Privatization: Politics, Law and Theory

Ronald A. Cass
# PRIVATIZATION: POLITICS, LAW, AND THEORY

Ronald A. Cass*

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* Commissioner, U.S. International Trade Commission; Professor of Law, Boston University (on leave). A number of friends and colleagues have provided helpful comments on early drafts, including Jack Beermann, Joe Brodley, Glen Robinson, Tom Schick, Ken Shepsle, participants in a Boston University Law Faculty Workshop, and participants in the Liberty Fund - Law and Economics Center Conference on Privatization: Assumptions and Implications. Financial assistance was provided by the Liberty Fund and research assistance by Marlene Alderman of Boston University. None of those named above need accept responsibility for the final product.
I. INTRODUCTION

"Privatization," a term rarely heard a few years ago, is now common around the world, both as a phenomenon and as a figure of speech. Many countries have engaged in privatization, and proposals for more are widely discussed.1 In countries other than the United States, the term has a fairly clear meaning: selling government-owned-and-operated businesses to private enterprise.2 The sale changes what once had been a publicly controlled operation into one that is subject to no public controls other than those generally applicable to private businesses.

In this country, the term privatization is sometimes used in this sense. There have been proposals to sell enterprises that now are owned and run by the government, including Conrail, the Weather Service, and the Federal

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1. See, e.g., Adam Smith Institute, 1 Over There 6 (1986).
Power Marketing Administrations. Interest in these proposals has been sparked in part by the burgeoning federal deficit and the difficulties political actors have encountered in finding painless means of reducing that deficit. Funds from the sale of Conrail provided a portion of the monies Congress and the President determined necessary to meet the target levels set by the Gramm-Rudman Deficit Reduction Act.

Privatization, however, has not been confined to this type of activity. The term has also been used to describe a wide array of other activity. In all of its various uses, privatization signifies a lessening of governmental involvement in some particular enterprise, but the form of "disinvolvement" and the amount and nature of any continuing governmental involvement in the enterprise do not remain constant across uses of the term.

Indeed, various privatization proposals rest on quite different assumptions about what problem now exists for which privatization is a cure. For some proponents, the problem is government's inefficiency; that is, its failure to get the maximum "bang for the buck." The privatizers concerned with "dollar efficiency" (simply lowering the cost of whatever the government does) have been buoyed by a raft of studies, adhering to more or less exacting statistical and scientific standards, and concluding that private enterprises are more efficient than governments at providing any number of different services. Other privatizers have been more interested in keeping the government from engaging in particular sorts of activity. For these

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6. See infra notes 30-56 and accompanying text.
proponents of privatization, the problem is less the cost of government than the confinement of government to a particular, limited role.\textsuperscript{10}

The remarkable range of different meanings for privatization reflects the term's popularity. In today's world, even though people will disagree on the reasons behind privatization, there frequently is consensus at an abstract level that it is good for private enterprise to do certain things and bad for government to do them. The term privatization avoids direct argument over the proper goals for society. It suggests in a general, imprecise way, that we can all agree on goals, but that the real issue is finding the right way to accomplish those goals. Individuals who are concerned with efficiency and individuals who are concerned with autonomy both can appreciate the benefit of substituting private for government action.\textsuperscript{11} Just as attractive women help to sell a variety of commercial products (yes, even in our consciousness-raised society female pulchritude remains Madison Avenue's best bet for marketing almost any good), political proposals currently receive an added push from affiliation with the idea of government doing less and private enterprise doing more.

At the same time, not all privatization proposals sell. For now, the Weather Service and the Federal Power Marketing Administrations remain firmly in place in the federal establishment. And a great number of other proposals for lessening government involvement in various activities have floundered.\textsuperscript{12} As with commercial products, even the affiliation with an al-


\textsuperscript{11} I do not here create a separate category for those who might be described as selfish and cheap. Many of these individuals would desire a reduced tax burden for both efficiency and autonomy reasons. They want the government to do whatever it does more efficiently. They also want the government to do less and allow everyone to do as he wishes (so far as he is able) to a much greater extent.

Of course, so far as these people are recipients of government benefits, not merely taxpayers who fund the benefits provided to others, the folks who might be deemed mean, spirited souls may want government spending increased. Depending on their relation to the government, as direct beneficiary or contractor, purely self interested actors who have a special relation to some government activity might desire more efficient service, producing greater output (e.g., higher payments for SSI disability insurance recipients and lower processing costs) or they may desire less efficient service, producing a steady level of output at greater cost. As it is likely that some well intentioned and some less saint-like folks will be positioned on either side of the privatization debate, creating a separate category for nasty privatizers does little to advance analysis.

luring marketing device cannot assure success for every good. The symbol helps, but it does not conquer all.

The failure of many privatization proposals to readily succeed indicates that, attractive as the notion of governmental disinvolvevement may be, there are political forces that support current levels and forms of governmental involvement. These forces are sufficient to block a variety of possible changes. This does not indicate that the changes are, in a strong normative sense, bad ideas. The public choice literature of the past twenty-five years describes the ways in which our representative democratic institutions can produce decisions that are quite difficult to justify under most normative systems. But brute, political force is often combined with a plausible rationale to induce representatives to support a particular policy outcome.

While the realities of political decisionmaking need not follow any coherent, normative system, neither the defeats nor the victories for privatization proposals should be viewed as products merely of brute political force. Preferences informed by various imperfectly understood, often inchoate, normative and positive influences control political decisionmaking, but rational argument also plays an important role. Such argument influences underlying constituent preferences, affects the way representatives perceive those preferences, and affects the weight representatives attach to those preferences.

In addition to political opposition, a variety of principled arguments have been invoked by opponents of privatization. As is true of those of its proponents, the arguments propounded by privatization’s opponents suggest disparate goals. Some embrace efficiency, yet debate the claims of


14. See, e.g., Kalt & Zupan, Capture and Ideology in the Economic Theory of Politics, 74 AM. ECON. REV. 279 (1984); Kau & Rubin, Self-Interest Ideology, and Logrolling in Congressional Voting, 22 J.L. & ECON. 365 (1979). This literature shows the influence of ideology on voting, both by electorate and by representatives. It does not rigorously substantiate the intuitively persuasive point that, in many instances, a representative may consciously trade away expected votes in favor of a position supported by an appealing argument. See Peltzman, Constituent Interest and Congressional Voting, 27 J.L. & ECON. 181 (1984). Plainly, the representative who does this too often will have a short tenure. But if, as studies of incumbency suggest, representatives have some ability to function other than as pure “price takers” in the political market, there will be some room for this sort of behavior. For discussion of the effect of incumbency, see Beth, Incumbency Advantage and Incumbency Resources: Recent Articles, 9 CONG. & PRES. 119 (1981-82). For discussion of the role of public interest consideration in public decisionmaking from differing viewpoints, see Easterbrook, Statutes’ Domains, 50 U. CHI. L. REV. 533 (1983); Eskridge, Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation, 74 VA. L. REV. 257 (1988); Macey, Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model, 86 COLUM. L. REV. 223 (1986); Sunstein, Interest Groups in American Public Law, 38 STAN. L. REV. 29 (1985).
privatization on that score. Some embrace the notion that government and private enterprise rightly occupy different spheres but hold views quite different from current advocates of privatization as to what defines those spheres. Others deny the existence of separate public and private spheres, arguing implicitly or explicitly for an extension of governmental regulation (albeit often in dramatically altered form) into what now generally is described as the private realm.

The increasing visibility of the political debate over privatization and the growing body of academic commentary on cognate matters invite greater attention to the rationales supporting and opposing privatization. At present, scholarly attention is generally directed to particular privatization possibilities or touches on privatization only as a tangent to the central inquiry. Within this framework, academic discourse about privatization principally concerns two aspects of the political debate. First, issue has been joined over the empirical evidence of the efficiency of public versus private enterprises. Second, academicians have extended the on-going debate over normative systems into an argument over which activities are best performed by public and what by private enterprises. Both lines of argument are important to the resolution of privatization issues. The normative inquiry is essential to discourse on the appropriate treatment of privatization in general or of particular proposals. For most people the empirical information will, in many circumstances, provide data relevant (even necessary) to resolution of the questions normative theory poses.

Elaboration of arguments on both of these issues, while necessary, is unlikely to end disagreement over privatization. Admittedly, no disquisition on reasons for or against privatization is apt to completely quell disagreement. A third sort of inquiry, however, might facilitate discussion of

15. See, e.g., McEntee, The Case Against Privatization, PRIVATIZATION REV. 7 (Fall 1985). See also sources cited infra note 102.
18. See supra notes 7 & 8.
privatization and, perhaps, provide some common ground. That inquiry asks how privatization proposals fit our current legal landscape. Current legal doctrines and structures plainly influence debate over privatization and the fate of privatization initiatives. Moreover, this positive inquiry provides information on the roles which we, as a society, now think are appropriate for government and on the concerns we have over government action. The inquiry should provide information, in particular, on the current consensus respecting government devolution of conduct or responsibilities to private actors: do legal doctrines reflect special concern over government disinvolvement, and, if so, over what kind of disinvolvement? This inquiry is, on occasion, joined with the other two inquiries, especially the normative; but this issue thus far has been subordinated to the primary focus on empirical evidence or normative theory.

This article incorporates this third inquiry into a more general examination of positive issues implicated in privatization efforts. The article addresses three positive questions. The first question is what “privatization” means as the term is currently used. To that end, Part II summarizes the different uses of the privatization label and the assumptions implicit in them.

In addition, the article seeks to identify a plausible positive theory of government to address the question of what sort of privatization is likely. Part III initially sketches two, alternative, positive theories of government. One theory is preferable as a predictor of government behavior. Government behavior seems largely explicable as promoting the distributional interests of politically well-positioned groups. Rent-seeking explanations of government, however, are inadequate predictors standing alone. A combination of private, rent-seeking interests and broader public interests is necessary to explain the roles assigned to government and the basis for particular limits on governmental or private actors.

Third, the article asks what legal-constitutional impediments may affect privatization efforts. Part IV suggests some of the legal obstacles to privatization and legal rules that might limit the gains from privatization. Notwithstanding the considerable political opposition to privatization and the considerable body of academic commentary suggesting skepticism of private actors' incentives, legal rules have focused more on the extension of government power than on its possible contraction. While privatization

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presents many legal issues, it does not confront serious legal constraints other than process constraints.

The paucity of legal restrictions on government disinvolvement might be explained as confirmation of the theory of government articulated in Part III. Alternatively, it might be taken to show the desirability of privatization. Or it might be explained as an historical anomaly. Or it might be argued to be a confirmation of the sorry state of our legal system; it protects that which it should constrain and vice versa. The possible interpretations of the current legal landscape, which replicate the varying political viewpoints concerning privatization, underscore the need for a conceptual framework. Nonetheless, discussion of privatization ultimately must continue to rest heavily on the normative and positive issues that are subjects of ongoing debate.

II. FORMS AND ASSUMPTIONS

A. Forms

Privatization proposals vary along several dimensions. They suggest different routes to lessen government involvement in a given activity; they bring about different degrees of public and private control over an activity; and they leave different types of control in public and private hands. The variation in each of these dimensions provides significant information about what is desired and what the consequences of a proposal will be. The simplest starting point, and that which probably coincides most closely with current legal thinking about government powers and obligations, is division of privatization possibilities by the route or manner of disinvolvement.

1. Divestiture

The first group of privatization possibilities involves formal government ownership of an asset and proposes that government terminate such ownership. The classic examples are government ownership of what seems to be a "proprietary" business, that is, one that produces a product and sells the product to consumers. Conrail is such a business, as is the Tennessee Valley Authority. Government ownership makes the government the ultimate decisionmaker on the quantity of goods produced, the quality of the

22. From its inception, Conrail technically was not a government instrumentality but a private, state-incorporated corporation operating with federal stock ownership and federal funding under provisions stipulated by federal law. See 45 U.S.C. §§ 741-69 (1982); Regional Rail Reorganization Act Cases, 419 U.S. 102 (1981).

goods, the manner of production, the means by which (and customers to whom) the goods are distributed, and the prices at which the goods are sold. The proposal to sell the business to a nongovernment buyer usually contemplates elimination of special governmental control over all of these facets of the business.\textsuperscript{24} The business will remain subject to generally applicable rules respecting liability for product defects, constraints on environmental pollution, relations with employee unions, and so on. These generally applicable rules provide government with a voice in many facets of business operation. What distinguishes the government-run business from private business is that in the former, all decisions on the various facets are mediated through government officials while in the latter, government officials' control is incomplete and generally is mediated through persons who are not government officials.

In addition to the sale of a going concern, government may reduce its ambit of authority by relinquishing other assets that may or may not be used to generate income in the manner of a private enterprise. The sale of land is exemplary.\textsuperscript{25} As with the sale of an enterprise, sale of an asset typically terminates special government control over it. In some instances, such as the sale of rights to collect funds owed the government,\textsuperscript{26} there are relatively few options for use of the asset. Application of the privatization label to this last set of transactions seems intended to mislead. In contrast to other forms of privatization, the sale of this sort of asset, while useful for short-term fund-raising, does not significantly affect the nature or amount of government activity.

Divestiture also can take the form of abandonment of assets. The government, before 1935, abandoned millions of acres of land to "homesteaders" who paid no money but agreed to improve the land in certain respects.\textsuperscript{27} Similarly, there have been proposals for governments to give (or sell at bargain prices) public housing projects to their tenants.\textsuperscript{28} The gift of assets to particular individuals or the abandonment of assets to any taker can terminate all government control or, as in the case of private transfers

\begin{itemize}
  \item \textsuperscript{24} See President's Budget Message to Congress, supra note 4; President's Budget Message to Congress, \textit{Weekly Comp. Pres. Doc.} \textsuperscript{\textendash} (1988).
  \item \textsuperscript{27} See P. Gates, \textit{History of Public Land Law Development} (1968).
\end{itemize}
of property, may be made subject to specific conditions regarding use of the assets.  

2. Contracting

A second group of privatization proposals involves the contractual rearrangement of control over some, but not all, aspects of an activity. These arrangements fall into two categories. One is the lease of government assets to another party. One example in this category would be the lease of mineral rights in government-owned land or the lease of NASA launching vehicles to propel privately-owned satellites into Earth's orbit. In the other category, known as "contracting out," the government purchases goods or services from another party. The purchase might be of management services for a government-owned facility, such as a hospital or prison; of other services, such as trash collection, road building or even law enforcement; or of goods for use by the government, from MX missiles to paper clips. The largest group of privatization proposals suggests contracting out this middle group of services. Proponents of privatization would have these services performed by privately-owned enterprises, but some proposals suggest inter-government contracting.

All of the contracting proposals provide for a sharing of decision-making responsibility between government and the other contract party. The division of control could take very different forms. At one extreme, government could lease property on long-term basis without restricting its uses.

29. The Rule Against Perpetuities is the most visible example of the longstanding legal antipathy to certain kinds of continuing restraints on asset use. See R. POSNER, ECONOMIC ANALYSIS OF LAW 479-87 (3d ed. 1986); Alexander, The Dead Hand and the Law of Trusts in the Nineteenth Century, 37 STAN. L. REV. 1189 (1985).


32. See Ferris & Graddy, supra note 31; Savas, supra note 8, at 39.


35. See Bish & Warren, Scale and Monopoly Problems in Urban Government, 8 URB. AFF. Q. 97 (1972); Mehay & Gonzalez, supra note 21.
At the other extreme, government could purchase a good and provide the design and manufacturing specifications, thereby leaving only the mechanics of its production to be contracted out; but even these can be largely government controlled. The contracting proposals also vary in another important dimension. In some instances, the privatization contemplated would consist of replacing a service provided on a monopoly basis by government with one provided under contract by a single private entrepreneur. Other proposals would end the monopoly provision of the affected government service.

3. Increasing Choices: Deregulation and Vouchers

The prior proposals would reduce government control over property or would substitute private inputs for government inputs in particular activities. Another group of privatization proposals is concerned with government restrictions on the range of choices available to private parties and suggests the reduction or removal of current constraints on private choice. Two sorts of privatization proposals take different approaches to this goal, each addressing one of two disparate sorts of governmental constraint.

