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THE PRIVATE ROLE IN PUBLIC GOVERNANCE

JODY FREEMAN*

In this Article, Professor Freeman proposes a conception of governance as a set of negotiated relationships between public and private actors. Under this view, public and private actors negotiate over policy making, implementation, and enforcement, thereby decentralizing the decision-making process. Recognizing the pervasive and varied roles played by private actors in all aspects of governance, Professor Freeman challenges the public/private distinction in administrative law and invites a reconsideration of the traditional administrative law preoccupation with the accountability of "public" actors. The Article offers theoretical support for the new conception, drawing on both public choice theory and critical legal studies to argue that there is neither a purely private realm, nor a purely public one—only negotiated relationships between public and private actors. Professor Freeman's argument proceeds through a series of empirical examples that demonstrate the roles played by private actors in a variety of administrative contexts, including health

* Acting Professor of Law, University of California Los Angeles. B.A., 1985, Stanford University; LL.B., 1989, University of Toronto; LL.M., 1991, S.J.D., 1995, Harvard University; Freeman@law.ucla.edu. I am grateful to many generous colleagues at UCLA and elsewhere for enormously helpful comments and extraordinary acts of collegiality: Rick Abel, Michael Asimow, Steve Bainbridge, Ann Carlson, Sharon Connors, Beth Garrett, Gillian Hadfield, Joel Handler, Bill Klein, Harold Krent, Gillian Lester, Tim Malloy, Tom McGarity, Mike Meurer, Eric Orts, Ed Rubin, Jim Salzman, Mark Seidenfeld, Clyde Spillenger, Nancy Staudt, Elizabeth Wehr, Jim Wooten, and Steve Yeazell. I am especially indebted to Mitu Gulati, who generously shared both ideas and enthusiasm on a daily basis. The UCLA Junior Group offered a particularly hospitable environment in which to cultivate these ideas. The article benefited from workshops at DePaul, the University of Toronto, and SUNY Buffalo. I thank the Academic Senate at UCLA and the Dean's Fund for financial support. Marc Luesebrink, Darrel Menthe, and the staff at the Hugh and Hazel Darling Library supplied excellent research assistance. Joanna Wolfe deserves special mention for outstanding research assistance and tireless devotion to this project. For superb administrative support, I thank Ellis Green and Tad Grietzer. I am to blame for mistakes. This is for my late father, Larry Freeman.

care delivery and prison management, as well as regulatory standard-setting, implementation, and enforcement. Professor Freeman not only invites administrative law to reckon with private power, but challenges the field's almost uniform defensiveness toward private actors. She further argues that actors do not merely exacerbate the legitimacy crisis in administrative law; they may also be regulatory resources, capable of producing accountability. From the perspective of the new conception, public and private actors together produce accountability through a combination of traditional and nontraditional mechanisms. This notion of "aggregate" accountability produced through horizontal negotiation is offered as a contrast to the formal, hierarchical approach to accountability that dominates administrative law. Professor Freeman concludes by proposing a new administrative law agenda that places public/private interdependence at the heart of the inquiry.

INTRODUCTION

Administrative law, a field motivated by the need to legitimize the exercise of governmental authority, must now reckon with private power, or risk irrelevance as a discipline.[1] Since the New Deal explosion of government agencies, administrative law has been defined by the crisis of legitimacy and the problem of agency discretion.[2] Agencies can claim, after all, only a dubious constitutional lineage—the Framers made no explicit provision for them, but instead divided power among the legislative and judicial branches and a unitary executive.[3] The combination of executive, legislative, and adjudicative functions in administrative agencies appears to violate the separation of powers principles embodied in the Constitution. Worse yet, despite their considerable discretionary power to impact individual liberty

[1] For a collection of essays arguing to this effect, see The Province of Administrative Law (Michael Taggart ed., 1997). Private power is an increasingly important subject of study in international political economy as well. See Susan Strange, The Retreat of the State: The Diffusion of Power in the World Economy (1996) (rejecting state-centered analysis of international relations theory and arguing that nonstate actors increasingly impinge upon traditional state domains).

[2] See James O. Freedman, Crisis and Legitimacy: The Administrative Process and American Government (1978). Administrative law scholars traditionally view administrative discretion as the greatest problem of the field. See, e.g., Kenneth Culp Davis, Discretionary Justice 216 (1969). Despite widespread faith in agency expertise during the New Deal era, even this relatively optimistic period was marked by attempts to constrain discretion, most notably the passage of the Administrative Procedure Act (APA) in 1946. See Administrative Procedure Act, Pub. L. No. 404, 60 Stat. 237 (codified as amended at 5 U.S.C. §§ 551-559, 701-706 (1994)).

[3] The U.S. Constitution does not mention administrative agencies. Authority to delegate power to them is rooted principally in the Take Care and Necessary and Proper Clauses. Article II, section 3 requires that the President "take Care that the Laws be faithfully executed." Article I, section 8 provides that Congress "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." Article II, section 2 provides for the appointment of "Officers of the United States." That administrators make law, adjudicate claims, or operate outside of the executive branch has concerned theorists since the federal government first engaged in regulatory activity. See Jerry L. Mashaw, Greed, Chaos and Governance 107 (1997).

and property rights, allocate benefits and burdens, and shape virtually every sector of the economy, agencies are not directly accountable to the electorate.[4]

Unsurprisingly, administrative law scholarship has organized itself largely around the need to defend the administrative state against accusations of illegitimacy, principally by emphasizing mechanisms that render agencies *indirectly* accountable to the electorate, such as legislative and executive oversight[5] and judicial review.[6] Scholars have expended considerable energy in particular on structuring and disciplining the exercise of discretion in order to limit agencies' freedom "to do as they please."[7] Only a handful of articles in the last sixty years, by contrast, have ventured beyond the traditional preoccupation with agencies and the project of constraint.[8]

The time has come, however, for the discipline of administrative law to grapple with private power. This Article explores the administrative law implications of the private role in governance. The subject

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[4] The American democratic system requires that the exercise of governmental or "public" power be politically accountable and subject to the rule of law. The basic notion is that citizens ought to be able to punish or reward decisionmakers by voting them in or out of office. Moreover, citizens ought to be assured that the government acts consistently with both procedural and substantive law. See generally Peter H. Schuck, Delegation and Democracy: Comments on David Schoenbrod, 20 Cardozo L. Rev. 775, 783-90 (1999) (outlining ways in which agencies are held democratically accountable).

[5] Although agencies are not directly accountable to the electorate, they are indirectly accountable by virtue of myriad formal and informal controls, such as congressional and executive oversight, the appropriations process, judicial review, media scrutiny, interest group pressure, professional norms, and bureaucratic management. See, e.g., Kathleen Bawn, Choosing Strategies to Control the Bureaucracy: Statutory Constraints, Oversight, and the Committee System, 13 J.L. Econ. & Org. 101, 102 (1997) (discussing role of Congress in affecting agency actions). Congress also exerts arguably the most important control of all, the power of the purse. See generally Kate Stith, Congress' Power of the Purse, 97 Yale L.J. 1343 (1988). The executive branch imposes significant analytic requirements on agencies and employs numerous informal political mechanisms for influencing their decisions. See Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 658-658g (1994 & Supp. III 1998) (setting forth procedures for acquiring funds to implement federal mandates); Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (1993) (requiring cost/benefit analysis for "major rules" and annual regulatory impact analysis).

[6] The purpose of judicial review is to guarantee the legality of agency decision making by monitoring fidelity to legal procedure and compliance with substantive norms of rationality. The distinction between procedural and substantive regularity is admittedly somewhat unsettled in American administrative law. Courts may invalidate agency actions that are lacking "substantial evidence," "arbitrary, capricious," or otherwise not in accordance with law, regardless of their compliance with procedural norms. See 5 U.S.C. § 706.

