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## The Changing Shape of Government

Alfred C. Aman

*Indiana University Maurer School of Law, aaman@indiana.edu*

Steve Savas

*Baruch College*

Elliott Sclar

*Columbia University*

Lester Salamon

*Johns Hopkins University*

Charles Sabel

*Columbia University Law School*

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# The Changing Shape of Government

## **Abstract**

Gillian E. Metzger, Alfred C. Aman Jr., Charles F. Sabel, Lester M. Salamon, E.S. Savas and Elliot D. Sclar participate in panel discussions focusing on the question of how to secure government accountability in the context of the expansion of privatization in government? This panel discusses some of the changes we are seeing in government institutions and in the ways government operates. The panelists describe ways in which the move toward privatization and the expansion of the gray area between public and private is occurring, but also will talk about changes we may see as being particularly useful in dealing with some of the challenges this expansion of privatization presents.

## THE CHANGING SHAPE OF GOVERNMENT

MS. METZGER: Hello. I am very pleased to be moderating this first panel on "The Changing Shape of Government." How to secure government accountability in the context of the expansion of privatization in government is a question central to our discussion today. Some aspects of this question pertain to political accountability: Does privatization lead to the undermining of traditional controls, in terms of either requirements or methods for participation in government decisions, because the entities that were providing government services are now outside of those regimes? Or, does it actually provide, for example, an opportunity to increase accountability by bringing private citizens into government and developing new methods of delivering services and in other ways transcending the public/private divide?

This first panel will provide background on that question by discussing some of the changes we are seeing in government institutions and in the ways government operates. The panelists will describe ways in which the move toward privatization and the expansion of the gray area between public and private is occurring, but also will talk about changes we may see as being particularly useful in dealing with some of the challenges this expansion of privatization presents.

On this panel we have five scholars who have written extensively on public administration and administrative law generally, as well as privatization, specifically. We will begin with Dean Alfred Aman of the Indiana University School of Law. Our second panelist will be Professor Steve Savas, who is a Professor of the School of Public Affairs at Baruch College; then, Professor Elliott Sclar, who is a Professor of Urban Planning and Public Affairs at Columbia University; then, Professor Lester Salamon of The Johns Hopkins University and Director of the Johns Hopkins Center for Civil Society Studies; and, finally, Professor Charles Sabel of Columbia Law School. After each presentation, we will have a few minutes for brief comments and then questions.

DEAN AMAN: Thank you very much. It is a great pleasure to be here.

In my paper I analyze the privatization of traditional government services by placing these changes in governance in a global

context.<sup>1</sup> The connections between private prisons and globalization may appear, at first glance, somewhat tenuous. What do such intensely domestic institutions as prisons have to do with the global economy? I address that question in a three-part discussion.

Part I of my article argues that privatization of governmental services is very much of a piece with deregulatory trends in the United States and elsewhere, in which state-centered approaches to a variety of regulatory problems increasingly have given way to markets and market discourses at all levels of government.<sup>2</sup>

The reasons for the shift from states to markets are many and complex, but they involve much more than simply a cyclical swing of the regulatory pendulum from liberal to conservative. Rather, the shift in perspective in the fundamental ways in which government conceives of and then carries out its responsibilities is closely tied to how decision makers at all levels of the public and private sectors conceptualize globalization. The privatization of governmental services is part of an economic conception of globalization, one based on markets and the competition that they engender.

These various markets differ, however, and some of them can be seen as more metaphorical than real. Some markets are more of an alternative form of regulation of public responsibility than a substitution of something wholly private for something that once was wholly public.

In Part II of the article, I consider the effects of such privatization trends on the public/private distinction itself and its implications for democracy in general.<sup>3</sup> The democracy problem under globalization—namely, the diminishing of transparency, the diminishing of opportunities for public participation, and, in particular, the diminishing of information flows that make public participation meaningful—is one of the most significant externalities of globalization. This externality arises from the disjunction between global economic and political processes, on the one hand, and local processes of democratic participation, on the other.

The global economy and the competition it engenders encourages cost-cutting on the part of both private and public sectors.<sup>4</sup> When cost-cutting occurs by way of privatization in the public sec-

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1. Dean Aman's discussion is based upon an article, appearing in its entirety, *infra* this volume of the *Fordham Urban Law Journal*. Alfred C. Aman Jr., *Privatization and the Democracy Problem in Globalization: Making Markets More Accountable Through Administrative Law*, 28 FORDHAM URB. L.J. 1477 (2001).

2. *Id.* at Part I.

3. *Id.* at Part II.

4. *Id.* at Introduction.

tor, the democracy problem intensifies.<sup>5</sup> In effect, this gives regulation or public responsibility over to the market. It is a kind of delegation of administrative authority to the market, which is usually treated as private, meaning that the public is no longer collectively involved in the decision making processes.

There are many types of markets and various forms of democracy. One of the goals of this article is to match the different types of markets with different types of democracies, different types of accountability and participation—including administrative democracy as well as contractual democracy. To this end, I discuss some of the reforms I think are worth considering.<sup>6</sup>

First, we need to privatize the Administrative Procedures Act.<sup>7</sup> We need not take it out of government; rather, we need to extend some of its principles and approaches to the private sector and to those public/private entities that are carrying out public-related functions. In so doing, we need not reinvent the wheel. It is important to devise cost-effective procedural approaches appropriate for the global era of administrative law.

Second, we need to get beyond the state action/due process kinds of rationales, partly because we are in this gray area, as Professor Diller pointed out,<sup>8</sup> and also because public law protections have diminished, especially as they relate to prisoners and the poor.

Third, and most important, we need to reconceptualize the way we think about the administrative process. We must focus on participation and transparency in ways that go beyond the simplistic labeling of an actor as public or private. Rather, it is more important to look at the power relationships between the parties—public or private—and the kinds of information flows that we, as citizens, need to understand whether our public functions are being carried out in humane and effective ways. To this end, my paper focuses on different markets and different forms of democracy. To make these points, I develop the concept of “global currency.”<sup>9</sup>

The more metaphorical markets become, the greater the risk we run that certain kinds of global currencies may be illegitimate. We

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5. *Id.*

6. *Id.* at Part II.C.

7. *Id.* at Part II.C; 5 U.S.C. § 551 (1994).

8. Dean Aman is referring to Professor Matthew Diller's introduction to this Symposium. Matthew Diller, *Introduction*, in Symposium, *Redefining the Public Sector: Accountability and Democracy in the Era of Privatization*, 28 *FORDHAM URB. L.J.* 1307 (2001).

9. Aman, *supra* note 1, at Part I.A.

need to have public input into such outcomes. Investment is essentially mobile. To attract investment to a particular place or to raise political capital, by *appearing* to be cost-effective and efficient or actually by *being* cost-effective and efficient, governments at all levels need to create global currency. Global currency is the means by which governmental units at all levels—local, state, and national—create competitive advantages to attract investment, to retain the means to achieve sustained economic growth in their respective jurisdictions. Global currency is, in effect, the price government is willing to pay to remain economically competitive on behalf of the residents already living in the area and investing in the jurisdiction, as well as to attract new investors of all kinds.

The most common form of currency is money generated from the provision of fewer, or more efficiently provided, governmental services, or both, lower taxes, lower regulatory cost, investments in infrastructure, and the human capital necessary to stimulate economic growth.

Not all forms of global currency are legitimate. If, for example, a competitive edge arises due to a lack of constitutional rights for prisoners in privatized prisons, we, as a body politic, would not think that was an appropriate or a legitimate form of global currency.<sup>10</sup> Child labor, poor wages, and unsafe working conditions also, in various contexts, are illegitimate forms of currency.<sup>11</sup> They provide a competitive advantage to a particular location and to some individuals associated with it, but the cost is usually borne by people who are unable to choose other alternatives or are unaware of the true cost of the “bargain” being struck for them.

Conceptualizing globalization primarily in economic competitive terms easily can reinforce a domestic political discourse that favors markets over government intervention and individualism over communitarian approaches in the public sector.<sup>12</sup> But the move to privatization can be disentangled from these ideological goals and beliefs. To explain more fully why the public/private distinction can be applied in new and democratic ways, I differentiate between

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10. E.g., *Hard Times, A Special Report: Profits at a Juvenile Prison Come With a Chilling Cost*, N.Y. TIMES, July 15, 1998, at A1.

11. See generally Katherine COX, *The Inevitability of Nimble Fingers? Law, Development, and Child Labor*, 32 VAND. J. TRANSNAT'L L. 115, 128-29 (1999); JEAN DREZÉ & AMARTYA SEN, *INDIA ECONOMIC DEVELOPMENT AND SOCIAL OPPORTUNITY*, 13-16 (1995); SASKIA SASSEN, *THE MOBILITY OF LABOR AND CAPITAL* (1988).

12. Aman, *supra* note 1.

different kinds of markets and democracies.<sup>13</sup> Governments at every level can be viewed as territorially-bounded economic units attempting to maximize their resources and to compete effectively with other economic units, whether those are other states, other municipalities, the county next door, or some country halfway around the world.