Deregulation addresses situations in which the government directly regulates particular private behavior. The regulatory program at issue might preclude entry into a business, or control the rates charged or the type of service offered. Deregulation suggests the elimination or modification of such rules. The most sweeping form of deregulation abolishes an entire regulatory structure, as the recent deregulation of domestic airlines nearly did. Less wholesale approaches that eliminate specific rules—rules that, for example, preclude entry into a business or restrict enterprises' opinions


38. See Moore, supra note 34.

39. Plainly, there is room for argument whether particular choices really are available to particular individuals and whether a given move reduces or expands the range of available choice. See infra notes 47-56 and accompanying text.


and options respecting the nature of services delivered or their prices or availability—have gained currency in a variety of other fields, such as regulation of securities communications, banking, and natural gas.\textsuperscript{42}

These more narrowly focused deregulatory efforts encompass removal of major impediments to private conduct, such as the authorization of essentially open entry into the long-distance telephone market\textsuperscript{43} or the repeal of the restriction on pricing securities brokerage fees.\textsuperscript{44} Other deregulatory efforts involve not the repeal, but the restructuring of governmental controls; for example, substitution of the "bubble concept" for pollution control targeted on particular equipment\textsuperscript{45} or the substitution of performance controls for more rigid product specifications.\textsuperscript{46} This sort of restructuring allows greater freedom for regulated entities to choose the means best suited, in a given instance to meet regulators' goals.

A related form of privatization is available when government relies less on command-and-control mechanisms than on direct provision of benefits to a class of beneficiaries. Various commentators have suggested that beneficiaries could be better off, and government would be more responsive to their needs and interests, if government allowed beneficiaries some choice among goods or services.\textsuperscript{47} Thus, instead of providing a publicly funded school for its residents, a locality might provide an "education voucher" redeemable at any school of the parents' (and children's) choice.\textsuperscript{48} The assumption is that any school, public or private, that did a good job of educating children at a reasonable price would flourish under such a system, while schools that did a poor job would go out of business, sell out to better managers or take other steps to improve their performance in order to attract voucher dollars.\textsuperscript{49}

\textsuperscript{42} See, e.g., T. Morgan, J. Harrison & P. Verkuil, Economic Regulation of Business: Cases and Materials 22-23 (2d ed. 1985).
\textsuperscript{47} E.g., Bridge, Citizen Choice in Public Services: Voucher Systems, Alternatives for Delivering Pub. Serv. 51 (E. Savas ed. 1977).
\textsuperscript{49} Of course, insofar as there are external effects that are not readily monitored and countered (for instance, fostering racial discrimination), a particular voucher system may simply ex-
4. Direct Dollar Choices

A final group of privatization proposals is also concerned with expanding the ambit of individual choices, focusing particularly on the choice to spend a given sum of money in exchange for given benefits. These proposals assert that private choice is restricted whenever government officials are authorized to collect a large block of funds and then, at their discretion, divide the funds over activities of their choosing. This group of privatization proposals calls for a more direct link between the payment of money and the receipt of a good or service. One example of this effort to tie costs more closely to benefits is the call for imposition of user fees, specific charges paid directly by those who elect or use particular government-provided goods or services. These fees have been used or proposed for a wide array of government benefits such as highway tolls, customs charges, and spectrum fees. Arguably, user fees decentralize decisions over the services to which they attach by giving the individuals who actually use the services a more direct stake in them; individuals confronted with such fees must decide if the benefits of the service exceed the fee. In each case, of course, it may be questioned how the fee charged relates to the cost of providing the service. But in all events, the payor is (at least presumptively) in a position to choose whether to pay and receive the service or decline to both pay and play.

A different route to collapsing individual decisions respecting payment for and receipt of benefits is simply to reduce general government revenues. By reducing the amount of money government has to spend, ceteris paribus, one increases the stock of money in private hands. Unlike the typical government decision — which raises money from taxing and borrowing and change one set of third-party consequences for another. See infra text accompanying notes 115-16, 201-02, 213-15.

50. See Grace Comm’n Report, supra note 7.
51. See Gillette & Hopkins, supra note 21.
53. Charges that one has been “coerced” to pay a user fee or “had no choice” but to pay it usually can be restated as complaints that the benefit received is so valuable to the recipient that he felt it clearly worth even a very high price. The fee in such a case may, but need not, be well above the cost (though not the value to our infra-marginal “payor”) of the service provided. If that is the case, the charge will often not be socially optimal. Apart from the expenditure of resources necessary to administer the scheme and of resources inefficiently attracted to efforts to undermine it, perfect price discrimination may prove the exceptional case to this point.
54. The focus in political economy often is on the demand side of public activity. A note should be added here respecting the supply side. There is a difference, reflected in one impetus for
spends it on a series of goods for which many taxpayers would not willingly pay\textsuperscript{55} — the prototypical private choice is to pay for a particular good a price which the purchaser is believes fair.\textsuperscript{56} Hence, tax reduction becomes privatization.

\section*{B. Assumptions}

The privatization proposals build on several assumptions, positive and normative. No single set of assumptions explains all of the proposals. Indeed, some privatization proposals arguably rest on assumptions which are at odds with those underlying other proposals. In general, the proposals build on some combination of the following five assumptions. The first two assumptions relate to normative goals, the remaining three to positive prediction of the means calculated to accomplish them.\textsuperscript{57}

1. Normative Bases

\hspace{1em} \textit{a. Baseline and Burden: The Contractarian Tradition}

A strong implication in much advocacy of privatization is the anomaly of government decisionmaking; the "natural state"\textsuperscript{58} is decisionmaking by autonomous individuals. For adherents to this view, it is generally irrelevant whether such autonomous individual decisionmaking in fact provides the first form of human interaction; that is, whether communities and tribal identity antedate concepts of individual identity.\textsuperscript{59} The assumption is that individual, autonomous decisionmaking is natural because it best suits privatization, between coerced (tax) funding and voluntary (loan) funding by government. The former is not so much the product of individual choice as is the latter and hence will not as closely track the payors' assessment of the equivalence of payment to and return from government.

\textsuperscript{55} I believe this statement holds even apart from public-goods/free-rider problems. See infra notes 116-24 and accompanying text.

\textsuperscript{56} A caveat should be added regarding corporate or associational decisionmaking. Group decisions will not always conform to this characterization. At the same time, affiliation with private groups usually reflects greater voluntariness (in other words, it is characterized by lower exit costs) than subjection to a given political decisionmaker.

\textsuperscript{57} The positive assumptions generally fit well with at least one of the normative bases for privatization. The positive assumptions may also be consistent with accomplishing other goals. See the discussion of private enterprise advantages (profit-motive and competition) infra notes 84-103.

\textsuperscript{58} Although it is no longer common to speak in terms of the state of nature as Hobbes did, many advocates of privatization clearly take as the paradigm against which to measure societal gains and losses the transactions of independent individuals sharing only a common set of ground rules respecting individual entitlements. See, e.g., R. Epstein, supra note 10; Lee, \textit{Choice and Harms}, in Rights and Regulation, supra note 9, at 157; Machan, supra note 9.

man’s nature as a rational being, and all proper institutions must derive from that nature. Subordination of individual decisions to governmental commands thus requires affirmative justification. Put differently, the baseline process for any activity is autonomous, private action; government power is presumptively disfavored until its proponents bear the burden of justification.

This normative proposition builds on the Lockean tradition which treats government as though it were the creation of contractual agreement among individuals who are free to choose whether and on what terms to have government. The Lockean or contractarian tradition long has played an important role in debate over the shape of American political institutions. It has not been the sole source of norms for public life, but has played, and continues to play, a leading part in the normative grounding of government. This tradition provides one inspiration for privatizers, many of whom assume acceptance of its normative precepts as a starting point.

It is important to note that the Lockean tradition provides base referents and presumptions, but it does not ordain particular results. The tradition is antipathetic to government in its elevation of individual, extragovernmental decisionmaking to a place of central prominence. At the same time, the tradition always has countenanced a role for government in the protection of essential rights and liberties. Although the adherents to this contractarian norm do not agree on a uniform set of essential rights, the Lockean argument gave prominence to rights to hold, use, and transfer property. True to the tradition, privatization proposals invariably assume some role for government, although generally not in all respects the role now played.

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60. Although not a straightline derivation, Lockean political philosophy builds on aspects of Cartesian rationalism, the epistemological rooting ground for much of the political and economic work that influenced Framers of the American Constitution and that continues to influence political debate.

61. See, e.g., S. Butler, supra note 9; Johnson, Regulation and Justice: An Economist’s Perspective, in Rights and Regulation, supra note 9, at 127.


64. See, e.g., J. Mashaw, Due Process in the Administrative State 183-99 (1985) (describing the three primary strands of liberal theory, all embedded in our current institutional makeup, as Benthamite, Lockean, and Kantian).

65. See id.

66. Notable for its explicit discussion of this background is R. Epstein, supra note 10.

67. J. Locke, supra note 62.

68. See Mnookin, supra note 16.
b. Utility and Wealth

The second normative assumption underlying much of the movement for privatization may be held along with the first assumption or independent of it. This norm proposes the maximization of aggregate individual utilities as the proper goal for social decisionmaking.69 Rejecting other "first principles" for social order, social utility maximization posits that the best course of action in any situation is that which makes society best off as judged not by reference to an abstract description of social good but by the synthesis of individual assessments.70 Social utility maximization builds on Benthamite utilitarianism.71 In moving from individual to social norms, the utilitarian necessarily meets, in addition to other reservations about utilitarianism,72 the objection that measurement of social utility is quite difficult.73 Variants of the social utility maximization norm have offered different answers to the appropriate means for deciding when, in any situation involving social choice, utility is maximized; the principal set of such efforts can be arrayed on a line from Pareto to Samuelson.74

Often it is not clear which version of social utility maximization informs a particular proposal, but many privatization proposals seem to accept two notions that are not uniformly accepted among those who espouse the social utility norm. First, privatizers generally seem comfortable with the proposition, common to non-Paretian social welfare functions, that we can conclude that social utility has increased even where one or more parties have been made worse off; that is, unanimous consent is not necessary to establish a gain in overall social utility.75 Second, many privatizers appear

69. See, e.g., Johnson, supra note 61.
71. See J. Mashaw, supra note 64; Posner, supra note 70.
73. See, e.g., A. Sen, CHOICE, WELFARE, AND MEASURE (1982).
74. These works are summarized in A. Feldman, WELFARE ECONOMICS AND SOCIAL CHOICE THEORY 138-48 (1980).
to accept as a norm the maximization of preferences weighted in dollars — what one would spend to secure or to prevent a given outcome, subject to current tastes and budgetary constraints — possibly in place of, but more likely as a surrogate for measurement of maximization of social utility.\textsuperscript{76} Reaction to privatization proposals may differ among those who accept wealth maximization as an adequate stand-in for utility maximization and those who choose less readily ascertainable but more philosophically defensible versions of utility maximization.\textsuperscript{77} Wealth maximization is defended as promoting a better society for all by the production of "a larger pie."\textsuperscript{78} Other forms of social utility maximization might be characterized as promoting production of the pie that yields the greatest total pleasure in eating (the best combination of taste and size). Most variants of either utility maximization or wealth maximization, however, share a focus on the whole pie rather than on the manner in which it is divided.\textsuperscript{79}

2. Information Positive Bases and Individual Action

The normative bases, while influential, seldom are brought to the surface in privatization arguments. Positive assumptions for privatization, while also often inarticulate, more frequently are explicit bases for argument.

One positive assumption that frequently supports privatization efforts is the informational advantage of decentralized, incremental decisionmaking over centralized, comprehensive decisionmaking. Examination of the psychology of decisionmaking has discussed various aspects of the problem under titles such as information impactedness, information overload, and bounded rationality. The technical distinctions among these concepts are not of consequence here; however, the essential message linking them is significant. For many decisions, so much information must be gathered, assimilated, and analyzed, and so many interrelated predictions made, that a single \textit{ex ante} calculation for an entire class of events stands relatively

\textsuperscript{76} See E. SAVAS, supra note 9. See also supra note 8.


\textsuperscript{78} See R. EPSTEIN, supra note 10; R. POSNER, \textit{The Economics of Justice} (1982); Posner, supra note 77.

little prospect of reaching accurate results, regardless of the normative goals posited. 80 When the governing norm makes the preferences of many individuals relevant to decision, the informational disadvantage of centralized determinations is exacerbated. 81 The production of consumer goods is a classic example. Even though competitive markets will often overproduce some goods and underproduce others, the fit between consumer wants and production in economies characterized by such markets is infinitely superior to that in centralized, planned economies. 82

Privatization proposals often assume both the desirability of maximizing consumer satisfaction and the utility of dispersed decisionmaking in achieving that end. Many of the divestiture, deregulation, and voucher proposals rest on this ground. 83 Even where other norms are pursued, however, the reduction in centralized decisionmaking that is present to some degree in all privatization proposals arguably improves the decisions generated.

a. Incentive Advantages: Private Enterprise and Competition

A second positive assumption, often explicit in privatization proposals, is that most governmental bureaucratic structures perform their assigned tasks poorly because the bureaucrats are not motivated to do better. Many of the contracting proposals provide no significant change in the government's mission, but posit that the mission can be accomplished better at lower cost — that is, more efficiently — under a different structure. 84 Two different, though often conflated, assumptions support these proposals.

First, it is assumed that private enterprise, and especially private, for-profit enterprise, can provide better performance incentives than can public

82. See, e.g., R. DAHL & C. LINDBLOM, POLITICS, ECONOMICS AND WELFARE 369-438 (1963); M. FRIEDMAN & R. FRIEDMAN, FREE TO CHOOSE (1982).
84. See, e.g., E. SAVAS, supra note 9.
enterprise. Profit-seeking institutions generate a fund of money, the size of which varies with the quality of the enterprise's performance. The ability to share in that fund can be a powerful inducement to better performance.

Of course, there are agency-cost problems in such enterprises, just as there are in government enterprises and in large, established enterprises of any sort these costs may be very large. On the other hand, the for-profit enterprise has a clear inducement to adopt efficient structures to reduce agency costs as long as more efficient performance promises increased profits. The monitors may be paid out of increased earnings to see that others do not shirk their duties. Moreover, even though there may be impediments to observation of employees' performance or to correlation of observed performance inputs with desired outputs, the existence of a clear unit of measure for overall performance — dollars of profit — aids the reduction of agency costs.

Governmental bureau heads share some of the incentives of corporate executives to secure good performance from their organizations and in fact appear to engage in many agency-cost reducing practices similar to those observed in private enterprise. However, it is unclear toward what end

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85. E.g., id.
88. K. ARROW, Control in Large Organizations, in ESSAYS IN THE THEORY OF RISK-BEARING 223 (1971); Ellickson, Cities and Homeowners Associations, 130 U. PA. L. REV. 1519 (1982); Pratt & Zeckhauser, supra note 86.
89. Even if, as is often noted, exogenous factors influence corporate performance, performance is likely to be correlated positively with certain relatively predictable inputs (e.g., hard work). The claimed benefit of the profit inducement may be reduced by the influence of exogenous factors, but so long as workers in the private sector recognize some connection between performance and profits this particular incentive advantage remains.
90. See, e.g., Alchian & Demsetz, Production, Information Costs, and Economic Organization, 62 AM. ECON. REV. 777 (1972); Pratt & Zeckhauser, supra note 86.
91. See Holmstrom, Moral Hazard and Observability, 10 BELL J. ECON. 74 (1979); Shavell, Risk-Sharing and Incentives in the Principal and Agent Relationship, 10 BELL J. ECON. 55 (1979).
92. E.g., Fama, supra note 86.
these measures are directed. While bureau heads seek to have subordinates' conduct conform to the bureau heads' desires, many commentators have opined that bureau heads pursue goals dissonant with the appropriate goal for their bureau. For that reason, perhaps, the tools at a government bureau head's disposal for controlling subordinates' behavior are less powerful than those generally enjoyed by their counterparts in private enterprise.

A second, independent reason why government bureaus are assumed to be poor motivators is that many are monopolies; they provide services for which no competitive alternative is available. Charles Tiebout's voting-with-the-feet model of local government tax-and-service selection introduces a measure of inter-government competition. Similar arguments have been made with respect to particular services provided by state government. Even in these arenas, however, competition is restricted and cannot be presumed to produce incentives equivalent to competition in markets where exit costs are less. More important, these quasi-competitive services probably represent a minority of government services. Although some writers have argued that monopolies should be at least as aggressive as competitive enterprises in pursuing beneficial strategies such as efficient production methods, organization, and investment in innovation, a strong consensus exists that competition does produce greater efficiency. At least some empirical evidence supports this contention.

Many privatization plans combine a shift of functions to private enterprise

94. E.g., W. Niskanen, BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (1971); Borcherding, supra note 87; Borcherding, Toward a Positive Theory of Public Sector Supply Arrangements, in CROWN CORPORATIONS IN CANADA 1, 99 (J. Prichard ed. 1983).


