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Privatization and Institutional Choice

Neil K. Komesar

PRIVATIZATION AND INSTITUTIONAL CHOICE

NEIL K. KOMESAR*

Professor Ronald Cass has presented us with a paper which has many levels and aspects. He has provided us with a taxonomy of privatization; a descripton of potential legal constraints on privatization and a theory of government which he associates with privatization. Several features of Professor Cass' paper are impressive as well as enlightening. However, I am left uncomfortable with his basic analytical framework which seems inadequate for the tasks Professor Cass wishes to assign it. In the comments which follow, I suggest how that framework might be altered to allow it to meet these intellectual challenges.

The taxonomy of privatization presented in the first part of Professor Cass' paper seems a particularly valuable contribution to the existing literature. As Professor Cass notes, privatization covers a vast variety of actions and proposals. The very notion of privatization is illusive. It is a subject as broad as the study of societal decisionmaking itself. Privatization involves the allocation of societal decisionmaking from one set of decisionmakers (the public sector — legislatures and administrative agencies) to another set (the private sector — the market). This allocation, whether from public to private or the reverse, has always been a subject of controversy and importance. Professor Cass offers a sophisticated apparatus for integrating and cataloging the dimensions and categories of the recent privatization controversy.

Professor Cass also offers us an encyclopedic view of the potential sources of legal constraints or problems. Though this discussion seems thorough, the analysis seems a bit wooden. Professor Cass concludes that there are few, if any, "legal" constraints on government decisions to privatize. On one level, his conclusion seems unassailable. To the extent that "legal" constraints are judicial constraints, a source of some ambiguity in Professor Cass' discussion, there are few legal constraints on governmental regulatory decisions in general. Outside of the use of such categories as race, alienage and gender or regulation of first amendment activities, there are few substantive constitutional constraints. Even procedural due process does not provide many problems for governmental choice here. Issues of federalism and separation of powers have little bite, notwithstanding the

* James E. and Ruth B. Doyle Professor of Law, University of Wisconsin Law School, Madison. A.B. (1963), A.M. (1964), J.D. (1967), Ph.D. (1973), University of Chicago.

courts' occasional concern about the structure of congressional decision-making or state regulations which inhibit interstate commerce.

Given the limited scope of constitutional constraints in general, it is not surprising that there are few constitutional constraints on privatization in particular. However, we know that the courts will occasionally invalidate governmental action under such doctrines as takings, delegation and structural due process, as well as equal protection and even substantive due process. Before we too easily assume that privatization will pass unscathed through the constitutional thicket, it is advisable to know the factors which have caused constitutional problems elsewhere. The delegation doctrine, the notion of entitlements and the definition of state action are malleable. Although their use has varied over time, they are clearly available to courts who wish to use them. The salient issue here is not whether they *could* be employed, but whether they *will* be employed.

Similarly, the power of courts to interpret statutes allows the courts to place constraints on both federal and state legislation as well as administrative action. We have a complex public sector with interactions between levels and branches of government and a vast web of administrative agencies. Courts bent on mischief could find the means to limit government action on privatization through their interpretation of the ever-present ambiguities in regulatory or deregulatory schemes. Again, the issue is not whether the courts could constrain or defeat privatization through statutory interpretation, but whether they would decide to do so.

Here, Professor Cass' discussion seems too much a report of what can be seen, as opposed to an attempt to project what the reaction might be. Privatization, although very old, has only recently caught the attention of public officials, judges and scholars. The picture of government action and behavior which unfolds may determine whether judicial discretion activates dormant doctrines and manipulates statutory ambiguities and conflicts.

We need a way to analyze this potential reaction. I have previously suggested that such analysis might be undertaken by focusing on the actual or perceived relative merits of alternative decisionmakers.[1] In the setting just discussed, the question of the degree and form of judicial response might be analyzed by examining the attributes of legislative versus judicial decisionmaking in the area of privatization in general or for each of the

1. Komesar, *A Job for the Judges—The Judiciary and the Constitution in a Massive and Complex Society*, 86 MICH. L. REV. __ (1988) [hereinafter *A Job for the Judges*]; Komesar, *Back to the Future—An Institutional View of Making and Interpreting Constitutions*, 81 NW. U.L. REV. 191 (1987); Komesar, *In Search of a General Approach to Legal Analysis: A Comparative Institutional Alternative*, 79 MICH. L. REV. 1350 (1981); Komesar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis*, 51 U. CHI. L. REV. 366 (1984).

various forms of privatization. Professor Cass seems to leave this institutional comparison largely unexplored.

To his credit, Professor Cass does focus on institutions or at least one set of institutions elsewhere in his paper. In Section IV, he argues that we need to have a "theory of government."[2] Such an assertion seems unassailable since it is the supposed failures of government which justify privatization and, paradoxically, the same government process which must decide whether, when and in what form, to privatize. Professor Cass' analysis in this connection, although intellectually impressive, is troubling at several levels. First, the theory of government he proposes is basically incomplete. Second, even a complete theory of government is insufficient as a means of analyzing privatization without parallel conceptions of relevant alternative institutions — the market and the judiciary are prominent examples — and a means of comparing these institutions.

