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BOOK REVIEW

THE POSSIBILITIES AND  
LIMITATIONS OF PRIVATIZATION

GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY. Edited by Jody Freeman and Martha Minow. Cambridge, Mass.: Harvard University Press. 2009. Pp. viii, 528. \$49.95.

*Reviewed by Edward Rubin\**

Neal Stephenson's *Snow Crash*<sup>1</sup> envisions a United States of the future where protection against foreign enemies is provided by Admiral Bob's Global Security, domestic order is the domain of the Central Intelligence Corporation, and local safety is maintained by MetaCops Unlimited ("Dial 1-800-THE COPS: All Major Credit Cards"<sup>2</sup>) — all of which fits perfectly with the name-branded, commercialized environment that dominates people's day-to-day existence. In Los Angeles, where the Mafia, a legal corporation, will deliver pizza anywhere in thirty minutes guaranteed, Fedland is a highly guarded office complex that has no function that anyone can discern other than to protect itself. The novel merits science fiction's much-coveted accolade of prescience for having also envisioned a cyberspace world where people can create virtual characters that move around and interact, and having introduced the term "avatar" to describe them.<sup>3</sup> Whether Stephenson's vision of a totally privatized America will turn out to be equally prescient is at least one theme of Jody Freeman and Martha Minow's edited volume, *Government by Contract*.

This excellent collection of essays arrives when the debate about privatization is already well advanced. Beginning largely during the 1970s, but accelerating in response to the second Bush Administra-

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<sup>1</sup> NEAL STEPHENSON, *SNOW CRASH* (1992).

<sup>2</sup> *Id.* at 44.

<sup>3</sup> In his acknowledgements, Stephenson notes that the term "avatar" was being used by a virtual reality system called Habitat at the time he wrote the book, although he became aware of it only after his book was published. *Id.* at 470. In any case, his book appears to be the origin of the term's current usage.

tion's unalloyed enthusiasm for privatization,<sup>4</sup> the scholarly literature on privatization is now voluminous. In fact, a number of the contributors to this volume have already written books or extensive articles about the topic.<sup>5</sup> This is an advantage. It means not only that the contributors are extremely knowledgeable, but also that they have moved past the overheated enthusiasm<sup>6</sup> or instinctive horror<sup>7</sup> with which the debate began to more modulated and informed positions. They can therefore enter into a sustained, constructive dialogue with each other that constitutes a further virtue of *Government by Contract*. In all too many edited volumes, the contributors talk past each other; these contributors have read one another's work, taken it seriously, and responded in ways that deepen the debate. The result is a book that will be extremely useful for readers who are new to the topic and want to familiarize themselves with its essential facts and basic issues, and equally useful for those who have been following the controversy and want to remain up to date with its most recent ramifications.

In other words, if you have any interest in privatization, you should read this book. And, as Freeman and Minow argue in the Introduction, if you do not have any interest in privatization, you should develop one. Privatization is an important issue by anyone's standards, but it is arguably much more than that. A convincing case can be made that it is one of two issues that has defined regulatory policy, and in large part presidential politics, for the past thirty years. According to Stephen Skowronek's Kuhnian model,<sup>8</sup> presidential administrations can be organized into sequences defined by distinctive paradigms of governance: one President defines or "reconstructs" a new approach to

<sup>4</sup> See, e.g., OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, THE PRESIDENT'S MANAGEMENT AGENDA, FISCAL YEAR 2002, at 17-18, 35-42 (2001), available at <http://www.whitehouse.gov/omb/budget/fy2002/mgmt.pdf>.

<sup>5</sup> See, e.g., ALFRED C. AMAN, JR., THE DEMOCRACY DEFICIT (2004); JOHN D. DONAHUE, THE PRIVATIZATION DECISION (1989); WILLIAM J. NOVAK, THE PEOPLE'S WELFARE (1996); PAUL R. VERKUIL, OUTSOURCING SOVEREIGNTY (2007); Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437 (2005); Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285 (2003); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003); Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalization, and Democracy*, 46 B.C. L. REV. 989 (2005); Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229 (2003) [hereinafter Minow, *Public and Private Partnerships*].

<sup>6</sup> See, e.g., E.S. SAVAS, PRIVATIZATION: THE KEY TO BETTER GOVERNMENT (1987).

<sup>7</sup> See, e.g., DANIEL GUTTMAN & BARRY WILLNER, THE SHADOW GOVERNMENT: THE GOVERNMENT'S MULTI-BILLION-DOLLAR GIVEAWAY OF ITS DECISION-MAKING POWERS TO PRIVATE MANAGEMENT CONSULTANTS, "EXPERTS," AND THINK TANKS (1976).

<sup>8</sup> See STEPHEN SKOWRONEK, THE POLITICS PRESIDENTS MAKE (1993); see also THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970) (arguing that scientific theories operate as paradigms). Skowronek, probably to his credit, does not rely explicitly on Thomas Kuhn in advancing his theory.

government, one or more successor Presidents extend or “articulate” that approach, and then one or more unfortunate or inadequate presidents continue the approach past its period of effectiveness, during what Skowronek describes as a “disjunction.”<sup>9</sup> An obvious example would be Franklin Roosevelt’s reconstruction, Lyndon Johnson’s articulation, and Jimmy Carter’s disjunction.<sup>10</sup> Within this framework, Ronald Reagan’s Administration could be regarded as a reconstruction, with the first Bush Administration being an articulation and the second a disjunction. With respect to regulatory policy, which Reagan moved directly to the forefront of political debate, the two principal pillars of his reconstruction were cost-benefit analysis and privatization. Both remained as the organizing principles of regulatory policy through the two Bush Administrations and, even more strikingly, through the Clinton Administration as well. They therefore can be said to constitute the paradigm of domestic regulatory policy that has prevailed for the past three decades.<sup>11</sup>

It is too early to tell whether the Obama Administration will represent a new reconstruction, but reevaluation of the privatization pillar of the Reagan paradigm is clearly underway. Office of Management and Budget (OMB) Circular A-76,<sup>12</sup> which has served as the centerpiece of privatization policy for the past twenty-five years and was a particular vehicle for the second Bush Administration’s efforts, was suspended for a year by the 2009 Omnibus Appropriations Act,<sup>13</sup> which President Obama signed this past March. In that same month, he issued a Presidential Memorandum instructing the new director of OMB to reevaluate government outsourcing.<sup>14</sup> The Memorandum states that:

[T]he line between inherently governmental activities that should not be outsourced and commercial activities that may be subject to private sector competition has been blurred and inadequately defined. As a result, contractors may be performing inherently governmental functions. Agencies

<sup>9</sup> SKOWRONEK, *supra* note 8, at 36.

<sup>10</sup> *Id.* at 287–406. The earlier clusters that Skowronek discusses in his book are Jefferson, Monroe, and Quincy Adams, *id.* at 61–128; Jackson, Polk, and Pierce, *id.* at 129–96; and Lincoln, Theodore Roosevelt, and Hoover, *id.* at 197–286.

<sup>11</sup> For a general survey of cost-benefit analysis as it has developed and flourished in the past four presidential administrations, see MATTHEW D. ADLER & ERIC A. POSNER, *NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS* (2006).

<sup>12</sup> Office of Mgmt. & Budget, Exec. Office of the President, Circular No. A-76 (Revised) (May 29, 2003) [hereinafter Revised OMB Circular A-76], *available at* <http://oam.ocs.doc.gov/docs/OMB%20Circular%20A-76%20Revised%202003.pdf>.

<sup>13</sup> Pub. L. No. 111-8, 123 Stat. 524 (2009).

<sup>14</sup> Barack Obama, Memorandum for the Heads of Executive Departments and Agencies (Mar. 4, 2009), 74 Fed. Reg. 9755, 9756 (Mar. 6, 2009), *available at* <http://www.govexec.com/pdfs/030409e1.pdf>.

and departments must operate under clear rules prescribing when outsourcing is and is not appropriate.<sup>15</sup>

Thus, it would appear that we have now reached a truly historic turning point, not merely for privatization, but for the thirty-year-long paradigm of regulatory policy that privatization has so largely defined.

Part I of this Review will summarize *Government by Contract*, not by simply reiterating the main points in each essay but — taking advantage of one of the book's virtues — by describing how the contributors' arguments interact with one another. Part II, continuing this theme, will attempt to identify the common ground that the contributors trace out as a result of their dialogue: first, that policymaking should remain in the control of politically accountable government authorities; second, that the primary purpose of privatization is to achieve greater efficiency; and third, that this efficiency gain depends on the claim that private contractors are competitive entities in a competitive environment. Part II will then go on to identify some of the areas where the contributors disagree, the most significant being the competitiveness of the contracting process and the level of efficiency that it achieves. The discussion will then proceed to some of the possibilities for privatization that lie beyond the realm of contractor efficiency and that future commentators might consider. Taken as a whole, these varied considerations suggest that privatization is not an issue that will yield to a simple or uniform solution. Rather, what will be required, as we move forward into a new era of American governance, is a fine-grained microanalysis of the possibilities and limitations of privatization in the many situations where it is potentially applicable.

## I. THE PRIVATIZATION DEBATE

### A. *The History of Privatization*

William Novak begins the book by placing privatization in historical perspective.<sup>16</sup> He points out, as have other participants in this debate, that the concept of privatization depends on a socially constructed distinction between public and private.<sup>17</sup> Over the course of

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<sup>15</sup> *Id.* at 9755–56. The phrase “inherently governmental” is quoted from Revised OMB Circular A-76, *supra* note 12, at 1. The Circular defines an inherently governmental activity as “an activity that is so intimately related to the public interest as to mandate performance by government personnel.” *Id.* at A-2. While it goes on to provide criteria, it never offers a definitive test, so the categorization, as President Obama’s statement suggests, is inevitably a matter of judgment.

<sup>16</sup> William J. Novak, *Public-Private Governance: A Historical Introduction*, in GOVERNMENT BY CONTRACT 23 (Jody Freeman & Martha Minow eds., 2009).

<sup>17</sup> See *id.* at 25–27; see also, e.g., Dan Guttman, *Governance by Contract: Constitutional Visions; Time for Reflection and Choice*, 33 PUB. CONT. L.J. 321, 322 n.1 (2004); Sheila S. Kennedy,

American history, patterns of collaborative governance inherited from longstanding English practice have produced a porous, intricate, and ever-shifting boundary between these supposedly separate spheres. Many state and city governments originated during the Colonial era as charters to private companies, and early American corporations were conceived as instruments of governance.<sup>18</sup> The dynamic interplay between the two realms, Novak notes, continues to the present time: "In the context of these twin concerns about the potential for public corruption in state-directed projects and private coercion in the free market, it is not an accident that the United States developed a preference for balancing public direction with private initiative."<sup>19</sup>

Novak's insight also applies to much of the pre-American Western world. Feudalism, the dominant mode of governance for many centuries after the collapse of the Roman Empire, was essentially an extreme form of privatization.<sup>20</sup> In theory — and often in practice as the result of coup or conquest — the king owned all the land in his realm. But the administrative capacities of royal regimes during this period were so limited, and the transportation and communications systems so primitive, that a king could not possibly control even a moderate-sized realm.<sup>21</sup> Instead, he would divide his lands among his followers, giving them property rights that were equivalent to total control and demanding only loyalty and in-kind service in return.<sup>22</sup> With the revival of trade and learning in the High Middle Ages, the governance capacities of European kingdoms began to expand, and monarchs

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*When Is Private Public? State Action in the Era of Privatization and Public-Private Partnerships*, 11 GEO. MASON U. CIV. RTS. L.J. 203, 209 (2001); Chris Sagers, *The Myth of "Privatization"*, 59 ADMIN. L. REV. 37, 57–63 (2007).

<sup>18</sup> See Novak, *supra* note 16, at 27–31. In addition, privately owned and operated ships played a significant part in U.S. warfare during the nineteenth century. See Nicholas Parrillo, *The De-Privatization of American Warfare: How the U.S. Government Used, Regulated, and Ultimately Abandoned Privateering in the Nineteenth Century*, 19 YALE J.L. & HUMAN. 1 (2007).

<sup>19</sup> Novak, *supra* note 16, at 32.

<sup>20</sup> For general descriptions of the feudal system, see MARC BLOCH, *FEUDAL SOCIETY* 145–279 (L.A. Manyon trans., 1961) (1939–1940); HEINRICH FICHTENAU, *LIVING IN THE TENTH CENTURY* 135–56 (Patrick J. Geary trans., 1991) (1984); and F.L. GANSHOF, *FEUDALISM* (Philip Grierson trans., 1964) (1961).

<sup>21</sup> Charlemagne tried assiduously to administer his enormous realm, sending out agents called *missi* to exercise direct control, but the effort collapsed even during his lifetime and proved completely impossible for his successors to maintain. See ROGER COLLINS, *EARLY MEDIEVAL EUROPE* 300–1000, at 298–300 (2d ed. 1999); R. Van Caenegem, *Government, Law and Society*, in *THE CAMBRIDGE HISTORY OF MEDIEVAL POLITICAL THOUGHT* C. 350–C. 1450, at 174, 174–83 (J.H. Burns ed., 1988).

<sup>22</sup> Most notable, of course, was military service. See, e.g., GANSHOF, *supra* note 20, at 31, 86–92. Minow notes this historical fact in her discussion of privatization in our contemporary military services. See Martha Minow, *Outsourcing Power: Privatizing Military Efforts and the Risks to Accountability, Professionalism, and Democracy*, in *GOVERNMENT BY CONTRACT*, *supra* note 16, at 110, 112–13.

gradually reasserted central control, canceling feudal rights and imposing political and economic obligations.<sup>23</sup>

But these governance capacities developed only slowly, and the nascent nation-states found that the rapidly expanding bureaucracies that they needed in order to effectuate control were too unwieldy and expensive to sustain. The solution, once again, was privatization, but now on the basis of function rather than geography. Major government offices were either initially created or gradually reconceived as private property. Thus, a particular individual would be assigned to perform some function for the state and would be granted the right to receive the revenue derived from that function.<sup>24</sup> This system prevailed until the end of the eighteenth century, when the administrative capacity of central governments finally caught up with their centralizing aspirations. They rescinded private property rights in offices by one means or another and established functionally organized agencies, staffed by full-time salaried employees, in their place.<sup>25</sup> According to Max Weber, this process constituted the transition to modern bureaucracy. Delegas this brief history suggests, there are no particular

As this brief history suggests, there are no particular sets of functions or responsibilities that are inherently public. For most of Western history, private parties carried out virtually all the activities we now regard as governmental. The last two centuries have seen a steady and dramatic increase in the scope of direct government authority, although often with the continued involvement of private parties, as Novak indicates.<sup>27</sup> Consequently, the current spate of privatization is correctly viewed as a sort of minor epicycle in a massive trend that has been moving rather steadily in the opposite direction. That fact does not reduce recent developments to insignificance, however. There can be no doubt that the last few decades of our nation's history have

<sup>23</sup> See, e.g., WILLIAM J. BOUWSMA, *THE WANING OF THE RENAISSANCE 1550–1640*, at 215–31 (2000); JAMES B. COLLINS, *THE STATE IN EARLY MODERN FRANCE 1–27* (1995); J.H. ELLIOTT, *IMPERIAL SPAIN 1469–1716*, at 85–102 (1963); THOMAS ERTMAN, *BIRTH OF THE LEVIATHAN 55–68* (1997).