96. See, e.g., Bish & Warren, supra note 35.


with the introduction of competition, but some simply introduce an element of competition into government.  

b. Government as Rent-Seeking

A final assumption supporting much privatization advocacy is that democratic-representative government inescapably operates as a vehicle for creating economic rents. The argument is that our government structures consistently produce appropriable private benefits at public expense.

This argument is compatible with a variety of normative goals for public decisionmaking. It does not deny the existence of principled justifications for collective action. Rather, the assertion is that even when there is a principled explanation for invoking government processes, those processes are apt to be used to other ends. This argument has received considerable play in recent years and supports the call to reduce the ambit of government action.

C. Debating Privatization: From Propriety to Probability

The assumptions that provide a supporting rationale for privatization may not fully explain the motivation for any given privatization proposal. The assumptions do, however, stake out the ground for debate. It is not surprising that considerable attention is paid to the conflicting empirical evidence respecting the relative efficiencies of private and public enterprises or perhaps, more accurately, to the conflicting conclusions drawn from the empirical evidence. It also is not surprising that debate over the assumptions has not proved availing. To an extraordinary degree, the positive as well as the normative rationales for or against privatization are not subject

103. See Mehay & Gonzalez, supra note 21.
105. See, e.g., S. Butler, supra note 28; Yeager, Is There a Bias Toward Overregulation?, in Machan, supra note at 99.
107. For a further discussion of the relationship between the concept of government as a producer of rents and as a producer of public goods see infra text accompanying notes 203-24.
108. See sources cited supra notes 8 & 102.
to proof in any meaningful sense and, hence, debate over them will continue to resist closure.

More fruitful ground for discussion might be found by inquiry into issues that do not directly implicate the propriety of privatization but instead address the probability of successful privatization. The issues addressed in Parts III and IV follow this path, asking first, what legislative success privatization is likely to achieve and second, what judicial controls might affect privatization.

While not directly assessing the propriety of privatization, these inquiries, as will become apparent shortly, cannot elide the issues that are posed by argument over the assumptions that underlie privatization proposals, especially as far as political prognostication is essayed. Any sort of guess at political actors' responses to the general run of privatization efforts requires a positive theory of government.\(^\text{109}\) And any such theory necessarily passes judgment on several of the assumptions that are matters of ongoing debate.

The shift to positive theory is useful, nonetheless, in providing a base for discussion that does not demand agreement on normative principles for governance, a project that has, for all the attention lavished on it, remained intractable.\(^\text{110}\) Positive theory, if successful, identifies the inchoate principles that have guided past decisions\(^\text{111}\) and may prove useful in mediating normative argument. Inevitably, however, positive theories must steer between the risk of tautology (merely cataloguing what is without simplifying, or propounding a principle of such generality as to give no guidance) and erroneous abstraction (simplifying, but suggesting a principle that does not fit the data sufficiently).\(^\text{112}\) The latter risk is especially acute where the data consists of human actions that are informed by heterogeneous, normative beliefs. Moreover, the initial theories examined here, although characterized as positive, plainly lend themselves to different normative approaches. Rather than treat them as disguised normative theses, they are taken here as possible inputs to a truly positive (descriptive-predictive) theory of government and are examined for their contribution to that effort.

\(^{109}\) See Cass, Models, supra note 20.


\(^{111}\) See, e.g., J. Mashaw, supra note 64, at 50 (discussing the "model of appropriateness").

\(^{112}\) See id.
III. PRIVATIZATION AND THE POSITIVE THEORY OF GOVERNMENT

This section examines two competing positive theories, offers a synthetic theory, and explores the implications of this theory. The synthetic theory suggests that, although our system of government will be characterized by both errors of omission and commission, the likely systematic error in public decisionmaking is inclination toward too much government activity, not too little (at least if the ideal is social wealth maximization). The theory further suggests that, because excessive governmental activity derives from impediments to publicly interested collective action, reduction in the ambit of government activity may respond to the same socially undesirable forces that play a role in affirmative government action.

Notwithstanding this possibility, recognition of the skew toward errors in governmental expansion would promote constitutional rules that provide relatively few constraints on government withdrawal from activities in which it engaged and more controls on extensions of governmental power. The theory also shows adoption of such wealth-increasing constitutional rules to be consistent with a constitutionally-based system of decisionmaking that often produces political decisions which reduce societal wealth. The tendencies predicted by the synthetic theory lead legislative and judicial decisions in different directions. Legislative decisions will be biased against privatization. Judicial decisions will incline in favor of privatization.

A. Public Interest, Public Choice, and the Supply of Government

1. Public Interest Theories

Descriptions of government decisionmaking fall within two principal groups. Public interest descriptions of government view at least the initial (usually legislative) decision to take some action as responsive to an objective concept of social good: government provides a service directly or regulates its provision by others in order to increase societal well-being. Although commentators who share this perspective do not all agree on a definition of social good, and few make explicit the definition that informs them, the consensus has been that one can identify appropriate areas for government action by reference to deficiencies in the incentives of private actors.

Four circumstances account for the bulk of situations in which private incentives have been found wanting. First, naturally monopolistic business enterprises, which are rewarded with greater profits if they restrict supply below the social optimum and raise price above it, generally are conceded to behave in a socially undesirable way absent government intervention. Second, because of free-rider and holdout problems, the private market is apt to produce too few public goods (goods that once produced can be used by additional consumers at low cost relative to the cost of excluding uncompensated use). Third, some activities generate negative externalities, harming individuals who do not participate directly in those activities; the expectation is that participants in these activities will harm others excessively. Finally, participants in some activities have asymmetric information; consequently, one set of participants will systematically be disadvantaged by the activity. These deficiencies in private, unregulated behavior are relied on to explain why government regulates utilities, funds the national defense, restricts pollution, and regulates the market for used cars.

Public interest descriptions of government face several difficulties. For one, the theories seem unable to combine coherence and accurate description. The identified deficiencies in private incentives all fit fairly well-developed economic models, but these categories cannot readily accommodate all of the programs in which government engages, much less those which are asserted to further public interest. Broader statements of the public interest become tautologies losing analytic cohesion.

Further, the identification of deficient private incentives establishes no more than half the predicate for public-interested government action; the

117. See, e.g., Sunstein, Legal Interference with Private Preferences, 53 U. Chi. L. Rev. 1129 (1986). If those who are informationally disadvantaged recognize that fact, too little of the activity may occur as the parties adjust their behavior to avoid harm.
119. Indeed, the close fit between public interest theories and the norm of allocative efficiency along with the poor correlation of these theories and observed government action calls into question the characterization of public interest theories as positive theories. Arguably, these theories are intended for prescriptive — not descriptive and predictive — ends. In their juxtaposition to the other theories discussed here, however, public interest theories have been explicitly offered and defended on positive rather than normative grounds.
120. Posner, Theories of Economic Regulation, 5 Bell J. Econ. 335 (1974).
consequences of private action must also be worse than those attending public intervention. As Ronald Coase and others have pointed out, there are many avenues for private conduct to remedy deficiencies in private incentives and equally many ways for government action to produce less desirable results. The public interest analysis requires an explanation of social goals, whether in social welfare, wealth-maximization, or other terms, and correlation of government action with those goals. No theory has successfully bridged the gap between identifying first-level imperfections in private conduct and demonstrating that the action taken by government improves society. In other words, the public interest theories describe situations in which government action could serve an overarching social interest, but the theories fall short of establishing that the action taken actually does so.

Finally, absent some demonstration that government action addressed to imperfections in the private sphere indeed promotes the public interest, public interest theories must propose some basis for belief that government actors at least enjoy incentives to promote the public interest. This is the clearest failing of these theories, for they contain no systematic linkage of public interest to the incentives of government actors.

2. Public Choice Theories

Public choice theories approach the description of government decision-making from a very different perspective. They begin not with abstract statements of social good but with individual self-interest, elaborating the manner in which individual choices will be aggregated in voting, the manner in which representatives respond to voter preferences so as to maximize the likelihood of re-election, the means by which representatives harmonize their divergent interests to arrive at legislative decisions, and

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121. Public action might be premised in its symbolic importance wholly apart from its more immediate, practical consequences. This premise, while a serious qualification of vigorously consequential analysis, is seldom articulated as a sufficient ground for government action and rarely operates free from consequential concerns. See, e.g., Cass, supra note 75.


123. See Posner, supra note 120; Sunstein, supra note 117.

124. Posner, supra note 120.


126. E.g., A. Downs, supra note 125; M. Olson, The Logic of Collective Action (1965); G. Tullock, Toward a Mathematics of Politics (1967).

the connection of bureaucrats’ decisional incentives to those of other government actors.128 The public choice writings argue that democratic-representative processes produce government decisions very different from those described by public interest theory. While public interest theories predict government action that arguably intends to improve society overall — promotion of allocative efficiency or altruism directed toward those who are in the worst position in society, for example — public choice theories emphasize the probability that government will force redistributions of wealth that diminish social utility.129 For example, from a median voter model that does not require much information about particular voting groups, Aaron Director deduced “Director’s Law,” which asserts that democratic-representative governments generally will redistribute wealth from both the wealthiest and the most impecunious members of the polity to those in the middle.130

Other public choice writings, incorporating more information about voters suggest ways in which relatively small groups also are advantaged by government. Democratic-representative processes are influenced not only by the number of citizens who prefer a particular outcome but also by variations in the intensity of individual preferences and by the costs of acquiring information, of aggregating funds, and of acting in furtherance of personal interests.131 Hence, groups that are most interested in particular issues and that face the lowest transaction costs in promoting their interests systematically will be favored both over other groups and over the general public.132

Public choice commentators argue that empirical evidence sustains these positive claims, establishing that industry groups have been able to persuade government to create unnatural monopolies,133 and that such groups have induced government to produce private goods at public expense (including overproduction of goods like road repair, that have both

131. E.g., J. Buchanan & G. Tullock, supra note 125; M. Olson, supra note 126; G. Tullock, supra note 126.
132. E.g., M. Olson, supra note 126.
privatization, politics, law, and theory (private and public goods aspects), to protect activities that generate negative externalities, and to assist those who enjoy informational advantages. Many public choice writings thus paint a very unflattering picture of social decisionmaking; not only are actors motivated by selfish interests, but their combined conduct, unlike that of the Smithian market, generates socially undesirable results.

As public choice theory has developed, some limitations of the theory also have appeared. Although the theory does a good job of suggesting those groups that do relatively well and those that do not, it is not yet able to generate specific predictions in many circumstances. Government sometimes acts and sometimes does not act to favor the groups that public choice theory indicates will be specially benefitted by representative processes. As median voter models suggest, government sometimes acts to benefit large, diffuse, modestly interested groups that, according to special interest focused public choice writings, would seem ill suited to command government’s favor.

Such actions suggest the necessity for greater integration of median voter and special interest public choice writing. In conjunction, special interest discussions may be seen not as offering a free-standing analysis of public decisionmaking but, instead, as describing the process by which legislative decisions are moved away from results that median voter analysis would predict. The insight of special interest public choice is that legislators’ decisions are affected not only by their estimate of median voter preferences but also by information on substantive effects of alternative decisions, by information on electoral effects, and by information on campaign funding effects. These factors enhance the influence of organized, intensely interested groups. The composite public choice model, however, does not envision a contest between an organized group and the general, diffuse, less intensely interested public. Rather, the contest is for interest groups to offer

135. E.g., B. Ackerman & W. Hassler, Clean Coal, Dirty Air (1981).
138. Although there is some difference of opinion, public choice writers generally agree that public decisionmaking systematically is skewed toward action at odds with overall social interest. At one extreme, some commentators suggest that nearly all public action attainable through our representative-democratic processes is socially undesirable. See, e.g., Stigler, supra note 128; Stigler, supra note 81.
enough to move the median legislative voter from a position presumptively consonant with general (median) voters' interests. In this contest, the further a group would have the legislators move from general public interests, the more the group must offer to secure a legislative majority. The composite public choice vision, then, would be comfortable with legislative action that, if inconsistent with principles defining total public interest, nonetheless seemed to benefit the general public.

Although this composite has been part of public choice theory for decades, most writing has opted for a heavier focus on one or the other analytic stand. In analysis of regulation, the special interest strand has been dominant. Thus, legislative and administrative participation in some privatization efforts, such as recent deregulation that many public choice writers have argued benefits the general consuming and tax-paying public, at the moment seem a strained fit with positive public choice theory.140

Writings within the public choice tradition, however, provide a basis for accepting a divergence of observed action from positive public choice (inter-


It may be possible to explain deregulation within standard public choice models by focusing on the changing conditions that reduce the benefits of regulation or that increase the costs of maintaining it. In some instances, such as telecommunications and banking, deregulation has followed technological developments that changed the scale economies of the regulated business so as to facilitate introduction of competitive enterprises. Faced with competition, the choice for regulated enterprises was to find a way legally to restrain the competitors or to eliminate some of the regulatory constraints that limited the enterprises' capacity to respond.

In other instances — airlines, perhaps — deregulation may in part be traced to a weakening of the cartel that supported and benefited from the regulatory regime. The centripetal forces that characterize cartels are well-known, and any factors that increase the divergence in cartel members individual interests may suffice to break down the consensus necessary to maintain the regulatory structure. Indeed, some cartel members may see individual advantage in dismemberment of the protective structure, even though regulation may be producing returns to the industry as a whole well above the competitive rate.

In yet other cases — trucking may be an example — the change may be a reduction in the cost of information about how the regulatory system works and who benefits from it. Plainly, acquisition of information entails costs; information also has public goods aspects. Persons or groups who are most interested in information on how the regulatory system works will be those who design and promote it, frequently the regulated industry's members. At the outset, then, their private investment in the regulatory process will give these individuals or entities an informational advantage over others. Over time, however, academics and others will have private incentives to evaluate how the system works, and the public goods aspects of information will facilitate dissemination of this news. The "power of ideas" is tied closely to this phenomenon.

These three factors — technological change, cartel breakdown, and reduced information costs to nonbeneficiaries — can be integrated into the public choice model and together may explain a good deal of the success of privatization to date. Rigorous examination of these factors, however, has yet to be done. Moreover, it still is not clear that integration of these into current public choice models would provide a complete explanation of successful privatization.
est group) prediction. Increasingly, public choice commentators argue that the market for government decisionmakers is imperfectly competitive, providing some scope for those decisionmakers to promote their own interests apart from the interests of any organized group. 141 For legislators, this self-interested action may take the form of promoting government structures that increase legislators' personal political capital, even though those structures do not serve the interests of any other group. 142 The self-interested action may take the form of pursuing personally appealing notions of public interest, even if those notions do not directly serve constituents' interests. 143 This latter possibility explains in part the recent revival of interest in the role an individual personality may play in shaping government action. 144 And, together with the median voter model, this explanation of legislative freedom may explain why some government action seems to serve overall public interest as well as the typical (median) voter's interest.

3. Synthesis and Implications for Substantive Constraints on Government

The government decision to supply a given service must be described as a mix of three broad phenomena: response to general voter interest (as in the median voter model), pressures to harmonize competing distributional claims by rent-seeking groups, and decisionmakers' efforts to advantage themselves (other than by service to particular client groups) or to advance

141. See, e.g., Kalt & Zupan, supra note 14; Kau & Rubin, supra note 14; Lott, Brand Names and Barriers to Entry in Political Markets, 51 PUB. CHOICE 87 (1986); McChesney, Rent Extraction and Rent Creation in the Economic Theory of Regulation, 15 J. LEGAL STUD. 101 (1987).


their personal conceptions of the public interest. The first and third of these phenomena may overlap — representatives' personal conceptions of the public interest should often replicate the views of the median voters in the representatives' constituencies — but they need not be wholly congruent. Of these phenomena, client-service is the most readily described and most easily identified by empirical measures, and in itself can provide a fairly good picture of most legislative conduct.\textsuperscript{145} It is likely, however, that all three effects will occur to some extent in nearly all political decisions, and efforts to describe such decisions by reference to one alone necessarily will err.

Incorporating these different approaches into a unified construct is difficult, and no robust theory has been offered that synthesizes public interest and public choice approaches. Such a theory would, among other things, require recognition that elements drawn from these diverse approaches exhibit no stable relationship. The degree to which one another phenomenon dominates will vary among decisions. Further, the degree to which the different responses will be at odds with one another will vary as well. At times, for instance, a legislator guided by precepts of allocative efficiency will find that personally appealing policies indeed best harmonize the competing claims of constituents, each of whom would first prefer a policy that distributed wealth to him in efficient ways. At other times, the optimal client-service decision will be dramatically at odds with legislators' personal precepts.