Professor Cass argues that there are two competing models of governmental choice — the public interest model and the public choice model. The latter he associates with what might be called a special interest (or what I have called a minoritarian bias) model.[3] Under the public choice model, small, concentrated interests parlay their advantages in organization into political influence (and rent-seeking) to the disadvantage of the dispersed majority. The public interest model, in contrast, has no sophisticated theory of behavior. It largely assumes that government officials do good. Although Professor Cass acknowledges the weak analytical underpinnings of the public interest model, he argues that it must be working sometimes because the public choice (special interest) model does not explain instances in which dispersed majorities succeed over concentrated minorities, or instances which seem consistent with the public interest. Therefore, he concludes, there is a need to turn to a mixed [public interest/public choice] model where "political competition" is imperfect and political figures are seen as capturing rents themselves often in the form of their preference for public interest activities. From this analytical base he makes a leap to the conclusion that government will minimize cost and sometimes achieve the public good.

I find the analysis and the associated conclusions uncompelling. The analytical model which connects imperfections in political competition, and captured by governmental actors, with the achievement of the public interest is weak. Even if we assume that political competition is imperfect, Pro-

2. *See* Cass, *Privatization: Politics, Law, and Theory*, 71 MARQ. L. REV. 449, 497-522 (1988) [hereinafter Cass].

3. *Id.* at 475-77.

fessor Cass' model provides no conception of when or why it would be imperfect — that is, when or why there would be deviation from the control of political constraints. We also do not know when or why political officials would extract their rents in the form of public interest activity. In addition, we do not know when or why the public interest conception of a large number of public officials will coincide. Quite a few public figures must, one, be loosened from the constraints of political competition; two, wish to extract rents in the form of public interest; and three, have the same conception of the public interest simultaneously, before Professor Cass' model would produce any systematic results, let alone the results he supposes. Such a possibility may exist, but I would not want to build a positive theory of government on it.

Professor Cass is correct in saying that the special interest model, which informs the economic theory of regulation, does not explain governmental action where dispersed majorities win or where governmental action is efficient. However, I disagree with his conclusion that the already dubious public interest model is the only alternative available. I have argued elsewhere that the special interest model of political behavior is not the only available perception of government response to the rarified public interest model.[4]

In a governmental structure where majority voting plays a role, one cannot dismiss a distortion which operates in a direction opposite from the special interest model. The special interest model assumes that a concentrated minority with advantages in organization and information-gathering will prevail over a dispersed majority whose low per capita impact may not even justify the resource outlays to recognize their position. For example, consumer legislation, supposedly promoted for the consumers' benefit, may often harm those who it is supposedly meant to help because special interest groups are able to obtain rents by impeding competition through such legislation. Consumers and taxpayers are easy pickings for rent seekers because of the economics of organization and information; the per capita impact of a given law on a given consumer or taxpayer is so small that there is no incentive to expend the resources in understanding the law's impact, let alone organizing to fight it.

But there is also a traditional perception which sees a dispersed, low per capita impact majority with advantages over a minority with high per capita impact. Phrases like "tyranny of the majority" reflect this perception. Most constitutional law of the last fifty years reveals a greater sensitivity to this form of bias than to special interest bias. Here it is the advantage of

4. *See A Job for the Judges, supra* note 1.

numbers — unweighted voting — which causes the distortion. To emphasize the parallel and contrasting natures of these conceptions of public decisionmaking, I have come to call these polar visions of governmental malfunction majoritarian and minoritarian biases, rather than "tyranny of the majority" and special interests theories.[5]

I am not about to argue, nor do I believe, that majoritarian bias, rather than minoritarian bias, characterizes governmental choice in general, or government privatization choices in particular. It is my view that both models are useful in understanding government decisionmaking. Whether one or the other is more likely in a given setting depends on a range of factors relating to the costs of information and organization and the degrees of concentration and dispersion of interests. Relevant to the present inquiry, I see no reason to assume that the vast range of decisions we call privatization, which involve a broad range of governmental decisionmaking institutions and governmental activity, will necessarily be characterized by one rather than the other of these biases.

We can now envision any observed successes of dispersed majorities over concentrated minorities as the products of a public choice analysis rather than as exceptions to it. In a given setting, the forces of the two biases may also tend to cancel each other out, producing a seemingly efficient result in the aggregate, while still consistent with rent-seeking behavior by individuals. This analysis would explain nonrent-seeking results without recourse to a public interest model which envisions political figures consciously seeking the public interest. The existence of polar biases also makes the determination of corrective mechanisms more difficult. What corrects minoritarian bias can aggravate majoritarian bias and vice versa. This Comment is not the place to work through these implications; I have done so elsewhere.[6] My point is that a theory of government used to address privatization should include the possibility of majoritarian as well as minoritarian bias.

