incorporation in common law rules).

302. See Minow, Partners, supra note 2, at 113–19, 142–50; Freeman, Extending Public Law Norms, supra note 10, at 1315–17.

enforce accountability under privatization than when services are publicly provided.[303]

That reforms of these types are often a more effective defense against abuse of power than constitutional law, whether such power is exercised by the government directly or by private surrogates, is undeniable. Measures such as HHS's regulations providing appeal and hearing rights for Medicare beneficiaries in MCOs make a private party's state actor status largely immaterial. More importantly, these measures can be targeted to the accountability dangers presented in particular contexts and provide protections that go beyond constitutional remedies.[304] The prevalence of private participation in governance also makes clear the value of rethinking the public-private divide from the private law side, so that private law doctrines are more sensitive to the "public" character and responsibilities of many private entities.

Thus, such nonconstitutional reforms are extremely important. However, their importance does not negate the need to address the disconnect between current constitutional doctrine and administrative reality of government. Statutory, administrative, and private law solutions to the dangers of privatization turn to a large extent on the government's willingness to grant individuals rights against private service providers and regulators. The same factors that may lead a government to privatize without close government oversight militate against it granting such rights: Doing so increases the costs of privatized programs, undermines the flexibility and efficiency that governments hope to gain through privatization, and deters private participation.[305] To be sure, a government might choose to provide program participants with enforceable rights as a means of guarding against abuse and guaranteeing that private contractors live up to their promises. But alternatively, a government might opt to ensure accountability by undertaking periodic monitoring itself, rather than by creating enforcement mechanisms it does not control.[306] Moreover, even when a government does provide enforceable rights, it may decide that certain rights do not merit protection against private violation. Widespread agreement exists on the importance of pro-

303. See Freeman, Private Role, supra note 2, at 664–66 (advocating a focus on aggregate accountability and discussing how different oversight mechanisms and constraints could be applied to a variety of programmatic contexts).

304. For example, application of constitutional constraints to nursing homes would ensure that residents have pre-eviction and pre-termination hearing rights, but do little directly to guard against substandard care. See id. at 599–610.

305. See supra note 224 and accompanying text.

306. See Freeman, Extending Public Law Norms, supra note 10, at 1329–35 (discussing incentives governments may have to adopt protective measures but acknowledging that governments may be unwilling to do so); Gilman, supra note 10, at 635–37 (arguing that government has an incentive to provide for beneficiary enforcement in contracts but acknowledging that whether beneficiaries are given enforcement rights will depend in part on their bargaining power).

tections against discrimination,[307] but an examination of recent state action cases suggests that due process, First Amendment, and Fourth Amendment rights are less likely to receive voluntary protection.[308]

What results is a situation in which the government has the power to police its private partners, but those participating in government programs lack power either to hold private providers accountable for their actions or to hold government accountable for insufficient oversight. In one sense, this makes privatized programs no different from many government-administered programs in which private rights of action to enforce statutory requirements are lacking. But the crucial difference is that program-specific private rights of action are not needed to ensure constitutional accountability where government itself is acting. In privatized contexts, however, mechanisms by which individuals can assert rights against private actors are essential to overcome the inadequacies of current state action doctrine and to preserve constitutional accountability.

Constitutional law can also affect the government's willingness to adopt protective statutory or regulatory reforms, as well as the type of reforms adopted. As discussed above, current constitutional doctrine may in fact discourage adoption of certain protections, such as close government oversight, by holding that such measures trigger government liability that it otherwise could avoid. On the other hand, the expected applicability of constitutional norms may make the government more willing to enact protective measures in the first place. For example, if welfare clients can force private organizations to hold hearings on mandatory job placements, then the government has an incentive to specify the nature and timing of hearings to challenge such placements because its judgment on this question is likely to trigger judicial deference.[309]

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307. As a result, core federal antidiscrimination statutes such as Title VII have been described as "quasi-constitutional." See William N. Eskridge, Jr. & John Ferejohn, Super-Statutes, 50 Duke L.J. 1215, 1216, 1237–42 (2001); see also Robert C. Post & Reva B. Siegel, Equal Protection by Law: Federal Antidiscrimination Legislation After *Morrison* and *Kimel*, 110 Yale L.J. 441, 492–93, 502, 516–18 (2000) (arguing that "Americans now believe that a core function of the federal government is to prohibit discrimination in the public and private sectors").

308. I conducted an informal examination of all published federal appellate decisions appearing in Westlaw from June 1, 2002 through May 31, 2003 and identified thirty-five cases presenting constitutional claims that involved actions by private entities. These thirty-five cases involved twelve substantive due process claims, seven First Amendment claims, six procedural due process claims, four Fourth Amendment claims, and only one equal protection claim. See also Post & Siegel, supra note 307, at 516–18 (stating that federal antidiscrimination statutes reduced pressure on the Court to liberalize its state action doctrine).

309. See Pierce, Due Process, supra note 225, at 1986–98; see also supra note 211 (describing courts' willingness to defer to government procedural choices by holding that existing procedures satisfy due process).

Beyond these instrumentalist rationales for examining and rethinking constitutional doctrine, however, lies the role of the Constitution. The concerns raised by privatization are not merely free-floating normative or policy concerns; they emanate from the basic constitutional accountability premise that government is subject to certain constraints in the way it operates. If, due to inadequacies in current analysis, the blurring of public and private roles in government is increasingly leading to unconstrained private exercises of government power, then it is essential to rethink constitutional doctrine. Simply to accept the disconnect between existing constitutional law and administrative reality risks threatening the principle of constitutional supremacy and the legitimacy of our constitutional system.

IV. A New Private Delegation Analysis for an Era of Privatized Government

While few would dispute the need to ensure that constitutional doctrine reflects the reality of privatized government, the question remains whether it is possible to achieve that goal without simultaneously destroying regulatory flexibility. The solution to this quandary, I suggest, is to return to the road not taken and to rethink state action in private delegation terms. Under a private delegation approach, the key issue becomes not whether private entities wield government power, but rather whether grants of government power to private entities are adequately structured to preserve constitutional accountability. Provided that alternative mechanisms exist to ensure that government power ultimately stays within constitutional limits, exercises of government power by constitutionally immune private actors do not present constitutional concerns. This approach secures constitutional accountability by ensuring that individuals are able to enforce constitutional limits on government power; but it also grants government more flexibility by allowing choices of how best to preserve constitutional limits to be made by the political branches in the first instance.

This Part is devoted to justifying and constructing such a private delegation analysis. I argue that the central criterion for singling out particular private delegations for enhanced scrutiny is whether they authorize private entities to act on the government's behalf, a factor usually established by assessing whether the requirements of agency are met. Even where agency relationships exist, however, mechanisms such as close government supervision or the presence of a meaningful choice among providers are often sufficient to preserve constitutional limits on government power. After discussing how unconstitutional delegations should be remedied, I then assess the extent to which this proposed private delegation approach is compatible with existing constitutional law and the likelihood of judicial adoption. Finally, in order to give a clearer illustration of what it would mean in practice, I apply the proposed analysis to the four recent examples of privatization described in Part I.

A. *The Case for Rethinking State Action in Private Delegation Terms*

Privatization appears to force a stark, binary choice between constitutional accountability, on the one hand, and political control and regulatory flexibility, on the other. Expanding state action analysis leads to judicial imposition of constitutionally-derived codes of behavior; constitutional constraints on government power are thereby preserved, but at the cost of significant intrusions on the political branches' regulatory role and on the opportunity for regulatory experimentation. But is this conflict in fact so unavoidable?

Obviously, constitutional requirements operate to restrict the government's freedom of action, yet the relationship between these two need not be a zero-sum game, as it is under current state action doctrine. To avoid this result, however, it is necessary to cast aside state action's understanding of constitutional accountability as requiring that constitutional constraints apply directly to every exercise of government power. This understanding is excessively narrow. As propounded in Part I, constitutional accountability demands only that individuals be able to ensure that exercises of government power stay within constitutional limits. Direct application of constitutional constraints to private actors wielding government power is certainly the most common means of preserving such limits. But no reason exists to conclude that this means is constitutionally mandated; other nonconstitutional mechanisms that impose adequate constraints on exercises of government power can also suffice.

The Court's private delegation decisions emphasizing the role of government oversight provide a valuable lesson.[310] True, the Court did not link such oversight to the question of whether private delegates' actions should be subject to constitutional scrutiny, or probe beyond the formal structures applicable to a delegation to determine whether the private delegate was in fact meaningfully constrained. Nonetheless, these decisions contain the important insight that the structure of a private delegation should matter more in determining its constitutionality than the mere fact that private actors are exercising government power. More specifically, they recognize that nonconstitutional accountability mechanisms can adequately address the constitutional concerns that private delegations might otherwise create.

This idea that alternative accountability mechanisms can satisfy constitutional requirements is one that surfaces elsewhere in constitutional law.[311] For example, the availability of ex post tort actions against the

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310. See supra Part II.C.

311. It is also worth noting the parallel between this aspect of private delegation doctrine and the emphasis on state supervision as a prerequisite for triggering the state action exception of antitrust law; notably, however, the Court has required more evidence of active government involvement in the antitrust context than in regard to private delegations. See Fed. Trade Comm'n v. Ticor Title Ins. Co., 504 U.S. 621, 634–35 (1992) (describing requirement of active state supervision as intended to ensure that "the State has exercised sufficient independent judgment and control so that the details of the rates

government to recover for injuries to property or liberty may satisfy procedural due process requirements, obviating the need for administrative hearings.[312] Similarly, in *Miranda v. Arizona* the Court laid out specific warnings that must be given prior to custodial interrogations, but indicated that these warnings were not required if "other fully effective means are devised" to protect suspects' Fifth Amendment rights against self-incrimination.[313] More recently, the *Zelman* decision underscored the importance of "genuine and independent choices of private individuals" in concluding that the use of public funds to pay tuition at religious schools did not violate the Establishment Clause.[314]

A focus on alternative accountability mechanisms also accords with modern separation of powers jurisprudence, where the Court generally eschews insistence on formal restrictions for a more flexible inquiry into whether sufficient checks exist in practice to prevent excessive accumulation of power in one branch.[315] Indeed, the separation of powers parallel runs even deeper. The Court's functionalist bent in the separation of powers arena reflects in part its recognition of modern administrative realities; regulatory complexity and uncertainty (not to mention the institutional constraints of Congress) mean that much of the content of gov-

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or prices have been established as a product of deliberative state intervention, not simply by agreement among private parties").

312. See Lujan v. G & G Fire Sprinklers, Inc., 532 U.S. 189, 196–97 (2001) (holding that availability of ordinary breach-of-contract suit satisfied due process demands where government contractor alleged government wrongly deprived it of full payment under contract); Parratt v. Taylor, 451 U.S. 527, 538–43 (1981) (holding that postdeprivation tort action for negligent loss of prisoner's property sufficient to meet due process requirements), overruled on other grounds by Daniels v. Williams, 474 U.S. 327 (1986); Ingraham v. Wright, 430 U.S. 651, 674–82 (1977) (holding that due process was satisfied by liability of teachers and principals for excessive use of corporal punishment in subsequent legal action); see also Chemerinsky, supra note 142, at 551–52 (arguing that ending the state action requirement would not make every crime or tort a constitutional violation because due process is satisfied by adequate state criminal and tort law remedies).

313. 384 U.S. 436, 444 (1966); see Michael C. Dorf & Barry Friedman, Shared Constitutional Interpretation, 2000 Sup. Ct. Rev. 61, 82 ("[T]he best way to understand *Miranda* is not as mandating specific procedures, but as laying down a right and creating a safe harbor for those charged with respecting it."); Henry P. Monaghan, The Supreme Court, 1974 Term—Foreword: Constitutional Common Law, 89 Harv. L. Rev. 1, 20–23 (1975) (describing *Miranda* warnings as a form of "constitutional common law," rules that implement constitutional rights but are not themselves an integral part of the rights involved); see also Dickerson v. United States, 530 U.S. 428, 436–39 (2000) (holding that Congress is required to provide at least as protective procedures when supplanting *Miranda*'s requirements).

314. Zelman v. Simmons-Harris, 536 U.S. 639, 649 (2002). For arguments emphasizing the importance of the structure of government funding programs in meeting Establishment Clause concerns, see Minow, Partners, supra note 2, at 83; Cole, supra note 7, at 564; Ira C. Lupu & Robert Tuttle, Sites of Redemption: A Wide-Angle Look at Government Vouchers and Sectarian Service Providers, 18 J.L. & Pol. 539, 575–84 (2002).

315. Mistretta v. United States, 488 U.S. 361, 381, 384 (1989).

erning rules must inevitably be set by administrative agencies.[316] In like vein, focusing on alternative mechanisms as a means of ensuring constitutional accountability recognizes of the reality of privatization, and the need to develop a constitutional analysis that better addresses the constitutional challenges that privatization poses.[317]

The private delegation decisions are additionally instructive in suggesting that express grants of power to private hands merit special scrutiny. Not all private delegations involve grants of government power, and evasion of constitutional constraints can occur through tacit authorizations as well as express ones. Moreover, some of the most vexing state action cases are poorly described in private delegation terms.[318] Yet the recent privatization examples and prior state action cases demonstrate the importance of express private delegations in statutes, contracts, and the like as means of transferring government power to private hands. Indeed, the frequent presence of express delegations of power to private entities is no accident, and instead indicates that most instances of privatization in this country represent moves to private implementation of government programs rather than government disengagement from an activity altogether.[319] As a result, focusing on private delegations is an appropriate method for identifying situations that may present significant threats to constitutional accountability.

Existing private delegation decisions thus provide the seeds for a new constitutional analysis of privatization. Like these decisions, the proposed analysis is structural in focus, in that it targets the inquiry on delegations of power to private actors and on the overall system of constraints to which these delegations are subject. Unlike the prior decisions, how-

316. See, e.g., id. at 371–73. Scholars disagree as to whether this functionalist approach violates the constitutional scheme. Compare Gary Lawson, The Rise and Rise of the Administrative State, 107 Harv. L. Rev. 1231, 1248–49 (1994) (arguing that modern administrative state is fundamentally inconsistent with separation of powers structure set out in the Constitution), with Peter L. Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 84 Colum. L. Rev. 573, 667 (1984) (arguing that, below the apex of government, the Constitution requires only adequate checks and balances to guard against one branch becoming too dominant and sufficient separation of functions within administrative agencies to satisfy due process).

317. An even further parallel is that, just as the Court takes a formalistic stance when a measure appears to aggrandize Congress' powers, see *Mistretta*, 488 U.S. at 381–84, putting ultimate primacy on ensuring constitutional accountability addresses the aggrandizement concerns associated with privatization—the dangers that government power will escape constitutional limits and governments will exploit such delegations as a means of constitutional evasion.

318. The Jaybird Association's de facto control over elections, addressed in Terry v. Adams, 345 U.S. 461, 469–70 (1953), is the prime example of a government power existing absent an express delegation, while cases such as Shelley v. Kraemer, 334 U.S. 1, 19–21 (1948), or Reitman v. Mulkey, 387 U.S. 369, 378–79 (1967), at best fit awkwardly under the private delegation label; their underlying concern instead appears to be with the state sanctioning or giving affirmative support to private racial discrimination. See, e.g., Tribe, Constitutional Choices, supra note 148, at 259–64; Black, supra note 147, at 80–83.