At present, all that can be offered in the way of a synthetic positive theory is a loose patchwork of these conflicting approaches. Even so, some conclusions can be elicited from positive theory in this rudimentary state. Notably, the failure of either general theory to fully explain government decisionmaking has important implications for the sort of rules that will govern public decisionmaking; the interplay of public choice and public interest considerations suggests that no stable, comprehensive set of substantive rules for government decisionmaking can emerge. The point is not so much that social choice mechanisms are ineffective at preventing cycling and other impediments to substantive stability.\textsuperscript{146} Rather, the disparate influences on collective choice suggest a necessary preference for procedural over substantive solutions to problems of instability. Accommodation of the competing distributional claims by rent-seeking interests and of the in-

\textsuperscript{145.} Peltzman, \textit{supra} note 14.

terests in broader public concerns is accomplished more by structural constraints on the range of choices permitted than by identification of substantive outcomes that harmonize these concerns, especially with large, heterogeneous populations and multiple possible outcomes.147

Of course, substantive rules exist which limit legislative action even at the federal level, although the Constitution relies more on procedural constraints. These relatively few binding substantive rules generally prohibit government action that can be expected to disserve broad public interests in circumstances that make it difficult to identify a group that would anticipate consistently to be advantaged by the absence of the restriction. Thus, for example, the first amendment’s limitation on government interference with speech serves the general public interest in preventing underproduction of a public good and also serves the private interest of certain organized groups to which speech is central.148 Moreover, from a position “behind the veil,”149 the groups that might have been most advantaged by freedom from this constraint would not be willing to invest in opposing it and might even join in promoting the restraint. Those groups might also be most disadvantaged by absence of the constraint if not they, but groups to which they were opposed, gained power.150 Unlike the typical legislative enactment, constitution-making is relatively apt to involve considerable uncertainty about parties’ future positions and correlatively more likely to


150. In fact, the Jeffersonian group, which had perhaps a slightly lower prospect of immediate access to federal power, was keener on the idea of a substantive constraint on federal speech regulation than was the Hamiltonian faction. See R. RUTLAND, THE BIRTH OF THE BILL OF RIGHTS (1955). Both groups, however, expressed doubt at the outset as to which group would gain power; both indeed held power during the first constitutional generation.
produce socially optimal arrangements.\textsuperscript{151} The twin difficulties of securing normative consensus, even under conditions of partial ignorance respecting individual self-interests, and of predicting the set of conditions for which substantive decisions must be made necessarily incline constitution-making toward specification of procedures for harmonizing divergent interests and away from specification of substantive rules.\textsuperscript{152}

4. Political Choice and Privatization

What does the synthetic theory suggest about privatization? At the simplest level, the inference from theory should be that substantive constitutional constraints on privatization are unlikely; whatever privatization initiatives emerge from legislative-administrative processes should also, by and large, survive judicial challenge. This inference is rooted in the paucity of substantive constraints on the political process. If privatization is subject to a judicially enforced, substantive restraint, the restraint must be premised on a consensus expectation that privatization (or some other class of actions to which particular privatization efforts can be assigned) generally will disserve social interests.

Although generalization at this level of abstraction is unwise, it seems more likely that restricting privatization would disserve social interests than would permitting privatization. If the makers of a constitution expected government decisionmaking systematically to be biased in the direction of rent-creation, they would oppose constitutional rules that inhibit government withdrawal from current rent-creating activity. A generic, substantive constraint on disinvolvment would serve neither public nor identifiable private interests. For the purpose of constitution-making, rent-seeking interest groups should conclude that they are not advantaged by a general rule locking in rents. Each group that hopes to secure some advantage from government operates under uncertainty respecting the magnitude of the rents it will be able to obtain. At the same time, each group should anticipate that the total rent conferred by government will be excessive.

Self-interest, as well as public interest, thus, should oppose constitutional constraints on government withdrawal from services, even though each group's self-interest will favor freedom to compete for rents in the political arena. Constitutional rules should allow the government freedom to withdraw entirely from a given service or to reduce its direct involvement


\textsuperscript{152} See Cass, supra note 110.
in other ways. Part IV of this article will examine the evidence from legal doctrines that might bear on this point.

The more difficult theoretical issue is the degree to which legislative-political processes will approve of privatization. Put differently, who gains from public provision of services and who loses from privatization? How will political processes accommodate these interests? These questions implicate the comparisons of public and private enterprise that are addressed below.

B. Public Enterprise, Private Enterprise, and Agency Costs

1. Agency Costs: Property Rights and Enterprise Goals

The argument over privatization is largely carried on in terms of the preferability of public or private enterprise. Cast in these terms, the argument is misleading. The choice to allow public enterprise alone, private enterprise alone, or some combination of both to provide certain services rests on differences among these alternatives that make them useful for different ends.

There are so many forms of public and private enterprise that distinctions between these general classes must be suggested with at least a touch of embarrassment. On examination, few gross differences between the two forms of enterprise turn out to be strongly sustainable. But differences of degree do exist, two of which are particularly important: property rights assignments and institutional goals.

The most frequently noted difference between public and private entities may be the absence in government of the sort of freely transferable property rights in residual claims that characterize ownership interests in private, profit-seeking firms. The absence of such rights reduces incentives to monitor managerial performance in line with insuring cost-minimizing, profit-maximizing performance. Beyond reducing direct monitoring, the absence of transferable rights makes replacement of poor managers difficult,


154. E.g., A. Hirschman, Exit Voice and Loyalty (1970); Alchian & Kessel, Competition, Monopoly and the Pursuit of Money, in Aspects of Labor Economies (Nat'l Bureau of Economic Research ed. 1962); Baxter, supra note 95; Becker & Stigler, Law Enforcement, Malfeasance and Compensation of Enforcers, 3 J. Legal Stud. 1 (1974); Borcherding, supra note 87, at 126; Frech, supra note 8; Latt, supra note 141.

155. Alchian & Kessel, supra note 154; Baxter, supra note 95; Borcherding, supra note 87.
limiting the effectiveness of another source of incentives to better managerial performance. 156

Of course, the difference between public and private enterprise is not absolute. The value of government services is capitalized into property values, and, especially within small political jurisdictions, this effect may be substantial. 157 This creates a class of monitors for government in some measure analogous to corporate shareholders. Further, there are forces that constrain public managers in ways similar to corporate raiders. The news media invests considerable sums in monitoring government managers who, in turn, spend large amounts to resist threatened “takeover” attempts by political opponents.158

But these public mechanisms are less effective than their private market counterparts. Moving out of even a relatively small jurisdiction is considerably more costly than selling shares of stock, and while news coverage of government actors may facilitate takeovers in some cases, its more general effect may be to strengthen the “brand name” advantage of incumbents.159 The disadvantages of public enterprise monitoring mechanisms are predicted to lead to higher agency costs (costs of behavior that depart from the enterprise’s goal and costs of combating such behavior).

A second difference between public and private enterprises also suggests that the former will be characterized by higher agency costs. The private enterprise with which public agencies are compared is the profit-seeking firm. Notwithstanding variation in the desires of individual firm


159. See Cass, Officers, supra note 87, at 115-66; Easterbrook, supra note 98; Rice, supra note 98. See also Beth, supra note 14; Lott, supra note 141.
members, these firms pursue a single, clear, joint goal: profit-maximization.

Public enterprises, in contrast, seldom possess a single or a clear goal. The contest for control of the government's coercive power is usually resolved by a quasi-compromise among competing interests. Rather than reach a determinate solution reduced to explicit contract terms, parties to the political process more often use ambiguous language in an effort to obscure the nature of the package offered or the deal struck. Ambiguity in this context conceals the degree to which the agreement transfers wealth from one group (usually the general public) to another group or groups, and it also allows some decisionmakers to construe the agreement honestly as promoting an abstract public interest while others regard it as serving more focused interests. Such language is not meaningless; it does serve to place general bounds on subordinate decisionmakers, but it conveys less information than would usually be required in private deals and increases friction over future action.

The absence of a single, clearly specified goal, itself in part a consequence of the absence of transferable residual claims, constitutes the second important distinction between government and private enterprise. Even without established property rights, organizations can have clearly established goals. With any well-defined goal, especially one with readily observable output measures, enterprise performance can be monitored and remedial steps taken to police departures from the goal. The public agency, lacking such a goal, should be characterized by higher agency costs.

160. See Alchian & Demsetz, supra note 90.
161. See, e.g., Baxter, supra note 95; Fama, supra note 86.
162. Cass, Allocation, supra note 20; Cass, supra note 110.
163. See R. Cass, Revolution in the Wasteland: Value and Diversity in Television 41-43 (1981); Aranson, Gellhorn & Robinson, supra note 106; Peltzman, supra note 128.
than private firms.\textsuperscript{167} The existence of greater agency costs in public enterprises, as well as concern about them, is reflected in the greater range of constraints imposed on public managers.\textsuperscript{168}

The existence of greater agency costs in public enterprise also helps to explain why legal rules focus more attention on restricting the extension rather than the contraction of public power. The former imposes larger dead weight losses on society. Thus, other things equal, public interest concerns generally should be greater where public agencies play a greater role.

Moreover, private interests are unlikely to favor generic constraints on the reduction of government's role, as such constraints cannot be predicted to produce net benefits to any group. Instead, each interest will favor more focused constraints on disinvolvment from activity that serves its particular ends, which accounts for the predicted prevalence of statutory rather than constitutional requirements for government to perform certain functions.\textsuperscript{169}

The sole exception to this characterization of private interest groups underscores the basis for concern over government enterprise; public employees are the one group that should desire generic constraints on reduction of the government's role. The greater agency costs mean that government employees are able to appropriate rents, that is, to work less hard, to do more of what they want, or to receive more pay or greater job security than their private sector counterparts.\textsuperscript{170} Public employees as a group, therefore, should resist efforts to privatize. The actions of public employees appear consistent with this rent-seeking description of public employment: public

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{167} W. Niskanen, supra note 94; Borcherding, supra note 87; Borcherding, supra note 94; see Peltzman, The Growth of Government, 23 J.L. Econ. & Org. 209 (1980).
\item \textsuperscript{168} See Cass, Allocation, supra note 20; Cass, Officers, supra note 87.
\item \textsuperscript{169} The tendency should be for groups to predict that they will be able to defeat attempts to repeal legislation that confers rents on them rather than that they will be able to secure repeal of legislation that confers rents on others. This prediction is a simple extension of public choice theory's observation that groups are politically most effective when their interest is most intense and when the cost of action is lowest. Both will hold for any group only where its own interests are most immediately at stake.
\item \textsuperscript{170} See, e.g., Borcherding, supra note 87; Denzau, The Voting Behavior of Bureaucrats, and Public Sector Growth, in Budget and Bureaucrats 45, 90 (T. Borcherding ed. 1977); Smith, Public/Private Wage Differentials in Metropolitan Areas, in Public Sector Labor Markets (1981). Of course, some of the public-private differential is replicated where employees work for private firms under regulatory regimes that reduce the firms' capacity to constrain wages or their returns from doing so. See generally R. Ehrenberg, The Regulatory Process and Labor Earnings (1979).
\end{itemize}
\end{footnotesize}
employee unions, indeed, have actively opposed the concept of privatization as well as specific privatization proposals.\textsuperscript{171}

2. Choice of Enterprise and Comparative Advantage

If the agency-cost disadvantage of public enterprise suggests an explanation for the relative lack of concern over government disinvolve ment, it neither explains why government allocates some decisions to private and others to public enterprise, nor establishes a general case for privatization. The positive theory of government offers some answers to the division of responsibilities between public and private entities. In so doing, however, the theory underscores the role necessarily played by normative argument.

The most successful positive theory of government, public choice, builds primarily on economic models. The tradition of economics posits that, other things being equal, all rational actors should choose the least costly means of production. Although more costly methods may be chosen at any given point due to information costs, both heuristic and competitive mechanisms preclude a sustained equilibrium at supra-optimal expenditures.\textsuperscript{172} Yet, contrary to the economist’s rational actor model, society continues to rely on more costly public provision of many services rather then opting for private provision.\textsuperscript{173}

The reliance on public enterprise need not be taken as evidence of the sort of social irrationality implied by Professor Kenneth Arrow’s impossibility theorem.\textsuperscript{174} Nor does it necessarily require revision of the economist’s assumption about individual rationality.\textsuperscript{175} As Professor Thomas Borcherding observes, the conundrum disappears when one recognizes that public and private enterprises, even when they provide nominally similar services, in fact pursue different goals and must be judged, from an agency-cost perspective, according to the efficiency with which those disparate goals are met.\textsuperscript{176}

Nearly all of the commentary on government’s relative agency-cost disadvantage focuses on dollar efficiency. Government works less well because private enterprises generally can produce the same outputs — a given quantity of claims processing, electricity, airline services, trash collection,

\textsuperscript{171} See, e.g., Denzau, \textit{supra} note 170. See also AMERICAN FED’N OF STATE, COUNTY & MUN. EMPLOYEES, PASSING THE BUCKS: THE CONTRACTING OUT OF PUBLIC SERVICES (1984).
\textsuperscript{172} E.g., G. Stigler, \textit{supra} note 101.
\textsuperscript{173} Borcherding, \textit{supra} note 94.
\textsuperscript{174} K. Arrow, \textit{supra} note 75.
\textsuperscript{176} Borcherding, \textit{supra} note 94.
or whatever — at lower cost.\textsuperscript{177} As privatization advocates argue, private enterprise has the superior record on efficient production of goods and services in standard competitive output markets. Further, some services now offered by government on a monopoly basis can be recast in this fashion, allowing consumers to choose among different price-and-product packages from competing suppliers.\textsuperscript{178}

Public enterprises, however, have been asked in large measure to do a different job: superintending wealth transfers. By all accounts they have done so,\textsuperscript{179} although competition for those wealth transfers does not always leave the transferees as well off as they might like to be.\textsuperscript{180} Professor Borcherding therefore argues that — despite the claims he and others have advanced that private firms should be the preferred instruments of government policy on pure efficiency grounds — government, in fact, can be seen to operate in a waste-minimizing fashion given the wealth-redistribution goals it pursues.\textsuperscript{181}

This argument draws on other work suggesting that, if the enterprise mission remains the same, public reliance on private firms introduces a new source of agency costs. The private firm generally will maximize its profits from closer relation of costs and returns for each class of clients/customers than would characterize pricing policies that might provide a cross-subsidy.\textsuperscript{182} Private firms will resist pricing policies that allow redistribution by cross-subsidy, endeavoring either to raise price or decrease service quality on the undervalued service. Whether the private firm is subject to command-and-control regulation or direct contract, the public agent intent on maintaining a redistributive subsidy must incur substantial costs to monitor the private firms' performance.\textsuperscript{183} The public agent also will find it essential to exclude unregulated competitors, whose free operation would undermine the subsidy. But this strategy risks creation of monopoly rents for the pre-

\textsuperscript{177} See supra notes 8 & 153. Professor Borcherding's excellent essay is a notable exception.

\textsuperscript{178} Refuse collection is an example. But see Gillette, \textit{Equality and Variety in the Delivery of Municipal Services} (Book Review), 100 \textit{Harv. L. Rev.} 946 (1987).


\textsuperscript{180} Borcherding, \textit{supra} note 87; Demsetz, \textit{supra} note 122; J. \textit{Buchanan}, R. \textit{Tollison} & G. \textit{Tullock}., \textit{supra} note 104.

\textsuperscript{181} Borcherding, \textit{supra} note 154.

\textsuperscript{182} See Baumol, \textit{Toward a Theory of Public Enterprise}, 12 \textit{Atlantic Econ. J.} 13 (Mar. 1984).

\textsuperscript{183} Borcherding, \textit{supra} note 87, at 126.
ferred private supplier. The record of telephone regulation and partial deregulation over the past thirty years illustrates the difficulty of attempts to preserve subsidies while policing economic rents.

Some commentators have suggested that private enterprise need not present greater problems than public enterprise even when the public policy makers desire to create subsidy rents. Commentators have, for example, argued that appropriately designed franchise contracts let by competitive bidding can eliminate these difficulties. However, theoretical inquiries into such contracting processes and experience with such contracts in the cable television industry indicate that considerable cost and slippage attends these franchise processes. The monitoring problems associated with contracting out or regulation will be exacerbated in proportion to the public agent's unwillingness to make the terms of the subsidy or the identity of its recipients explicit.