[7] Schuck, supra note 4, at 777.

[8] See, e.g., Harold I. Abramson, A Fifth Branch of Government: The Private Regulators and Their Constitutionality, 16 Hastings Const. L.Q. 165 (1989); Louis Jaffe, Law Making by Private Groups, 51 Harv. L. Rev. 201 (1937); Harold J. Krent, Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government, 85 Nw. U. L. Rev. 62 (1990).

has attracted significant attention only recently, in the wake of international trends toward privatization, deregulation, devolution, and the contracting out of services to private providers. Although the United States has embraced these trends, they are not altogether new; rather, they build on a longstanding tradition of private participation in governance—one barely noticed by the public, acknowledged by politicians, or scrutinized by scholars.[9] Virtually any example of service provision or regulation reveals a deep interdependence among public and private actors in accomplishing the business of governance. This interdependence shatters the notion of "public" power that animates the legitimacy crisis in administrative law.

Private participation in governance is neither marginal nor restricted to the implementation of rules and regulations. A variety of nongovernmental actors, including corporations, public interest organizations, private standard setting bodies, professional associations, and nonprofit groups, engage in "public" decision making in myriad ways. Nongovernmental actors perform "legislative" and "adjudicative" roles, along with many others, in a broad variety of regulatory contexts. They set standards, provide services, and deliver benefits. In addition, they help implement, monitor, and enforce compliance with regulations. Nongovernmental organizations exert, in the context of a larger network of relationships, coercive power. A careful inquiry into the private role in governance reveals not only its pervasiveness, but also the extent to which it operates symbiotically with public authority. That is, the relationship between public and private actors in administrative law cannot properly be understood in zero-sum terms, as if augmenting one necessarily depletes the other.

Most administrative law theory now adheres to a hierarchical, agency-centered conception of administrative power in which the

[9] The United States has experienced relatively less privatization than other countries only because fewer assets historically have been state-owned. See John D. Donahue, The Privatization Decision 6 (1989) (comparing extent of government asset ownership in industrialized countries and pointing out that United States has always had relatively few state-owned enterprises). For a general discussion of devolution, see John J. DiIulio, Jr. & Richard P. Nathan, Introduction, in Medicaid and Devolution 1, 1 (Frank J. Thompson & John J. DiIulio, Jr. eds., 1998) (referring to 1990s as "decade of devolution"). On the devolution of authority over welfare as part of a larger trend toward privatization and decentralization, see Joel F. Handler, Down from Bureaucracy 41-49 (1996). Deregulation in the form of relaxed controls on entry barriers and rates has affected numerous industries in the last 20 years, including "airlines, natural gas producers, railroads, motor carriers, securities brokers, telephone companies, financial institutions, and broadcasters." Ronald A. Cass et al., Administrative Law 1019 (3d ed. 1998).

most pressing theoretical goal is to constrain agency discretion.[10] Given the reality of public/private interdependence, I propose an alternative conception of administration as a set of negotiated relationships. Specifically, public and private actors negotiate over policy making, implementation, and enforcement. This evokes a decentralized image of decision making, one that depends on combinations of public and private actors linked by implicit or explicit agreements. One might describe this conception by using the term "shared governance," but "governance" implies a hierarchy of control in which there is one thing—or a set of things—to be governed, and a center of control that does the governing. In my conception, however, there are only problems to confront and decisions to make. There is nothing to govern.

This alternative conception challenges the fundamental public/private distinction in administrative law. It invites a reconsideration of the agency as the primary unit of analysis in the field. There is no center of decision making, as we tend to think in administrative law.[11] Viewing governance in this light allows us to recognize that both critical legal studies and public choice theory are correct: There is no purely private realm and no purely public one. If both are true at the same time—as I think they are—the entity on which we ought to focus administrative law's scholarly attention is neither public nor private but something else: the set of negotiated relationships between the public and the private.

This approach also casts private parties in a more realistic and balanced light. The view that private actors exacerbate the traditional legitimacy crisis in administrative law—that they are menacing outsiders whose influence threatens to derail legitimate "public" pursuits—

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[10] See Christopher F. Edley, Jr., Administrative Law: Rethinking Judicial Control of Bureaucracy 11 (1990) (claiming that administrative law field's preoccupation with discretion is neither practically nor theoretically fruitful).

[11] For a conception of the firm as a "set of contracts" that similarly lacks a center, see G. Mitu Gulati et al., Connected Contracts, 47 UCLA L. Rev. 887 (forthcoming 2000). As we completed our respective drafts, my colleagues and I noted interesting parallels. Just as they argue that the focus on agency costs in corporation law is too narrow, I criticize administrative law's focus on the problem of constraining agency discretion, which can be understood as a species of the agency problem. (Here it is crucial to remember that, in administrative law, the word "agency" refers to the government agency as an institution, while, at the same time, the government agency as a *delegate* of legislative power presents an "agency problem" as it is understood in corporate law.) Just as my three colleagues reject reference to a "nexus" or "web" of contracts because they wish to describe a system in which there is no central authority, so does my conception of negotiated relationships reject the notion of a center. This rejection has made the search for a metaphor difficult. The spider web was a candidate because it captures the woven nature of public/private relationships, but the spider itself—implying a central authority figure—proved problematic.

features prominently in the dominant models of the field. And yet, private actors are also regulatory resources capable of contributing to the efficacy and legitimacy of administration. This realization suggests the possibility of harnessing private capacity to serve public goals. A focus on interdependence reorients administrative law toward facilitating the effectiveness of public/private regulatory regimes and away from the traditional project of constraining agency discretion.[12]

Such an endeavor, I propose, demands a search for alternative accountability mechanisms that are largely unrecognized in administrative law and that might supplement, or supplant, more traditional forms of oversight. Among these mechanisms, contracts may play a central role, but other tools may prove equally important. The inquiry into accountability in administrative law currently focuses inordinately on formal accountability to the three branches of government. I argue, in contrast, that accountability is more plural and contextual than traditional administrative law theory allows. In light of public/private interdependence, I propose that we think in terms of "aggregate" accountability: a mix of formal and informal mechanisms, emanating not just from government supervision, but from independent third parties and regulated entities themselves. Taken together, these mechanisms can allay our concerns about the particular risks posed by arrangements of public and private actors, while capitalizing on their capacities.

Contract thus plays two roles in this Article—one literal, the other metaphorical. Literally, contract is an increasingly important governing tool. In an era of contracting out, it behooves administrative law scholars to pay closer attention to contract as a vehicle for the exercise of authority and as an instrument of regulation. In both contexts, contract represents a potentially crucial mechanism for imposing accountability on both public and private actors, providing an important component of a system of aggregate accountability. As a metaphor for how governance actually works, moreover, contract captures the idea that all of the participants in a particular context—government agencies together with a wide variety of nongovernmental actors—negotiate over policy and its implementation. Contract therefore offers a valuable heuristic, a way for us to reimagine the nature of what we now call governance.

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[12] Elsewhere I have offered the term "regulatory regime" as a way to describe the interdependence among public and private actors. See Jody Freeman, Private Parties, Public Functions and the New Administrative Law, in Recrafting the Rule of Law 331, 369 (David Dyzenhaus ed., 1999).

I
RECKONING WITH PRIVATE POWER

A. Tradeoffs and Conundrums

This Article presents a difficult choice between what to provide first: the theoretical foundation for an alternative conception of administration or the concrete evidence of private participation in governance on which that conception is based. Each organizational option involves a tradeoff. Presenting the theory first asks the reader to take on faith that the examples provided will prove the theory. It also leads with abstraction, which is ironic, since an important purpose of this Article is to supply concrete descriptions of public/private interdependence to make a case that administrative law theory has largely ignored. I initially thought it best to delve immediately into examples. After all, without seeing it for him- or herself, why should the reader believe that administrative law is missing something?