It does not always follow that the scale of governmentally-run services is efficient. It may be more efficient to provide certain services if the unit of service is larger or if you can combine forces with other government agencies to avoid duplication. Given the territorial constraints of governmental units, private actors often are in better positions to conceptualize problems and implement solutions that are not linked to arbitrary territorial boundaries.<sup>14</sup> This is one reason why, in theory, contracting out certain services to private entities can yield efficiencies beyond what even an efficient governmental unit might provide.

These efficiencies are even greater if a private unit, capable of operating in many jurisdictions at once, can count on minimal, or at least, certain kinds of uniform regulatory costs throughout the service area. So there is a pressure for harmonization, and many times market approaches harmonize more easily than complicated regulatory approaches.

Finally, low-tax approaches at all levels of government may be politically popular and help attract and retain some businesses. However, they obviously yield scarce resources while forcing governmental units to seek new efficiencies through the reallocation of their resources, as well as re-engineering. These governmental cuts in expenditures usually pose difficult questions. But when you make the decision to move to the market, the market itself can then take care of a lot of these acts because, theoretically, such change is now impersonal. The market is not an elected official saying, "I am making a decision to cut these expenditures." Rather, such an approach says: "The market requires that we have fewer sources or fewer employees." There is a kind of neutrality that is built into some kinds of market decisions, which encourages privatization. If you are going to have scarcity and someone is going to allocate scarcity, politicians like to allocate it in a non-

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13. Aman, *supra* note 1, at Part II.B (comparing classic consumer markets to regulatory, more administrative markets).

14. Aman, *supra* note 1, at Part I.B.

threatening, neutral way, in which they are not necessarily the cause of the adverse effects of the decisions involved.<sup>15</sup>

In short, the economic logics that apply to privatization at national, state, and local levels are similar to those that apply at the international level. The multiplicity of jurisdictions, the inherent limitations of territorially-bounded governmental units, the relative freedom, flexibility, and efficiency of private actors, and the need to conserve funds and create global currencies with which to compete in a global economy all militate in favor of different forms of privatization.

Markets bring discipline and anonymity. They also bring uniformity, as well as a means of making difficult political decisions in relatively impersonal ways. But I think one of the challenges in my field, administrative law, is to make these markets accountable and not to treat all markets the same. It is important to recognize that there is a kind of market rhetoric, a market discourse, requiring public input and accountability. Such markets and privatized services present a challenge to us to reconceptualize administrative law in ways that now extend procedures and participatory opportunities, in an efficient, thoughtful way, to what once was thought of as the "private sector."

MS. METZGER: Thank you very much.

Professor Savas?

PROFESSOR SAVAS: Privatization is changing the shape of government.<sup>16</sup> Privatization means relying more on the private institutions of society and less on government to satisfy public needs. Society's private institutions include: (1) the marketplace and organizations operating therein; (2) voluntary associations of all kinds; and (3) the family, which is, after all, the original Department of Health, Department of Education, Department of Housing, and Department of Social Services.

There are many forms of privatization: contracting, franchising, vouchering, leasing, selling government-owned assets to the private sector, shedding services, withdrawing services, and deregulating to allow the private sector to provide desired goods and services.

Contracting out common government services and selling-off government-owned businesses has gone far beyond the conventional contracting out for garbage collection and selling-off in rem

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15. Aman, *supra* note 1, at I.B.

16. Professor Savas' discussion is based upon an essay, appearing in its entirety, *infra* this volume of the *Fordham Urban Law Journal*. E.S. Savas, *Privatization and the New Public Management*, 28 FORDHAM URB. L.J. 1731 (2001).



properties. Let me give some of the more unusual examples that have been occurring, which give some depth and sense to what is going on.

Once upon a time, the United States Coast Guard used to provide assistance to foundering pleasure craft.<sup>17</sup> If you owned a yacht and you ran out of gas in Long Island Sound, the Coast Guard would come along and tow you away. It does not do that anymore. You have to hire a private firm to do that; just as when your car breaks down on the highway you do not call the New York State Department of Transportation, you call the American Automobile Association (“AAA”). Other organizations now provide precisely that kind of assistance for boats and the Coast Guard no longer does that business. In case of a serious problem such as fire or sinking, the Coast Guard will, of course, bail you out.

Another example is the privatized approaches that are protecting the environment. Private environmental entrepreneurs are using market forces to buy and retire fishing rights to North Atlantic salmon.<sup>18</sup>

A third example is private groups that are saving open space.<sup>19</sup> In the last ten years, 1200 local land trusts permanently protected 2.7 million new acres from development. In other words, one does not need the President of the United States to prohibit building roads in national forests to protect the environment; this is an additional way that can be, and is being, used.

And finally, a market-based approach, namely international emissions trading, is called for in the Kyoto Protocol to reduce pollution that is said to contribute to global warming.<sup>20</sup>

More examples:

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17. Joyce Wadler, *Belying the Legend of the Crusty Old Salt*, N.Y. TIMES, July 1, 1998, at B2.

18. Orri Vigfusson, *How Markets Save Salmon*, PERC REP., Sept. 1998.

19. James Brooke, *Land Trusts Multiplying, Study Shows*, N.Y. TIMES, Oct. 1, 1998, at A20.

20. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22 (1998) [hereinafter Kyoto Protocol] John H. Cushman Jr., *Washington Skirmishes Over Treaty on Warming*, N.Y. TIMES, Nov. 11, 1998, at A11. See Brendan P. McGivern, Introductory Note, Conference of the Parties to the Framework Convention on Climate Change: Kyoto Protocol, 37 I.L.M. 22 (1998) (containing Kyoto Protocol and introductory remarks). The Kyoto Protocol is commonly referred to as the Kyoto Agreement.

- New York State turned over Stewart and Niagara Falls Airports to British and Spanish airport operators, respectively, on ninety-nine-year leases.<sup>21</sup>
- The Port Authority of New York and New Jersey is negotiating to lease out the World Trade Center for ninety-nine years, expecting to take in at least \$3 billion.<sup>22</sup>
- Churches in Indianapolis maintain neighborhood parks under city contracts.<sup>23</sup> Steve Goldsmith was the Mayor of Indianapolis who pioneered this, and now, just this week, President Bush appointed him Director of the Corporation for National Service.<sup>24</sup>
- In the middle of Manhattan, six-acre Bryant Park was transformed by a voluntary local business association from a crime-ridden haven for junkies to a magnificent urban jewel.<sup>25</sup>
- Riverside County, California, contracts with a private company to manage its twenty-five-branch library system.<sup>26</sup>
- The City of Richmond, Virginia, contracts with a company to manage its entire on-street parking program, that is, parking meters and parking enforcement.<sup>27</sup>
- American embassies abroad are guarded only in part by United States Marines. Most of the guard work is being done by local private guard services under contract to the State Department.<sup>28</sup>
- A foreign example: The St. Lawrence Seaway, owned by the Canadian government, is now being managed by a private group comprised of the major users of the Seaway, who hope to restore the Seaway's fortunes by making it more competitive

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21. Kevin Collison & Andrew Z. Galarneau, *International Airport's New Lease on Life*, BUFF. NEWS, Jan. 30, 2001, at B1; Tom Incantalupo, *Another Way Out of Here: Stewart Airport May Emerge as Alternative*, NEWSDAY, Dec. 19, 2000, at A28.

22. Lois Weiss, *Lines Drawn in Bid War for WTC Lease*, N.Y. POST, Feb. 1, 2001, at 31.

23. Lisa Snell, Reason Pub. Pol'y Inst., *Indianapolis Parks Bloom Under Church Management*, PRIVATIZATION WATCH, Oct. 1998.

24. *Bush on the Creation of a White House Office Tied to Religion*, N.Y. TIMES, Jan. 30, 2001, at A18.

25. Tony Walker, *Private Sector Revitalises New York's Mean Streets*, FIN. TIMES, July 1, 1998, at 8.

26. Robert Hanley and Steve Strunsky, *Jersey City Weighs Private Management of Libraries*, N.Y. TIMES, June 29, 1998, at B1.

27. *Central Parking Corporation Awarded Contract to Manage On-Street Parking in Richmond; Contract Highlights Continued Growth in Privatization of Municipal Parking Programs*, BUSINESS WIRE, July 13, 1998.

28. *The Wackenhut Corporation Wins Contract for Embassy Security*, PR NEWSWIRE, Oct. 15, 1998.

with other forms of transportation.<sup>29</sup> On the other hand, the United States government continues to own the corporation that operates and maintains that part of the St. Lawrence Seaway that is in U.S. waters.

- Here is a final striking example from Britain: the Blair Administration is looking into privatizing the Queen's airline, which is equivalent to Air Force One.<sup>30</sup> It is the Royal Air Force squadron that transports the Royal Family and British VIPs around the world.

These are some rather dramatic instances and examples of the spread and growth of privatization, and it presents a challenge to governments: how to regulate newly privatized entities.