319. See supra text accompanying notes 16–18 and 84–86.

ever, this analysis generally accepts that private actors can exercise the type of power at issue; it focuses on assessing the impact the private delegation has on the constitutional imperative of accountability. The central concern is determining whether a private delegation is structured so as to ensure that private exercises of government power do not violate constitutional requirements. Constitutional accountability thus has primacy, as the government is prohibited from delegating government power in ways that are not sufficiently constrained. But the government also has flexibility in structuring its relationships with its private partners because various mechanisms exist by which constitutional constraints can be enforced.

Notwithstanding its emphasis on adequate regulatory protections, two central features make this analysis at its core a constitutional inquiry. First, the requirement that adequate protections be extended to privatized programs rests ultimately not on political will, but instead on the Constitution itself, which imposes fundamental limits on how government can act. Second, the Constitution provides the specific substantive content of the protections that regulatory mechanisms must afford, as well as the procedural requirement that these mechanisms must allow for individual enforcement. Even when involvement of private entities affects the substance of constitutional rights,[320] the determination of what protections must be afforded remains a constitutional one: It turns on assessing specifically the constitutional interests at stake, as opposed to simply determining which protections will yield the best policy outcome, "all-things-considered."[321]

Yet under this approach constitutional law will function differently from the standard court-centered image of constitutional adjudication, where the courts bear primary responsibility for enforcing constitutional requirements.[322] Here the courts provide the constitutional baseline, but the task of translating that baseline into practice falls to the elected branches of government.[323] Moreover, this approach transforms the constitutional right being asserted. The fundamental claim at issue becomes

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320. See infra text accompanying notes 375–378.

321. Hills, supra note 131, at 154.

322. See, e.g., Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 365 (2001) ("[I]t is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees.").

323. In this sense, the proposed analysis is akin to the "structural" approach Susan Sturm has identified the Court as taking in the employment discrimination context, which creates incentives for employers to adopt measures to prevent and redress harassment or bias problems. See Susan Sturm, Second Generation Employment Discrimination: A Structural Approach, 101 Colum. L. Rev. 458, 479–89 (2001). According to William Simon and Charles Sabel, courts increasingly are taking a similar approach in public law litigation, eschewing detailed judicial oversight of public institutions and instead holding administrators responsible for achieving specified performance goals. See Charles F. Sabel & William H. Simon, Destabilization Rights: How Public Law Litigation Succeeds, 107 Harv. L. Rev. (forthcoming 2004) (manuscript at 9–42, on file with the *Columbia Law Review*).

not that the private delegate exercised its powers in ways that violated the plaintiff's constitutional rights, but rather that the private delegation *itself* violates the Constitution because it fails to ensure a sufficient level of constitutional accountability. This latter constitutional claim finds a textual home in the Due Process Clauses because allowing exercises of government power outside of constitutional constraints is a violation of the clauses' prohibition on arbitrary government action. But it also can be seen as rooted not in a particular constitutional text, but in the structural Constitution, because—like separation of powers or federalism—the principle of constitutional accountability that this claim embodies is one of the basic structural postulates of our constitutional system.[324]

Adopting a constitutional analysis that focuses on the overall system of constraints applicable to an exercise of government power offers several advantages. A central benefit is, of course, the potential for better safeguarding of both government regulatory prerogatives and constitutional accountability. In addition, adopting this focus avoids the all-or-nothing character of current state action doctrine. Rather than reducing the inquiry to a single question—whether a particular private entity is a state actor—it pursues a multi-step approach that neither starts nor stops with identifying private exercises of government power. Private delegations are singled out for enhanced constitutional scrutiny because of the possibility, not the actuality, that they involve grants of government power; even if they do, a private delegate's constitutional immunity is not problematic provided that constitutional constraints on government power are otherwise preserved. A third, and particularly important, advantage is that this analysis aligns the government's interests with the goal of preserving constitutional accountability. Instead of creating perverse incentives for government to delegate power without strings attached or to control private actors at one step removed, this approach gives government an incentive to ensure that its private delegations are adequately constrained.

B. *Sketching the Contours of a Private Delegation Analysis*

Such a private delegation analysis holds promise in theory as a remedy for the flaws of current state action doctrine. But as the Supreme Court's prior failure to develop a coherent private delegation doctrine indicates, the real question is whether this program can work in practice. Three elements of the proposed analysis are central to its success: (1) identifying constitutionally troublesome private delegations; (2) assessing whether such delegations are adequately structured to ensure constitutional accountability; and (3) remedying unconstitutional delegations. A fourth important issue concerns the relationship between the proposed

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324. See Principality of Monaco v. Mississippi, 292 U.S. 313, 322 (1934) ("Behind the words of the constitutional provisions are postulates which limit and control.").

analysis and current state action doctrine and the likelihood of the former's adoption.

1. *Identifying Which Private Delegations Matter: The Centrality of Acting on the Government's Behalf and Agency.* — One major obstacle to developing the proposed private delegation inquiry is the extremely broad scope of what could qualify as a private delegation, even limiting the field to express delegations. Licenses, corporate charters, and rights of property and contract, such as the warehouser's self-help remedy at issue in *Flagg*,[325] are "delegations" of state power to private actors as much as government contracts with private service providers or statutes authorizing private regulation. But if all law is understood to represent a private delegation of government power, the effect of targeting private delegations for special scrutiny would be the same as casting aside any constitutional distinction between public and private—something, again, the Court is plainly unwilling to do.

Yet it is a mistake to conclude that for constitutional purposes no meaningful or legitimate basis exists upon which to differentiate among private delegations. A central characteristic of much government privatization is that private delegates are granted powers not simply for their own advantage, but rather to enable them to act—and more specifically, to interact with third parties—on the government's behalf.[326] As discussed in Part I, this characteristic of acting on behalf of government is what makes these private delegations particularly threatening to the principle of constitutionally-constrained government. By effectively stepping into the government's shoes in its dealings with third parties, private entities are more likely to have access to powers that are distinctly governmental. These include not simply the ability to exert coercive powers on a nonconsensual basis, but also control over access to government resources and government programs. Particularly when privatization occurs in contexts where program participants or applicants have a great need for the government benefits and services at issue, private entities' roles in implementing government programs may significantly augment their powers over others and enhance their ability to cause harm. Moreover, this enhancement of private powers is often undertaken in lieu of direct government involvement, which suggests that governments may be evading constitutional requirements simply by changes in form rather

325. 436 U.S. 149 (1978).

326. This is not to deny that other delegations, such as private property or contract rights can, as a practical matter, transfer substantial coercive powers to private hands. See Morris R. Cohen, Property and Sovereignty, 13 Cornell L.Q. 8, 11–14 (1927) (arguing that private property is a form of sovereignty because of the power it gives over the lives of others); Jaffe, supra note 259, at 214 (noting "the power that men exercise over others through the protection given by the law to property and contract"). But accepting the public-private divide in constitutional law means that de facto power over others ordinarily is not enough to trigger application of constitutional constraints. There must be some additional basis for tying the power at issue to government.

than substance.[327] Finally, private entities are often the face of government for participants in government programs,[328] and thus such private actors' freedom from constitutional controls risks eroding popular belief in constitutionally-constrained government.

Notwithstanding the clear importance to constitutional accountability of a private entity acting on the government's behalf, the Court's state action cases have largely ignored this feature.[329] Private law, however, has long recognized the special dangers of relationships in which one party is empowered to act on another's behalf and addressed these relationships under the law of agency. "Agency is the fiduciary relationship that arises when one person ('a principal') manifests assent to another person ('an agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act."[330] Agency law makes clear that individuals can be acting on another's behalf even when their actions also advance their own interests; indeed, such dual motives are endemic to agency relationships.[331] But the bare fact that an individual's pursuit of her own interest benefits another is insufficient to create an agency relationship; instead, both principal and agent must assent to the agent's acting on the principal's behalf.[332] A further essential element of agency is ongoing principal con-

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327. See Minow, Public and Private Partnerships, supra note 12, at 1267–68.

328. See Smith & Lipsky, supra note 13, at 13–14.

329. One exception is *Polk County v. Dodson*, where the Court held that a public defender was not a state actor in her representation of indigent defendants because in that role she assumed an adversarial position towards the state. 454 U.S. 312, 321–24 (1981); see also id. at 324–25 (noting that public defender is a state actor "when making hiring and firing decisions on behalf of the State"). Frank Goodman has also emphasized the importance of authorizing private individuals to act on behalf of government, as opposed to granting them permission to act on their own behalf, in state action analysis. See Frank I. Goodman, Professor Brest on State Action and Liberal Theory, and a Postscript to Professor Stone, 130 U. Pa. L. Rev. 1331, 1338 (1982); see also Barak-Erez, supra note 8, at 1190 (including consideration of whether private actor is operating a public service on behalf of the state in public function test).

330. Restatement (Third) of Agency § 1.01 (Tentative Draft No. 2, 2001) [hereinafter Restatement (Third) Agency (Tentative Draft)]; see also Meyer v. Holley, 123 S. Ct. 824, 829 (2003) (stating elements of agency); Restatement (Second) of Agency § 1 (1958) [hereinafter Restatement (Second) Agency] (same). Agency law further defines acting on the government's behalf as signaling that the agent has "power to affect the legal rights and duties of the other person." Restatement (Third) Agency (Tentative Draft), supra, § 1.01 cmt. c; accord Restatement (Second) Agency, supra, § 12 ("An agent . . . holds a power to alter the legal relations between the principal and third persons and between the principal and himself.").

331. As a result, policing against self-serving agent behavior is at the core of many discussions of the principal-agent problem. See Donahue, supra note 16, at 38–56; John W. Pratt & Richard J. Zeckhauser, Principals and Agents: An Overview, *in* Principals and Agents: The Structure of Business 1, 12–15 (John W. Pratt & Richard J. Zeckhauser eds., 1985).

332. See Restatement (Third) Agency (Tentative Draft), supra note 329, § 1.01 cmt. d (describing creation of agency); id. § 1.03 (explaining manifestations of assent); id. § 2.03 (noting that doctrine of apparent authority allows agent's acts to be attributed to principal

trol: "A relationship is not one of agency within the common-law definition unless . . . the principal has the right throughout the duration of the relationship to control the agent's acts."[333]

Agency offers a useful means for identifying private delegations that are especially threatening to constitutional accountability and therefore merit greater scrutiny.[334] With its focus on identifying acts on another's behalf, agency targets precisely the characteristic of private delegations that makes them constitutionally troublesome. Moreover, like the constitutional inquiry into the status of private delegates, a central concern of agency is balancing interests of third parties with those of principals and agents, and much of agency law is similarly focused on determining when it is fair to attribute responsibility for the actions of an agent to a principal.[335] Agency law's requirements of principal control and manifestations of assent also resonate from a constitutional accountability perspective. The dangers of constitutional evasion are particularly great when the government retains ability to control its delegates; in addition, the presence of assent eases concerns regarding unfairly intruding on regulatory choices or individual autonomy, because both the government and the delegate are able to foresee the likely constitutional repercussions of their relationship.

Of particular importance is agency law's approach to principal control. At first glance, agency's insistence on principal control appears problematically akin to current doctrine's insistence on identifying government involvement—either participation in specific private acts or more general pervasive entwinement in the private entity—before finding state action. Significantly, however, agency law has adopted fairly broad tests for determining when the triggering condition of principal control is met.[336] What matters from an agency perspective is that a prin-

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even absent principal assent "when a third party reasonably believes the actor has authority to act on behalf of principal and that belief is traceable to principal's manifestations"); see also Restatement (Second) Agency, supra note 330, § 15 (requiring manifestations of consent to agency relationship by principal and agent for relationship to exist).

333. Restatement (Third) Agency (Tentative Draft), supra note 330, § 1.01 cmt. c; see also id. cmt. f(1) ("The power to give interim instructions distinguishes principals in agency relationships from those who contract to receive services provided by persons who are not agents."); Restatement (Second) Agency, supra note 330, § 14 (describing principal control).

334. For prior discussions of privatization in terms of agency, see Donahue, supra note 16, at 38–39; S. Kennedy, Private Public, supra note 8, at 219–23; see also Gilmour & Jensen, supra note 17, at 253 ("Accountability for governmental action can be ensured only when the agents of the government, in all of their manifestations, can be recognized.").

335. See Restatement (Third) Agency (Tentative Draft), supra note 330, § 1.01 cmt. c ("It has been said that a relationship of agency always 'contemplates three parties—the principal, the agent, and the third party with whom the agent is to deal.'" (quoting Floyd Mechem, A Treatise on the Law of Agency § 27 (1914))); S. Kennedy, Private Public, supra note 8, at 221.

336. See Restatement (Third) Agency (Tentative Draft), supra note 330, § 1.01 cmt. c (describing principal's "right to control" as well as agent's consent to act on behalf of

cipal has the power to control an agent's actions, not that it actually controls a specific act.[337] Moreover, principal control is compatible with independent decisonmaking and discretion, and agents may enjoy extraordinarily wide authority to make decisions on a principal's behalf.[338] In contrast to current state action doctrine, governments are not able to escape findings of agency simply by avoiding involvement in day-to-day decisionmaking; instead, they would have to largely cede any right to control a private entity's actions. Of course, it remains possible that a government would cede such right of control or would restructure its programs—for example by repealing statutory provisions requiring the government to provide certain benefits—in order to prevent a court from finding that private entities were acting as agents on its behalf. But significant political (and legal) obstacles will likely exist to the government's giving out funds or regulatory power to private actors with so few strings attached.[339]

As a result, focusing on agency offers a means of identifying at least some constitutionally troubling private delegations while still satisfying the demand for a constitutional distinction between public and private. *Blum* and *Rendell-Baker* are instructive on the difference resulting from an agency analysis compared to current state action doctrine. While in both decisions the Court held that state action was lacking, the underlying facts plainly support finding that the nursing home and school were government agents: Both provided services to third-party beneficiaries that the government was statutorily required to make available; moreover, the

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principal as core elements of agency, but noting that "the content or specific meaning of the right [to control] is variable," and "failure to exercise the right of control does not eliminate it"); id. cmt. f(1) (describing control as "a concept that embraces a wide spectrum of meanings"); Restatement (Second) Agency, supra note 329, § 14 cmt. a (noting that principal control exists "even though the principal agreed that he would not exercise it" and that "control of the principal does not . . . include control at every moment; its exercise may be very attenuated").

337. See Restatement (Third) Agency (Tentative Draft), supra note 330, § 1.01 cmt. c.

338. See id. § 1.01 cmt. f(1) (noting that principal must "initially state[ ] what the agent shall and shall not do" but can do so in "specific or general terms"). Moreover, under agency law the fact that a contract specifies an agent's responsibilities does not mean the principal lacks power to add to or alter those responsibilities; doing so may simply give the agent a breach of contract action against the principal. See id. § 1.01 cmt. f(1).