This would force the reader to do some heavy lifting, however, without a clear sense of the awaiting theoretical payoff. I elected, in the end, to order things this way: an abbreviated glimpse of private participation in governance (to whet the reader's appetite), then the theoretical argument, followed by the detailed illustrations of public/private interdependence, and finally a discussion of their implications. Even within the theory section, I succumbed to another tradeoff, describing the traditional administrative law reaction to private parties first, before offering my alternative conception of negotiated relationships.

The Article also poses something of a linguistic conundrum. Because I believe that they are meaningful signifiers, I continue to use the terms "public" and "private."[13] They connote ideas that we all understand: Private firms and public agencies tend to have different capacities, cultures, and priorities, for example, and respond to different incentives. "Public" and "private" are helpful ways of referring to areas of life that we experience as more or less under our control,

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[13] See J. M. Balkin, Populism and Progressivism as Constitutional Categories, 104 Yale L.J. 1935, 1968-69 (1995) (book review):

> [T]he point . . . is not to abolish the distinctions between concepts like public and private power. The goal rather is to understand these boundaries as more flexible. . . . [I]t is a fool's errand to think that we can abandon the distinction between public and private, between positive and negative liberty, or between government action and inaction. Whenever we attempt to cast these distinctions aside, they simply return in other forms. They are what I have called in other contexts "nested oppositions"; conceptual opposites whose intellectual coherence depends in an uncanny way on the existence of their opposite numbers.

(internal citation omitted).

more or less coercive, more or less alienating. As a symbolic matter, the imprimatur of the state might matter to us. Discrimination at the hands of a government agency might sting more than discrimination at the hand of our neighbor. More concretely, the particular coercive power of the state—to impose financial penalties, withhold benefits, condemn our property, throw us in jail—is undeniable.

At the same time, both the examples and the analysis in the Article question the conceptual coherence of these categories, at least for the purpose of understanding how administration actually functions. For my purposes, then, one should proceed in a manner reminiscent of Potter Stewart's observation about pornography: You know it when you see it.[14] "Public" refers to organizations that we associate with state power and of which we typically expect "public-regarding" behavior, such as government agencies. "Private" refers to organizations that we associate with the pursuit of profit, such as firms, or ideological goals, such as environmental organizations. However, while we might talk in terms of "public" and "private" actors, the reader should not conclude that there is such a thing as a purely private or purely public realm.

B. The Pervasive Private Role

Private actors are deeply involved in regulation, service provision, policy design, and implementation. Private contributions to regulation range from the "merely" advisory to the full-fledged assumption of policy-making authority.[15] Agencies rely extensively, for example, on private standard setting in establishing federal health, safety, and product standards. Congress also formally delegates power to a number of self-regulatory bodies, that both set and implement standards. Informally, both domestic and international private organizations establish de facto regulatory standards that compete with, or effectively displace, government regulation. The implementation and enforcement process, even in traditional command-and-control regulation, relies significantly on the regulated entities themselves. Independent third parties, such as public interest or professional organizations, also play important roles in implementation

[14] See Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

[15] Government formally delegates standard setting to a number of private groups. Contracting out service provision segues in many cases from implementation of government policy into policy making itself. The list of actors includes private individuals, private firms, financial institutions, public interest organizations, domestic and international standard setting bodies, professional associations, labor unions, business networks, advisory boards, expert panels, self-regulating organizations, and nonprofit groups. See generally Douglas C. Michael, Federal Agency Use of Audited Self-Regulation as a Regulatory Technique, 47 Admin. L. Rev. 171 (1995).

and enforcement by monitoring compliance and serving as private attorneys general in a number of regulatory settings.[16]

The story is the same for service provision. In the last half century, the private nonprofit sector has become the primary mechanism for delivering government-financed human services, such as health care.[17] For-profit firms have begun to enter markets once exclusively reserved for nonprofits, such as nursing home care; nonprofits, while continuing to provide their traditional services, are taking on new roles.[18] The scope of activities for which government agencies contract with private providers, whether for profit or not, appears moreover to have expanded. Not only do private providers furnish social services such as health care, and fulfill local government responsibilities such as waste collection and road repair; they also increasingly perform such traditionally public functions as prison management.

Rather than representing a wholesale shift from the state to the market, recent privatization trends throw the longstanding private role in governance into stark relief.[19] Virtually every service or func-

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16 See, e.g., Robert C. Marshall et al., The Private Attorney General Meets Public Contract Law: Procurement Oversight by Protest, 20 Hofstra L. Rev. 1 (1991) (arguing for effectiveness of private oversight of public procurement contracts). Citizen suit provisions in environmental statutes and the liberalization of standing doctrine have facilitated private enforcement of environmental laws. See Barton H. Thompson, Jr., The Continuing Innovation of Citizen Enforcement, 2000 U. Ill. L. Rev. (forthcoming). In recent years, however, the Supreme Court has limited standing doctrine by conservatively interpreting the constitutional requirement of "concrete" injury and the prudential requirement of redressability. See Ann E. Carlson, Standing for the Environment, 45 UCLA L. Rev. 931, 944-51 (1998).

17 On the important role played by nonprofit groups in providing publicly financed services and the larger phenomenon of "third party government," see generally Lester M. Salamon, Partners in Public Service: Government-Nonprofit Relations in the Modern Welfare State (1995). "Third party government" refers to networks of alliances among the federal government and a host of actors that actually deliver the bulk of social services, including banks, businesses, nonprofits, and local governments. See Steven Rathgeb Smith & Michael Lipsky, Nonprofits for Hire (1993) (discussing contracting out of social services); Burton A. Weisbrod, The Nonprofit Economy 2 (1988) (emphasizing rapid expansion of hybrid nonprofit/for-profit institutions).

18 See Weisbrod, supra note 17, at 1-2 (characterizing post-World War II era as one of "active experimentation with nonprofit and related hybrid forms of organizations," including joint ventures between for-profit and nonprofit organizations).

19 The term "privatization" can be misleading. While the term might be defined narrowly, limiting it to the deliberate sale of state-owned enterprises or assets to private economic agents, I use this term more loosely. See William L. Megginson & Jeffry M. Netter, From State to Market: A Survey of Empirical Studies on Privatization 3 (NYSE Working Paper 98-05, 1998) <http://www.nyse.com/pdfs/wp98-05.pdf> (surveying academic literature on privatization, defined as "the deliberate sale by a government of state-owned enterprises . . . or assets to private agents"). When referring to "privatization trends," I mean to include arrangements that fall short of selling state assets, but that involve a significant role for private actors, such as contracting out. This is consistent with the more inclusive approach that characterizes much legal and policy scholarship, particularly in the Ameri-

tion we now think of as "traditionally" public, including tax collection, fire protection, welfare provision, education, and policing, has at one time or another been privately performed.[20] Even as public agencies took on these responsibilities in the twentieth century, the private role in governance persisted, and more recently it has grown. In the last twenty years, for example, private alternatives to public adjudication have multiplied exponentially.[21] Voluntary self-regulation by trade associations or individual firms has developed alongside traditional command-and-control regulation, rather than being displaced by it.[22] Indeed, many professions have long engaged in self-regulation.[23] Coincident with the rise of privatization and contracting out is a notable trend toward new blends of public and private power.[24] Recently, the

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can context, where the selling of state assets has been limited, albeit due to the comparatively small degree of state ownership in the U.S. economy. See supra note 9. At the same time, when discussing a particular example, I specify the particular form of privatization at issue in order to eliminate confusion. See Donahue, supra note 9, at 7 ("Aside from a strictly limited number of asset sales, [privatization in the United States means] enlisting private energies to improve the performance of tasks that would remain in some sense public."). To illustrate, the literature on private prison operation refers to the growth of private prison management as "privatization," even though the term "contracting out" might be more appropriate. Private prisons operate subject to the state's capacity to exercise residual control through revocable delegation, the enforcement of contractual terms, licensing, and judicial review. See Tony Prosser, Social Limits to Privatization, 21 Brook. J. Int'l L. 213 (1995) (identifying mechanisms such as licensing, rate regulation, and basic standards as methods for regulating privatized firms).