"New Public Management"<sup>31</sup> is the label being applied to a set of innovative reforms, one of the defining features of which is the infusion of market principles into the world of government. Privatizing, itself, is one of the elements of the New Public Management.

Reverting to core functions and getting government out of activities that are not its natural area are other elements of the New Public Management, as are deregulating and liberalizing the economy and utilizing economic market models such as public choice, negotiated contracts, transaction costs, and principal-agent theory for political and administrative relationships.

Other elements of the New Public Management are emphasizing competition, performance-based contracting, service delivery, customer satisfaction, market incentives, and restoring civil society. A major feature of President Bush's Inaugural Address was the creation of the White House Office of Faith-Based and Community Initiatives.<sup>32</sup>

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29. *The Seaway Goes Private- Ottawa Gives Up Management*, THE TORONTO STAR, Oct. 1, 1998, at E2.

30. *Queen's Flight to Bring in Private Industry*, AGENCE FRANCE-PRESSE, Nov. 15, 1998.

31. Savas, *supra* note 16.

32. Press Release, The White House, Remarks by the President in Announcement of the Faith-Based Initiative <http://www.whitehouse.gov/news/releases/20010129-5.html> (Jan. 29, 2001); Press Release, The White House, Executive Order, Establishment of White House Office of Faith-Based and Community Initiatives, <http://www.whitehouse.gov/news/releases/20010129-2.html>; The White House, Executive Order, Agency Responsibilities With Respect to Faith-Based and Community Initiatives, 2001 WL 75853, Jan. 29, 2001 (containing text of executive order #13198, establishing agency responsibilities with respect to Faith Based and Community Initiatives); The White House, Executive Order, Establishment of White House Office of Faith-Based and Community Initiatives, 2001 WL 75854, Jan. 29, 2001 (containing text of executive order #13199, establishing White House Office of Faith-Based and Commu-

Government's changing role and requirements now pose a challenge. With respect to contracting, for example, the changing role of government means that the government is no longer a producer of services, but rather an articulator of demand, determining how often a particular city street should be swept: once a month, once a week, once a day, twice a day? Government should be figuring out what the demand should be, articulating the demand, and then contracting, for example, to satisfy that demand, doing it either in-house or outside, via a vendor.

In short, government becomes an articulator of demand, a purchaser of services, a monitor of performance, and a regulator of markets. There are not new functions, they are merely expanded under New Public Management.

Thus, public managers and decision-makers are facing complex choices: Which public services and functions should be kept in the private sector and which ones should be privatized? How to carry out the privatization, that is, which of the many different forms are to be used? How to elicit the participation of the private sector in ways that protect the public interest while allowing businesses to earn a reasonable return on their investments? What kind of supervision to exercise over the private sector?

Government must be restructured so that, instead of delivering services, it can authorize, partially finance, oversee, and assure access to many types of services and infrastructure. Public and private-sector managers both will have to gain a better understanding of that changing role of government. They will have to find effective ways to forge public/private partnerships that can provide services and infrastructure for which neither sector alone has sufficient resources or talent. They must develop the capacity to manage contractual relationships and public/private partnerships. As functions shift from state enterprises and public agencies to the private sector, governments are responsible for crafting and enforcing cost-effective regulations that protect the collective welfare, ensure open competition, and take advantage of market discipline, without imposing unrealistic costs, constraining businesses unnecessarily, or sabotaging the attainment of goals.

Public officials and public employees must be trained in negotiation and interaction, in effective regulation, and in how markets and private companies operate. They are responsible for overseeing those privatized enterprises that are natural monopolies or that

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nity Initiatives); see also Andrew Miga, *Bush Boosts Faith Based Charities*, BOSTON HERALD, Jan. 30, 2001, at 6.

provide services that directly affect the social and economic well-being of citizens. They should not do what California did with energy deregulation.<sup>33</sup>

Finally, they must play an essential role in mitigating any temporary negative impacts of the transition to a more market-based system.

Privatization, when properly carried out, works well and produces proven benefits. However, it requires a different role for government. It calls for more brain cells and fewer muscle cells in the public service, more steering and less rowing.

Thank you.

MS. METZGER: Thank you, Professor Savas.

Professor Sclar?

PROFESSOR SCLAR: In the 1960s, at the height of the first wave of James Bond mania, there was a TV show called *The Man from U.N.C.L.E.*<sup>34</sup> U.N.C.L.E.'s cause was assumed to be noble and good, and its agents were basically the good guys. On the other side, there was an organization called T.H.R.U.S.H. that did evil deeds. Every week, the agents of U.N.C.L.E. would foil the plots of world domination hatched by the minions of T.H.R.U.S.H. and wait for another episode.

So, with little more than the power of inference, it seems to me, this battle also is taking place on the debate over privatization. In this arena, things that are "private," like U.N.C.L.E., are good, and things that are called "public," like T.H.R.U.S.H., are bad.

Let me stress I am not exaggerating when I say this. In my travels around the country, people frequently approach me with some variation on the following tale: "Our state/town/county/village recently privatized service X. Nobody questioned it at the time. We just assumed that private would be better or less expensive. Then, Y occurred and we realized that privatization was a mistake, but now it is too late." And then, of course, to make me feel good, they say, "And I am really sorry we didn't read your book sooner."<sup>35</sup>

But now, whenever privatization fails, proponents of the cause claim that it was just not done correctly in the situation at hand. Thus, as we watch the lights go off in California, we are informed that the problem is that, unlike Colonel Sanders who does chicken

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33. Peter Behr & William Booth, *Hot, Dark Summer Ahead for California; Drought Worsens Power Crunch, Senators Told*, WASH. POST, Feb. 1, 2001, at E1.

34. *The Man From U.N.C.L.E.* (NBC television broadcast 1964-1968).

35. ELLIOT SCLAR, *YOU DON'T ALWAYS GET WHAT YOU PAY FOR: THE ECONOMICS OF PRIVATIZATION* (2000).

right, California did deregulation *wrong*.<sup>36</sup> Maybe yes, maybe no. The sages then go on to explain that the problem is that demand exceeds supply. They never, of course, explain why it is that demand is the same this year as last year and so is supply, yet there is now a crisis.<sup>37</sup>

Explaining the California energy privatization debacle is not my main point for today, but it does serve to illustrate how this policy debate, by inference, proceeds. It is based on the strongly held conventional wisdom that private is good and public is bad, and, if private fails, it is merely because the forces of good simply were not well served in this particular instance.

I am a social scientist and an economist by training, and, as such, I am forced to note that if a policy approach fails as often as privatization has, it is not just a matter of idiosyncratic failure. When something happens that often, we have to look for systematic trends behind the problem.

The intellectual problem is that a lot of the failure rests upon two logically powerful and interconnected ideas that actually explain nothing about the world as it exists. The first is the concept of idealized competitive markets—the standard market model that explains that if left to its own devices, competition creates output efficiently and creates what consumers want. Of course, there are a number of very heroic assumptions that one has to accept with that.

The second notion comes from the field and crosses from economics into political science. It is called public choice, or rational choice. It starts with the assumption that public employees are essentially materialistic bureaucrats who are seeking to enlarge their domains at the expense of taxpayers and service users and concludes that reform is impossible.<sup>38</sup>

The problem is that neither the idealized market nor public choice theories provide a kernel of truth. Everybody has stood on a line at a motor vehicle office and torn his or her hair out. Certainly, it is true that markets do many good things for us. But although markets are very good servants, they are terrible masters, and that is where some of the problems exist.

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36. Behr & Booth, *supra* note 31. *But see* CONSUMER'S RES. MAG., Feb. 1, 2000 Adrian T. Moore & Lynne Kiesling, *Why California's Power 'Experiment' Failed*, (arguing that California's actions were more akin to restructuring than deregulating).

37. *But cf.* Moore & Kiesling, *supra*, note 36 (arguing that demand for electricity grew and supply remained stable causing the crisis in California).

38. Edward L. Rubin, *Getting Past Democracy*, 149 U. PA. L. REV. 711, 740-47 (2001).

If this were just TV and another week's adventure with the men from U.N.C.L.E., then this lazy conventional wisdom approach to public reform would not matter. However, as we are learning to see by the dimming lights of California, the reality is that we are going to need more, not less, active government in service delivery if we are going to solve problems.

Government service in the future is likely to contain more use of contracts, public/private partnerships, innovative labor/management work arrangements, and marketized alternative schemes. The challenge is to make this work in the public interest, not the private interest. In order to do that, we will need to get beyond the simplistic debate over privatization and begin to envision government as it really works, and not as a straw man for political reaction.

On the other hand, we need not idealize it as a bulwark against private greed. We need to take it on its own terms, warts and all, and fix the problems in a much less grand, but much more effective, manner. By the same token, we need not idealize the private partners of government as paradigms of idealized competition. We need to see contractors with all their bumps and pimples, too.

So it seems to me the place to start is to understand the characteristics of public service that are pertinent; basically, kind of an economic understanding of the effectiveness of these new arrangements. There are four characteristics I want to stress.