Other commentators have suggested the introduction of limited competition with other supply sources, private or public, as an alternative to complete public or private provisions of certain services. An initial government supplier's tendency to inefficiency would be constrained by the new, competitive entrant while regulation of the additional supplier arguably would limit the undesirable by-products of regulatory friction that occurs when service is provided by a single private supplier whose profit incentives are at odds with the program's wealth-transfer goals. These proposals, too, seem problematic. In fact, the alternative suppliers, especially private entities, will have incentives to undermine the subsidy part of the public program, for instance, by serving the low-cost, high-demand seg-

184. E.g., A. Kahn, supra note 114.
188. See, e.g., Borcherding, supra note 87; Goldberg, supra note 179.
189. See, e.g., Bish & Warren, supra note 35.
190. See id.; Klein, Crawford & Alchian, supra note 187.
ment of consumers. This appears to happen in those areas, such as education, where mixed supply has been used for some time.

In summary, the principal choice is between private or public provision of goods and services. The argument from efficiency is that public and private enterprise are employed to maximize each one's comparative advantage. In essence, private enterprise is used to produce goods and services cost effectively and public enterprise is used to produce in-kind wealth transfers cost effectively.

C. Positive Theory and Political Prediction

1. Positive Outlook on a Normative Problem

The comparative advantage explanation reconciles seemingly conflicting data, but it unduly diminishes the difficulty of identifying the underlying choice of political goals, at the same time, this explanation underscores the centrality of that normative choice to argument over the assignment of functions to public or private hands. The choice is not simply efficiency versus rent-seeking, with private provision serving the former and public provision serving the latter.

If the public interest theories overreach in their sometimes explicit and sometimes implicit characterizations of the vast array of government actions as congruent with efficiency, there is nonetheless ample reason to believe that sometimes government action can and does improve efficiency. This generally occurs in situations in which monopoly has at least some advantages over competition, as where services present extraordinary problems of rights specification if offered on a private, competitive basis. Professor William Landes and Judge Richard Posner have advanced this argument with respect to the enforcement and adjudication of legal claims, although they confine the argument to a subset of claims that require significant research or that confer public goods in the form of precedent. Judge Frank Easterbrook and Professor Dan Fischel have made a similar argument respecting government intervention in the market for corporate control. And it has long been accepted that government intervention in the markets for creative and productive ideas can advance efficiency through the creation of limited monopolies. The use of government's coercive power in the form of liability rules to force a wide array of target actors to take into account the third party effects of their conduct suggests

192. E.g., Easterbrook & Fischel, supra note 156.
yet another instance in which interference in private markets can yield efficiency gains.\textsuperscript{194} Although one may doubt claims that the law is universally efficient or inexorably approaches efficiency, ample evidence exists that many legal rules and structures are efficiency-enhancing.\textsuperscript{195}

Of course, the efficiency-based privatization argument does not demand that government take no action. Rather, it presumes that government actions are more likely than not to be inefficient and to reduce social wealth. When government actions such as the foregoing are shown to enhance efficiency, the argument presumes that efficiency will be improved if government action in combating the particular private inefficiency is kept to a minimum. Thus, where government support is necessary to overcome public goods problems, the government arguably should be restricted to a funding and not a production role. Where monopoly is more efficient than competition, the government should license the monopoly, but not operate it.

This argument is an oversimplification. The private enterprise provider’s incentive to maximize profits can lead to rent-creating behavior. Monopoly pricing, hold out problems, fraud, and moral hazards generate costs that may be worse under private than under public provision of many services.\textsuperscript{196} The empirical question is how these costs, plus the costs of policing them, compare to the agency-costs of public provision.

The obverse of the assumption that government provision of a service reflects the desire to effect a wealth transfer is that commitment of a function to private enterprise is inconsistent with this intent. Again, this assumption is problematic. While government may be peculiarly useful for effecting wealth transfers, it will not be equally good at effecting all wealth transfers. Wealth transfers to particular groups may be associated with either public or private activity, but the identity of the actual beneficiaries may vary. For example, studies of many monopoly or cartelized industries

\textsuperscript{194} See, e.g., G. \textsc{Calabresi}, \textit{The Costs of Accidents} (1970); \textsc{Brown}, \textit{Toward an Economic Theory of Liability}, 2 J. \textsc{Legal Stud.} 323 (1973). A far less sanguine assessment of law’s capacity to induce efficient behavior is found in \textsc{Priest}, \textit{Modern Products Liability Law and Its Effect on the Accident Rate} (Civil Liability Project Working Paper, 1987).

\textsuperscript{195} An extraordinary array of these rules is discussed in R. \textsc{Posner}, \textit{supra} note 29. Many of his specific examples have been criticized, but the congruence of at least some legal rules with generally accepted notions of social efficiency seems compelling.

\textsuperscript{196} Borcherding, \textit{supra} note 87; \textsc{Klein}, \textit{The Competitive Supply of Money}, 6 J. \textsc{Money, Credit & Banking} 423 (1974); Thompson, \textit{An Economic Basis for the “National Defense Argument” for Aiding Certain Industries}, 87 J. \textsc{Pol. Econ.} 3 (1979). This is, in effect, the argument advanced by the Arizona Supreme Court against allowing private provision of legal representation for indigent defendants, at least under a system that contracted-out all such representation for a given period to the low bidder. \textit{See} State v. Smith, 140 Ariz. 355, 681 P.2d 1374 (1984) discussed \textit{infra} note 250.
suggest that private rents have been captured largely by organized labor. By the same token, studies of government indicate that public employees capture a large share of the rents produced by many government programs.¹⁹⁷

Hence, the choice between government and private monopoly supply may well be as much a choice between rent recipients as it is a choice of the right amount of rent. Moreover, the choice cannot be cast simply as one between private and public beneficiaries: both regulatory and deregulatory decisions affect the distribution of rents among government employees.¹⁹⁸ Privatization may therefore function in some instances to shift regulatory power and associated rents from one government agency to another,¹⁹⁹ from one level of government to another,²⁰⁰ or from regulatory agencies to courts.²⁰¹

These complications do not falsify the basic proposition of the positive theory that public and private enterprises have divergent comparative advantages and may generally be expected to be used to those disparate ends. The general assumption that privatization — reduction of the direct exercise of government power — will reduce rents and increase social wealth seems valid, even if in some instances privatization may eliminate socially beneficial government activity. The government, as the sole legitimate source of coercive wealth transfers, will be the preferred vehicle for rent-seeking. While reduction of government power often can produce gains, competitive pressures generally will preclude the creation of the rents absent government intervention.

¹⁹⁷. E.g., Denzau, supra note 170; Smith, supra note 170.

¹⁹⁸. McChesney, supra note 141.

¹⁹⁹. For example, the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978), while gaining notoriety for its abolition of the Civil Aeronautics Board (as of January 1, 1985), in fact eliminated far less of the CAB's regulatory jurisdiction. Much of the CAB's authority along with its work force was transferred to the Department of Transportation. Id.


At the same time, the superior capacity of the government to generate rents should make us hesitant to accept uncritically, privatization proposals as simple exercises in rent reduction. Although the synthetic positive theory of government admits the possibility of public-interested political decisions, such public-interested actions would be difficult to explain unless the concentrated private harm from rent reduction was offset by a significant benefit to some other, ascertainable group. While privatization proposals may suggest government disinvolvment that serves a general public interest, actual implementation of such proposals may respond to narrower interests. The form of the government's initial intervention and of its post-privatization involvement becomes critical to the allocation of rents. Further, the benefit or loss from any privatization initiative cannot be judged solely by reference to the productive efficiencies of one or another mode of supply. Not only can government action sometimes improve efficiency, even where efficiency is best produced by private markets, but privatization proposals may also present a complicated second-best problem.\footnote{202}

The dominant problem in selecting the optimal vehicles for supply of a given service ultimately is the underlying normative problem of social choice. The positive evidence indicates that government provides many services that could be provided more efficiently by private enterprise but for the desire, whether self-interested or public-spirited, to effect efficiency-reducing wealth transfers. The evidence also indicates that public decisionmakers are not unconcerned with efficiency. The difficulty of selecting a single, definitive goal for government action, which increases agency costs in government, also frustrates efforts to prescribe mechanisms for accomplishing the ends chosen for the polity and to deduce the social goal for any given activity from the means chosen.

2. Predicting Privatization: Focus on Forms

The preceding discussion should make plain the difficulty of successful prediction of political actions. As with weather prediction, there is a considerable difference between the ability to describe general tendencies and the capacity to foretell specific occurrences. The large number of variables that must be accounted for and the dispersion of results possible from small changes in any of those variables make specific predictions extraordinarily data-dependent. Simply put, in these ventures, a small unknown can overwhelm a substantial amount of known.

Still, even if the observed pattern will not be an exact fit, positive theory provides an adequate basis for postulating the larger political trends in privatization, as well as in the affirmative assertion of government power. Prediction necessarily rests on simplification of the positive theory sketched above. The critical judgment for predictive purposes returns to the division between the two more determinate theories that are joined in the synthetic positive theory. Even though public-interested decisionmaking is an admitted possibility, the synthetic theory rests more heavily on public choice as dictating the general case. Taking public choice’s description of government as rent creation, the initial postulate is that privatization will be less probable if it eliminates government action creating substantial rents. The forms of privatization described in Part II serve as useful, if somewhat artificial, dividers for elaboration of this postulate.

Divestiture of government-owned assets is probably the most likely form of privatization, at least under one set of conditions. Although some government asset ownership appears to confer substantial rents on groups well-positioned to protect those rents, other asset ownership appears at most a nonessential by-product of rent-creating programs. An example of this second category, rentless government ownership, is the government’s ownership of many sorts of financial obligations, such as students’ educational loans. The initial loan, at rates reduced to reflect the government’s guarantee or at directly subsidized below-market rates, confers rents on loan recipients. The continued holding of the obligation by the government, rather than by another party, however, generally does not confer additional rents. For this category of government-held asset, even modest gains which are widely shared by the general public, can suffice to prompt asset sale if the benefits are publicly visible, as is currently the case with reduction of the federal deficit. Contrast the ownership of land rights, such as mineral and timber rights or access to recreational areas, which are dis-

203. In fact, the government initially is a guarantor on most such loans and assumes “ownership” of the loan only following a student default. The government does, however, buy discounted loans of varying sorts, and the technical position of ownership of the loan recipient’s basic obligation or secondary ownership conditioned on default of the primary obligee does not affect analysis here.

204. Further rents could be conferred by the government’s relative inefficiency as a debt-collector. The efficiency gain from selling the loans would be subject to the same analysis as the gain from contracting out collection, discussed below. Here, the assumption is that the choice of asset sale rather than contracting for collection reflects other considerations than the efficiency to be gained from private collection efforts. The simplifying assumption is that, as far as sale of the loan obligations is concerned, the efficiency gains from private collection are trivial.
posed of by the government at below-market rates.\textsuperscript{205} Continued government ownership of these assets is an integral part of rent-creation.

Rentless government assets, while the most likely to be divested, are not the only government assets that might be sold. The other class of divestments that seems politically saleable involves assets that confer relatively visible rents at visible public cost. Conrail is an example. As a federally run rail service, Conrail benefitted shippers by charging below-market rates and providing noneconomic service while manifestly benefitting employees by maintaining a workforce that was supra-optimal both in size and compensation.\textsuperscript{206} Indeed, it seems fairly clear that federalization of the roads that became Conrail was intended to confer such benefits.\textsuperscript{207} The existence of private rents such as those associated with government operation of Conrail in itself usually is insufficient to mobilize political opposition, but if the rents are visible, as they are when they generate a clearly identified operating deficit, the subsidy becomes a more inviting target.

The outcome of any political struggle over such a government operation depends, among other things, on the size of the rent-beneficiary coalition and the degree of competition for the rents. As the size of the beneficiary coalition declines and competition increases — either reducing the amount of rent actually realized by beneficiaries or providing alternative services that fragment the beneficiary coalition — divestiture becomes a politically realistic outcome. For example, the increasing availability of air and motor substitutes for Conrail's services, the prospect of more efficient rail alternatives including more efficient service by Conrail (reflecting the probability that employees rather than customers received the bulk of Conrail's rents), the decline in the size of Conrail's workforce, and the structuring of the private sale to confer additional benefits on Conrail employees all combined with the increased interest in deficit reduction to produce an outcome — private sale of a rent-producing public business — seemingly at odds with public choice theory.\textsuperscript{208} The confluence of factors that made the Conrail

\begin{itemize}
\item \textsuperscript{205} \textit{See}, e.g., Libecap, \textit{supra} note 25.
\item \textsuperscript{206} One difficulty with analysis of the benefits attached to government operation of Conrail is that the operation of railroads by private enterprise has been extensively regulated, and the effects of this regulation cannot be separated readily from those of government ownership and direct operation.
\item \textsuperscript{207} \textit{See} L. Musolf, \textit{Uncle Sam's Private Profit-Seeking Corporations} (1983).
\item \textsuperscript{208} Before the initial steps were taken to reduce Conrail's operating deficit, its workforce was considerably larger and its tangible assets less substantial than at its sale. The operating losses were significant, and over a period of five years, the government invested ten billion dollars in Conrail before Congress directed that Conrail be made profitable and take steps toward privatization. \textit{See} M. Dayton, \textit{Economic Viability of Conrail} (1986); L. Musolf, \textit{supra} note 207. If the sale itself seems assimilable to rent-reducing government activity (an assumption that of
sale a reality, however, is far from typical. A different result would likely ensue where, as is more often the case, the privatization seriously threatens the rents associated with public ownership, where the beneficiary group is larger as it is in public schools, and where the available or imminent substitutes appear less attractive.

Contracting out government operations is the next most politically likely form of privatization. The considerations are similar to those applicable to divestiture of rent-conferring government assets. The efficiency gains of contracting will militate in its favor especially where budget constraints introduce a zero-sum quality to rent production and where extant competitive alternatives to government production of the services at issue make plain the efficiency loss attending such production.

Although there is visible evidence of significant deregulation at the federal level, this form of privatization seems generally less compatible with the synthetic positive theory than divestiture or contracting. Whatever public interest goals it might advance, regulation generally is associated with rent-creation. A second noteworthy feature of regulation is that it seldom requires substantial direct investment by government. Thus, rent recipients should support continued regulation while budget constraints will not play a significant role in promoting deregulation. As noted earlier, changes in the political and economic environment following enactment of regulatory programs — including technological changes, cartel breakdown, and reduced information costs to nonbeneficiaries of regulation — can contribute to the impetus for deregulation. Further, commitment to public interest norms can facilitate deregulation, but deregulation still seems an exceptional phenomenon. Rather than anticipating a continued series of successful deregulatory ventures, a systematic reappraisal of deregulation and pressure to reinstate at least some rent-creating features of regulation more readily harmonized with widely shared public interest norms seems the likely pattern. Current political reaction to telephone and airline deregulation provides anecdotal confirmation of this expectation.

Another unlikely form of privatization is the subject of proposals to replace government monopoly provision of a service, or mandatory contribution to government provision, with vouchers redeemable at alternative

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209. See, e.g., Fixler & Poole, supra note 34.
211. See supra note 140.
service providers. The capacity of voucher systems to replace government production with more efficient private production would seem to make these proposals functional equivalents of contracting out. Indeed, programs like the provision of "food stamps" or the payment for medical services rendered to recipients of Medicare seem perfect examples of the voucher system already in place. However, unlike the existing programs which generally represent extensions of government benefits to a class of persons not previously eligible (hardly a form of privatization), the current voucher proposals generally represent efforts to present additional choices to the current class of eligible beneficiaries. These proposals generally take rents from current, identified recipients, usually without providing any clear savings in explicit commitment of public funds. Although the voucher systems create rents for persons who now decline benefits for which they are eligible because they find the service choice unacceptable, that class seldom will be as significant as the class of current recipients. Moreover, the new class of service providers will, as competitors, not receive the full measure of rents lost by current providers.

These features make voucher proposals problematic vehicles for collective choice. At the same time, these features also make such proposals particularly attractive to those who are ideologically committed to reducing the scope of government decisionmaking (increasing the ambit of private decisionmaking). The voucher proposals are a natural focal point for argument among those who believe that public goods characteristics of particular services justify public funding, even though the government cannot efficiently produce the services; those who believe that public production itself is tied to the creation of the public goods; and those who doubt the public goods assertion for the service under either public or private production.