339. This is true even in regard to politically unpopular programs. While the TANF legislation did away with the federal entitlement to welfare benefits and allowed the states great discretion in structuring their welfare programs, it still imposed some significant obligations on the states. For example, states are required to meet specified work participation goals, restrict the uses to which they put TANF funds, and substantially reduce federally-funded assistance to certain individuals, such as a woman who refuses to identify the father of her child. HHS is authorized to sanction noncompliant states by reducing their federal TANF grants. 42 U.S.C. §§ 604, 607, 608(a)(2), 609 (2000). On the legal front, existing private delegation doctrine would prohibit grants of a private regulatory role without at least formal provision for government oversight. See supra Part II.C.

provision of these services was subsidized by the government and undertaken pursuant to express government authorization. Perhaps most importantly, while not mandating the specific decisions in question, in both cases the government exercised ongoing control over provision of these services through regulations and extensive agency oversight.[340] Like the doctor providing medical services to prisoners in *West*, the nursing home and school were, in essence, independent contractors.[341] Notably, independent contractors can qualify as "agents" for many purposes, even though they enjoy greater freedom from principal control than do employees.[342] State action doctrine, with its emphasis on actual exercises of control, ends up privileging the independent contractor relationship for constitutional purposes compared to the employee relationship, but from

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340. See Blum v. Yaretsky, 457 U.S. 991, 1005–10 (1982) (describing detailed requirements applicable to nursing homes in caring for Medicaid beneficiaries, including regulations specifying forms homes must use in making assessments of beneficiaries' care needs and stating that homes are required to ensure that beneficiaries receive appropriate level of care); Rendell-Baker v. Kohn, 457 U.S. 830, 833–34 (1982) (noting that local school committees were required to develop individual educational programs for students placed at the school and to include specific service requirements in contracts with the school); see also Rendell-Baker v. Kohn, 641 F.2d 14, 24–25 (1st Cir. 1981) (noting that "the school's dependence on state funds, in itself, demonstrates only that the state has the potential to control the school's operations, not that it actually does so" and holding that actual control is a requirement for applying constitutional requirements to a private institution), aff'd, 457 U.S. 830 (1982).

341. See, e.g., United States v. Orleans, 425 U.S. 807, 815–16 (1976) (holding federally-funded private nonprofit organization operating as community action agency was independent contractor because organization's day-to-day operations were not supervised by federal government). But see Dixson v. United States, 465 U.S. 482, 490–99 (1984) (holding employees of private community organization which administered federal block-grant funds were public officials for purposes of federal bribery statute).

342. Restatement (Third) Agency (Tentative Draft), supra note 330, § 1.01 cmt. c (indicating that independent contractors can be agents notwithstanding limits on employer's power of control over how independent contractor performs); Restatement (Second) Agency, supra note 330, § 2(3) ("An independent contractor is a person who . . . is not . . . subject to the [principal's] right to control with respect to his physical conduct in the performance of the undertaking. He may or may not be an agent."); see also Clackamas Gastroenterology Assocs. v. Wells, 123 S. Ct. 1673, 1677–79 & 1678 n.5 (2003) (noting several factors serve to distinguish employees and independent contractors, a central one being extent of principal control).

In some situations, limits on a principal's control do preclude an independent contractor from being an agent. See Restatement (Second) Agency, supra note 330, § 2 cmt. b. Interestingly, however, agency law also responds to limits on principal control not by denying that agency exists, but rather by restricting the extent to which principals are liable for the actions of independent contractors. See id. (noting "principal is not liable to third persons for tangible harm resulting from [an independent contractor's] unauthorized physical conduct within the scope of the employment"); Restatement (Third) Agency (Tentative Draft), supra note 330, § 2.04 cmt. b (noting that respondeat superior is not applicable where agents are not employees); see also Deborah A. DeMott, The Mechanisms of Control, 13 Conn. J. Int'l L. 233, 238–39 (1999) (noting distinction between right of control required for agency and type of domination required to pierce corporate veil).

an agency perspective little reason exists for drawing such a categorical line.[343]

Indeed, many instances of privatization are fairly clear-cut instances of agency relationships. Private intermediaries processing claims for Medicare, for example, are statutorily designated government agents and have been so recognized.[344] In *Lebron v. National Railroad Passenger Corp.*, the Court indicated that when "the [g]overnment creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the [corporation's] directors," the corporation is an agency of government for constitutional purposes.[345] *Brentwood Academy* could have been decided on a similar basis, with public school officials' dominance of the Association (particularly given the State's express delegation of oversight responsibility for interscholastic athletics in the past and the Association's assumption of such responsibility) demonstrating that the Association was acting on behalf of the state and subject to its control.

There are also instances of privatization in which no basis exists to conclude that private delegates are acting on the government's behalf and therefore agency is lacking. Assent to act on the principal's behalf appears generally absent in contexts when the government does no more than purchase goods and services for its own use from a private entity; here, the private provider is not interacting with third parties, even its employees, as the government's representative or on the government's behalf.[346] *Sullivan* suggests another example. There, the private insurance companies challenging workers' claims for benefits cannot be described as acting on the government's behalf, except in the attenuated sense that having private employers provide such insurance served the government's policy goals of ensuring compensation for all work-related

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343. Others have similarly criticized current doctrine's distinction between government employees and other government contractual relationships. See, e.g., Barak-Erez, supra note 8, at 1187; see also David A. Strauss, State Action After the Civil Rights Era, 10 Const. Comment. 409, 411 (1993) (arguing that current doctrine errs in its automatic treatment of acts of government employees as state action, even when the acts bears many attributes of private action).

344. See 42 U.S.C. § 1395h (2000).

345. 513 U.S. 374, 400 (1995).

346. See Restatement (Third) Agency (Tentative Draft), supra note 330, § 1.01 cmt. c ("[I]f a service provider simply furnishes advice and does not interact with third parties as the representative of the recipient of the advice, the service provider is not acting as an agent."). Lack of principal control may also preclude agency in this context. See S. Kennedy, Private Public, supra note 8, at 221 ("Where government . . . purchase involves a product or service that is generally available and relatively standardized, production of the good or performance is substantially, if not entirely, controlled by the vendor."). Instances exist, however, where providing goods for the government transforms private entities into government agents for some purposes, due to the scope of government control over contractors' operations. See, e.g., Boyle v. United Techs. Corp., 487 U.S. 500, 511–13 (1988) (recognizing federal contractor immunity from design defect liability when products designed according to government specifications).

injuries.[347] Except in its role as employer, the government bore no statutory responsibility to provide medical services and gained no financial benefit when medical services were ruled unnecessary. Particularly viewed against the history of workers' compensation systems, Pennsylvania's authorizing insurers to deny claim payment until medical necessity is determined seems more a realignment of the respective rights of workers and employers in the employers' favor than a delegation creating an agency relationship.[348] To the extent that the private insurers were functioning as agents at all, they were serving as agents of employers (who bore statutory liability for workers' compensation benefits) and not of the government.[349]

In a number of privatized contexts, however, the presence or lack of an agency relationship will be harder to determine. Is a corporation always a government agent when the government appoints a majority of its directors, even if the government makes no effort to exercise control over the corporation's operations?[350] What if such board and operational control is lacking, but the government charters the corporation and grants it sole regulatory authority over a sphere of activity with the aim of

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347. See Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 44–46 (1999).

348. On the development of workers' compensation statutes, see generally Witt, supra note 37.

349. For the same reason, labor unions are also not government agents, notwithstanding the National Labor Relations Act (NLRA)'s authorization of union shop agreements, which delegates to unions (and employers) the power to compel all employees in the bargaining unit to join the union. It is difficult to see why union decisions made pursuant to this authorization should be seen as action on behalf of the government any more than any other private assertion of a legally provided power, such as an employer's assertion of the right to fire employees at will. Plainly, union shop arrangements give unions power over dissenting employees, but employee coercion is equally likely as a result of an employer's control over the workplace. See Hale, supra note 99, at 472–74.

This marks an instance where the proposed private delegation analysis leads to a narrower application of constitutional requirements than under current law. Although it has not reached the question in the NLRA context, the Court has held that the authorization of union shops in the Railway Labor Act (RLA) meant that union decisions regarding the use of union dues collected pursuant to such an agreement constitute state action because the RLA's authorization preempts conflicting state laws. See Ry. Employees v. Hanson, 351 U.S. 225, 232, 238 (1956); see also Ellis v. Bhd. of Ry., Airline & S.S. Clerks, 466 U.S. 435, 455–57 (1984) (reaffirming *Hanson*'s holding that First Amendment applies to union use of funds). *Hanson*'s reasoning is hard to square with recent state action cases rejecting claims that simply exercising statutorily delegated rights creates state action. See *Sullivan*, 526 U.S. at 52–53; Flagg Bros. v. Brooks, 436 U.S. 149, 164–65 (1978). But see Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 614 (1989) (holding statutory preemption of legal barriers that would otherwise prohibit private conduct in question is sufficient government encouragement to create state action).

350. See *Lebron*, 513 U.S. at 399 (suggesting that formal government control is less relevant in determining constitutional status of private corporation where control is temporary and is not used to advance specific policy objectives). See generally A. Michael Froomkin, Reinventing the Government Corporation, 1995 U. Ill. L. Rev. 543 (discussing accountability concerns raised by federally-chartered corporations).

advancing the national interest?[351] Does a statutory provision mandating employee drug testing for public safety purposes transform an employer who engages in such drug testing into a government agent vis-à-vis its employees?[352] Government grants often may create agency relationships, because the government frequently conditions award of the grant on performance of a specific project and closely regulates grantee behavior. Where this is the case, use of grants rather than direct reimbursement for services is an administrative detail that seems to lack wider import. But grants can also represent government efforts to foster independent private action, and distinguishing between the two contexts no doubt will prove difficult.

Moreover, while a useful starting point, agency cannot be an exclusive test for identifying all constitutionally troublesome private delegations. The ultimate issue from a constitutional perspective is whether private entities wield government power, not whether they qualify as government agents. Instances will exist where private actors are delegated what appear to be government powers, but the conditions of agency will be lacking. *Georgia v. McCollum* is a case on point.[353] There, the Court held that a private defendant's use of peremptory challenges in juror selection constituted state action, in part because the defendant was helping to select the members of an official government body. In this sense, the defendant could be seen as acting on the government's behalf; plainly, however, the defendant used the peremptories for his own advantage and his actions were constitutionally protected against prosecutorial control, negating an agency relationship.[354] In other contexts, agency's requirement of ongoing principal control may preclude finding an agency relationship, even though private entities are acting on the government's behalf and exercising government powers.[355]

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351. See San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 543–45 (1987).

352. Compare *Skinner*, 489 U.S. at 614–15 (holding that statutory encouragement of drug testing of railroad employees transforms such testing into state action, subject to Fourth Amendment's requirements), with Mathis v. Pac. Gas & Elec. Co., 891 F.2d 1429, 1432, 1434 (9th Cir. 1989) (denying that proposed rule requiring nuclear power plant licensees to undertake psychological testing of employees transformed such testing into state action when performed subject to independent professional standards).

353. 505 U.S. 42 (1992).

354. See id. at 53–55; see also id. at 64–68 (O'Connor, J., dissenting) (arguing that defense counsel's immunity from prosecutorial control precluded a finding of state action). Another example comes from Currin v. Wallace, 306 U.S. 1 (1938). The statute at issue there allowed tobacco growers to decide whether government standards would apply to a given tobacco market. A decision to subject an activity to government regulation seems clearly an exercise of government power, yet no agency relationship existed between the growers and the government; tbe government imposed no restrictions on how these decisions were made and the growers were seeking their own pecuniary gain. See id. at 6–8.

355. An example is wben the government provides that accreditation by private organizations suffices to establish eligibility to participate in government programs, but exercises little control over the accreditation process. For instance, accreditation by the

Thus, the existence of an agency relationship should be a sufficient but not a necessary condition for subjecting private delegations to greater scrutiny. It will always remain necessary to investigate whether the delegation represents such a clear grant of government power or power to act on the government's behalf that further scrutiny is warranted. Yet even though some or many hard cases will remain and it cannot be an exclusive test, agency is an important criterion in singling out which delegations merit special scrutiny. Over time greater clarity will likely develop, and focusing on agency relationships serves to narrow the range of hard cases. In addition, room exists to err on the side of finding agency because, unlike state action determinations, such a finding does not inexorably result in direct application of constitutional constraints on the delegates' actions. Instead, it triggers an investigation into whether constitutional accountability concerns are adequately addressed.

2. *Structuring Private Delegations to Ensure Constitutional Accountability.* — Determining when private delegations are adequately structured to ensure constitutional accountability represents the second key element in the proposed private delegation analysis. Private delegations that do not create agency relationships or involve clear grants of government power do not require further scrutiny. Such delegations may provide private entities with significant powers, but given the constitutional public-private divide, they do not raise constitutional accountability concerns.

This leaves, however, the many private delegations that do have these characteristics, creating the danger that private delegates are stepping into the shoes of government and wielding government power. When are such private delegations adequately structured to preserve constitutional accountability notwithstanding that the private delegates involved are exempt from the Constitution's purview? One central requirement, derived from the definition of constitutional accountability, is that a mechanism must exist by which individuals can enforce constitutional constraints on government power, ultimately in court, even if they cannot assert constitutional rights directly against private delegates.[356] This requirement, in turn, suggests two ways in which private delegations can be structured to meet constitutional accountability concerns. Under the first, alternative mechanisms exist through which individuals can assert constitutional constraints (or adequate surrogates) on exercises of government power even though private delegates wielding government power are immune from direct constitutional scrutiny. Under the sec-

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JCAHO means that a health care institution is deemed eligible to participate in Medicare, yet the federal government exercises little direct control over specific JCAHO accreditation decisions. Instead, it relies on indirect measures of oversight, such as annual assessments as to whether JCAHO accreditation standards comply with Medicare conditions of participation. See Freeman, Private Role, supra note 2, at 610–12; Timothy Stoltzfus Jost, Medicare and the Joint Commission on Accreditation of Healthcare Organizations: A Healthy Relationship?, Law & Contemp. Probs., Autumn 1994, at 15, 18–22.

356. See supra Part I.C.

ond, private delegations are significantly limited, so that the private delegates do not in fact wield government power—or if they do, their exercises of this power are constitutionally insignificant.[357] Both of these approaches allow room for a court to conclude that the content of constitutional protections may differ in the context of private delegations in comparison to when government officials act alone.

a. *Alternative Mechanisms to Enforce Constitutional Constraints.* — The most obvious alternative mechanism for enforcing constitutional constraints is government supervision of private decisionmaking. Government supervision is, of course, the structural mechanism emphasized in existing private delegation decisions that reject claims that private delegations contravene separation of powers and due process requirements.[358] Government supervision also prefigured in two of the Supreme Court's recent encounters with privatization, *Correctional Services Corp. v. Malesko* and *Richardson v. McKnight*, both of which involved private prisons. In *Malesko*, the Court emphasized that inmates in private facilities could access the Bureau of Prisons' administrative complaint system and from there obtain judicial review in denying a *Bivens* action for constitutional violations against the private prison operators.[359] Meanwhile, in *Richardson* the Court held that individual guards at private prisons generally do not enjoy qualified immunity against constitutional claims under § 1983, but the Court expressly reserved the question of whether qualified immunity would be available to private individuals "acting under close official supervision."[360]

Government supervision is a particularly important mechanism for ensuring accountability in privatization contexts. The government's regulatory and contractual powers, as well as its administrative resources and

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357. For a similar suggestion as to how private decisionmaking in government programs should be constrained, although not argued for as constitutionally required, see Minow, Public and Private Partnerships, supra note 12, at 1261.