1. Public service is labor-intensive. The problem with principles is that there are always exceptions to them. But, by and large, most of the public services we are talking about are very labor-intensive.
2. Government services always involve contracting. Roughly half of all government money is spent via contract. This has not changed as far back as I can trace it.
3. The work is very fluid. That contracting always has existed.<sup>39</sup> Government has put contracts out; government has taken work back in. These decisions move on their own.
4. Information technology is changing the nature of what we mean by organizations. This opens up a lot of new possibilities to us in terms of what we can do.

In light of these characteristics, there are three alternatives I want to put forward that I think we have to deal with when we talk about reform. The title of my talk is "After the Ball is Over: Re-

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39. Moshe Adler, *Been There, Done That: The Privatization of Street Cleaning in Nineteenth Century New York*, 4 *NEW LAB. F.* 88-99 (1999).

thinking the Shape of Government in the Post-Privatization Era," because I do not think that we can dwell on the debate a lot longer.

The first has to do with contracting. There is a very well-developed literature on the economics of contracting.<sup>40</sup> If you break contracts out, complete contracts are simple to talk about. If you are going to hire somebody to paint your house, you specify the paint color, you can specify the manufacturer, you can talk about how many coats you want. It is a finite job; it is a deliverable product. But I still would advise you not to take your vacation the week that the painters come. There is still some supervision that you are going to have to do. But basically the product is clear; the points of law are settled; if there is a dispute, it can be a dispute over the facts, it could be taken before a judge; there are ways to enforce the contract; and the transactions costs are relatively low.

The other kind of contracts, the kinds that we often get into with privatization, are what are called incomplete contracts. They are contracts in which we are talking about activities that are going to take place over some very long period into the future in which there are a lot of indeterminate variables that come in. Conceptually, one could try to draft a contract that takes everything into account, but that would tie everything up into knots, and the reality is you are not going to know what the problems are until they unfold.

One way out of this, obviously, is what the economist Oliver Williamson calls third-party governance: we agree on how we are going to solve disagreements with arbitration, with mediation, with something of that sort.<sup>41</sup> But when you have incomplete contracting you do it for items that are not easy. Easy cases would be either the wall has been painted or the wall has not been painted; the grass has been cut or the grass has not been cut. You look to see if the child has been educated or the patient has been well served. When you get to things that are not easy to do, you end up with a lot of transactions costs and administrative costs, and there is not necessarily an inherent advantage of one over the other.

When we talk about steering versus rowing, for example, which is one way that we often talk about this, the problem is that, when

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40. See generally Oliver E. Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 J.L. & ECON. 233 (1979) (developing a good general scheme); OLIVER E. WILLIAMSON, *ANTITRUST ECONOMICS: MERGERS, CONTRACTING AND STRATEGIC BEHAVIOR* 134, 160 (1987) (discussing vertical integration).

41. Williamson, *supra* note 40, at 233, 237.



you are in a rowboat, you are doing both. So it seems to me that sometimes the analogies do not quite help. Sometimes, when the work is complex, you have to both administer *and* do the work at the same time.

The next thing we could talk about is networked organizations, which are a much more interesting way to go at outsourcing. If public/private partnerships become a form of that, we can talk about ways in which two organizations relate to each other. They are not necessarily disciplined by the market; they are disciplined by their relationship to one another.

My final point is there is also the issue of labor/management cooperation and restructuring public-sector work. There are a lot of examples of that working; Indianapolis is talked about a lot. One of the best stories there is how the municipal vehicle maintenance service in Indianapolis restructured their work through labor and management. These stories exist all over the country. I've got a collection of them, but we will leave them for another time.

Thank you.

MS. METZGER: Professor Salamon?

PROFESSOR SALAMON: I am going to broaden our lens a bit, and suggest that privatization is really a euphemism, as I think some previous speakers have indicated. What we need to do, therefore, is get beyond this euphemism and begin to be more concrete and specific about what really is going on. To do so, we need to put the privatization discussion into a bigger framework. That is really what I want to do, drawing on a chapter in a book I have prepared for Oxford University Press.<sup>42</sup>

The central point of this book is that a fundamental change has taken place over the past half century in the whole character of the public sector, a change that involves much more than an expansion in the scope and scale of government, that involves as well a fundamental change in its basic forms.

The picture of the public sector that most of us carry around in our heads, and that is still the straw man against which the privatization advocates and the reinventing-government advocates harangue, the image of the government bureaucrat delivering a

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42. Professor Salamon's discussion is based upon an article, appearing in its entirety, *infra* this volume of the *Fordham Urban Law Journal*. Lester M. Salamon, *The New Governance and The Tools of Public Action: An Introduction*, 28 *FORDHAM URB. L.J.* 1611 (2001). A version of the article will be published in *THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE* (Lester M. Salamon ed., forthcoming 2001).

service, turns out not to be a very accurate depiction of most of what government does today and has not been for quite a long time.

We have been in the midst of what I refer to as “a revolution in the technology of public action” that I think goes well beyond privatization and for which “privatization” is, I think, a somewhat inaccurate, or at least inadequate, term. The heart of this technological revolution is a massive proliferation of tools of public action, the emergence and application over the past fifty years of a whole variety of new instruments for solving public problems.

There is “direct government,” of course, but this is just one of the tools of public action. It turns out that we have a whole variety of other tools as well, some of which Professor Savas indicated.<sup>43</sup> These include contracts, grants, direct loans, loan guarantees, economic regulation, social regulation, insurance, corrective fees—to name just a handful.

Each one of these tools has its own operating characteristics, its own skill requirements, its own delivery system, almost its own political economy. Terms like “privatization” are really too crude to capture the subtle and important differences that exist among these approaches. Each tool has its own actors and engages its own set of players, with its own standard operating procedures and skills. Each one has its own tasks associated with it. As a consequence, this gives certain advantages to different players in the process.

Choices among these tools are not wholly neutral choices. Rather, they have profound consequences for how the public sector operates and how we go about doing various collective things. In addition, many of the tools that are increasingly being used have a very important common characteristic: they are increasingly indirect; they rely on a variety of other institutions to have their effect. It is not simply private-sector institutions that they are using; they are using a whole variety of types of institutions.

We have built a system that I have referred to as “third-party government,” in which the public sector is extensively using a whole host of third-party agents to carry out public purposes.<sup>44</sup> This third-party government phenomenon is distinctive because it involves the sharing of the discretionary authority of government with a host of third-party actors: nonprofit organizations, for-profit corporations, and other levels of government. This makes it of par-

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43. See Remarks of E.S. Savas, *supra* this Panel Discussion.

44. Salamon, *supra* note 42, at Introduction.

ticular concern to the legal profession, which is concerned about the control of discretionary authority.

This has been possible because we have, in a sense, deconstructed public action, as Professor Savas indicated.<sup>45</sup> We have taken what used to be thought of as a single whole—a government program—and broken it into its constituent parts. So, for example, we distinguish now between the financing and the delivery of public services, and acknowledge the fact that these can be handled by different entities, as shown in Table 1. Thus, both finance and delivery can be public or private, and public delivery in turn can be broken down between the national government and state and local governments. Similarly, private delivery can be broken down between nonprofit and for-profit. You begin to see the options that are available for structuring the provision of public services, which is, of course, just one of the functions that the public sector is engaged in.

**TABLE 1: PATTERNS OF PUBLIC PROBLEM-SOLVING**

DELIVERY	FINANCE	
	Public	Private
Public (1) National (2) State/local	A	B
Private (1) Nonprofit (2) For-profit	C	D

The result is a whole variety of options. Cell A in Table 1 is probably the one that most Americans have in mind: it features public finance and public delivery. This is the classic system. But it is not the only way that we can structure things. We can have Cell C, which involves public finance and private delivery, using contracts or grants or any of the other vehicles that are available. Or we can rely on private finance and public delivery—Cell B—which is the system that Professor Savas was referring to with the Coast Guard charging for some of the services that it used to provide for free. Finally, the public sector can encourage private finance of private services—Cell D—as it does with tax credits for the private purchase of private day care.

So we have deconstructed the doing of public business in very significant ways. The scope of what has transpired is really ex-

45. See Remarks of E.S. Savas, *supra* this Panel Discussion.

traordinary. It turns out that if we look at the federal government, the amount of money that goes out through the classic, stereotyped image of how the public service operates is a very, very small share of total government activity. For example, although we have a \$1.8 trillion federal budget,<sup>46</sup> I would argue that the true value of federal activity today is more in the nature of \$3.6 trillion, or twice as large, when you include all of the things the federal government is doing and put a value on them (see Table 2).<sup>47</sup> Of that \$3.6 trillion, only about \$187 billion, or five percent, takes the form of the direct provision of goods and services by government, as shown in Table 2.<sup>48</sup>

Even if we include questionable items in the direct category, such as direct income supports, Social Security, interest on the national debt, and direct loans, we are still talking about only approximately \$1 trillion of federal activity, or twenty-eight percent of the total.<sup>49</sup>

Beyond that, there is a whole variety of other activity that I would put into the indirect category. As shown in Table 2, this includes about \$200 billion of contracting, \$286 billion in grants, and \$251 billion in vouchers. All of these are "on budget." In addition, however, there are tax expenditures of \$602 billion; loan guarantee commitments of \$252 billion in fiscal year 1999 alone; insurance, if we include only net additions to deposit insurance and forget pension insurance and disaster insurance, of \$376.1 billion<sup>50</sup>; and regulation that imposes costs elsewhere in the economy that is estimated at about \$200 billion.<sup>51</sup>

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46. U.S. OFFICE OF MGMT. & BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2001, at 2 (2000) [hereinafter 2001 BUDGET].

