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PUBLIC LAW LIMITATIONS ON PRIVATIZATION OF GOVERNMENT FUNCTIONS

PAUL R. VERKUIL*

The privatization movement is on the verge of succeeding too well. The fact that some of what government does can be done better and cheaper by the private sector has gained such momentum that the public sector is sometimes seen as redundant or irrelevant. But the economist's make-or-buy choice simply fails to capture the full range of responsibilities that government faces in deciding whether to outsource a particular function to private contractors.

This Article illuminates the public dimension of government functions. By exploring the public-private distinction and relating it to constitutional, statutory, and administrative requirements, it structures an argument that identifies and insulates inherent functions of government from the outsourcing calculation. The idea that some jobs in government are better performed by the private sector is accepted; but for other assignments, where policymaking is at stake, the public actor is not fungible or replaceable. The public interest, an elusive concept admittedly, has an inevitable role to play in our political system. The elusive concept can sometimes best be identified in emblematic ways, through the presence of a badge or the taking of an oath.

* Professor of Law, Cardozo Law School, Yeshiva University. Thanks are due to the participants in the February 2005 Cardozo Law School/Michigan Law School Conference on Contracting Out at the National Academy of Public Administration and the March 2005 Harvard Law School Conference on Government by Design for their insightful comments on earlier versions of this Article. In addition, Jody Freeman, Michael Gerhardt, Dan Guttman, Michael Herz, Gillian Metzger, Martha Minow, Sallyanne Payton, Steven Schooner, and Kevin Stack offered valuable ideas and encouragement. Daniel Austin Green, Cardozo Law 2006, provided extensive and effective research assistance. James D. Finn and John D. Veazey of the *North Carolina Law Review* made the Article better during the editing process, as did the participants in the UNC faculty colloquium where this Article was presented in November 2005.

For those less concerned about the historical background of the public-private distinction and its influence on the privatization debate, Parts I and II can be skimmed. Discussing the practical dimensions of privatization starts with Part III. Parts IV and V offer a variety of legal and policy prescriptions. The Article concludes by observing that all three branches of government must help keep privatization within democratic bounds.

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INTRODUCTION

The relationship of government to the private sector is very much in flux these days. Pressures are building to outsource more and more government functions. At the same time, the federal civilian bureaucracy is shrinking in alarming proportion to its oversight responsibilities.¹ The number of private contractors doing the work of government has accelerated, while the number of federal employees needed to supervise them has eroded.² This imbalance has negative consequences for public management generally, but it specifically makes surveillance of privatized activities an urgent matter.³ When combined with the loss of key government personnel, this lack of oversight and control becomes an inevitable consequence of privatization, producing imbalance between those in government

1. There are currently fewer than 1.9 million civilian employees of the federal government (excluding the post office). In 1990 there were over 2.25 million. At the Department of Defense (the “DOD”), civilian employment was virtually cut in half during the 1990 to 2003 period. See OFFICE OF PERS. MGMT., FEDERAL CIVILIAN WORKFORCE STATISTICS: THE FACT BOOK 8–9 (2004) [hereinafter THE FACT BOOK], available at <http://www.opm.gov/feddata/factbook/2004/factbook.pdf>. Of course not all employees are equally important, but the downsizing trend is also reflected in the Senior Executive Service, the top public managers. See *infra* note 378.

2. See PAUL C. LIGHT, THE TRUE SIZE OF GOVERNMENT 1 (1999) (stating that the “shadow of government” . . . consisted of 12.7 million full-time-equivalent jobs” in 1996). The ratio of private contractors to public employees is now over 6 to 1, but the more significant deficit is in the reduction of top level government officials, such as contracting officers and the Senior Executive Service, who have seen their numbers drop as their contracting oversight responsibilities have grown. See *infra* note 378.

3. The Government Accountability Office, for example, has reported that DOD oversight was insufficient in about one-third of its contracts, a deficiency it attributes at least partially to declining personnel levels. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-05-274, CONTRACT MANAGEMENT: OPPORTUNITIES TO IMPROVE SURVEILLANCE ON DEPARTMENT OF DEFENSE SERVICE CONTRACTS 2–3 (2005) [hereinafter GAO REPORT ON IMPROVING SURVEILLANCE], available at <http://www.gao.gov/cgi-bin/getrpt?GAO-05-274>.

who should oversee and those in the private sector who are meant to be overseen.

This accountability⁴ gap is really a byproduct of two converging forces: the deregulation movement, which renders many government regulatory programs unnecessary, and the privatization movement, which transfers government activities to the private sector. Deregulation critiques the economic role of government over the economy. It seeks to end programs that are inefficient or counterproductive.⁵ Privatization plays a different role. It accepts the need for a government activity, but sees efficiency advantages in shifting it to private hands. In the United States, at least,⁶ privatization, unlike deregulation, is concerned less with the amount of government expenditures than with where to place responsibility for the activity.⁷ The size of government, viewed as a percentage of the Gross Domestic Product ("GDP"), could well grow in a privatized environment, as it has during the Bush administration.⁸

Proponents of privatization and deregulation share a belief that the market will improve the services provided by a monopolistic bureaucracy. Privatization was a cornerstone of the reinventing government movement during the Clinton-Gore administration.⁹ It has thrived during the Bush administration. President Bush's vision

4. A useful definition of accountability in the bureaucratic setting is provided by Professor Rubin: "[A]ccountability refers to the ability of one actor to demand an explanation or justification of another actor for its actions and to reward or punish that second actor on the basis of its performance or its explanation." Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2119 (2005) (arguing for the accountability advantages of the administrative state).

5. For example, consider airline regulation by the Civil Aeronautics Board. Of course, not all deregulatory actions involve program termination, and "reregulation" often follows deregulation. See JEFFREY HARRISON, THOMAS D. MORGAN, & PAUL R. VERKUIL, *REGULATION AND DEREGULATION* 16–19 (2d ed. 2004); see also ALFRED C. AMAN, JR., *THE DEMOCRACY DEFICIT* 93–96 (2004) (describing various kinds of legislative delegation to the market).

6. Privatization in European countries has a broader connotation—the denationalization of government programs. By transferring assets to the private sector (airlines, television stations, and public utilities are good examples) some nations can reduce the size of the public sector. See generally Alessandro Petretto, *The Liberalization and Privatization of Public Utilities and the Protection of Users' Rights: The Perspective of Economic Theory*, in PUBLIC SERVICES AND CITIZENSHIP IN EUROPEAN LAW: PUBLIC AND LABOUR LAW PERSPECTIVES 99, 99–106 (Mark Freedland & Silvana Sciarra eds., 1998) [hereinafter PUBLIC SERVICES AND CITIZENSHIP IN EUROPEAN LAW] (describing public utility deregulation).

7. See *infra* text accompanying note 120.

8. See discussion *infra* note 333.

9. See discussion *infra* notes 107–10 and accompanying text.

of an “ownership society,”¹⁰ which advocates private accounts as an alternative to Social Security, further highlights the private sector’s role in the provision of traditional government services. Privatization is a presumed good in this setting. And the reality is that our government could not function without contracting out some of its services. Privatization has been part of government management since the post World War II period,¹¹ but its acceleration to the limits of accountability is a relatively recent phenomenon. Today, the degree and level of those delegations has become a central issue of public policy.

In addition, stating a preference for private over public solutions, as the “ownership society” suggests, can have unintended consequences. By endorsing the view that private enterprise provides a superior organizing principle to government monopoly, privatization forces the public sector to defend itself. Thus, the central question of the privatization movement is whether the term “public sector” continues to be a viable social concept. Stated alternatively, is the public-private distinction, which has demarked law and political theory from the earliest times, still meaningful in an era of transcendent privatization?

This Article explores the relationship of public law to privatization.¹² It elaborates upon the public-private distinction and asks whether the values of responsibility and accountability behind the distinction still serve to limit the privatization movement. Accepting privatization, it is argued, need not mean the end of public law; indeed, public law limitations must be satisfied before some government functions can be outsourced.

The contracting out process, which broadly describes how the government transfers programs to the private sector, is configured next. Longstanding practice assumes that the contracting out of “inherent government functions” is not permitted. But the pro-

10. See David E. Rosenbaum, *Bush to Return to ‘Ownership Society’ Theme in Push for Social Security Changes*, N.Y. TIMES, Jan. 16, 2005, at A20.

11. See Dan Guttman, *Inherently Government Functions and the New Millennium: The Legacy of Twentieth-Century Reform*, in MAKING GOVERNMENT MANAGEABLE: EXECUTIVE ORGANIZATION AND MANAGEMENT IN THE TWENTY-FIRST CENTURY 40, 40–46 (Thomas H. Stanton & Benjamin Ginsberg eds., 2004).

12. In doing so, it does not challenge creative attempts to involve the private sector in the regulatory process. See, e.g., IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 3–4 (1992) (proposing participation by the private sector in shaping regulations); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 376–79 (2004) (describing how regulated parties should be able to help shape the regulation that controls them).

privatization environment erodes whatever limits that phrase implies. One purpose of this Article is to insist that inherent government functions must be preserved in the process of contracting out. Here the application of both constitutional and statutory requirements, in particular the Take Care Clause and the Subdelegation Act, frame the analysis. Do these provisions serve not only as grants of power to the executive branch, but also as limits on the exercise of these powers? Administrative practice under the Office of Management and Budget's ("OMB's") Circular A-76 is explored in order to help define the limits of the contracting out process. After understanding the realities of current practice, improvements are suggested in the way that contracting out is usually conducted by agencies and OMB.

The goal is to balance the two positives of the private and public sectors—efficiency and accountability—in ways that confirm rather than threaten our legal and political traditions. Accountability for private delegations emerges from legal standards already in place as well as from new formulations that embrace an invigorated conception of the public sector.

I. THE PUBLIC-PRIVATE DISTINCTION: HISTORICAL AND CONSTITUTIONAL PERSPECTIVES

For anyone who has studied the administrative state here and abroad, the most complicated question is understanding where the line between public and private is drawn. Often the effort is abandoned as unproductive. Yet when confronted with the phenomenon of "privatization," the question becomes irresistible; one is compelled to discover whether a line (or some approximation of it) can be drawn. Identifying the continuing role for the state in the context of privatization implicates the public-private distinction and its connection to democratic political theory.

A. *An Overview of the Public-Private Distinction*

The words "public" and "private" are so commonplace in American law and society that they almost defy definition. In society generally, these words are politically charged. To take but one example, they have been invoked to separate public discourse from private conversation in an effort to foster civic engagement.¹³

13. See Judith Rodin & Stephen P. Steinberg, *Introduction: Incivility and Public Discourse*, in PUBLIC DISCOURSE IN AMERICA 1, 7–11 (Judith Rodin & Stephen P. Steinberg eds., 2003). See generally JEAN L. COHEN & ANDREW ARATO, *CIVIL SOCIETY AND POLITICAL THEORY* (1992) (describing civil society).

Inevitably, the line between them remains ambiguous and contested. In fact, Neil Smelser has noted that “the private-public distinction constitutes a political strategy in and of itself.”¹⁴ One makes a political choice by using the distinction to defend or attack the public order. As Michael Taggart perceives, “the public/private divide . . . has its roots in liberalism.”¹⁵ Liberalism not only underpins our social order: it ultimately derives its force from the Constitution.

Calling an activity “public” has served to legitimate governmental action since society was formed. Indeed, from the time of Justinian,¹⁶ “public law” and “private law” have defined the relationship of the individual to the state. In Continental jurisprudence, which traces its roots to Roman law, public law carries with it substantive obligations of the state to the citizen.¹⁷ In the Anglo-American legal tradition,¹⁸ public law has similar, but less well articulated connotations.

Still, expressions of the “public interest” are often used to justify the role of government in our liberal democratic state. For example, since the nineteenth century, agencies have been empowered to protect the “public interest, convenience, and necessity.”¹⁹ But that

14. Neil Smelser, *A Paradox of Public Discourse and Political Democracy*, in PUBLIC DISCOURSE IN AMERICA, *supra* note 13, at 178, 179.

15. Michael Taggart, *The Province of Administrative Law Determined?*, in THE PROVINCE OF ADMINISTRATIVE LAW 1, 4 (Michael Taggart ed., 1997).

16. Justinian's Digests read as follows: “There are two branches of legal study: public and private law. Public law is that which respects the establishment of the Roman commonwealth, private that which respects individuals' interests, some matters being of public and others of private interest.” DIG. 1.1.1.2 (Ulpian, Institutes 1) (1 THE DIGEST OF JUSTINIAN § 1 (Theodor Mommsen et al. eds., University of Pennsylvania Press 1985)).

17. See generally David Faulkner, *Public Services, Citizenship and the State—the British Experience 1967–97*, in PUBLIC SERVICES AND CITIZENSHIP IN EUROPEAN LAW, *supra* note 6, at 35, 36–37 (discussing how civil law tradition connected the public interest to public law); Mark Freedland, *Law, Public Services, and Citizenship—New Domains, New Regimes?*, in PUBLIC SERVICES AND CITIZENSHIP IN EUROPEAN LAW, *supra* note 6, at 1, 33–34 (same); Carol Harlow, *Public Service, Market Ideology, and Citizenship*, in PUBLIC SERVICES AND CITIZENSHIP IN EUROPEAN LAW, *supra* note 6, at 49, 53–54 (same).

18. Public law in common law America and England is far less well developed than in civil law Europe. However, various public law doctrines have been incorporated in our system of administrative law. See RICHARD J. PIERCE, JR., SIDNEY A. SHAPIRO & PAUL R. VERKUIL, ADMINISTRATIVE LAW AND PROCESS § 1.1 (4th ed. 2004). See generally ADAM TOMKINS, PUBLIC LAW (2003) (describing the development of English public law).

19. See Paul R. Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 340–41 (1989) (connecting the public interest to the rule of law); Paul R. Verkuil, *Understanding the “Public Interest” Justification for Government Actions*, 39 ACTA JURIDICA HUNGARICA 141, 142 (1998) [hereinafter Verkuil, *Understanding Public Interest*] (describing various formulations of the public interest and seeking to define it in rule of law terms) (quoting KENNETH CULP DAVIS & RICHARD J. PIERCE, 1 ADMINISTRATIVE LAW TREATISE § 2.6, at 67 (3d ed. 1994)).

phrase is offensively self-fulfilling in a liberal society where the presumption is in favor of private interests. Classical liberals believe with Adam Smith that the exercise of self (private) interest is the best way to represent the public interest,²⁰ guaranteeing controversy when the assertion of an independent public interest is made. The broad public interest justifications acceptable to the New Deal, for example, were constantly challenged during the Reagan presidency.²¹ The Reagan spirit animates the current Administration as well. The focus on an ownership society is meant to undermine the underlying values of the New Deal itself.²² The privatization movement also challenges expansive notions of the public interest. But this debate is hard to conclude.

As the definition in Justinian's Digests suggests²³ and history demonstrates, the line between public and private regularly shifts over time.²⁴ Private law traditionally encompassed the common law of contract, torts, and property that regulate relations among individuals.²⁵ But the term "private" is hardly any more self-evident (or any less self-fulfilling) than the term "public." Since law and its enforcement are public acts, all legal regimes, even if ostensibly private at common law, are in some sense public.²⁶ Additionally, otherwise private relations are often umpired and regulated by

20. See, e.g., Charles Silver & Frank B. Cross, *What's Not To Like About Being a Lawyer?*, 109 YALE L.J. 1443, 1479 (2000) (arguing that private sector lawyers, by pursuing their self-interest, make an "enormous economic contribution to social welfare").

21. See Paul R. Verkuil, *Reverse Yardstick Competition: A New Deal for the Nineties*, 45 U. FLA. L. REV. 1, 4-5 (1993) (describing how Reaganomics brought the New Deal to a halt).

22. See, e.g., Paul Krugman, *The Fighting Moderates*, N.Y. TIMES, Feb. 15, 2005, at A19 ("[I]t takes an act of willful blindness not to see that the Bush plan for Social Security is intended, in essence, to dismantle the most important achievement of the New Deal.").

23. See DIG. 1.1.1.2-4 (Ulpian, Institutes 1) (1 THE DIGEST OF JUSTINIAN, *supra* note 16, § 1) (noting that some matters of private law can be of public interest and dividing private law into a tripartite structure, including natural law, the law of nations, and civil law).

24. Indeed, even in France, which has always embraced the public-private distinction in its legal system, the dividing line between the ordinary and administrative courts has to be adjudicated by the *Tribunal des Conflits*. See L. NEVILLE BROWN & JOHN S. BELL, *FRENCH ADMINISTRATIVE LAW* 144-45 (4th ed. 1993).

25. For a good discussion of the public-private distinction as it relates to English common and public law, see MARTIN LOUGHLIN, *THE IDEA OF PUBLIC LAW* 6, 77-80 (2003).

26. Since much of the common law has become statutory, one can view the work of legislatures in this regard as the publicization of private law. For example, contracts are only enforceable through public acts. See F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 230-32 (1960).

government.²⁷ In our society, the Constitution continuously expands or contracts the private category through definitions of property or privacy. Each time it does, the role of government is expanded or inhibited accordingly.²⁸ To the extent that America is characterized as a “deliberative democracy,”²⁹ we can always expect the legal definition of private and public to ebb and flow based on the preferences of interest groups, political parties, and the views of the judiciary.

When government delegates public powers to private hands, as when it “privatizes” regulatory activity, the impact on the public interest is hard to measure.³⁰ To some degree, making public actions “private” validates the close connection between these two concepts. On the other hand, the potential transfer of power to private hands raises procedural as well as substantive questions: do public law controls, such as oversight and accountability, come with the delegations; should private parties be able to wield public power? These rule of law based considerations help establish a dividing line between public and private. That line is fundamental—it ultimately distinguishes liberal society from its despotic alternatives.³¹ Fairness in procedures, indeed legalism itself, is how the liberal state is defined. Viewed in philosophical terms, through the work of Stuart Hampshire for example, process is not only a basic condition of the

27. See, e.g., Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621–634 (2000) (displacing “private” tort remedies with government regulatory programs).

28. For example, the First Amendment in separating church and state ensures a “private sector” for religion. And the Due Process Clause can also cover even larger notions of privacy. See *Lawrence v. Texas*, 539 U.S. 558, 567, 578–79 (2003) (holding that consensual and private sex acts may not be reached by sodomy laws); cf. Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1401–04 (2004) (asserting that the case announces a “privatized liberty right”).

29. See David M. Ryfe, *Deliberative Democracy and Public Discourse*, in PUBLIC DISCOURSE IN AMERICA, *supra* note 13, at 40, 42–45 (comparing deliberative democracy to individual rights and social choice theories and noting that many Americans prefer “political privatization”). See generally RICHARD POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* (2003) (expressing generally critical views of deliberative democracy).

30. The question of privatization becomes the political one of how far “the individualization of judgments about what constitutes public value” can or should go in our society. See Mark H. Moore, *Introduction to Symposium, Public Values in an Era of Privatization*, 116 HARV. L. REV. 1212, 1218 (2003) (discussing the left-right politics of the privatization debate).

31. The dividing line between democracy and fascism has been said to consist of some limits upon the merger of the public and private sectors. See ROBERT O. PAXTON, *THE ANATOMY OF FASCISM* 11 (2004) (stating that in fascism, “an individual had no rights outside [the] community interest”).

liberal state, but of human nature itself.³² Delegations of government authority to private hands in our society are not simple transfer decisions. They come with strings attached that ensure fairness at the individual level and accountability at the political level. In this way, the debate about public versus private becomes a meditation on our constitutional values.

B. Constitutional Connections to the Public-Private Distinction

The public-private distinction underpins our common law and constitutional traditions. These traditions in turn help set limits on the impulse to privatize. But before reaching that point, the constitutional roots of the distinction are worth remembering.

The public-private distinction was central to the natural rights liberalism of John Locke,³³ who transmitted the values of the Glorious Revolution to the Constitution's drafters.³⁴ Locke saw the emergence of separate realms of public and private as essential conditions of the liberal democratic state.³⁵ To some extent, Locke

32. STUART HAMPSHIRE, *JUSTICE AS CONFLICT* 4 (2000). Stuart Hampshire makes a powerful case for "adversarial thinking" as a constraint on human nature. *See id.* at 12. In the privatization setting, the issue becomes whether procedures will be transferred along with delegated duties. *See* discussion *infra* notes 148–49 and accompanying text.

33. Social contract theorists from John Locke to John Rawls have understood the role of government in civil society to be a limited and consensual one. For Locke, the purpose of government (commonwealth) was the preservation of both private property and the civil society. But he talks about the need for the ruler to act for the "public good." JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 124–25 (Thomas P. Peardon ed., 1952) (1690); *see* J. RAWLS, *A THEORY OF JUSTICE* 11–17 (1971). One difference between Locke and Rawls, however, is that Locke accepts that there is a "public body" that has a right to preserve itself, whereas Rawls's liberalism rejects the notion of political society as a community. *See* PETER JOSEPHSON, *THE GREAT ART OF GOVERNMENT—LOCKE'S USE OF CONSENT* 11–12 (2002).

34. *See* DAVID S. LOVEJOY, *THE GLORIOUS REVOLUTION IN AMERICA* 235–70 (1972) (describing how the colonies responded to the 1688 Glorious Revolution in England). Locke's influence on the Constitution and the Declaration of Independence is well established. *See* GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 14 (1969) (showing how American colonists "borrowed promiscuously" from John Locke, among others); *see also* *Mistretta v. United States*, 488 U.S. 361, 420–21 (1989) (Scalia, J., dissenting) (quoting John Locke on nondelegation of legislative powers). *See generally* HAYEK, *supra* note 26, at 169–71 (placing Locke at the center of the Glorious Revolution's creation of the rule of law).