20 See Donahue, supra note 9, at 34 (noting that private entities have performed public undertakings throughout history); David A. Sklansky, The Private Police, 46 UCLA L. Rev. 1165 (1999) (discussing history of private policing). Private residential associations also offer many services associated with local government. See David J. Kennedy, Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers, 105 Yale L.J. 761, 778-79 (1995).

21 See Harold H. Bruff, Public Programs, Private Deciders: The Constitutionality of Arbitration in Federal Programs, 67 Tex. L. Rev. 441, 445-47 (1989) (outlining history of acceptance of arbitration by federal courts); Richard C. Reuben, Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice, 47 UCLA L. Rev. (forthcoming 2000) (canvassing forms of private dispute resolution).

22 Some industries have a long history of self-regulation; others have adopted stringent self-regulatory regimes as a response to public relations disasters or anticipated government regulation. See Joseph V. Rees, Hostages of Each Other: The Transformation of Nuclear Safety Since Three Mile Island 1-2 (1994). Voluntary self-regulation has been spurred in recent years by the popularity of public management reforms devoted to total quality management, continuous improvement, and self-auditing. See generally Dennis C. Kinlaw, Continuous Improvement and Measurement for Total Quality (1992) (describing desirability of total quality management and setting out means to achieve it).

23 Of course, many professions and industries self-regulate in order to stave off impending government regulation. On self-regulation by the American Bar Association, for example, see Richard L. Abel, American Lawyers 142-57 (1989).

24 See Alfred C. Aman, Jr., The Globalizing State: A Future-Oriented Perspective on the Public/Private Distinction, Federalism, and Democracy, 31 Vand. J. Transnat'l L. 769, 802 (1998) (discussing role of globalization in creating new forms of blended public and private power).

federal government has encouraged the use of more formally structured multistakeholder processes, such as habitat conservation planning (HCP)[25] and negotiated rulemaking,[26] which involve both public and private actors.[27]

Of course, private involvement in "public" decision making is hardly new; federal and state governments have long sought to harness private capacity to accomplish public ends.[28] Still, public/private hybrids appear to be proliferating. The number of federal government corporations, which combine federal and private powers and obligations, is at an all time high.[29] Business Improvement Districts (BIDs)—whose functions defy easy categorization as either "public" or "private"—have exploded onto the municipal scene.[30] While they

[25] Habitat Conservation Planning (HCP) is a multistakeholder planning process, bringing together developers, agencies, and environmentalists, to devise a plan to mitigate the impact of a development project on a threatened or endangered species. See Endangered Species Act of 1973, 16 U.S.C. § 1539(a)(2)(A) (1994) (detailing requirements of HCPs).

[26] Negotiated rulemaking allows stakeholders to negotiate rules directly with an agency, using a consensus-based process. See generally Philip J. Harter, Negotiating Regulations: A Cure for Malaise, 71 Geo. L.J. 1 (1982).

[27] Natural resource management offers numerous examples of collaborative public/private processes. The CALFED Bay-Delta Program, for example, is a collaborative multistakeholder effort to develop a comprehensive long-term plan to restore ecosystem health and improve water management for the Bay-Delta system in northern California, involving federal and state agencies, developers, environmentalists, and other stakeholders. See CALFED Bay-Delta Program, Phase II Interim Report (1998) <http://calfed.ca.gov/historical/phase2/overview.html>. Draft CALFED planning documents contemplate the creation of a permanent government body, the Delta Ecosystem Restoration Authority (DERA), to manage the ecosystem restoration process once a final plan is adopted. Under one alternative, the DERA would be advised by a board of directors consisting of members of federal and state wildlife agencies, representatives of environmental, farming, and urban water organizations, and at-large appointees.

[28] Indeed, the emergence of the corporation as a private entity and as the dominant organizational form for commercial enterprises in the late nineteenth century illustrates the historically blurred line between public and private. See Charles W. McCurdy, Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897, 61 J. Am. Hist. 970, 971 (1975) (describing Justice Field's role in designing legal rules separating public and private into fixed and inviolable spheres in context of boom and bust economy of post-Civil War period); see also Lawrence M. Friedman, A History of American Law 166-67 (1973) (tracking emergence of private corporation from publicly chartered colonial corporations that included churches, charities, and cities).

[29] See A. Michael Froomkin, Reinventing the Government Corporation, 1995 U. Ill. L. Rev. 543, 547 (noting number of federal government corporations (FGCs) at peacetime record high). Indeed, the National Performance Review suggests that Congress create more such entities. See National Performance Review, From Red Tape to Results: Creating a Government That Works Better & Costs Less 60-62 (1993). For example, one proposed FGC would semiprivatize the Federal Aviation Administration. See Froomkin, supra, at 547 n.8 (citing National Performance Review, supra, at 149).

[30] Business Improvement Districts (BIDs) are districts in which property owners voluntarily tax themselves to fund an improvement association, in order to make public area improvements or to provide services such as sanitation. See Mark S. Davies, Business

are not traditional governmental entities, BIDs raise taxes and undertake a variety of services typically associated with local government, including sanitation, social services, security, and business development.[31]

Finally, the Clinton Administration, both in its rhetoric and in practice, has sought to promote public-private partnerships.[32] The National Performance Review (NPR)[33] and its regulatory reinvention initiatives feature a preference for both market-based regulatory mechanisms and flexible, negotiation-based processes. The NPR also adopts private sector measures for monitoring productivity and ensuring accountability, further reinforcing the convergence of the public and private sectors.[34]

Given all of these developments, it is remarkable that we know so little about private participation in governance. Beyond the familiar literature on agency capture and more recent public choice analyses of legislative and bureaucratic behavior,[35] administrative law scholarship mostly ignores the private role in administration.[36] There are exceptions, of course. A handful of scholars have explored the constitution-

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Improvement Districts, 52 Wash. U. J. Urb. & Contemp. L. 187, 188-89 (1997). For a comprehensive discussion of the growth of BIDs and an analysis of their implications, see generally Richard Briffault, A Government for Our Time? Business Improvement Districts and Urban Governance, 99 Colum. L. Rev. 365 (1999).

31 See Michael J. Sandel, Democracy's Discontent 331 (1996) (expressing concern for balkanizing effects of such districts on society and democracy); Briffault, supra note 30, at 366.

32 See National Performance Review, supra note 29, at 107-08 (giving examples).

33 See id. at 62-64 (discussing how government can use market mechanisms to solve problems).

34 In order to enhance the public sector's accountability, the NPR adopts many mechanisms used by private industry to measure productivity and success—for example, budgeting by performance objectives. See id. at 65-91.

35 For a discussion of capture theory, see generally John Shepard Wiley, Jr., A Capture Theory of Antitrust Federalism, 99 Harv. L. Rev. 713 (1986). For classic works on agency capture by regulated industries, see generally Richard A. Posner, Theories of Economic Regulation, 5 Bell J. Econ. & Management Sci. 335 (1974); George J. Stigler, The Theory of Economic Regulation, 2 Bell J. Econ. & Management Sci. 3 (1971). For an overview of public choice theory, see Daniel A. Farber & Philip P. Frickey, Law and Public Choice (1991); Symposium, 74 Va. L. Rev. 167 (1988) (collecting articles on public choice theory). For a useful analysis of the distinction between traditional capture theory and public choice theory, see Thomas W. Merrill, Capture Theory and the Courts: 1967-1983, 72 Chi.-Kent L. Rev. 1039, 1069 (1997).