47. See Salamon, *supra* note 42, at tbl.3. The table appears as "Table 2" in this transcript, but is "Table 3" in the article. Sources for the table include: Data on government contracting from GEN. SERVS. ADMIN., FEDERAL PROCUREMENT DATA SYSTEM, FEDERAL CONTRACT ACTIONS AND DOLLARS, FY 1999 available at <http://www.fpds.gsa.gov/fpds/fpr/sfcomp.htm>. Data on regulations from U.S. OFFICE OF MGMT & BUDGET, COSTS AND BENEFITS OF REGULATION 2000, available at <http://www.whitehouse.gov/omb/info/reg/2000fedreg-charts.pdf>. Data on tax expenditures, grants, loan guarantees, government-sponsored enterprises from U.S. OFFICE OF MGMT & BUDGET, ANALYTICAL PERSPECTIVES, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2001, at 109-11, 184-85, 204, 230-37, 246 (1999). Data on deposit insurance is available from the Federal Deposit Insurance Corporation (FDIC) at <http://www.fdic.gov/bank/statistical/statistics>. All other data from: 2001 BUDGET, *supra* note 46.

48. *Id.*

49. *Id.*

50. See FED. DEP. INS. CORP., FDIC 1999 ANNUAL REPORT: PROMISES KEPT (2000), at <http://www.fdic.gov/about/strategic/report/99AnnualReport/index.html>.

51. *Supra* note 47.

**TABLE 2: SCALE OF U.S. FEDERAL GOVERNMENT ACTIVITY,  
TOOL OF PUBLIC ACTION, FY 1999**

	Amt (\$ bns)	%
<b>Direct Government Goods and Services</b>	186.8	5.2%
Income support	550.4	15.4%
Interest	229.7	6.4%
Direct loans (Obligations)	38.4	1.1%
<i>Subtotal, Direct</i>	1005.3	28.1%
<b>Indirect Government</b>		
Contracting	198.8	5.6%
Grants	286.4	8.0%
Vouchers	251.0	7.0%
Tax expenditures	602.0	16.8%
Loan guarantees (Commitments)	252.4	7.0%
Govt-sponsored enterprises (Loans)	409.2	11.4%
Insurance (Deposit insurance)	376.1	10.5%
Regulation	200.0	5.6%
<i>Subtotal, Indirect</i>	2575.9	71.9%
<b>GRAND TOTAL</b>	3581.2	100.0%
Budget outlays	1703.1	47.6%
Other activity	1878.1	52.4%

This yields total indirect activity of close to \$2.6 trillion, compared to the direct activity of \$1 trillion.<sup>52</sup> We are therefore talking about a government that operates in a very different way than I think most of us understand, than most of the traditional public administration texts suggest, and than most of the “reinventing government” and “New Public Management” theories suggest. Far from being a change to be promoted, the outsourcing of public functions turns out already to be a very significant part of how government operates.

All of this has profound implications. For one thing, there are immense *management challenges* that flow from this way of organizing the public sector. The public management problem has leapt beyond the borders of the public agency. It now suffuses significant portions of the entire society. We are operating our programs through incredibly complicated chains of indirection, and we know from much of the recent management theory that it is extremely challenging to manage such indirect action.

52. *Id.*

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**TABLE 3: IMPLICATIONS**


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- Management challenge
  - Accountability challenge
  - Legitimacy challenge
- 

For example, we have a whole body of theory, called principal-agent theory, which tells us that in these circumstances it is not the principal, but the agent, who ends up with most of the influence because the agent has more knowledge of what is going on on the ground.<sup>53</sup> The paradox that results is that contrary to the popular aphorism that “she who pays the piper calls the tune,” in this new world of indirection, it is actually the piper who is in control.

This, in turn, raises fundamental *accountability challenges*. How do we hold these agents accountable? We frequently do not even know what they are doing, which is why we get into the problems Professor Sclar alluded to.<sup>54</sup>

Third-party government also raises very significant *legitimacy challenges*. Thanks to these new forms of public action, the public often does not understand what is going on in its name. What is more, the connection between the taxes people pay and the services they receive becomes confused when the services reach them through some private for-profit or nonprofit agency. This disconnection is fundamentally threatening to the legitimacy of public action.

To correct these problems, we need a new way of thinking—a new paradigm—that goes well beyond the simple aphorism of privatization and really begins to come to terms with the far more complex reality that we are living with. I propose the “New Governance” as the name for this new paradigm. I use this term to stress the two central features of this approach.

The first, signified by use of the term “Governance,” suggests that what we are talking about is not government as a set of institutions, but a collaborative process of collective problem-solving involving partnership and interdependence as its central core.

The second, signified by the word “New,” stresses that we now have to approach these collaborative processes in a new way that

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53. See John W. Pratt & Richard J. Zeckhauser, *Principals and Agents: An Overview*, in *PRINCIPALS AND AGENTS: THE STRUCTURE OF BUSINESS* 1-3 (John W. Pratt & Richard J. Zeckhauser eds., 1985) (explaining that agents often “know more about their tasks than their principals do”).

54. See Remarks of Elliott D. Sclar, *supra* this Panel Discussion.

takes serious account of their significant challenges, something that the new public administration and the advocates of privatization have not done sufficiently.

What does this paradigm consist of? Fundamentally, it has five key features,<sup>55</sup> and I will try to run through a few. First, as shown in Table 4, it involves a very fundamental shift in the unit of analysis in policy work. Both the traditional, and the new, public administration tend to focus on the *agency* or the *individual* program as the unit of analysis. The “New Governance” shifts the focus dramatically to “the tool of public action,” the distinctive instruments that are used. It calls for us to get serious about understanding the differences among these tools of public action, and begin to look much more closely at them, instead of just lumping them in a big pot called privatization.

**TABLE 4: THE “NEW GOVERNANCE” PARADIGM**

Classical Public Administration	“New Governance”
Program/agency	Tool
Hierarchy	Network
Public vs. private	Public & private
Command and control	Negotiation and persuasion
Management skills	Enablement skills

A tool of public action is an identifiable method through which collective action is structured to address public problems. But tools are really bundles of attributes. As shown in Table 5, they involve a *good or an activity*, a *delivery vehicle* (e.g., a loan or a grant), a delivery system, and a set of rules. So when you choose a tool, you also choose a delivery vehicle, and a delivery system. You may choose the commercial banking system, for example, if your delivery vehicle is a loan guarantee.

**TABLE 5: TOOLS AS BUNDLES OF ATTRIBUTES**

- 
- Good or activity
  - Delivery vehicle
  - Delivery system
  - Rules and procedures
- 

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55. Salamon, *supra* note 42.

Reflecting this, tools have various dimensions to them. They are not simply public or private. They vary in their degree of *coerciveness*, *directness*, *visibility*, and *automaticity* (see Table 6).

**TABLE 6: DIMENSIONS OF TOOLS**

- 
- Coerciveness
  - Directness
  - Visibility
  - Automaticity
- 

These, in turn, are associated with different effects. The different choices among these different dimensions thus have consequences. An automatic tool may be more efficient, but it may not be more effective, and it may not yield greater equity. Therefore, we have to balance the choices of these tools against these various criteria.

Let me very quickly comment on a few of the other key features of this New Governance paradigm.

As Table 4 shows, the New Governance also involves a shift from a focus on hierarchy, which is the focus both of traditional public administration and of the new public administration, to much more serious attention to the public/private *networks* that many of the newer tools engage. This, in turn, requires an understanding of network management. And it turns out that network management is not as simple as some of the new public administration literature seems to assume. We know from other bodies of theory, such as principal-agent theory and network theory, that these are extremely complicated mechanisms to manage.

The New Governance also involves a shift from thinking of the public sector and the private sector in opposition to each other, as is common both in the traditional public administration and some of the privatization theories, to seeing the two as partners in public service.

Similarly, the New Governance requires us to shift from seeing command and control as the central features of administrative behavior, to an emphasis on negotiation and persuasion as the central elements in administrative action.

Finally, the New Governance calls for a shift from management skills on the part of public servants to enablement skills, the skills



of activating, orchestrating, and modulating these complicated relationships and networks.