358. See supra Part II.C.

359. See Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 63, 74 (2001).

360. 521 U.S. 399, 412–13 (1997). The reasoning of these two decisions is hard to square, in that *Malesko* presumed that the private status of the prison operator was essentially irrelevant in assessing the deterrent value of a suit against it, whereas in *Richardson* the Court emphasized that private corporations have greater flexibility than public agencies in structuring their operations to ensure that private prison guards act with the appropriate balance of vigor and caution. Compare *Malesko*, 534 U.S. at 69–71 (analogizing to denial of *Bivens* actions against federal agencies in similarly denying *Bivens* action against private corporation managing federal prison facility), with *Richardson*, 521 U.S. at 409–12 (holding that factors against counseling for grants of qualified immunity to public prison guards are not present in private prison context). An important distinction that explains the two cases' differing results, even if it fails to justify their contrasting reasoning, is the fact that *Richardson* arose under 42 U.S.C. § 1983 (2000) while *Malesko* involved an implied damage action under *Bivens*; the rejection of liability in *Malesko* thus largely reflected the Rehnquist Court's hostility to *Bivens* actions and implied rights of action generally. For a discussion of the conflict between *Malesko* and *Richardson*, see Gillian E. Metzger, Privatization, Accountability, and Judicial Review 5–27 (Mar. 21, 2002) (unpublished manuscript, on file with the *Columbia Law Review*).

expertise, put it in the best position to control private delegates' behavior. In order to meet the demands of constitutional accountability, however, government supervision must take the form of a complaint or appeals system akin to that in *Grijalva* or *Malesko*, through which affected individuals can challenge specific private decisions, policies, and procedures. Such a review system not only provides a direct administrative check against private delegate abuses, but also provides the requisite basis for a subsequent constitutional challenge in court. If the government denies relief, individuals then can bring constitutional challenges to the government's own decisions—for example, alleging that the government violated due process by sanctioning inadequate private decisionmaking procedures or by affirming a private decision made on racially discriminatory grounds.[361] On occasion, preserving constitutional accountability may require additional safeguards, such as a means for immediate review where urgently needed assistance is at stake,[362] or de novo review where the government delegates enforcement of regulatory requirements to private hands.[363]

One advantage of using government oversight to ensure constitutional accountability is that government officials are not limited to rectifying constitutional violations, but can also use their oversight to enforce regulatory requirements and contractual promises, and in other ways improve the effectiveness and quality of privatized programs. While governments rarely can be required to undertake such enforcement,[364] the necessity of providing an individual appeals mechanism gives them an

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361. One point to note is that this approach in essence requires administrative exhaustion of constitutional claims, and thus is somewhat at odds with cases holding such exhaustion unnecessary. See, e.g., McCarthy v. Madigan, 503 U.S. 140, 149 (1992). Given that many suits against state and local officials will be premised on 42 U.S.C. § 1983, the conflict between this approach and the rule of Patsy v. Bd. of Regents, 457 U.S. 496, 516 (1982), that exhaustion of state administrative remedies is not required under § 1983, appears particularly stark. In fact, however, the proposed approach can be made to accord doctrinally with the rule of *Patsy*, on the grounds that, if an adequate administrative appeals mechanism exists, private acts only become acts taken "under color of state law" and thus are subject to § 1983 once that mechanism is exhausted. See Lugar v. Edmondson Oil Co., 457 U.S. 922, 935 (1982) (holding that private conduct found to be state action for constitutional purposes also constitutes § 1983's "under color of state law" requirement); infra note 404 and accompanying text.

362. See Grijalva v. Shalala, 152 F.3d 1115, 1121–23 (9th Cir. 1998) (holding that due process requires means for obtaining speedy predeprivation review of MCOs' denials of medical coverage), vacated, 526 U.S. 1096 (1999); cf. Goldberg v. Kelly, 397 U.S. 254, 264 (1970) (emphasizing importance of welfare benefits in requiring oral hearing before benefits are terminated).

363. See Todd & Co. v. SEC, 557 F.2d 1008, 1012–13 (3d Cir. 1977) (emphasizing importance of full government review in upholding constitutionality of delegating responsibility for enforcing securities laws to private association).

364. See Heckler v. Chaney, 470 U.S. 821, 831–35 (1985) (concluding that government agency's decision not to take enforcement action is presumed immune from judicial review, but Congress may rebut presumption through statutory limitations on agency's enforcement discretion).

incentive to do so. This mechanism supplies governments with needed information about the performance of their private delegates, and also allows governments to review the quality of services in individual cases without significant administrative cost. Moreover, enforcing regulatory and contractual requirements regarding delegates' behavior will lessen the danger that private delegates will act in constitutionally prohibited ways, for which the government might subsequently be found liable. On the flip side, however, governments are not left with much flexibility regarding how they conduct oversight of their private delegates. Since a large part of the motivation behind privatization is the government's desire to avoid involvement in implementation decisions, holding that private delegations can be rendered constitutional by such involvement seems to offer little solace.[365]

Here, an important point to emphasize is that unlike government proper, not all actions by private government agents trigger constitutional consequences; instead, constitutional requirements attach only when private entities are wielding powers derived from their agency relationship with the government. As a result, where a private delegate's actions are ones that it otherwise had authority to undertake and which relate tangentially to the responsibilities it performs for the government, more minimal government oversight should suffice. *Rendell-Baker* is illustrative. There, the private school fired teachers who had criticized aspects of the school's operations, and the teachers challenged their terminations on constitutional grounds.[366] While the school qualified as a government agent, given its responsibility to provide special needs education on behalf of the local school committees, it would have had the same power over its teachers absent the committees' delegation of this responsibility.[367] What makes the teachers' firing nonetheless seem constitutionally troubling is the importance of the teachers' ability to criticize the school as a protection against the school abusing its delegated powers over students. Yet this constitutional concern seems adequately addressed if some means exists by which teachers and parents can bring issues regarding the school's operation to the government's attention. In *Rendell-Baker*, such a means was present in the guise of informal oversight by the state.[368]

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365. However, the government still enjoys more flexibility than if its private delegates are found to be state actors; it avoids the danger of being found liable for private delegates' actions that it did not sanction, and does not have to compensate such delegates for their potential constitutional liability, through indemnification or higher contracting costs.

366. Rendell-Baker v. Kohn, 457 U.S. 830, 834–35 (1982).

367. Cf. Logiodice v. Trs. of Me. Cent. Inst., 296 F.3d 22, 29 (1st Cir. 2002) ("A school teacher dismissed by a private school without due process is likely to have other options for employment; a student wrongly expelled from the only free secondary education in town is in far more trouble, unless his parents are rich or mobile."), cert. denied, 537 U.S. 1107 (2003).

368. See 457 U.S. at 834–35 (noting that state required school to provide explanation for teacher's firing).

A second point is that close government supervision of private delegates is not the only alternative mechanism by which to ensure constitutional accountability. The government instead could create separate decisionmaking tracks, so that affected individuals obtain a completely independent decision from the government in place of the private delegate's ruling.[369] Another option is for the government to forego being involved in oversight and instead to make private delegates directly subject to substantive and procedural requirements that represent adequate surrogates for constitutional protections.[370] Such requirements could be based in federal or state law (depending on the level of government where they originate) and imposed by statute, regulation, or contract. Title VI's prohibition on recipients of federal funds engaging in race discrimination is a statutory example of this approach.[371] A third variation is for the government to impose a general requirement that private delegates assume constitutional responsibilities, rather than detail the substantive and procedural constraints to which delegates must adhere. In order for these latter two approaches to satisfy constitutional accountability concerns, a means by which individuals could enforce these requirements against private delegates, such as an express right of action, must exist.

Finally, state law rights not specific to privatization contexts may suffice to meet constitutional accountability requirements. In some situations, private remedies, such as a tort action for negligence or a suit under generally applicable civil rights statutes, may provide equal or greater protection than is available through constitutional litigation.[372]

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369. The procedure for certifying psychiatric hospitals as eligible for participating in Medicare at issue in *Cospito* (and since repealed) provides an instance of this approach; as construed by the Third Circuit, the Medicare statute allowed psychiatric hospitals the alternatives of being accredited by the JCAHO, a private association, or of obtaining a determination of eligibility directly from HHS. Cospito v. Heckler, 742 F.2d 72, 87–89 (3d Cir. 1984).

370. See, e.g., Freeman, Private Role, supra note 2, at 586–88 (suggesting Congress could extend requirements of procedural due process to private entities); see also Aman, supra note 10, at 1500–05 (arguing for expansion of Administrative Procedure Act to private actors).

371. See 42 U.S.C. § 2000d (2000). Another example is the detailed procedures and hearing requirements imposed when individuals are involuntarily committed in private or public facilities. See Project Release v. Prevost, 722 F.2d 960, 965–68 (2d Cir. 1983) (describing requirements of New York's Mental Hygiene Law). Yet a third is the statute at issue in *Todd*, which mandated that in performing their self-regulatory duties, private securities associations must adopt disciplinary rules that provided for "specific charges, a hearing of record, and a statement of the findings," thereby affording minimal due process protections. Todd & Co. v. SEC, 557 F.2d 1008, 1012 (3d Cir. 1977).

372. See supra note 312 (noting cases holding that ordinary tort or contract actions provide all the process due in particular contexts); see also Prune Yard Sbopping Ctr. v. Robins, 447 U.S. 74, 80–81, 88 (1980) (upholding state constitutional requirement that private shopping centers allow access to individuals seeking to exercise free speech rights). Title VII of the Civil Rights Act of 1964, for example, prohibits employment practices that have an unjustified disparate impact on statutorily-protected groups, whereas to succeed

State law may also provide a basis for public law actions that force the government to remedy abuses by its private partners. In *Logiodice*, the First Circuit concluded that under Maine law, school districts are statutorily obligated to provide students with a free education. That a school district contracted with a private school to perform this function did not relieve the district of its statutory duty, and thus a student wrongly expelled could sue in state court to compel the district to provide the free education to which she was entitled.[373] One point to note here is that the emphasis on acting on the government's behalf and agency may limit the availability of some private remedies, as this emphasis may expand the scope of private actors entitled to government contractor immunity.[374]

In assessing the adequacy of these alternative mechanisms, courts will by necessity have to address the question of whether the involvement of private delegates changes the substance of constitutional protections.[375] The principle of constitutional accountability might at first sug-

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on a constitutional equal protection claim, a plaintiff must demonstrate discriminatory intent as well. Compare Washington v. Davis, 426 U.S. 229, 238–41 (1976) (holding that intentional discrimination is required for constitutional equal protection violation), with Griggs v. Duke Power Co., 401 U.S. 424, 430–31 (1971) (holding that Title VII prohibits employment practices that are "discriminatory in operation" even if neutrally motivated and not facially discriminatory). See also 42 U.S.C. § 2000e-2(k)(1)(A) (2000) (codifying disparate impact standard of *Griggs*). As noted earlier, actions seeking to enforce the terms of government contracts on general third-party beneficiary principles may also be available, see *Logiodice*, 296 F.3d at 30 (suggesting that students in private schools operating under contracts with school district may be able to enforce contractual terms through such a suit), but judicial reluctance to interfere with government enforcement discretion may limit the practical impact of this approach. See supra note 114 and accompanying text.

373. 296 F.3d at 30. Indeed, with its investigation into whether alternative means of redress made application of constitutional constraints unnecessary, the analysis employed by the majority in *Logiodice* is a close parallel to the approach advocated here. But a critical distinction between the two is that the *Logiodice* majority expressly refused to find that the school district had any constitutional obligation to ensure that adequate protections existed as a condition of delegating its responsibility to provide free education to a private school. Id. at 31.

374. See Boyle v. United Techs. Corp., 487 U.S. 500, 511–13 (1988) (recognizing federal contractor immunity from design defect liability when products designed according to government specifications); see also Butters v. Vance Int'l, Inc., 225 F.3d 462, 466 (4th Cir. 2000) (holding that private company serving as agent of foreign state qualifies for immunity under the Foreign Sovereign Immunities Act (FSIA)). Cf. Abigail Hing Wen, Note, Suing the Sovereign's Servant: The Implications of Privatization for the Scope of Foreign Sovereign Immunities, 103 Colum. L. Rev. 1538, 1548–56 (2003) (arguing against granting private entities immunity under the FSIA based on their agency relationships with foreign governments). But see Royal Ins. Co. of Am. v. Ru-Val Elec. Corp., 918 F. Supp. 647, 654–55 (E.D.N.Y. 1996) (holding that private organization authorized to perform electrical inspections for municipalities is not entitled to government contractor immunity).

375. Some have tried to explain seeming inconsistencies among the Court's state action decisions by arguing that less government involvement and control are required to trigger application of equal protection guarantees than are needed in regard to due process protections. See Henry J. Friendly, The Dartmouth College Case and the Public-Private Penumbra 18–24 (1969); Jody Young Jakosa, Parsing Public from Private: The

gest that the presence of a private delegation should have no such effect, so as not to create an incentive to delegate government power. Under such an approach, to be deemed constitutionally adequate, an alternative accountability mechanism would have to impose constraints at least as great as those the Constitution imposes on government. Weighing against this conclusion are the constitutional protections for private associational autonomy and other freedoms that may be unduly infringed if private delegates are found to be subject to the identical constitutional prohibitions as the government.[376] Thus, taking full account of constitutional concerns requires courts to balance the conflicting constitutional values at stake.

Importantly, however, the question of whether private delegates' involvement affects the substance of asserted constitutional constraints comes framed by a court's antecedent determination that the private delegate is in an agency relationship with the government, and therefore is likely to be wielding government power. This means that such judicial balancing of constitutional rights and private autonomy concerns is necessarily interstitial: It does not extend to activities that fall on the private side of the public-private divide; moreover, the content of constitutional constraints on government represents the baseline from which any deviations must be justified. As a result, it is less threatening to the political branches' regulatory prerogatives than the wholesale balancing associated with casting aside the state action doctrine altogether.[377] Indeed, balancing in this form is a common feature of ordinary constitutional adjudication, where the specific substance of constitutional rights frequently varies by context.[378]

Failure of Differential State Action Analysis, 19 Harv. C.R.-C.L. L. Rev. 193, 195–206 (1984) (describing this approach, adopted in particular by the Second Circuit); see also Yeo v. Town of Lexington, 131 F.3d 241, 249 (1st Cir. 1997) (en banc) ("The analytic model used must take account of the specific constitutional claim being asserted."). This explanation may well reflect reality, but it is fundamentally at odds with the analytic paradigm of state action as a threshold determination preliminary to assessment on the merits. See Jakosa, supra, at 206–31.

376. Albeit arising in the unique context of political parties, California Democratic Party v. Jones, 530 U.S. 567 (2000), illustrates the way that private autonomy concerns may affect the content of constitutional rights. There, while acknowledging that California's use of a primary election system constituted a delegation of public power to private associations, the Court held that California's blanket primary system violated the First Amendment associational rights of political parties because it required parties to allow voters who were not party members to participate in their primary elections. Id. at 573 n.4, 586. Yet the Court also reaffirmed earlier precedent holding that equal protection prohibited private associations from excluding voters on racial grounds. Id. at 573 n.5.

377. See supra notes 277–278. Indeed, against this background of public power, the likely effect of balancing is to enhance the political branches' regulatory authority hy minimizing constitutional demands in privatized contexts.