35. Underpinning Locke in this regard was Benedict de Spinoza, who perceived the need to create a public-private dichotomy from the prospective of a religious minority. *See* STEVEN NADLER, *SPINOZA'S HERESY* 19–22 (2001). The motivation for Spinoza's political philosophy was the "theologico-political problem," the resolution of which required the separation of church and state. STEVEN B. SMITH, *SPINOZA, LIBERALISM, AND THE QUESTION OF JEWISH IDENTITY* 1–27 (1997); Steven B. Smith, *On Leo Strauss's Critique of Spinoza*, 25 *CARDOZO L. REV.* 741, 751–52 (2003).

and his followers³⁶ (including our constitutional drafters) made liberal democracy a theory about what can be made public. The Constitution employs the words “public” and “private” in ways that acknowledge the historical distinction between them.³⁷ And by placing sovereignty in the people, both liberal theory and the Constitution make the political sovereign the source of delegated, not inherent, powers. The powers not thereby granted remain as private rights.³⁸ Public law must justify itself in these terms. It does so through the law of the Constitution and, by extension, of the administrative state which undergirds it.³⁹ By pursuing expressions of public and private contained in our Constitution, the connections between these words emerge.

1. The Fifth Amendment’s “Public Use” Requirement

The Just Compensation Clause of the Fifth Amendment⁴⁰ both guarantees the existence of private property and limits the extent to which government may commandeer (or “publicize”) it. The “public use” requirement expresses the constitutional limits implicit in the public-private distinction. By second guessing what can be made public and protecting something private, the clause mediates the boundaries between the two concepts. Interpreting this clause is one

36. See generally WILHELM VON HUMBOLDT, *THE LIMITS OF STATE ACTION* (1852) (J.W. Burrow ed., 1969). Von Humboldt’s classic work, which inspired John Stuart Mill’s *On Liberty*, focused on the need to restrain government activity as a means of preserving individual freedom.

37. The Constitution uses the word “public” in several ways: “public money,” U.S. CONST. art. I, § 9, cl. 7; “public acts,” U.S. CONST. art. IV, § 1; “public danger,” U.S. CONST. amend. V; “public debt,” U.S. CONST. amend. XIV, § 4. While the word “private” is not attached to “property” in the Due Process Clause of the Fifth and Fourteenth Amendments, its presence is to be assumed. U.S. CONST. amend. V and XIV. The phrase “private property” is used in the Just Compensation Clause of the Fifth Amendment. U.S. CONST. amend. V. It should be noted that the word “property” may not mean the same thing in these different constitutional contexts. See Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 893, 954–56 (2000); see also *E. Enters. v. Apfel*, 524 U.S. 498, 557 (1998) (Breyer, J., dissenting) (“[Property] appears in the midst of different phrases with somewhat different objectives, thereby permitting differences in the way in which the term is interpreted.”).

38. This is the purpose of the Ninth and Tenth Amendments which speak of rights “retained by” or “reserved to” the people. See U.S. CONST. amends. IX & X; RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* 354–57 (2004) (rejecting the social contract theory but urging protection of liberty through application of the Ninth and Tenth Amendments).

39. See generally A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 179–201, 324–401 (8th ed. 1915) (providing the classical description of the role and limits of constitutional law and administrative law in England).

40. U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

of the best ways to define the public-private distinction in constitutional terms.

Despite this conceptual purpose, however, the “public use” doctrine has not often been used in an authoritative way.⁴¹ The Supreme Court has usually left the interpretation of public use to state courts, which do not move in consistent directions.⁴² In a recent example, the Michigan Supreme Court in *County of Wayne v. Hathcock*⁴³ articulated public use limits upon the transfer of private property to private rather than public hands.⁴⁴ *Hathcock*’s limitations upon public use seemed both to preserve the public-private distinction and to support a process based limitation upon the privatizing of public functions.⁴⁵ On the other hand, the Connecticut Supreme Court, in *Kelo v. City of New London*,⁴⁶ in permitting transfers of public property to private developers for economic development purposes,⁴⁷ glossed over the public-private distinction. As Stuart Sterk argues, the only consistent thing one can say about the public use cases is that the Supreme Court honors the underlying federalism values behind state court interpretations.⁴⁸ However, the “consistency” of the federalism approach to public use has itself been challenged.

The Supreme Court affirmed *Kelo* in a 5–4 decision, but the pro-federalism Justices were counted in the minority. They sought to

41. The Court has left it largely to Congress or state legislatures to decide what is a public use. See, e.g., *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 239–43 (1984) (state); *Berman v. Parker*, 348 U.S. 26, 32–33 (1954) (federal). See generally, Errol E. Meidinger, *The “Public Uses” of Eminent Domain: History and Policy*, 11 ENVTL. L. REP. 1 (1980) (discussing shifting definitions of public use).

42. See *Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004) (holding economic development by private entities an acceptable public use under federal and state constitutions over strong dissents), *aff’d.*, 125 S. Ct. 2655 (5–4) (2005); *County of Wayne v. Hathcock*, 684 N.W.2d 765, 788 (Mich. 2004) (holding condemnation for a business park fails the public use test).

43. 684 N.W.2d 765 (Mich. 2004).

44. See *id.* at 786–87 (overruling an earlier decision, *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (1981)).

45. The *Hathcock* court limited the condemnation of private property for transfer to private hands under the public use doctrine to situations where there was: (1) public necessity; (2) public oversight; and (3) a public concern. See *id.* at 781–83. These limitations give meaning to a concept of public use that respects public control and limits and also accountability (oversight).

46. 843 A.2d 500 (Conn. 2004), *aff’d.*, 125 S. Ct. 2655 (5–4) (2005); see discussion *supra* note 42 and accompanying text.

47. *Kelo*, 843 A.2d at 561–62.

48. See Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 222–26 (2004) (explaining the confused results in takings cases as an (overlooked) function of federalism).

restore a public-private line and balked at further diluting the idea of “public use.”⁴⁹ Justice Stevens’ majority opinion, reflecting the Court’s dominant view, equated public use with “public purpose” and approved the use of eminent domain proceedings for economic development purposes.⁵⁰ But Justice O’Connor’s biting dissent sought to infuse “public use” with constitutional content.⁵¹ Accusing the majority of trying “to wash out any distinction between private and public use of property,” she refused to defer to state legislative judgments or to equate public use with the broad exercise of police power.⁵² For Justice Thomas, also in dissent, the limitations upon public use were even clearer; he found that the Constitution elsewhere defined “use” in the narrow sense of government ownership or control.⁵³ These dissents may signal a revival of classical property law limitations upon public use.⁵⁴ They surely help resuscitate the public-private distinction elucidated here.

Indeed, the public use requirements of the Just Compensation Clause, if so revived, connect directly to the Lockean concept of limited government discussed above.⁵⁵ The renewed vigor with which the dissenters in *Kelo* supported a fixed meaning of public use makes these historical sources all the more relevant. But employing them to frame a coherent idea of public use may not yield any more consistency than the current federalism-based approach. As with the “affected with a public interest” category discussed in the next Section, the application of principle to specific facts inevitably produces indeterminacy.

49. *Kelo v. City of New London*, 125 S. Ct. 2655, 2668 (2005).

50. *Id.* at 2667 (rejecting a bright line rule against transfers of private property to private developers and rejecting “empirical debates over the wisdom of takings”).

51. Justice O’Connor identified three categories of takings: transfers of private property to public ownership (e.g., for roads); transfers to common carriers (e.g., railroad rights of way); and limited transfers to satisfy public purposes. *Id.* at 2673 (O’Connor, J., dissenting). While *Kelo* involved the third category, with its still unresolved dimensions, the second category reflects the “affected with a public interest” test discussed in the next section.

52. *Id.* at 2671 (Thomas, J., dissenting).

53. *Id.* at 2678–79. Justice Thomas also refers to the common law background of the Constitution as reinforcing a narrower (Blackstone-inspired) definition of public use. *Id.* at 2677.

54. See Richard A. Epstein, Op-Ed, *Supreme Folly*, WALL ST. J., June 27, 2005, at A14 (calling the majority opinion “a new low point in the Supreme Court’s takings jurisprudence”).

55. See discussion *supra* notes 33–36 and accompanying text.

2. The Rise and Fall of "Affected with a Public Interest"

The public-private distinction is often equated with the nineteenth century rise of capitalism. Public charters, which had earlier been granted by government to provide protection for established monopolies, were challenged by new enterprises eager to enter those restricted markets.⁵⁶ Legislatures distinguished private corporations from public ones, and the Supreme Court guaranteed Contracts Clause protection for new enterprises.⁵⁷ The corporate identity itself—through the expanded concept of limited liability—helped make capital formation easier and more accessible. As Richard Epstein explains, incorporation conferred "upon corporations and their shareholders a privilege against the rest of the world that they could not obtain under the usual rules of property, contract, and tort."⁵⁸ In this way, public law became an early instrument in the expansion of private enterprise.

But public law also constrained this expanded private power. The concept of businesses "affected with a public interest" granted states regulatory control over private monopolies. In *Munn v. Illinois*,⁵⁹ the Court traced the "affected with a public interest" concept back to English common law,⁶⁰ under which "common carriers" with monopoly power were controlled from the earliest times.⁶¹ However, this connection was often attenuated, and tying the fate of common carriers to the shifting sands of monopoly power did

56. See *Charles River Bridge v. Warren Bridge*, 36 U.S. 420, 549–52 (1837) (holding that the Contract Clause cannot be used to protect existing state-chartered bridges from new competition); see also Henry N. Butler, *Nineteenth Century Jurisdictional Competition in the Granting of Corporate Privileges*, 14 J. LEGAL STUD. 129, 138–42 (1985) (discussing abuses of the special charter system).

57. See *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat) 518, 707–12 (1819) (explaining that the State cannot abrogate a grant to a private corporation by public action of reincorporation); RICHARD EPSTEIN, *BARGAINING WITH THE STATE* 107 (1993) (emphasizing importance of limited liability to the growth of the economy).

58. EPSTEIN, *supra* note 57, at 107.

59. 94 U.S. 113 (1876).

60. *Id.* at 123–25; see also LOUGHLIN, *supra* note 25, at 77–80 (describing the emergence of the public-private distinction in English law).

61. The common law had always subjected "common carriers" to absolute liability when they exercised their economic powers to raise prices and restrict output. Hackmen, ferrymen, wharfmen, innkeepers, and the like had economic control over commerce that rendered them common rather than private carriers. See generally SIR MATTHEW HALE, *THE HISTORY OF COMMON LAW OF ENGLAND* (C.M. Gray ed., 1971) (providing a general history of English law). The category of common carriers was loosely tied to the exercise of monopoly power.

not always make economic sense.⁶² But even after *Munn*, the “affected with a public interest” concept maintained its vitality.

Once substantive control of enterprise was established, the focus shifted to the regulatory overseers, the bureaucracy itself. The “spoils” system of government, emblematic of the administrations of Presidents Jackson and Grant,⁶³ came under attack for undermining the effectiveness of the regulatory process. To regulate in the public interest government had to confront the need to bring integrity, if not competency and efficiency, into the public service.⁶⁴ Civil service reform helped reshape the political process into a public interest regime.⁶⁵ In fostering oversight and accountability through professional management, government tried to remove process deficiencies from the existing regulatory model.⁶⁶ By subjecting the administrative process to the rule of law, regulations became a more rational exercise.

The “affected with a public interest” theory of regulation, the formation of the civil service,⁶⁷ and the rule of law are all related. Professional administration coupled with legal process defined public interest by adding fairness, transparency, and accountability to regulation. This idealized version of the beginnings of public management contains a necessary truth: without the connection to the rule of law, the definitional vagueness of the “affected with a public interest” concept would be unacceptable. The rule of law

62. Oliver W. Holmes questioned whether there should be special liability rules for all common carriers, but reserved some room for special cases, such as railroads, which clearly possessed monopoly power. See O.W. HOLMES, *THE COMMON LAW* 155–62 (1881) (Mark DeWolf Howe ed., 1963). *The Civil Rights Cases*, 109 U.S. 3, 37–38 (1883) (Harlan, J., dissenting), focused on the public use aspects of *Munn* to justify federal antidiscrimination legislation held unconstitutional in that case. See Paul R. Verkuil, *Privatizing Due Process*, 57 ADMIN. L. REV. 669, 670–71 (2005).

63. See, e.g., ARTHUR M. SCHLESINGER, JR., *THE AGE OF JACKSON* 45–47 (1953) (describing President Jackson’s doctrine of “rotation in office,” also known as the spoils system).

64. See Civil Service (Pendleton) Act of 1883, ch. 27, 22 Stat 403.

65. See WILLIAM E. NELSON, *THE ROOTS OF AMERICAN BUREAUCRACY 1830–1900*, at 119–25 (1982) (providing a thorough analysis of the civil service reform period of the late nineteenth century).

66. In England, the notion of civil service predated our own. See DICEY, *supra* note 39, at 384–87 (describing servants of the Crown and distinguishing the English Civil Service under the rule of law from the French *droit administratif*).

67. Professor Nelson attributes the creation of the term “civil service” to British reformers. See NELSON, *supra* note 65, at 119. The connection of “civil service” to “civil society,” mentioned earlier, see discussion *supra* notes 13–14 and accompanying text, is also of significance.

forces some degree of rationality upon the regulatory process,⁶⁸ and the presence of a professional civil service removes some degree of politics from the outcome. In our pluralistic society where agreement on ends is never assured, justice as process at least provides agreements in means. For Stuart Hampshire, who stipulates substantive disagreements over concepts of justice in society, the common commitment to procedural justice is what permits a just society to emerge.⁶⁹

Regulation of the abusive exercise of economic power has deep roots. Even during the era of *Lochner v. New York*,⁷⁰ when regulation based on the conclusory notion of "public interest" was consistently challenged, the monopoly-based theory underlying *Munn* managed to survive.⁷¹ In otherwise constitutionalizing the private interests protected by liberty of contract,⁷² *Lochner* traced its roots back to the notions of liberalism inspired by Locke. Its premises were tied to deeply felt ideas of individualism and economic liberty.⁷³ Later, a more skeptical Court, inspired by Holmes' *Lochner* dissent,⁷⁴ ultimately rejected these premises. Ironically, it also threw out the monopoly-based definition of "affected with a public interest" that had survived during the *Lochner* period.⁷⁵ Perhaps, as Professor

68. See Verkuil, *Understanding Public Interest*, *supra* note 19, at 146–49 (explaining the historical concept of public interest in rule of law terms).

69. See HAMPSHIRE, *supra* note 32, at 4–5 (connecting procedural justice to adversary reasoning); see also discussion *supra* note 32 and accompanying text.

70. 198 U.S. 45 (1905).

71. Of course, the regulation of monopoly had been granted statutory status in the Sherman Act after the *Munn* decision, which permitted direct regulation to support, if not supplant, "affected with a public interest" regulation. See Sherman Act of 1890, ch. 647, 26 Stat. 209 (codified as amended at 15 U.S.C. §§ 1–7 (2000)), amended by Pub. L. No. 108-237, 118 Stat. 661 (2004). Also, in 1887, the Interstate Commerce Commission established rate regulation as a bureaucratic goal. See NELSON, *supra* note 65, at 130–33.

72. See David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373, 374–75 (2003) (arguing that *Lochner*'s error was in exalting liberty of contract). But see Richard A. Epstein, *The Perils of Posnerian Pragmatism*, 71 U. CHI. L. REV. 639, 654–55 (2004) (challenging Strauss' views on *Lochner*); Richard A. Posner, *Pragmatic Liberalism Versus Classical Liberalism*, 71 U. CHI. L. REV. 659, 661 (2004) (assailing Epstein's desire to make "freedom of contract the supreme constitutional principle").

73. See BARNETT, *supra* note 38, at 211–18, 222–23 (extolling the virtues of *Lochner* and theorizing about its revival); see also, Trevor W. Morrison, *Lamenting Lochner's Loss: Randy Barnett's Case for a Libertarian Constitution*, 90 CORNELL L. REV. 839, 840–45 (2005) (critiquing the libertarian constitution).

74. See *Lochner*, 198 U.S. at 74–76 (Holmes, J., dissenting) ("The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics.").

75. See *Nebbia v. New York*, 291 U.S. 502, 538–39 (1934) (permitting state regulation of retail milk prices and effectively undermining the monopoly-based limitation upon the "affected with a public interest" concept). But see *Mayflower Farms, Inc. v. Ten Eyck*, 297 U.S. 266, 274 (1936) (striking down a New York milk regulation designed to freeze out

Horwitz has argued, rejection of the monopoly based limits of public interest was the fault of the Legal Realists, who, in debunking the idea of a truly private sector, also undermined the notion of a truly public sector.⁷⁶ But once freed from its historical moorings, the public interest concept became just another legal fiction, which made it fair game for later critics of government regulation.⁷⁷ Today the focus is more on the procedural side of regulation since the public interest rationale is less able to serve as a justifying or limiting principle.⁷⁸

3. Public Functions and Process Limits

The public interest concept flourished during the New Deal, which subjected many kinds of previously unregulated private enterprises to government control.⁷⁹ An invigorated bureaucracy transformed government's relationship to the private sector, which made government service a creative enterprise.⁸⁰ The Roosevelt administration acted through agencies (such as the Securities and Exchange Commission) and made extensive use of governmental

competitors). See generally Barry Cushman, *The Great Depression and the New Deal*, in CAMBRIDGE HISTORY OF LAW IN AMERICA (forthcoming 2006) (describing post-*Nebbia* New Deal cases that preserved the monopoly distinction).

76. See Morton J. Horwitz, *The History of the Public-Private Distinction*, 130 U. PA. L. REV. 1423, 1426–27 (1982); see also Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1351–57 (1982) (discussing the merger of public and private). But see Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 874–75 (1987) (reaffirming *Lochner's* assumption about neutrality of the common law in the state action context).

77. See generally HARRISON, MORGAN, & VERKUIL, *supra* note 5, at 56–120, 250–421 (describing public choice critiques of regulation); Verkuil, *Understanding Public Interest*, *supra* note 19, at 146–50 (discussing ways in which the public interest is still evoked without analysis).

78. Interestingly, if *Lochner's* substantive due process approach was to be revived, as Professor Barnett has suggested, see BARNETT, *supra* note 38, at 120–24, the public interest could be attacked directly, and then its monopoly-based rationale might reemerge. See also BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 264–66 (1980) (comparing *laissez-faire* to “an active, yet principled, conception of governmental regulation”).

79. See Verkuil, *Understanding Public Interest*, *supra* note 19, at 142 (listing the Federal Communications Commission as a New Deal agency whose mandate was to regulate in “the public interest, convenience and necessity”); see also JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 40–41 (1938) (describing the virtues of regulatory agencies); MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT* 250–55 (1996) (comparing the National Recovery Administration to other New Deal regulatory initiatives).

80. The New Deal made the bureaucracy a challenging profession precisely because its powers could be exercised so creatively. See P.H. IRONS, *THE NEW DEAL LAWYERS passim* (1982) (documenting the career paths in government of top law school graduates); see also DAVID E. LILIENTHAL, *THE JOURNAL OF DAVID E. LILIENTHAL—THE TVA YEARS 1939–1945*, 10–13, 549 (1964) (discussing author's years at Harvard Law School and his relationship to Felix Frankfurter).

corporations.⁸¹ The notion of “yardstick” competition,⁸² with government showing private enterprise how to compete, gave government an entrepreneurial role in major projects like the Tennessee Valley Authority.⁸³ It also suggested an arrogance—government can not only regulate better, it can compete better—that would be short lived. In a way, the privatization movement may be government’s way of doing penance for its earlier assumption of private roles.

After *Nebbia v. New York*,⁸⁴ challenges to the substance of the regulation were virtually foreclosed.⁸⁵ But greater calls for procedural regularity were increasingly heard. The expressed fear was that administrative regulations would overwhelm the rule of law and jeopardize the premises of the liberal democratic state.⁸⁶ Conservatives, outflanked on the substance of New Deal legislation, turned to process as a means of restricting substantive goals.⁸⁷ The Administrative Procedure Act (“APA”)⁸⁸ emerged to accommodate the appropriate role of process. Today the APA remains the primary method for achieving procedural justice in the federal administrative state.⁸⁹

The Due Process Clause was also invoked, but in its procedural, not substantive (i.e., Lochnerian) sense. The “public function” doctrine subjected private activities to government control. In cases like *Smith v. Allwright*⁹⁰ and *Marsh v. Alabama*⁹¹ the Supreme Court

81. See *Lebron v. Nat’l. R.R. Passengers Corp.*, 513 U.S. 374, 394 (1995) (describing the New Deal as the “heyday of those corporations”).

82. See Jeffery L. Harrison, *Yardstick Competition: A Prematurely Discarded Form of Regulatory Relief*, 53 TUL. L. REV. 465, 466 (1979).

83. See generally LILIENTHAL, *supra* note 80 (describing the TVA experience).

84. 291 U.S. 502 (1934); see also *supra* note 75 (providing related public interest cases).

85. See BARRY D. KARL, *THE UNEASY STATE* 131–39 (1983) (describing the heights of New Deal social legislation).

86. Roscoe Pound, as chair of the American Bar Association Committee to Create the Administrative Procedure Act, was a most outspoken advocate of the New Deal’s penchant for “administrative absolutism.” See 63 A.B.A. REP. 339–46 (1938). See generally Paul R. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 260, 268–70 (1978) (discussing the New Deal’s challenges to established notions of the rule of law).

87. See Verkuil, *supra* note 86, at 270–72 (describing the battle between procedural conservatives and regulatory liberals that led to the compromise of the Administrative Procedure Act).

88. 5 U.S.C. §§ 551–559, 701–706 (2000 & Supp. II 2002).

89. See generally PIERCE, SHAPIRO, & VERKUIL, *supra* note 18, § 2.3 (describing the APA’s role).

90. 321 U.S. 649 (1944).