All of this requires a whole new body of knowledge that we have to develop, teach, and introduce into both legal and administrative courses. First, as shown in Table 7, we must develop a systematic body of knowledge about these different tools so that students understand what it means to operate a contracting program and how that differs from running an economic regulation program, and how that, in turn, differs from social regulation. Second, we must perfect our *design knowledge*, so that we can make better decisions about which tool is appropriate in which circumstance. Finally, we have to improve our *operational knowledge*—our knowledge of how to run these different types of programs given their peculiar characteristics

**TABLE 7: NEEDED: NEW KNOWLEDGE**

- 
- Tool knowledge
  - Design knowledge
  - Operational knowledge
- 

All of this will require a fundamental rethinking of a lot of our training both in the public sector and in the nearby private sector so that people can come to understand the demands of this world of new governance.

Thank you.

MS. METZGER: Professor Sabel?

PROFESSOR SABEL: Good morning.

I will continue our progression, but first, let me just review the story as I have understood it so far.

The first version of things is that we have a progression; we have a movement from the public to the private, in which public and private are understood in familiar ways. “Public” is a bureaucracy providing a service accountable to a legislature and, thereby, indirectly accountable to the electorate. “Private” is a group of private agents communicating with each other largely through price signals or contracts with specified goals, which are themselves translatable into price signals.

The claim is that these are well-known entities; there is a movement from one province, public, to the other, private. The question is how should government respond at the second order? If the

first-order activity is abandoning its traditional activities to the private sector, then what should its response be to reordering the private orderers that are now doing what the government used to do?

We have deconstructed somehow both the actors, public and private, and the very notion of a public/private boundary, given that there are no longer such things as distinct public/private actors in any intelligible sense. We should examine the new tools that have emerged to solve problems, and, somehow or other, a deeper understanding of those tools will allow us to do something, better prosecute the goals of public action in some way. In that view, it is not a question of governing a new structure, it is a question of learning to govern where there are no fixed structures, where there are only tools themselves and their application under discussion.

I want to propose a third version of what is going on. In order to do this, given the time constraints, I want to use an example: what is going on conspicuously in education. A year and a half ago, education looked like it was a good example of the debates that attend the first view of things—the movement from the public to the private. People who believe in public education traditionally believed it was necessarily *public* because it involved the formation of young citizens in a way that had to be subtracted from the logic of profit-making providers. Furthermore, efficiency and accountability require that education be provided in some bureaucratized form where people could oversee teachers, thereby ensuring that the people got what they were promised.

On the other side are the people who embrace the public choice view. This group believes that precisely because of the democratic accountability structure and the bureaucratic organization required to assure accountability, education has to be privatized because it is unreformable. It is unreformable because the combination of legislative oversight and the de facto bureaucratic monopoly means that entrenched interests—the teachers' unions, the janitors, the friends of the local school board—entrench themselves partially, and then the people who manage oust them and partially entrench their own favorite ideas. The result is either a concerted grab by some group that sits unmolested for decades, or total chaos as different contending groups impose fragmentary solutions. The public choice perspective is: privatize it or it cannot be improved.

Neither of these things has happened. We simply have not stayed with the public structure, let alone expanded it in the old way; nor is there a substantial movement toward anything that looks like real privatization, as you can see from the very limited

diffusion of vouchers, and their defeat in several referenda, and many other indicators.<sup>56</sup>

The real reason is not that the debate is stalemated, but rather that in the interim, while people were fussing about those things, an alternative emerged in the last decade or fifteen years in states like Kentucky, Texas, and North Carolina.<sup>57</sup> It is now a massive movement and you see a huge amount of what I am about to describe in California; it is arriving piecemeal even in the backwater of New York.<sup>58</sup> If it is here, too, with respect to education, you know it has taken hold pretty much all over the country.

This alternative is a transfer of decision-making between the central unit of government, typically a state or a district, and individual schools; *but the solution scales*. The central unit gives the lower-level unit, for example, the school or the school district, the autonomy to address by its own means problems that come to light. It gives them the resources to reorganize the school in return for reporting rich information about performance and improvement.

So this implies that there are standards, and somebody initially sets them, for example, at the state level.<sup>59</sup> Those standards provide that students have to be progressing and attaining certain levels, and if they do, everything is okay, and if they are not, there is a problem. There is testing, there are results, and then several things happen.<sup>60</sup>

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56. See Maureen Downey, *Vouchers Movement Repudiated: Constitution Editorial Board Members Offer Their Interpretation on Votes Around the Country*, ATLANTA CONST., Nov. 9, 2000, at A27.

57. See Molly Hunter, *All Eyes Forward: Public Engagement and Educational Reform in Kentucky*, 485 J.L. & EDUC. 498 (1999) (detailing the Kentucky Education Reform Act of 1990, 1990 Ky. Acts 476. See generally William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on Public School Finance Reform Litigation*, 19 J.L. & EDUC. 219 (1990); *Symposium: Investing in Our Children's Future: School Finance Reform in the '90s*, 28 HARV. J. ON LEGIS. 379 (1991) (examining and detailing Texas' education reforms, throughout the 1980s and 1990s); N.C. GEN. STAT. §115C-238.29A (1999) (outlining the purpose for charter schools in North Carolina); Andrew Broy, Comment, *Charter Schools and Education Reform: How State Constitutional Challenges Will Alter Charter School Legislation*, 79 N.C.L.R. 493, 516-28 (2001) (analyzing North Carolina's chartering process and other education reform programs); CTR. FOR EDUC. REFORM, STATE BY STATE CHARTER LAW PROFILES (listing states with charter school enabling acts, including North Carolina and Texas), at [http://www.edreform.com/charter\\_schools/laws/](http://www.edreform.com/charter_schools/laws/).

58. See Lynn Olson, *Redefining 'Public' Schools*, EDUC. WEEK, Apr. 26, 2000, at 1, 24, 25, 27 (mentioning California and New York as two states that are experimenting with Charter schools as an alternative to vouchers).

59. Kentucky, for example, passed the Kentucky Education Reform Act of 1990, 1990 Ky. Acts 476. See Molly A. Hunter, *All Eyes Forward: Public Engagement & Educational Reform in Kentucky*, 485 J.L. & EDUC. 498 (1999).

60. Hunter, *supra* note 59.

Individual schools that do badly must reorganize in order to improve. The standards often will be reorganized if they prove to be defective. All of this is done in the good cases with extreme attention to the fates and rates of improvement of subgroups that are at risk.

This system does something that is theoretically quite anomalous. It is not a hierarchy because the lower-level units have freedom to propose solutions and to carry them out in a way that is simply inconsistent with any principal-agent model or any standard notion of hierarchy. But the system is not serviced or accountable through markets either, because lower-level agents are responsible for responding to a framework, which is itself continuously updated and rich in information. It is the opposite of a single-price metric. The lower-level agents have to fulfill a very high-dimensional set of requirements. The requirements themselves emerge from some form of collaboration between the higher-level and the lower-level agents.

Now, this is a unique system. I assure you that neither network theory nor principal-agent theory will explain this. That does not mean that it is unintelligible or that it cannot work. It just means that it is something in the repertoire of organizational capacities that was unanticipated by these earlier theoretical considerations and the political debates with which they were associated.

Not at all incidentally, the structure of this education system turns out to be the structure of private reorganization in the new economy. This is the way modern firms are organized, and it also explains why there is a very porous boundary between what is inside the firm and what is outside the firm.

The education example is not singular. There are many examples, ranging from very large changes in environmental regulation<sup>61</sup> to drug courts,<sup>62</sup> in which very similar things are going on. There are even a few where the structure is as consolidated as in education and where, amazingly, there is a political consensus of the depth that there is in education.

I am not claiming that *all* the changes you see are necessarily going in this direction, or that everything that looks like this is this.

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61. See President Bill Clinton & Vice President Al Gore, State of the Union Address Reinventing Environmental Regulation? (1995), available at <http://es.epa.gov/program/exec/environ.html>.

62. See generally Hon. Stephen L. Platt, *Drug Court Experiment*, 34 MD. BAR J. 44 (2001) (explaining the need for and delineating the different groups that work together to form "drug courts").

The point is: many things that do not superficially look like the outcome I am pointing to, are turning into it. Many things that could be billed as it, that do look superficially like it, are not, and there are very, very profound implications for the idea of democratic accountability when you move from a system where it is the legislature that is exercising bureaucratic oversight to a system in which some diffuse form of participation in the activities of the lower-level units and the ability to review the whole system is the form of accountability.

I leave you to your deliberations. Thank you.

MS. METZGER: Thank you, all.

One of the things I found most interesting was this question of whether privatization is really the issue. Or should we be looking more broadly in terms of restructuring government and some of the issues that become involved as we do so, and start coming up with new solutions? I would like to relate that back to the first discussion about the levels of government at which we are seeing some changes.

At what point is this something that requires reforming at the local level, in particular? Can it work as well in terms of intergovernmental relationships? Does this suggest to us where we should be focusing our administrative reforms? Or is the same point about the way that we need to reconceive the public/private divide as applicable at whatever level?