<sup>24</sup> See, e.g., ERNEST BARKER, *THE DEVELOPMENT OF PUBLIC SERVICES IN WESTERN EUROPE 1660–1930*, at 9–11 (1944); NORMAN CHESTER, *THE ENGLISH ADMINISTRATIVE SYSTEM 1780–1870*, at 14–16 (1981); JONATHAN DEWALD, *ARISTOCRATIC EXPERIENCE AND THE ORIGINS OF MODERN CULTURE 97–98* (1993).

<sup>25</sup> This change was effectuated by revolution in France, see CLIVE H. CHURCH, *REVOLUTION AND RED TAPE: THE FRENCH MINISTERIAL BUREAUCRACY 1770–1850*, at 69–110 (1981), and by a benevolent despot in Austria, see T.C.W. BLANNING, *JOSEPH II*, at 18–20, 34–40 (1994); ROBERT A. KANN, *A HISTORY OF THE HABSBURG EMPIRE 1526–1918*, at 174–202 (1974). Great Britain, lacking the benefit of either, but just as determined to de-privatize its offices, had to rely on attrition or buy out the office holders with annuities. See BARKER, *supra* note 24, at 34–36, 62–64; JOHN P. MACKINTOSH, *THE BRITISH CABINET 70–73* (3d ed. 1977).

<sup>26</sup> MAX WEBER, *ECONOMY AND SOCIETY 217–26* (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., Bedminster Press 1968) (1922).

<sup>27</sup> See Novak, *supra* note 16, at 39.

seen the privatization of many activities that were previously regarded as the preserve of public authority. The point is simply that these recent privatization efforts cannot be opposed on the ground that they relinquish inherently governmental functions into private hands. Arguments against privatization must be framed in more pragmatic, instrumental terms.

### B. Critiques of Privatization

One of the many virtues of *Government by Contract* is that it is precisely these kinds of pragmatic arguments that its contributors advance. The critics of privatization, avoiding both the conceptual error and the unconstructive consequences of deontological declarations, focus on particular and potentially remediable defects, thus inviting rather than foreclosing a response. Martha Minow offers one of the most far-reaching critiques.<sup>28</sup> Her examples are the wars in Afghanistan and Iraq, in which the second Bush Administration's heavy reliance on privatization overlapped with a number of its other readily critiqued enthusiasms. She notes that, in Afghanistan, private contractors "served in paramilitary units with the CIA, maintained combat equipment, provided logistical support, and worked on surveillance and targeting."<sup>29</sup> In Iraq, they were involved in "planning, policy writing, budgeting, intelligence gathering, [and] nation building."<sup>30</sup> Because monitoring these varied, extensive, and complex contractual activities was clearly a difficult task, the Department of Defense contracted out its monitoring function to private contractors as well.<sup>31</sup>

This extensive reliance on private contracting was not accompanied by a concomitant commitment to the procedures that are supposed to govern the contracting process. The Department of Defense failed to follow the required rules for competitive bidding, to monitor and control the performance of the contracting parties, and to ensure that contractor employees followed appropriate legal and moral norms.<sup>32</sup> The consequences of these casual attitudes are well known in the case of Abu Ghraib, where private contractors carried out many of

<sup>28</sup> Minow, *supra* note 22.

<sup>29</sup> *Id.* at 112.

<sup>30</sup> *Id.* (quoting Dan Guttman, Ctr. For Pub. Integrity, *Commentary: The Shadow Pentagon: Private Contractors Play a Huge Role in Basic Government Work — Mostly Out of Public View*, Sept. 29, 2004, <http://projects.publicintegrity.org/pns/report.aspx?aid=386>) (internal quotation mark omitted).

<sup>31</sup> *Id.* at 117.

<sup>32</sup> *Id.* at 114–23. In her contribution to the volume, Laura Dickinson notes these same failures, pointing out that the contract with CACI International to provide interrogators in Iraq was "completely silent on whether interrogators will receive education in international humanitarian and human rights law." Laura Dickinson, *Public Values/Private Contract*, in *GOVERNMENT BY CONTRACT*, *supra* note 16, at 335, 341.

the interrogations.<sup>33</sup> This was more than an unfortunate lapse in contractual supervision of the sort that can cost the U.S. government a billion dollars or so.<sup>34</sup> Regardless of how one feels about such a massive human rights violation, the fact is that the images of naked, sometimes bloodied Arab men lying on the floor under the supercilious grins of male and female Americans will be vividly present in the mind of every adult in an embattled region where we are absolutely reliant on the support and goodwill of moderate forces for our security and our supply of crucial resources.<sup>35</sup>

But the difficulties with the military's use of private contracting, in Minow's view, run deeper than the specific failures during the wars in Afghanistan and Iraq. First, the competitive process that supposedly renders private enterprise more efficient than public agencies cannot be effectively implemented in many cases because there is no non-government market for the product in question.<sup>36</sup> An obvious example is the LOGCAP contract through which a few private companies have provided a broad range of logistical services to the Army since the Reagan Administration.<sup>37</sup> In these circumstances, there is no real

<sup>33</sup> See MARK DANNER, *TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR* (2004); Stan Soloway & Alan Chvotkin, *Federal Contracting in Context: What Drives It, How To Improve It*, in *GOVERNMENT BY CONTRACT*, *supra* note 16, at 222; Seymour M. Hersh, *Torture at Abu Ghraib*, *NEW YORKER*, May 10, 2004, at 42, 45–46. As these reports make clear, the primary responsibility must rest with the American military itself. Private contractors, however, played a significant role.

<sup>34</sup> For example, in 2004, Darleen Druyun, the second-highest-ranking procurement officer in the Air Force, pleaded guilty to improperly awarding billions of dollars in contracts to Boeing, which had employed her daughter and son-in-law and subsequently employed her as well. She was sentenced to nine months in prison. See Jeffrey Branstetter, *Darleen Druyun: An Evolving Case Study in Corruption, Power, and Procurement*, 34 *PUB. CONT. L.J.* 443, 444, 447 (2005); Leslie Wayne, *Air Force at Unease in the Capital*, *N.Y. TIMES*, Dec. 16, 2004, at C1.

<sup>35</sup> For discussions focusing specifically on the images that emerged from Abu Ghraib and their effects, see DANNER, *supra* note 33, at 217–24; STEPHEN F. EISENMAN, *THE ABU GHRAIB EFFECT* (2007); Barbara Ehrenreich, *Feminism's Assumptions Upended*, in *ABU GHRAIB: THE POLITICS OF TORTURE* 65 (2004); and Charles Stein, *Abu Ghraib and the Magic of Images*, in *ABU GHRAIB: THE POLITICS OF TORTURE*, *supra*, at 102.

<sup>36</sup> See Minow, *supra* note 22, at 118.

<sup>37</sup> LOGCAP stands for Logistics Civil Augmentation Program. Under LOGCAP, civilians can contract to provide housing, sanitation, food, recreation, and burial services to soldiers, as well as operations, information, personnel, and maintenance services to the Army as a whole. See U.S. Dep't of the Army, Army Regulation 700-137, Logistics Civil Augmentation Program (LOGCAP) (1985), available at <http://www.aschq.army.mil/gc/files/AR700-137.pdf>. The four successive LOGCAP contracts have been awarded to just two contractors, KBR and DynCorp, except that Fluor Corporation received parts of the most recent contract following disclosure of extensive legal violations and business inefficiencies by KBR and criticism of the award on the basis that Vice President Cheney had been CEO of KBR's corporate parent, Halliburton. See PRATAP CHATTERJEE, *HALLIBURTON'S ARMY* 62, 71, 198–209 (2009); Dana Hedgpeth, *Army Splits Award Among Three Firms*, *WASH. POST*, June 28, 2007, at A8; Nathan Vardi, *DynCorp Takes Afghanistan*, *FORBES.COM*, July 30, 2009, <http://www.forbes.com/2009/07/30/dyncorp-kbr-afghanistan-business-logistics-dyncorp.html>.



competition for the initial award, and there is also a serious constraint on the effectiveness of subsequent monitoring because the government cannot afford to terminate the contract.<sup>38</sup> Second, the private contractor's employees cannot be fully monitored or controlled because they lie outside the hierarchical structure that is so central to military discipline, and are thus exempt from many of the rules that constrain military personnel.<sup>39</sup> Third, legal and moral norms can never be fully imposed on private contractors because private firms lack the democratic accountability of public agencies.<sup>40</sup>

Both Sharon Dolovich and Paul Verkuil raise equally basic concerns about privatization. According to Dolovich, the process of deciding whether to privatize a particular function will distort the way that function is conceived, regardless of the ultimate decision.<sup>41</sup> The reason is that the decision process necessarily turns on the relative efficiency of government and private providers. This tends to narrow the goals of any particular function — Dolovich focuses on the incarceration of convicted felons — to efficiency alone. At the same time, it ensconces the existing level of performance as a ceiling that the private party needs to reach at a lower cost than the public agency. Cost-benefit analysis, the basic tool by which government and private performance is compared, is often viewed as a way to avoid this exclusive focus on efficiency because it can account for the entire range of program outcomes. But cost-benefit analysis suffers from a well-known tendency to undervalue “soft” variables — that is, those variables that cannot be measured in strictly economic terms — and also from its dependence on previously established goals.<sup>42</sup> The result is to reinstate the efficiency analysis around a principle that Dolovich identifies as cost min-

<sup>38</sup> Federal regulations authorize the use of clauses allowing the government to terminate a contract for either default or convenience. Federal Acquisition Regulation, 48 C.F.R. § 52.249-2 (2008) (termination for convenience); *id.* § 52.249-8 (termination for default of fixed-price supply and service contracts); *id.* § 52.249-10 (termination for default of fixed-price construction contracts). Default is broadly defined and includes failure to make progress in carrying out the contract. *See* *Danzig v. AEC Corp.*, 224 F.3d 1333 (Fed. Cir. 2000). *See generally* Brad Fagg, *Default Terminations for Failure To Make Progress*, 25 PUB. CONT. L.J. 113 (1995). The contracting officer has wide discretion in exercising the termination right. *See* *Fairfield Scientific Corp. v. United States*, 611 F.2d 854, 862 (Ct. Cl. 1979). As Minow points out, however, these powers are of little use if the government agency has become dependent on a particular contractor to carry out an essential function. Minow, *supra* note 22, at 118.

<sup>39</sup> *See* Minow, *supra* note 22, at 118–22.

<sup>40</sup> *See id.* at 122–23.

<sup>41</sup> Sharon Dolovich, *How Privatization Thinks: The Case of Prisons*, in GOVERNMENT BY CONTRACT, *supra* note 16, at 128.

<sup>42</sup> *See, e.g.*, Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553, 1566, 1578–80 (2002); Martha C. Nussbaum, *The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis*, 29 J. LEGAL STUD. 1005, 1028–36 (2000).

imization,<sup>43</sup> thereby undermining democratic accountability.<sup>44</sup> Verkuil reaches a similar conclusion on the basis of a constitutional analysis.<sup>45</sup> The Constitution's Appointments Clause, he points out, provides that the President appoints "Officers of the United States" with the advice and consent of the Senate.<sup>46</sup> But the transfer of roles from appointed officers to private parties denies Congress the opportunity to approve or reject the appointment, and similarly circumvents its power to impeach for "high Crimes and Misdemeanors."<sup>47</sup> The crucial question is whether these private parties, by virtue of the authority they have been granted, qualify as "Officers" in the constitutional sense. In *Buckley v. Valeo*,<sup>48</sup> the Supreme Court established three criteria for making this determination: the scope of authority, the duration of employment, and the permanence of the task assigned.<sup>49</sup> It did not indicate, however, whether these criteria were conjunctive, disjunctive, or something in between. The Office of Legal Counsel (OLC) during the first Bush Administration concluded that they were disjunctive, namely, that meeting any one of the three criteria made one an officer.<sup>50</sup> The Clinton Administration's OLC repudiated this conclusion and held that the private party must meet all three criteria.<sup>51</sup> Under the first Bush Administration's interpretation, privatization would be largely unconstitutional without explicit congressional consent. Under the Clinton Administration's interpretation, the effect of the Appointments Clause would not be so extreme, but it would nonetheless bar many private contracts, such as LOGCAP. Verkuil does not view this constitutional concern, or several others that he discusses, as mere formalism. Allowing private parties to function as government officers highlights the need for them to be supervised effectively by the execu-

<sup>43</sup> See Dolovich, *supra* note 41, at 139–43.

<sup>44</sup> Dolovich's example is well chosen because accountability is a particular problem in the prison context. See MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 150–71 (1998).

<sup>45</sup> Paul R. Verkuil, *Outsourcing and the Duty To Govern*, in GOVERNMENT BY CONTRACT, *supra* note 16, at 310.

<sup>46</sup> *Id.* at 314 (quoting U.S. CONST. art. II, § 2, cl. 2).

<sup>47</sup> U.S. CONST. art. II, § 4; see also *id.* art. I, § 2, cl. 5 (House power to impeach); *id.* art. I, § 3, cl. 6 (Senate power to try impeachments); *id.* art. I, § 3, cl. 7 (consequences of impeachment).

<sup>48</sup> 424 U.S. 1 (1976).

<sup>49</sup> See Verkuil, *supra* note 45, at 318 (citing *Buckley*, 424 U.S. 1).

<sup>50</sup> *Id.* at 318–19.

<sup>51</sup> *Id.* The two Administrations reached these conclusions in connection with the issue of *qui tam* actions. *Id.* at 318–20. When these actions are at issue, rather than government contracts with private parties, the political polarity is reversed. Liberals tend to favor *qui tam* actions and conservatives tend to oppose them, whereas privatization tends to be endorsed by conservatives and criticized by liberals. It is a virtue of Verkuil's essay that he connects the two issues, thus putting us all to the test of either articulating a single, consistent position or explaining the difference between the two issues.

tive, and for both the executive and the legislature to hold them accountable for their performance.<sup>52</sup>

*C. Proposed Reforms of the Privatization Process*

At least four of the other essays in *Government by Contract* — those by Gillian Metzger, Alfred Aman, Laura Dickinson, and Nina Mendelson — generally agree with these critiques and propose legal reforms to remedy the problems that have been identified. Metzger grounds her proposal on constitutional law.<sup>53</sup> In light of Minow's critique that the executive branch has failed to monitor private contractors and Verkuil's critique that the legislative branch has been precluded from doing so, she proposes an expanded monitoring role for the judiciary. The major impediment to judicial monitoring, Metzger notes, is the current interpretation of the state action doctrine.<sup>54</sup> Private contractors, like administrative agencies, possess delegated power,<sup>55</sup> but the constitutional constraints that discipline public agencies, most notably due process, can be applied to private contractors only if they are deemed to be state actors.<sup>56</sup> While the current state action doctrine recognizes the basic reality of delegated power, it imposes two limitations that are nearly fatal to judicial monitoring. First, the doctrine limits the finding that a private contractor is performing a public function to "decisions traditionally and exclusively made by the sovereign for and on behalf of the public";<sup>57</sup> second, it requires that the government be specifically involved in the contractor's performance of its tasks.<sup>58</sup> Metzger demonstrates that both of these limitations are conceptually flawed. With respect to the first, she points out, in agreement with Novak, that there is no fixed category of intrinsically governmental tasks, particularly given the dramatic expansion of governmental roles in the administrative state. With respect to the second, she argues that a lack of government involvement

<sup>52</sup> In his book on privatization, Verkuil voices, with a particular focus on the military, many of the same policy-based concerns that Minow raises in *Government by Contract*. He emphasizes the absence of supervision and attributes it to both legal and policy factors. VERKUIL, *supra* note 5, at 103–09, 158–73.

<sup>53</sup> Gillian E. Metzger, *Private Delegations, Due Process, and the Duty To Supervise*, in *GOVERNMENT BY CONTRACT*, *supra* note 16, at 291.