91. 326 U.S. 501 (1946).

extended “state action” status to private entities, such as company towns, that by their monopoly positions inevitably performed public functions.⁹² Echoing *Munn*, these cases essentially designated monopolistic private entities as “affected with a public interest.” The exercise of monopoly power by these private entities became, as had the exercise of monopoly by the grain elevators in *Munn*, the justification for regulation. These cases in effect overcame limits on state action earlier declared under the Fourteenth Amendment.⁹³ In reconnecting due process to the exercise of private power, the Court in the public function cases achieved public accountability and oversight. Over time, the public function test has waned in influence. The Court, while continuing to recognize that the test tracked the monopoly concerns behind regulation,⁹⁴ seems to have abandoned the quest for an adequate definition of public function.⁹⁵

The “public function” and “public interest” tests suffer from the same definitional weaknesses, so it is not surprising that the Court is hesitant to give them legal force. But it is surely intriguing that those members of the Court who hesitate to give these open-ended terms legal content have in their *Kelo* dissents embarked on a comparable attempt to define “public use” under the Fifth Amendment.⁹⁶

“Public function,” “public interest,” and “public use” share a checkered history as legal concepts. But since they capture broad legal and social concerns, they cannot be avoided. Thus, while demurring on the merits of the public-private distinction, the Court is still entangled in its various substantive manifestations. And the

92. See *Marsh*, 326 U.S. at 506 (finding that a “company” town performs public functions and is subject to First Amendment control); *Smith*, 321 U.S. at 663–64 (noting that conduct of elections is a public function); see also *Terry v. Adams*, 345 U.S. 461, 469 (1953) (same); Gillian Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1422–24 (2003) (describing public functions).

93. See *The Civil Rights Cases*, 109 U.S. 3, 25–26 (1883) (declaring a federal statute that would have prevented certain private businesses from discriminating constitutional under the Fourteenth Amendment); see also *Verkuil*, *supra* note 62, at 670 (discussing how the “Supreme Court limited the potential reach of the Due Process clause in the *Civil Rights Cases*” to state action).

94. The monopoly point was raised by the Court in *Flagg Brothers v. Brooks*, 436 U.S. 149, 162 (1978), when it distinguished the private monopoly in *Marsh* from the wide number of choices debtors and creditors have under the state self-help statute in *Flagg*. Professor Metzger has also connected the state action cases to the Court’s earlier concerns with private delegations in cases like *Carter Coal*. See Metzger, *supra* note 92, at 1444 (noting this as a link the Court itself has failed to make).

95. See, e.g., *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 348 (1974) (regulation of private utility is not “state action” under the due process clause of the Fourteenth Amendment); see also *Verkuil*, *supra* note 62, at 674–75 (describing the state action pullback led by *Jackson*).

96. See discussion *supra* notes 49–53 and accompanying text.

distinction continues to demand process controls that reflect the rule of law values connected to our political and legal traditions.

C. *New Property and the Old Bureaucracy*

The emergence of the concept of "new property" complicated the rule of law.⁹⁷ In the 1960s the administration of government benefit programs fell under increased judicial scrutiny. The notion of government as a neutral and benign dispenser of privileges was systematically deconstructed.⁹⁸ The expansion of programs begun in the New Deal ultimately tested the limits of due process based procedures. Once subjected to rights based analysis, many processes of government were exposed as arbitrary or even irrational.⁹⁹ Faith in bureaucracy waned¹⁰⁰ and the underlying public interest rationales for regulatory programs suffered. *Goldberg v. Kelly*,¹⁰¹ which focused on the procedural rights of beneficiaries of welfare programs, became the emblematic case for judicial intervention.¹⁰² In a way, *Goldberg* did to government control of public property procedurally what *Lochner* had done for government control of private property substantively. But *Goldberg* could no more sustain itself than *Lochner* could. Its thoroughgoing commitment to the adversary model proved unworkable,¹⁰³ and the Supreme Court soon limited the

97. Charles Reich, *The New Property*, 73 YALE L.J. 733, 778-86 (1964) (declaring rights to government benefits, privileges, and licenses to be new property no less entitled to legal protection than traditional forms of property); see William Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1451-57 (1968). As Professor Van Alstyne showed, the demise of the right-privilege distinction meant an expansion of due process protection for certain kinds of property. *Id.* The public-private distinction relates to the right-privilege distinction in the sense that it shifted certain property interests from the private to the public side of the equation. *Id.*

98. This same discontent with the provision of public services occurred in England as well. See Faulkner, *supra* note 17, at 35, 35-37.

99. But see JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 4 (1983) (advocating alternatives to adversary decisionmaking); Paul R. Verkuil, *The Self-Legitimizing Bureaucracy*, 93 YALE L.J. 780, 790-91 (1984) (endorsing Mashaw's search for an "internal" administrative process).

100. Cf. Daniel R. Ernst, *Law and State, 1920-2000*, in CAMBRIDGE HISTORY OF LAW IN AMERICA 33-34 (Michael Grossberg & Christopher L. Tomlins eds., 2004) (documenting through the work of James Landis the later disaffection with New Deal versions of bureaucracy).

101. 397 U.S. 254 (1970).

102. *Id.* at 264 (constitutionalizing adversary-type welfare procedures under the Fourteenth Amendment Due Process Clause).

103. Unworkable in the sense that few government programs could measure up to the demands to provide adversary procedures dictated by *Goldberg*. See Paul R. Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739, 777 (1976) (describing numerous federal programs that failed to provide *Goldberg* procedures). Ultimately, the decision costs of procedural changes and the potentially limited rewards in enhanced

application of the Due Process Clause and the state action doctrine.¹⁰⁴ The Court has been retreating from intrusive procedural review ever since,¹⁰⁵ and Congress has also limited process rights in government programs.¹⁰⁶ As a result, the Due Process Clause has become a less active monitoring device for assuring the rule of law.

D. *The Present State of the Public-Private Distinction*

In the 1990s, the distinction was further blurred when private solutions became increasingly attractive alternatives to government decision making. Spurred on by productivity goals that were sweeping the private sector,¹⁰⁷ government was increasingly viewed as inefficient and bloated.¹⁰⁸ When President Clinton announced that the era of big government was over¹⁰⁹ and Vice President Gore's reinventing government initiative began downsizing government employment,¹¹⁰ the public interest was increasingly equated with market solutions.

The fallout from this merger of public and private was predictable: trust in government hit new lows in public opinion polls and "bureaucracy" became a pejorative term.¹¹¹ When the deregulation and privatization movements merged, the concept of

accuracy led the Court to establish a new due process standard of procedural balancing. See *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976) (creating a three-prong balancing test to determine what procedures due process requires).

104. See Verkuil, *supra* note 62, at 672–73 (describing the judicial retrenching on due process and state action after *Goldberg*). The pivotal case was *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 358 (1974), where the Court refused to subject the procedures of a state regulated utility to due process analysis. See also *Lujan v. G&G Fire Sprinklers, Inc.*, 532 U.S. 189, 197 (2001) (finding due process adequately provided by common law contract suit); *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 51 (1999) (finding no state action under § 1983 in a state-authorized suit against a private insurer).

105. See PIERCE, SHAPIRO, & VERKUIL, *supra* note 18, § 6.3.1 (describing cases).

106. See, e.g., Personal Responsibility and Work Opportunity Act, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (replacing AFDC payments with block grants and declaring no entitlement in the grants).

107. Total Quality Management and reengineering were favorite concepts. See DAVID OSBORNE & TED GAEBLER, *REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR* xix, 21–22, 159–60 (1992).

108. See Verkuil, *supra* note 21, at 4–9 (documenting government efforts to privatize during the Reagan, Bush I, and Clinton administrations).

109. See Verkuil, *Understanding Public Interest*, *supra* note 19, at 147.

110. Paul R. Verkuil, *Is Efficient Government an Oxymoron?*, 43 DUKE L.J. 1221, 1222–23 (1994).

111. See CHARLES T. GOODSSELL, *THE CASE FOR BUREAUCRACY* 1–23 (4th ed. 2004) (discussing the controversial nature of bureaucracy).

"deregulating the public service" was born.¹¹² It hardly seemed to matter that the phrase had been misconstrued (it was meant to "free" government employees to be more effective, not to turn over all functions of government to the private sector¹¹³). The new lexicon of government management now included "privatization," "public and private partnerships," "deregulation," "downsizing," and "self-regulation."¹¹⁴

The success of these initiatives creates a new political reality. Privatization places few limits on the exercise of public functions by private contractors, and downsizing has led to fewer federal civilian employees to do the work of the government.¹¹⁵ President Bush is pushing to "privatize" 850,000 more civilian employees.¹¹⁶ Some view this development as further demonstration of a bloated bureaucracy,¹¹⁷ and surely some of the positions are unessential. But continued contraction of the civil service also has adverse effects on the public interest. Downsizing poses limits on both the capacity to govern and the capacity to oversee or process those who do the work of government. The rule of law values of oversight and accountability, which first justified and then survived the era of direct public control, cannot be realized without competent public officials. Professional government leadership is increasingly in short supply. Some day it may not be entirely facetious to ask, when the last government employee leaves, will she please turn out the lights.

112. See John J. DiIulio, Jr., *What Is Deregulating the Public Service*, in DEREGULATING THE PUBLIC SERVICE—CAN GOVERNMENT BE IMPROVED? 1, 1–5 (John J. DiIulio ed., 1994).

113. See Paul A. Volcker & William F. Winter, *Introduction: Democracy and Public Service*, in DEREGULATING THE PUBLIC SERVICE—CAN GOVERNMENT BE IMPROVED?, *supra* note 112, at xi–xvii. The authors state: "Unfortunately, the phrase deregulating the public service invites possible confusion . . . we are talking about pruning overgrown government personnel regulations that make it exceedingly difficult to attract talented people into public service . . ." *Id.* at xvi. The authors conclude that "effective public service is essential to our democracy." *Id.* at xvii.

114. See generally HARRISON, MORGAN, & VERKUIL, *supra* note 5, at 422–516 (describing these phrases).

115. The number of civilian employees is now below two million; that figure does not include the Post Office, which accounts for almost 900,000 positions. See Volcker & Winter, *supra* note 113, at 118 (charting government employees over the decades).

116. See Geoffrey F. Seagal, *Realizing the President's Management Agenda*, TECH CENTRAL STATION, July 27, 2004 (extolling "public-private competitions where public employees compete with the private sector to determine the best source of service delivery"); see also discussion *infra* notes 227–28 and accompanying text.

117. See STEPHEN GOLDSMITH & WILLIAM D. EGGERS, GOVERNING BY NETWORK: THE NEW SHAPE OF THE PUBLIC SECTOR 21–23 (2004) (arguing for improved government management over increased contracting out of public sector jobs); Stephen Goldsmith & William D. Eggers, *Government for Hire*, N.Y. TIMES, Feb. 21, 2005, at A19.

In a way, our society has come full circle: from an early time when civil society struggled to emerge, to a period when the liberal state established separate realms of public and private, to the time when government became virtually indispensable, to the present when many things government does have devolved to the private sector. For one who was enthusiastic about the “reinvention” of government a decade ago,¹¹⁸ the accomplishments of privatization are impressive. But its very success now begs a more important question. Perhaps privatization has succeeded too well. One can still applaud the efficiency-based achievements it promised while questioning its long term consequences. The questions are similar to those earlier asked about the merging of the private and public sectors.¹¹⁹ The Legal Realists were concerned about the public sector being merged out of existence by substantive private norms (such as liberty of contract); the present “merger” involves the private sector potentially supplanting both public functions and public norms of administration. Seen in this light, unrestrained delegation of government functions to private hands challenges the role of government and the rule of law that sustains it.

At stake in privatization (as opposed to downsizing) is not the size of government in terms of expenditures.¹²⁰ The issue is how to improve the quality of government while retaining public sector values.¹²¹ The number of key government officials, those who are presidential appointees or members of the Senior Executive Service (“SES”) has remained static, or even declined, while their oversight responsibilities have grown dramatically.¹²² The outsourcing of government functions and the downsizing produced by the reinvention movement has resulted in the perfect storm for public

118. See Verkuil, *supra* note 21, at 10–12.

119. See *supra* notes 75–77 and accompanying text.

120. Privatization does not involve shrinking the size of government. See Floyd Norris, *In the Bush Years, Government Grows as the Private Sector Struggles*, N.Y. TIMES, Sept. 3, 2004, at C1 (describing how the government’s share of GDP has risen under the Bush administration).

121. This problem is presented by the faith-based initiative process, which places religious institutions in the position of dispensing government benefits. For this to work, public sector values must co-exist with religious values. See John J. DiIulio, Jr., *Government by Proxy: A Faithful Overview*, 116 HARV. L. REV. 1271, 1276–78 (2003).

122. There are only about 500 presidential appointees (excluding ambassadors) with full-time jobs and another 1,000 Schedule C (policy determining) officials. See U.S. OFFICE OF PERSONNEL MANAGEMENT, OFFICE OF WORKFORCE INFORMATION, POLITICAL APPOINTMENTS BY TYPE AND WORK SCHEDULE (Sept. 2001), available at <http://www.opm.gov/feddata/POL0901.pdf>. There are about 6,000 members of the SES. See *infra* note 378.

control—a vacuum of senior leadership at a time when government is increasingly at risk.¹²³

It used to be fashionable to deprecate the quality of government—“running against Washington” was a reliable vote-getter. But our love-hate relationship with government may once again be changing.¹²⁴ In the post 9/11 world,¹²⁵ the public is recognizing that government is needed both to define and oversee new responsibilities.¹²⁶ Social Security reform proposals have alerted the public to the downside of privatization. The term itself has become so controversial that the Bush administration now forbids its use in that context.¹²⁷ Renewed government credibility has produced new opportunities for the public sector. Ideas that can align political forces around public responsibility for public acts¹²⁸ may now be as compelling as the rallying cry of privatization.¹²⁹

To decide if privatization has reached its limits, we must know whether “inherent functions”¹³⁰ of government are being delegated. It may be no easier to locate these functions than it was to determine what businesses are affected with a public interest, what private actions are public functions, or what property transfers amount to public use.¹³¹ But the inquiry cannot be avoided. Certain exercises of public authority in the liberal state still must be performed by

123. The Iraq war and the Hurricane Katrina disaster have embroiled government in the highly risky activity of no-bid contracting where oversight by public officials is vital. See *infra* notes 216–18.

124. Cf. JAMES O. FREEDMAN, *CRISIS AND LEGITIMACY—THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT* 7–12 (1978) (documenting the American love-hate relationship with bureaucracy).

125. THE 9/11 COMMISSION REPORT 395 (2004), available at <http://www.9-11commission.gov/report/911Report.pdf> (describing the sacrifices of public officials like fire and police).

126. See Symposium, *Public Values in an Era of Privatization*, 116 HARV. L. REV. 1211 (2003) (raising this question). See generally JOHN A. ROHR, *TO RUN A CONSTITUTION* 181–86 (1986) (documenting the role “public administration” plays in implementing the Founders’ Constitution).

127. See Editorial, *Mr. Bush’s Two Big Ideas*, N.Y. TIMES, Feb. 3, 2005, at A26 (noting that President Bush no longer uses the term “privatized” in connection with Social Security because “polls showed that the American people reacted badly to the concept”).

128. See Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1285 (2003) (using the term “publicization” as a counterpoint to “privatization”).

129. There are signs that Congress is aware of the negative effects that downsizing has had on the government’s capacity to govern. The Senate Armed Services Committee recently concluded “that continuing problems [in contracting] are attributable, in significant part, to inadequate human capital planning and continued reductions in the defense acquisition workforce.” S. REP. NO. 109-69, at 344 (2005).

130. See discussion *infra* Part III.B (discussing OMB Circular A-76).

131. See discussion *infra* Part III.B.1 (discussing the interrogation of prisoners in Iraq).

government. These duties are nondelegable, or at least not delegable without continuing governmental oversight. The public-private distinction still has a role to play in locating limits on the transfer of political power to private hands.

II. PRIVATIZATION, NONDELEGATION, AND DUE PROCESS

The threat privatization poses to standard assumptions about public control of decision authority is of recent origin. But the constitutional theories that might be employed to secure against this threat, such as the nondelegation doctrine, have been around for a long time. In addition, statutory provisions, such as the Subdelegation Act and judicial review provisions of the APA, can also play a role in controlling delegations to private hands. This Part of the Article connects these public law doctrines and statutory authorities to outline themes of regulatory control over the privatization process.

A. *Private Nondelegation*

Challenges to the transfer of public power to the private sector start with the nondelegation doctrine. Nondelegation seeks to cure the unchecked transfer of legislative power to the executive. While it has shown occasional signs of life, the doctrine has been moribund since the end of the *Lochner* era.¹³² However, Professor Metzger shows that nondelegation has continuing vitality and remains connected to the public-private distinction.¹³³ Thus, even though the doctrine in its traditional guise has few friends,¹³⁴ when adapted to

132. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 414–15 (1935). In *Schechter*, Justice Cardozo's concurrence about "delegation running riot" has become the classic formulation of the nondelegation of legislative power position. 295 U.S. at 553; see DAVID SCHOENBRUM, *POWER WITHOUT RESPONSIBILITY* 155–64 (1995) (praising the nondelegation doctrine and discussing cases). As Professor Rubin has pointed out, the nondelegation doctrine has only been applied against the National Industrial Recovery Act where public power was transferred to private hands. See Rubin, *supra* note 4, at 2095 n.7.

133. After extensively reviewing the cases, Professor Metzger concludes that the "private delegation doctrine" is a casualty of the post-*Lochner* era. But she also views it as a possible road to be taken by Congress or the courts. See Metzger, *supra* note 92, at 1441–43; see also Freeman, *supra* note 128, at 1285 (suggesting that Congress could require public actors to adhere to public law norms in exchange for privatizing activities).

134. See Gary Lawson, *Discretion as Delegation: The "Proper" Understanding of the Nondelegation Doctrine*, 73 GEO. WASH. L. REV. 235, 236–37 (2005) (arguing for a middle road on nondelegation that reconciles the competing camps); Eric Posner & Adrian Vermeule, *Nondelegation: A Post-Mortem*, 70 U. CHI. L. REV. 1331, 1331 (2003). But see

the needs of our time, it may have vitality. For example, Professor Merrill proposes jettisoning the nondelegation doctrine in favor of an "exclusive delegation doctrine" which focuses solely on whether Congress has acted at all, not how carefully it has acted.¹³⁵ This is a creative adjustment to political and constitutional realities and opens the way for a rethinking of its purposes in the privatization setting.

The question, as phrased by Professor Metzger, is not so much whether Congress can delegate legislative power (or in Professor Merrill's terms whether it *has* delegated its power) to the executive, but whether government (either Congress or the executive branch) can subdelegate that power to the private sector, and, if so, under what conditions. This inquiry presents the two faces of the nondelegation doctrine—its Article I and its due process dimensions, along with the newly formulated exclusive delegation doctrine.

*Carter v. Carter Coal*¹³⁶ offers the traditional departure point. The Bituminous Coal Conservation Act¹³⁷ established "districts" wherein a district board elected by coal operators and unions would set wages binding upon all coal producers. For Justice Sutherland and the *Carter Coal* majority "[t]his [was] legislative delegation in its most obnoxious form; for it [was] not even delegation to an official or an official body, presumptively disinterested."¹³⁸ The Court held the delegation arbitrary both under Article I of the Constitution and the Due Process Clause of the Fifth Amendment.¹³⁹ The delegation failed under Article I because it transferred the legislative power to set wages; it failed as a matter of procedural due process because there was no public oversight of the exercise of private power.

But these two dimensions were redundant. As Louis Jaffe suggested in his analysis of *Carter Coal*,¹⁴⁰ "we might drop the word 'delegation' completely, at least as indicating a constitutional category, and regard the question simply as one of reasonableness

David Schoenbrod, *Delegation and Democracy: A Reply to My Critics*, 20 CARDOZO L. REV. 731, 732 (1999) (discussing unreconstructed nondelegation).

135. See Thomas W. Merrill, *Rethinking Article I, Section I: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2109 (2004).

136. 298 U.S. 238 (1936); see also Michael Froomkin, *Reinventing the Government Corporation*, 1995 U. ILL. L. REV. 543, 575 (discussing the *Carter Coal* doctrine).

137. 15 U.S.C. §§ 801–827 (2000) (repealed 1937).

138. *Carter Coal*, 298 U.S. at 311.

139. *Id.*

140. See Louis L. Jaffe, *Lawmaking by Private Groups*, 51 HARV. L. REV. 201, 248 (1937); see also Metzger, *supra* note 92, at 1443–44 (relating the private lawmaking point to delegation issues).

within the due process clause.”¹⁴¹ Professor Jaffe perceived that due process could become the face of the delegation doctrine that would survive federally.¹⁴² As Professor Tribe noted much later, “[t]he judicial hostility to private lawmaking . . . represents a persistent theme in American constitutional law.”¹⁴³

Though federal nondelegation arguments based on separation of powers are rarely successful,¹⁴⁴ the due process dimensions of nondelegation can still reach to federal and state regulatory schemes.¹⁴⁵ Even under Merrill’s alternative exclusive delegation theory there is room for the due process approach. Professor Merrill argues that the nondelegation doctrine does not distinguish between private or public delegates despite *Carter Coal*, but he offers several alternative theories, including due process, that might constrain delegations to private parties.¹⁴⁶ Professors Merrill and Jaffe both

141. Jaffe, *supra* note 140, at 204. As Jaffe noted, this is presumably what must be done when the Court is confronted with a state regulation.

142. Indeed, it is possible to explain the *Panama* and *Schechter* cases in due process terms. If one uses Justice Cardozo’s dissent in *Panama* and concurrence in *Schechter* as touchstones, the presence of express state regulatory control over “hot oil” in *Panama* (through the Texas Commission) provides a due process rationale that was missing in the purely privately promulgated NIRA Code at stake in *Schechter*. The latter situation is much closer to that in *Carter Coal*. Admittedly, Justice Cardozo focused less on due process than interstate commerce in his concurrence. But it was the breathtaking scope of the NIRA, dealing as he said with the “welfare of the nation” that galvanized him. See ANDREW KAUFMAN, CARDOZO 508–12 (1998) (noting that it was Cardozo’s *Panama* dissent he was most proud of).