PROFESSOR SAVAS: One of the aspects of the new public management is devolution, and that is taking place at the federal-to-state level. I am not sure to what extent it is happening from state-to-local,<sup>63</sup> but even at the local level there is a growing emphasis on community and community-based organizations. Thus, these concepts apply through the entire range of governments.

DEAN AMAN: I would agree with that. I think that the drive for different kinds of efficiencies and competition occur throughout all levels of government. If you look at the federal level, privatizing prisons at the federal level mirrors really what is going on at the state level.<sup>64</sup>

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63. KEITH WATSON & STEVEN GOLD, THE URBAN INST., THE OTHER SIDE OF DEVOLUTION: SHIFTING RELATIONSHIPS BETWEEN STATE & LOCAL GOVERNMENTS (1997), available at <http://newfederalism.urban.org/html/other.htm>.

64. See David J. DeFiandra, Comment, *The Growth of Prison Privatization and the Threat Posed by 42 U.S.C. § 1983*, 38 DUQ. L. REV. 591 (2000); Peter J. Duitsman, Comment, *The Private Prison Experiment: A Private Sector Solution to Prison Overcrowding*, 76 N.C. L. REV. 2209 (1998).

Each area differs substantially. There are some common bonds, but it is like globalization where industries differ significantly. But there is common ground and it goes through all levels of government as well as the private sector.

PROFESSOR SCLAR: My sense is that what is emerging is this notion that the market as the alternative to organization reform is a moot issue. It is really not what is happening, because even after you sign a contract, markets are out the door because you are now in a long-term relationship. And, as Professor Salamon said, it really has to do with skills in negotiation and participation once you are at that stage.

So the real issue, I think, and Professor Sabel begins to raise it, is that information technology is changing the way organizations could inter-penetrate each other, and the way people can be accountable. At the same time, in the private sector there is more use of outsourcing and also more growth.<sup>65</sup>

Banks become very consolidated and large because as they grow, the per-unit cost of maintaining accounts goes way down so they can afford to buy other banks, further removing per-unit cost, etc. On the other hand, they can contract out a lot of services because they can lower the accountability transaction costs.

We must begin by asking what the services and issues are. Instead of going with these preconceived notions of markets and hierarchy, we must ask what we need to do to make something work, because the public sector is a labor-intensive sector. The public sector is a funny business; it is a business in which, if it was a private business, your capital walks out the door every night; these are the people who know what the work is and how it gets done. A lot of times the question is: How do you begin to restructure and reorganize that so that public sector workers can do things more productively?

The questions and issues that interest me are: What is the less costly way to do it? How do you get accountability and efficiency? If we just stay at that level of moving the big pieces around the board, we do not see these things are happening at the micro level.

So I do not see it as a state/local/federal issue; I see it much more as restructuring organizations and information and getting responsiveness in these things.

PROFESSOR SALAMON: The central point is to emphasize how difficult these instruments of operation are, and the new de-

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65. Savas, *supra* note 16.

mands that they are putting on all levels of government. This may have particular implications for state and local government. They certainly have implications for the federal government.

In general, the current instruments of operation escalate the demands in terms of skill and capacity. It is not the case that the public sector is going to be as labor-intensive in the future. I think this is the point that Professor Savas was making, that it is the brain cells that are increasingly being utilized in the public sector, and this requires a very different set of skills. It is extremely difficult to go head-to-head against some of the private contractors that you are having to deal with increasingly and to manage these things, given the lack of information and the difficulties of figuring out what actually is happening.

In education, actually holding the local districts accountable in a flow of information that is frequently imperfect, requires figuring out how to make the public sector smart buyers, how to equip them to manage contracts, as opposed to managing personnel who are delivering services. Such systems are not entirely new, but the scope and the plethora of different instruments that the public sector managers are going to have to learn is immense.

Therefore, I think the fundamental point is to emphasize the increased skill demands that are being placed on state and local governments.

**PROFESSOR SABEL:** On the skills, let me just make two points: one on the question of whether the government can acquire the new skills, at whatever level; and then, I will say something about the levels.

It is not automatic, but the government's acquisition of new skills is a less onerous task than you might think. The reason is that in many of these circumstances, if you get competing proposals to carry out a difficult task, each of the proposals is essentially a criticism of the other proposals. The good proposals recommend themselves by telling you what is wrong with the others, and then you go back to the other proposal makers and say, I have just learned this, and go answer the questions raised by it, and only then do you write the contracts.

Government can acquire this knowledge. If you are the central agent in this operation and are looking at the proposals from varying jurisdictions, it is not at all difficult to do this, if you decide that is what you want to do.

Now, a lot of the problem is that people actually mean they just want to devolve decision-making and not assume any responsibility

for it, in which case they do not get the information; they do not carry out this kind of contractual oversight with learning. But it is not a technical problem. You would have to introduce substantial resources into various levels of government to accommodate this. The actual nature of these kinds of systems is self-correction.

The other small point is this. The architectures that I am talking about have two features. First, they scale higher and lower with respect to each other—they can be the school district and the school, the state and the school district, the federal government and the state and the school district. This is true in all of these different areas.

Sub-point one is that increasingly you do not need to have all the levels involved in many of these programs. Sometimes it is best to go federal/very local, and sometimes it is federal/state.

Sub-point two: one of the real problems is not that it is hard to do this at any particular level of government, though there are questions of sheer incompetence and corruption that have to be addressed. We have our traditional notions of federalism, in which the states are sovereign entities and have dignitary rights and, not incidentally, a Supreme Court which is straddling the last part of the nineteenth century and the remote part of this century in an interesting way for jurisprudence, but maybe not for citizens. The Supreme Court is very attentive to these distinctions that do not really appear to make a difference from the point of view of these new architectures. So that is not a trivial problem.

**PROFESSOR SCLAR:** Professor Salamon made the point that the new public sector is not going to be as labor-intensive, but work is still labor-intensive. Whether the government contracts for, or itself does the work, there is a lot of work to do. If you are filling potholes, you are filling potholes. The question is: Does it pay to have a manager who manages a contract who manages another manager who manages the worker, or does it pay to manage the worker directly? The answer is clearly and unequivocally: “it depends,” and let me be firm about that.

But the point is, you have more than one way to do this work, but it is still labor-intensive work. The question is: How is the technology changing and how can you control things? You cannot separate government managing from government doing. Sometimes you can, but, as I said, with steering and rowing, if you are in a canoe, you tell me when you are steering and you tell me when you are rowing if you are sitting in the back there all by yourself.



We've got to break out of some of these old conceptual boxes and start thinking about this in more functional ways.

MS. METZGER: Are there questions from the audience?

QUESTION: Professor Sclar, when you were talking about the energy crisis in California and making the general point that when a policy fails, often you hear these explanations that "it would have worked if we had done it this way or that way." At a certain point you get to the conclusion—it is really the policy that is a failure, not the implementation.

It is interesting, because I have often heard that as a criticism, not of privatization, but of the more publicly administered systems. The critics of public schools will say, "If the public schools in urban settings fail over and over again, do not tell us the solution is more money, do not tell us it is new curriculum; the fundamental system itself has a flaw." The same criticism is made in the context of public housing, public hospitals, etc.

So my question is: Whether it is the private side or the traditional administrative structures, how do you know that when a policy fails again in particular cases that the reason it fails is the policy itself, rather than just that the policy was really good but if this variable or that variable were changed it would be a good policy? How do we know when it is the system itself that is the source of the failure?

PROFESSOR SCLAR: I think that is a good question and I think that is a good critique of what I said. I would agree with you that this knife cuts both ways. The problem is I do not have a simple answer to that. The only answer I keep coming back to is to try to get clear about what the problem is.

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

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

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

PROFESSOR SAVAS: I think there is an easy answer to that: using competition and comparisons. In the case of schooling, that

is a particularly good approach. There are plenty of private schools that do well; parochial schools, which accept students very much like the public schools accept; and finally, home schooling. So those comparisons are available. The political problem is how to deal with those, how to take advantage of that knowledge, and, in my opinion, how to provide that kind of choice for parents and children.

PROFESSOR SALAMON: My point would be that we have a real danger of a mis-specification problem, mis-specifying the cause of the problem. In particular, if you agree with my argument, which is that there are very few programs that take the form of pure public activity, much of what we are criticizing and using terms like public program to refer to, conjuring up this image of a public bureaucracy delivering a service, turns out not to be that at all. So, much of the critique of the 1960s' social programs, which criticized them as too much government, fail to note that when you strip away the rhetoric of those programs, what those programs consisted of were grants to states. In most cases the majority of the money was then contracted out to either a for-profit or a nonprofit vendor, creating a very complicated system of indirection, which then became extremely difficult to manage and to control and to evaluate. To call that an example of a public-sector failure without realizing what it really was is unfair.

I would argue that many of the most egregious failures attributed to public action in recent decades turn out to be failures of indirect government, as opposed to failures of direct government. That is certainly true at the national level.