378. See, e.g., Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 321–27 (2002); Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976); see also T. Alexander Aleinikoff, Constitutional Law in the Age of Balancing, 96 Yale L.J. 943, 943–45 (1987) (arguing that balancing is ubiquitous in constitutional law); Kathleen M. Sullivan,

b. *Limits on Private Delegations.* — Governments can also ensure constitutional accountability by limiting the powers they delegate. While an agency relationship between private delegates and the government increases the risk that private delegates are exercising government power, this result is not inevitable. On some occasions, acting on the government's behalf does not give private delegates enhanced power over others. One such situation is where there is a large pool of private delegates who compete with one another and wield the same authority on the government's behalf, with the result that no delegate exercises monopoly or even quasi-monopoly control over program participants or access to government benefits.[379] This renders it unlikely that any particular delegate's powers will be enhanced significantly by the delegations in question, or that the government will be able to exert control over privatized programs without actively intervening in specific decisions. Medicare's fee-for-service program, under which every physician licensed by the state is eligible to provide government-subsidized care, represents one example.[380] The Food Stamp and Section 8 housing voucher programs are others.[381]

Part of what minimizes accountability concerns in these contexts is the role played by individual choice. The authority to make decisions on behalf of government is exercised by beneficiaries who are directly affected by the decisions and who, in principle at least, can protect themselves against abuse by choosing different providers. If anything, the private delegates most empowered by this type of delegation are the beneficiaries themselves; and the fact that beneficiaries make decisions primarily for themselves rather than for others minimizes the danger that the delegates' expanded powers represent an exercise of government authority.[382] Seen in this light, this structural device is not limited to broad

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The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards, 106 Harv. L. Rev. 22, 56–95 (1992) (describing different Justices' stances on balancing as form of constitutional adjudication).

379. This focus on monopoly powers also appears in state action analysis, where the presence of a monopoly is one factor courts examine in deciding whether state action exists. See Jackson v. Metro. Edison Co., 419 U.S. 345, 351–52 (1974) (ruling utility is not a state actor notwithstanding its monopoly over electricity provision); see also Marsh v. Alabama, 326 U.S. 501, 507–09 (1946) (emphasizing total control over information and speech that company could exercise over residents in company town unless subject to First Amendment).

380. See 42 U.S.C. § 1395x(r) (2000) ("The term 'physician', when used in connection with the performance of any function or action, means (1) a doctor of medicine or osteopathy legally authorized to practice medicine and surgery by the State in which he performs such function or action . . . .").

381. See Moffitt, supra note 37, at 125–26; Peterson, supra note 37, at 147–51.

382. Arguably, such delegations of power to beneficiaries do not trigger heightened scrutiny, for the beneficiaries are acting in their own interests and any manifestation of consent to an agency relationship seems lacking. Yet, as their decisions affect the shape of government programs or regulation—for example, housing choices by Section 8 voucher recipients determine what housing will be subsidized under that program—these delegations could represent instances where delegates are acting on behalf of government,

delegations, but is also present in some self-regulation contexts where affected individuals directly participate in setting the content of binding norms.

A key requirement, however, is that individual choice and right of participation must be real.[383] Thus, if the nature of the services at issue makes it difficult to switch providers once services have begun, then a broad pool of delegates' and beneficiaries' power of choice may not protect against private delegates wielding government power. Given their relatively closed environments and the trauma that the elderly and vulnerable experience when forced to transfer, nursing homes can exercise tremendous power over residents.[384] Hence, the fact that Medicaid beneficiaries can choose from a broad array of private homes in deciding where to reside does not remove the constitutional accountability problem in *Blum*, where homes were authorized to determine residents' eligibility for different types of care. In addition, form meaningful choice, individuals must be informed of the availability of alternative providers and the procedures by which they can switch providers.[385] The outer range of constitutionally-required information is unclear. Arguably, where the services involved are of particular importance and difficult to assess, ensuring a meaningful choice requires that the government provide detailed information on the services provided by different providers and perhaps offer additional assistance to beneficiaries in making their selections.[386] Yet such a requirement is at least superficially hard to

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although not qualifying as government agents. In the end, however, this classification issue is irrelevant, other than to show how the availability of the second step of the private delegation analysis allows a broader approach in identifying which delegations merit scrutiny.

383. See Minow, Partners, supra note 2, at 97–99, 102 ("[G]enuine individual choice . . . requires both sufficient autonomy to choose and sufficient options for the choice to be meaningful.").

384. See, e.g., Handler, Down from Bureaucracy, supra note 13, at 149–51; Freeman, Private Role, supra note 2, at 602–10.

385. Cf. Dusenbery v. United States, 534 U.S. 161, 167–69 (2002) (holding that due process requires government to provide notice that is reasonably calculated under all circumstances to apprise individual of threatened deprivation of protected interest). Some programs already require such information be provided. See, e.g., 29 U.S.C. § 2864(d)(2) (2000) (requiring one-stop centers under WIA to provide detailed information on types of services available, local job market conditions, and performance of eligible training providers); 42 U.S.C. § 1395w-21(d) (describing Medicare MCO information that must be provided to Medicare beneficiaries). The charitable choice provision of TANF has been criticized for not requiring that beneficiaries be informed of their statutory right to receive services from a nonreligious provider. See Minow, Partners, supra note 2, at 99; see also 42 U.S.C. § 604a(a) (setting out requirements for use of religious providers under TANF).

386. Cf. Minow, Partners, supra note 2, at 97 ("Autonomous choice is in jeopardy when the individual has no money, food, or housing and is offered these necessities . . . ."); Nan Ellis, Individual Training Accounts Under the Workforce Investment Act of 1998: Is Choice A Good Thing?, 8 Geo. J. on Poverty L. & Pol'y 235, 246–55 (2001) (describing measures such as consumer education and assistance programs that could improve quality of individuals' choices under child care, health care, education, and employment-services voucher programs).

square with the Court's refusal to impose affirmative assistance obligations in many instances where the government is acting directly against an individual's interests.[387]

A final alternative is to design the delegation in such a way that private entities' exercise of their delegated authority necessarily comports with substantive constitutional requirements. *Currin* provides an example of this approach.[388] There, tobacco growers had the sole power to determine whether tobacco standards promulgated by the Secretary of Agriculture would apply in a particular area. Thus, the delegation was not one where government retained the power to review private decisionmaking, nor one where all affected individuals participated. Yet the growers could determine only whether the standards would become effective; they could determine neither the content of the standards, nor how the standards would apply in particular cases. In rejecting the claim that the statute was a private delegation of legislative power, the Court emphasized the growers' limited role,[389] but the point applies more broadly. The tobacco growers' power was so circumscribed that its exercise, even for purely biased and self-interested ends, would not violate the Constitution. Indeed, self-interested exercise was the very point. This was simply an example of Congress regulating to improve the growers' economic position, as it had power to do, but letting the growers determine whether such regulation really was to their advantage.

How far this final option extends is unclear, and existing precedent seems to suggest a narrow scope. Although *Sunshine* did not expressly hold that government oversight is a constitutional imperative when some private actors are delegated power to promulgate regulatory standards binding on others, this conclusion follows from the Court's reasoning.[390] Similarly, professional norms impose standards often exceeding the scope of constitutional prohibitions. Yet, in *West*, the Court rejected the claim that delegating government power to professionals obviated the need for individuals to be able to assert constitutional constraints.[391] On the other hand, these decisions focused on the question of whether the private actors involved were wielding legislative power or were state actors, not whether the move to privatized contexts altered the applicable substantive content of constitutional guarantees. Once the fact that pri-

387. See, e.g., Scott v. Illinois, 440 U.S. 367, 373–74 (1979) (holding that the Constitution does not require government to provide counsel to indigent defendants in nonfelony trials if no term of imprisonment is actually imposed); Ortwein v. Schwab, 410 U.S. 656, 659 (1973) (concluding no constitutional right exists to waiver of fees in challenging reduction of welfare benefits). But see M.L.B. v. S.L.J., 519 U.S. 102, 110–16 (1996) (describing instances where government is constitutionally compelled to waive fee requirements and provide access to services free of charge).

388. Currin v. Wallace, 306 U.S. 1 (1939).

389. Id. at 15–16.

390. Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 399 (1940) (upholding statutory scheme on grounds that "law-making is not entrusted to the industry").

391. See West v. Atkins, 487 U.S. 42, 51–52 & 52 n.10 (1988).

vate delegates are wielding government power is acknowledged, this latter question moves to the fore.

3. *Remedying Unconstitutional Private Delegations.* — The discussion so far has sketched most of the contours of the proposed private delegation analysis. An additional important question that remains, however, concerns how courts should remedy delegations held unconstitutional.

a. *Invalidation* — In prior private delegation cases and analogous contexts, the court employed a remedy of granting declaratory or injunctive relief in holding a delegation valid.[392] The government would then be responsible for adding the required accountability or otherwise refashioning the delegation to be constitutional. It would then be up to the government to add the required accountability mechanisms or otherwise refashion the delegation to be constitutional. Not only is this remedial route the most logical response to an unconstitutional delegation, but more importantly, it accords with the basic claim underlying the proposed analysis: that the political branches of government bear primary responsibility for structuring private delegations to ensure constitutional accountability. It is, however, subject to two potentially significant criticisms. First, invalidating unconstitutional private delegations could be very disruptive, particularly given the heavy reliance on private actors in social welfare programs, where beneficiaries are often in urgent need for services and continuous care relationships are particularly important.[393] Second, this remedy would fail to rectify the harm an individual suffers as a result of an inadequately constrained private delegation; for example, simply invalidating a welfare program's reliance on private case managers does not make whole a welfare recipient who was dropped from the rolls or denied an opportunity to participate in a job training program because of her race.[394]

b. *Direct Application of Constitutional Constraints to Private Delegates.* — An alternative approach would be for a court to remedy an unconstitutional private delegation by applying constitutional constraints directly to the private delegates at issue. Governments then could continue to rely on their private delegates, and courts could ensure full relief by proceeding to consider the merits of an individual's constitutional claims if they find a private delegation to be inadequately structured. This option has

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392. See, e.g., Carter v. Carter Coal, 298 U.S. 238, 310–12 (1936); Geo-Tech Reclamation Indus. v. Hamrick, 886 F.2d 662, 666–67 (4th Cir. 1989).

393. This potential for disruption is not a concern in all cases. For example, in *Blum*, invalidating the delegation authorizing nursing homes to assess Medicaid beneficiaries' care needs would not force changes in the care beneficiaries received; it would simply mean that the state Medicaid agency would have to provide beneficiaries an opportunity to challenge the nursing homes' level-of-care assessments. But where the government does not have a substantial agency oversight mechanism already in place, invalidation could be more problematic.

394. Cf. Susan Tinsley Gooden, Race and Welfare: Examining Employment Outcomes of White and Black Welfare Recipients, 4 J. Pov. 21, 31–39 (2000) (discussing different treatment of white and African American TANF recipients in Virginia).

the further advantage of being most in keeping with current practice. Indeed, the effect of this remedial option would be to transform the private delegation approach into a version of state action analysis, one that—unlike current doctrine—allows for contingent ascriptions of state action. On this account, a private delegate's state actor status would depend upon the absence of adequate alternative accountability mechanisms.[395] Such greater compatibility with existing law is important, because it may dramatically increase the likelihood that the proposed private delegation analysis will be judicially adopted.

These benefits come at a significant cost, however. Such a state action remedy once again collapses the problem of how to constrain government power into the question of whether private actors should be subject to constitutional requirements, thereby undermining the proposed analysis' structural focus on grants of power and overall constraints. Moreover, this approach would erode the government's incentives to structure its private delegations adequately from the outset. Equally problematic are the potential effects on judicial review. Courts are more likely to insist on exact surrogates for applicable constitutional constraints when imposing such constraints on private actors represents the immediate alternative; as a result, they will be less willing to accept accountability mechanisms that are different in structure as constitutionally adequate alternatives. At the same time, the opposite danger also exists: that courts will adopt an excessively narrow account of when private delegations trigger heightened scrutiny to avoid subjecting private individuals and entities to constitutional requirements. Perhaps the latter result is likely regardless, given the extent to which the current Court seems willing to ignore the reality of privatized government in state action cases. But its probability is only enhanced by relying on a remedy that requires courts to impose liability for constitutional defects on private actors rather than on government.

c. *Invalidation with Direct Application if No Adequate Alternative Exists.* — On balance, the route of invalidation in a suit against the government appears generally the better remedial option. The remedial stage is where the equitable powers of the courts are at their broadest and thus courts should not have difficulty fashioning interim relief that minimizes disruption or ensures that injured individuals are made whole. Courts should be able to hold the government responsible to rectify harms caused by unconstitutional actions of private delegates, not be-

395. Such a contingent ascription might seem incompatible with what it means to be a state actor. That is, if what makes a private delegate into a state actor is its exercise of government power, then why should the presence of alternative accountability mechanisms make a difference? This objection loses its force, however, under a functionalist conception that views application of constitutional constraints to private actors as simply one means of ensuring that government power is exercised subject to constitutional constraints, rather than as an inevitable conclusion of finding private actors to be wielding government authority.

cause those delegates are state actors, but rather because the government itself violated the plaintiffs' constitutional rights by delegating government power without adequate safeguards. Courts also could respond to a delegation's potential unconstitutionality by reading the grant of delegated powers narrowly, a remedy much more commonly used to address delegation concerns than outright invalidation.[396] Courts also can invoke separability doctrine.[397]

On the other hand, the rejection of direct application of constitutional constraints to private actors should not be absolute. The barrier is prudential only, assuming that the private delegates are defendants in the case. Once a court has found an agency relationship indicating private exercise of government power, no substantive constitutional barrier prohibits subjecting private actors to constitutional requirements. In some contexts, an adequate alternative to direct constitutional application will not exist, whether because of the pervasiveness and potency of the delegate's powers or because other means of ensuring accountability are not readily available. One example of the latter situation is a defendant's exercise of peremptory challenges, which the Sixth Amendment protects from government supervision other than by a court.[398] The choice then becomes whether to apply constitutional constraints directly to private delegates in such contexts, or to prohibit these private delegations entirely. While either of these options would satisfy constitutional accountability concerns, the proposed analysis' emphasis on respecting the political branches' regulatory freedom counsels for direct constitutional application rather than prohibition.

In other contexts, the government may signal its willingness to have its delegates bound by constitutional requirements, for example, by statute or in its contracts with private entities. Where the government has so provided, the regulatory prerogatives argument against direct application of constitutional norms is once again quite weak. The real question is instead one of forum: Should plaintiffs be forced to sue under these stipulations, which often would be based in state law and thus would limit

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396. See, e.g., Cass R. Sunstein, Is the Clean Air Act Unconstitutional?, 98 Mich. L. Rev. 303, 357–59 (1999). But see David M. Driesen, Loose Canons: Statutory Construction and the New Nondelegation Doctrine, 64 U. Pitt. L. Rev. 1, 23–37 (2002) (arguing that the Court rarely adopts narrow statutory constructions on nondelegation grounds). *Cospito* is an example of this approach in the private delegation context, with the court of appeals there reading the Medicare statute as not giving the Joint Commission on Accreditation of Hospitals (now JCAHO) exclusive control over accreditation. This reading conflicted directly with the statute's text which required that hospitals must be accredited by JCAHO or satisfy government-promulgated standards that were equivalent to JCAHO's standards. See Cospito v. Heckler, 742 F.2d 72, 87–89 (3d Cir. 1984); see also id. at 89–91 (Becker, J., dissenting) (arguing that majority's reading did not accord with the text of Medicare statute).

397. On separability doctrine, see Hart & Wechsler's, supra note 115, at 180–84.

398. See Georgia v. McCollum, 505 U.S. 42, 59 (1992).

them to state court?[399] Or should plaintiffs also have access to federal courts based on direct constitutional claims, even though these stipulations arguably cure any constitutional accountability problem with the underlying delegation? Given that the federal Constitution is the ultimate measure of the rights being asserted, requiring plaintiffs to sue again in state court appears hard to justify. Hence, here too, the appropriate course will often be to hold that constitutional rights apply directly to the private entities involved, thereby ensuring access to federal courts under existing jurisdictional statutes.[400]

4. *The Effect of the Proposed Analysis on Existing State Action and Private Delegation Doctrine.* — A final issue concerns how the proposed private delegation analysis would interact with existing constitutional approaches to privatization. This analysis is derived from existing private delegation decisions and requires little alteration of that doctrine. But it would force a marked departure from how courts address what are now seen as state action problems.