143. See LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 993 (3d ed. 2000).

144. See, e.g., *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 474 (2001) (rejecting a nondelegation challenge); *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 845 (1984) (delegating legal questions to agencies where Congress has not resolved the issue directly); see also TRIBE, *supra* note 143, at 993–96 (explaining the current application of the nondelegation doctrine).

State constitutional analysis, by contrast, still emphasizes the separation of powers aspect of nondelegation. See, e.g., *Texas Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 456–58 (Tex. 1997) (challenging delegation to a private foundation, certified by the Commissioner of Agriculture, establishing eradication zones, assessing growers, and destroying crops of non-paying growers); see also Jim Rossi, *Overcoming Parochialism: State Administrative Procedure and Institutional Design*, 53 ADMIN. L. REV. 551, 562 (2001) (stating that nearly twenty states endorse a rigorous nondelegation doctrine).

145. The due process aspect of nondelegation may be stronger as a challenge to state legal regimes. See TRIBE, *supra* note 143, at 988–92 (describing due process constraints on state delegations to private parties). The procedural due process cases which led to the demise of the right-privilege distinction apply to federal and state regulatory schemes. See *supra* notes 101–05.

146. See Merrill, *supra* note 135, at 2165–69 (reserving the due process aspects of delegation while jettisoning the Article I (“intelligible principle”) dimension). Professor Merrill also offers a “three branch” constraint that would seem to limit private delegations. *Id.* at 2168.

offer alternatives that can sidestep the judicial reluctance to revive a due process based nondelegation doctrine.¹⁴⁷

Of course, due process theory can carry the privatization debate only so far: it can only control private delegations through procedural constraints on the exercise of private power.¹⁴⁸ Still, Professor Metzger argues that is no small step—private delegations with process attached facilitate public oversight and accountability.¹⁴⁹ But the idea of *inherent* governmental functions implies something more powerful—limits on delegations or subdelegations that cannot be justified procedurally. Absolute limits on the delegation of public powers require constitutional arguments that are not easily mustered. The public-private distinction divides functions into separate realms. Neither the nondelegation doctrine nor the exclusive delegation doctrine addresses the larger problem of what might be called the *true* nondelegation doctrine, i.e., the proposition that some government functions are nondelegable under any circumstances.

B. Nondelegation, Subdelegation, and Discretionary Acts

Once an inherent government power is identified, can it be delegated at all? Nondelegation, in both its Article I and due process faces, is still about process. Nondelegation requires that Congress create “ascertainable standards” for the executive branch to follow, but does not forbid the delegation *ab initio*.¹⁵⁰ Professor Merrill’s exclusive delegation theory is satisfied once an express grant of delegated or subdelegated power is found. The most *Carter Coal*’s due process constraint accomplishes is to provide procedural mechanisms for government officials to oversee the exercise of private power.

But certain government functions may be so fundamental as not to be transferable to private hands under any circumstances. Acts of government committed to high officials, including the President, who have taken oaths to uphold the Constitution fall into this category.¹⁵¹

147. See cases cited *supra* note 144.

148. See *Mathews v. Eldridge*, 424 U.S. 319, 348–49 (1976) (creating a balancing of interests test to evaluate procedures).

149. See discussion *supra* notes 90–96 and accompanying text.

150. Of course, a rigorously enforced nondelegation doctrine also forbids delegations since Congress may be unable politically to satisfy such a strict test. In this way, nondelegation could transmute itself into a form of substantive due process that also forbids delegation. See PIERCE, SHAPIRO, & VERKUIL, *supra* note 18, at 48–49.

151. See U.S. CONST. art. VI, cl. 3 (requiring oaths or affirmations to support the institution of all federal and state legislative, executive, and judicial officers); see also *Webster v. Doe*, 486 U.S. 592, 613 (1988) (Scalia, J., dissenting) (concluding that taking the

But calling some government acts nondelegable does not identify them. Just what are the functions of government that cannot be privatized?

1. Nondelegable Duties of Government

Some duties have always been nondelegable. We can all agree with Justice Scalia that Congress cannot hand the legislative power to the President and adjourn *sine die*.¹⁵² By a parity of reasoning, the President cannot turn the executive power over to the Vice President and retire in office.¹⁵³ These are clear examples of nondelegable duties of office under the Constitution. But how far beyond these obvious examples does the inherent limitation on delegation go? Important powers exercised by Cabinet officials and other principal officers presumably must be exercised by those who have taken an oath to uphold the Constitution.¹⁵⁴ Thus, the Secretary of Defense cannot delegate the power to conduct the war in Iraq to the Rand Corporation any more than the Attorney General can leave it to private (rather than “special”) counsel to decide when to prosecute.¹⁵⁵ In these situations, the core responsibility is both to exercise and to oversee the exercise of government powers. Stated more broadly, the

oath to uphold the Constitution sometimes allows executive officials “to perform that oath unreviewed”); discussion *infra* notes 181–82.

152. See *Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting) (“Our members of Congress could not, even if they wished, vote all power to the President and adjourn *sine die*.”). Justice Scalia’s *Mistretta* dissent noted that some duties of legislators, such as voting on bills, cannot be delegated. *Id.* at 425. Justice Scalia also calls the Sentencing Commission a “junior-varsity Congress.” *Id.* at 427. One wonders whether he might apply the same pejorative to private legislative delegates such as standard setting organizations. See discussion *infra* notes 194–99 and accompanying text; see also *TRIBE*, *supra* note 143, at 982 (the legislative power as a whole is not transferable).

153. Cf. Peter L. Strauss & Cass Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 190 (1985) (questioning the Vice President’s role in overseeing the rulemaking process).

154. Duties of principal officers are nondelegable both because of the oath or affirmation requirement, see *supra* note 151, and because of the Senate’s advise and consent function in Article II. U.S. CONST. art. II, § 1. Any officer confirmed by the Senate owes a duty both to the President and to the Congress to perform her responsibilities directly; the Senate is consenting to the exercise of duties by the officer confirmed, not by some unconfirmed private subdelegatee. Moreover, the impeachment power is also implicated because Congress cannot hold the private subdelegatee responsible through its exercise.

155. See *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 802–09 (1987) (finding that the Attorney General’s duty to be disinterested disqualified a private attorney from presenting a violation of a court order).

duty to be accountable for public decisions is not a function performable by those outside government.¹⁵⁶

2. The Subdelegation Act

Some power to delegate within government is necessary to make the system work. Even though the President embodies the executive power under Article I, he cannot carry out all duties directly.¹⁵⁷ Realizing this, Congress long ago gave the President the power to delegate to his subordinates. Under the Subdelegation Act,¹⁵⁸ delegations can be made without specific legislation. But these delegations have limits: they can only be made to Officers of the United States. And even though the Act delegates to the President the unrestricted power to subdelegate without express legislative authority, it has not been challenged on nondelegation grounds.¹⁵⁹ Moreover, the Act is unlikely to upset those with a unitary view of the President's powers since it is permissive rather than restrictive.¹⁶⁰ The Subdelegation Act is also consistent with the exclusive delegation theory posited by Professor Merrill.¹⁶¹ The idea that the President

156. The Attorney General's constitutional control over litigation for the United States has to be reconciled with *qui tam* suits that permit private parties to represent the government in certain circumstances. See, e.g., The False Claims Act, 31 U.S.C. §§ 3729–3733 (2000). These actions have been available since the beginning of our constitutional period, but their anomalous nature still raises nondelegation questions under Article II's Appointments and Take Care clauses. See *Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 778 n.8 (2000) (Scalia, J.) (upholding the False Claims Act against an Article III challenge, but reserving the question as to Article II); see also *FEC v. Akins*, 524 U.S. 11, 34–37 (1998) (Scalia, J., dissenting) (noting that citizen attorney general provisions of Act may violate the President's Article II requirement of “faithful execution” of the laws).

157. See generally *Myers v. United States*, 272 U.S. 52 (1926) (expressing Chief Justice Taft's expansive view on the necessity of the President to control the bureaucracy).

158. 3 U.S.C. §§ 301–302 (2000) (permitting delegation by the President to any official required to be appointed by and with the advice and consent of the Senate, unless affirmatively prohibited by Congress).

159. See Posner & Vermeule, *supra* note 134, at 1335 (“But to our knowledge, no one has ever suggested that the Subdelegation Act violates the Constitution . . .”). And since the subdelegations are limited to public officials, they would not involve the *Carter Coal* variations on the nondelegation doctrine. See *supra* notes 138–42.

160. See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 571 (1994) (advocating an expansive reading of Article II). Conceivably, unitarians could object to any statute that channels, if not limits, the President's powers as the Subdelegation Act does. If they went this far, the contrary view expressed by Professor Stack would have resonance. See Kevin Stack, *The Statutory President*, 90 IOWA L. REV. 539, 541–46 (2005) (describing the ways in which Congress has long delegated power directly and exclusively to the President and other executive officials).

161. The virtue of Professor Merrill's exclusive delegation approach is that it removes any concerns about standardless delegations under the Subdelegation Act. See Merrill,

needs to delegate to his cabinet officials or other officers of the United States recognizes the realities of modern government. The Subdelegation Act grants the executive branch extensive authority to organize the Administration in this spirit.¹⁶²

But the Act contains a more powerful lesson for present purposes—it is both a grant to and a limitation upon the executive branch's power to subdelegate.¹⁶³ By limiting delegations to government officials, indeed to high government officials, the Act implicitly denies the President authority to delegate to lesser public officials or to outside parties.¹⁶⁴ So defined, the Subdelegation Act amounts to a congressional early warning system. If the executive tries to delegate powers to private parties, the Subdelegation Act tests whether these delegations are consistent with the exercise of executive authority. Congress can then decide whether to approve subdelegations to private hands through enabling legislation.

Reading the Act in this manner reflects existing practice. Congress has in fact permitted some delegations to private contractors in statutes like the Federal Activities Inventory Reform Act (the "FAIR Act").¹⁶⁵ The harder constitutional question—whether, without the Subdelegation Act, the President must have the inherent power to delegate duties assigned to him by Congress¹⁶⁶—is not raised in the private delegation context. The President could never claim an inherent power to delegate official duties to private

supra note 135, at 2179. But under the exclusive delegation theory, the existence of some statutory delegation, rather than implied executive authority to subdelegate, is essential. *See id.* at 2175–76.

162. The Subdelegation Act dates to the Reorganization Act of 1951, which in turn was based on the Hoover Commission reorganization plan. *See* THE HOOVER COMMISSION REPORT ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT 433–39 (1949).

163. Over the years the courts have limited subdelegations under this act. *See* *Cudahy Packing Co. v. Holland*, 315 U.S. 788, 788 (1942) (amending an earlier decision, *Cudahy Packing Co. v. Holland*, 315 U.S. 357 (1942)); *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 567–68 (D.C. Cir. 2004) (limiting independent agency delegation to state authority).

164. In *U.S. Telecom*, the court emphasized that “the cases recognize an important distinction between subdelegation to a *subordinate* and subdelegation to an *outside party*.” 359 F.3d at 565.

165. *See* discussion *infra* note 344 and accompanying text. For an argument on the negative implications of the Subdelegation Act as it applies to Executive Orders, see discussion *infra* notes 324–325 and accompanying text.

166. The President cannot ignore congressional decisions to place political power in the hands of specific cabinet officers. *See* Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965, 986 (1997) (arguing that the President wields executive power within congressional constraints); *see also* Glendon A. Schubert, Jr., *Judicial Review of the Subdelegation of Presidential Power*, 12 J. POLITICS 668, 684–89 (1950) (describing cases limiting presidential powers to subdelegate).

hands. In fact when phrased this way, the constitutional limits on private delegations seem unexceptionable.

3. The Role of Discretion, Politics, and Oaths

The President and other executive officials exercise inherent and political powers that derive from separation of powers principles under Article I. They are discretionary and may not be second-guessed by the courts or limited by Congress. The well known formulation is that of Chief Justice Marshall in *Marbury v. Madison*¹⁶⁷:

By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders.¹⁶⁸

The touchstone is the politically sensitive and discretionary nature of decisionmaking about core decisions of government. As to these decisions, even Congress, which can assign most substantive delegations to executive officials, is constitutionally limited in how it can control aspects of that power.¹⁶⁹ But the acknowledged genius of *Marbury* is that while it insulated certain political acts from judicial scrutiny, it also established principles of judicial review over other government actions affecting individuals.¹⁷⁰

A further implication of *Marbury* relates to the privatization issue. The President is protected in the exercise of his political powers *personally* (or as to certain appointed officers). But this category must be limited to public officials. Only officials of government who are oath takers can discharge these protected duties. Executive privilege protects "the President against judicial intrusion

167. 5 U.S. (1 Cranch) 137 (1803).

168. *Id.* at 165-66.

169. The appointment and removal cases plumb the depths of what is both inherent and not subject to congressional control. See *Humphrey v. United States*, 295 U.S. 602, 629 (1935) (permitting congressional removal restrictions for quasi-judicial officials); *Myers v. United States*, 272 U.S. 52, 176 (1926) (holding even inferior executive officers—i.e., postmasters—free from congressional removal); see also *United States v. Perkins*, 116 U.S. 483, 484-85 (1886) (stating that civil service restrictions are constitutional).

170. See Henry Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 15-17 (1983) (describing the judicial review imperatives of *Marbury*).

into official acts,”¹⁷¹ but these official acts only apply to acts by “officials.”

Another way to view this exercise of protected political discretion is to compare it to the “discretionary function” exception in the Federal Tort Claims Act.¹⁷² This provision gives statutory expression to the limitations upon judicial review of political functions that the executive branch performs.¹⁷³ Discretionary functions equate to sovereign functions that the President cannot be held accountable for at law.¹⁷⁴ Under *Marbury*, these would be unreviewable “political powers.”¹⁷⁵ Thus, government conduct driven by discretion (political judgment or choice) is immune from tort law if it involves a policy making official.¹⁷⁶ The broader the range of judgment the official possesses, the greater the need for discretion. By a parity of reasoning, if the executive official exercising discretionary powers cannot be held accountable, she cannot delegate that discretion to others who are not officials of government. The higher the level of decision involved, the greater the need for the decisionmaker to be a government official. Candidates for this category would include not only cabinet officers but perhaps all “Officers of the United States.”¹⁷⁷

171. In *Cheney v. United States District Court*, 542 U.S. 367, 375–77 (2004), Vice President Cheney claimed that receiving advice from the private sector for energy policy is protected by executive privilege. And this position was upheld. See *In re Cheney*, 406 F.3d 723, 728 (D.C. Cir. 2005) (en banc) (holding that the Vice President need only certify that decision authority on energy policy was not delegated to the private sector).

172. 28 U.S.C. § 2680(h) (2000) (limiting waiver of the sovereign immunity of the United States).

173. See 28 U.S.C. §§ 1346(6), 2671–2680 (2000).

174. See *Dalehite v. United States*, 346 U.S. 15, 34 (1953) (discussing a cabinet level decision to initiate a fertilizer program that led to a disastrous explosion); see also *Gager v. United States*, 149 F.3d 918, 921 (9th Cir. 1998) (holding the Postal Service’s decision not to provide universal training and supervision in mail bomb detection fell within discretionary function exception because it involved judgment or choice on the part of postal officials); *First Nat. Bank in Albuquerque v. United States*, 552 F.2d 370, 376 (10th Cir. 1977) (holding actions of government employees in registering mercury fungicide for interstate sale and approving labeling of fungicide pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act fell within discretionary function exception).

175. See *supra* text accompanying note 168 (quoting *Marbury v. Madison*).

176. See *United States v. Gaubert*, 499 U.S. 315, 319 (1991) (holding supervisory decision of the Home Loan Bank Board to be within the discretionary function). Justice Scalia’s concurrence elaborates on the connection between the level of decisionmaker and the scope of judgment or choice. *Id.* at 335 (Scalia, J., concurring).

177. U.S. CONST. art. II, § 2, 4. To the extent that officers of the United States are subject to the advise and consent function, privatization of their duties would be offensive to the constitutional powers of two branches. See *supra* note 154.

There is also a connection between the nondelegation of certain functions of executive officers and judicial review under the APA. Under § 701(a)(2), judicial review is not available when actions are “committed to agency discretion by law.”¹⁷⁸ The Court in *Webster v. Doe*¹⁷⁹ held that this provision denies review when statutory violations are asserted, but left open the question of whether review can also be denied when constitutional violations are asserted.¹⁸⁰ Justice Scalia’s dissent in *Webster* argues for the latter interpretation, but in so doing assumes that these decisions, especially if unreviewable, must be made by federal officials who have taken an oath to uphold the Constitution.¹⁸¹ Justice Scalia shows us that the oath requirement is no mere formality.¹⁸² It confirms the fact that some government actions must be taken by public officials; this would also be true for the “committed to discretion” provision to apply. Private contractors, as non-oath takers, are excluded from the highest levels of government.

Of course, conceptualizing a category of mandatory government actors is not the same thing as identifying them. While it is unrealistic to think Congress could create a personnel table¹⁸³ for this purpose, it is in Congress’ interests to know how far such delegations can go. The Subdelegation Act alerts Congress by limiting the delegates Congress approves of in advance to Officers of the United States. This is the standard unless Congress changes that category by specific legislation. The Supreme Court finds it difficult to define a category of officials with discretionary duties beyond Officers of the United

178. 5 U.S.C. § 701(a)(2) (2000).

179. 486 U.S. 592 (1988).

180. *Id.* at 601 (holding section 102(C) of the National Security Act unreviewable under section 701(a)(2)). See generally Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689 (1990) (discussing the category of unreviewable administrative action that is committed to agency discretion).

181. Justice Scalia states:

In sum, it is simply untenable that there must be a judicial remedy for every constitutional violation. Members of Congress and the supervising officers of the Executive Branch take the same oath to uphold the Constitution that we do, and sometimes they are left to perform that oath unreviewed, as we always are.

Webster, 486 U.S. at 613 (Scalia, J., dissenting).

182. As Professor Amar has shown, the Constitution’s drafters relied on the oath requirement to discourage “by making *dishonorable*” any attempts by legislators to pass unconstitutional legislation. See AHKIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 62–63 (2005).

183. It might be possible, for example, for Congress to list these qualifying officials, as it does for the “independent” regulatory agencies. See 5 U.S.C. § 104 (2000) (defining “independent establishment”); 44 U.S.C. § 3502(5) (2000) (defining “independent regulatory agency”).

States.¹⁸⁴ But it might well decide that the category of discretionary officials can never include private contractors. *Webster v. Doe*, which has difficulty deciding on the scope of judicial review, clearly places great emphasis on the oath requirement. It could lead the Court to employ a *real* nondelegation doctrine,¹⁸⁵ one that holds discretionary tasks must remain in the hands of public officers. Private contractors can never qualify to exercise these powers.

4. The Connection Between State Action and Inherent Functions

Another way the Court has approached the question of nondelegable duties is to view them after the fact. Sometimes legislatures delegate to private hands duties of a public nature and the courts have no choice but to second guess the result. The public function test¹⁸⁶ labels some actions “state action” after they have been delegated to private parties. The Court is reluctant to create a category of inherent government functions in this fashion,¹⁸⁷ but it retains the power to do so. Moreover, the state action concept does not limit the functions that government can delegate. Instead it “constitutionalizes” after-the-fact delegations that amount to the exercise of public authority.¹⁸⁸

These cases highlight the Court’s role in preventing government from avoiding constitutional responsibilities through the private delegation device. In *Lebron v. National Rail Passenger Corp.*,¹⁸⁹ for example, the Court held that Amtrak, a government corporation with private directors, was for First Amendment purposes still the government and could not impose content restrictions on advertising.¹⁹⁰ Justice Scalia’s majority opinion makes it clear that government could not avoid its constitutional responsibilities by the

184. See *Morrison v. Olson*, 487 U.S. 654, 670–71 (1988) (distinguishing between principal and inferior officers); *Myers v. United States*, 272 U.S. 52, 162 (1926) (distinguishing between officers and employees). The total number of full-time political appointees including presidential appointees with or without Senate confirmation, non-career Senior Executives, and Schedule C appointees is 1,847. See U.S. OFFICE OF PERS. MGMT., CENTRAL PERSONNEL DATA FILE (2001), <http://www.fedscope.opm.gov/employment.asp>.

185. See discussion *supra* note 132–35 and accompanying text.

186. See *supra* notes 90–94 and accompanying text.

187. Justice O’Connor has stated that “cases deciding when private action might be deemed that of the state have not been a model of consistency.” *Edmonson v. Leeville Concrete Co.*, 500 U.S. 614, 632 (1991) (O’Connor, J., dissenting).

188. The state action cases determine when some private functions become public or sovereign acts. See, e.g., *Richardson v. McKnight*, 521 U.S. 399, 401 (1997) (holding private prison guards subject to § 1983 liability).

189. 513 U.S. 374 (1995).

190. *Id.* at 400.

delegation device of a corporate charter.¹⁹¹ *Lebron* thus sets important limits upon the government's ability to privatize by suggesting that the Court will oversee legislative attempts to avoid public responsibilities through delegations to private regimes.

Admittedly, *Lebron* does not indicate that the Court will entertain a restraint upon the act of delegation itself. But it helps preserve the public role of government. The Subdelegation Act is one limitation upon outsourcing of important government functions. *Lebron* provides another. These limitations provide a framework around which Congress can structure limits on privatization. The Subdelegation Act and the state action cases can be viewed as efforts by Congress and the courts to preserve the public-private distinction.

III. DELEGATION OF PUBLIC POWER TO THE PRIVATE SECTOR

Public functions have long been delegated to private hands at all levels of government. While other examples could have been chosen,¹⁹² the two selected highlight the broad contours of the policy delegation problem raised in the last Part. These are: (1) the use of standard setting organizations to produce off-the-shelf legislative enactments; and (2) the practice of "contracting out" by the federal government, especially as that process involves the distinction between competitive sourcing and inherent government functions. These examples show that both the legislative and executive branches have experience with privatization and that they have anticipated the resulting oversight and accountability problems. The contracting out phenomenon is subjected to more elaborate analysis in Section B. It has military as well as civilian dimensions, and it includes important new functions like the status of airport screeners.