Political response to the final two forms of privatization — imposition of user fees and reduction of tax assessments — is even less readily predicted. Both would seem inherently unlikely from a public choice perspective. Assessing fees on users of government services generates funds that reduce imposition on general tax receipts, hence concentrating costs and widely distributing benefits, the reverse of what public choice predicts as standard collective choice outcomes. The case for general tax reduction is

214. See supra note 49.
only slightly less promising, as both the benefits and costs are generalized across broad groups.

The fate of each initiative for one of these privatization forms depends largely on the degree to which the benefits can be appropriated by a more limited group. In a world of increasing budget constraints, user fees can rebound to the benefit of the administering agency, assuming a less than unitary offset against the budget contribution from general revenues. The bureaucrats' usual clients, who often will be taxed with the new fees, may not be so opposed as at first would appear; they must weigh the likely diminution in agency-generated rents under a reduced budget against the cost of the new fees. Still, the critical question for them will be "compared to what?" If the agency's principal clients believe that such fees only minimally add to the agency budget and that the expanded budget contributes less than proportionately to client rents, then they have an unambiguous interest in opposing the fees. This interest is tempered only by the prospect of worsening relations with regulators whose personal interests generally favor the new fees.\textsuperscript{216}

The analysis of tax reduction is similar. In a government with many programs and a large revenue base, legislators will comprise the concentrated group most critically affected by tax reduction. They may gain from tax reduction, nonetheless, if a majority coalition of voters concludes that the reduction in government spending consequent to decreased revenue principally will affect government programs not of immediate interest to them. Where politicians serve an entrepreneurial role, their personal gain from tax reduction can exceed their personal loss from revenue reduction.\textsuperscript{217}

In a government with a smaller revenue base and fewer programs, the argument over tax levels may involve groups more clearly engaged in a zero-sum game. Thus, for instance, in debating the appropriate level of town taxes, town residents who do not have school-age children or who value private schools over public schools enough to pay their additional costs may join in opposition to a coalition of parents who prefer public schools, parents who value education for their children (above some minimal level) at less than its fully distributed cost, and public school teachers and administrators. Even where school revenues are not based on a separate, special tax, the parties to this debate may be fairly confident that a reduction in the tax level will have its principal impact on school expendi-

\textsuperscript{216} Cf. Gillette & Hopkins, \textit{supra} note 21.

\textsuperscript{217} Cf. Denzau & Munger, \textit{supra} note 143.
In this case, both the costs and the benefits of tax reduction appear more concentrated than in the usual case.

Because the standard case presents an asymmetry between the less concentrated beneficiaries of privatization and those who are harmed by privatization, the ordinary expectation should be for political opposition to privatization to make it infeasible. At the same time, for reasons discussed earlier, predictions based on the simplified public choice model manifestly will be less than fully accurate. Privatization may succeed in exceptional cases, even though concentrated interests oppose it vigorously. And, as previously discussed, privatization should be relatively free of legal impediments outside the control of political actors when it does pass the political hurdle. Examination of this last prediction is the focus of Part IV.

IV. Legal Issues: Limits and Lines

Privatization potentially raises a series of legal issues, few extensively litigated in this context. These issues can be organized in three untidy categories: structural concerns, general obligations, and specific entitlements.

A. Structural Concerns: Constraint and Authority

1. Delegation

Concerns about the exercise of governmental power have been addressed in many ways. Although no single mechanism for controlling government can fully explain the legal system we now have or the impulses that inform it, the most important devices for assuaging concerns about government undoubtedly have been structural. The Federal Constitution, shaped in no small measure by concerns about the appropriate nature, locus, and confinement of government power, evidences this reliance on structure; the Framers responded to concerns about government by dividing government power among various individuals and entities, by constituting the entities in disparate fashions so that the individual actors within them respond to divergent incentives, and by placing the constitutive framework in a form that resists easy revision. Even the substantive limita-

218. In the town example, a complicating factor is the capitalization of the expected benefit of public schools funded at a given level into the value of property located in the town. See Tiebout, supra note 97; Yinger, supra note 157.


220. See, e.g., The Federalist Nos. 10, 40, 47, 48, 51, 73, 75, 76, 78 (A. Hamilton).

tions on the federal government gain the stature of binding constraints rather than hortatory injunctions by virtue of these structural controls.222

Where particular types of conduct have been anticipated and have been thought to be especially problematic, a structural measure to combat them should be evident. The strongest legal constraint on privatization would be a constitutional prohibition on government passing off its functions to private actors. There are dicta that indicate that such a constraint exists, but in fact only partial, weak constraints on delegation of particular functions appear to characterize most American constitutions.

At the federal level, judicial attention to the constitutionality of assigning functions from government to private parties was addressed most prominently in the context of a general debate over the delegability of legislative power. During the course of its brief effort to give fiber to the hoary dictum that legislative power could not be delegated,223 the Supreme Court declared that, as distasteful as it found the assignment of such power to executive officers, the allocation of this power to “private persons”224 was “legislative delegation in its most obnoxious form . . . .”225 Arguably, this special concern over delegation of legislative authority to private parties could provide the basis for a broader proscription of delegation of other authority to private actors.

This doctrinal development, however, has not occurred. Both common sense and the history of the Court’s efforts in the 1930’s to restrict delegation of legislative power (and to a lesser degree, its efforts at other times to separate government powers) reveal why.

The necessary linchpin of the generic anti-delegation argument is a notion of the functions that are essentially governmental and, hence, nondelegable.226 There are two different approaches to articulation of essentially

Black, Structure and Relationship in Constitutional Law (1969) (making similar points in the context of an argument for a style of constitutional interpretation focused less on textual language and more on structure).


224. The Court actually directed its concern at delegations to “private persons whose interests may be and often are adverse to the interests of others in the same [regulated] business.” Carter, 298 U.S. at 311.

225. Id.

226. This describes the federal treatment of nondelegation. State treatments have differed, often taking a more expansive view of the nondelegation doctrine focused less on particular characterization of the activity at issue than on an evaluation of the externalities generated by its delegation. See Gillette, Who Puts the Public in Good?, 71 Marq. L. Rev. 701 (1988) (infra, this issue).
governmental functions. One is historical, the other definitional. Neither provides firm doctrinal footing.

The historical approach asks what government does or has done, declaring the positive evidence descriptive of essentially governmental functions. Apart from its conflation of positive and normative issues, the historical approach is either nonsensical or unworkable. One sort of historical approach begins with the government as it is today. This approach, by labeling anything the government now does as necessarily a governmental function, would in effect prohibit the government from reducing the scope of its undertaking; the government can never do less or spend less than it does now. This is the most administratively tenable, historical government-function test, but it makes no sense. Why demand a one-way ratchet in government? Even the most ardent advocates of expansive government authority surely would not want a constitutional mandate of this sort.

An alternative historical approach asks what government traditionally has done. This alternative cannot be dismissed out of hand as senseless. One might at least imagine plausible bases for seeking to keep some rough constancy over time in the minimum functions performed by government, but this test poses enormous administrative problems. There is virtually no discrete function that one can identify as historically committed to government, rather than to private parties. To take just one example, pri-

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227. One can, of course, imagine the sort of difficulties this test would produce in deciding what constituted a reduction in the scope of government undertaking, difficulties present even at the base level of deciding the measure for government spending: nominal dollars? inflation-adjusted dollars? government-budget dollars relative to gross national product? The argument over public antitrust enforcement under the Reagan Administration reveals another avenue for argument. Critics claim that antitrust enforcement has been eviscerated in this administration. Despite the substantial increase in the number of suits filed (especially criminal). See Salop & White, Private Antitrust Litigation: An Introduction, Table 1, in Private Antitrust Litigation: New Evidence, New Learning (Salop & White, ed., 1987); Brodley, Critical Factual Assumptions Underlying Public Policy, in id. The critics allege that enforcement of nearly all the important substantive antitrust constraints has ceased. See, e.g., Litvack, Government Antitrust Policy: Theory Versus Practice and the Role of the Antitrust Division, 60 Tex. L. Rev. 649 (1982). Plainly, the administration thinks otherwise. See Baxter, Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law, 60 Tex. L. Rev. 661 (1982). Notwithstanding these interpretive difficulties, rough consensus can be had in many instances on whether government has slackened its pace in some manner.


230. The experience with a similar test for inter-governmental assignment of functions was abandoned by the Supreme Court at least in part for this reason. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

vate security forces both antedate public police forces and continue alongside public forces. Further complicating the relation, deputizing private citizens as temporary public law enforcement officers was once common and private actors generally are privileged from tort liability for certain acts in aid of law enforcement. Tradition can provide information on the roles played by government at various times, but it cannot of itself divide governmental from private activities. The roles have not divided simply enough for description, unaided by theoretical interpolation, to suffice.

The definitional approach to identifying essential government functions fails for related reasons. This approach requires a verbal formula that distinguishes what government must do directly from what it may choose to do in cooperation with private parties, or not to do. The complex intermingling of functions among public and private parties that has in fact occurred indicates the difficulty of this task. The problem is especially apparent when one looks at more modest efforts to erect definitional barriers between government actors. The Supreme Court's New Deal Era effort to preclude delegations of legislative authority, which required a differentiation of legislative from executive authority, was quickly abandoned. The effort to define a limited federal sphere under the commerce clause was similarly given up.

The Court has not completely foresworn definitional distinction among government powers. The still unfolding doctrines respecting appointment and removal of federal officers and respecting the appropriate means for legislative and executive control over administrative rulemaking reveal the current attraction of the definitional approach. It is noteworthy, however, that the Court increasingly has opted for broad, categorical controls over the method of action by particular government entities rather than a

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233. See Restatement (Second) of Torts §§ 112-44 (1979).


real definitional separation of functions. Further, in the few instances where the Court does rely on definitional separations among governmental actions, it has shown itself unwilling to impose substantial constraints on the exercise of a given function by a government agency whose appropriate sphere of action arguably excludes that function.

Moreover, the animating force behind the Court's decisions in assignment of functions among government officers cannot easily become the basis for a constraint on delegation of functions to private actors. The decisions on inter- and intra-government conflicts show particular concern for preventing the concentration of excessive power in one branch, one level of government, or one officer. Although the ability to give authority to others increases the donor's power in some respects, the concern over concentration of power is less acute than where power is arrogated directly to the suspect actor. The Court, hence, has acquiesced in the exercise of a variety of powers, including rulemaking and adjudication by private parties.

The Court's occasional condemnation of private exercise of delegated powers further supports the conclusion that no general bar to such delegation exists. In Gibson v. Berryhill, the United States Supreme Court declared that the part-time members of an occupational licensure board, in essence private delegates of public authority, were disqualified from passing on the propriety of certain practices engaged in by roughly half the practitioners then licensed by the board. The Court's decision rested squarely on the large and relatively direct financial interest of board members in de-licensure of the practitioners in question, not on a distinction between public officials and private actors. The imposition of similar constraints on financially interested public officials and the approval of other exercises

238. Thus, the Court declared in Chadha that all formally effective legislative action must incorporate presentment and bicameralism; and in Buckley and Bowsher, the Court decreed that all formally effective action by a federal employee who is not a president, vice president, a congressman, or a judge must be taken by someone whose appointment and removal are initially under executive control.


240. See Aranson, Gellhorn & Robinson, supra note 128.


246. Id. at 578-79.

of broad decisional authority by arguably private actors indistinguishable from those in *Gibson* make it clear that *Gibson* signals a specific substantive constraint on government power, not a special concern over delegation of that power to parties who are not full-time on the public payroll.

Although there is no basis for a general constraint on delegation of government authority, it is likely that some government powers will be found to be nondelegable, that constitutionally only a specific governmental actor can perform certain given functions. Thus, even if some adjudicatory authority can be exercised by any public or private delegee, whatever adjudicatory authority is deemed to come within the judicial power of article III must be exercised by judges who have lifetime tenure, irreducible salaries, and who do not perform functions which are inconsistent with their judicial roles. These restrictions on delegation, however, will be rare; each must rest on some specific constitutional inhibition or particularized substantive concerns. Even privatization proposals involving activities that intuitively appear to be essentially governmental are unlikely to pose constitutional delegation problems.

2. Public Liabilities

While only the extraordinary activity will be committed solely to government hands, the law may impose other constraints on privatization. The same sorts of concerns that inform decisions on government structure also inform decisions respecting the imposition of special liabilities on, or the grant of special immunities to, government. In what circumstances do private parties share these special liabilities or immunities? When, in other words, is private action viewed by the legal system as more or less problematic than government action? The special liability issue is taken up first.

It is a truism in our system that government often is asked to eschew conduct that we tolerate from private actors. Government, for instance, cannot engage in certain types of discrimination among practitioners of par-

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250. The nondelegation argument against private management of prisons, for example, is unlikely to succeed. *See, e.g.*, Robbins, *Privatization of Corrections: Defining the Issues, 69 Judicature* 324, 331 (1986). Its proponents must elaborate not just reasons why public prison employees will enjoy incentives superior to those which a private prison employee would enjoy, but also reasons for special concern about the particular conduct expected of private prison employees. *Cf State v. Smith*, 681 P.2d 1374 (Ariz. 1984) (bid system of contracting out representation of indigent criminal defendants raised inference of inadequate assistance of counsel; however, the inference was rebutted in this case).
ticular religions that are permitted for private actors.\textsuperscript{251} Government often must give its employees procedural protections that private employers are free to offer or withhold.\textsuperscript{252} Also, government frequently is disabled from distinguishing among messages in ways that private speakers and owners of private property are free to do.\textsuperscript{253}

Each limitation especially imposed on government power has its own particular background and basis,\textsuperscript{254} but all share a common sense that government should be treated differently. Understanding why government is specially constrained should facilitate a determination as to whether those constraints will be imposed on other actors following privatization.

Some obvious possible bases must be rejected as not explaining special strictures for government. The distinction between public and private actors for these purposes cannot rest exclusively on the function the actor performs, for public and private entities are treated differently even when both perform the same function.\textsuperscript{255} Showing a functional equivalence between public and private conduct may be relevant to the treatment of privatized activity, but it will not be dispositive. Similarly, although some generalized notion of the relative “power” of the actors may be relevant to the treatment of privatized activity, special burdens on government cannot rest on commonly accepted, accessible correlates of influence, such as wealth or size, as mega-corporations remain free of constraints that bind tiny municipal governments.\textsuperscript{256}

Rather, special inhibitions on government seem rooted in government’s monopoly over the lawful resort to physical coercive power in the absence of consent from the object of coercion save by presence of the object within the spatial boundary lines demarcating the government’s jurisdiction.\textsuperscript{257}

\begin{footnotesize}

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\item[254.] See Cass, \textit{The Perils of Positive Thinking}, supra note 148.

\item[255.] Hence, public schools are bound by legal controls on their actions with respect to students and faculty that private schools do not share. See, \textit{e.g.}, Ingraham v. Wright, 430 U.S. 651 (1977); Goss v. Lopez, 419 U.S. 565 (1975).


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More precisely, the variety of restrictions on government, going well beyond direct limitations on penal sanctions, indicates that government is different by virtue of the possession of this coercive power, and not by virtue simply of its exercise of that power. Unfortunately, identifying the shared basis for government constraints serves more to illuminate the ambiguity of the division between public and private action. This is the problem: what makes government distinctive so as to call for special controls defies easy isolation. The pervasiveness of government power to intervene in its citizens' lives and to command obedience to its dictates lest the coercive power be brought into play makes it difficult to mark the separate spheres of private and public action. Nearly anything the government suffers to happen can be laid at the public door.

The potentially inflatable quality of the concept of public action, however, probably does not auger for a significant expansion of public liabilities consequent to privatization. Undoubtedly, there will be some instances in which a formally private actor — for instance, the private manager of a state prison or an INS detention facility — will be seen as invested with the state's coercive power and be subject to the same constraints as the state. More often, privatization will present not a clear transfer of state coercive power, but a more subtle sharing of power. The very difficulty of isolating these activities from the broad run of private conduct makes its assimilation to government action unlikely.

Evidence of the likely resistance to treating privatized activities as fully equivalent to government action is provided by the courts' past treatment of state action claims. Courts have had ample invitation to extend the reach of

258. A clear example is provided by cases holding that the mere prospect of punishment can invalidate illicit government action. See, e.g., Monaghan, Overbreadth, 1982 SUP. CT. REV. 1.


260. Indeed, some commentators have argued that nearly everything the government suffers to happen should be laid at the public door. See, e.g., Frug, The Ideology of Bureaucracy in American Law, 97 HARV. L. REV. 1277 (1984); Kennedy, supra note 17.

special inhibitions on public activity, but have generally been reluctant to apply these constraints to private actors.