We have a lot of examples of failed systems of indirection. I think that the real priority we are going to live with is indirection; I do not think that is going to change; our only solution is to make it work better. So I think we have to be careful about mis-specifying the cause and nature of the difficulties.

MS. METZGER: Professor Sabel?

PROFESSOR SABEL: Let me return to your very precise question. I think it is a very good question to ask at this point.

Let me suggest there is another simple answer to it. It is not an elegant answer, but it is a simple answer, and I actually think it is the answer that explains why there has been change.

In fact, it is very hard to know when something is a systemic breakdown and when it is accidental. People who are in charge of things are not generally disposed to hit the panic button every time

there is a problem, so the inclination is to think it is an accident and try to fix it.

So how do you know when it tips from being accidental to systemic? The way to know is when all the people in the system, the people who deal with the problems of the system day by day, decide that they cannot fix it within the confines of the existing system. That is different from a comparison. Comparisons are easy to conjure up and comparisons tend to be made by people outside the system. But what really tends to let you know you have a reliable judgment of failure is when people inside, the public school bureaucracy—which is free of indirection—say to themselves, “This is not working.” The way you on the outside know they say that is because all of a sudden you get coalitions, quite surprising coalitions, of very disgruntled insiders whose professional honor, whose sense of dedication, whose sense of humanity, and whose sense of disgust are triggered, teaming up with people on the outside to try new things. That is the indication that the scheme is really systematically broken. That is an endogenous indication, if you like. It lacks a certain objectivity, but it is coincident with real change.

You would not be having the massive change that we are having in American public institutions if people on the inside were not well aware of the problems.

Go back to these old books about the public choice and the logics of collective action.<sup>66</sup> They essentially tell you that entrenched interests can never be dislodged because their stakes in preserving the old system are so much larger than the outsiders’ stakes in improving it.<sup>67</sup> And yet, they are being dislodged, and the reason is that there are new forms of public action that essentially suppose the alliance between disgruntled insiders and people on the outside. So there is a non-empirical, but effective, indication.

PROFESSOR SAVAS: Would you illustrate that with an example?

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66. See generally Williamson, *supra* note 40 (discussing vertical integration); MANCUR OLSON JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965). For summaries of the public choice theory, see DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* (1991); DENNIS C. MUELLER, *PUBLIC CHOICE II* (1989); Edward L. Rubin, *Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes*, 66 N.Y.U. L. REV. 1 (1991); MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH STAGFLATION, AND SOCIAL RIGIDITIES* 77-79 (1982). For a good summary of economic analysis of interest groups following Olson, see RUSSELL HARDIN, *COLLECTIVE ACTION* (1982) and TODD SANDLER, *COLLECTIVE ACTION: THEORIES AND APPLICATIONS* (1992).

67. See generally Olson, *supra* note 66.

PROFESSOR SABEL: The examples are the school movements that I referred to in Texas and Kentucky.<sup>68</sup> In Kentucky, there is a statewide initiative composed of people from inside the school system, former high officials in the Kentucky Education Department and whole communities across the state.<sup>69</sup> They organized a giant campaign to pressure the Kentucky State Legislature, the Kentucky Supreme Court, and the Department of Education of Kentucky.<sup>70</sup>

In Texas it is a totally explicit alliance of the same thing.<sup>71</sup> The same thing is also going on now in California and many other places.<sup>72</sup> It is not that it occurs sometimes; it is the absolute typical pattern in these things. We could do it for environmentalism, too.

MS. METZGER: I would like to get one more question, if someone has one.

PROFESSOR SABEL: One quick point. If anyone is interested, there is a paper I co-authored with Jim Liebman on my Web site that has tons of detail about this topic.<sup>73</sup> This is not a freehand construction.

MR. WARD: My name is Mark Ward and I am with the U.S. General Accounting Office. I am intrigued by some of the emerging paradigms that you have discussed in terms of new governance. Given that our middle name is accountability, and the fact that we have looked and continue to look at privatization, what are some of your thoughts as to how the so-called accountability or oversight systems or organizations could be reconfigured or reorganized to shift themselves with the emerging new governance? I am thinking, for example, of traditional contract auditing functions, ways of getting public input on grievances, or other procedures or processes that try to answer the question of accountability both from the perspective of to whom and for what?

DEAN AMAN: Without getting too technical on this, this is why I think that, from the administrative law point of view, this public/

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68. Hunter, *supra* note 59.

69. *Id.* at 494.

70. *Id.* at 491.

71. William Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J.L. & EDUC. 219 (1990).

72. Michael Rebell & Robert Hughes, *Schools, Communities and the Courts: A Dialogic Approach to Education Reform*, 14 YALE L. & POL'Y REV. 99, 117 n.225 (1996).

73. CHARLES SABEL & JAMES LIEBMAN, *Emerging Model of Public School Governance and Legal Reform: Beyond Redistribution and Privatization*, at <http://www.law.columbia.edu/sabel/papers.htm>.

private divide is written into the law through the state action doctrine and through a number of our laws that refer to state agencies.<sup>74</sup> Certain requirements apply to state agencies, but they do not apply to private actors who are carrying out similar tasks. So at a minimum, freedom of information acts, both at the federal and at the state level, are geared to just public agencies but not to the private side.

Secondly, the federal Administrative Procedures Act,<sup>75</sup> which is mirrored to a fair extent in many state administrative procedure acts, has an exception for contracting out, because when it was written, the drafters of the legislation were thinking of the kinds of contracts that, for example, an agency would enter into with the Xerox repair person.<sup>76</sup> You are not going to have notice and comment and public involvement as to who you are going to choose to keep your Xerox machine functioning.

But, of course, the whole nature of contracting has changed dramatically. One way to look at contracts is to see them as a form of rule-making in which there should be notice to the public and opportunities to comment.

Still another way to think of them is as treaties. I think this can be a useful way to conceptualize these issues. You do not want to bring to bear a lot of old thinking in the form of, New Deal kinds of procedures that do not necessarily work in this new governance area. But the international model is a useful one because there is so much soft law and so many informational approaches to procedure that one finds in provisions dealing with the compliance of treaties. I think this can be a fruitful analogy.

This would not be based on a coercion model of procedure, but it would be one based on compliance, and, most importantly, it would institutionalize the kind of information flow that all of you have been indicating is occurring now. It may be occurring in some areas, but how do you restructure these contracts when you get the public more widely involved in it? How do the contracts in question appear to the public and are there opportunities along the way for the public to intervene and express their views?

Finally, I believe it is difficult and probably impossible to separate administration from policy-making. Policy-making does not end when there is a public decision to contract out. Administration

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74. See generally Aman, *supra* note 1 (discussing privatization in the global context).

75. 5 U.S.C. § 551 (1994).

76. *Id.*

and policy-making continue and there needs to be a public component for that administration. But administrative lawyers have to be careful not to import a lot of unnecessary procedures. We need to be more creative than in the past. One way may be to develop the informational aspects of procedure more fully through reporting requirements and various ways in which citizens could petition to have contracts amended if they do not appear to be working properly.

The easy example is prisons. There are examples of private prisons and private juvenile detention centers whose conditions are abominable. Stories have appeared in the newspapers, and eventually citizens realize that something is wrong, and the private providers involved are more than a little embarrassed by that. We need to institutionalize the possibility of this kind of public/private dialogue so that it can take place, when necessary.

PROFESSOR SALAMON: I just want to make note of the fact that this book I mentioned has a chapter on accountability written by the Director of the Budget Division of U.S. General Accounting Office, Paul Posner, who has taken up precisely these questions.<sup>77</sup> I think the fundamental message is that the traditional notions and procedures of accountability have been changed and are beginning to change. We have notions of negotiated rule-making, for example, which is a fundamental shift from the standards of the Administrative Procedures Act.<sup>78</sup> Instead of restricting and forbidding *ex parte* involvement in the development of rules, it encourages and creates a structure for it.

There have been similar changes in contracting, with the effect of sometimes replacing old-style arm's-length contracting with various forms of negotiated contracting with a restricted array of bidders who are invited into the process.

So there are very fundamental shifts in the nature of accountability. Accountability remains a crucial issue and it explains why it does make a difference that this is collective action and public action, but the forms of accountability are changing quite dramatically.

PROFESSOR SCLAR: One quick comment. When we talk about accountability in terms of public contracts, we have to remember that one person's accountability is another person's red tape. Part of the nature of the public sector is that it has not found

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77. *THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE* (Lester M. Salamon ed., forthcoming 2001).

78. 5 U.S.C. § 551 (1994).

a good way to protect public capital. Since it is everybody's capital, it is nobody's capital, so we end up with the rules. The question becomes: What adds value and what is just waste? We do not have a good way yet to sort that out, but that is one of the problems.

MS. METZGER: I would like to thank the panelists.

MR. HATCH: I would like to thank our moderator, Gillian Metzger, and all of our panelists for that terrific introduction to our topic and transition to our second panel, which will look at "Public Oversight of Public/Private Partnerships."