191. "It surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form." *Id.* at 397.

192. Other examples of privatization, such as the provision of welfare and health care, faith based initiatives, and prison services have been well explored elsewhere and will not be repeated here. See Freeman, *supra* note 128, at 1306-14; Metzger, *supra* note 92, at 1376; David Saperstein, *Public Accountability and Faith-Based Organization: A Problem Best Avoided*, 116 HARV. L. REV. 1353, 1361-64 (2003) (describing the mixed motives behind public-religious partnerships). See generally Lawrence A. Cunningham, *Private Standards in Public Law: Copyright, Lawmaking and the Case of Accounting*, 104 MICH. L. REV. (forthcoming 2006) (discussing private standard setting in regulatory accounting); Michael P. Vanderbergh, *The Private Life of Public Law*, 105 COLUM. L. REV. (forthcoming 2006) (documenting the extensive interaction between private and public actions especially in the area of environmental regulation).

A. Standard Setting Organizations as Private Legislatures

Privatization is not just the result of executive action; it is part of the legislative process as well. Legislatures often consult Standard Setting Organizations (“SSOs”), which provide private, professionally-based expertise in highly technical matters.¹⁹³ Both state legislatures and Congress delegate authority to these groups to formulate standards. These privately produced standards are then incorporated directly into law.

This practice is so accepted that its nondelegation aspects seem never to have been addressed.¹⁹⁴ In fact, the opposite often occurs—SSOs are given the equivalent of public status through judicial immunities when their work is challenged under antitrust laws.¹⁹⁵ SSOs set standards of performance through thousands of model codes.¹⁹⁶ This privatization of legislative authority is done under explicit mandates of Congress¹⁹⁷ and many state legislatures.¹⁹⁸ It has also received the approval of the Supreme Court.¹⁹⁹

193. For example, the safety of boilers and pressure vessels is determined by privately created boiler codes that states incorporate into law. See, e.g., ALASKA STAT. § 18.60.180 (2003). See generally *Am. Soc’y of Mech. Eng’rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982) (discussing American Society of Mechanical Engineers (“ASME”) codes).

194. The nondelegation doctrine has been concerned with the transfer of legislative power to the executive branch, see *supra* notes 132–35, more than with the transfer of legislative power to private hands. Moreover, since the legislature enacts the privately created standards, the delegation, even if questionable, may be cured by subsequent actions. If the legislation incorporates future changes to standards set by SSOs without requiring subsequent legislation, however, that “cure” is not available. See Christopher L. Sagers, *Antitrust Immunity and Standard Setting Organizations: A Case Study in the Public-Private Distinction*, 25 CARDOZO L. REV. 1393, 1473 (2004) (discussing state legislatures’ prospective adoption of ABA rules).

195. See *id.* (criticizing the expansive nature of antitrust and First Amendment exemptions for SSOs); see also David Snyder, *Private Lawmaking*, 64 OHIO ST. L.J. 371, 447–48 (2003) (suggesting that “private lawmaking is accomplished through a variety of means, including legislative and judicial adoption”).

196. See Sagers, *supra* note 194, at 1398–1401.

197. For example, the Joint Commission on Accreditation of Health Organizations, composed of nongovernmental representatives of private industry and professional associates, determines which healthcare providers may treat Medicaid recipients. See Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 617–18 (2000).

198. See Sagers, *supra* note 194, at 1398 (collecting state laws incorporating private codes).

199. The opposition to the use of SSOs has largely been due to antitrust, not delegation, concerns. See *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 502–04 (1998) (denying *Noerr* doctrine immunity to an SSO); see also *Am. Soc’y of Mech. Eng’rs v. Hydrolevel Corp.*, 456 U.S. 556, 570–76 (1982) (holding that SSOs are not liable for antitrust violation); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656, 659–60 (1961) (per curiam) (same). Cf. Jody Freeman, *Privatization: Private Parties, Public Functions and the New Administrative Law*, 52 ADMIN. L. REV. 813, 819–20 (2000) (confirming the judicial acceptance of SSOs).

The public interest is only preserved in these private delegations through procedural means. Legislatures require SSOs to create standards through an open and inclusive process. For example, Congress in the National Technology Transfer and Advancement Act,²⁰⁰ requires executive branch agencies to use “voluntary standards” in establishing policy unless to do so would be “inconsistent with law or otherwise impractical.”²⁰¹ The OMB circular accompanying the Act says that “due process” standards must be observed by SSOs.²⁰² What due process means in this context is not explained, but it presumably includes requirements of openness and transparency of membership in the SSO and its deliberations.²⁰³ The message of *Carter Coal*, that delegation to private bodies can be accepted, indeed even encouraged, so long as there is some public check on their exercise, is implicit in OMB’s due process formula. Whether that formula works in practice to adequately preserve the public interest is not easy to determine, however.

Some measure of procedural control can also come through the application of the antitrust laws. SSOs that set standards for industry behavior are engaging in potentially anticompetitive conduct—perhaps a group boycott or price fixing under the antitrust laws. The courts provide a safe haven from antitrust scrutiny in two ways: through application of the *Noerr-Pennington* First Amendment immunity²⁰⁴ or the *Midcal* immunity²⁰⁵ at the state level. *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*²⁰⁶ involved

200. Pub. L. No. 104-113, 110 Stat. 775 (1995) (codified in scattered sections of 15 U.S.C.).

201. *Id.*, 110 Stat. at 783.

202. OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, OMB CIRCULAR A-76, at A-2, available at http://www.whitehouse.gov/omb/circulars/a076/a76_incl_tech_correction.pdf [hereinafter CIRCULAR A-76]. See discussion *infra* notes 225–226 and accompanying text.

203. See *supra* notes 136–42 (discussing *Carter Coal*’s requirements). Whether the procedures outlined by OMB would satisfy due process if they are challenged by those affected is another matter altogether. See discussion *supra* notes 101–104 (discussing the evolving due process requirements for government programs).

204. See *United Mine Workers v. Pennington*, 381 U.S. 657, 669–72 (1965) (applying First Amendment protection to anticompetitive actions seeking legislation); *E. R.R. Presidents’ Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137–39 (1961) (stating that where restraint of trade or monopolization is the result of valid government action there is no violation of the Sherman Act); *Mass. School of Law v. ABA*, 107 F.3d 1026, 1041 (3d Cir. 1997) (holding restraints on limiting access to the state bar exam to ABA accredited law schools protected by the First Amendment petitioning immunity).

205. See *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum Inc.*, 445 U.S. 97, 105 (1980). The immunity test is whether the SSO sets standards pursuant to (1) clearly articulated state policy and (2) whether that policy is actively supervised by the state. *Id.*

206. 445 U.S. 97 (1980).

retail price fixing at the behest of the state. *Midcal* “state supervision” is really a procedural requirement—designed to ensure that the resulting standard, otherwise a restraint on trade, is both intended by the state and then kept within bounds established by the state.²⁰⁷ These limitations are similar to those applied to SSOs that require openness by including non-industry or public members in their ranks and a willingness to consider views of outsiders.²⁰⁸

At the federal level, the recently enacted Standards Development Organization Advancement Act of 2004²⁰⁹ provides limited immunity against antitrust damages for entities under its regime. Research and development efforts and joint ventures are entitled to rule of reason and single damages protections if they register with the Department of Justice or the Federal Trade Commission. The fact of registration implies transparency and offers further opportunity for government oversight. Both of these conditions foster government accountability over private entities.²¹⁰

Immunity from antitrust laws for private regulatory bodies has also been connected to the presence of due process procedures. In *Silver v. New York Stock Exchange*²¹¹ the Court introduced the idea that antitrust immunity for stock exchanges could depend upon whether the self-regulatory body disciplined members consistent with due process.²¹² The *Silver* case reflects the same concept at the federal level that *Midcal*’s state supervision requirement does at the

207. *Id.* at 105–06.

208. *See supra* notes 200–02 and accompanying text.

209. Pub. L. No. 108-237, 118 Stat. 661, 664 (2004) (to be codified as amendments to the National Cooperative Research and Production Act, 15 U.S.C. §§ 4301–4305); *see also* U.S. OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, OMB CIRCULAR A-119, *available at* <http://www.whitehouse.gov/omb/circulars/a119/a119.html> (supplementing the Act).

210. In a related context, the OMB has implemented the Information Quality Act, Pub. L. 106-554, § 515, 114 Stat. 2763 (2000), by providing for peer review of information produced by agencies for public consumption. *See* Proposed Bulletin on Peer Review and Information Quality, 68 Fed. Reg. 54,023 (Sept. 15, 2003). While peer review fosters government accountability, the OMB procedures have been criticized for not going far enough. *See* Sidney A. Shapiro, *OMB’s Dubious Peer Review Procedures*, 34 ENVTL. L. REP. 10066–67 (2004) (criticizing OMB for exempting peer review procedures from the Federal Advisory Committee Act).

211. 373 U.S. 341 (1963).

212. *Id.* at 362–63. *But see* *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 293 (1985) (stating that “the absence of procedural safeguards can in no sense determine antitrust analysis”). The Supreme Court is hesitant to turn the antitrust laws into a surrogate procedural law for private organizations, but its *Midcal* decision keeps the connection alive.

state level.²¹³ Both immunities respect *Carter Coal*'s admonition that the exercise of delegated public power by private bodies must be done with some degree of public oversight.²¹⁴

The due process principles contained in the Technology Transfer Act and the antitrust immunity cases show that government will not share its public role without some assurances of transparency and accountability. However, proper controls over the private exercise of public powers remains a central issue of government management. When the focus shifts from privatized delegations by the legislature to the executive, oversight issues are even more significant. The contracting out process, next considered, has expanded to the degree that controls are stretched thin. Viewed in a *Midcal* sense, "state supervision" may be lacking when privatized functions operate with inadequate government oversight.

B. Contracting Out and the Circular A-76 Process

Contracting out—outsourcing—the provision of services by the government has a long history.²¹⁵ Most of this activity takes place between agency contracting officers and selected private vendors of services; contracts are usually awarded after competitive bidding. But recently the number of performance-based or single sourced contracts has been growing.²¹⁶ This is especially true in connection with Department of Defense contracts for private military services in

213. The FTC has issued a report that brings "due process" requirements to the "active supervision" requirement of *Midcal*. See FED. TRADE COMMISSION, OFFICE OF POLICY PLANNING, REPORT OF THE STATE ACTION TASK FORCE 52–54, available at <http://www.ftc.gov/os/2003/09/stateactionreport.pdf>; see also FED. TRADE COMMISSION, ANALYSIS OF PROPOSED CONSENT ORDER TO AID PUBLIC COMMENT IN INDIANA HOUSEHOLD GOODS AND WAREHOUSEMEN, INC., File No. 021-0115, at 3 (2003), available at <http://www.ftc.gov/os/2003/03/indianahouseholdmoversanalysis.pdf> (applying the Report of the State Action Task Force); cf. *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 637–40 (1992) (seeking procedural supervision requirements).

214. See discussion *supra* notes 136–42 and accompanying text.

215. See Dan Guttman, *Governance by Contract: Constitutional Vision, Time for Reflection and Choice*, 33 PUB. CONT. L.J. 321, 326–29 (2004) (documenting earlier efforts to contract out during the Eisenhower and Kennedy administrations).

216. See Kimberly Palmer, *Performance-Based Contracting 'Not Working,' Industry Leader Says*, GOVEXEC.com (May 17, 2005), <http://www.govexec.com/dailyfed/0505/051705k1.htm> (stating that "[i]n fiscal 2004, \$41.66 billion worth of procurements were noncompetitive").

Iraq²¹⁷ and with Federal Emergency Management Agency (“FEMA”) contracts after Hurricane Katrina.²¹⁸

Sometimes outsourcing is conducted under OMB’s Circular A-76 process, which requires that “competitive sourcing” involve private vendors.²¹⁹ This process permits government services to be outsourced only after a review process and makes “inherent” government functions ineligible to be outsourced at all. In this way, the A-76 process reflects concerns earlier expressed about the outsourcing of significant government functions.²²⁰

The Bush administration, as part of its downsizing project, has expanded the conditions under which contracting out may be employed. In May 2003, OMB’s Circular A-76 was amended to encourage contracting out (or “competitive sourcing”),²²¹ and in September 2003 OMB issued a report: “Competitive Sourcing and Responsible Public-Private Competition” that documented the government’s success at contracting out.²²²

217. See John Swain, *Making a Killing*, SUNDAY TIMES MAG. (London), Oct. 23, 2005, at 40, 40–45 (documenting contracts for private military services in Iraq that have made the private military the second largest force in Iraq after the United States military itself).

218. See, e.g., Scott Shane & Eric Lipton, *Stumbling Storm-Aid Effort Put Tons of Ice on Trips to Nowhere*, N.Y. TIMES, Oct. 2, 2005, at A1 (describing contracting errors in FEMA’s provision of supplies to storm victims).

219. See Verkuil, *supra* note 21, at 8–12 (describing OMB’s Circular A-76 policy).

220. See discussion *supra* notes 151–56.

221. See CIRCULAR A-76, *supra* note 202, at Attachment A, pt. B, § 1(a) (narrowing nondelegable functions by changing “requiring the exercise of discretion” to “requiring the exercise of *substantial* discretion”); Rebecca Rafferty Vernon, *Battlefield Contractors: Facing the Tough Issues*, 33 PUB. CONT. L.J. 365, 376 (2004). Circular A-76 defines commercial functions as:

Commercial Activities. A commercial activity is a recurring service that could be performed by the private sector and is resourced, performed, and controlled by the agency through performance by government personnel, a contract, or a fee-for-service agreement. A commercial activity is not so intimately related to the public interest as to mandate performance by government personnel. Commercial activities may be found within, or throughout, organizations that perform inherently governmental activities or classified work.

CIRCULAR A-76, *supra* note 202, at Attachment A, pt. B, § 2.

222. Circular A-76 and the reports are available at <http://www.whitehouse.gov/omb/index.html>. In May 2004, OMB issued a report on competitive sourcing for the prior year which indicated that agencies had completed 662 “competitive assessments” with a net estimated savings of \$1.1 billion (over three to five years) or about \$12,000 per full-time employee competed with a total cost avoidance of about fifteen percent. COMPETITIVE SOURCING: REPORT ON COMPETITIVE SOURCING RESULTS FISCAL YEAR 2003, at 2 (May 2004), http://www.whitehouse.gov/results/agenda/cs_omb_647_report_final.pdf.

Circular A-76 also recognizes limits on contracting out. It describes certain nondelegable functions as “inherently governmental” activities. These activities involve:

- (1) Binding the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;
- (2) Determining, protecting, and advancing economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;
- (3) Significantly affecting the life, liberty, or property of private persons; or
- (4) Exerting ultimate control over the acquisition, use, or disposition of United States property (real or personal, intangible), including establishing policies or procedures for the collection, control, or disbursement of appropriated and other federal funds.²²³

The Circular incorporates the FAIR Act, which requires agencies to submit annual inventories of agency-performed commercial activities.²²⁴ The Circular also requires agencies (including independent agencies) to identify all of their activities as either commercial or inherently governmental.²²⁵ Agencies must appoint a “competitive sourcing official” (“CSO”) to centralize agency oversight and to publish annual inventories of jobs eligible to be contracted out.²²⁶

223. CIRCULAR A-76, *supra* note 202, at Attachment A, pt. B, § 1(a).

224. Federal Activities Inventory Reform Act, Pub. L. No. 105-270, § 2(a), 112 Stat. 2382, 2382 (1998).

225. CIRCULAR A-76, *supra* note 202, at Attachment A, pt. A, § 1 (“An agency shall prepare two annual inventories that categorize all activities performed by government personnel as either commercial or inherently governmental.”).

226. The agency lists appear in the Federal Register. *E.g.*, 69 Fed. Reg. 30,341-02 (May 27, 2004); 69 Fed. Reg. 3401-02 (Jan. 23, 2004). In its 2004 report, the GAO lists only some agency contracting out data and it is from 2002. U.S. GEN. ACCOUNTING OFFICE, GAO-04-367, COMPETITIVE SOURCING: GREATER EMPHASIS NEEDED ON INCREASING EFFICIENCY AND IMPROVING PERFORMANCE (2004) [hereinafter GAO COMPETITIVE SOURCING], available at <http://www.gao.gov/new.items/d04367.pdf>.

The Bush administration's goal is to contract out the jobs of more federal civilian employees.²²⁷ This push for privatization has produced tensions with Congress over the effectiveness of private sourcing,²²⁸ and it has raised questions about the relationship of government to the private sector, implicating the "constitutional premises of our Government."²²⁹ Interestingly, the push to outsource in government comes at a time when the whole question of the benefits of outsourcing is being challenged in the private sector.²³⁰ Thus, the Administration finds itself encouraging private sector solutions when these solutions may be less tenable in private management terms.

Outsourcing exercises a centrifugal force on the capacity of government to oversee even properly contracted out jobs. The shortage of government employees to oversee outsourced functions produced by downsizing pushes government even further in the direction of contracting out. As a practical matter, inherently governmental functions, which were once thought to be over-articulated,²³¹ are now increasingly at risk.²³² The concern is both with the number and nature of jobs being contracted out. Indeed, private contractors are even evaluating the performance of government programs on which they may ultimately bid.²³³

227. In November 2002 President Bush announced that the White House intended to let the private sector compete for 850,000 out of less than two million civil service jobs. Guttman, *supra* note 215, at 330 & n.23 (citing Richard Stevenson, *Government May Make Private Nearly Half of Its Civilian Jobs*, N.Y. TIMES, Nov. 15, 2002, at A1). See generally OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, THE PRESIDENT'S MANAGEMENT AGENDA 17-18 (2002), available at <http://www.whitehouse.gov/omb/budget/fy2002/mgmt.pdf> (committing the Administration to the cost saving objectives met by competitive sourcing).

228. Guttman, *supra* note 215, at 332 n.33 (explaining that "[i]n the mid-1990s, promised reforms led to congressional inquiries regarding hundreds of millions, even billions, in actual or projected cost overruns on various M&O contracts" (citing DOE's *Fixed Price Cleanup Contracts: Why Are Costs Still Out of Control?: Hearing Before the Subcomm. on Oversight & Investigations of the House Comm. on Commerce*, 106th Cong. 27-28 (2000) (prepared statement of Gary Jones, GAO)).

229. *Id.* at 327.

230. See DELOITTE CONSULTING, CALLING A CHANGE IN THE OUTSOURCING MARKET 4 (2005) ("Instead of simplifying operations, outsourcing often introduces complexity, increased cost and friction into the value chain . . .") [hereinafter DELOITTE CONSULTING REPORT].

231. See Verkuil, *supra* note 21, at 8.

232. See discussion *supra* note 219 and accompanying text.

233. See Chris Strohm, *TSA Examines Conflict of Interest Charges Against Contractor*, GOVEXEC.com, May 23, 2005, <http://govexec.com/dailyfed/0505/052305c1.htm> (describing Lockheed Martin's contract with the Transportation Security Administration to evaluate airport screening operations, some of which may be contracted out at a later

As a legal matter, of course, government officials remain responsible for overseeing the expenditure of public funds.²³⁴ But when fewer and fewer federal officials are available to oversee more and more private contractors,²³⁵ accountability and oversight are bound to suffer. The legal responsibility is challenged when public management is decreased in effectiveness. The issue is quality control over supervision. By analogy to the *Midcal* doctrine, it takes “active state supervision”²³⁶ to justify immunity from antitrust liability; when public officials are stretched thin,²³⁷ the active (or effective) predicate to supervision is lost.

But this problem is not with the formal requirements of Circular A-76. It defines inherent government functions²³⁸ and tells agencies to exempt them from contracting out. However, it may not protect those functions from erroneous classifications. The agency’s designation of what is “inherent” is not subject to administrative review. The procedural protections of Circular A-76 as well as the FAIR Act²³⁹ are directed instead at the competitive sourcing process. If an agency erroneously designates a function as competitive when it involves policymaking and decision control, review is limited. That designation can only be challenged by an agency official who is competing against a private contractor to save her job. These procedures for internal review, and the obstacles to judicial review, will be deferred until Part V.

date); see also *infra* notes 267–69 and accompanying text (discussing Rand Report on the use of private contractors on the battlefield).

234. See Guttman, *supra* note 215, at 332–34.

235. See LIGHT, *supra* note 2, at 1 (providing numbers as of 1996).

236. See discussion *supra* notes 205, 213.

237. See discussion *supra* notes 115–16 and accompanying text.

238. See generally Ralph C. Nash & John Cibinic, *Contracting Out Procurement Functions: “The Inherently Government Function” Exception*, NASH & CIBINIC REPORT, Sept. 2000, at 45 (analyzing the definition of “inherently governmental function” and its application to the government’s procurement activities).

239. The FAIR Act codified the pre-existing definition of “inherently governmental” contained in Circular A-76 and the OFPP Policy Letter. OMB TRANSMITTAL MEMORANDUM #20, available at <http://www.whitehouse.gov/omb/circulars/a076/a076tm20.html> (explaining that “the FAIR Act codified the pre-existing requirement for agencies to inventory their commercial activities, as well as the pre-existing definition of “inherently governmental function”). 10 U.S.C. § 2464(b) (2000) dictates that the “performance of workload needed to maintain a logistics capability [by DOD] may not be contracted for performance by non-Government personnel under the procedures and requirements of [OMB] Circular A-76.”