<sup>54</sup> *Id.* at 295.

<sup>55</sup> Metzger has previously explored the relationship between contracting out and delegation with great insight. See Metzger, *supra* note 5.

<sup>56</sup> See, e.g., *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288 (2001) (holding statewide high school athletics association to be a state actor); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978) (holding private party taking action authorized by codified common law not to be a state actor); *Marsh v. Alabama*, 326 U.S. 501 (1946) (holding company town to be a state actor).

<sup>57</sup> *Blum v. Yaretsky*, 457 U.S. 991, 1012 (1982).

<sup>58</sup> Metzger, *supra* note 53, at 295.

of the sort that Minow documents is exactly the situation where judicial monitoring is most needed: “The less the government is involved, the more discretion and power private entities have.”<sup>59</sup> By eliminating these limitations on the reach of the state action doctrine, the federal judiciary could require that contractors who exercise delegated power over private parties conform to the same standards of regularity, accuracy, and impartiality that are already imposed on government agencies.

The volume moves from constitutional to statutory law with Aman’s effort to deploy the resources of administrative law doctrine to address the lack of accountability that concerns Minow, Dolovich, and Verkuil.<sup>60</sup> He agrees with Novak that the public-private dichotomy is artificial, and with Metzger that similar constraints should apply when the government chooses to act directly and when it chooses to act indirectly through private contractors. The Administrative Procedure Act<sup>61</sup> (APA), he notes, requires that administrative agencies announce their intention to enact a regulation in advance, open their decision-making processes to public participation, and publicly explain their reasons for the decisions that they ultimately reach. Similarly, the Freedom of Information Act<sup>62</sup> (FOIA) requires that agencies disclose information about their decision processes to the public. Applying these statutory provisions to privatization would mean that the government needs to announce its intent to contract out in advance, accept public commentary on the decision, and explain the reasons for whatever contract it ultimately enters. The contracting party would be required to make information about its performance of the contract open to the public. Thus, whether the function was to be performed publicly or privately, the mechanisms that ensure accountability to the public would be essentially the same.

Two other contributions extend the consideration of legal reforms to common law. Dickinson argues that contractual terms can be used to import public values such as fairness, transparency, and accountability into the realm of private contracting.<sup>63</sup> The government can require a private contractor to follow a public law norm, establish clear benchmarks for contractor performance, subject the contractor to specific monitoring processes by a public agency, require that it engage in self-evaluation, require that it be accredited by an independent trade or standard-setting organization, and establish specific criteria for ter-

<sup>59</sup> *Id.*

<sup>60</sup> Alfred C. Aman, Jr., *Privatization and Democracy: Resources in Administrative Law*, in *GOVERNMENT BY CONTRACT*, *supra* note 16, at 261.

<sup>61</sup> 5 U.S.C. §§ 551–559, 701–706 (2006).

<sup>62</sup> *Id.* § 552 (codified as an amendment to the APA).

<sup>63</sup> Dickinson, *supra* note 32.

mination or partial takeover of the contract. Dickinson notes that many of these devices appear in government contracts for domestic goods and services, but have been strikingly absent in the international setting. Based on her survey of all the publicly available contracts the government has entered into to support its military and foreign aid efforts in Iraq, she concurs with Minow that the contracts themselves were slovenly designed, oversight was weak or nonexistent, corruption was rampant, and performance was inadequate.<sup>64</sup>

Mendelson also proposes a reform of common law as a means of increasing contractor accountability.<sup>65</sup> Her more general theme is that existing legal provisions can be incrementally adjusted to increase the accountability of private contractors, thus avoiding the need for new and necessarily controversial legislation. She therefore seconds Metzger's view that the state action doctrine should be reformulated so that private contractors are subject to constitutional claims, and Aman's view that administrative law standards, such as those embodied in the APA and FOIA, should be applied when government agencies choose to contract out certain functions. Mendelson devotes particular attention, however, to tort law and proposes that the excessively generous defenses to liability that have been granted to private contractors be rescinded. Courts quite reasonably allow a contractor to assert a defense against tort liability when the contractor is acting in accordance with government specifications. But the courts have expanded this "government contractor defense"<sup>66</sup> to any situation where the specifications are "reasonably precise,"<sup>67</sup> even if the action at issue in the lawsuit is not encompassed by those specifications. "In the best-case scenario for contractor accountability," Mendelson writes, "a court could conceivably decline to apply the government contractor defense in a tort case unless the government had specifically required particular actions (or nonactions) on the part of the contractor."<sup>68</sup>

#### *D. Defenses of Privatization and Responses to the Critiques*

The remaining five contributions to *Government by Contract* respond to these calls for legal reform. Three of the five — those written by Steven Kelman, Stan Soloway and Alan Chvotkin, and Mathew Blum — argue that existing controls on government contracting are adequate and that additional restrictions of the sort proposed by other contributors would be counterproductive. Kelman employs transac-

<sup>64</sup> *Id.* at 339–40.

<sup>65</sup> Nina A. Mendelson, *Six Simple Steps To Increase Contractor Accountability*, in GOVERNMENT BY CONTRACT, *supra* note 16, at 241.

<sup>66</sup> *Id.* at 247.

<sup>67</sup> *Id.* (internal quotation marks omitted).

<sup>68</sup> *Id.*

tion cost economics, as developed by Ronald Coase and Oliver Williamson,<sup>69</sup> to articulate a conceptual framework for privatization.<sup>70</sup> A firm must always decide whether to “make or buy” a particular product or service; for functions outside the core competency of the firm (that is, the thing the firm does better than anything else), contracting for the good or service will tend to be the efficient solution unless the contracting process is beset by unusual uncertainties, the contract will reduce competition by generating assets that cannot be used for other purposes, or the firm will have difficulty determining whether the contractor has performed in a satisfactory manner. Government must make this same determination, Kelman argues. Traditionally, though, political sensitivity to corruption and a legally suffused environment led public policymakers to focus on constraining the contracting process, rather than on achieving efficient results. The result was a constellation of counterproductive rules: negotiations about matters other than price were prohibited; the contractor’s past performance could not be considered; discounts and sale prices could not be offered; and specifications were required to purchase standard, off-the-shelf items. Overarching all these and other specific prohibitions were the sheer magnitude and complexity of the requirements, a tangle of red tape that generated ritualized processes and redundant verbiage instead of efficient implementation.

The Clinton Administration’s effort to refocus agencies on results, rather than constraints, was called “reinventing government.”<sup>71</sup> Agency officials were issued credit cards to make small purchases, government-wide acquisition contracts were developed to simplify large purchases, best value replaced lowest price as the standard for awarding contracts, and rules against the negotiation of nonprice terms were eliminated.<sup>72</sup> Kelman argues that these changes have had salutary ef-

<sup>69</sup> See OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM* (1985) [hereinafter WILLIAMSON, *ECONOMIC INSTITUTIONS*]; OLIVER E. WILLIAMSON, *MARKETS AND HIERARCHIES* 3–4, 252–53 (1975) [hereinafter WILLIAMSON, *MARKETS*]; OLIVER E. WILLIAMSON, *THE MECHANISMS OF GOVERNANCE* 54–92 (1996) [hereinafter WILLIAMSON, *MECHANISMS*]; R.H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937).

<sup>70</sup> Steven J. Kelman, *Achieving Contracting Goals and Recognizing Public Law Concerns*, in *GOVERNMENT BY CONTRACT*, *supra* note 16, at 153.

<sup>71</sup> DAVID OSBORNE & TED GAEBLER, *REINVENTING GOVERNMENT* (1992). For a discussion of privatization per se, see *id.* at 76–107. The basic contours of the National Performance Review initiative itself are stated in ALBERT GORE, *FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER AND COSTS LESS* (1993).

<sup>72</sup> See 48 C.F.R. § 1.102 (2008). The legal structure is a bit more complex than this single citation suggests, however. Since World War II, separate statutes have governed military and civilian contracting: the Armed Services Procurement Act of 1947, 10 U.S.C. §§ 2202, 2302–2314, 2381, 2383 (2006 & Supp. II 2008), and the Federal Property and Administrative Services Act of 1949, 41 U.S.C.A. §§ 251–266a (West 2003 & Supp. 2009). Regulations implementing both statutes are promulgated jointly by the Defense Acquisition Regulations Council and the Civilian Agency Acquisition Council, the former under the authority of the Secretary of Defense and the latter un-

fects and should not be reversed. Imposing APA requirements on the contracting process or subjecting contractors to constitutional, statutory, or common law liability suits would only revive the unwieldy complexity that recent reforms have succeeded in eliminating. Most government contracts involve technical matters, such as standardized goods or ministerial services, that do not raise public policy-level issues. Those relatively rare situations where public law issues are involved are usually motivated by the government's need for a temporary increase in capacity (a natural disaster, for example), its need for highly specialized expertise that would be excessively expensive to maintain on staff, or — ironically — the greater control that agency officials can often exert over contractual employees.<sup>73</sup> There are already many safeguards in place under current law to control the contracting process in these situations. What is really needed, in Kelman's view, is for government to focus its attention more fully on the monitoring process and to hire talented, experienced, and committed staff to carry out that process.<sup>74</sup> It is the lack of adequate staff, not the scope of contracting or the level of legal constraints on it, that constitutes the major problem in the current federal contracting system.

Soloway and Chvotkin, officers of the Professional Services Council (a trade association for government contractors) adopt a similar position.<sup>75</sup> The real motivation for outsourcing, they argue, is not any specific desire to dismantle the government, but rather the decline in the government's research capacity and the vastly superior resources in this area — so crucial in our modern, technological society — that the private sector offers.<sup>76</sup> This disparity results from the rigidity of the civil service system, which disables the government from attracting highly trained and skilled employees. Outsourcing's primary role has been to expand the government's capacity in rapidly growing high-tech fields, generally not to replace existing federal workers.<sup>77</sup> As

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der the authority of the Administrator of General Services. It is this system that is known as the Federal Acquisition Regulation (FAR). The Clinton Administration reforms were codified in Simplified Acquisition Methods, 48 C.F.R. §§ 13.301–.307 (2008), and supported by the Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (codified in scattered sections of 10 U.S.C. and 41 U.S.C.). These reforms rendered various federal contracting laws inapplicable to small purchases.

<sup>73</sup> The argument that private contractors are easier to control than public employees is also advanced in JAMES Q. WILSON, *BUREAUCRACY* 359 (1989). It is a striking claim, and one that Wilson supports only with anecdotes. Proving it would require careful analysis based on clear definitions of control. Beyond that, it would be necessary to decide whether the control being exercised is desirable. In some cases, for example, civil servants may resist orders from political appointees because those orders contravene the applicable statute.

<sup>74</sup> See Kelman, *supra* note 70, at 171–77.

<sup>75</sup> Soloway & Chvotkin, *supra* note 33.

<sup>76</sup> See *id.* at 207–08.

<sup>77</sup> See *id.* at 210–11.

such, it is just as frequently a response to strategic and human capital demands as it is an intentionally planned make-or-buy decision. Soloway and Chvotkin concur strongly with Kelman that this process is already subject to a fully adequate set of safeguards.<sup>78</sup> All potential contracts worth over \$25,000 must be publicly posted to allow competing bids, all awards over \$25,000 must be posted as well,<sup>79</sup> all bidders must be registered in a centralized database,<sup>80</sup> each contract must be managed by a specially assigned federal officer, and the government must affirmatively approve all payments. Like Kelman, they conclude that additional procedures or constraints would unnecessarily encumber a process that is already quite complex, and they recommend instead that the federal government expand its contract monitoring capacities.<sup>81</sup>

Another similar, but even stronger, stand against imposing additional constraints on outsourcing is advanced by Blum, Associate Administrator of the Office of Federal Procurement Policy in OMB during the second Bush Administration, who argues that the Administration's outsourcing policy achieved substantial savings and increased the efficiency of government.<sup>82</sup> Under the 2001 President's Management Agenda (PMA), every federal agency was required to perform an analysis to determine which activities were eligible for public-private competition.<sup>83</sup> The Administration's position was that this was properly described as a policy of competitive sourcing, not privatization or outsourcing, because it made "*no presumption* as to which sector is the better provider of a commercial service."<sup>84</sup> As Blum describes the process: "Agencies [we]re required to annually prepare two inventories of the activities performed by their employees: one inventory must identify commercial activities, the other must identify inherently governmental activities."<sup>85</sup> Through OMB Circular A-76, as revised in 2003, every agency was required to designate a Competitive Sourcing Official (CSO) whose role was to implement the Circular and to "justify, in writing, any designation of governmental

<sup>78</sup> See *id.* at 235-37.

<sup>79</sup> These and other requirements were established by the Competition in Contracting Act of 1984 (CICA), 41 U.S.C.A. § 253 (West 2003 & Supp. 2009), and implemented in 48 C.F.R. §§ 6.201-.502 (2008).

<sup>80</sup> This database is called the Central Contractor Registration (CCR), and it requires the contractor to provide information that attests to the contractor's legitimacy, availability for suit, and so forth. See 48 C.F.R. § 52.204-7.

<sup>81</sup> See Soloway & Chvotkin, *supra* note 33, at 238.

<sup>82</sup> Mathew Blum, *The Federal Framework for Competing Commercial Work Between the Public and Private Sectors*, in GOVERNMENT BY CONTRACT, *supra* note 16, at 63.

<sup>83</sup> *Id.* at 63-65.

<sup>84</sup> *Id.* at 64.

<sup>85</sup> *Id.* at 65-66.



personnel performing inherently governmental activities.”<sup>86</sup> OMB reviewed these justifications, and they were made available to “the public,” which, of course, meant lobbyists for companies that wanted to obtain contracts from the federal government. Once those activities that were eligible for public-private competition had been identified, the agency was required to follow step-by-step procedures that involved a comparison between private bids for the activity involved and the agency’s offer, or “tender,” to continue performing that activity itself.<sup>87</sup> This tender was prepared by another designated staff member, the Agency Tender Official (ATO), and had to include “a staffing plan that reflect[ed] the agency’s ‘most efficient organization’ (MEO) for performing the work with federal employees.”<sup>88</sup> The agency’s decision could be challenged by a private offeror, either to the agency itself or to the Government Accountability Office (GAO).<sup>89</sup>

In other words, the PMA required agencies to open everything they did to competition unless their CSO could justify to OMB that the activity in question was inherently governmental; if not, the PMA required that the ATO demonstrate to the agency or to the GAO that the agency’s MEO was more efficient than the offers submitted by private companies. This procedure certainly seemed to create a presumption in favor of outsourcing, whatever the Bush Administration claimed; agencies that previously carried out their assigned functions as a matter of course were required to demonstrate that they could perform these functions more efficiently than private firms that were being invited to make countervailing, often unsubstantiated offers. More importantly, it cast the entire process of government in the efficiency-based, private market framework that Dolovich critiques for systematically ignoring or minimizing public values. Soloway and Chvotkin’s observation, echoed by Blum, that relatively little work was actually outsourced under this program<sup>90</sup> makes the situation worse, not better; it means that the entire government was cast into this market framework for a relatively small gain in efficiency. It is perhaps for this reason that competitive sourcing under Revised OMB Circular A-76 has been suspended and is under evaluation by the Obama Administration.<sup>91</sup>

The two final contributions also respond to the calls for reform, but agree with them in part. John Donahue begins, as Kelman does, by relying on transaction cost economics to establish the parameters for

<sup>86</sup> *Id.* at 67.

<sup>87</sup> *Id.* at 71–74.

<sup>88</sup> *Id.* at 72.