36 Administrative law scholars recognize, of course, the extensive private role in lobbying and litigation as well as in both notice-and-comment rulemaking and citizen enforcement. See, e.g., Thomas McGarity, Reinventing Rationality: The Role of Regulatory Analysis in the Federal Bureaucracy xiii-xiv (1991). Legal scholars long have been interested in legal avenues for citizens to access agency decision making. See, e.g., Handler, supra note 9, at 66 (discussing impact of devolution on citizen empowerment). As I argue in greater detail, see infra notes 49-78 and accompanying text, legal scholarship tends to focus on the negative aspects of private influence on agency decision making. This empha-

ality of private delegations[37] and the Administrative Conference did publish a 1993 report on the federal government's use of "audited self-regulation."[38] But only one major law review article in the last twenty years describes the extent of private involvement in regulatory standard setting.[39] Unquestionably, nongovernmental actors remain marginal in a field dominated by a focus on agency action.[40]

C. *The Response to Private Actors in Administrative Law*

The traditional administrative law concern to control agency discretion usually takes the form of debates over statutory interpretation and standards of review.[41] The field continues, as a result, to remain heavily court centered. In part, this orientation is explained by the

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sis is different from analyzing the private role in sharing responsibility for policy making or implementation.

[37] See, e.g., Abramson, supra note 8; Krent, supra note 8.

[38] See Administrative Conference of the United States, Recommendations and Reports 1994-1995, at 65 (reprinting Michael, supra note 15).

[39] See Robert W. Hamilton, The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health, 56 Tex. L. Rev. 1329 (1978); see also Eleanor D. Kinney, Behind the Veil Where the Action Is: Private Policy Making and American Health Care, 51 Admin. L. Rev. 145, 184 (1999). There are numerous articles on private standard setting and antitrust, but these focus on the antitrust implications of private standard setting rather than the implications of the private role for administration. See, e.g., Harry S. Gerla, Federal Antitrust Law and Trade and Professional Association Standards and Certification, 19 U. Dayton L. Rev. 471 (1994); Clark C. Havighurst & Nancy M.P. King, Private Credentialing of Health Care Personnel: An Antitrust Perspective—Part One, 9 Am. J.L. & Med. 131 (1983); Mark A. Lemley, Standardizing Government Standard-Setting Policy for Electronic Commerce, 14 Berkeley Tech. L.J. 745 (1999); Mark A. Lemley & David McGowan, Could Java Change Everything? The Competitive Propriety of a Proprietary Standard, 43 Antitrust Bull. 715, 753-54 (1998).

[40] See Susan Rose-Ackerman, Progressive Law and Economics—and the New Administrative Law, 98 Yale L.J. 341, 347 (1988) (stating that administrative law remains "court-centered field focusing on judicial review of agency behavior").

[41] Scope of review questions long have dominated administrative law. Scholars disagree about the reasons for judicial deference and the degree of deference owed to particular kinds of agency decisions. Some scholars justify deference to agency interpretations of law on the theory that agencies are expert, others on the theory that courts should not disrupt the essentially political process of bureaucratic decision making. Still others defend deference on the view that legislative ambiguity signals Congress' intent to leave an interpretive question to the agency. Compare Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L.J. 511, 514-15 (arguing against both separation of powers and agency expertise as justifications for deference to statutory interpretation by agencies), with Colin S. Diver, Statutory Interpretation in the Administrative State, 133 U. Pa. L. Rev. 549, 552 (1985) (arguing that courts should presumptively defer to agency where Congress has endowed agency with substantial policy-making authority), and Richard J. Pierce, Jr., *Chevron* and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions, 41 Vand. L. Rev. 301, 303 (1988) (positing agency expertise as justification for judicial deference). But see Edley, supra note 10, at 11 (arguing that most significant problem with contemporary regulation is frequent failure to achieve public policy goals rather than problem of scope of review).

original diagnosis of the legitimacy crisis that administrative law was designed to address. In part, it is habit.

The concept of legitimacy has remained usefully vague in administrative law theory, serving as a vessel into which scholars could pour their most pressing concerns about administrative power.[42] As a critique, the charge of illegitimacy captures several complaints, including the absence of direct political accountability and incompatibility with separation of powers principles. The traditional administrative law concern about legitimacy finds expression today in periodic appeals to eliminate particular agencies,[43] cyclical calls for the revival of the nondelegation doctrine,[44] or hotly contested debates over the appropriate standard of judicial review of agency action.[45] At its core, the quest for legitimacy might be understood as the pursuit of public acceptance of administrative authority.[46] That pursuit has traditionally demanded an almost exclusive focus on agencies.

Indeed, most conceptions of the administrative process, whether grounded in public interest theory, civic republicanism, or pluralism, focus primarily—both positively and normatively—on agencies as

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42 See Freedman, supra note 2, at 10; see also Cynthia R. Farina, The Consent of the Governed: Against Simple Rules for a Complex World, 72 Chi.-Kent L. Rev. 987, 987 (1997) (observing that legitimacy problem is handed down through generations of administrative law scholars).

43 Congress abolished the Interstate Commerce Commission, the oldest federal regulatory agency, in December 1995. See Richard T. Cooper, Demise of the ICC: Is It Really "Much Ado About Nothing"?, L.A. Times, Jan. 3, 1996, at A5. A favorite target for elimination is the Internal Revenue Service. See, e.g., Peter A. McKay, IRS Abolitionists Lead Crusade from Manassas, Wash. Post, Prince William Extra, Apr. 21, 1999, at 5.

44 See David Schoenbrod, Power Without Responsibility: How Congress Abuses the People Through Delegation 3 (1993) (arguing that delegation weakens democracy and urging federal courts to resurrect nondelegation doctrine). For the argument that broad delegations are "policy without law," see Theodore J. Lowi, The End of Liberalism 93 (2d ed. 1979). But see Schuck, supra note 4, at 776-77, 779 (arguing that agency accountability is not particularly problematic, and that while Schoenbrod believes that "[t]he right question to pose about delegation . . . is not about its social consequences but about its effects on democratic legitimacy," better view is that "democratic legitimacy is a function of effective governance, desirable policy outcomes, and other political values"). See also Richard J. Pierce, Jr., Political Accountability and Delegated Power: A Response to Professor Lowi, 36 Am. U. L. Rev. 391, 392 (1987) (arguing that judicial enforcement of nondelegation doctrine would be "terrible" response to broad delegations of power to agencies over last two decades).

45 While the nature of judicial review of agency action has been called one of the "persistently intriguing puzzles" in administrative law, Cynthia R. Farina, Statutory Interpretation and the Balance of Power in the Administrative State, 89 Colum. L. Rev. 452, 452 (1989), this puzzle is not the only one worth solving. See Edley, supra note 10, at 11 (suggesting that public policy outcomes matter more than traditional focus on discretion).

46 See Freedman, supra note 2, at 260 (arguing that public acceptance is crucial to effectiveness of administrative state).

decisionmakers.[47] This is not to say that the dominant models entirely exclude consideration of private actors, only that they discuss the private role in the administrative process primarily in terms of capture, factionalism, and interest group pressure—in other words, in terms of its danger.[48]

1. Public Interest Theory: Suspicion

Public interest theories of administrative law are suspicious of private participation. In a public interest model, the agency is obligated to exercise its discretion in implementing statutes with a view to the national interest or general welfare, rather than yielding to factional pressure at the behest of one or another powerful interest group.[49] Public interest theory reached its apotheosis in the New Deal and post New Deal era. It coupled "rationalism—that is, the faith that complex problems can by mastered by human reason"—with a view of agencies as comparatively well situated and equipped to tackle those problems.[50] As centralized, expert bodies with combined legislative, executive, and adjudicative authority, theoretically insulated from politics, agencies represented the great hope that the systematic application of knowledge might lay social and economic ills to rest.[51]

Although frequently employed, the concept of the "public interest" evades rigorous definition in administrative law.[52] At a mini-

47 See generally Jim Rossi, Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking, 92 Nw. U. L. Rev. 173 (1997) (explaining how public participation is understood within different theoretical models of agency decision making).