Most notably, under the proposed analysis, the government's substantial involvement in specific private acts or more general "pervasive entwinement" with a private delegate would not subject the delegate to direct constitutional liability. On the contrary, close government involvement will often serve to defeat constitutional objections. While such involvement supports finding that the private delegate is a government agent and is exercising government power, it increases the probability that suits against the government alone are available as alternative means to ensure constitutional accountability. The private delegation approach is more compatible with the present public function test; in fact, the category of private delegations found to represent clear grants of government power could be defined alternatively as cases where a private delegate is exercising powers that traditionally and exclusively were reserved for the state.[401] But here as well the logic of the proposed analysis would force alterations. No reason exists for subjecting private delegates to constitutional constraints simply because they are performing a public function if constitutional accountability is otherwise achievable. Often, however, application of the proposed analysis would not change the result in public function cases, because the types of power at issue in those contexts tend to be such that no other mechanism adequately ensures constitutional accountability.

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399. See, e.g., Merrell Dow Pharms. v. Thompson, 478 U.S. 804, 808–10, 817 (1986) (noting general rule that "a suit arises under the law that creates the cause of action" and refusing to find federal question jurisdiction not withstanding that violation of federal statute was element of state cause of action (internal quotations omitted)).

400. 28 U.S.C. §§ 1331, 1343 (2000); 42 U.S.C. § 1983 (2000).

401. I have not defined it in those terms, however, to preserve the distinctness of the two analyses; moreover, the backwards focus of the current public function test ill comports with the private delegation analysis' concern with preserving constitutional accountability under new forms of governance.

The inconsistency of the proposed private delegation analysis and current state action doctrine, of course, makes it unlikely that the Court will adopt the proposed approach. From a realist perspective, the odds of judicial adoption are further diminished by the fact that the proposed analysis will subject many public-private relationships assumed to be unproblematic under state action doctrine to a much more searching review, with some no doubt being invalidated. Yet as privatization expands, courts increasingly must confront the transparent inadequacies of current state action doctrine. Judges will be in the uncomfortable position of choosing between constitutionalizing private action and thus displacing the political branches' regulation of government-private relationships, or allowing substantial exercises of government power to evade constitutional scrutiny. Faced with such an unpalatable choice, courts may become more accepting of efforts to fundamentally rework state action analysis, and more willing to impose obligations to preserve constitutional accountability on governments as the price of privatization.

If so, the private delegation approach has notable advantages compared to the proposals for reforming state action doctrine considered in Part III. Determining whether an agency relationship exists may at times be difficult, but, even so, agency law provides more principled and independent guidance for courts than amorphous tests such as "public function" or "pervasive entwinement." While offering a more formalized inquiry, the proposed analysis still allows courts to take account of the realities of government-private relationships; these realities will factor into a court's determinations of whether agency is present and whether the private delegations at issue are adequately structured to preserve constitutional accountability. Unlike prior reform proposals, the private delegation approach avoids unnecessary restrictions of the political branches' regulatory role by emphasizing alternative accountability mechanisms and foregoing direct application of constitutional constraints to private actors.

Perhaps most significantly, notwithstanding its inconsistency with current state action doctrine, the proposed analysis accords with the basic constitutional propositions on which that doctrine is based. One such proposition is acceptance of a public-private divide for constitutional purposes. True, the proposed private delegation approach draws this line differently from current doctrine. But the waxing and waning of state action doctrine over the second half of the twentieth century makes clear that there is more than one way of construing the meaning of government power. What the public-private divide requires is simply a recognition that the sphere of the Constitution's application is limited, so that certain actions are not subject to constitutional scrutiny. But it does not prohibit drawing the appropriate dividing line based upon a measured assessment of how best to balance constitutional accountability and gov-

ernment regulatory freedom.[402] Similarly, no conflict exists between the proposed analysis and the principle that the Constitution applies to all state action, even though private exercises of government power are immune from direct constitutional scrutiny.[403] Under the proposed analysis, constitutional constraints on government power are preserved, albeit through a different means. Private delegates' general immunity from direct constitutional scrutiny can also be justified on the grounds that when the state has imposed adequate constraints on its private delegates' exercises of government power, such exercises should not be deemed to constitute state action for constitutional purposes.[404]

The proposed analysis is also compatible with the principle that, absent exceptional circumstances, government owes no duty to protect individuals from independent private harm. True, the effect will often be to require the government to provide protections against private abuse; indeed, one central advantage of the private delegation approach is that it encourages the government to undertake greater supervision of its private delegates. Critically, however, private delegations do not represent situations in which the government has failed to intervene to address harms caused by private actors, but rather ones where the government has affirmatively acted by delegating decisionmaking authority over government programs to private hands.[405] Thus, holding that government bears responsibility for ensuring private delegations are adequately constrained is simply demanding that the government itself act in accordance with constitutional requirements—in this case, with the principle of constitutional accountability.[406] Here again, the structural emphasis of the proposed inquiry is useful because it directs attention to the govern-

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402. See Seidman, Public Principle, supra note 131, at 1019–29 (advancing view of public-private divide as socially constructed boundary that balances conflicting values).

403. It is, however, at odds with current state action doctrine, which treats all actions of the government as state action for constitutional purposes. See Strauss et al., supra note 187, at 414–19 (criticizing this feature of current doctrine and advocating systemic or functionalist approach that looks at effect of government entity's actions on individual freedoms generally).

404. Notably, support for this proposition can be found in the *Civil Rights Cases*, the seminal decision setting forth the state action doctrine. 109 U.S. 3 (1883). One reading of that decision views it as holding that private harm cannot be state action when the state stands ready to rectify private harm through other means. See id. at 25 ("Innkeepers and public carriers, by the laws of all the states . . . are bound . . . to furnish proper accommodation to all unobjectionable persons who in good faith apply for them. If the laws themselves make any unjust discrimination . . . Congress has full power to afford a remedy . . . ."); Seidman, State Action, supra note 128, at 395.

405. Even *DeShaney* acknowledged that the government can be liable for failing to protect individuals where it makes them vulnerable to private harm, although it suggested that only a state's assuming custodial control can lead to ascription of such affirmative duties. See DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 199–200 (1989); Erwin Chemerinsky, Federal Jurisdiction § 8.9 (2d ed. 1994) (discussing subsequent lower court decisions on when government is subject to duty to protect).

406. Contra Logiodice v. Trs. of Me. Cent. Inst., 296 F.3d 22, 31 (1st Cir. 2002) (holding that failure to include adequate protections in contract with private school

ment's own decisions regarding the design of private delegations, conduct for which the government is clearly liable.[407]

C. *Application of the Proposed Private Delegation Analysis*

To summarize, the proposed private delegation analysis would proceed as follows: An individual injured or likely to be injured by a private delegate's action would bring suit against the government (and perhaps the private delegate itself), arguing that the delegation authorizing the private action is unconstitutional because it is inadequately structured to ensure that private exercises of government power adhere to constitutional requirements. In assessing the merits of this claim, the court would first determine whether the delegation creates an agency relationship between the private actor and the government. If not, and if the private delegation does not otherwise involve a clear grant of government power or power to act on the government's behalf, the plaintiff would lose on the merits.

Where the court finds such an agency relationship, it would then proceed to assess whether the delegation is adequately structured to preserve constitutional accountability. This requirement is met where some mechanism exists by which the individual can enforce constitutional limits on private exercises of government power, such as a statutory surrogate for a constitutional claim or the ability to assert actual constitutional claims against the government. The government becomes a potential target for constitutional challenge when it either sanctions the private delegate's specific actions on administrative review or makes an independent determination as an alternative to private decisionmaking. Other means of satisfying constitutional accountability demands would be to structure the delegation so that no private delegate exercises monopolistic or quasi-monopolistic control over access to government benefits, or to delegate only very limited powers. A court may also conclude that a private delegation meets constitutional requirements, even without limitations on private delegates equivalent to those that apply to government, because in a particular context the Constitution imposes lesser substantive constraints on private entities wielding government authority.

As this description suggests, the claim that a private delegation is inadequately structured to preserve constitutional accountability can take the form of a facial challenge. In some cases, however, the inadequacy of

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represents government inaction for which *DeShaney* precludes constitutional liability), cert. denied, 537 U.S. 1107 (2003).

407. See Tribe, Constitutional Choices, supra note 148, at 253, 265. That the government is so responsible is clear from private delegation decisions such as *Currin* and *Sunshine*, which never questioned the propriety of the government's status as a defendant. Indeed, the presence of state action in such design choices is so clear that it often goes unstated. For the rare case where this issue was discussed, see Denver Area Educ. Telecomm Consortium, Inc. v. FCC, 518 U.S. 727, 737–39 (1996) (noting that congressional statute "by definition" is congressional action subject to First Amendment).

alternative accountability mechanisms will only become apparent through practical application; for example, it may not be clear from the face of governing regulations that certain types of claims are excluded from an administrative complaint system. In such as-applied contexts, plaintiffs would combine their claims for relief under existing accountability mechanisms with the alternative argument that if such relief is unavailable, the delegation is unconstitutional.

If a private delegation creates an agency relationship or involves delegation of power to act on the government's behalf, and is inadequately structured to ensure that government power is ultimately kept within constitutional bounds, the delegation would be unconstitutional. The usual remedy will be for a court to invalidate the delegation and hold the government responsible for the delegate's unconstitutional acts. But in rare situations, courts may instead apply constitutional constraints directly to the private delegates involved, because doing so represents the only means of ensuring constitutional accountability.

The major question remaining is what difference the proposed private delegation analysis will make in practice. Some sense of an answer comes from examining the different results in past state action cases, summarized below in Table I. Further indications about the practical effect of the proposed analysis become apparent when applying it to the recent government privatization efforts in the health care, welfare, public education, and prison contexts discussed in Part I.

1. *Privatization in Health Care: Medicare and Medicaid Managed Care.* — The statutes, regulations, and contracts authorizing the use of managed care under Medicare and Medicaid represent private delegations that create agency relationships between MCOs and the government. While desirous of making a profit for themselves, the MCOs also plainly act on the government's behalf: In exchange for a set per-beneficiary payment, the MCOs determine eligibility for and provide medical services that federal and state governments are required to make available to beneficiaries in these programs. The contracts between the government and MCOs, as well as the obvious connection of the MCOs' services to Medicare and Medicaid, offer ample evidence of principal and agent assent to an agency relationship. Principal control, in turn, is manifested by the government's stipulations regarding which services must be provided and regulation of MCOs' operations.[408]

408. See Grijalva v. Shalala, 152 F.3d 1115, 1120 (9th Cir. 1998) ("[Medicare MCOs] . . . are not making decisions to which the government merely responds. [MCOs] are following congressional and regulatory orders and are making [coverage] decisions as a governmental proxy."), vacated, 526 U.S. 1096 (1998); see also J.K. v. Dillenberg, 836 F. Supp. 694, 699–700 (D. Ariz. 1993) (finding agency where private organization given authority to determine eligibility for and arrange provision of behavioral health services).

TABLE I

Case	Current State Action Doctrine	Proposed Private Delegation Analysis	
		Result	Rationale
Blum v. Yaretsky	No state action	Unconstitutional private delegation	The delegation to nursing homes of power to determine extent of Medicaid beneficiaries' need for nursing services creates an agency relationship, and this delegation is not adequately structured to preserve constitutional accountability: No mechanism exists by which individual beneficiaries can challenge nursing homes' care determinations; in addition, homes exercise quasi-monopoly powers over residents.
Rendell-Baker v. Kohn	No state action	Constitutional private delegation	The delegation to private school of responsibility to provide education to special needs students creates an agency relationship, but, at least with regard to teacher terminations, informal state oversight is adequate to preserve constitutional accountability.
West v. Atkins	State action	Unconstitutional private delegation	The delegation to a private doctor to provide medical services to inmates creates an agency relationship, and this delegation is not adequately structured to preserve constitutional accountability: The government undertook no oversight of the doctor's medical decisions; private law remedies such as malpractice suits do not support a claim for failure to provide medical services; and the doctor exercised a monopoly over inmate access to medical care.
Am. Mfrs. Mut. Ins. Co. v. Sullivan	No state action	Constitutional private delegation	The statutory authorization for private medical insurers to decline to pay workers' compensation claims absent a finding of medical necessity does not create an agency relationship.

TABLE I (CONTINUED)

Case	Current State Action Doctrine	Proposed Private Delegation Analysis	
		Result	Rationale
Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n	State action	Unconstitutional private delegation	The prior state delegation of exclusive control over interscholastic athletics, combined with public school officials' de facto control of the Association, creates an agency relationship, and this delegation is not adequately structured to preserve constitutional accountability: The Association's decisions were not subject to government review; no alternative means of enforcing constitutional requirements existed; and the Association exercised substantial authority over high school athletics in the state.
San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.	No state action	Unconstitutional private delegation	Whether Congress' delegation to the USOC of exclusive oversight over amateur sports created an agency relationship with the federal government is a close question. This delegation, as evidenced by Congress' chartering of the USOC and granting it direct access to federal funds, served federal policy goals; however, the government bore no statutory responsibility to provide oversight of amateur sports or of the United States' representation at the Olympics. Regardless, the grant of exclusive oversight represents a clear delegation of government power, because the USOC is authorized to regulate amateur athletics and take enforcement action against individual athletes and organizations. While procedural requirements imposed on the USOC by statute may be adequate to meet due process requirements, mechanisms to enforce other constitutional limits appear lacking.

Thus, under the proposed private delegation analysis, these delegations merit enhanced scrutiny to determine if they are adequately structured to ensure constitutional accountability. Regulations limit when beneficiaries can leave an MCO, so that the options of enrolling in a different MCO or returning to fee-for-service (options that may only exist under Medicare) do not satisfy concerns about the MCOs' powers over beneficiaries.[409] Accreditation requirements are significant protections against poor quality services and denials of medically needed services;[410] however, they are not adequate safeguards from a constitutional accountability perspective because accrediting organizations do not provide oversight of MCO decisions in particular cases and often lack mechanisms by which individuals can challenge accreditation decisions.[411] Private rights of action and rights to independent review of coverage denials may be available under state law,[412] but such rights may not extend to the Medicare and Medicaid contexts given the federal nature of the programs and the presence of administrative systems for review of denials.[413]

As a result, whether these private delegations to MCOs are constitutional turns on the adequacy of these systems and their respective provisions for administrative review. In *Grijalva*, the court concluded that the existing system for administrative appeals, which closely paralleled the appeals procedures used to challenge denials of coverage under Medicare fee-for-service,[414] failed to satisfy due process in the MCO context where such a denial prevents access to health care, not just access to reimbursement. In particular, the court concluded that the period within which administrative review had to occur was excessively long and that notices of appeal rights provided by MCOs were inadequate.[415] The due process concerns raised by the court appear quite real,[416] and the conclusion that

409. See, e.g., Election of Coverage Under an M+C Plan, 42 C.F.R. § 422.62(a) (2002). Moreover, in some regions of the country, very few MCOs participate in Medicare. Outside of central urban areas, beneficiaries commonly have only one choice of managed care plan; indeed the vast majority of beneficiaries in rural areas have no choice of managed care at all. See Gold & McCoy, supra note 24, at 1–2.