<sup>89</sup> *Id.* at 73.

<sup>90</sup> *See id.* at 80–85; Soloway & Chvotkin, *supra* note 33, at 204–07.

<sup>91</sup> *See supra* pp. 892–93.

privatization.<sup>92</sup> He identifies three factors that favor outsourcing a particular government task — the ability to specify the task, the ease of evaluating the quality of the contractor's performance, and the presence of a competitive market, which imposes the discipline of efficiency on the contractor.<sup>93</sup> Based on these considerations, he argues that straightforward functions, which he calls "commodity tasks," are appropriate for outsourcing, whereas more complex, sophisticated functions, which he calls "custom tasks," are more problematic.<sup>94</sup> Throughout the federal government, however, the pattern has often been exactly the reverse, with custom tasks being outsourced and commodity tasks being retained in-house. One reason, Donahue suggests, is the lobbying efforts of civil service workers.<sup>95</sup> Those who are performing commodity tasks fear outsourcing because it will expose them to the remorseless rigors of the private, competitive market, whereas those who perform custom tasks and are generally more highly skilled welcome the greater rewards and perquisites that the private market can provide. This political dynamic, Donahue predicts, will hobble any effort to develop a rational approach to government outsourcing.

Miriam Seifter's contribution is the volume's one case study, and appears at first to be a tale of privatization run riot.<sup>96</sup> The Commonwealth of Massachusetts contracts out the cleanup of hazardous waste sites to private firms — not just the acquisition of necessary materials, not just the provision of cleanup services, but the entire process of hiring, cleanup, and approval. Under the Massachusetts Contingency Plan,<sup>97</sup> landowners are required to hire a licensed firm, called a Licensed Site Professional (LSP), and to pay that firm to certify that the site in question meets the legal standards for hazardous waste removal. Very often, the LSP performs the work itself before providing the approval to the landowner. The state's role in implementing the program is limited to auditing twenty percent of the cleanups — audits that regularly reveal that the site has not been cleaned up in a satisfactory manner.<sup>98</sup>

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<sup>92</sup> John Donahue, *The Transformation of Government Work: Causes, Consequences, and Distortions*, in GOVERNMENT BY CONTRACT, *supra* note 16, at 41.

<sup>93</sup> *Id.* at 44–45.

<sup>94</sup> *Id.* at 46 (internal quotation marks omitted).

<sup>95</sup> *Id.* at 49–55.

<sup>96</sup> Miriam Seifter, *Rent-a-Regulator: Design and Innovation in Environmental Decision Making*, in GOVERNMENT BY CONTRACT, *supra* note 16, at 93.

<sup>97</sup> 310 MASS. CODE REGS. 40.0000 (2006).

<sup>98</sup> As Seifter reports, the percentage of audited cleanups that were deemed complete upon inspection between 1994 and 2005 varied between 13% and 29%. At another 5% to 21% of the sites inspected during this period, the cleanup was deemed completely unsatisfactory. Where the auditors decided that follow-up was required before the cleanup could be approved, only 6.5% succeeded in eliminating all contamination. About half achieved a risk-based result where some con-

Although the privatization of Massachusetts's hazardous waste removal program is so extensive that Seifter regards the LSP as akin to an agent of the landowner, rather than an independent regulator,<sup>99</sup> she does not recommend that the scope of privatization be restricted. Apparently, the state simply lacks the administrative capacity to take charge of any significant component of the cleanup process. Instead, she recommends that the program be redesigned to eliminate conflicts of interest; the LSP that certifies the cleanup should not be the same one that performs it, and the contractual relationship between the landowner and the LSP, if permitted to continue, should be regulated. In addition, along the lines suggested by Kelman and by Soloway and Chvotkin, she recommends that the state expand its capacity to monitor the program and impose disciplinary measures on LSPs that under-enforce or violate the applicable rules.<sup>100</sup>

## II. COMMON GROUND AND OPEN QUESTIONS

Considering the contributions to *Government by Contract* as a whole, it appears that they actually agree on a number of the basic principles that should govern the privatization process. Nonetheless, they disagree about the scope and application of these principles, and thus about the conclusions that should be drawn from them. This Part identifies and recharacterizes the agreed-upon principles. It then attempts to determine, on the basis of that recharacterization, what we can learn from the fact of disagreement among such thoughtful, well-informed authors, and where future discussions of privatization might profitably be directed.

### A. Policy Should Continue To Be Set by Government Authorities

Virtually every one of the contributors supports the proposition that policymaking should remain in the control of politically accountable government authorities.<sup>101</sup> Policymaking is generally regarded as at least one of the "inherently governmental activities" that Revised OMB Circular A-76 excludes from its competitive sourcing procedure. But the definition in the document is muddy and, as Kelman points out and the Iraqi experience confirms, the boundary between policymak-

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tamination remained, and a significant number were required to accept use restrictions on the site because of continuing contamination. See Seifter, *supra* note 96, at 99-100.

<sup>99</sup> Her specific analogy is that hiring an LSP is like hiring an attorney. *Id.* at 102.

<sup>100</sup> See *id.* at 103-08.

<sup>101</sup> See Aman, *supra* note 60, at 285; Blum, *supra* note 82, at 66; Dolovich, *supra* note 41, at 144; Donahue, *supra* note 92, at 43-44; Kelman, *supra* note 70, at 182; Mendelson, *supra* note 65, at 260; Metzger, *supra* note 53, at 306-09; Minow, *supra* note 22, at 126-27; Novak, *supra* note 16, at 39-40; Seifter, *supra* note 96, at 108; Soloway & Chvotkin, *supra* note 33, at 219-20; Verkuil, *supra* note 45, at 311-12.

ing and other activities is frequently unclear.<sup>102</sup> This line-drawing difficulty would seem to demand that scholars develop a more precise definition of policy than is characteristically offered in the privatization literature. An even more insistent demand for clarification emerges from the need for policymakers to use this broadly agreed-upon principle as a source of guidance. The political rationale for insisting that policymaking must remain within government control is fairly obvious, at least in a democracy. But we must also know the theoretical rationale for the principle — its relationship to modern administrative government in general — if we want to fully understand its implications.

While we often associate policymaking with the process of lawmaking and describe the legislature, which enacts the laws, as our primary policymaker, this concept of law will be of little value in this inquiry. As I have noted elsewhere, we inherited the term “law” from our pre-modern, pre-administrative past, when it referred to a system of rules that was perceived as possessing an inherent order or logic, and was thus homologous with, though not equivalent to, natural law.<sup>103</sup> Common law could be plausibly viewed from this perspective, with the occasional statutes that the legislature or the king enacted being explained as either clarifications or intrusions. In a modern administrative state, however, statutes are seen as expressions of political will and are not expected to possess any logical or conceptual relationship to existing legal rules. Recognizing this fact enables us to disentangle policymaking from our inherited concept of law and perceive it as an independent function that determines the direction of our regulatory apparatus. The purpose of this apparatus then becomes apparent — it is to implement the policy that some authorized government authority, whether legislative or executive, has articulated. Thus, in place of the essentially pre-modern concept of law, we now have a modern process of policy formation and implementation.

Viewed in this manner, the modern state is organized in accordance with the principle of Weberian rationality<sup>104</sup> — which is not surprising, since Weber articulated that principle as a description of the mod-

<sup>102</sup> Kelman, *supra* note 70, at 182.

<sup>103</sup> See EDWARD L. RUBIN, *BEYOND CAMELOT: RETHINKING POLITICS AND LAW FOR THE MODERN STATE* 191–226 (2005). See generally ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* pt. I-II, q. 91, arts. 2–4, at 10–16 (Fathers of the English Dominican Province trans., 1915) (1265–1274); *id.* q. 94, arts. 2–5, at 42–51; OTTO GIERKE, *POLITICAL THEORIES OF THE MIDDLE AGE* 75–76 (Frederic William Maitland trans., Cambridge Univ. Press 1987) (1900); K. Pennington, *Law, Legislative Authority, and Theories of Government*, 1150–1300, in *THE CAMBRIDGE HISTORY OF MEDIEVAL POLITICAL THOUGHT* C. 350–C. 1450, *supra* note 21, at 424, 424–30.

<sup>104</sup> See generally WEBER, *supra* note 26, at 24–26.

ern mode of thought.<sup>105</sup> Policy formation represents a choice of goals or values; implementation is a form of instrumental rationality designed to achieve the defined goal in an effective manner. The goals are deontological, that is, they are chosen for their own sake, independently of their prospects for success, but they define success for implementation programs. This does not imply, however, that the choice of goals is a matter of pure power or political will and beyond the boundaries of rational debate. Weber identifies a separate form of rationality, which he calls values rationality, that governs the debate about goals in a modern, or post-traditional, society,<sup>106</sup> and Jürgen Habermas makes this debate, which he describes as communicative action, the repository of the modern world's emancipatory possibilities.<sup>107</sup> The point, as Habermas emphasizes, is that goals or values should be debated at the policy level;<sup>108</sup> once a goal is chosen by means of that debate, rational behavior consists of achieving that goal in the most effective manner.

The generally accepted principle that the government should not privatize policy decisions can be understood, from this perspective, as inherent to the concept of government itself. What it means to assign a particular task or subject area to the government is that the government, that is, public officials of one sort or another, must define the goals to be achieved in that area. If, for example, punishment of criminals is a government function, then some government authority must decide what those who implement the actual punishment are expected to achieve. Goal setting thus delineates the boundaries of government, dividing the functions that the government declares as its responsibility from those assigned to other institutions in society. Of course, as Novak points out and Western history confirms, there is no general theory that tells us which tasks or subject areas are inherently governmental.<sup>109</sup> Relinquishing the policymaking role with respect to a specific subject area renders that area nongovernmental, but that is not, by itself, an argument against doing so. In fact, the older meaning of the term "privatization" is precisely that: the government withdraws entirely from a field it once occupied, such as operation of passenger

<sup>105</sup> In his basic definitional passage, Weber explicitly contrasts instrumentally rational and value rational modes of social action with traditional social action. MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 26 (Talcott Parsons trans., 1958) (1905).

<sup>106</sup> See WEBER, *supra* note 26, at 24–26. This was an important insight, because reason or rationality, in the Western tradition, had been treated as a unitary quality or concept.

<sup>107</sup> I JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* 273–337 (Thomas McCarthy trans., 1984) (1981) [hereinafter HABERMAS, *COMMUNICATIVE ACTION*]. For a detailed discussion of how this process can occur through the modality of law, see JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS* (William Rehg trans., MIT Press 1996) (1992).

<sup>108</sup> HABERMAS, *COMMUNICATIVE ACTION*, *supra* note 107, at 254–70.

<sup>109</sup> Novak, *supra* note 16, at 25–27.

railways or electricity production, typically by selling its assets in the area to private firms.<sup>110</sup> Whether such withdrawal is a good idea is certainly a valid topic for public debate. But if a decision has been reached that the government should take responsibility for a particular area, the government must, at the very least, set policy — that is, define goals — in that area.<sup>111</sup> For a government agency to privatize policymaking in an area that has been assigned to it is to be derelict in its duty, to abandon a task that it is obligated to perform.

Once a particular area has been assigned to government, by whatever process such decisions are made, privatization in the more commonly used sense of the term becomes a relevant concern. Soloway and Chvotkin propose that we should avoid confusion by describing this second form of privatization as “outsourcing,” and reserve the term “privatization” for the government’s complete withdrawal from a given field.<sup>112</sup> It is probably too late in the day for such verbal housecleaning. The more important point is that the terms privatization and outsourcing are both misleading for a different reason, namely, that they suggest that action is occurring in a particular direction. The implicit image is that the government once carried out some particular action itself, in more virtuous or benighted times depending on one’s point of view, and has now seen the light or embraced the darkness by transferring control to a private party. The real question, however, is whether a task would be better performed by public or private agents. This is a matter of instrumental rationality: which mode of action will be most effective in achieving the applicable policy goal. In other words, privatization, in the second, more commonly used sense, is a

<sup>110</sup> See DONAHUE, *supra* note 5, at 6; see also, e.g., ROMAN FRYDMAN ET AL., *THE PRIVATIZATION PROCESS IN CENTRAL EUROPE* (1993); ROMAN FRYDMAN & ANDRZEJ RAPACZYNSKI, *PRIVATIZATION IN EASTERN EUROPE* (1994). As Donahue points out, this definition is not particularly useful in the American context because the public has been so averse to government-run enterprises in the first place that there is not very much to sell. See DONAHUE, *supra* note 5, at 6, 215. While this insight seems generally correct, the socially constructed nature of the public-private distinction must be kept in mind. It is possible to sell off all sorts of things that we think of as inherently public. A notable example is Chile’s sale of virtually all control of its water supply to private parties. See CARL J. BAUER, *SIREN SONG: CHILEAN WATER LAW AS A MODEL FOR INTERNATIONAL REFORM* (2004); PETER H. GLIECK ET AL., *PAC. INST. FOR STUDIES IN DEV., ENV’T & SEC., THE NEW ECONOMY OF WATER* 24, 33, 39 (2002).

<sup>111</sup> This is not to suggest that government authorities should be precluded from consulting with private parties in formulating goals. One of the themes of New Public Governance literature is that such consultation can lead to more realistic goals and higher levels of compliance. See generally IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* (1992); EUGENE BARDACH & ROBERT A. KAGAN, *GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS* (1982); Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875 (2003); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001).

<sup>112</sup> Soloway & Chvotkin, *supra* note 33, at 195–97.

means to an end, a strategy that readily fits within the policy and implementation framework that serves as a more accurate description than the term “law” does for our current dominant mode of government action.<sup>113</sup>

The socially constructed character of the public-private distinction means that either method of implementation will be possible in almost any circumstance. Private companies can fight wars (and have throughout the course of Western history) or punish criminals (and have throughout the course of Western history); conversely, public agencies can run factories and retail stores or nurture young children. Occasionally, the range of means available for implementing a particular policy will affect the choice of the policy itself, but this will usually occur because of an extreme situation — the realization, for example, that a particular policy cannot be implemented by any means without unacceptable costs — not merely because of relative differences in effectiveness between public and private implementation. A more common but less defensible effect of means on ends occurs as a matter of rhetorical strategy. Commentators who favor extensive regulation of the market at the policy level often argue against privatization at the implementation level, while those who oppose market regulation tend to welcome privatized implementation.<sup>114</sup> The motivation, presumably, is that privatization sounds like a more technical, politically neutral topic. But these positions are not logically related; favoring privatization as a means of decreasing regulation or opposing it as a means of increasing regulation is simply an effort to achieve a policy position through the backdoor of implementation techniques. It is more coherent, as a matter of academic analysis, and more productive, as a matter of social discourse, to fight out policy questions at the policy level. The willingness to do so, rather than smuggling policy positions into arguments about instrumentalities, is the basis of the emancipatory process that Habermas prescribes.<sup>115</sup>

*B. Privatization Is Presumptively Superior  
When the Goal Is Efficiency*

A second subject of agreement among the contributors to *Government by Contract* is that the primary purpose of privatization is to achieve greater efficiency. The contributors are somewhat less explicit about this than they are about the need for government to retain its policymaking role, but the linkage between privatization and efficiency

<sup>113</sup> See, e.g., Blum, *supra* note 82, at 63–64.

<sup>114</sup> Habermas refers to arguments of this nature as strategic as opposed to communicative action, that is, the argument is intended to manipulate the other person's views, rather than achieve mutual understanding. HABERMAS, COMMUNICATIVE ACTION, *supra* note 107, at 286–95.