1. Contracting Out and the Military

The Department of Defense (“DOD”) is by far the largest government contracting agency. While the procurement of equipment (weapons systems, supplies, etc.) is a classic competitive sourcing situation, the DOD has also become a large services contractor. Today, fifty-seven percent of the Pentagon’s procurement dollars are spent on services, not equipment; services expenditures increased by sixty-six percent from FY 1999 to FY 2003.²⁴⁰ Many of these services potentially involve significant or inherent functions of government, but they are only subject to Circular A-76 if they involve competitive sourcing challenges.²⁴¹

The war in Iraq has been either an outsourcing nightmare or bonanza depending upon whether you are the government or a private contractor.²⁴² The war has posed enormous personnel and deployment challenges for the military. War requires a capacity to bring services on line quickly, which can be done only if the military contracts some services to the private sector.²⁴³ This necessity, however, brings management problems of the first order.²⁴⁴

There is an obvious need for the military to contract out logistical or support services (food services, construction, etc.) to private hands. The difficulty comes when these services include military functions.²⁴⁵ The privatization of force raises special problems for the public sector. The military has a monopoly on force, but how can it ensure that when its power is delegated the private exercise is circumscribed by public values and controls?²⁴⁶

One example is the abuse of detainees at Abu Ghraib prison outside Baghdad. This debacle has an outsourcing dimension, as well

240. GAO REPORT ON IMPROVING SURVEILLANCE, *supra* note 3, at 1.

241. See discussion *infra* note 254.

242. To be fair, it can sometimes also be a nightmare for private contractors who bear the brunt of poorly articulated contractual requirements that make them look bad in terms of public opinion.

243. See Daniel Bergner, *The Other Army*, N.Y. TIMES, Aug. 14, 2004, § 6 (Magazine), at 29, 30 (placing the number of armed military contractors in Iraq at 25,000, the second largest force after the U.S. military).

244. See DEBORAH D. AVANT, *THE MARKET FOR FORCE: THE CONSEQUENCES OF PRIVATIZING SECURITY* 1 (2005) (noting that one in ten in Iraq is employed by private security).

245. See P.W. SINGER, *CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY* *passim* (2003) (documenting private military deployments in the Balkans, Colombia, and Africa in addition to Iraq).

246. See AVANT, *supra* note 244, at 5–7.

as a challenge to military discipline and command and control.²⁴⁷ When large contracts were issued to civilian organizations like CACI, Inc. and Premier Technology Group, Inc. for “intelligence and technical support,”²⁴⁸ private contractors were employed as interrogators.²⁴⁹ In comparison, military translation services provided by contractors like Titan Corp²⁵⁰ might well be “commercial” in the Circular A-76 sense.²⁵¹ By any measure, however, interrogation of prisoners should qualify as an inherently governmental function. Interrogation involves “military action and matters significantly affecting life, liberty and property.”²⁵² When interrogation leads to prisoner abuse the result is an embarrassment for the military and its civilian leadership.²⁵³ The Abu Ghraib abuses cannot be blamed entirely on private contractors, of course. But once civilian contractors assume military roles the public accountability function becomes that much harder to achieve.

The public management question is how did these contracts happen. Objections to interrogation contracts have not been raised under DOD contracting rules or in the A-76 process.²⁵⁴ Yet military

247. See Eric Schmitt, *Abuse Panel Says Rules on Inmates Need Overhaul: Command Chain Faulted*, N.Y. TIMES, Aug. 25, 2004, at A1 (summarizing the FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DEPARTMENT OF DEFENSE DETENTION OPERATIONS (2004), available at <http://www.defense.gov/news/Aug2004/d20040824finalreport.pdf>); see also Steven Schooner, *Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government*, 16 STAN. L. & POL. REV. 549, 555–57 (2005) (discussing the problems caused by using contractor personnel).

248. See Shane Harris, *Technology Contract Used to Purchase Interrogation Work*, GOVEXEC.com, May 20, 2004, <http://www.govexec.com/dailyfed/0504/052004h1.htm> (documenting CACI, Inc. and Premier Technology Group, Inc. contracts for “intelligence advisors” and “intelligence and technical support”).

249. The military has been investigating ten homicides at Iraqi detention centers including at least one by a private contractor. See Bradley Graham, *Army Investigates Wider Iraq Offenses: Cases Include Deaths, Assaults Outside Prisons*, WASH. POST, June 1, 2004, at A1. At Abu Ghraib, several of the challenged interrogators were private contractors. Schmitt, *supra* note 247.

250. See *Titan Competing with Northrup, L-3 To Keep Its Largest Contract*, BLOOMBERG NEWS, June 7, 2004, available at <http://quote.bloomberg.com/apps/news?pid=10000103&sid=afR4zWgUnpDo&refer=us>.

251. See *supra* note 221.

252. *Id.*

253. Secretary of Defense Donald Rumsfeld, in hearings before the Armed Services Committees of the House and Senate on May 7, 2004, said: “These events occurred on my watch as secretary of defense [sic]. I am accountable for them. I take full responsibility.” Bradley Graham, *Rumsfeld Takes Responsibility for Abuse: Defense Secretary Warns of More Photos and Videos*, WASH. POST, May 8, 2004, at A1. Secretary Rumsfeld also alerted Committee members that “[t]here are a lot more photographs and videos that exist. If these are released to the public, obviously it’s going to make matters worse.” *Id.*

254. There have been few challenges to the contracting out of military functions. When the Army tried to bypass A-76 altogether and deny federal employees any

privatization reveals gaps in oversight and control. Private contractors are not subject to the Uniform Code of Military Justice for any crimes they may have committed.²⁵⁵ While they are made subject to other criminal statutes,²⁵⁶ such as the Military Extraterritorial Jurisdiction Reform Act,²⁵⁷ those controls are weak at best.²⁵⁸ Statutory liability for the commission of criminal acts by private contractors simply cannot replace effective public control. Of course, this accountability gap exists whether contractors are performing commercial or inherently governmental functions, but the stakes are necessarily higher in the latter situation. The Iraq invasion has put enormous pressure on the military resources of the United States,²⁵⁹ and contracting out has made the problem worse. The management problems privatization produces have long term consequences.

The role of private military contractors expanded in Iraq without a change in the law on private delegations. Under the FAIR Act, private contractors can only provide “non-inherently governmental” goods and services, but they cannot fill military positions, such as those involving essential military skills or other skills necessary for

opportunity to retain their jobs (even if they could do them more cost-effectively), the debate became whether or not agencies could waive the requirements of A-76. In only one of those cases, dealing with a challenge to outsourcing army logistics jobs, was the challenge brought under A-76 for contracting out “inherently governmental” functions. *See Federal Employees Union Appeals Decision to Outsource Logistics Jobs*, 41 GOV’T CONTRACTOR ¶ 275 (June 23, 1999).

255. The Uniform Code of Military Justice does not apply to civilians. *See* Grisham v. Hagan, 361 U.S. 278, 279–80 (1960); *United States v. Gatlin*, 216 F.3d 207, 220–23 (2d Cir. 2000).

256. The Department of Justice has indicted a private contractor, employed by the CIA, for beating a detainee in Iraq who later died. *See* Richard A. Oppel, Jr. & Ariel Hart, *Contractor Indicted in Afghan Detainee’s Beating; First Civilian Charged in Abuses—the Prisoner Died the Next Day*, N.Y. TIMES, June 18, 2004, at A1. Other statutes that may apply are the War Crimes Act of 1996, 18 U.S.C. § 2441 (2000); the Torture Act of 2000, 18 U.S.C. §§ 2340A, 2340B (2000); and the Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 (2000).

257. *See* Joseph R. Perlak, *The Military Extraterritorial Jurisdiction Act of 2000: Implications for Contractor Personnel*, 169 MIL. L. REV. 92, 95 (2001) (discussing the ambiguity of the Act as it relates to contractors overseas).

258. The Military Extraterritorial Jurisdiction Act, for example, only applies to civilians working for the DOD, not other federal agencies such as the CIA. *See* P.W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT’L L. 521, 523–24 (2004) (discussing the difficulty of regulating a private military firm).

259. Iraq presents many challenges to the military, not least of which is its failure to meet recruiting targets, thereby increasing the pressure to contract out. *See* Thom Shanker & Eric Schmitt, *Rumsfeld Seeks Leaner Army, and a Full Term*, N.Y. TIMES, May 11, 2005, at A1.

career progression.²⁶⁰ Even though the Circular A-76 inherently governmental function requirement, which tracks the FAIR Act, was not changed in 2003,²⁶¹ the use of military contractors in sensitive roles seems to have increased. The line between military and competitive functions has been blurred in a way that the laws have not yet responded to.²⁶² When private contractors are accused of participating in acts of torture,²⁶³ there is a failure of public responsibility. Torture is one governmental “function” that cannot be privatized.²⁶⁴

When many military contracting out decisions are single sourced rather than competitively bid,²⁶⁵ oversight and financial control problems are further exacerbated. Circular A-76 not only defines as “inherently governmental” an activity that “significantly affects life, liberty, or property of private persons,”²⁶⁶ it reflects a commitment to competitive sourcing. If the A-76 process is not employed, this potential check on military contracting is unavailable. This leaves contracting to each military branches’ internal control rules.

The results are revealing. The Department of the Army reviewed its use of military contractors on the battlefield by contracting out a report on the subject from the Rand Corporation.²⁶⁷ The Rand Report analyzed the Army Field Manual (#3-100) which instructed military officers on how and when to hire private contractors. The Report was designed to sharpen the Army’s risk

260. See Rebecca Rafferty Vernon, *Battlefield Contractors: Facing the Tough Issues*, 33 PUB. CONT. L.J. 369, 376–77 (2004).

261. See notes *supra* 221–23 and accompanying text.

262. This gap is potentially widened in Iraq by a June 2003 order that protects civilian contractors from Iraqi prosecution. See Joanne Mariner, *Private Contractors Who Torture*, FINDLAW.COM, May 10, 2004, <http://writ.news.findlaw.com/mariner/20040510.html>; COALITION PROVISIONAL AUTHORITY ORDER NUMBER 17 (REVISED), STATUS OF THE COALITION PROVISIONAL AUTHORITY, MNF—IRAQ, CERTAIN MISSIONS AND PERSONNEL IN IRAQ (2003), available at http://www.iraqcoalition.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf (“Contractors shall be immune from all Iraqi legal process with respect to acts performed by them pursuant to the terms and conditions of a contract or any sub-contract thereto.”).

263. See *supra* notes 248–49, 256 and accompanying text.

264. See The Torture Act of 2000, 18 U.S.C. § 2340 (2000) (listing those individuals covered by the Act).

265. See discussion *supra* notes 216–17 and accompanying text.

266. CIRCULAR A-76, *supra* note 202, at Attachment A, pt. B, § 1(a)(3).

267. FRANK CAMM & VICTORIA A. GREENFIELD, HOW SHOULD THE ARMY USE CONTRACTORS ON THE BATTLEFIELD? ASSESSING COMPARATIVE RISK IN SOURCING DECISIONS iv (2005), available at http://www.rand.org/pubs/monographs/2005/RAND_MG296.pdf.

assessment procedures.²⁶⁸ It viewed the question in classic make-or-buy transaction cost economics terms.²⁶⁹ The Report ignored the larger question of whether the type of job being outsourced on the battlefield was the kind that should not be contracted out under any circumstances. When the DOD issued final rules on the use of contractor personnel, it ignored this overriding issue.²⁷⁰

The military limits its inquiry to better accountability over an accepted civilian contracting out process rather than (or in addition to) a hard look at the delegations of inherent government functions. The question of whether some government jobs—especially combat ones—are not delegable at all is not even on the horizon. The irony of the Rand Report should not be ignored. When the military has to contract out the plan to deal with contracting out on the battlefield, it is demonstrating how limited its “inherent” policy making resources really are.²⁷¹

2. The Public-Private Distinction and Airport Security

The experience with contracting out by the military makes it appear that the momentum to privatize is largely unchecked. But there is a counter example that must be considered: airport security by the Transportation Security Administration (“TSA”). This example is made all the more salient by the fact that the TSA replaced a private regime with public employees. The public-private distinction still seems to have lessons to teach.

The Aviation and Transportation Security Act became law on November 19, 2001.²⁷² Its passage was preceded by a contentious debate over whether the airport security personnel (newly reorganized in the TSA) should be public employees. The Senate initially passed a bill unanimously that made these officials public employees.²⁷³ Then the White House dropped its support and the House of Representatives began to peel away Senate support.²⁷⁴

268. *See id.* at 125–28 (summarizing relevant risks in choosing between military or private personnel).

269. *See infra* notes 328–30 and accompanying text.

270. Defense Federal Acquisition Regulation Supplement; Contractor Personnel Supporting a Force Deployed Outside the United States, 70 Fed. Reg. 23,790 (May 5, 2005) (to be codified at 48 C.F.R. pts. 207, 212, 225, and 252).

271. This is not a question of Rand having a programmatic conflict of interest. *See supra* note 233 (discussing Lockheed Martin’s TSA contract). However, as an intellectual resource for the military, it seems to dominate the market for creative thought.

272. Aviation and Transportation Security Act, Pub. L. No. 107-71, § 110(2)(a), 115 Stat. 597 (2001) (codified as amended in scattered sections of 49 U.S.C.).

273. *See* 147 CONG. REC. S11,974–75 (remarks of Sen. Hollings) (2001).

274. *Id.*

After much debate, Senators McCain and Hollings managed to shepherd through a revised bill that the White House ultimately supported.²⁷⁵ The final resolution was to make airport screeners public employees, subject to an opt out by airport operators who could, after November 19, 2004, show that employing private screeners would be just as effective as employing public ones.²⁷⁶

The political battle was waged over the need for public employees.²⁷⁷ The prior screeners—the ones who were on duty on 9/11—had been private contractors for the airlines.²⁷⁸ The airlines had sought to fulfill the screening function at the lowest possible cost, which meant minimum wages for screeners.²⁷⁹ Since these screeners were already private, they had to be brought into government.²⁸⁰ The Republican distaste for increasing government employment (in this case by 28,000) stymied the legislation until an opt out compromise was accepted.²⁸¹ The White House also objected to providing airport screeners with civil service protections and demanded the right to hire and fire personnel.²⁸²

The arguments in favor of federal employees turned on the issue of what functions should be inherently governmental. Proponents

275. *Id.*

276. § 110(2)(a), 115 Stat. 597, 614.

277. *See, e.g.*, 147 CONG. REC. S11,982 (remarks of Senator Rockefeller) (“We can no longer allow the lives of our citizens to be placed into the hands of private companies.”).

278. House Aviation Subcommittee Chairman John Mica “and other Republicans, who were never entirely comfortable with creating a new bureaucracy, want to *return* all airport security screener jobs to the private sector, *where they were before Sept. 11, 2001.*” *Some in GOP Want Private Airport Screeners*, USA TODAY, June 1, 2004, available at http://www.usatoday.com/travel/news/2004-06-01-screeners_x.htm (emphasis added).

279. *See* 147 CONG. REC. S11,978 (2001) (“Security is not something you can contract out to the lowest bidder.”) (remarks of Senator Hutchinson). The responsibilities of airport screeners changed dramatically after 9/11 and they are now responsible for performing limited law enforcement functions which make them much more of the public sector than they were previously. *Id.*

280. In Professor Freeman’s words, the issue became whether, after 9/11, screeners should be “publicized.” *See* Freeman, *supra* note 128, at 1286.

281. *See, e.g.*, Press Release, Ari Fleischer, White House Office of Communications, Federalization of Airport Workers (Nov. 6, 2001), <http://www.whitehouse.gov/news/releases/2001/11/20011106-8.html>. The privatizing opt out is managed through regulations established by the Department of Transportation. At this juncture there are five airports participating in the opt out program: San Francisco, Kansas City, Greater Rochester, Jackson Hole, and Tupelo airports. *See* Press Release, Transportation Security Administration, Transportation Security Administration Awards Contracts for Private Screening Pilot Programs at Kansas City, Rochester, NY, and Jackson Hole, WY Airports (Oct. 10, 2005), <http://www.tsa.gov/public/display?content=0900051980003736>.

282. 147 CONG. REC. H8300-02 (2001); *Talk of the Nation: Federalizing Airport Screeners* (NPR radio broadcast Oct. 25, 2001), available at <http://www.npr.org/templates/story/story?storyID=1132037>.

emphasized that since government was responsible for security functions (e.g., FBI, CIA, Border Patrol, and INS), Congress should not privatize airport security because “[l]aw enforcement is a proper function of the federal government.”²⁸³ While that proposition may state matters too broadly (private security guards are sometimes employed by government), it does highlight the essential role of government when it comes to the use of force. The presence of a badge, much like the requirement of an oath,²⁸⁴ is an indicator of government authority and control.

Of course, even with airport security the badge requirement is not an absolute condition, since some airports were exempted from it and others might be able to contract out of it. Still the TSA opt out program had to be specifically exempted from OMB Circular A-76 since airport security would otherwise have been an inherently governmental function.²⁸⁵ And the decision to opt out will not be lightly made. Private opt outs require continuing TSA supervision and must be made under the condition that the security of the aviation system is and will always be an overriding concern.²⁸⁶ This

283. 147 CONG. REC. S11975 (2001) (remarks of Senator McCain).

284. See discussion *supra* notes 181–84.

285. See *supra* note 223 and accompanying text (defining inherent government function).

286. It is also subject to criteria established by the Department of Transportation. 49 U.S.C.A. § 44920 (West Supp. 2005):

(a) In general . . . an operator of an airport may submit to the Under Secretary an application to have the screening of passengers and property at the airport under section 44901 to be carried out by the screening personnel of a qualified private screening company under a contract entered into with the Under Secretary . . .

....

(c) Qualified private screening company.—A private screening company is qualified to provide screening services at an airport under this section if the company will only employ individuals to provide such services who meet all the requirements of this chapter applicable to Federal Government personnel who perform screening services at airports under this chapter . . .

(d) Standards for private screening companies.—The Under Secretary may enter into a contract with a private screening company to provide screening at an airport under this section only if the Under Secretary determines and certifies to Congress that—

(1) the level of screening services and protection provided at the airport under the contract will be equal to or greater than the level that would be provided at the airport by Federal Government personnel under this chapter; and

congressional concern with oversight and control of privatized security screener contracts supports the accountability theme and promises continuing government involvement. In fact, to date increased privatization of screeners has not progressed beyond the five originally exempted airports.²⁸⁷

Whether the private opt out program will truly demand security equivalency or will be done summarily by an Administration eager to "evade headcount pressures"²⁸⁸ cannot be assured. But at least a standard has been set for the TSA to administer. The agency appears to be taking its responsibilities to evaluate the efficacy of public control seriously.²⁸⁹ Congress has given the TSA public accountability responsibilities that are missing in the military contractor situation. The TSA and DOD both deal with serious security issues, but a greater emphasis on the accountability of private contractors in the military context might be expected. However, the evidence is to the contrary. Congress, perhaps for separation of powers reasons, has not resolved the accountability gaps in DOD privatizations as it has with airport security through the TSA.

(2) the private screening company is owned and controlled by a citizen of the United States, to the extent that the Under Secretary determines that there are private screening companies owned and controlled by such citizens.

(e) Supervision of screened personnel.—The Under Secretary shall provide Federal Government supervisors to oversee all screening at each airport at which screening services are provided under this section and provide Federal Government law enforcement officers at the airport pursuant to this chapter.

287. See *supra* note 281.

288. *Then and Now: An Update on the Bush Administration's Competitive Sourcing Initiative Before the Subcomm. on Oversight of Gov't Mgmt., the Fed. Workforce and the Dist. of Columbia of the S. Comm. on Governmental Affairs*, 108th Cong. 168 (2003) (testimony of Paul C. Light, Ph.D., Senior Fellow, The Brookings Institution) [hereinafter *Hearings*], available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_senate_hearings&docid=f:88936.wais.pdf. Even under the opt out program the TSA continues to pay the salaries of the screeners, which are ultimately passed on to the air traveling public. 49 U.S.C.A. § 44940(a) (West Supp. 2005).

289. The Lockheed Martin report to TSA notes that 99.5% of federal screeners passed its recertification process. Strohm, *supra* note 233. However, the quality control checks of airport security have not been all that reassuring. Eric Lipton, *U.S. To Spend Billions More To Alter Security Systems: Concerns About the Cost and Reliability of Equipment Bought After 9/11*, N.Y. TIMES, May 8, 2005, at A1 (noting among the items to be replaced is "[p]assenger-screening equipment at airports that auditors have found is no more likely than before federal screeners took over to detect whether someone is trying to carry a weapon or a bomb aboard a plane").

IV. JUDICIAL CHALLENGES TO PRIVATIZATION BY THE EXECUTIVE BRANCH

The dangers that privatization poses to the governance function can ultimately be framed in judicial terms. But constitutional challenges face a variety of preclusionary doctrines unrelated to the merits, especially as they relate to military functions. Statutory challenges are potentially more available, though they have not been effectively utilized to date. Whatever the likelihood of success on the merits, however, the judiciary provides an important forum for reform. Courts command attention, even if they do not provide all the relief sought. In being forced to respond to the courts, the executive branch investigates its own practices or can also set an agenda for further action by the Congress.

A. *Constitutional Claims*

The paradigm privatization case at the constitutional level involves executive branch delegation of inherent government functions to private hands. Privatizing the work or duties of Officers of the United States potentially contravenes the President's general duty to exercise the executive power under Article II²⁹⁰ and the specific dictates of the Take Care clause.²⁹¹ Moreover, Congress' role in the appointment process, under the advise and consent function, is also compromised.²⁹² Neither branch contemplates appointing and confirming key government officials who permit the transfer of their duties to private hands.

If the duties privately delegated are military functions, the President's Commander in Chief power²⁹³ would be implicated. In the military setting, privatization clearly challenges constitutional limits when inherent government functions (matters involving life and death and the exercise of discretion) are performed by private security firms on the front lines in Iraq and elsewhere;²⁹⁴ these duties are intended to be performed by Officers of the United States.²⁹⁵

290. See U.S. CONST. art. II, § 3.

291. See generally Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1788-98 (1996) (reviewing the historical meaning of the Executive Power Clause, Take Care Clause, and Opinions Clause).