48 For classic sources on interest group pressure, see Mancur Olson, Jr., The Logic of Collective Action: Public Goods and the Theory of Groups (1965) (describing organizational dynamics that impede efforts by large groups to pursue common interests); George J. Stigler, The Citizen and the State: Essays on Regulation (1975) (arguing that economically unjustified regulations are often result of pressure from interest groups); Cass R. Sunstein, Interest Groups in American Public Law, 38 Stan. L. Rev. 29 (1985) (arguing that problem of faction has been major concern of constitutional law since American Revolution). For a discussion of the extent to which interest group influence has generated public mistrust of government, see Ann McBride, Ethics in Congress: Agenda and Action, 58 Geo. Wash. L. Rev. 451, 453 (1990) (discussing ethical regulation of Congress); Developments in the Law—Conflicts of Interest and Government Attorneys, 94 Harv. L. Rev. 1413 (1981) (discussing conflict of interest models for government lawyers).

49 See generally Jerry L. Mashaw, Prodelegation: Why Administrators Should Make Political Decisions, 1 J.L. Econ. & Org. 81, 83 (1985).

50 See Merrill, supra note 35, at 1048.

51 See id. at 1048-49.

52 Scholars often refer to public interest *theory*, which, rather than suggesting any content for the concept, alludes to a number of different qualities that one might expect from agencies. Chief among these qualities seem to be expertise, rationality, and disinterest. See Daniel A. Farber, Democracy and Disgust: Reflections on Public Choice, 65 Chi.-Kent L. Rev. 161, 174 (1989). When arguing that agencies should implement their mandates to promote the public interest, scholars simply may mean that administrators are bound to

mum, however, pursuing the public interest must mean resisting pressure from third parties (who only have their narrow self-interest in mind).

2. *Civic Republicanism: Insulation*

Civic republican theories of the administrative process envision expert bureaucrats deliberating over decisions in a "public-regarding" way.[53] Although there may be no single public interest in the republican view, bureaucrats are obligated to defend their choices by appealing to some conception of the common good. Merely satisfying private interests proves insufficient justification for choosing a course of action. In this sense, civic republicanism has much in common with traditional public interest theory. Civic republicans value private input but fear factional pressure. Their approach displays an overriding concern with the integrity of the deliberative process.[54] Insulating decisionmakers from private pressure is crucial to enabling that process to function appropriately.[55] Judicial review further plays a critical role in both the public interest and civic republican models by providing a check against capture. In the republican account, judicial review is specifically justified as a mechanism for promoting enlightened deliberation among bureaucrats insulated from private pressure.[56]

3. *Pluralism: Democratization*

In a pluralist "interest representation" model of administrative law, administrative procedures and judicial review facilitate an essentially political decision-making process: They ensure that interest groups enjoy a forum in which to press their views and that agencies

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implement statutes with a view to effecting their underlying purpose (assuming that statutes generally do evince such a purpose).

Alternatively, scholars advocating decision making in the public interest really may mean that agencies ought to take a longer view—that they should consider noneconomic values, or protect diffuse, unorganized interests lacking a voice in the political or administrative process. For a discussion of public interest theory in the tax context, see Daniel Shaviro, Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s, 139 U. Pa. L. Rev. 1, 61-64 (1990).

[53] The premium placed on "public-regarding" deliberation is characteristic of the republican approach to politics. See, e.g., Mark Seidenfeld, A Civic Republican Justification for the Bureaucratic State, 105 Harv. L. Rev. 1511, 1515 (1992) (arguing that civic republicanism provides strong justification for broad delegations to agencies, which are best situated to deliberate in public regarding way); Cass R. Sunstein, Beyond the Republican Revival, 97 Yale L.J. 1539, 1541-42 (1988) (describing four central principles of "liberal" republicanism as deliberation in politics, equality of political actors, universalism, and citizenship).

[54] See Sunstein, supra note 53, at 1548-49.

[55] See id. at 1549.

[56] See id.

adequately consider those views when making policy choices.[57] Although conscious of capture, the theory envisions this pathology as limited to agencies,[58] and as correctable, presumably by democratizing the agency decision-making process to include numerous interest groups. In this sense, interest representation reveals a lingering optimism about the democratic potential of pluralism, when properly structured.

For some theorists, this pluralist account of agency process may leave little room for independent decision making by agency officials or the articulation of a public good. Instead, interest representation is a system of interest aggregation over which agency officials simply preside. Exercising a role different from that described by civic republican accounts of the administrative process, agency officials do not step back and critically deliberate about alternative courses of action, seeking to justify choices in terms of a common good.

On another view, however, interest representation may offer agency officials a more robust role. Instead of acting as "an umpire blandly calling balls and strikes,"[59] an agency enacts regulations consistent with its interpretation of its legislative mandate and within the constraints of congressional and legislative oversight, while taking private preferences into account. Private views might inform that process, but they do not determine it. Stringent judicial review, broadened standing, and the requirement that the agency produce a record reflecting agency consideration of private views still leaves the agency with the power—indeed the responsibility—to adopt and defend its own choice. This understanding accepts the political nature of the administrative process without abandoning altogether the possibility that legislation contains public purposes that agencies can discern, and which they have an obligation to pursue. As in civic republicanism, private participation may inform this process and help agency officials to devise superior regulations, and may also enhance the legitimacy of the regulatory enterprise.

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[57] The interests of regulated parties may be overrepresented in the agency decision making process. See Richard B. Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1667, 1713 (1975). Administrative law's purpose became, over time, the provision of a surrogate political process to ensure the fair representation of a wide range of interests in the process of administrative decision making. See id. at 1670. This was achieved through broadened standing (in both court and agency proceedings), formalization of participation rights, and the requirement that the agency consideration of participants' interests be reflected in the record. See id. at 1723, 1748, 1756.

[58] For an account of the "spread" of this difficulty from agencies to legislatures and courts, as the economics literature has developed, see Merrill, supra note 35, at 1070-71.

[59] Scenic Hudson Preservation Conference v. Federal Power Comm'n, 354 F.2d 608, 620 (2d Cir. 1965) (noting that commission's role as representative of public interest required active protection by commission).

4. *Public Choice Theory: Confirmation and Denial*

Public choice theory understands administrative decisions as the product of interest group pressure brought to bear on bureaucrats seeking rewards such as job security, enhanced authority, or the favor of powerful legislators upon whom the agency depends.[60] Public choice theory shares with interest representation a political model of interest group pressure on agencies, but it goes still further, treating agency outcomes as products of interest group appeals to individual bureaucrats' preferences.[61] It extends the pathology of capture, moreover, to legislatures.[62] Like legislators motivated by the desire for reelection, bureaucrats rationally pursue their own interests when exercising administrative discretion.[63] The theory treats administrative procedure, moreover, as a set of controls imposed on agencies by legislators seeking to facilitate interest group monitoring of agencies.[64] In this view, interest groups use administrative procedures to secure the implementation of the legislative "deals" for which they success-

[60] I describe here the branch of public choice theory that concerns itself with bureaucracies, legislatures, and the state, and that is "largely organized around the concept of *homo economicus*—the conventional basic maximizing paradigm of microeconomics where individuals (in both political and economic arenas) are modeled as behaving as if they were maximizing utility." Nicholas Mercuro & Steven G. Medema, Economics and the Law 85 (1997) (describing and distinguishing different branches of public choice theory). The other branch worth noting is catallaxy, which directs attention to the processes by which political and economic actors make voluntary agreements. Catallaxy is distinguished from conventional public choice theory chiefly because it proposes that consensus (as opposed to efficiency) may be the criterion by which to judge the correctness or appropriateness of public policy. That is, "[i]n a sense, a policy is fair because the individuals in the society unanimously adopted it; they did not adopt it because it was a priori 'fair.'" Id. at 96. Nonetheless, these subtleties have yet to be absorbed into mainstream administrative law, which is still wrestling with the implications of the conventional public choice approach. It is thus that branch of public choice theory that I describe here.