<sup>115</sup> See *id.* at 254–71.

clearly underlies virtually all the essays in the volume. The proponents of privatization (Blum, Donahue, Kelman, and Soloway and Chvotkin) present efficiency as its primary virtue, while the critics argue either that privatization achieves efficiency at the expense of other values (Aman, Dolovich, and Verkuil), or that it fails to do so because the contractors are inadequately monitored (Dickinson, Mendelson, and Minow).

The model of modern government action as policy and implementation establishes and clarifies the relationship between these two principles. If a particular subject matter is assigned to government, then government institutions must articulate policy within that area. The policy must then be implemented, and that process should be governed by instrumental rationality. Efficiency is an element of instrumental rationality; it determines how the goal can be achieved at the lowest possible cost.<sup>116</sup> Sometimes the policymaker specifies efficiency as an independent goal, with the Simplified Acquisition Methods adopted by the Clinton Administration being an obvious example.<sup>117</sup> More often, some other goal is specified — providing welfare benefits to the indigent, incarcerating convicted felons, exploring Mars — and efficiency, or cost minimization, serves as a guiding principle in determining the means by which that goal can be achieved.

While efficiency is not the primary goal of most statutory or regulatory enactments, it is almost always a relevant consideration. A government authority may commission a steel sculpture for its headquarters for purely aesthetic reasons, having chosen the artist on purely aesthetic grounds, but it will still want to get the best possible price on the steel. This creates a certain complexity in defining the task to be performed. A task that is not defined in terms of efficiency may have components that can be so defined, and we might well regard the failure to separate these components and resolve them in terms of efficiency as a poor implementation strategy, that is, a failure of instrumental rationality.<sup>118</sup> To use Dolovich's prison example, the policymaker may decide that the main purpose of incarcerating felons is to rehabilitate them, not simply to incapacitate them at the lowest cost. Although we could say that we want to implement this policy in the most efficient manner, we might not be able to articulate sufficiently clear metrics to use efficiency as our principle for designing the pris-

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<sup>116</sup> There are, of course, various definitions of efficiency, including Pareto optimality and Kaldor-Hicks efficiency. For present purposes, it is not necessary to enter into the complexities of welfare economics. When used in the context of implementing a previously established goal, efficiency can be defined as achieving that goal at the lowest cost, subject to all applicable constraints.

<sup>117</sup> Simplified Acquisition Methods, 48 C.F.R. §§ 13.301–307 (2008).

<sup>118</sup> See Donahue, *supra* note 92, at 42–44.



on.<sup>119</sup> But specific components of the prison might be defined as separate tasks, such as food services or health services, and these might be relatively easy to define in cost-minimization terms. Precisely how a general program defined by the policymaker should be segmented by the implementing agency is a subject that requires further exploration.<sup>120</sup> It would appear that as an agency separates a task into discrete components, a greater proportion of that task can be defined in efficiency-based terms. At some point, however, the transaction costs involved in balkanizing a single function in this manner may overwhelm the savings gained by placing more parts of the task on a cost-minimization basis.

As an implementation strategy, privatization depends upon the claim that, for a given program or program component, private contractors can achieve the stated goal efficiently. No real-world institution or strategy is likely to be perfectly efficient, of course; the more precise claim that proponents of privatization advance is that private contractors will be able to perform a particular task more efficiently than government agents can.<sup>121</sup> If this claim is true for any program or program component for which efficiency is the primary goal, privatization is a presumptively advantageous implementation strategy. While the government should always set policy internally, and should often implement that policy internally when the goal is something other than efficiency, it should, according to this view, assign any task for which the goal is efficiency to private contractors unless it can be specifically demonstrated that government agents can implement it more efficiently. This is the rationale of Revised OMB Circular A-76, the culmination of the paradigm of governance that Reagan initiated.<sup>122</sup>

There seem to be two similar but distinct explanations for the superior efficiency of private firms. Both rely upon the phenomenon of

<sup>119</sup> As Donahue points out, "You can only delegate what you can define." *Id.* at 44. Bengt Holmstrom and Paul Milgrom, in their study of outsourcing in industrial sales, conclude that a firm will outsource or arrange employment relationships similar to outsourcing (strong output-based incentives, ownership of customer by the sales agent, and freedom to sell products of other manufacturers) when performance is relatively easy to measure, but will opt for employment or employment-type relationships when the cost of measuring sales performance is high or when non-selling activities that are hard to measure are important. See Bengt Holmstrom & Paul Milgrom, *The Firm as an Incentive System*, 84 AM. ECON. REV. 972 (1994).

<sup>120</sup> For private, for-profit firms, the analogous issue is an important topic in transaction cost economics. See WILLIAMSON, *ECONOMIC INSTITUTIONS*, *supra* note 69, at 206-39; Coase, *supra* note 69; Sanford J. Grossman & Oliver D. Hart, *The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration*, 94 J. POL. ECON. 691 (1986).

<sup>121</sup> See SAVAS, *supra* note 6; Donahue, *supra* note 92, at 57-58; Kelman, *supra* note 70, at 158-60; Andrei Shleifer, *State Versus Private Ownership*, J. ECON. PERSP., Fall 1998, at 133; Soloway & Chvotkin, *supra* note 33, at 224-26; Michael J. Trebilcock & Edward M. Iacobucci, *Privatization and Accountability*, 116 HARV. L. REV. 1422, 1424-31 (2003) (responding to Minow, *Public and Private Partnerships*, *supra* note 5).

<sup>122</sup> See Revised OMB Circular A-76, *supra* note 12.

competition. The first, which can be described as a transaction-based account, is that private contractors must compete for government work and thus have an incentive to minimize costs, whereas government agents can simply take their assignments for granted.<sup>123</sup> The second account, which can be described as institution-based, is that private contractors are more efficient because they exist in a competitive environment; in other words, the lash of competition makes them inherently different from public agencies.

*C. The Presumptive Efficiency of Privatization Depends  
on the Existence of a Competitive Market*

The contributors' third area of agreement is that the presumption that favors privatization where efficiency is the dominant consideration depends on the accuracy of the claim that private contractors are in a competitive situation. It follows that one's attitude toward the market, its competitive conditions, and the level of economic efficiency that it thereby achieves will strongly affect one's views about privatization. There are many grounds for questioning the claim that markets are competitive and efficiency-maximizing. A general analysis of market failure may be beyond the ambit of the privatization debate, and is certainly beyond the bounds of this Review. Two criticisms of market efficiency are directly relevant to the privatization debate, however. The first, at the macro level, involves the nature of the firm in a modern mass-technological society, and the second, at the micro level, involves the specific way in which contracts between government and private firms are formed.

Proponents of privatization regularly depict government agencies as inefficient because they are massive bureaucracies whose scale, hierarchical organization, and internal politics create a potpourri of perverse incentives. But the firms that take over the operations of these government agencies are unlikely to be mom-and-pop operations. Rather, the size of the typical government contract and the demand for experience and expertise that shapes the criteria for its award means that most successful bidders will be large, complex institutions, perhaps as large or larger than the agency whose role they are replacing. Adolf Berle and Gardiner Means observed that ownership and control

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<sup>123</sup> The civil service is often held responsible for creating or exacerbating this situation. See STEPHEN GOLDSMITH & WILLIAM D. EGGERS, *GOVERNING BY NETWORK* 174–76 (2004); SAVAS, *supra* note 6, at 159–60; Donahue, *supra* note 92, at 49–55; Kelman, *supra* note 70, at 181–82, 190; Soloway & Chvotkin, *supra* note 33, at 212–13. See generally RONALD N. JOHNSON & GARY D. LIBECAP, *THE FEDERAL CIVIL SERVICE SYSTEM AND THE PROBLEM OF BUREAUCRACY* (1994) (discussing the political distortions caused by the civil service system).

are generally separate in such firms,<sup>124</sup> and modern theories of firm structure are built upon this insight.<sup>125</sup> The consequence is that the marvelous alignment of strong, self-interested motivations with optimal collective outcomes that was celebrated even earlier than Adam Smith<sup>126</sup> may not be operative. Further, as Oliver Williamson points out, large private firms are bureaucracies and suffer from many of the same afflictions that encumber government agencies.<sup>127</sup> In one of the more enthusiastic endorsements of privatization, Michael Trebilcock and Edward Iacobucci respond to this argument by asserting that most of these incentive problems are resolved by market competition.<sup>128</sup> It is easy enough to assert this as a matter of faith or ideology, of course, but demonstrating it empirically is a more difficult matter, particularly given the wide range of circumstances to which it would need to be applied.

The potential inefficiency of large-scale private firms is particularly troubling if the firms are not being held accountable for their performance, a concern that was voiced by most of the contributors to this volume who criticize privatization, including Aman, Dickinson, Mendelson, Metzger, Minow, and Verkuil.<sup>129</sup> The proponents of privatization take this concern quite seriously, and it serves as the basis for many of their more delimited recommendations for reform.<sup>130</sup> Of course, the term "accountability" must be used with caution, as it can refer to a wide variety of inter-institutional relationships, some of which are largely fanciful.<sup>131</sup> In this context, it appears to have two

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<sup>124</sup> ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (rev. ed. 1968); see also JAMES P. HAWLEY & ANDREW T. WILLIAMS, *THE RISE OF FIDUCIARY CAPITALISM* 42–68 (2000).

<sup>125</sup> See generally Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288 (1980); Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J.L. & ECON. 301 (1983); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

<sup>126</sup> See BERNARD MANDEVILLE, *THE FABLE OF THE BEES, OR PRIVATE VICES, PUBLIC BENEFITS* (Oxford Univ. Press 1924) (1714).

<sup>127</sup> WILLIAMSON, *MECHANISMS*, *supra* note 69, at 17–18, 219–49.

<sup>128</sup> Trebilcock & Iacobucci, *supra* note 121, at 1424–31. For general versions of the assertion that a competitive market eliminates irrational behavior through a Darwinian process, see RICHARD R. NELSON & SIDNEY G. WINTER, *AN EVOLUTIONARY THEORY OF ECONOMIC CHANGE* 206–45 (1982); and Armen A. Alchian, *Uncertainty, Evolution, and Economic Theory*, 58 J. POL. ECON. 211 (1950).

<sup>129</sup> For other criticisms based on this concern, see PAUL C. LIGHT, *THE TRUE SIZE OF GOVERNMENT* 184–88 (1999); Ellen Dannin, *Red Tape or Accountability: Privatization, Publicization, and Public Values*, 15 CORNELL J.L. & PUB. POL'Y 111 (2005); and Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 WASH. U. L.Q. 1001, 1062–83 (2004).

<sup>130</sup> See Blum, *supra* note 82, at 71–74; Soloway & Chvotkin, *supra* note 33, at 227–38.

<sup>131</sup> See Jerry L. Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance*, in PUBLIC ACCOUNTABILITY 115, 115–18 (Michael W. Dowdle ed.,

distinguishable meanings. One is that private firms are not accountable to the public, that is, they are not supervised by, or answerable to, elected officials. This may or may not be a good thing; one of the reasons for granting authority to administrative agencies is that they are supposed to be expert bodies insulated from the vicissitudes of politics.<sup>132</sup>

A second meaning of the accountability concern is that private firms are not accountable to the agency, that is, the agency cannot control them and ensure that they achieve the purposes for which they have been retained. The results are cost overruns, nonfunctional equipment, poor service, and corruption. This would appear to be an undeniably bad thing,<sup>133</sup> and may be sufficiently bad to create a presumption against privatization. It is of course the case that the agency is supposed to exercise such control. But the doubts about an agency's ability to function efficiently — doubts that may have served as the impetus for privatization in the first place — may also lead us to wonder whether that same agency can exercise effective control over the contractor in a complex situation. Proponents of privatization tend to respond to this concern by once again invoking the competitive nature of the market and its participants. Firms that compete for government contracts will necessarily strive to achieve the goals that the agency sets so that the agency will renew the contracts or grant them other contracts in the future. This means that, as both proponents (such as Kelman and Soloway and Chvotkin) and critics (such as Dickinson and Mendelson) point out, the contract itself serves as a powerful instrument of control. Many terms, including demanding ones that government could not impose through generally applicable laws or regulations, can be written into a contract and enforced by a wide variety of means, including the government's ability to terminate or fail to renew the contract.<sup>134</sup> More generally, it can be argued that a competitive market operates as a powerful constraint that makes direct accountability less critical.<sup>135</sup> A major purpose of holding subordinate officials

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2006); Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073 (2005).

<sup>132</sup> See generally Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189 (1986). The APA can be viewed as primarily designed to insulate agency decisionmaking from politics. This view is certainly the thrust of many of the major cases interpreting the Act. See, e.g., *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) (requiring that the agency offer reasoned arguments for rescinding a regulation despite clear evidence that the President wanted the regulation rescinded); *Citizens To Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971) (requiring that the agency provide a reasoned basis for a highly discretionary decision); *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977) (restricting ex parte contacts in the rulemaking process).

<sup>133</sup> See Metzger, *supra* note 53, at 292–98.

<sup>134</sup> See *supra* note 38 (discussing grounds for the termination of government contracts).

<sup>135</sup> See generally Trebilcock & Iacobucci, *supra* note 121.

accountable, after all, is to ensure that they devote their energies to their assigned tasks. Accountability is necessary in this setting because public officials, who do not depend on the success of their efforts for their remuneration or job security, have powerful incentives to divert resources toward increasing their leisure time, achieving their personal goals, or enriching themselves at the expense of their organizations. For private firms, it is argued, the Darwinian force of competition exercises a similar disciplining effect. Once again, the assertion certainly makes some sense, but the market is subject to so many defects and distortions that it cannot be accepted simply as a matter of faith.

In addition to the doubts about market efficiency that arise at the macro level — that is, the level of firms as institutions — there are a number of additional doubts about market efficiency that occur at the micro level — that is, the level of particular transactions. These doubts are generated by the nature of the seller, the nature of the buyer, and the nature of the transaction between the two. Ideal competition occurs when the government is one of many buyers for a product that has many sellers. This is the case for many standard consumer items that constitute a rather significant proportion of government purchases, such as computer workstations, automobiles, office furniture, office supplies, kitchen equipment, and the like. Here the government can choose among competing suppliers without affecting the market, thereby ensuring that it is obtaining products and prices that result from open competition.<sup>136</sup> The government may be a particularly large purchaser, but as long as it enters the market as an ordinary buyer, abjuring the use of its coercive power, its size only means that it should be able to negotiate more advantageous prices. This situation represents the strongest case for privatization; no one thinks that the government should manufacture the ordinary items that it uses.<sup>137</sup> The Clinton Administration's "reinventing government" reforms that allowed government officials to use credit cards, opposed the use of specifications for ordinary consumer items, and authorized volume discounts, were designed to put the government in the position of an ordinary buyer as frequently as possible.<sup>138</sup>

In many cases, however, the government is not buying a standard consumer product, like a car, for which a large nongovernment market

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<sup>136</sup> The inability of any given buyer or seller to affect the price of an item is one of the hallmarks of a perfectly competitive market. See ROBERT S. PINDYCK & DANIEL L. RUBINFELD, *MICROECONOMICS* 271–73 (7th ed. 2009).

<sup>137</sup> This might not be true, however, if the government has goals other than efficiency. For example, the government may have prisoners manufacture office furniture for its facilities so that they can learn useful skills. The goal here is not to obtain cheaper or better office furniture but to keep the prisoners employed and possibly teach them a useful skill.