410. Several commentators have emphasized the importance of accrediting institutions in ensuring accountability of the services and activities of MCOs. See, e.g., Furrow, supra note 22, at 396–406; Gladieux, supra note 22, at 107–17. For a discussion of the role of accreditation in public health programs, see Kinney, Private Accreditation, supra note 26, at 47; see also Clark Havighurst, Foreword: The Place of Private Accrediting Among the Instruments of Government, Law & Contemp. Probs., Autumn 1994, at 1, 5–14 (discussing arguments for and against government reliance on private accreditors).

411. See Freeman, Private Role, supra note 2, at 613–15.

412. See supra sources cited in note 35.

413. See Medicare Program, Improvements, supra note 213, at 16,661 (noting that federal rules preempt state grievance requirements relating to coverage decisions).

414. See Gladieux, supra note 22, at 66–68.

415. Grijalva v. Shalala, 946 F. Supp. 747, 757–60 (D. Ariz. 1996).

416. See Bonnyman & Johnson, supra note 27, at 376–79 (arguing that due process requires better notice and more expedited review than was provided under Medicare managed care prior to *Grijalva*, as well as impartial review and maintenance of services pending appeal); Morrison, supra note 22, at 741–42 (detailing inadequacies in Medicare

a system of government review fails to ensure due process would also mean that the system is inadequate as a constraint on a private delegation.

Until this point, therefore, the proposed analysis deviates little from that in *Grijalva*.[417] The difference between the two lies instead at the remedial stage. *Grijalva*'s state action finding would support suits directly against the MCOs on constitutional claims, had it not been vacated post-*Sullivan*. Under the proposed analysis, however, such suits would not be authorized and instead claims of unconstitutional delegations would lead only to relief from claims against the government. Moreover, the content of such relief would be different from that in *Grijalva*. Rather than specifying the substance of the procedures MCOs must follow in detail (including the size of font to be used in notices), courts would simply require the government to adopt adequate constraints or rescind the delegation. It would be up to the government to determine whether to improve its oversight of MCOs or adopt another approach, such as express rights to independent review. In addition, the regulations that the government issued while *Grijalva* was on appeal might well satisfy constitutional accountability requirements, even though they did not comply with the specifications in the district court's order.[418] Hence, their promulgation would have ended the government's liability and mooted the case.[419]

MCO appeal procedures); Wright, supra note 34, at 174, 177–78 (arguing that due process requires right to appeal every MCO coverage determination and concluding that constitutionally adequate managed care is thus infeasible under Medicare and Medicaid).

417. Given its emphasis on preserving regulatory flexibility, the proposed analysis would give government claims of administrative burden and negative regulatory trade-offs more serious consideration than they were accorded by the district and appeals courts in *Grijalva*. See Grijalva v. Shalala, 152 F.3d 1115, 1123 (9th Cir. 1998), vacated, 526 U.S. 1096 (1999). In the end, however, courts might still find these concerns outweighed by the other factors in the *Mathews v. Eldridge* three-part due process balance. 424 U.S. 319, 335 (1976).

418. These regulations required MCOs to provide notice of appeals procedures and complete coverage determinations generally within fourteen calendar days (or within seventy-two hours when expedited review was medically warranted), and authorized independent review of coverage denials. By contrast, *Grijalva* required MCOs to complete determinations within five working days, imposed more extensive notice obligations, required appeal rights for service reductions as well as terminations, and mandated continuation of benefits pending appeal in a broader range of cases. See Morrison, supra note 22, at 755–57; see also Gladieux, supra note 22, at 89–90 (arguing that regulations basically accorded with *Grijalva* requirements and approving of both their provision for accelerated expedited review as well as their different timelines for payment-related and service-related appeals); Gegwich, supra note 33, at 223–24 (arguing that Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251, provides adequate improvements to appeals process).

419. See, e.g., Healey v. Thompson, 186 F. Supp. 2d 105, 121, 127 (D. Conn. 2001) (emphasizing that "a court should be loathe [to] intervene and usurp the reform process already running its course" and refusing to require notices before home health services are reduced or terminated). The court of appeals' refusal to consider the new regulations in *Grijalva* stemmed from its perhaps justified annoyance that the government had not

Implicit in the foregoing is that the delegations to MCOs raise constitutional accountability concerns only with respect to their treatment of enrolled beneficiaries. MCOs also exercise control over other third parties—specifically beneficiaries seeking to enroll, employees, and participating medical providers. But with respect to these individuals, the delegations are adequately structured to preserve constitutional accountability. Governing statutes and regulations expressly protect the rights of Medicare beneficiaries to enroll in a participating MCO,[420] and the option of fee-for-service in the interim plays a more curative role. Similarly, medical providers' ability to affiliate with another MCO or offer services through fee-for-service means that no single MCO exercises monopolistic or quasi-monopolistic power over providers' ability to participate in Medicare. Accordingly, MCOs do not appear to be in an agency relationship with the federal government regarding their other employees.[421]

2. *Privatization in Welfare: Wisconsin's W-2 and Contracted-Out Welfare Services.* — Little doubt exists that Wisconsin's delegation to private organizations of responsibility for operating the W-2 welfare program in Milwaukee creates agency relationships between the organizations and the State. Indeed, the W-2 statute makes this clear by defining the entities implementing W-2 as "agenc[ies]."[422] Unlike the workers' compensation system in *Sullivan*, here the obligation to provide benefits lies by statute with the government, which in turn contracted out this responsibility to private agencies, with the state welfare department exercising over-

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sought such relief from the district court. Under the proposed analysis, however, responsibility would lie in the first instance with the government to design new regulations to address constitutional accountability concerns once the district court found the existing regulations inadequate.

420. See 42 U.S.C. §§ 1395w-21(a)(1), 22(b) (2000). Under Medicaid, the concern is not an MCO's refusal to enroll beneficiaries so much as beneficiaries being automatically enrolled in MCOs not of their choosing. See Marsha Gold et al., Medicaid Managed Care: Lessons from Five States, *in* Contemporary Managed Care, supra note 31, at 191, 195–97; Eric Lipton, State Extends Program to Enroll the Poor in Managed Care Plans, N.Y. Times, July 1, 2000, at B4 (noting problems with enrollment in Medicaid managed care in New York); Jennifer Steinhauer, 73% Enroll in First Drive to Shift City's Medicaid Patients to Health Plans, N.Y. Times, Dec. 1, 1999, at B5 (noting initial data on mandatory Medicaid MCO enrollment suggest over 25% of beneficiaries may end up being automatically assigned to managed care plan).

421. Cf. Blumstein & Sloan, supra note 212, at 228 (contending that concerns regarding governments' ability to evade constitutional limitations by delegating statutory responsibilities to private entities are inapplicable to Medicaid MCOs' relationships with providers and suppliers). In any event, federal law grants providers procedural rights to challenge Medicare MCO participation decisions and prohibits Medicare MCOs from limiting providers' ability to recommend services. See § 1395w-22(j); see also §§ 1395w-22(b), 1396u-2(b)(7) (protecting providers against discrimination by Medicare and Medicaid MCOs on the basis of their licenses or certifications).

422. Wis. Stat. Ann. § 49.143 (2003); see also Wis. Admin. Code DWD § 12.03(38) (2003).

sight.[423] The W-2 statute sets out the basic features of the W-2 program that the W-2 agencies are responsible for implementing—including the program's eligibility and participation requirements, levels of benefits, and types of services available to beneficiaries.[424] Nor can there be much doubt that this delegation is inadequately structured to preserve constitutional accountability. Although four private W-2 agencies now operate in Milwaukee, each has a monopoly over implementing the program and providing welfare benefits in the particular geographic regions it serves.[425] The W-2 statute imposes few procedural restrictions on the W-2 agencies, and the government's contracts with W-2 agencies also impose very few restrictions on how their programs operate.[426] The oversight undertaken by the state's welfare department, while sufficient to support a finding of agency, is insufficient for constitutional purposes; individuals are allowed to petition the department for review of adverse W-2 agency decisions, but the department need grant such review only where the decision found an applicant financially ineligible for aid.[427] A provision in Wisconsin's public assistance law states that public assistance agencies shall respect the rights of public assistance recipients, including constitutional rights, but it provides no express mechanisms by which recipients can enforce this requirement.[428]

Hence, the delegation in its current form would be unconstitutional. Moreover, adequately restructuring the program to ensure sufficient accountability would appear to require that the government either implement a broader administrative appeals system, or dramatically alter the performance incentive structure of the W-2 program. The current struc-

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423. See Wis. Stat. Ann. § 49.141(1)(p) (defining Wisconsin Works as "the assistance program for families with dependent children"); id. § 49.143(1) (authorizing contracting out of W-2 administration and requiring the department to administer W-2 in a geographic area if no other provider is selected); Wis. Admin. Code DWD § 12.04 (granting department of workforce development oversight responsibility for administration of Wisconsin Works by contract agencies).

424. See Wis. Stat. Ann. §§ 49.143–49.161; Wis. Admin. Code DWD § 12.05(1) (requiring W-2 agency to comply with governing statutes, regulations, and program procedures).

425. See Wis. Stat. Ann. § 49.143(6); McConnell et al., supra note 42, appx. at A24.

426. See Wis. Stat. Ann. § 49.143(2) (listing W-2 contract requirements, which almost entirely address substance of services); id. § 49.152 (requiring W-2 agencies to provide review of certain decisions if timely requested to do so); Wis. Admin. Code DWD § 12.06(4) (imposing time limits on processing of applications for W-2); Dodenhoff, supra note 42, at 19–21 (describing initial W-2 contracts as "say[ing] next to nothing about how W-2 agencies are to run their programs on a day-to-day basis," although including sanctions for private agencies that fail to provide procedural due process).

427. See Wis. Stat. Ann. § 49.152; Wis. Admin. Code DWD §§ 3.01–3.12, 12.22; see also Rotker et al., supra note 54, at 536–39 (detailing inadequacies in appeals procedures).

428. See Wis. Stat. Ann. § 49.81; see also State of Wis. Dep't of Workforce Dev., Wisconsin Works (W-2) and Related Programs Contract for the Period January 1, 2002 through December 31, 2003, at ¶ 30 (2001), available at http://www.dwd.state.wi.us/dws/w2/contracts/20022003/pdf/w2contract.pdf (on file with the *Columbia Law Review*) (imposing nondiscrimination requirements on W-2 agencies).

ture gives the W-2 agencies a financial interest in the decisions they make regarding program participants,[429] such that allowing the agencies to make these decisions, at least absent access to independent review, appears to violate due process.[430]

These problems notwithstanding, the W-2 case illustrates how a private delegation inquiry can invest the government with more regulatory freedom than does a state action analysis. It seems likely that the private W-2 agencies would be found to be state actors on the basis of government involvement; as in *Grivalja*, the W-2 agencies not only provide state-subsidized services, but also implement state-specified welfare eligibility and participation requirements. There is also a solid chance that wholesale administration of a state's income assistance program would qualify as a public function, particularly given that in most of Wisconsin, the functions of the private W-2 agencies are performed by county social services departments.[431] Accordingly, under current doctrine the W-2 agencies are subject to direct constitutional scrutiny. While the government's regulatory flexibility is also limited under the private delegation analysis, it at least gives the government the choice of avoiding this result by instituting more comprehensive review.

The opposite situation holds with respect to contracted-out job placement and case management services. *Blum* and *Rendell-Baker* indicate that these situations will rarely trigger a state action conclusion. Yet these forms of privatization are instances of private delegations that create agency relationships with the government and that would provoke enhanced scrutiny under the private delegation analysis. Some of these delegations may end up being unconstitutional, but such a result is not preordained. While governments exercise little case-by-case oversight over the actions of such contracted service providers, even a minimal opportunity for review of job placement decisions will likely satisfy constitutional concerns, at least as long as providers have no financial interest in limiting placements and particularly if placement decisions are given to professionals. But under the proposed analysis, courts would be able to

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429. Each agency is allocated a set amount to cover program costs during a period and is allowed to retain a portion of any surplus not paid for services. In addition, agencies are eligible for performance bonuses based on placements and job retention rates of participants. See Wis. Stat. Ann. § 49.143(3g); Wis. Legislative Audit Bureau, supra note 44, at 40–43.

430. See D. Kennedy, Due Process, supra note 7, at 301–05; see also Tumey v. Ohio, 273 U.S. 510, 523 (1927) ("[I]t certainly . . . deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him.").

431. See, e.g., Catanzano v. Dowling, 60 F.3d 113, 119–20 (2d Cir. 1995) (holding private home health agencies to be state actors where their decisions regarding eligibility for nursing care are not subject to further review); Blumstein & Sloan, supra note 212, at 228–30 (arguing that case law "strongly suggests that a total and final decisionmaking delegation to a private entity regarding eligibility for a public benefits program would be considered state action, even when there is no tradition of public provision of services").

assess whether additional procedural safeguards are needed to ensure private providers' decisions regarding services comport with constitutional requirements, whereas under current doctrine such private decisionmaking is constitutionally exempt. As a result, courts are able to assess whether additional protections may be required in particular contexts—for example, when a private provider's determination that a beneficiary has been absent from a placement without good cause results in sanctions or terminations of benefits where constitutional concerns may be more acute.

A more interesting alternative is suggested by the Workforce Investment Act of 1998 (WIA).[432] Included in the WIA is a requirement that states provide individual training accounts as part of their workforce development programs, which allow program participants eligible for training services to choose their providers rather than be assigned.[433] The WIA provides little detail on how these accounts will operate in practice.[434] But assuming the WIA board has contracted with a variety of providers and beneficiaries can truly choose among programs, use of this approach would adequately address constitutional accountability concerns otherwise presented by private providers' control over government-subsidized employment services.

3. *Privatization in Public Education: Charters, EMOs, and Vouchers.* — A useful starting point for assessing the impact of the proposed analysis on the three moves to greater privatization in public education detailed above—development of charter schools, reliance on private EMOs to manage public schools, and subsidization of private school tuition through vouchers—is to examine how these three initiatives fare under current state action doctrine. Charter schools most likely would be found part of the government for constitutional purposes, given that they are officially denominated public schools, often are created by the state, and operate subject to the state's direct oversight.[435] At a minimum, these features present a very strong case for a conclusion of state action, either on the basis of extensive government involvement as in *Brentwood Academy*, or on the theory that managing a public school (although not providing educational services) is traditionally the exclusive prerogative of

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432. 29 U.S.C. § 2801 (2000).

433. Id. § 2864(d)(4)(F)(iii); see also 42 U.S.C. § 607(h) (2000) (discussing individual development accounts under TANF). Hennepin County, Minnesota, has adopted a similar approach in regard to TANF case management and allows beneficiaries to choose between public and private case management services. See McConnell et al., supra note 42, at 7, appx. at A7–A8.

434. See Ellis, supra note 386, at 242, 253.

435. See Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 397–99 (1995) (finding Amtrak to be part of government for constitutional purposes where government chartered the corporation, appointed a majority of directors, and used Amtrak to serve its policy goals).

the state.[436] A similar conclusion applies to privately managed public schools and the decisions of EMOs in operating them.[437] On the other hand, *Rendell-Baker* strongly suggests that state action will not exist with regard to private schools participating in a voucher program unless there is evidence the state compelled or encouraged the specific decision at issue.[438]

All three, however, represent delegations where private entities are authorized to act on the government's behalf, even if not instances of agency relationships. EMOs are perhaps the clearest case for agency: They not only operate acknowledged public institutions and provide education services in exchange for payment from the government, but are most clearly subject to government control through school board supervision and oversight. Charter schools' frequent exemption from state educational regulations in exchange for performance promises renders government control more limited. But the combination of requirements that the government does impose on charter operation (such as open access mandates) with provisions for chartering agency oversight and charter revocation,[439] may suffice to establish agency; their official denomination as public schools adds an additional basis for finding agency status. On the other hand, while the private schools involved in voucher programs are providing educational services subsidized by the government and are subject to some government regulation, the relationship between the government and the private schools appears too attenuated to support a finding of agency. Nonetheless, private schools participating in voucher programs are fairly described as acting on the government's behalf, in that they provide educational services in exchange for payment by the government, services that the government would otherwise have to provide directly. Moreover, the schools clearly exercise some control over enrolled students' access to a government benefit: a subsidized education.