[61] See generally Gary S. Becker, A Theory of Competition Among Pressure Groups for Political Influence, 98 Q.J. Econ. 371 (1983). Public choice theory understands the legislative process as a wealth transfer from "society as a whole to those discrete, well-organized groups that enjoy superior access to the political process." Jonathan R. Macey, Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model, 86 Colum. L. Rev. 223, 230 (1986).

[62] See William N. Eskridge, Jr., Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation, 74 Va. L. Rev. 275, 285-89 (1988) (describing public choice theorists' account of legislative process).

[63] See Mathew D. McCubbins et al., Administrative Procedures as Instruments of Political Control, 3 J.L. Econ. & Org. 243, 247 (1987) (arguing that, in absence of oversight, agency officials are likely to make decisions reflecting personal preferences derived from private political values, personal career objectives, and aversion to effort).

[64] For an empirical study of the effectiveness of congressional oversight mechanisms, see Jessica Korn, The Power of Separation: American Constitutionalism and the Myth of the Legislative Veto (1996).

fully bargained.[65] The bulk of the literature suggests a powerful but narrow private role: Private groups manipulate, pressure, bargain, and bribe to benefit themselves at the expense of others.[66]

This vision of administration contrasts sharply with public interest and civic republican accounts, both of which seem attached to the romantic notion (at least from a public choice perspective) of a disinterested, expert agency operating above the political fray.[67] Whereas "the economic models of public choice maintain a rather jaundiced view of the motivation of legislators and bureaucrats,"[63] civic republicanism portrays government as a moral force for the common good.[69] In a republican view, politics does not merely aggregate exogenous preferences into regulatory bargains, but forms and reforms them in the process of public-regarding deliberation: Republicanism and public choice theory thus directly conflict.[70] Many public choice scholars eschew normative arguments altogether, and many others make only small scale normative recommendations, such as to adopt a statute, rule, or reform in light of their analysis. However, some proponents of public choice theory prescribe a policy of sharp restraints on government action and significant deregulation.[71] To the extent that public choice leads to a strong normative claim, then, it is to depoliticize economic activity—to liberate the market from the hypocrisy of politics. Rather than constraining private power, the problem, in this view, is public power.

Administrative law theory largely reacts to public choice, not by adopting this prescription, but by cutting its positive account in half:

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65 See Frank H. Easterbrook, The Supreme Court, 1983 Term—Foreword: The Court and the Economic System, 98 Harv. L. Rev. 4, 14-18 (1984) (urging courts, when interpreting statutes, to consider interest group nature of legislative process). But see Macey, supra note 61, at 226 (rejecting Easterbrook's approach).

66 The assumption of self-interest applies to legislators and bureaucrats as well, of course. On lobbyists drafting legislation, see Muriel Morisey Spence, The Sleeping Giant: Textualism as Power Struggle, 67 S. Cal. L. Rev. 585, 604-08 (1994) (discussing fact that lobbyists draft legislation for members of Congress); see also Ralph Nader & Wesley J. Smith, No Contest: Corporate Lawyers and the Perversion of Justice in America 256-319 (1996) (chronicling attempts of corporate lobbyists to "deform" tort law).

67 See supra note 53 and accompanying text.

68 Mercuro & Medema, supra note 60, at 97.

69 See supra note 53 and accompanying text.

70 See Mercuro & Medena, supra note 60, at 99. Indeed, the strongest version of the public choice claim denies that politics consists of the pursuit of the public interest. See id. at 85 (arguing that defining characteristic of public choice is that its proponents reject "two basic tenets of conventional political science," i.e., political science organic conception of state, and its view that government officials seek to act for common good).

71 See Andrei Shleifer & Robert W. Vishny, The Grabbing Hand (1998) (arguing that premise of "grabbing hand" approach is that government control of economic activity is fundamental problem).

Scholars simultaneously resist the description of legislators and bureaucrats as motivated only by self-interest and accept the account of interest groups.[72] These positions are not inconsistent. One might plausibly argue that different considerations drive public and private actors. Ideology and civic virtue, not just self-interest, may play a role in the decisions of elected and appointed officials while having little to do with the calculations of interest groups.[73] Thus, even scholars who reject self-interest as the only explanation for legislative and bureaucratic behavior,[74] or who critique public choice theory as an implausible account of the vagaries of administrative process,[75] tend not to contest the rather narrow image of interest groups, and individual behavior, at its core.[76] Indeed, it confirms what they thought they already knew: Private actors are dangerous.

5. Defensiveness

Thus, with the exception of those who view the public choice account as both descriptively accurate and normatively unproblematic, most administrative law scholars react to the "private" *defensively*.[77] Both public interest and civic republican theory fear factionalism and envision the agency as a bulwark against narrow private pressure. In-

[72] Of course, some scholars appear to criticize public choice analysis without making the distinction between its account of public versus private motivations. They focus on methodological flaws or counterexamples that disprove the public choice explanation of the legislative and bureaucratic process, pointing, for example, to legislation that cannot be entirely explained from within a rational actor model. For this critique of public choice, see Mashaw, supra note 3, at 124-30. As a general matter, however, one senses among administrative law scholars greater hostility to the public choice account of public officials than to its depiction of private actors.

[73] See Farber, supra note 52, at 163 (referring to depiction of political process as arena of pure greed as "vulgar pluralism"). Although public choice theory is vulnerable to criticism on its merits, scholars such as Farber seem to reject it in part because it is so pessimistic. If the dealmaking view of legislative and bureaucratic behavior strikes us as unseemly, we may wish to adopt procedural measures that insulate legislators and agency bureaucrats from private influence or increase the transparency of political contacts with agencies. Alternatively, we may try to alter legislative and bureaucratic incentives. We may, for example, wish to support campaign finance reform.

[74] See, e.g., Abner Mikva, Foreword, 74 Va. L. Rev. 167, 168-69 (1988) (rejecting idea that we can usefully predict behavior of public decisionmakers and arguing that motivations of politicians—and presumably bureaucrats—are mixed).

[75] For a critique of the public choice explanation of administrative procedure, see Mashaw, supra note 3, at 124-30.

[76] For example, civic republican scholars acknowledge that their view is more aspirational than descriptive and largely accept an interest representation (if not a public choice) account of interest group activity. See, e.g., Sunstein, supra note 48, at 48-49.

[77] See supra notes 67, 69 and accompanying text. Scholars sympathetic to interest representation theory might be more sanguine about private power but they would still structure it. At a minimum, they might advocate the imposition of procedures to guarantee balanced representation, openness, and reasoned decision making. See Stewart, supra note 57, at 1759.

terest representation theory accepts the inevitability of private pressure but seeks to protect against the capture by ensuring a balanced representation of interests. Moreover, in all but the most extreme accounts, interest representation still relies on the agency to protect independently the public interest, however defined. Only in the public choice account is bureaucratic decision making reduced to a derivative of private pressure on self-interested bureaucrats. That public choice theorists may feel misunderstood by legal scholars or unfairly indicted for holding normative positions they do not espouse is beside the point.[78] The description of the bureaucratic process itself may be normatively neutral, but its application in administrative law theory has reinforced an ingrained disciplinary fear of private groups.