292. See discussion *supra* notes 154, 177.

293. U.S. CONST. art. II, § 2.

294. See discussion *supra* note 245 and accompanying text.

295. The President appoints all military officers, including second lieutenants, and the Senate confirms them. See *Weiss v. United States*, 510 U.S. 163, 169 (1994) (holding that all military officers are Officers of the United States); see also *United States v. Perkins*, 116 U.S. 483, 484 (1886) (cadet engineer appointed by Secretary of Navy).

But threshold doctrines of standing and justiciability would be obstacles to judicial intervention in the military context.²⁹⁶ Judicial intervention in wartime is carefully circumscribed.²⁹⁷ Indeed, in *Hamdi v. Rumsfeld*²⁹⁸ Justice O'Connor reminded us that "our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them."²⁹⁹ This sentence is a double entendre in the privatization context: on the one hand it reaffirms the nonjusticiability of military decisions, but on the other, it assumes that the President and the military itself will make those decisions. Still, it seems unlikely that the second meaning will trump the first.

In the civilian setting, constitutional challenges to the improper delegation of executive power to private hands are less constrained by justiciability issues.³⁰⁰ The use of private contractors is growing and the higher up the policy ladder delegations go the more likely they will encroach upon inherent governmental functions constitutionally committed to officers of the United States.

Assuming the proper plaintiff (for example, a government official whose job was privatized), an action based on the Due Process Clause and the nondelegation doctrine could either restrain the privatized delegation entirely or limit it until sufficient government oversight or accountability is provided. While the reformulated due process version of *Carter Coal*³⁰¹ moderates the traditional

296. See *Allen v. Wright*, 468 U.S. 737, 755 (1984) (holding that private parties "have no standing to complain simply that their Government is violating the law"); *United States v. Richardson*, 418 U.S. 166, 179 (1974) (holding that challenges to the Vietnam War are nonjusticiable). The political question doctrine also has a role to play in the military setting. See, e.g., *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) (refusing to subject the "composition, training, equipping and control" of the National Guard to judicial review). Whatever the present state of the doctrine, its application, if not revival, might be expected in circumstances where military calls on the battlefield are sought to be second guessed. See generally Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 55 DUKE L.J. (forthcoming 2006).

297. See Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2050-51 (2001) (describing standards of judicial review during wartime).

298. 542 U.S. 507 (2004).

299. *Id.* at 600.

300. Of course, standing issues would still remain, and the plaintiffs would have to allege injury to themselves. See *Flast v. Cohen*, 392 U.S. 83, 105-06 (1968) (granting taxpayer standing to challenge expenditures to parochial schools under the First Amendment); see also *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576-78 (1992) (raising Article II objections to public law standing provisions).

301. Professor Merrill's exclusive delegation doctrine could also buttress the *Carter Coal* approach. See discussion *supra* notes 135, 146 and accompanying text. It would still require the Court to accept a shift in doctrine.

nondelegation doctrine, it too proposes a doctrinal shift.³⁰² Designing an effective accountability standard for delegated activities complicates the judicial role, but it is still far less constrained than in the military context.

The larger *Marbury* question of whether some discretionary functions are nondelegable depends upon the right case being found. If the situation involves delegation of the functions of Officers of the United States there is support under both Article I and II for preventing it.³⁰³ But at this point *Marbury* itself would have to be overcome since it postulates a category of policy decisions that are beyond the reach of the courts.³⁰⁴ While there are such policy decisions that would be justiciable despite *Marbury*,³⁰⁵ the actual delegations will rarely be so clearly defined. Rather than delegate duties per se, the usual situations involve delegation of functions over which these constitutional officers remain nominally in charge. This puts the judiciary in the awkward position of second guessing agency decisions concerning workload, budget, and policy matters.³⁰⁶ The use of outside contractors to help with the decisionmaking process is an established administrative practice; curtailing it will require second guessing that is usually disfavored by the courts. The initial lesson of the *Morgan* cases,³⁰⁷ that “[t]he one who decides must hear,”³⁰⁸ must be reviewed if the courts are to play a central role.³⁰⁹

302. Even under *Carter Coal*, delegations to private hands seem to require only a formal set of oversight mechanisms which would likely be satisfied by the government process that awards the contract, even if that process is questionably executed. See discussion *supra* notes 148–49 and accompanying text. In expressing these reservations, however, I am no less respectful of the creative work Gillian Metzger has done to establish constitutional standards for oversight of delegations. See Metzger, *supra* note 92, at 1422–24.

303. See *supra* notes 179–81 and accompanying text (discussing the oath requirement of *Webster v. Doe*).

304. See discussion *supra* notes 167–71 and accompanying text.

305. Strauss, *supra* note 166, at 976–78 (discussing *Marbury*’s limitations as a judicial review tool).

306. Cf. *Heckler v. Chaney*, 470 U.S. 821, 837–38 (1985) (holding that an agency’s failure to act is not reviewable).

307. *Morgan v. United States*, 298 U.S. 468 (1936).

308. *Id.* at 481.

309. The final lesson of the *Morgan* cases is that “inquiry into the mental processes of administrative decisionmakers is usually to be avoided.” *United States v. Morgan*, 313 U.S. 409, 422 (1941); see also *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (stating that it is inappropriate to put administrators on the witness stand).

B. Statutory Challenges

Statutes could provide a workable theory of judicial review,³¹⁰ even though the contracting out process has received little attention from the courts. OMB's Circular A-76 process, which forbids the delegation of inherent government functions, is potentially subject to judicial review. However, Circular A-76 states that "[n]oncompliance with this circular shall not be interpreted to create a substantive or procedural basis to challenge agency action or inaction."³¹¹ The Circular has so far not provided a basis for judicial review.³¹² The FAIR Act, which could provide a statutory basis for judicial review, also has not yet been construed by the courts. Some commentators have said it does not permit judicial review,³¹³ still, section 3(b) of the Act specifically provides for "interested party" standing at the administrative level and the statute does not expressly bar judicial review.³¹⁴ Generalized judicial review provisions of the APA³¹⁵ are available,³¹⁶ and prudential standing requirements normally support public employees and the unions (as well as private contractors) as within the "zone of interests" the FAIR Act seeks to protect.³¹⁷

But judicial review has so far not been granted under the FAIR Act to claims of federal employees,³¹⁸ even though disappointed

310. After all, even under *Heckler*, the concurring Justices reserved reviewability for "abdication of statutory responsibilities." *Heckler*, 470 U.S. at 853 (Marshall, J., concurring). In our situation, the failure to act would amount to an agency refusing to enforce the inherent government function requirement of Circular A-76 or the FAIR Act.

311. See CIRCULAR A-76, *supra* note 202, at 3.

312. See *Courtney v. Smith*, 2002 FED App. 0248P, P16, 297 F.3d 455, 463 (6th Cir.) (holding Circular A-76 does not provide standing because it is not a law and stating that "[t]his limitation suggests that the internal administrative appeals process . . . is intended to be the sole basis for challenging agency action that allegedly violates the Circular").

313. See Robert H. Shriver III, *No Seat at the Table: Flawed Contracting Out Process Unfairly Limits Front-Line Federal Employee Participation*, 30 PUB. CONT. L.J. 613, 621 (2001).

314. The Senate's Committee on Governmental Affairs' report accompanying the FAIR Act indicates, however, that "any challenges to the inventory list [are] to be resolved solely at the agency level by the agency." S. REP. NO. 105-269, at 9 (1998).

315. 5 U.S.C. § 702 (2000). See generally PIERCE, SHAPIRO, & VERKUIL, *supra* note 18, § 5.3 (summarizing judicial review provisions of the APA and relevant decisions).

316. See, e.g., *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 488-89 (1998) (holding the "zone of interests" test for prudential standing does not require courts to "inquire whether there has been a congressional intent to benefit the would-be plaintiff").

317. See *Nat'l Air Traffic Controllers Ass'n v. Pena*, No. 95-3016, 1996 U.S. App. LEXIS 8258, at *14 (6th Cir. Mar. 7, 1996) (unpublished opinion) (granting standing to challenge related actions under the Office of Federal Procurement Policy Act Amendments of 1979).

318. Federal employees performing non-inherent government functions have not been able to challenge procurement actions. See *Am. Fed'n of Gov't Employees v. Babbitt*, 46

private contractors can challenge government procurement actions. The Federal Circuit has effectively closed the door to employee judicial challenges by holding that the Government Accountability Office's ("GAO's") interpretation of "interested person" should control.³¹⁹ Congressional action to provide statutory standing for employees before the Court of Claims would be opposed by the Administration.³²⁰ This leaves contractors themselves the most likely candidates to achieve judicial review and makes such review dependent upon the government denying rather than granting a request to privatize a government function.

But even if standing were achieved by employees, judicial review might be of limited value. The scope of review would be limited to arbitrary and capricious actions.³²¹ Under this standard, courts would be reluctant to rule on the substance of government delegations of functions to the private sector. As to the competitive sourcing process itself, the courts have limited tools with which to perform this task. The key question on substantive review would be what is an inherent government function. While the FAIR Act and Circular A-76 provide definitions, the judiciary would find itself embroiled in the workings of the contracting out process. This places the courts in an awkward oversight role. One is reminded of the difficulties the courts have had in deciding what a public function is for state action purposes.³²² Instead of serious substantive review, the courts would likely settle for review of the procedures employed at the administrative level.³²³

The question of what is an inherent government function might draw closer scrutiny, especially if the agency procedures were

Fed. App'x 254, 256–57 (6th Cir. 2002) (per curiam) (holding that civil employees who lost their jobs at air force bases lacked prudential standing under the APA).

319. See *Am. Fed'n of Gov't Employees v. United States*, 258 F.3d 1294, 1302 (Fed. Cir. 2001) (affirming a Court of Claims denial of employee standing under relevant statutes). Since the Court of Claims has exclusive jurisdiction over bid protests, the Federal Circuit's word is final.

320. The GAO would likely oppose such an amendment since it sees judicial review of the A-76 process as potentially dilatory and expensive (attorney fees, etc.). See COMMERCIAL ACTIVITIES PANEL, U.S. GEN. ACCOUNTING OFFICE, IMPROVING THE SOURCING DECISIONS OF THE GOVERNMENT: FINAL REPORT 89 (2002), available at <http://www.gao.gov/a76panel/dcap0201.pdf> [hereinafter COMMERCIAL ACTIVITIES PANEL] (describing costs of litigation related to challenges of Circular A-76 decisions).

321. See PIERCE, SHAPIRO, & VERKUIL, *supra* note 18, § 7.3.2 (explaining that arbitrary and capricious is the default standard of administrative review and is the most deferential to agencies).

322. See *supra* notes 90–92 and accompanying text.

323. This is a course the courts have pursued on judicial review of informal rulemaking, for example. See PIERCE, SHAPIRO, & VERKUIL, *supra* note 18, § 6.4.6.

deficient in defining it. Since the outsourcing of these functions clearly violates the statute, a legal standard would have to be developed. This effort raises in statutory guise the underlying constitutional issue of nondelegable functions. Assuming a proper plaintiff (either a disappointed contractor or a government official), the courts cannot ignore the statutory formulation.

The relationship between the contracting out process and the Subdelegation Act should also receive closer study judicially. The Subdelegation Act, which permits delegations only to federal officials unless Congress specifies otherwise,³²⁴ is a potential barrier to delegations to private parties.³²⁵ In the contracting out situation there are two controlling standards—the FAIR Act which requires agencies to designate inherent government functions and the Circular A-76 process which drives the public-private competition over competitive sourcing. The FAIR Act might satisfy the Subdelegation Act's requirement for statutory delegation, but the A-76 process clearly would not (indeed, as a Circular, it does not even have the status of an Executive Order).

The key issue is the choice agencies make under the FAIR Act to declare certain government functions eligible for contracting out. This choice is legislatively required and ties into the Subdelegation Act's requirement that delegations be limited to Officers of the United States. It would have to be demonstrated that Congress was aware of the Subdelegation Act effect of the FAIR Act. The Department of Justice would be expected to argue the affirmative, but Congress's awareness of the Subdelegation Act's connection to privatization might be hard to show. The relationship of the FAIR Act to the Subdelegation Act and to privatization of government functions, if framed judicially, would test Congress's purpose. The pro-government official bias of the Subdelegation Act shows that Congress intended to act cautiously in this area.³²⁶ This makes the Subdelegation Act the best available tool for judicially restraining the privatization of inherent government functions.

324. See *supra* note 158 and accompanying text.

325. Cf. *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 574 (D.C. Cir. 2004) (preventing delegation to state officials under the Subdelegation Act).

326. The pro-government delegatee bias of the Subdelegation Act (passed in the 1950s) reflects a time before wholesale privatizing was contemplated or endorsed. See discussion *supra* note 158. The Act seems anachronistic now in that regard, but its powerful message about the role of public officials in the delegation process may be prescient.

V. ADMINISTRATIVE CHALLENGES TO PRIVATIZATION OF INHERENTLY GOVERNMENTAL FUNCTIONS

Much of this Article has been devoted to understanding and developing legal theories to constrain government from placing in private hands functions that are significant, discretionary, or “inherently governmental.” These theories may take time to realize since they are tested on the extension of judicial precedents that have to be refocused to meet the challenges of privatization. The most effective immediate approaches may well be political or administrative. The agencies themselves—such as the DOD, OMB, and GAO—can be the best place to seek enforcement of statutory requirements. The administrative structure, with congressional support, has to make the first efforts at effecting change in this contentious area.³²⁷

A. *Economic and Political Considerations Involving Inherent Government Functions*

Circular A-76, the FAIR Act, and the Aviation and Transportation Security Act have one thing in common—they all ask the crucial question of whether to privatize functions that are arguably inherently governmental. This is a political question that implicates the doctrine of separation of powers. But it is also an economic question with practical dimensions. At one level, government entities are no different from private corporations when they decide to contract out functions formerly performed in-house.³²⁸

In business as well as government, contracting out is a classic make-or-buy decision. It can be analyzed in terms of transaction cost economics, as Professor Oliver Williamson has done.³²⁹ If the outsourced transaction costs less than the in-house alternative, resources will be best utilized if they support this choice, whether they are private or government. Admittedly, the decision worlds are quite different, and as Professor Shapiro suggests, contracting out (the “buy” rather than “make” decision) is made more costly with

327. See generally Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 121–23 (2005) (arguing for a greater role of the executive rather than the courts in controlling private enforcement).

328. In this connection, the Deloitte Consulting report, questioning the value of outsourcing to the private sector, strikes a cautionary note for government as well. DELOITTE CONSULTING REPORT, *supra* note 230, at 2. If outsourcing is failing as a business concept, it can no longer be embraced as a principle of government management.

329. See Oliver E. Williamson, *Public and Private Bureaucracies: A Transaction Cost Economics Perspective*, 15 J. L. ECON. & ORG. 306, 319–26 (1999).

incomplete contracts that invite opportunistic behavior and hold-up problems.³³⁰ Government contracts in the Iraq setting have struggled to define the services to be provided under contracts that are open-ended, incomplete, and single sourced.³³¹

When the government contracting out process involves inherent government functions, however, a new magnitude of complexity arises. These contracts cannot be viewed solely through the lens of transaction cost analysis. The appropriate roles of the public and private sector raise questions beyond efficiency concerns. The debate over airport security questioned the purpose of government control. The social value of the badge, and its relationship to public acceptance of security goals were seen as normative questions. Oath-taking factors into the efficiency of a government official's performance; that performance cannot be measured solely on an efficiency basis. The airport security debate demonstrates that the tension between competitive sourcing and inherent government functions is more political than economic. Privatized activities determined by the A-76 process are supposed to save the government money,³³² but the key inquiries remain political and legal.

Under the Bush administration, government has grown on a GDP basis even as the number of government employees has been reduced.³³³ The political dimension of contracting out in the airport security context had to do with headcounts, not cost. Republicans generally favor contracting out in order to constrain the largely Democrat, unionized base of government employees.³³⁴ Thus the politics of contracting out includes the assumed voting preferences of government employees. But both sides have political grievances. Democrats are entitled to complain that private firms who benefit

330. Professor Shapiro has expanded the transaction cost analysis to contracting out in important ways. See Sidney A. Shapiro, *Outsourcing Government Regulation*, 53 DUKE L.J. 389, 391 (2003).

331. See discussion *supra* note 217 and accompanying text.

332. This was not true in connection with airport security since the TSA employees are funded by an airport tax on passengers, whether or not the officials are public or private. See Airport Security Transportation Act, 49 U.S.C.A. § 44940(a) (West Supp. 2005).

333. See Norris, *supra* note 120, at C1 (stating that under President Bush "17.4 percent of all wage and salary payments came directly from the government" versus sixteen percent under President Clinton); see also David Brooks, *How to Reinvent the G.O.P.*, N.Y. TIMES, Aug. 29, 2004, § 6 (Magazine), at 30, 32-35 (explaining how Republicans abandoned the ideal of small government).

334. But contracting out also has bipartisan roots which go back to the reinventing government movement sponsored by the Clinton-Gore administration. To some extent, those earlier successes have led to the present crisis over adequate numbers of government acquisitions personnel. See discussion *supra* notes 107-10 and accompanying text.

from contracting out are likely to be Republican campaign contributors.³³⁵

These political battles ultimately become stalemated. Political analysis at a higher level might accept the notion that public functions are part of public administration, if not public law. The political role, like the economic one, assesses the value of government involvement independently. Government has the duty to protect inherent government functions, both politically and constitutionally, under either political party. The task of the administrative process is to help make this calculation fairly and accurately.

B. Challenging Outsourcing Determinations

Inherent government functions (“IGFs”) are elusive concepts; they are best articulated by the administrative process. Agency actions make the initial IGF decisions and appellate administrative proceedings evaluate these agency recommendations. Challenges to agency IGF decisions on administrative review are limited in several ways, including administrative standing rules. Under the Circular A-76 process, agencies, which are required to post competitive positions on a biannual basis, make the initial determination whether a function is an IGF or whether it is eligible for competitive sourcing. This first cut is rarely subject to independent administrative review.³³⁶ Of course, the competitive sourcing decision is challengeable within

335. See *Outsourcing: Hearing Before the H. Subcomm. on Military Readiness of the H. Comm. on Armed Services*, 107th Cong. 22 (2002) (statement of Bobby L. Harnage, National President of the American Federation of Government Employees), available at http://commdocs.house.gov/committees/security/has177030.000/has177030_0f.htm (lamenting the cronyism and political aspects of contracting out). The “pork barrel” aspects of competitive sourcing are bipartisan. Steven L. Schooner explained that “both executive and legislative branch pressure prompted the reduction in the size of the federal bureaucracy” and that “[b]oth political parties reveled in, and claim[ed] credit for having contributed to, the reduction in size of the Federal Government.” Steven L. Schooner, *Competitive Sourcing Policy: More Sail than Rudder?*, 33 PUB. CONT. L.J. 263, 284–86 (2004). Schooner concludes:

During the government downsizing frenzy of the 1990s . . . agencies routinely deemed their acquisition professionals nonessential to their core missions. Accordingly, buyers, auditors, contract specialists, and quality assurance personnel were jettisoned in waves at [severe] rates Only after the fact did senior leadership concede the stark ramifications of the acquisition workforce purge.

Id. at 284–85.

336. Oversight agencies include the GAO which can be a potential ally in defining and perhaps protecting IGFs from ill-considered elimination. But it is doubtful that GAO sees its role as independently determining the public interest in public employment. So far, judicial review has not second guessed any of these decisions. See discussion *infra* note 345 and accompanying text.

the agency. Eligible objectors are either private contractors seeking to expand the competitive sourcing side of the equation or government employees (often represented by their union, the American Federation of Government Employees ("AFGE")) who are trying to protect these jobs from competition.

In general, this is how the competitive sourcing process works. Agencies (such as DOD) are required to post two annual inventories categorizing functions as commercial or inherently governmental. This is done by publishing lists of qualifying jobs.³³⁷ OMB reviews these lists and, after translating the personnel codes into job descriptions, makes judgments about their adequacy. But OMB does not mount effective challenges to agency IGF decisions; it has neither the personnel nor incentive to do so.³³⁸ Thus the initial agency IGF decision goes largely unreviewed—the focus is on competitive sourcing instead.

The agency's initial decision to designate jobs for competitive sourcing sets up a public-private competition. The private firms and the affected officials make presentations before the agency to establish which one is more efficient. Government officials do quite well in these contests.³³⁹ Their success is based on a preestablished public-private cost comparison that requires private challengers to achieve at least a ten percent cost differential over in-house costs to prevail.³⁴⁰

Revised Circular A-76 gives standing to a "directly interested party" to contest aspects of the process on appeal to the agency.³⁴¹ Parties include both private sector offerors who contest a failure to designate a job or function as private (or to select them as more competitive) and a representative of those federal employees directly

337. Unfortunately, these lists are produced in the form of personnel codes, which are incomprehensible to the general reader. With 700 functional codes and twenty-three major categories, "[a]gencies [have] reported difficulty in classifying positions as inherently governmental or commercial and in applying guidance to categorize activities." GAO COMPETITIVE SOURCING, *supra* note 226, at 3.

338. After all, it is OMB that is pushing the contracting out question on the agencies in the first place.

339. It is estimated that government officials prevail in fifty percent of the competitive sourcing challenges. See COMMERCIAL ACTIVITIES PANEL, *supra* note 320, at 19–20 (documenting twenty-two A-76 comparison protests reviewed by GAO since 1999, eleven of which were "sustained" (sent back) to the agency for failure to follow statutes or regulations).

340. *Id.* at 19.