<sup>138</sup> See sources cited *supra* note 71.

exists, but a specially designed product that is unique to government, like a nuclear submarine. As Donahue and Minow point out, this situation creates the danger of monopoly, that most obvious of market failures, since a specialized product of this sort may have only one producer.<sup>139</sup> The issue, of course, is not whether there is only one seller for the product in question, but whether the contract that the government offers is contestable.<sup>140</sup> Assume, for example, that there is only one producer of an exotic product such as phosphorescent highway signs. If the federal government were to decide that all the signs on interstate highways must be phosphorescent, the contract to produce these signs could be safely opened to competitive bidding because many firms would have the motivation and technological capacity to enter, or contest, this newly lucrative market. Moreover, the contract for the production of all these highway signs could be safely given to a single producer because the next time it was put out to bid, there would still be many firms willing and able to contest it. The same cannot necessarily be said for a highly complex, specialized product like a nuclear submarine. The number of firms that can realistically bid on such an item may be very limited; even more problematically, once one firm is awarded such a contract, it is likely to develop expertise and dedicated assets that no other firm can match in subsequent bid cycles.<sup>141</sup> Donahue gives the example of the Clinton Administration's ten-year contract for operation of the space shuttle program, awarded in 1996 to a new company with the none-too-subtle initials USA (for United Space Alliance), which was jointly owned by Lockheed Martin and Boeing.<sup>142</sup> Few other companies could have bid on this contract when it was first awarded, and even fewer, if any, could contest it ten years later when it was renewed.<sup>143</sup>

<sup>139</sup> See Donahue, *supra* note 92, at 58–61; Minow, *supra* note 22, at 118. A similar market failure can also occur when the market is highly localized. See ELLIOT D. SCLAR, YOU DON'T ALWAYS GET WHAT YOU PAY FOR: THE ECONOMICS OF PRIVATIZATION 83–90 (2000).

<sup>140</sup> See generally WILLIAM J. BAUMOL, JOHN C. PANZAR & ROBERT D. WILLIG, CONTESTABLE MARKETS AND THE THEORY OF INDUSTRY STRUCTURE (1982).

<sup>141</sup> The idea of asset specificity is central to transaction cost economics. See WILLIAMSON, ECONOMIC INSTITUTIONS, *supra* note 69, at 30 (“Transaction cost economics . . . maintains that the most critical dimension for describing transactions is the condition of asset specificity.”); Benjamin Klein, Robert G. Crawford & Armen A. Alchian, *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J.L. & ECON. 297, 298 (1978) (describing the “potentially appropriable specialized portion” of transaction rents as “that portion, if any, in excess of its value to the second highest-valuing user” (emphasis omitted)).

<sup>142</sup> Donahue, *supra* note 92, at 58–59. USA was formed in 1995 by Lockheed Martin and Rockwell International, but Rockwell's aerospace and defense operations, including its share of USA, were sold to Boeing in 1996. NASA exercised its option to extend the contract twice, in 2001 and 2004, and awarded USA a new contract in 2006. See United Space Alliance, About USA, <http://www.unitedspacealliance.com/about/history.asp> (last visited Jan. 9, 2010).

<sup>143</sup> Boeing and Lockheed Martin ranked first and third, respectively, among the largest American aerospace companies by revenue in the 2007 Fortune 500 listing. CNNMoney.com, The 2007

The specialized nature of many government purchases also creates the possibility that the government will be the only buyer for a given product, which is the market failure of monopsony.<sup>144</sup> In an ideally competitive market, where there are many sellers and many buyers, the buyer is essentially anonymous as far as the seller is concerned; the only way that the seller can persuade the buyer to select its product is through the price or quality of the product itself. According to some observers, advertising disrupts the efficiency of the market because it permits the manipulation of desire.<sup>145</sup> Negotiations between professional parties for specially designed goods or services also represent a loss of anonymity, but they are not thought to impair efficiency because both parties are market actors, and thus, at least in theory, are guided by the principle of efficiency. Government institutions are not shaped by the market, however, and their agents may respond to other motivations.

Monopsony is not a problem when the government is one of many buyers, first, because the seller must produce a competitive product in order to retain its nongovernment sales, and second, because the nongovernment buyers set a market standard that the government can simply follow. However, when the government is the only buyer, which generally means that it is buying a specialized product, the market failure of monopsony arises. In theory, a government monopsony should redound to the public's benefit because the government agency, as the sole buyer, should be able to capture the entire surplus value of the contract, thus driving the seller's profits down to its cost of capital. The problem is that monopsony may also allow private firms to appeal to nonmarket factors in obtaining the contract or increasing the size of the market.<sup>146</sup> These firms, focusing their attention

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Fortune 500: Aerospace and Defense Industry, [http://money.cnn.com/magazines/fortune/fortune500/2007/industries/Aerospace\\_and\\_Defense/1.html](http://money.cnn.com/magazines/fortune/fortune500/2007/industries/Aerospace_and_Defense/1.html) (last visited Jan. 9, 2010). The LOGCAP contract is another obvious example. See *supra* note 37.

<sup>144</sup> See generally ROGER D. BLAIR & JEFFREY L. HARRISON, *MONOPSONY* (1993); PINDYCK & RUBINFELD, *supra* note 136, at 373–76. Monopsony is relatively rare in America's private markets; where it does occur, it is usually the result of collusive behavior. See BLAIR & HARRISON, *supra*, at 3–4.

<sup>145</sup> See generally STUART EWEN, *CAPTAINS OF CONSCIOUSNESS* (1976); SUT JHALLY, *THE CODES OF ADVERTISING* (1987); LIZ MCFALL, *ADVERTISING* (2004). Other observers dispute this claim, of course. See, e.g., JERRY KIRKPATRICK, *IN DEFENSE OF ADVERTISING* 42–46, 141–45 (1994); MICHAEL J. PHILLIPS, *ETHICS AND MANIPULATION IN ADVERTISING* 143–71 (1997).

<sup>146</sup> Alexander Volokh argues that the concern voiced by some critics of privatization — that private firms will distort policy by lobbying to increase the size of their market — is overstated. He reasons that the entry of private firms into a market creates a collective action problem: the amount that any one firm wants to spend to convince the agency to increase its expenditures will decline because increased lobbying expenditures would resemble a public good for the industry as a whole. See Alexander Volokh, *Privatization and the Law and Economics of Political Advocacy*, 60 STAN. L. REV. 1197 (2008). This claim may be true when there are many sellers and many

on this single buyer that is almost always well known to them — particularly if they have followed the common practice of staffing themselves with former government employees — can engage in a systematic manipulation of desire. The effort will not always be successful, of course; many government officials are intelligent, conscientious, and sagacious, and will not be influenced by importunate potential contractors. But other officials, lacking a profit motive, may be intrigued by visions of spectacular new weapons, worry-free military support services, ruthlessly efficient welfare fraud prevention programs, or riot-free, escape-proof penitentiaries.<sup>147</sup> Competitive bidding requirements will not protect the government against these carefully crafted temptations because the crucial decisions regarding a program's initiation and design generally occur — and often must occur — before the bidding process begins.

The problem of monopsony does not necessarily arise when the only buyer is the government, because “the government” can consist of many different entities that together constitute a robust market. School textbooks, for example, are bought by a large number of separately administered school districts; even making the charitable assumption that handcuffs are bought primarily by police departments and corrections agencies, there are nonetheless a sufficiently large number of these agencies to constitute a competitive market. In some cases, however, as with nuclear submarines or space shuttle operations, all purchases are made by a single government agency, and the resulting monopsony can lead to the same level of inefficiency as a contractor monopoly.

Moreover, distortions of the competitive market reinforce each other because government monopsony breeds contractor monopoly. Once there is only a single buyer, that buyer is subject to concerted efforts from each potential contractor interested in persuading it to adopt a program design that only that contractor can fulfill. A market monopolist would resist these blandishments in the interest of higher profits, but a government agency may well succumb to them because they promise the countervailing advantages of familiarity, convenience, and

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buyers in a market. When there are only a few sellers, however, and the only potential buyer is the government, the benefit each seller can gain from influencing the government's decisionmaking will constitute a powerful inducement for sellers to undertake the effort.

<sup>147</sup> This account does not even include baser inducements that potential contractors offer, such as dinners, junkets, friendship, and future employment. In theory, outright gifts from contractors or potential contractors are prohibited by the Federal Acquisition Regulation, 48 C.F.R. § 3.101-2 (2008). But there are many ways to circumvent the prohibition. In 1981–1982, for example, five executives from Boeing who were leaving the company to accept positions in the Reagan Administration were given large lump-sum payments shortly before they left. *See Crandon v. United States*, 494 U.S. 152, 168 (1990) (holding that the payment did not violate 18 U.S.C. § 209(a), which criminalizes private payments to government officials).



contractor expertise. It is hardly surprising, for example, that NASA's contract with United Space Alliance has been renewed three times.<sup>148</sup> As noted above, it is a somewhat unstable position to champion privatization based on the asserted inefficiency of government agencies and yet rely on the supervisory skills of these agencies to ensure that privatization achieves the public policies for which it is designed. For example, if the motivation for privatization stems from the concern that agencies do not act efficiently, but rather try to minimize external pressures,<sup>149</sup> or "hassles," why should we assume that this same desire will not induce an agency to continue its contractual relationship with an inefficient provider, rather than face the hassle of that provider's lobbying and litigating fury that will follow ineluctably upon the termination of its contract?<sup>150</sup>

Even more significantly, contractor monopoly and government monopsony distortions reinforce each other because they translate the pressure on the transactional aspect of competition for government contracts into pressure on the institutional aspect of that competition. Once private firms become monopolists in providing a product to government, or once they become lobbyists in an effort to secure contracts from a government monopsonist, their market-based behavior may be supplanted by more bureaucratic inclinations.<sup>151</sup> They become importunate rather than efficient, and replace private production with public relations.<sup>152</sup> While this process may be imperceptible if government contracts represent only a small fraction of the firm's total business, it is likely to become a dominant characteristic of firms that derive most of their income from government contracts.<sup>153</sup> There is nothing sur-

<sup>148</sup> See *supra* note 142.

<sup>149</sup> The motivation to minimize external pressures is one theory of bureaucratic behavior that is often employed to explain the asserted inefficiency of government agencies. See Jean-Luc Migué & Gérard Bélanger, *Toward a General Theory of Managerial Discretion*, 17 PUB. CHOICE 27 (1974). A related idea is that shirking by bureaucrats is difficult to control. See WILSON, *supra* note 73, at 155-57. But the empirical validity of these theories is open to doubt. See Terry M. Moe, *The Positive Theory of Public Bureaucracy*, in PERSPECTIVES ON PUBLIC CHOICE 455, 459-60 (Dennis C. Mueller ed., 1997).

<sup>150</sup> In addition to various other litigating possibilities, a private firm whose contract is transferred to another firm can file a protest against the second firm's contract. See Exec. Order No. 12,979, 60 Fed. Reg. 55,171 (Oct. 25, 1995); Federal Acquisition Regulation, 48 C.F.R. § 33.103. Protests can be filed in several different venues, the most common one being the Government Accountability Office (GAO). See William E. Kovacic, *Procurement Reform and the Choice of Forum in Bid Protest Disputes*, 9 ADMIN. L.J. AM. U. 461, 467 (1995); Jonathan R. Cantor, Note, *Bid Protests and Procurement Reform: The Case for Leaving Well Enough Alone*, 27 PUB. CONT. L.J. 155, 157-60 (1997).

<sup>151</sup> Cf. WILLIAMSON, *MECHANISMS*, *supra* note 69, at 17-18.

<sup>152</sup> This transformation could possibly be measured in the relative size and importance of a firm's "government relations" office, or the number of former government officials it employs.

<sup>153</sup> As Donahue reports, Lockheed Martin, one of the two owners of United Space Alliance, derives ninety-five percent of its income from government contracts, and private prison operators

prising about this result; the competitive behavior of private firms is probably just a special case of the more general principle that institutions, like living creatures, adapt to their environment.<sup>154</sup> When the environment is dominated by the government, rather than the market, private firms are likely to morph into political contestants, regardless of their former identity or current resemblance to market combatants.

The third reason to question the presumptive efficiency of private contractors, and thus the basic rationale for privatization, involves the nature of the transaction itself, rather than the character of the buyer or seller. When a government agency purchases a product for that agency's own use, we can analogize its action to the sort of thing that a private, for-profit firm would do. Even products that only the government buys can be treated in this manner; it is true that no private firms buy nuclear submarines or military tanks, but they do buy big boats and big trucks. There are certain activities of government, however, that have no market analogue, either because no one would buy them or because no one would sell them. Punishment is an example of the first, and welfare benefits (free money) are an example of the second. To be sure, if the government chooses to privatize the management of its correctional facilities or welfare system, it can be regarded as the purchaser of these management or operational services. But the efficiency of the market resides in its preference-revealing character; uncoerced, fully informed market exchanges are efficient because each party knows its own preferences and can choose exchanges that, in its own view, improve its situation. When the government is acting on behalf of benefit recipients or acting on behalf of that diffuse entity known as the public in punishing convicted felons, this dynamic is not operating. Rather, principal-agent inefficiencies — particularly of the sort that afflict fiduciary relationships<sup>155</sup> — will regularly arise.

The transaction cost analysis of make-or-buy decisions seems so readily applicable to the privatization process<sup>156</sup> that it is necessary for

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like Corrections Corporation of America earn a substantial share of their revenue from the government. Donahue, *supra* note 92, at 61. It is difficult to see how companies like this can be characterized as private actors in the traditional sense, or how we can expect them to display the efficiencies that we associate with market behavior.

<sup>154</sup> For a theory of organizations based on this analogy, see generally RUSSELL L. ACKOFF & FRED E. EMERY, *ON PURPOSEFUL SYSTEMS* (1972); LUDWIG VON BERTALANFFY, *GENERAL SYSTEM THEORY* (rev. ed. 1968); C. WEST CHURCHMAN, *THE SYSTEMS APPROACH* (1968); ROBERT LILIENFELD, *THE RISE OF SYSTEMS THEORY* (1978); and *SYSTEMS THINKING* (F.E. Emery ed., 1969).

<sup>155</sup> See Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. REV. 1045, 1048–51 (1991); Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795 (1983).

<sup>156</sup> Several of the contributors rely extensively on transaction cost analysis, including Donahue, *supra* note 92, at 42–44, and Kelman, *supra* note 70, at 154–57. For other applications of transac-

us to remind ourselves that this analysis is, after all, only an analogy, as Williamson himself acknowledges.<sup>157</sup> When the government buys services on behalf of its citizens, it is not acting like a market participant at all; it is acting like the government. Consider, for example, privatization of benefit management, an increasingly popular practice at the state and local levels.<sup>158</sup> While part of the purpose is to limit fraud, the private contractor is also expected to provide better service to legitimate recipients. In order for these recipients to impose true market discipline on the provider, however, they must possess the ability to choose among competing providers; in other words, with respect to any given provider, they must possess the power to exit.<sup>159</sup> This ability will be lacking in the case of public benefit recipients, and it will be spectacularly lacking for soldiers at a military base or inmates of a prison. Instead, the power to exit will be in the hands of the government agency that entered into the contract. But the agency's incentive structure does not align with the preferences of the benefit recipients. Whatever discontinuities or misunderstandings existed between the agency and the recipients when the agency was administering the program directly will continue to exist when it is negotiating with a private party on the recipients' behalf.<sup>160</sup> The problem may be generalized as the disjunction between the buyer and the user of the service or product. Whenever this disjunction occurs, there will be no competition in the market sense of the term because the user will not be able to express his preferences to the seller.