As a result, the constitutionality of all three private delegations again reduces to the question of whether the delegations are adequately constrained. Where the government provides an administrative process

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436. See id. (distinguishing between finding a private entity to be part of government for constitutional purposes and finding it to be a state actor); see also Robert M. O'Neil, School Choice and State Action, *in* School Choice and Social Controversy: Politics, Policy, and Law 215, 220–22 (Stephen D. Sugarman & Frank R. Kemerer eds., 1999) (noting that charter schools are an easy case for state action); Frank R. Kemerer & Catherine Maloney, The Legal Framework for Educational Privatization and Accountability, 150 West's Educ. L. Rptr. 589, 593 (2001) (arguing that charter schools are indisputably state actors).

437. See Kemerer, Legal Status, supra note 65, at 43–44.

438. Jesse H. Choper, Federal Constitutional Issues, *in* School Choice and Social Controversy, supra note 436, at 235, 252–53; Kemerer & Maloney, supra note 436, at 593. But see O'Neil, supra note 436, at 225–32 (arguing that Fourteenth Amendment prohibition on racial discrimination applies to private schools participating in voucher program).

439. See supra note 60 and accompanying text.

under which students and teachers can file complaints and obtain expeditious independent review of particular actions, such as suspensions or employment terminations, adequate constraints appear present. But such a complaint mechanism is unlikely to be available; in the case of EMOs operating public schools, access to government review mechanisms will likely depend on the terms of the contract between the EMO and the district,[440] while charter school laws and voucher programs provide at best for periodic oversight by government agencies.[441] Independently enforceable statutory or regulatory controls are also unlikely, as states generally impose few substantive requirements on charter schools or schools participating in voucher programs.[442] Similarly, the state law remedy relied upon in *Logiodice*—an action against the school district for failing to meet its statutory duty to provide a free education—will have less traction where public school alternatives are provided.[443]

This raises the interesting question of whether adequate constraints are provided by the very system of school choice itself. In principle, such systems of choice should adequately ensure constitutional accountability because the schools' powers are dependent on parent, student, and teacher decisions. A central difficulty with relying on school choice to preserve constitutional accountability, however, comes from the fact that all three moves to privatization are much more common in urban school districts marked by failing public schools.[444] Realistically, therefore, the option of remaining in the public school system is not available, and os-

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440. See, e.g., Rendell-Baker v. Kohn, 457 U.S. 830, 834–35, 841–42 (1982) (detailing lack of mechanisms for government to review employment decision of school providing services under contract to local school district and state agency); Logiodice v. Trs. of Me. Cent. Inst., 296 F.3d 22, 28 (1st Cir. 2002) (noting whether private school obligated to follow state law on student suspension turns on its contract with school district), cert. denied, 537 U.S. 1107 (2003); Kemerer, Legal Status, supra note 65, at 46–48 (detailing effects of privatization on collective bargaining agreements with teachers).

441. For discussions of government oversight, see Hill & Lake, supra note 72, at 48–49 (detailing problems with oversight of charter schools); Sugarman & Kuboyama, supra note 59, at 917–29 (noting chartering agency oversight focuses on student performance and fiscal accountability).

442. For requirements applied to charter schools and voucher schools, Frank P. Kemerer, Legal Issues Involving Educational Privatization and Accountability 38–40 (Nat'l Ctr. for the Study of Privatization in Educ., Teachers Coll., Columbia Univ., Occasional Paper No. 6, Aug. 2000), available at http://ncspe.org/publications_files/400_OP06.pdf (on file with the *Columbia Law Review*); Kemerer, Legal Status, supra note 65, at 53–54 (noting initial requirement, later dropped, in Wisconsin voucher program that schools must protect a wide variety of constitutional rights); see supra note 60. See also Jay P. Heubert, Schools Without Rules? Charter Schools, Federal Disability Law, and the Paradoxes of Deregulation, 32 Harv. C.R.-C.L. L. Rev. 301, 313–40 (1997) (describing the applicability of federal disability laws to charter schools).

443. *Logiodice* also suggests that this form of redress is unlikely to apply to private school actions short of expulsion, but notes that the specific rights available would turn on the content of the state law in question. 296 F.3d at 30.

444. See Ryan & Heise, supra note 65, at 2073–85 (discussing urban-suburban differences in charter schools and voucher programs).

tensible school choice may offer little protection against private abuse of government power. Yet, *Zelman* indicates, that the Court views "private choice" in the public education context as meaning formal rather than actual choice. The Court sustained Cleveland's voucher program against an Establishment Clause challenge in part because the program allowed students to attend Cleveland's public schools, out-of-district public schools, or private non-sectarian schools—even while simultaneously acknowledging the abysmal education available through the first alternative, and notwithstanding that low tuition subsidies made the other two nearly nonexistent in practice.[445] Holding that constitutional accountability demands use of vouchers only when the public schools are healthy is also at odds with *Zelman*'s suggestion that in such contexts a better case can be made that the voucher program is unconstitutionally motivated by a desire to foster religion.[446] And as a practical matter, that approach seems to deny the government flexibility to explore privatization precisely when such flexibility is most needed.

Looking at these instances of public education privatization through a private delegation analysis thus could have varying effects. It would forestall finding charter schools and EMOs directly subject to constitutional constraints as state actors. But, more importantly, it would require states to expand their systems of oversight or impose independently enforceable requirements on charters, EMOs, and private schools participating in voucher programs. On the other hand, the reliance on individual choice to structure these programs suggests that the level of close government supervision required in the Medicare/Medicaid MCO and W-2 contexts should not be required here.

Charter schools and voucher programs are also good examples of how constitutional rights may change with the move to more private contexts. In part, this results from changes in the factual underpinnings that support certain claims; teachers who are hired by charter schools or private schools do not have the same expectation of continued tenure as those hired by public schools governed by civil service or collective bargaining rules and thus may have no procedural due process right to a hearing if fired.[447] Further, it may be that the substance of some consti-

445. Zelman v. Simmons-Harris, 536 U.S. 639, 644–45, 653–56 (2002). See also Vincent Blasi, Vouchers and Steering, 18 J.L. & Pol. 607, 615 (2002) (noting that *Zelman* does not impose obligation on government to provide range of realistic nonreligious educational options as requirement of avoiding Establishment Clause violation); Lupu & Tuttle, supra note 314, at 595–605 (arguing that government should have to demonstrate that voucher recipients have sufficient nonreligious choices within voucher program for the program to withstand Establishment Clause challenge).

446. See *Zelman*, 536 U.S. at 649.

447. See Bd. of Regents v. Roth, 408 U.S. 564, 566–69 (1972) (holding due process does not protect untenured professor's interest in continued employment where hired to teach for one year only); see also Perry v. Sindermann, 408 U.S. 593, 599–603 (1972) (holding due process required hearing on untenured professor's claim that practice and expectations were that employment contracts would be renewed). Even if teacher

tutional rights changes in order to accommodate the legitimate autonomy and associational interests at stake. To take a contentious example, perhaps religious schools participating in voucher programs should be able to prohibit advocacy of other faiths on school grounds without violating the First Amendment, although no public school could do so.[448] Under current doctrine, this conclusion follows from the lack of state action, but it could also result under the private delegation analysis from recognition of the school's strong interest in preserving its religious identity.[449] Alternatively, given the government's interest in preserving private flexibility, perhaps private schools should not be subject to the same due process requirements as public schools, even when similar benefit entitlements are at stake. Indeed, the refusal to find state action in *Logiodice* appears motivated in part by the Court's conclusion that the private school's failure to hold a hearing on the student's suspension—which the majority describes as one of "the small arguable unfairnesses that are part of life"—should not constitute a due process violation.[450]

4. *Private Prisons.* — This leaves application of the proposed analysis to privately operated prisons. Currently, private prisons are a fairly straightforward case for finding state action on public function grounds. Notwithstanding the lengthy historical pedigree of private involvement in incarceration, today punishment and the legitimate use of physical coercion are seen as exclusive state prerogatives.[451] Similarly, under the proposed analysis, the use of private prisons easily constitutes a delegation of government power, whether because of the agency relationship created by contracts between governments and prison operators or because incarceration is inherently an exercise of government power.

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employment relationships in the charter and voucher contexts were framed as entitlements, application of the test in Mathews v. Eldridge, 424 U.S. 319, 335 (1976), might lead to a similar result, in that the government's interest in preserving charter schools' flexibility and the willingness of private schools to participate in voucher programs may tip the balance against pretermination hearings and militate for very minimal procedural protections generally.

448. See Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 390–97 (1993); see also *Zelman*, 536 U.S. at 715 (Souter, J., dissenting) (arguing that one danger of voucher programs is that they will lead to political efforts to limit what is taught in religious voucher schools). For contrasting views on the acceptability of such religious discrimination, compare O'Neil, supra note 436, at 225–26 (supporting), with Minow, Partners, supra note 2, at 118 (opposing).

449. See Kathleen M. Sullivan, The New Religion and the Constitution, 116 Harv. L. Rev. 1397, 1397–1402 (2003) (discussing threat to religious autonomy posed by prohibitions on religious and other forms of discrimination); see also Eule & Varat, supra note 132, at 1605–33 (discussing associational and autonomy harms of transporting First Amendment free speech requirements to private contexts).

450. Logiodice v. Trs. of Me. Cent. Inst., 296 F.3d 22, 30 (1st Cir. 2002), cert. denied, 537 U.S. 1107 (2003).

451. Although the Court has not addressed the question, its holding in *West* that a doctor treating prison inmates was a state actor supports this conclusion, and several lower courts have found private prisons to be state actors in suits by prisoners because incarceration represents a public function. See supra note 94 and accompanying text.

The more interesting issue is whether alternative mechanisms exist that would adequately preserve constitutional accountability without direct application of constitutional constraints to private prison operators. The most obvious candidate is an administrative complaint system under which inmates would have extensive ability to challenge private prisons' decisions and actions. But the powers wielded by prison operators and guards are too pervasive and the interactions between prison staff and inmates too inherently discretionary to be adequately policed solely by a system of indirect controls.[452] This conclusion draws support from the Court's decision in *Malesko*. There, in refusing to imply a private right of action for damages for constitutional violations against the private prison operator, the Court underscored the availability of alternative means for enforcing constitutional requirements—direct injunctive relief and actions against individual prison guards—in addition to the availability of administrative review.[453]

An alternative mechanism would be regulatory or contractual provisions requiring private prisons to respect the constitutional rights of inmates and authorizing inmates to bring suit against private prisons to challenge alleged violations. Here, direct protections against private abuse are provided. However, this route often would preclude suits against private prisons in federal court, as unless the prisons were operating on the behalf of the federal government, actions based on these provisions would be rooted solely in state law. Absent a basis in federal statutory law, ensuring access to federal courts in this context requires finding private prisons to be state actors directly subject to constitutional constraints.[454] Given the historical importance of federal courts in improving conditions in public prisons,[455] the prudential case for direct application of constitutional constraints is particularly strong.[456]

Thus, privately operated prisons represent one of the instances where under the proposed analysis private entities might still be deemed state actors. Yet the proposed analysis could lead to different results in regard to other forms of prison privatization. For example, in *West*, the Court found that a private doctor providing medical care to inmates pursuant to a contract with a public prison was a state actor. This contractual arrangement clearly qualifies as a private delegation that created an agency relationship. Moreover, on the facts of *West*, that delegation was not adequately structured to preserve constitutional accountability: Inmates could obtain medical care only through the doctor selected by the

452. See supra notes 79–83 and accompanying text (describing discretionary nature of incarceration and resultant difficulty in policing against abuse).

453. Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 74 (2001).

454. See supra note 400 and accompanying text.

455. See Feeley & Rubin, supra note 144, at 13–17, 34–50.

456. On the other hand, the significant restrictions in prisoners' access to the federal courts under the Prison Litigation Reform Act (PLRA) means that prisoners may well find state courts more receptive to their claims. On the effect of PLRA, see Margo Schlanger, Inmate Litigation, 116 Harv. L. Rev. 1557, 1633–91 (2003).

prison, and the government did not provide an administrative or statutory means for challenging the doctor's decisions.[457] However, under the proposed analysis, the result would be invalidation of the delegation rather than authorization of a constitutional suit against the private doctor, with the government being liable for any inadequate care the doctor had provided. The proposed analysis and current state action doctrine would have diverged even further if North Carolina had instead subsidized medical treatment by a doctor of a prisoner's choosing and allowed prisoners a meaningful choice among providers. In that case, no doctor would exercise a monopoly over access to medical care and the individual prisoner's ability to choose providers would suffice to address constitutional accountability concerns.[458]

CONCLUSION

The vision of clearly distinct public and private realms embodied in current state action doctrine bears little resemblance to the modern administrative state, with its endless and varied reliance upon private actors to perform the tasks of government. The result of this disjuncture is a profound challenge to the principle of constitutional accountability. Current doctrine targets government involvement, either involvement in specific private acts or pervasive entwinement with the private entity more generally, for constitutional condemnation. But such government involvement is rarely present, and also is not the real constitutional concern. Far more threatening is the potential that private actors wield broad discretion over government programs with insufficient government oversight and also (as a result) outside of constitutional controls. Reforming existing doctrine to reflect current administrative reality is critical, particularly given recent moves to increase public-private partnerships and expand the authority delegated to private entities. At the same time, however, simply targeting existing doctrine as underinclusive is too facile, for it fails to take account of why contemporary constitutional law is so accepting of private delegations, notwithstanding the obvious constitutional dangers. A major reason for that phenomenon is the perception that gains in constitutional accountability come at the expense of government regulatory freedom.

This Article argues not only that current state action doctrine is singularly deficient, but further that it is possible to secure constitutional accountability without destroying regulatory flexibility. The key to so doing lies in accepting private exercises of government power as a reality of

457. West v. Atkins, 487 U.S. 42, 44 & n.2 (1988).

458. The presence of a meaningful choice among providers might offer adequate protection even in some contexts involving privately operated and owned custodial facilities, such as private drug or alcohol treatment centers. See, e.g., Freedom from Religion Found., Inc. v. McCallum, 324 F.3d 880, 881–84 (7th Cir. 2003) (holding state did not violate Establishment Clause by offering parolees option of religious halfway house when secular halfway house was provided as alternative).

modern government and then replacing state action's focus on whether constitutional requirements should apply to private actors. The real constitutional concern should be instead whether private delegations of government power are adequately structured to preserve constitutional accountability. No reason exists to hold private entities directly subject to constitutional constraints when alternative mechanisms exist by which individuals can enforce constitutional limits on government power. Moreover, direct constitutional scrutiny of private entities is also generally inappropriate when such mechanisms are lacking. The fundamental constitutional flaw in this context lies in the nature of the delegation involved—the government's decision to delegate government power to private entities without ensuring that constitutional controls will be preserved. Responsibility to rectify such an unconstitutional delegation should lie with the political branches, not the courts.