341. CIRCULAR A-76, *supra* note 202, at B-17.

affected by the decision to designate a public job as private.³⁴² But the right to appeal beyond the agency stage to GAO is presently limited to private sector challengers.³⁴³ The FAIR Act, which controls competitive challenges before DOD, has a broader standing provision. It provides an administrative appeals process that allows any “interested party” to challenge DOD’s decision to classify a list of activities as commercial or inherently governmental.³⁴⁴ This would presumably include government officials or their representatives as well. Under the Act, the initial privatization lists are also required to be made available for public inspection and can be subject to challenge during the initial decision period. The IGF/competitive sourcing decision receives a broader airing, assuming an objector can meet the administrative standing (“interested person”) requirement. Judicial review, however, is not provided for in the FAIR Act and is not supported by the relevant legislative history.³⁴⁵

1. The Lessons of the Seafood Inspector Challenge

While both Circular A-76 and the FAIR Act permit administrative challenges to the agencies’ initial designations, so far few challenges to that decision (as opposed to competitive sourcing decisions) have been successful.³⁴⁶ One that has, however, offers some valuable lessons. The agency involved, the National Oceanic and Atmospheric Administration (“NOAA”), made an initial decision to list the function of seafood inspector as commercial rather

342. The revised Circular limits the public objector to a single individual rather than multiple objecting “federal employees (or their representatives).” CIRCULAR A-76, *supra* note 202, at F-5. Circular A-76 Attachment D defines a “Directly Interested Party” as an “agency tender official who submitted the agency tender; a single individual appointed by a majority of directly affected employees as their agent; a private sector offeror; or the official who certifies the public reimbursable tender.” Circular A-76, *supra* note 202, at D-4. See discussion *infra* note 363 (defining “agency tender official”).

343. The challenge must first be to an agency appeal board and then, if it is a private challenge, either to GAO or the Federal Court of Claims. COMMERCIAL ACTIVITIES PANEL, *supra* note 320, at 19; see also *id.* at 19–20 (documenting that since 1999, of 22 A-76 protests, GAO sustained eleven and denied eleven).

344. Federal Activities Inventory Act of 1998, Pub. L. No. 105-270, 112 Stat. 2382 (codified at note following 31 U.S.C. § 501 (2000)).

345. While the Senate report suggests that challenges are too limited at the administrative stage, it does not contemplate judicial review. In Senate Report No. 269, the Committee on Governmental Affairs stated that it “intend[ed] for any challenges to the inventory list to be resolved solely at the agency level by the agency.” S. REP. NO. 105-269, at 9 (1998); see discussion on judicial review *supra* notes 320–21 and accompanying text.

346. See COMMERCIAL ACTIVITIES PANEL, *supra* note 320, at 19 (documenting that, of 101 DOD appeals during FY 1997–2001, six successfully challenged cost comparison decisions).

than as an IGF. The result was to make the jobs of seafood inspectors eligible for competitive sourcing. This choice was challenged before the agency by the program inspectors themselves.³⁴⁷ The inspectors argued that their role as public officials was not a competitive one and could not be played by private contractors.³⁴⁸ Government employment provided inspectors with credibility, they maintained, which was a quality that had an independent value, especially in the international market.³⁴⁹ This value was touted as not just symbolic but also economic. The evidence presented showed that if the inspectors were not viewed as authoritative by foreign governments—especially by China and the European Union—shipments of United States fish to those countries could be jeopardized.³⁵⁰ Foreign governments, it seems, place an independent value on the presence of a “badge” in the inspection process.

The seafood inspectors ultimately gained assistance from Members of Congress³⁵¹ and had the designation reversed on appeal by the Department of Commerce (the agency to which NOAA reports).³⁵² Ironically, the private sector—the fishing industry—also saw the value of continued “publicization” of the inspector program. Even though the program was entirely paid for by their fees,³⁵³ the fishing industry decided it got more value (in terms of inspector credibility) from continued public control of the process. The Department’s support for public control was painless, since no appropriated funds were at issue, which was also the case with airport security.

The lesson of the seafood inspectors program should not be lost; the requirement of official authority (a badge, if you will) convinced all sides of the debate that public control was needed. A similar argument applies to other federal jobs where the badge or oath matters, such as airport inspectors, prison guards, and especially military personnel. The equation of seafood inspectors with security personnel can be legitimated because the interests at stake are

347. See James McCullough et al., *Feature Comment*, Year 2003 OMB Circular A-76 Decisions and Developments, 46 Gov’t Contractor (West) ¶ 27, at 259 (Jan. 21, 2004).

348. *Id.*

349. *Id.*

350. *Id.*

351. In the seafood inspector situation, thirty-nine members of Congress expressed their strong opposition to the commercial designation. *Id.*

352. See generally Letter from Richard V. Cano, Acting Director of Seafood Inspection Program, to Otto J. Wolff, C.F.O., U.S. Department of Commerce (June 3, 2003) (on file with author).

353. *Id.* at 1.

comparable. Security of seafood is a public health issue as is the well-being of those who travel.

Finally, the willingness of Congress to intervene in what might seem to be a minor matter demonstrates how crucial its role can be to a proper resolution.³⁵⁴ The politics are more complicated when the inquiry shifts to the security or military sector, but the same concerns apply. In all these settings, the make-or-buy decision for government often places the badge and the oath on the scales in weighing whether a public or private provider is more efficient.

C. *The Crucial Role of GAO*

A potential administrative ally in defending public functions of government is the Comptroller General and the agency he heads: GAO. GAO is not part of the executive branch;³⁵⁵ it must investigate matters brought to its attention by members of Congress, whether on the majority or minority side.³⁵⁶ This mandate places GAO in a position to consider the government-wide implications of the contracting out process.

GAO has bid protest authority under the Competition in Contracting Act ("CICA").³⁵⁷ But GAO's scope of review is limited—it will not review the merits of the competitive source/IGF decision (which it views as a matter of executive branch policy).³⁵⁸ GAO's role is to determine whether an agency properly followed the procedural requirements of Circular A-76.³⁵⁹ Under CICA, protests may be brought by actual or prospective bidders, who are invariably private contractors.³⁶⁰ This restriction has led GAO to dismiss protests by federal employees and their unions for lack of

354. Of course, the pressures on Congress, when major military contractors like Lockheed Martin are on the other side, must also be acknowledged. *See supra* notes 233, 289.

355. *See Bowsher v. Synar*, 478 U.S. 714, 730–32 (1986) (discussing the congressional role of the Comptroller General and GAO).

356. *See generally* 31 U.S.C. § 719 (2000) (explaining the requirements of Comptroller General reports); *id.* §§ 711–720 (2000 & Supp. II 2002) (describing the "General Duties and Powers" of GAO).

357. Competition in Contracting Act, Pub. L. No. 98-369, 98 Stat. 1175 (1984) (codified at 31 U.S.C. § 3551 (2000)).

358. *See* COMMERCIAL ACTIVITIES PANEL, *supra* note 320, at 19–20 (describing GAO's role in the contracting out process).

359. *See* Jayna Richardson, Comment, *Outsourcing and OMB Circular A-76: Sixth Circuit Opens the Door to Federal Employee Challenges of Agency Determinations*, 28 PUB. CONT. L.J. 203, 212 (1999).

360. 31 U.S.C. § 3551(2) (2000). In the last three years, more than fifty private protests have been filed challenging A-76 competitions. Admin. Practice and Procedure Notice, 68 Fed. Reg. 35,411 (June 13, 2003).

administrative standing because they were not “offerors” under CICA.³⁶¹

By so restricting administrative standing, GAO has unnecessarily imbalanced the administrative appeals process. If only those challenging the agencies’ failure to contract out can object, the appeals process creates a one-way ratchet in favor of privatization.³⁶² However, GAO appears to be relaxing its position on public entity standing in Circular A-76 challenges.³⁶³ Its interest in the question has undoubtedly been heightened by congressional pressures,³⁶⁴ still, the outcome better serves the public purposes of the privatization process.

GAO is now an “accountability” office in name³⁶⁵ as well as in mission so its role in the privatization process could not be more appropriate, since public accountability is at stake. The Comptroller General has committed GAO to providing “Congress with professional, objective, fact-based, non-partisan and non-ideological information.”³⁶⁶ This commitment helps assure careful and balanced decisions which GAO encourages through its latest standing proposal.³⁶⁷

GAO is the agency most likely to represent the public interest in reviewing the contracting out process and preserving the public-private distinction. The only other candidate for this role is OMB, but, as an executive branch agency, it has an interest in seeing the Administration’s privatization process succeed. In the words of Paul Light, what is needed is an entity that can view competitive sourcing

361. See, e.g., Am. Fed’n of Gov’t Employees, B-282904.2, 2000 CPC # 87 (June 7, 2000), available at http://strategicsourcing.navy.mil/reference_documents/American%20Federation%20of%20Government%20Employees.pdf.

362. This means that erroneous agency decisions to contract out IGFs rather than competitive sources cannot be detected through an appeals process.

363. GAO has sought comments on changes in “interested party” status in connection with A-76 protests. See 45 GC #244 (May 2003). It has recently proposed a rule to provide an “agency tender official” with the status to appeal on behalf of public employees. See Bid Protest Regulations, 69 Fed. Reg. 75,878 (Dec. 20, 2004) (to be codified at 4 C.F.R. pt. 21). It still denies unions the right to appeal. *Id.*

364. The Senate introduced a bill that would amend the CICA that would provide federal employees with bid protest rights. S. 2438, 108th Cong. (2004).

365. GAO’s name was changed from the Government Accounting Office on July 7, 2004. 31 U.S.C.A. § 702 (West Supp. 2005).

366. See David M. Walker, *GAO Answers the Question: What’s in a Name?*, ROLL CALL, July 19, 2004, 2004 WLNR 4024409.

367. See discussion *supra* note 342 (concerning standing for agency tender officials to represent government employees whose jobs are proposed to be outsourced). The proposal also talks about employees being entitled to representation by someone selected by a majority of them, which seems more difficult to administer. See *supra* note 363.

issues as meant not only to “protect the private sector from government” but also to “protect civil society from the private sector.”³⁶⁸

GAO is well known for improving agency performance. A good example is its recent work on identifying organizational conflicts of interest.³⁶⁹ In this era of rampant contracting out, many organizations have potential conflicts in deciding who gets contracts. The problem is exacerbated when general performance contracts are involved, as they are in Iraq.³⁷⁰ The problem of conflicts involves both private and public sector competitors.³⁷¹ GAO is in the best position to conduct these conflict reviews since it is as nonpolitical and respected as one can expect a government agency to be.

GAO should also look more carefully at agency IGF decisions, which precede and frame the A-76 competitions. To date, it has been unwilling to take positions on what it sees as the political question of inherent functions. But it could review these agency decisions without having to reverse them. Collecting agency decisions could lead to the creation of a “common law” of IGF decisions. Once data are collected, “grey area” IGF decisions could be identified.³⁷² By sharing this information with other agencies, GAO would produce a better picture of how agencies decide to delegate functions of government to private parties, which is still an unilluminated aspect of the contracting out process.

D. Structuring a Viable Administrative Review Process

When public employees (if not their unions) ultimately gain administrative standing as interested persons under Circular A-76 and the FAIR Act, the appeals process will be more balanced. The quality of the review then becomes the focus of attention. GAO helps ensure decisional regularity where procedures are in short supply. It remands decisions to agencies for further review where the

368. *Hearings*, *supra* note 288, at 161.

369. See Daniel I. Gordon, *Organizational Conflicts of Interest: A Growing Integrity Challenge* 7–15 (Geo. Wash. U. L. Sch. Pub. Law & Legal Theory Working Paper Group, Paper No. 127, 2005), available at <http://ssrn.com/abstract=665274>. Mr. Gordon is managing associate general counsel of GAO.

370. One example involves a contract awarded to CACI, Inc., for interrogation service, where one of its officials was involved in writing the statement of work. See *id.* at 3.

371. See *id.* at 7–8.

372. The U.S. Army’s FAIR Act website allows for the review of its decisions in this regard. See <http://web.lmi.org/fairnet/select.cfm>.

initial effort was factually deficient.³⁷³ But GAO is not in the policymaking business, and its role is limited. Congress will have to change the substantive standards. Gauging the interest of Congress in this effort is difficult, but the pendulum may be swinging behind the public values side of the debate. Professor Minow has pointed towards a “dilution of public values” as an unintended consequence of privatization that should increasingly worry Congress.³⁷⁴ GAO’s role in illuminating privatization choices—while still not choosing to make them itself—could help strengthen congressional interest. The possibility of future activity can be glimpsed from the congressional role in encouraging the Department of Commerce to reverse the seafood inspector status from private to public.³⁷⁵

Under the present structure, federal employees, their unions, and private contractors represent the “public interest.” Affected employees have the most knowledge about the nature of their jobs and how competitive or inherently governmental they might be. But they and their unions are primarily concerned about job protection, which compromises their ability to serve the public’s interest. Private firms of course have equally conflicted views. To some extent, at the administrative level, the disinterested public interest (if not taken up by GAO) is left out of the equation. In this context, the public interest should ensure that inherent government functions are not inadvertently privatized during the outsourcing process.

Groups who speak for accountable government, such as the National Academy of Public Administration, the Brookings Institution, or the American Enterprise Institute, could play a role in this regard. They would not have administrative standing to ensure that IGF decisions are made properly in the first instance, but they could wield power after the fact by commenting on the propriety of those decisions. Agencies would benefit from more objective views on the constitutional imperatives behind government functions.

More articulated views about inherent government functions and how to protect them might emerge from exchanges between agencies and these outside groups. Then the process for commenting on agency IGF decisions could be regularized by employing procedures associated with notice and comment rulemaking, which would make

373. GAO has sustained challenges on cost comparison decisions in fifty percent of cases between 1999 and 2002. See COMMERCIAL ACTIVITIES PANEL, *supra* note 320, at 19–20.

374. Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1246 (2003).

375. See discussion *supra* Part V.B.1.

the review process more open and effective.³⁷⁶ These ideas require no statutory changes.³⁷⁷ They require only the will to hear all sides and to recognize the constitutional significance of the inherent government function decision.

E. The Relevance of Civil Service Reforms

An issue that keeps recurring is the capacity of government officials to oversee private contractors. Oversight is essential for outsourcing to work, yet, as privatization proceeds, the number of “overseeing” officials in the SES is thinning out.³⁷⁸ Cutbacks in personnel below the SES level also threaten the residual capacity of government to ensure that its contracts are properly enforced. These developments raise the more general question of the continued vitality of the civil service. This is not the place for an extended discussion of the civil service or its reform. But the professional future of government depends upon a strong civil service. Retirements in the face of new demands for oversight of privatized activities only widen the leadership gap. And service overregulation can be one of the incentives for privatization. Agencies often feel that to get the talent they need quickly and cost effectively, they must go outside government; this is true for the military.³⁷⁹

Government officials often feel that they have more control over private contractors than they do over their own employees due to restrictions on hiring or firing permanent employees.³⁸⁰ The legislative compromise on airport security shows how civil service rules can affect public management adversely. The Transportation Security Act only became law when rules restricting hiring and firing

376. See 5 U.S.C. § 553(c) (2000) (describing the opportunity interested persons have to participate in the rulemaking process after notice of a proposed rule is published in the Federal Register). The notice periods could be shortened and comments could be submitted in written form. Since these are personnel matters not subject to § 553 requirements in the first place, the use of expedited procedures would be entirely proper.

377. If statutory change were contemplated, it should revise the A-76 process to ensure agency consideration of inherent government functions and OMB consideration of the “accountability gap” that is emerging government-side when top officials (i.e., SES level) are replaced or stretched too thin.

378. The Senior Executive Service has about 6,000 career positions, forty-six percent of which are eligible for retirement (including early out). See THE FACT BOOK, *supra* note 1, at 75. In 1990, there were approximately 6,800 career SES positions. *Id.* at 76.

379. See SINGER, *supra* note 245, *passim* (documenting private military deployments in the Balkans, Columbia, Africa, and Iraq).

380. It stands to reason that, given an alternative, government officials might prefer obedient and enthusiastic private contractors to entrenched and often disinterested civil servants.

personnel were suspended.³⁸¹ But the need for public sector employees at TSA was accepted despite these difficulties. To some extent, civil service "deregulation" can help to encourage government to outsource only those functions that could be classified as competitive rather than inherently governmental.³⁸² It is the latter category that must be protected from privatization in order for government to fulfill its responsibilities to the public.³⁸³

Paul Volcker has long been a champion of freeing the public service from constraints that limit and often frustrate the mission of government officials.³⁸⁴ His message has gone unheeded during the era of privatization, but the times and needs are different after 9/11. The phrase "I'm from the government and I want to help you" no longer draws instant applause and derisive laughter. Avoidance of the delegation of inherent government functions to the private sector can happen more readily in a world where civil service rules and standards make government service more attractive to the kind of talent that now appears on the rosters of private contractors.³⁸⁵ Moving some of these talented and dedicated people back into government (or attracting them in the first place) has to be a major goal of reform for the civil service.

VI. CONNECTIONS AND CONCLUSIONS

This Article has sought to connect the public-private distinction to the essential question of who runs the government and for what reasons. There is a long historical, political, and legal tradition that supports this distinction and its role in our society. It is at the core of those functions of government that are labeled "inherent." These functions are performed by officials who exercise discretion and are accountable for the important actions of government. The privatization movement's success has placed these functions and the actors who perform them increasingly at risk. Protecting the public

381. See *supra* note 282 and accompanying text.

382. See DiIulio, *supra* note 121, at 1284 (arguing that government by proxy (private actors) needs a "framework of accountability" (quoting Minow, *supra* note 374, at 1267).

383. See DiIulio, *supra* note 112, at 28 (advocating "an organizational culture of performance rather than of security").

384. See NAT'L COMM'N ON THE PUB. SERV., LEADERSHIP FOR AMERICA: REBUILDING THE PUBLIC SERVICE 29-30 (1989) (recommending changes in civil service requirements for living, etc.); see also GOODSSELL, *supra* note 111, at 42-58 (defending bureaucracy against various negative "myths").

385. In the military setting, the inability to re-sign experienced soldiers has reached crisis proportions. See Bergner, *supra* note 243, at 33-34 (documenting the bonuses paid to military officials in Iraq).

sector means placing some functions beyond the reach of privatization.

Giving the public sector an independent value does not undermine the private sector. This is not a zero sum game. Indeed, in terms of democratic theory this is a positive sum game where both sides can win.³⁸⁶ If the public sector is given independent value, the private sector benefits from clearer rules and better oversight. Our tradition of political liberalism keeps the public sector from usurping the essential role of private enterprise. But our notions of civil society require that the public enterprise operate effectively as well.

It is difficult for the courts to implement the public-private distinction under the Constitution. *Carter Coal's* concern with due process and private delegations is one method; some limitations on delegations by high government officials under *Marbury* could be another. As a statutory matter, the Subdelegation Act is an intriguing proposition. It has the potential to limit government delegations and to make Congress think twice about transferring control of important government activities to private hands. Judicial intervention can often provide the prod, even if it will not provide the solution.

The various statutory and administrative alternatives under the FAIR Act and Circular A-76 have not realized their public law potential. The FAIR Act honors the public-private distinction by defining inherent government functions; Circular A-76 sets up a competitive process that allows government employees to challenge rampant privatization. If Congress replaces Circular A-76 with a better defined statute that guarantees objective consideration of the larger issues, many open issues can be resolved.

An expanded administrative process could be led by GAO. GAO can help ensure that the government remains in charge of those functions that are crucial to our functioning as a civil society. Its role as an objective decider and honest broker gives it enormous credibility. There is also no substitute for the public's voice on these matters, as expressed both through public-private competitors and a broad range of interest groups. Should GAO's role expand, congressional interest will be heightened. Congress must evaluate what society is losing when the private-public distinction becomes submerged by the privatization movement. At stake, of course, is the degree of accountability and credibility necessary to make our government and society work effectively.

386. See generally ROBERT WRIGHT, *NON-ZERO: THE LOGIC OF HUMAN DESTINY* 209–28 (2000) (describing how society progresses by cooperating, not competing).

Privatization need not be the enemy here. Many functions of government can be performed better and more effectively with competitive sourcing. But the higher up the policy ladder the process goes, the closer one gets to inappropriate outcomes. What is lost is not just the job, but the credentials of the official involved. As Justice Scalia noted in his *Webster v. Doe* dissent,³⁸⁷ government officials take oaths of office to uphold the Constitution. But they also subscribe to stringent conflict of interest and ethics rules,³⁸⁸ and work for more than money.³⁸⁹ Oaths and badges are not merely symbols or formalities. They accompany the defining qualities of authority and credibility. In our post 9/11 world, government officials have earned renewed respect from the public.³⁹⁰ The credibility of a public sector employee is not easily transferred to the private sector.

The public's perceptions matter. The seafood inspector program³⁹¹ and the airport security situation are two diverse examples that make a larger point: the private sector often prefers to have government officials in charge. The public is demanding of government officials, but it is also respectful of them. Admittedly, credibility is hard to measure and we are entitled to be skeptical about it. Still, officials of government are not always bound by the self-interested calculations of political markets.³⁹² The values behind public service help animate the public-private distinction. When private contractors perform inherent government functions, they jeopardize core values of public law and weaken government's capacity to do the common good.

The goal is to grant privatization its due while protecting public sector values. Boundaries are admittedly hard to draw. But as the trend toward privatizing government functions accelerates, locating

387. *Webster v. Doe*, 486 U.S. 592, 613 (1988) (Scalia, J., dissenting); see discussion *supra* note 181 and accompanying text.

388. See JOHN A. ROHR, *ETHICS FOR BUREAUCRATS: AN ESSAY ON LAW AND VALUES* 48 (2d ed. 1989) (connecting the political challenges of administration to ethical principles).

389. The view of government officials as purely "budget maximizers" has been challenged. See GOODSELL, *supra* note 111, at 100-06 (finding non-economic motivations of government officials in addition to budget maximizing cases).

390. One need only consider the respect that flows to firefighters and police in New York City after 9/11; these are now prestigious jobs, and the public respects those who hold them. To see this confirmed, one needs only to count the number of "FDNY" or "NYPD" caps on private heads.

391. See discussion *supra* Part V.B.1.

392. See Michael J. Trebilcock & Edward M. Iacobucci, *Privatization and Accountability*, 116 HARV. L. REV. 1422, 1439-41 (2003) (describing the relevance of "public choice" theory to public decisionmaking).

them becomes an imperative exercise in public law and government management. All three branches of government have a stake in ensuring that this exercise succeeds.