To generalize still further, the monopoly, monopsony, and disjunction situations are all created by the presence of the government. This is not because the government is necessarily incompetent or corrupt, but simply because it is not a market actor; it exists in a political environment, not a competitive one. It can participate in a competitive market, of course, but as soon as it begins to impact the structure of

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tion cost analysis to the topic of privatization, see SCLAR, *supra* note 139, at 96–121; Sidney A. Shapiro, *Outsourcing Government Regulation*, 53 DUKE L.J. 389 (2003); and David A. Super, *Privatization, Policy Paralysis, and the Poor*, 96 CAL. L. REV. 393 (2008). The earliest use of this analogy appears to be WILSON, *supra* note 73, at 358.

<sup>157</sup> See WILLIAMSON, ECONOMIC INSTITUTIONS, *supra* note 69, at 44–47; WILLIAMSON, MARKETS, *supra* note 69, at 21–26; WILLIAMSON, MECHANISMS, *supra* note 69, at 222–25; Oliver E. Williamson, *Public and Private Bureaucracies: A Transaction Cost Economics Perspective*, 15 J.L. ECON. & ORG. 306, 307 (1999). Williamson's ideas about the bounded rationality of human behavior are designed to be applicable to everyone, but the behavior that the theory predicts depends powerfully on the setting in which the actors operate.

<sup>158</sup> For discussions of this practice, see generally Matthew Diller, *Form and Substance in the Privatization of Poverty Programs*, 49 UCLA L. REV. 1739 (2002); Dru Stevenson, *Privatization of Welfare Services: Delegation by Commercial Contract*, 45 ARIZ. L. REV. 83 (2003); and Super, *supra* note 156.

<sup>159</sup> See generally ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY (1970).

<sup>160</sup> For an insightful discussion of these discontinuities, see Super, *supra* note 156, at 429–41.

that market, it will disrupt its competitive, efficiency-producing character. If it creates the market, as it does for nuclear submarines, prisons, or the management of welfare benefits, that market will not be fully competitive and thus will lack inherent efficiency.

None of this means that privatization should be prohibited in situations where the competitive process is impaired. What it does mean, however, is that the presumptive superiority of privatization as an implementation mechanism for programs where efficiency is a crucial consideration will no longer apply. Using transaction cost economics with the caution that its theoretical underpinnings would recommend, Sidney Shapiro and David Super have pointed out that these noncompetitive situations turn out to be much more prevalent than the enthusiasts of privatization seem to recognize.<sup>161</sup> When the government can engage in a truly unimpaired market transaction, such as purchasing equipment for an office or food services for an institution, the presumptive argument for privatization remains strong. But the competitive process turns out to be rather fragile in the presence of the government.

#### *D. Beyond Efficiency: Privatizing for Non-Presumptive Reasons*

The microanalysis of privatization, involving both the institutional nature of private firms and the nature of the contracting process between private firms and government, indicates that the presumptive efficiency of privatization is open to serious question. This conclusion suggests that the areas where privatization proves advantageous may be more limited than its more enthusiastic advocates believe. Conversely, privatization may be advantageous in circumstances where private actors are not presumptively more efficient, or indeed, in areas where efficiency is not even the primary goal. As a strategy of governance, privatization may offer other advantages which the emphasis on efficiency has obscured. At the same time, the focus on efficiency has tended to suppress the significance of other values and to force the multiple goals that are relevant to many government programs into the Procrustean bed of efficiency, as Dolovich argues. The observation that presumptions in favor of privatization must yield to microanalysis where the government's goal is efficiency also suggests that presumptions against privatization where there is no private market, or where there is some other government goal, are open to question. Two potential avenues of inquiry involve first, other benefits that existing private actors might provide to government beyond arguably superior efficiency, and second, other ways that government might take advantage of private actors beyond the assignment of operational responsibility. In

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<sup>161</sup> See Shapiro, *supra* note 156; Super, *supra* note 156.

particular, privatization can provide economies of scale and emergency or surge capacity, and private firms can provide government agencies with new ideas or act as participants in a government-created market. There is nothing particularly startling or innovative about any of these strategies, but they have been underrepresented in a discussion that has perhaps focused too heavily on provocative comparisons between the persistent inefficiency of government and the marvelous efficiency of private enterprise.<sup>162</sup>

Large cities have firefighting departments staffed by full-time, Weberian employees, but many small towns in America rely on volunteer firefighters. This is privatization,<sup>163</sup> and it is motivated by the desire for efficiency; it would be a waste of money for a locality to employ a team of firefighters on a full-time basis if it is unlikely to have more than one or two incidents per year. Although volunteer firefighters thus represent an efficiency-based privatization, the rationale for relying on them is not the superior efficiency of private enterprise over public agencies.<sup>164</sup> The volunteers are not an enterprise; they do not compete for their positions and cannot claim the presumptive efficiency of firms that have evolved in a market environment. Rather, the efficiency results from the massive diseconomies of scale that would be involved if small town governments employed full-time firefighters.

Several of the contributors refer to the government's need for emergency or surge capacity as a reason to rely on private parties,<sup>165</sup> but the issue merits further exploration. It may make sense, for example, for the government to take a more directive role when relying on private parties for this reason. First, the government is using the private parties as temporary employees to implement a task that it would otherwise perform itself. Second, since the motivation is not the private party's superior efficiency, there is less reason to preserve the pri-

<sup>162</sup> See, e.g., WILSON, *supra* note 73, at 113–15, 134–36 (contrasting the customer service and management of a typical state motor vehicle bureau with that of a McDonald's restaurant); see also *id.* at 346–64 (discussing disparities in efficiency, equity, accountability, and authority between private enterprises and government bureaus).

<sup>163</sup> Volunteer firefighters have earned some passing references in privatization literature. See DONAHUE, *supra* note 5, at 15; E.S. SAVAS, *PRIVATIZATION AND PUBLIC-PRIVATE PARTNERSHIPS* 53, 84–85 (2000). However, they do not appear to be discussed at any length, perhaps because they lack the element of directionality that the term privatization seems to imply — small towns have always fought fires this way.

<sup>164</sup> Of course, the privatization of firefighting services through government contracts with private firms could be justified on the superior efficiency rationale. See DONAHUE, *supra* note 5, at 70–71; SCLAR, *supra* note 139, at 72–82. But see William Glaberson, *Experiment in Private Fire Protection Fails for a Westchester Village*, N.Y. TIMES, Mar. 13, 1998, at B1.

<sup>165</sup> See Donahue, *supra* note 92, at 57–58, 61–62; Jody Freeman & Martha Minow, *Introduction: Reframing the Outsourcing Debates*, in *GOVERNMENT BY CONTRACT*, *supra* note 16, at 1, 17; Kelman, *supra* note 70, at 180–81. Soloway and Chvotkin do not refer to this issue specifically, but they note that privatization is often driven by the government's human resource shortages. See Soloway & Chvotkin, *supra* note 33, at 197–99.

vate party's decisionmaking process from government intervention. At the same time, the government may experience difficulty in implementing an increased level of supervision. As Freeman and Minow point out, the lack of "internal capacity to ramp up services and logistics quickly . . . also hampers the government's ability to draft and manage the outsourcing contracts used to substitute for the government's missing capacity."<sup>166</sup>

Government agencies can also look to private parties to achieve goals other than efficiency. One of the persistent criticisms of privatization, strongly voiced by Aman, Dickinson, Dolovich, Metzger, Minow, and Verkuil, is that it sacrifices public values, achieving market efficiency by using market ruthlessness.<sup>167</sup> A relatively simple solution, which several of these critics make the primary focus of their contributions, is to ensure that private contractors are subject to the same rules as the public agencies that they replace.<sup>168</sup> Viewed in this light, the Supreme Court's reversal of then-Judge Sotomayor's decision in *Correctional Services Corp. v. Malesko*<sup>169</sup> was ill-considered; as Mendelson argues, a private prison should be subject to *Bivens* damage actions<sup>170</sup> for constitutional violations to the same extent as a publicly run prison.<sup>171</sup> Judge Sotomayor concluded that redress against a private party that has contracted to carry out a mission that would otherwise be performed by government, and thereby subject to important constitutional restrictions, should not be denied on the basis of law and economics arguments that the remedy will not produce sufficient deterrent effects or that the cost will ultimately be passed on to the government.<sup>172</sup> Going beyond *Malesko*, the real issue is the preservation of the constitutional restrictions themselves in the privatized setting. It may make sense to exempt a contractor from statutory rules imposed on public agencies when the rules are designed to prevent mission creep or corruption on the ground that the market will impose equivalent constraints for efficiency-related reasons. But the market

<sup>166</sup> Freeman & Minow, *supra* note 165, at 17.

<sup>167</sup> See Aman, *supra* note 60, at 274–75, 279–83; Dickinson, *supra* note 32, at 335; Dolovich, *supra* note 41, at 134–35; Metzger, *supra* note 53, at 291–92; Minow, *supra* note 22, at 118, 122–27; Verkuil, *supra* note 45, at 311–14.

<sup>168</sup> For ideas on requiring compliance with public rules, see Aman, *supra* note 60, at 283–88; Dickinson, *supra* note 32, at 339–40; and Metzger, *supra* note 53, at 297–306.

<sup>169</sup> 534 U.S. 61 (2001), *rev'd* 229 F.3d 374 (2d Cir. 2000).

<sup>170</sup> See *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (implying a federal cause of action for the violation of certain important constitutional rights).

<sup>171</sup> Mendelson, *supra* note 65, at 250–51, 257. With respect to *Malesko*, Mendelson states that reversing the Supreme Court's decision "would give private contracting entities market-based incentives to honor — and to ensure their employees honor — the constitutional rights of individuals." *Id.* at 257.

<sup>172</sup> See *Malesko*, 229 F.3d at 379–81.

will not impose the normative restraints of constitutional law, and privatization should not serve as a means of circumventing these constraints.

The private contractors' role in implementing public values does not need to be stated in exclusively negative terms, or restricted to constraints. Dolovich criticizes privatization for these limitations. For a given function currently performed by a government agency, such as prison management, the existing situation operates as a floor, since no one would agree to a change that made the situation worse. Once a competitive process is initiated for a function, Dolovich argues that the floor becomes a ceiling.<sup>173</sup> The private contractor is bidding to perform the existing function at a lower cost, and the government agency must compete against that bid by demonstrating that its costs will be still lower. Proposals to improve the quality of the function would tend to increase costs, and thus are unlikely to emerge from such a process. Whether the lack of quality improvement is troublesome depends upon the nature of the function. In the prison context, for example, we might be content to limit the goals for medical or food services to cost minimization, provided the quality of service remains acceptable; no one expects prison health services to be a source of new medical discoveries, or prison food services to develop an exciting new cuisine. But with respect to prison management in general, we certainly do expect government to develop new, more effective approaches to incarceration that achieve goals other than cost minimization, the obvious goal being a reduction in recidivism.<sup>174</sup>

These more aspirational goals do not preclude privatization, but the process would need to be defined in different terms than it was under the second Bush Administration. As Dickinson points out, the government writes the contract, and there is no reason why it could not require that the quality of a function or service be improved as an enforceable condition.<sup>175</sup> Alternatively, the agency could solicit ideas for improving the function from private parties, rather than soliciting offers to operate it at its existing level. This opens up the possibility of treating privatization as a means of forging cooperative, creative relationships between government and private parties, rather than basing privatization on excessively broad and unnecessarily demeaning claims about government incompetence, or equally excessive and unjustified encomia to market efficiency. In the prison example, the result of privatization might be that private parties help the government implement its functions more effectively by developing new strategies for in-

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<sup>173</sup> See Dolovich, *supra* note 41, at 132–33.

<sup>174</sup> See *id.* at 134–35.

<sup>175</sup> See Dickinson, *supra* note 32, at 345–48, 355–59.

carceration, and the particular parties that do so might be nonprofit institutions rather than market actors. These possibilities can only be assessed through microanalysis of the specific situations in which they would be applied.

One other mode of privatization that extends beyond efficiency is for the government to make a market in a particular commodity or service. By doing so, it can enlist the private sector in producing public goods or goods whose value is too speculative to engender private investment. This makes the disjunction of buyer and user an impetus for government action, rather than an impediment to government efficiency. The obvious example is the market for new ideas and empirical investigations that the federal government has created through National Science Foundation (NSF), National Institute of Justice (NIJ), and National Institutes of Health (NIH) grants, among others. Like the private market, this government-created market relies on people's desire to improve their material position, either directly through grant-funded compensation or indirectly by developing an enhanced and ultimately marketable reputation. Like the private market, it unleashes the competitive inclinations that seem hardwired into *Homo sapiens*.<sup>176</sup> There are, of course, other consumers of research besides the federal government, including state governments (largely in the form of public universities),<sup>177</sup> private nonprofits, and for-profit firms. But in many areas of research, the government has been the market maker, "buying" research products that would otherwise lack a sponsor.<sup>178</sup> In this way, as in others, the government can use the implementation mechanism of privatization to achieve results that go beyond the goal of efficiency and the ambit of privately created markets.

*E. The Need for Microanalysis of Privatization's  
Performance and Possibilities*

To summarize, the essays in *Government by Contract* delineate a certain amount of common ground, but it is rather rough terrain. While the contributors agree on basic principles, there are several variations of these principles and they can be applied in different ways. Viewing government action as a continuum from policymaking at the

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<sup>176</sup> An issue that needs exploration is whether the use of a high-powered incentive such as funding will weaken the researcher's other incentives, such as formulating a coherent research agenda. It is the mix of incentives that will determine behavior. See Holmstrom & Milgrom, *supra* note 119, at 973, 989.

<sup>177</sup> See DAVID B. AUDRETSCH, *THE ENTREPRENEURIAL SOCIETY* 152–53 (2007); BERNARD D. REAMS, JR., *UNIVERSITY-INDUSTRY RESEARCH PARTNERSHIPS* 23–41 (1986).

<sup>178</sup> A notable example is the research on communication between computers that ultimately led to the internet. See STEPHEN SEGALLER, *NERDS 2.0.1: A BRIEF HISTORY OF THE INTERNET* (1998); Steve Bickerstaff, *Shackles on the Giant: How the Federal Government Created Microsoft, Personal Computers, and the Internet*, 78 TEX. L. REV. 1 (1999).



high end to ordinary purchasing at the low end, all the authors seem to agree on the two endpoints.<sup>179</sup> Policymaking should almost always remain in the control of duly elected or appointed public authorities, who are more likely to reflect the desires of the populace and employ public values in shaping their decisions. Ordinary off-the-shelf purchases should almost always be privatized; the government should not only avoid manufacturing standard items, but should obtain them as an ordinary market participant and avoid writing specifications for them. With respect to the extensive intervening territory, however, there is considerable disagreement.<sup>180</sup> Some of the contributors, although acknowledging that privatization can be of value, see recent efforts as an almost unrelieved succession of mismanagement, inefficiency, and abuse. Others, although admitting that privatization is sometimes misused or inapplicable, see it as a wide-ranging solution to the problems of governance. Both positions are presented in well-informed, thoughtful discussions. As with a well-argued legal case, the reader may often find each side convincing as it is presented and end with some sense of bewilderment about how to reconcile the conflicting perspectives.

One conclusion that can be drawn from this dilemma is that we need to abjure global solutions and comprehensive pronouncements in favor of what I have elsewhere described as a microanalysis of institutions.<sup>181</sup> This means that the possibilities and limitations of privatization as an implementation mechanism need to be traced out with care for each function, and in each institutional setting. The conclusion not only applies to the decision to privatize, but also to the variations and potential reforms in the way that privatization is carried out. Privatization cannot be governed by law in the premodern sense, that is, it cannot conform to a logically coherent code of rules. Rather, it is a strategy for implementing public policy in an instrumentally rational manner, and its contours will consequently vary with the circumstances.<sup>182</sup> Should we make FOIA applicable to private contract

<sup>179</sup> It is also important to remember that references to high and low, continua, and endpoints are all heuristic imagery. See generally GEORGE LAKOFF, *WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND* 68–76 (1987). The actual decision-maker in any given situation may not conceptualize her task in the same terms as an observer, and this is important for the observer to keep in mind. RUBIN, *supra* note 103, at 15–18.