The courts, of course, have not limited the application of strictures on government conduct to instances in which full-time government employees themselves take all of the actions necessary to directly violate a prohibition. Courts have sought to police government conduct that, while not in itself completing the transgression, seems intended to violate such a prohibition. 262 Courts have been most attentive to the capacity of government conduct, intermixed with conduct of private parties, to bring about the ill effects against which the prohibition on state action was directed in cases alleging racial discrimination, and at times courts have invoked formulae that put intention entirely aside and instead speak in terms of active involvement, support, or encouragement. 263 In this vein, use of the state’s law enforcement apparatus in aid of private, discriminatory agreements has been found to violate requirements of evenhanded state action. 264 Similarly, the Supreme Court’s 1967 decision in Reitman v. Mulkey 265 invalidated a state constitutional amendment prohibiting state agencies from interfering with private decisions to sell or rent (or not to sell or rent) residential property. The effort to privatize by withdrawing from regulation of discrimination in the housing market “authorized private discrimination,” “made the state ‘at least a partner in the . . . act of discrimination,’” and could not conceivably serve any other purpose than authorizing such discrimination. 266

While the analytic structure of these cases suggests an openness to the concept of state action that might make anyone performing a privatized activity subject to the same constraints as the government, much less should be made of it. The race discrimination cases do establish the possibility that government may be prohibited from privatizing in ways that encourage such discrimination. However, even this conclusion must be qualified in light of more recent cases emphasizing the importance of discriminatory


266. Id. at 375-76 (quoting the California Supreme Court, 64 Cal. 2d 529, 413 P.2d 825, 50 Cal. Rptr. 881 (1966)).
Moreover, outside the context of racial discrimination the courts have been much more wary of expanding the state action concept.

Three lines of authority are illustrative. Most prominent is that derived from *Marsh v. Alabama*, the "company town" case, suggesting that when private property is used for a "public function" it is subject to the same constraints (there, first amendment strictures) as publicly-owned property. Although the Supreme Court built on that rationale in extending free speech rights to a private shopping complex in *Amalgamated Food Employees Union v. Logan Valley Plaza*, it subsequently undercut and then directly repudiated that holding. The Court has confirmed the continued vitality of the "public function notion" in dicta, but in so doing it has whittled down the concept, stating that "the relevant question is not simply whether a private group is serving a 'public function' " but rather "whether the function performed has been traditionally the exclusive prerogative of the State."

A second line of authority, beginning with *Sniadach v. Family Finance Corp.*, suggests that state enforcement of private debtor-creditor agreements does not convert private into public action, but the state's actions must comport with due process regardless of the terms of the private parties' agreement. Having almost reflexively applied the due process clause to invalidate the mix of public and private conduct in *Sniadach*, the Supreme Court has struggled to identify the level of state involvement necessary to implicate due process concerns as well as the nature of state conduct adequate to satisfy those concerns. Although several state statutory schemes concerning judicial enforcement of credit agreements failed to pass muster, the Court has found some schemes constitutionally adequate and, more to the point, has held that due process concerns are not even triggered where the state's involvement consists only of statutory authorization for creditors to use "self-help" in disputes with debtors. Thus, where the state is directly involved in the enforcement process through its officers — judges, clerks, sheriffs — so that it can be viewed as the party that effec-

tively takes the debtor’s property, the due process clause applies, but not where the state simply authorizes private taking pursuant to private agreements.

The third line of authority, beginning with the Supreme Court’s decision in Public Utilities Commission v. Pollak,\textsuperscript{276} combines the public function and state involvement theories. In Pollak, a private transit company’s broadcast of radio programs to riders was scrutinized for consistency with the first and fifth amendments. The Court noted that the transit company was a monopoly provider of streetcar and bus services, that the services were provided pursuant to government authorization, that the services constituted “a public utility,” and that the Public Utilities Commission, which regulated the company, had investigated the company’s amplified radio service and concluded that “the public safety, comfort and convenience were not impaired thereby.”\textsuperscript{277}

The Pollak case could provide a basis for extension of public obligations to private enterprises providing services cooperatively with the government or under government supervision but for its fate over the last thirty-five years. In a variety of circumstances, the Supreme Court has found the requisite state action wanting in challenges to government sanctioned actions of government licensees, rebuffing attacks on a utility company’s termination of customer service,\textsuperscript{278} FCC-licensed-and-regulated broadcasters’ refusal to air certain advertisements,\textsuperscript{279} and Medicaid-reimbursed nursing homes’ policies on patient transfers.\textsuperscript{280}

Finally, in Rendell-Baker v. Kohn,\textsuperscript{281} the Court rejected the claim that free speech and due process rights are applicable to the teacher discharge decisions of a private institution authorized and paid by the state to educate “special needs” students. The dissent declared that “the State has delegated to the . . . School its statutory duty to educate children with special needs,”\textsuperscript{282} noting that students were placed in the school by various agencies of the state, that the state regulated the school’s operation extensively, and that the state contributed more than ninety percent of the school’s funds (ninety-nine percent in one of the two years relevant to the case). The majority, however, found these factors insufficient:

\textsuperscript{276} 343 U.S. 451 (1952).
\textsuperscript{277} \textit{Id.} at 462.
\textsuperscript{281} 457 U.S. 830 (1982).
The school . . . is not fundamentally different from any private corporation whose business depends primarily on contracts to build roads, bridges, dams, ships, or submarines for the government. Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts.\(^\text{283}\)

Given the Courts' holdings and statements, most privatization proposals — including most contracting out, as well as deregulation, sale of assets, and so on — should allow the privatized activities to be carried on free from the special inhibitions on government action. Where direct, physically coercive power is exercised over individuals involuntarily committed by government to private hands\(^\text{284}\) or where clearly governmental actors retain control over the very aspect of the activity to which a special constraint attaches, as in some of the debtor-creditor cases,\(^\text{285}\) the public constraint still will bind the public actors. As in *Rendell-Baker*, however, even fairly slight movements away from that posture are likely to support a relaxation of public liabilities.

3. Public Immunities

The obverse of special governmental liability is special governmental immunity. The opportunity for popular control of government proves a common explanation for the fact that government, but not other entities, is empowered to exercise certain coercive authority. Just as the threat of its coercive power supports special constraints on government, faith in popular control supports special immunities for government. If privatization generally will remove public constraints from certain activities, will it also delete the public immunities? Similar questions have arisen in at least three contexts: the state action exemption from antitrust liability, the market participant exception to constitutional commerce clause constraints, and the government contractor defense to tort liability. Although only the second of these is a *constitutional* constraint, all three are the products of judicial decisionmaking in the "common law" mode, free from reasonably specific legislative instruction. All three doctrines draw fairly tight lines around the public immunity.

The Supreme Court's 1943 decision in *Parker v. Brown*,\(^\text{286}\) insulating a state-sponsored agricultural marketing cartel against antitrust scrutiny, cre-

\(^{283}\) *Id.* at 840-41.


\(^{285}\) *See supra* notes 163 and 164.

\(^{286}\) 317 U.S. 341 (1943).
ated an exception to the antitrust laws for state exercise of the police power to pursue objectives inconsistent with open, competitive markets. The Parker Court also declared, however, that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." 287 Many commentators have noted the vagaries of the Court's efforts to apply and circumscribe the Parker exemption. 288 The Court has not followed a clear and steady path, but its recent decisions, as a group, have indicated increasing concern to confine the exemption to situations in which the legislature specifically sets an anti-competitive policy and that policy is "actively supervised by the State itself." 289 In the words of another decision, the anti-competitive conduct must be "compelled by the State acting as a sovereign." 290

The restriction imposed by the Parker exemption, however, suggests that the substitution of private for public actors will increase the exposure to antitrust constraints. 291 Municipalities and other state instrumentalities have received special statutory immunity from certain antitrust damage liability (though not injunctive relief and associated costs) 292 and are subject to less stringent state supervision requirements for Parker immunity. 293 Further, proof of conspiracy, where that is a necessary element of the antitrust offense, may prove more difficult to establish when the anti-competitive conduct is promoted by public actors, even where those actors are not shielded by the Parker defense. 294 Where private actors engage in conduct that the antitrust laws condemn, approval of the conduct by public actors

287. Id. at 351 (quoting Northern Sec. Co. v. United States, 193 U.S. 197, 332, 344-47 (1903)).
291. E.g., Community Communications, 455 U.S. at 40; Lafayette, 435 U.S. at 389.
whose conduct would be considered safe from liability will not suffice to protect the private actors.\textsuperscript{295}

The "market participant" exception to commerce clause restraints\textsuperscript{296} is another immunity that is unlikely to be retained following commitment of an activity into private hands. The Supreme Court has read the commerce clause of the Constitution\textsuperscript{297} to bar a variety of state practices that burden goods or services from other states but not similar home-state goods or services.\textsuperscript{298} The Court has, however, distinguished instances in which states (or their subdivisions) act as "market participants" from those in which states act as "market regulators."\textsuperscript{299} As a market participant, the state can choose from what sources it wants to buy goods or services or to what consumers it wishes to sell.\textsuperscript{300} The exception is limited to one "level," if the state imposes on its buyers or sellers requirements respecting their use of home-state goods or services, the state will be deemed to be acting as a regulator and not merely as a participant.\textsuperscript{301}

A similar distinction between the state's conduct as a player and as a referee has been drawn in the context of the privileges and immunities clause,\textsuperscript{302} allowing the state greater leeway (although not complete exemption) when it participates directly in market transactions than when it affects such affairs by commands to others.\textsuperscript{303} Given the limitation of these immunities to states as direct market players, state privatization efforts that are intended only to secure the benefits of profit motivation or of private sector expertise, and not to change the nature of the government's actions,
risk confrontation with constitutional barriers that states acting directly might avoid or hurdle.

A third immunity specially available to government is the general sovereign immunity from liability in tort. This immunity has been modified substantially by statute and court decisions, reducing the scope of government immunity or abrogating the doctrine entirely. Even at its fullest flower, the immunity did not extend to all official conduct. Municipalities were most likely to be excluded from the immunity's protection. Reversing the position given them in the commerce clause cases, "governmental" municipal activities were within the tort immunity, but "proprietary" municipal activities were outside the immunity. The federal government and most state governments were protected by a broader tort immunity than lesser subdivisions, but pressures to provide relief for government torts caused the courts to decide immunity claims with sufficient inconsistancy to establish at best "a somewhat wavering pattern" of immunity. Nonetheless, in some areas, even after the statutory waivers and judicial exceptions, a fairly strong sovereign immunity remains.

Although the government tort immunity, like the Parker antitrust immunity and the market participant exemption, protects only a subset of government activity, the tort immunity can extend to some private actors doing business with the government. The private actors may invoke what has come to be known as the "government contractor defense." The defense has several forms. The oldest version of this defense excuses any contractor who faithfully follows the government's contract specifications. Newer forms focus on the distribution of knowledge and control between the con-

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307. Thus, for example, the federal government has not waived sovereign immunity for strict liability torts, for a variety of intentional torts, for service-connected injuries to military personnel, for claims arising from negligent handling of the mails or from the activities of the TVA, or for "discretionary function[s]." See 28 U.S.C. §§ 1346(b), 2680 (1982); Laird v. Nelms, 406 U.S. 797 (1972); Feres v. United States, 340 U.S. 135 (1950). Moreover, its waiver of immunity from other tort liability is subject to a number of substantive and procedural qualifications. The current state of government tort immunities is discussed in Cass, Official Liability in America: Actors and Incentives, in Government Liability, Compensation, and the Law of Civil Wrongs (A. Bradley ed. forthcoming 1988).
308. See, e.g., Cass & Gillette, supra note 36.
tractor and the government. While not limited to this context, much of the recent litigation has involved federal defense contractors. The courts traditionally have been solicitous of government decisionmaking on military matters, but that solicitude has not translated into broad protections for military contractors. Lower federal courts have suggested at least three disparate tests, all requiring some evidence that the government's relative control and knowledge make the contractor less suited to monitor aspects of the contract critical to tort liability. Courts have recognized that contractor immunity can serve many of the same ends as government immunity, but have nonetheless been reluctant to extend an equivalent immunity. In other contexts, judicial construction of broad contractor immunity is even less likely. Of course, legislatures interested in privatizing an activity may decide to create such immunities or to authorize administrators to do so. The status of contractor immunities to date, however, like that of antitrust and constitutional immunities, suggests that privatization efforts generally will entail some loss of special governmental immunities.

312. See Tozer v. LTV Corp., 792 F.2d 403 (4th Cir. 1986); Shaw v. Grumman Aerospace Corp., 778 F.2d 736 (11th Cir. 1985); Bynum v. FMC Corp., 770 F.2d 556 (5th Cir. 1985); Tillet v. J.I. Case Co., 756 F.2d 591 (7th Cir. 1985); Koutoubos v. Boeing Vertol, 755 F.2d 352 (3d Cir. 1985); McKay v. Rockwell Int'l Corp., 704 F.2d 444 (9th Cir. 1983); In re "Agent Orange" Prod. Liab. Litig., 534 F. Supp. 1046 (E.D.N.Y. 1982).
313. See, e.g., National Swine Flu Immunization Program of 1976, 42 U.S.C. § 247b(k) (1982). The legislatures indeed have responded to various pleas for relief from civil liability, coming to the aid of some employees who were exposed to personal liability for official acts and also protecting others not contractually linked to the government who were able to secure the legislature's ear. Abraham, Medical Malpractice Reform: A Preliminary Analysis, 36 MD. L. REV. 489 (1977); Boger, Gittenstein & Verkuil, The Federal Tort Claims Act Intentional Torts Amendment: An Interpretive Analysis, 54 N.C.L. REV. 487 (1976); Robinson, The Medical Malpractice Crisis of the 1970's: A Retrospective, 49 L. & CONTEMP. PROBS. 5 (Spring 1986).
314. Administrators currently have some capacity to do this by the manner in which they structure contract terms, and certainly they can provide payment terms that produce incentives equivalent to those of an immunity rule. Administrators may not choose to exercise this authority in the circumstances that might be most appropriate for immunity, however, nor will such exercise produce all the same results as an immunity rule if the effects on government and third parties are taken into account. See Baxter, supra note 95; Cass, Officers, supra note 87.
315. An important government immunity not addressed above is the exemption of much government-owned property and activities from liability for various taxes. The omission of this subject is predicated purely on ignorance of tax systems and surmises that a high cost is associated with reducing that ignorance.
B. General Obligations

The special constraints and authorizations discussed above directly reflect beliefs that particular decisionmaking structures can uniquely threaten or serve public interests. The same concerns in large measure account for the imposition of certain general obligations on government and the recognition of specific individual claims against government and others. In the latter contexts, the linkage to decisional structures recedes somewhat and concerns subsumed within the structural arguments assume greater prominence. The concerns that are classed here under the rubric of general obligations relate to the capacity of concentrated private interests to use government to secure special advantage over more diffuse interests. The concerns grouped under the category of particular expectations derive from the prospect for larger groups to impose incommensurate burdens on smaller groups.

1. Public Benefit

The essence of government, in large measure, is the separation of benefits and burdens. By and large, in private activity benefits and burdens are linked; if one seeks a benefit, usually he must pay its costs. Of course, this formulation oversimplifies. There are, to be sure, externalities (third party effects) from an incredible array of private activities. While many of these are the subjects of legal regulation, a substantial measure of external harm as well as benefit necessarily escapes.316 Still, to a considerable degree the nature of much private activity is the direct quid pro quo, payment, in cash or in kind, exchanged for goods.317 In contrast, government is able to break the normal transaction, to disaggregate benefit from burden. The key to this separation is government's capacity to impose burdens by fiat.

The separation of benefit from burden allows government to overcome free-rider problems that often plague private action,318 but it also raises the possibility that some groups will use the government's coercive power to impose burdens on the public while arrogating special benefits to themselves.319 This capture problem is alleviated somewhat by the possibility

319. See J. BUCHANAN, R. TOLLISON & G. TULLOCK, supra note 104.
that those who are burdened will exit from the jurisdiction\footnote{320} and more by the requirements of successful coalition-building.\footnote{321} These constraints still leave substantial scope for effective interest groups to use the political process to their own advantage.\footnote{322}

To buttress the practical limitations on the use of government to confer "naked preferences" on well-situated groups,\footnote{323} a number of legal constraints attempt to assure that as long as the burdens of a government activity are imposed on the general public, the benefits will also be duly shared. The federal requirement that property taken through the "eminent domain" power be put to "public use"\footnote{324} is perhaps the most visible example. Similar concerns underlie state requirements that a public purpose be served by exercise of the eminent domain power,\footnote{325} by state prohibition of "special legislation,"\footnote{326} and even by the debt limits commonly imposed on local governments.\footnote{327} Privatization proposals arguably could be challenged as conferring private benefits at public expense in contravention of restrictive legal provisions such as these.