Professor Cass' theory of government also suppresses interesting questions about political behavior toward privatization. He somehow characterizes privatization decisions as those "public interest exceptions" to the public choice model. However, he offers no basis for the belief that these

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5. *See generally id.* Professor Cass alludes to examples of majoritarian bias at several points in his paper without recognizing the role of this bias in a full picture of public choice. He notes the Director's Law where societal benefits are captured by a political majority in the middle class. *See generally* Cass, *supra* note 2. He talks in terms of both majority and minority political power. *Id.* However, when Professor Cass builds his theory of government he adopts only the special interest focus of recent public choice theory.

6. *See generally A Job for the Judges, supra* note 1.

decisions and not others would be subject to these exceptions, if such exceptions in fact exist. One of the paradoxes of privatization is that the same political process, whose foibles argue for privatization, controls privatization. Here one would expect a search for those interest groups with political influence and an identification of the forms of privatization these interest groups might produce. With rare exception,[7] Professor Cass' analysis of government behavior ignores these groups and their selfish interests and instead sees privatization decisions as a breed of government behavior dominated by public interest motives. It is especially difficult to understand why special interest groups who produced these government schemes, according to the economic theory of regulation, would now be absent during their dismantling. Professor Cass' theory tells us nothing about when this is possible, let alone likely. He is simply assuming that these outcomes are the product of assumed lapses in the public choice model.

There is a great deal lost in such an analysis. The form of privatization may be severely skewed and even perverse because of the pressures of the very groups whose rule is now assumed away. Professor Cass' analysis would not allow us to determine when and if such distortions are possible, let alone their form.

Moreover, Professor Cass' analysis also has problems beyond his theory of government. Whatever the attributes of the theory of government we construct, a full analysis of privatization (normative or positive) also requires a parallel analysis of alternative institutions to the government. The analysis must be comparative. One obvious alternative is the market. Privatization is the movement of societal decisionmaking from public to private decisionmakers. Professor Cass recognizes the comparative aspects by reference to the traditional market failure notions of free-rider, public good and monopoly. However, it might be better if we could cast the issues of market failure in the same terms in which we cast governmental failure. Both the minoritarian or special interest bias model Professor Cass uses and the majoritiarian bias model I suggest are defined in terms of differences in response to concentration or dispersion of citizen interest.[8]

I believe that problems in the market can be cast in these same terms. Take, for example, the issue of consumer protection which, as we have seen, may produce special interest legislation. On the other side of the issue is

7. Only once is there a description of expected political behavior, and this is confined to the position of labor versus other interest groups. Cass, *supra* note 2, at 519-20.

8. The special interest distortion occurs because concentrated (intensely impacted) minorities are overrepresented. The majoritarian bias, operating through unweighted voting, has the opposite effect.

usually some question of consumer safety which the market allegedly fails to handle. This potential for failure can once again be seen in terms of the concentration and dispersion of interests. If the safety problem facing consumers is complex and faces each consumer with a relatively low impact per capita, albeit large when aggregated over all consumers, we have the conditions for a failure of consumer demand for the safety step in the market. Dispersion of interests which weakens the ability of certain groups to recognize and promote their interests in the political arena causes parallel problems in the market.

I am not arguing that this likelihood is greater (or less) than in the political arena. My point is that analogous problems exist in both institutional settings and they can be cast, studied, and evaluated in similar terms. Free-rider and public good problems are a function of transaction costs which are affected by concentration and dispersion of impacts. Costs of information and organization are relevant in the functioning of both the market and political arena while concentration and dispersion affect the costs and effectiveness of information and organization.

Similarly, the judicial response, like the legislative, administrative and market responses, can be analyzed in these terms. There are potential distortions in the judiciary which can be cast in terms of concentration and dispersion. Litigating, like lobbying, requires organization and information, and once again dispersion can be a disadvantage and concentration can be an advantage.

Like Professor Cass, I think that the issue of privatization can best be analyzed by an institutional approach. I believe, however, that a more sophisticated model of the privatization decision must be employed to address a wider range of issues before we have an adequate analysis of privatization. I believe we must ask questions about both legal and governmental decisions from an institutional perspective. Furthermore, the degree to which legislatures or administrative agencies will constrain or promote privatization depends on an understanding of governmental behavior more sophisticated than the familiar public interest versus special interest conception. There is a broader range of models which allows us to address these questions without abandoning the analytically robust assumptions of self-interested behavior and aggregate interaction. If we are concerned with a normative assessment of privatization, then we need to examine both market and governmental responses in complete and parallel fashion. To this end, I have proposed a conception of institutional choice broad enough to handle the analytical challenges inherent in a complex issue such as privatization.