<sup>180</sup> The authors' varying attitudes toward the conduct of the Iraq war are emblematic of these differing views. For some, the war embodies all that is wrong with the current use of privatization, see Dickinson, *supra* note 32; Minow, *supra* note 22, while for others, it was an extraordinary situation that should not be generalized, see Kelman, *supra* note 70, at 173, 180–81; Soloway & Chvotkin, *supra* note 33, at 229–36.

<sup>181</sup> See Edward L. Rubin, Commentary, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1425 (1996).

<sup>182</sup> See *id.* at 1428.

ors, as Aman, Mendelson, and Verkuil suggest,<sup>183</sup> or should we insulate contractors from its strictures, as Kelman urges?<sup>184</sup> The answer will vary in different circumstances; in some cases, the transparency may be essential, while in others it may be only an expense and an annoyance.

Microanalysis is not opposed to theory, and does not embrace the naïve pragmatism that underlies a substantial amount of American legal scholarship. In fact, the approach is based on the converse recognition that we have a number of appealing theories, some of which offer rival explanations for the same phenomenon. The goal of microanalysis is to provide a methodology for choosing among theories, not by debating their general merits but by tracing their range of application in specific instances. Consider, for example, one of the most prevalent theories in modern American legal scholarship and social science, the rational actor model of human behavior. This approach lies at the foundation of microeconomics,<sup>185</sup> one of the great intellectual successes of the postwar era, and possesses a great deal of explanatory power in other fields as well.<sup>186</sup> Recent scholarship, however, has revealed numerous limitations on its range of application that arise from cognitive illusions,<sup>187</sup> norm-determined behavior such as voting,<sup>188</sup> commitment-based behavior such as participation in social movements,<sup>189</sup> and altruism.<sup>190</sup> Thus, microanalysis would treat ra-

<sup>183</sup> See Aman, *supra* note 60, at 284; Mendelson, *supra* note 65, at 249–50, 254; Verkuil, *supra* note 45, at 316–17. For problems that arise under the current Act as it applies to government agencies, because private contractors can effectively veto disclosure under the trade secrets exception, see Dickinson, *supra* note 32, at 337.

<sup>184</sup> See Kelman, *supra* note 70, at 185–86. Soloway and Chvotkin make a broader supporting point that new laws are not needed. See Soloway & Chvotkin, *supra* note 33, at 235–38.

<sup>185</sup> See generally ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 14–55 (5th ed. 2008); N. GREGORY MANKIW, *PRINCIPLES OF MICROECONOMICS* 4–8 (5th ed. 2009).

<sup>186</sup> See generally JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* (1962) (political science); JAMES S. COLEMAN, *FOUNDATIONS OF SOCIAL THEORY* (1990) (sociology); ROBERT D. COOTER, *THE STRATEGIC CONSTITUTION* (2000) (constitutional law); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 249–73 (7th ed. 2007) (common law).

<sup>187</sup> See, e.g., *JUDGMENT UNDER UNCERTAINTY* (Daniel Kahneman et al. eds., 1982). The extensive follow-up research to the seminal studies discussed in *Judgment Under Uncertainty* has spawned an entire bestiary of illusions, including the hindsight bias, the overconfidence bias, the representativeness heuristic, the availability heuristic, the anchoring effect, the validity effect, and others. See *COGNITIVE ILLUSIONS* (Rüdiger F. Pohl ed., 2004); SCOTT PLOUS, *THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING* (1993).

<sup>188</sup> See, e.g., DONALD P. GREEN & IAN SHAPIRO, *PATHOLOGIES OF RATIONAL CHOICE THEORY* 47–71 (1994); Geoffrey Brennan & James Buchanan, *Voter Choice: Evaluating Political Alternatives*, 28 *AM. BEHAV. SCIENTIST* 185 (1984).

<sup>189</sup> See, e.g., DONATELLA DELLA PORTA & MARIO DIANI, *SOCIAL MOVEMENTS* 68–82 (1999); ALAIN TOURAINE, *CAN WE LIVE TOGETHER?* 89–124 (David Macey trans., 2000).

<sup>190</sup> See generally KRISTEN RENWICK MONROE, *THE HEART OF ALTRUISM* (1996); THOMAS NAGEL, *THE POSSIBILITY OF ALTRUISM* (1970). Thomas Nagel treats altruism as an aspect

tional actor theory as the dominant explanation for human conduct within a delimited range, a contributing explanation in certain other circumstances, and a minor consideration in still others.<sup>191</sup> It would attempt to define that limited range, identify other relevant theories of behavior, and assess the interaction between these theories and the rational actor model.

With respect to the privatization decision, the two groups whose behaviors are most directly relevant are government agents and private firms. Rational actor theory has proven to be quite powerful in explaining the behavior of people in private, for-profit firms. Its limitation in this area arises, as discussed above, when institutional factors intervene.<sup>192</sup> Another theory, generally called organization theory and regarded as a branch of sociology, provides the most empirically convincing explanation for these factors.<sup>193</sup> For appointed government officials such as agency staff, the rational actor model has been a notable failure. Various efforts have been made to identify some personal, self-interested goal that these officials are attempting to maximize, such as

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of rationality, but his notion of rationality is explicitly opposed to rational actor theory because it is not based on maximizing the actor's self-interest.

<sup>191</sup> See Michael Taylor, *When Rationality Fails*, in *THE RATIONAL CHOICE CONTROVERSY* 223, 223-33 (Jeffrey Friedman ed., 1996).

<sup>192</sup> Rational actor theory can readily take account of the decisionmaker's limited cognitive capacities or lack of information by invoking the concept of bounded rationality. See 3 HERBERT A. SIMON, *MODELS OF BOUNDED RATIONALITY* 291-94 (1997); WILLIAMSON, *MARKETS*, *supra* note 69, at 5, 31-33, 126-27; F.A. Hayek, *The Use of Knowledge in Society*, 35 *AM. ECON. REV.* 519 (1945); Herbert A. Simon, *Theories of Bounded Rationality*, in *DECISION AND ORGANIZATION* 161, 163-64 (C.B. McGuire & Roy Radner eds., 1972).

<sup>193</sup> Organization theory is in fact a complex field in its own right, consisting of various schools that can be characterized in various ways. One way to subdivide it is into general systems theory, see, e.g., FRANK BAKER, *ORGANIZATIONAL SYSTEMS* (1973); BERTALANFFY, *supra* note 154; LARS SKYTTNER, *GENERAL SYSTEMS THEORY* (1996), decision theory, see, e.g., MICHAEL D. COHEN & JAMES G. MARCH, *LEADERSHIP AND AMBIGUITY* (1974); RICHARD M. CYERT & JAMES G. MARCH, *A BEHAVIORAL THEORY OF THE FIRM* (1963); HERBERT A. SIMON, *ADMINISTRATIVE BEHAVIOR* (4th ed. 1997), human relations theory, see, e.g., ELTON MAYO, *THE HUMAN PROBLEMS OF AN INDUSTRIAL CIVILIZATION* (1933); HELEN B. SCHWARTZMAN, *ETHNOGRAPHY IN ORGANIZATIONS* (1993); PHILIP SELZNICK, *TVA AND THE GRASS ROOTS* (1949), and new institutionalism, see, e.g., *INSTITUTIONAL ENVIRONMENTS AND ORGANIZATIONS* (W. Richard Scott & John W. Meyer eds., 1994); *THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS* (Walter W. Powell & Paul J. DiMaggio eds., 1991); Lynne G. Zucker, *The Role of Institutionalization in Cultural Persistence*, 42 *AM. SOC. REV.* 726 (1977). While all these theories differ from rational actor theory, which, in essence, dissolves the organization into individuals with independent motivations, there have also been various efforts to unify the differing methodologies. See, e.g., DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* (1990); WILLIAMSON, *MECHANISMS*, *supra* note 69, at 219-49.

their individual discretion<sup>194</sup> or their agency's budget,<sup>195</sup> but these efforts have foundered on conceptual incoherence and a lack of empirical support.<sup>196</sup> As a result, organization theory must serve as the primary explanation for the behavior of agency officials in a microanalytic analysis.

Neither rational actor theory nor organization theory is definitive enough to produce convincing predictions of human behavior in isolation from its context. We can predict, as a matter of atomic theory, what an oxygen atom will weigh and how it will interact, no matter where it is. Social science theories, in contrast, generally possess less predictive power,<sup>197</sup> so it makes sense to vary their range and application from one situation to another, as microanalysis recommends. Each situation will necessarily be different, and each will require that the entire analysis be performed anew. From this perspective, it is apparent that uniform, formulaic procedures like those imposed by Revised OMB Circular A-76 will be inaccurate to the point of counter-productivity. To be sure, the second Bush Administration, which promulgated this procedure, was uniquely ideologically driven and incompetent in the field of public administration, but the instinct to rely on uniform procedures is a general one, and one that should often be avoided when complex decisions must be made.

It may be objected that microanalysis demands a great deal of effort, expense, and expertise. That is true. For small-scale decisions, or decisions that, due to human capital exigencies, are being made by relatively untrained individuals, the costs of engaging in microanalysis are likely to exceed the benefits; clearly, there are many government settings, from the motor vehicle bureau to the cell block to the battlefield, where simple, uniform decision processes should be employed. But a privatization decision is unlikely to be such a setting, except when the government is acquiring standard consumer items and the desirable policy — full privatization — is relatively clear. The alloca-

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<sup>194</sup> See, e.g., Migué & Bélanger, *supra* note 149 (discussing the maximization of discretion, or slack).

<sup>195</sup> See, e.g., WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (1971) (discussing the maximization of budget).

<sup>196</sup> See, e.g., Albert Breton & Ronald Wintrobe, *The Equilibrium Size of a Budget-Maximizing Bureau: A Note on Niskanen's Theory of Bureaucracy*, 83 J. POL. ECON. 195 (1975); John A.C. Conybeare, *Bureaucracy, Monopoly, and Competition: A Critical Analysis of the Budget-Maximizing Model of Bureaucracy*, 28 AM. J. POL. SCI. 479 (1984); William T. Gormley, Jr., *Institutional Policy Analysis: A Critical Review*, 6 J. POL'Y ANALYSIS & MGMT. 153 (1987); Moe, *supra* note 149.

<sup>197</sup> See ALASDAIR MACINTYRE, AFTER VIRTUE 88–108 (2d ed. 1984); DONALD N. MCCLOSKEY, IF YOU'RE SO SMART 12 (1990); MAX WEBER, "Objectivity" in *Social Science and Social Policy*, in THE METHODOLOGY OF THE SOCIAL SCIENCES 49 (Edward A. Shils & Henry A. Finch eds. & trans., 1949); PETER WINCH, THE IDEA OF A SOCIAL SCIENCE AND ITS RELATION TO PHILOSOPHY 91–94 (2d ed. 1990).

tion of tasks to a government agency or a private firm is generally a second-order decision that involves an allocation of resources that will be mid-sized or large relative to the scale of the decisionmaking agency. For decisions such as these, the gain in the caliber of the result will generally be worth the effort. Of course, it is always easier and cheaper to recite an incantation than to build a machine, but the consequences of magical thinking are unlikely to be satisfactory in a secular society. Microanalysis will not always produce the optimal solution, but it is more likely to do so than an ideologically driven wish that complex, multifactor decisions could be resolved with a simple, theoretically unjustified formula.

The somewhat daunting prospect of applying microanalysis to such a broad range of decisions can be made less formidable by increasing the number of trained personnel available to the agency. General rules like the Federal Acquisition Regulations may be useful as default provisions, but what we ultimately need is a group of highly trained contract officers who can craft individualized strategies to achieve the most effective results in each specific situation. The need for such officers, interestingly, is something about which virtually all the contributors agree. The critics of privatization point to the government's lack of supervisory capacity as the breeding ground of contractor malfeasance and incompetence, and as evidence that privatization represents the government's dereliction of duty.<sup>198</sup> The proponents of privatization identify this same deficiency as the most serious problem with an otherwise effective strategy, and suggest that the strategy cannot be evaluated fairly unless government personnel fulfill their responsibilities within the process.<sup>199</sup> Both positions are correct, and the conflict between them can be partially resolved by moving their recommendations up one decisionmaking level. Sophisticated, trained policy analysts are needed to avoid privatization's pitfalls and to make it function most effectively, as the contributors to *Government by Contract* urge.<sup>200</sup> These same analysts are needed to perform a microanalysis and determine the possibilities and limitations of privatization in each situation where it is being contemplated.

### CONCLUSION

There is a direct connection between the two apparently distinct predictions in Stephenson's *Snow Crash*. The cyberspace world into which his characters withdraw to indulge their fantasies also

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<sup>198</sup> See Minow, *supra* note 22, at 114-17; Verkuil, *supra* note 45, at 313-14, 330.

<sup>199</sup> See Kelman, *supra* note 70, at 171-77, 189-91; Seifter, *supra* note 96, at 105-08; Soloway & Chvotkin, *supra* note 33, at 227-38.

<sup>200</sup> See Dickinson, *supra* note 32, at 342-48; Mendelson, *supra* note 65, at 242-46.

represents a withdrawal from public, collaborative life that might well lead to the atrophy of government and its replacement with a largely privatized mode of social regulation.<sup>201</sup> During the past several decades, there has been a substantial amount of enthusiasm for this vision of the future.<sup>202</sup> But the catastrophes that have ensued from the second Bush Administration's efforts to fight a war with unsupervised private contractors; to respond to a natural disaster with an underfunded, incompetent emergency relief agency;<sup>203</sup> and to allow private money managers to spin out increasingly complex financial instruments without regulatory constraint have brought home the values of collective action and government responsibility. As we move into a new presidential administration, and perhaps a new paradigm of governance, we should not recreate the bureaucratic rigidities that inspired the prior paradigm. We need a new approach to the complex relationship between government and private parties, one that recognizes the strengths of each and deploys them in a sophisticated, micro-analytic manner. *Government by Contract*, with its well-informed, insightful individual essays and the engaged, attentive dialogue that emerges from the volume as a whole, represents an enormously valuable step in that direction.

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<sup>201</sup> Cf. CASS R. SUNSTEIN, *REPUBLIC.COM 2.0* (2007) (suggesting that the ability of people to control information inputs through the internet is degrading public discourse).

<sup>202</sup> One example is the proliferation of self-regulated gated residential subdivisions. See, e.g., EDWARD J. BLAKELY & MARY GAIL SNYDER, *FORTRESS AMERICA* (1997); SETHA LOW, *BEHIND THE GATES* (2003); EVAN MCKENZIE, *PRIVATOPIA* (1994).

<sup>203</sup> Ronald Reagan, when inaugurating the paradigm of governance that George W. Bush brought to its conclusion, famously said: "The nine most terrifying words in the English language are, 'I'm from the government and I'm here to help.'" JULIA VITULLO-MARTIN & J. ROBERT MOSKIN, *THE EXECUTIVE'S BOOK OF QUOTATIONS* 130 (1994) (quoting President Ronald Reagan, Press Conference in Chicago (Aug. 2, 1986)). It was not government assistance, however, that terrified the residents of New Orleans.