Although these prohibitions on government capture may generate litigation, they offer little in the way of a serious impediment. Take for example the proposal to give public housing projects to their tenants or to sell the projects at a quarter of their market value.\footnote{328} Plainly one group, the current tenants, receives a benefit. Plainly, too, if the project has a market value substantially greater than the price (if any) paid, the public bears the immediate burden of that loss in value. Clearly then, this seems a case of private benefits being had at public cost. Putting aside consideration of whether that characterization is accurate, the constraints on government action almost surely will not preclude this gift. First, the public use con-
straint on takings will not be availing: the property taken was not private, hence, the predicate for application of the takings clause fails. Second, even if the clause applied, judicial construction of the public use requirement has all but eliminated that obstacle to government distributions of property directly from one private party to another.\textsuperscript{329} Nor would state limitations on public purpose or special interest legislation preclude the gift of public property where an arguable purpose, other than mere conferral of private advantage, can be made out — and it does not take a gifted rhetoretician to propound such arguments here, or indeed, in nearly any conceivable case in which privatization is likely to occur.\textsuperscript{330}

Similarly, the debt limitation constraint on local government tends not to be a serious obstacle to government action.\textsuperscript{331} Moreover, privatization proposals of almost any type are not apt to increase public debt. In fact, the ability to reduce public indebtedness by selling assets or to avoid public indebtedness by contracting for goods or services rather than investing in the capital base necessary to produce them is a significant inducement to privatization of government services. Some states count long-term contractual commitments against local debt ceilings, but most do not.\textsuperscript{332}

There is, however, a set of legislative and administrative constraints, rooted in similar concerns about government capture, that is far more likely to chafe when administrative officials endeavor to privatize by contracting out. Virtually every government is subject to special constraints on the means by which it contracts for services. At the federal level, volumes of regulations control the government's procurement practices.\textsuperscript{333} Regulations detail the circumstances in which public bidding is required, the manner in which bids should be solicited, the form for and timing of bids, the criteria for selection of a winning bidder, and the opportunities for contesting contract awards.\textsuperscript{334}

The explanation for these rules is quite simple; government officers and private contractors are not trusted to resist the opportunity to acquire per-
sonal benefits at public expense.\textsuperscript{335} Indeed, a standard complaint about the transfer of government money for privately-produced goods or services is that routinely too much of the former is traded for too little of the latter.\textsuperscript{336} Stories of goods provided to the government at special prices — toilet seats and coffee pots have been recent subjects — and of contractors caught cheating add to the widespread supposition that the contracting process provides ample opportunity for fleecing the public.

The rules respecting administrative contracting will not preclude legislative decisions to use private contracts in place of public provision of particular services. And the opportunities for private gains to contractors may increase the political prospects for such actions. At the same time, the concerns that underlie constraints on administrative contracting should prompt political decisionmakers to weigh possible efficiency losses from the government contracting process against expected gains from private production.

2. Public Guarantees

In addition to the legal requirements intended to assure that government serves general public interests whenever it imposes burdens on the general public, some governments have made explicit commitments to provide minimal levels or types of certain services. An example, well-known in some circles, is the New Jersey Constitution’s mandate that the state provide a “thorough and efficient system of free public schools.”\textsuperscript{337} Unlike the entitlements considered below, these guarantees do not run to any particular individuals or identifiable groups.

Nonetheless, courts at times have found such guarantees both enforceable by individual citizens and contrary to particular state actions. Thus, for instance, in Robinson v. Cahill,\textsuperscript{338} the New Jersey constitutional provision was held to require the state to abandon its method of financing public education, relying on local property tax revenues.\textsuperscript{339} The New Jersey Supreme Court concluded that this financing mechanism did not produce good schools throughout the state, and no reason offered by the state persuaded the court that the funding mechanism was efficient.

\textsuperscript{335} For a general treatment, see Banfield, \textit{Corruption as a Feature of Governmental Organization}, 18 J.L. & Econ. 587 (1975); Rottenberg, \textit{Comment}, 18 J.L. & Econ. 611 (1975) (commenting on Banfield).


\textsuperscript{337} N.J. Const. art. VIII, § 4, ¶ 1.


\textsuperscript{339} This decision was part of a long-running dispute over the New Jersey education system. See D. Mandelker, D. Netsch & P. Salisch, Jr., \textit{State and Local Government in a Federal System} 703-06 (2d ed. 1983).
Guarantees of this sort arguably could pose obstacles to privatization. The reduction in government spending on particular projects or the increased reliance on local or individual choice could be found to violate substantive commitments. Clearly, New Jersey could not, absent constitutional amendment, privatize education by simply getting out of the business of financing or of supervising public education. Similarly, privatization through education user fees (at least above some fee level) might be found to contravene New Jersey's constitutional commitment.

The conflict between substantive state guarantees and privatization, however, is not so great as this example might suggest. First, the existence of general substantive guarantees does not, in itself, mean that privatization of activities to which such guarantees attach is unlawful. New Jersey, for instance, might choose to contract with private schools to provide education in the state's behalf, without separate charge, to school-age children. This form of privatization might better accommodate the constitutional mandate at issue in Robinson than pure public provision of education.

Second, the legal constraint at issue in Robinson is uncommon. There are relatively few enforceable, general substantive commands of this sort in American constitutions. Notwithstanding Professor Crosskey's suggestion that the preamble to the Federal Constitution provides a binding, general, substantive commitment, most statements of aspirational goals have been treated as precatory; that is, courts will not enforce substantive directives unless framed in terms that indicate an intent to allow vindication at the behest of individuals specially burdened by their violation.

There are, to be sure, a large number of general statutory obligations that might be thought inconsistent with particular privatization efforts. Although courts also may be reluctant to enforce some of these statutory prescriptions for government conduct, in other instances the courts no doubt will prove a willing forum for challenges to administrative privatization. In such instances, privatization will require legislative acquies-

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cence. As the recent legislative record on deregulation indicates, this presents far less an impediment to privatization than would a constitutional inhibition.\textsuperscript{345}

C. Private Entitlements: Grated Expectations

The most likely legal impediments to privatization efforts derive from claims of special, private entitlements, rather than from general public obligations or structural constraints. By definition, legal entitlements confer on their possessors the capacity to extract something from the government, or from someone else with the government's assistance. The action, of course, lies in determining when a claimant has an entitlement and to what exactly the claimant is entitled. Answering these questions in a great many contexts has proven to be anything but easy; this article certainly cannot purport to suggest all of the possible entitlements that might interfere with or add costs to privatization efforts, much less identify those entitlements that will in fact be judicially recognized. Rather, this section contains a modest adumbration of the sort of claims that might be asserted and a guess as to their probable success.

The search for entitlements takes two different forms.\textsuperscript{346} The positivist approach looks for explicit recognition of an entitlement in authoritative, formal sources of law.\textsuperscript{347} The constructivist instead propounds normative propositions that should be the basis for entitlements.\textsuperscript{348} Few commentators embrace radical versions of either approach. Positivists recognize that authoritative sources frequently confer entitlements by implication and rely on normative assumptions to interpret ambiguous statements in positive

\begin{footnotes}
\item[345] See supra notes 41 & 42. Of course, the legislative record on deregulation indicates that statutory obligations do present a substantial obstacle to privatization, largely for reasons discussed supra notes 169-71 & 203-18 and accompanying text.

\item[346] A different dichotomy is suggested in Michelman, Property as a Constitutional Right, 38 Wash. & Lee Rev. 1097, 1099-1104 (1981).

\item[347] See J. Mashaw, supra note 64.

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Constructivists generally embrace normative views that give substantial weight to positive law, holding that individuals should be entitled to protections that they reasonably expected and looking to positive law as an important datum on what expectations are reasonable. Thus, under either approach, positive guarantees should provide an acceptable starting point for identifying the entitlements likely to threaten privatization.

Grist for legal entitlements can be found in contracts with the government, in statutes granting benefits to particular individuals or classes, and in constitutional provisions guaranteeing certain protections to particular persons or groups. Often, a combination of these sources of legal control will be relied on to support a claim of entitlement.

The claims that should have the most concrete foundation are those based in contracts with the government. Contractual objections to privatization could arise, for instance, from collective bargaining or other employment agreements with employees who would be displaced by the decision to eliminate or, more likely, to contract out government services that formerly were performed in-house. At the federal level, a series of cases already has addressed employee challenges to contracting out decisions. Those cases typically involve plaintiffs arguing agency failure to abide by bargaining agreement terms governing various matters collateral to the contract out decision itself.

As is generally the situation with public authorities, resolution of these cases has turned not only on the contract itself but also on the particular statutory and administrative rules applicable to the employees. Numerous suits have asserted contract rights under the aegis of Title VII of the Civil Service Reform Act of 1978. The Act specifically excludes the decision to contract out from the range of subjects negotiable between federal agencies and employee representatives. It does, however, permit agencies to negotiate employee numbers, tours of duty, the means by which agencies decide whether to contract out, and the treatment of employees adversely affected by the decision to contract out.

Putting these provisions together, the Act appears to allow agencies to bargain with employee representatives about the contracting out process and the effects of contracting out decisions, but precludes bargaining about management's prerogative to decide whether to contract out. The Federal Labor Relations Authority (FLRA) and the United States Court of Appeals for the District of Columbia Circuit have construed the provisions as allowing an agency to be bound by particular procedures concerning contracting out decisions. Moreover, the court of appeals and the FLRA concluded that agencies are required to follow the guidelines contained in an Office of Management and Budget Circular on contracting out and that, even in the absence of separate agency agreement, employee unions are entitled to binding grievance arbitration whenever they question agency compliance with the circular. This interpretation may be thought to stretch somewhat the range of protection permitted to employee interests under federal statutory authority.

Similar issues are certain to arise in state and local privatization. Will employees be deemed entitled to bargain over the scope of contracting out authority or over specific contracting out decisions? Will the sale of a government owned business subject the buyer to the government's obligation to workers? To creditors? As at the federal level, answers to these questions will depend on the particular content of statutory authorization and contractual commitments.

Even where there are fairly clear, positive commitments, government largely remains free to revise those commitments. In contrast with judicial zeal to protect tangible, privately-held property against even quite modest physical invasions, courts have approved legislative revisions of intangible rights that substantially and, at times, dramatically diminish the value of private property, upholding such revisions against challenges premised on the takings clause of the fifth amendment, the contract clause, the


357. AFGE, Nat'l Council of EEOC Locals v. EEOC, 10 F.L.R.A. 3 (1982), aff'd sub. nom. EEOC v. FLRA, 744 F.2d 842 (D.C. Cir. 1984), cert. dismissed, 476 U.S. 19 (1986). Justice Stevens, the only justice to reach the merits of the case, would have reversed the decision below on all of these points. See 476 U.S. at 26-28 (Stevens, J., dissenting). See also Ketler, supra note 351, at 118 (interpretation of the Civil Service Reform Act).

358. See Ketler, supra note 351, at 150.


equal protection clause,\textsuperscript{362} and the due process clause.\textsuperscript{363} The federal and state legislatures are not, of course, free to reshuffle individual entitlements entirely at will. At some point, albeit ill defined, individual expectations based on positive law become crystallized into entitlements that they may be altered only through appropriate procedures,\textsuperscript{364} or subject to government reimbursement for at least a portion of their lost value.\textsuperscript{365} Hence, while government enjoys considerable latitude to alter existing arrangements, even if such alteration reduces the value of private holdings or breaches private expectations reasonably based in positive law, it cannot take actions that impose substantial, adverse retroactive burdens on individuals previously within the contemplation of special governmental guarantees.

Although a variety of claims arising out of government privatization could be imagined, few that come readily to mind seem to entail the retroactive abrogation of firmly established government commitments. For example, a change in the current farm support programs could allow greater play to market forces by altering the means by which subsidies are allocated.\textsuperscript{366} Such a change might also reduce the level of payments to farmers, now reported to be around twenty-six billion dollars.\textsuperscript{367} Many farmers have planned their investments in anticipation of continued government support of the same sort as is now received. The farmers' expectations doubtlessly will produce political pressure against change of this sort, but so long as the change is made on general policy grounds, which do not vary from farm to farm on the basis of individual farmers' personal characteristics or conduct\textsuperscript{368} and in accord with normal legislative processes, the law will not

\textsuperscript{364} E.g., Perry v. Sindermann, 408 U.S. 593 (1972).
\textsuperscript{365} E.g., First English Evangelical Lutheran Church v. County of Los Angeles, 107 S. Ct. 2378 (1987).
\textsuperscript{366} This could be accomplished by changing from payment for crops coupled with mandatory acreage reduction to compensation based on, say, changes in export barriers or changes in other countries' subsidies to food imports.
\textsuperscript{368} E.g., Goldberg v. Kelly, 397 U.S. 254 (1970). The cases generally referred to as establishing the dividing line between instances in which claims of frustrated expectation necessarily are committed to adjudicative process and those in which such claims may be cut off by legislative action are Bi-Metallic Invest. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915), and Londoner v. Denver, 210 U.S. 373 (1908).
block it. Other claims may be more compelling. For example, veterans could claim not only that a change in their benefits violates their expectations but that it reneges on the implicit bargain under which they served their country. 369

However compelling this claim may be morally or politically, it is by no means clear that courts would treat it more favorably than the farmers' claim. 370 Most changes in government services — deregulating, contracting out, imposing user fees, withdrawing entirely from direct government — will alter expectations to the detriment of some group with a plausible claim based in positive law. A casual glance suggests that few of those thus far affected will secure assistance from the courts.

V. Conclusion

Privatization seems, at present, a concept rightly more central to political debate and economic inquiry than to legal discourse. The least problematic aspect of privatization is the legal background against which successful privatization efforts will be judged.

The possibility of legal challenges to privatization is significant; but the prospect for judicial interposition of obstacles to legislatively approved privatization is quite remote. The law plainly offers a great many avenues for possible challenges to privatization schemes. It is probable that some particular privatization efforts will be found to violate legal strictures, especially where the actual use of government's power of physical coercion is implicated (as distinguished from the pervasive, background threat that such power will be brought into play). Moreover, it is even more likely that privatization generally will require abandonment of the special immunities enjoyed by governmental actors. Current legal doctrine, however, offers strikingly few serious judicial obstacles to government disinvolvelement, at least as long as it is accomplished through the normal political processes.

The absence of nonstatutory legal constraints conforms to a prediction derivative of positive political theory. Constitution-making, the initial source of typical nonstatutory legal constraints, responds to public interests through the mechanics of long-term, generic decisionmaking under unusually great uncertainty. Given the tension between overall public interest

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369. In the case of veterans, claims of this sort would have to distinguish between those whose service was compelled and those who contracted with the government on a volunteer basis.

370. Indeed, the claim is quite similar to that of the railroad employees who had worked up to twenty-five years in expectation of certain retirement benefits that, following legislative revision of the railroad retirement scheme, would not be forthcoming. See United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980).
and many applications of government's coercive power, constitutions would be expected to admit general freedom for government to reduce or end its involvement in particular activities. As an initial supposition, freedom to privatize seems to advance public interests provided that the political processes are not biased toward too little governmental activity.

Specification of the "right" amount of, not to mention the right occasions for, governmental activity, however, introduces an intractable difficulty. Normative discussion of political activity quickly passes beyond the realm of consensus. The optimal level of government activity and the optimal types of activity are not likely to be readily agreed upon. If allocative efficiency is accepted as an apposite standard against which to measure government behavior, some agreement can be had on positive issues, but even then no theory has demonstrated terribly good predictive capacity.

In simple form, positive analysis suggests that government often will behave in ways that increase private returns at public expense. This tendency describes much, but not all, government activity. Where this tendency holds with respect to affirmative extensions of government power, privatization is at once useful (for those who desire to increase allocative efficiency) and relatively unlikely. Political success for privatization efforts in such cases depends on the insignificance of the private loss from privatization, on the characterization of the decision on privatization as a choice between directly competing uses of scarce resources, or on the would-be privatizers' ability to make public gains from privatization both visible and important.

Privatization, in short, cannot be separated from the incompletely understood and often suspect political forces that determine the affirmative reach of government power. At present, privatization has entered the popular lexicon as an appealing, if ambiguous, label for actions of varied social and private import. It remains to be seen if and where it will stick.