II

THE ILLUSION OF A PUBLIC REALM

The traditional emphasis on agency action and the theoretical defensiveness toward private activity make it difficult for administrative law to explore how administration really works. In Jerry Mashaw's words, administrative law has failed "to ask hard questions about whether its ideological pretensions are in any way connected to the realities of bureaucratic governance."[79] That failure leaves the field vulnerable, he claims, to the kind of realist critique embodied in critical legal studies and public choice theory.[80] Indeed, critical legal studies (CLS) and public choice are both indispensable to developing a theory of administration as a set of negotiated relationships—a theory, that is, that comports with the reality of public/private interdependence. Considered independently, CLS and public choice are each missing a crucial insight that the other has to offer. In combination, however, they create a powerful framework for understanding governance.

Critical legal scholars, building on legal realism, successfully exposed the incoherence of the public/private divide, revealing that a purely private realm exists only as a legal construct.[81] The flip side of

[78] For the argument that the descriptive analysis of public choice has "profound" normative implications, see Merrill, supra note 35, at 1069. For a critique of public choice theory as "reactionary legal economic ideology" expressing "an unbending contempt for legislative and agency action," see Mark Kelman, On Democracy-Bashing: A Skeptical Look at the Theoretical and 'Empirical' Practice of the Public Choice Movement, 74 Va. L. Rev. 199, 201 (1988).

[79] Mashaw, supra note 3, at 109.

[80] Id.

[81] See, e.g., Duncan Kennedy, The Structure of Blackstone's Commentaries, 28 Buff. L. Rev. 209, 217 (1979) (describing liberal split between civil society and state); Nadine Taub & Elizabeth M. Schneider, Women's Subordination and the Role of Law, in The Politics of

that argument—that a purely public sphere is also illusory—proves equally true, and has gone relatively unnoticed in administrative law. Public choice theory comes close to embracing this view when it explains legislative and bureaucratic behavior as the product of interest group pressure.[82] Indeed, to public choice scholars, the observation that there is no purely public realm might seem banal. However, public choice prescriptions for depoliticizing economic behavior appear to assume a purely private world to which we can return, thus ignoring the CLS critique.[83] In fact, both are correct: There is neither a purely public nor a purely private realm. There is only interdependence. Thus, the conception of administration as a set of negotiated relationships (neither public nor private, but something else) is the improbable offspring of CLS and public choice.

A. Critical Legal Studies

Understanding the ideological project of critical legal studies helps to explain its lopsided focus on the "private" realm. For many critical scholars, the purpose of eroding the public/private divide so central to liberalism was to reveal the extent of regulation in arenas thought to be beyond the state's reach, such as the market and the family.[84] This eliminated the intellectual defense for treating private

Law 328 (David Kairys ed., 3d ed. 1998) (exploring how exclusion of women from "public sphere" furthered male dominance). One need not be a crit or a feminist to recognize the instability of the public/private distinction. Countless law review symposia have been devoted to the topic. See, e.g., Symposium, The Public/Private Distinction, 130 U. Pa. L. Rev. 1289 (1982). For an effort to explore the complicated relationships that mediate individual relationships to the state, see Special Issue, Mediating Institutions: Beyond the Public/Private Distinction, 61 U. Chi. L. Rev. 1213 (1994).

[82] See supra note 66 and accompanying text.

[83] See Megginson & Netter, supra note 19, passim (discussing relative merits of state and private ownership of companies). Even sale of state assets may not mean absolute relinquishing of control. In an ostensibly privatized regime, government usually retains important powers. For example, agencies may still influence industrial policy through licensing or reserving shares in newly private corporations, giving government veto power over major decisions and enabling it to block undesired takeovers. See id.

[84] CLS built on the realist point that the private realm is already deeply structured and regulated by the authority of the state. See Karl E. Klare, The Public/Private Distinction in Labor Law, 130 U. Pa. L. Rev. 1358, 1362-63 (1982) (describing "private" employment contracts as structured by the state); Taub & Schneider, supra note 81, at 328-38 (describing role of public/private distinction in women's exclusion from public sphere). The supposedly free market depends, for example, on enforceable rights of property and contract. See, e.g., Peter Gabel & Jay Feinman, Contract Law as Ideology, in The Politics of Law, supra note 81, at 497, 506-07 (discussing complex ideological process whereby contract rights are developed and enforced and ways in which this process is essential to maintenance of ostensibly free market); Robert W. Gordon, Some Critical Theories of Law and Their Critics, in The Politics of Law, supra note 81, at 641, 651-52 (noting that concept of "property" necessarily requires mobilization of "coercive state power" to enforce private economic relationships); Frances E. Olsen, The Family and the Market: A Study of Ideol-

power differently from public power. The question became not whether to intervene in the private realm but whether it was possible to defend the nature of the existing intervention.

That the public side of the public/private divide might also involve private actors was of little interest to CLS, given its ideological commitments. Many critical scholars had given up on the state as a potential source of progressive change.[85] The project of rights was bankrupt. Liberalism and liberal legal theory masked massive inequalities in power and made them appear to be the logical consequence of a natural order. The CLS project, in large part, was to reveal that seemingly natural dichotomies (public/private, state/society, contract/property) were artifacts, and that the existing order, while appearing neutral and natural, served some at the expense of others. CLS sought to demonstrate that the rules governing private law, just like the rules governing public law, were chosen. It made sense to focus this critique on the private side of the public/private divide: No one was claiming that the public realm was (or ought to be) free from regulation or that it reflected a natural ordering.[86]

It follows from the CLS critique that the public realm is infused with private power.[87] And yet, upon reflection, a conception of the

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ogy and Legal Reform, 96 Harv. L. Rev. 1497, 1528 (1983) (arguing that public equality before law masks private inequalities allegedly beyond law's reach). Private racism depends on judicial enforcement of the right of trespass, which confers on private actors the power to exclude. See, e.g., Klare, supra, at 1367 (describing right to exclude as part of private property ownership); Joseph William Singer, Property, in The Politics of Law, supra note 81, at 240, 244 (same).

By revealing the extent to which the public had already structured the private, CLS disarmed the liberal claim that there are areas free of government influence. In addition, just as feminist theory claimed that the "personal" is political, so did CLS seek to demonstrate that the private is political space. See, e.g., Taub & Schneider, supra note 81, at 335-36 (discussing effect of abortion cases on perception of public/private split). CLS represents a diverse array of work in which the similarities outweigh the differences. For some representative works other than those cited herein, see the articles collected in Critical Legal Studies (James Boyle ed., 1992).

[85] The state was theorized as captured by capital, ineffectual, cowardly, or all three. See Karl E. Klare, Workplace Democracy and Market Reconstruction: An Agenda for Legal Reform, 38 Cath. U. L. Rev. 1 (1988).

[86] See generally Gabel & Feinman, supra note 84, at 497 (unpacking ideological assumptions implicit in contemporary and historical notions of "property" and "contract"); Gordon, supra note 84, at 644, 654 (discussing ways in which liberal legal theory elided value judgments implicit in law, summarizing critical theory critique of liberalism, and noting that "critical legal theory is not particularly oriented toward capture of central state machinery"); Kennedy, supra note 81, at 217 (emphasizing degree to which liberal theory relies on distinction between civil society and state). I thank my colleagues Rick Abel and Fran Olsen for helpful discussions on the CLS project.

[87] Some CLS scholars adhere to an explicitly decentralized image of the state and public power. See generally Duncan Kennedy, Legal Education and the Reproduction of Hierarchy (1983) (arguing that state and society are interlinked).

public realm as a set of negotiated relationships might strike some CLS scholars as a hindrance, depending on the extent to which they rely on a vestigial notion of the liberal state to effectuate a positive program of change. Perhaps some scholars who subscribe to the critique of the private realm may nonetheless wish to engage the state in rectifying inequality or regulating private actors more stringently. They may, in other words, seek to eliminate half of the public/private distinction (the assertion of a purely private realm) while simultaneously engaging the other half (the notion of a purely public state) to accomplish their political ambitions.[88]

The position of CLS scholars and their progeny, however, remains unclear. The debate over whether CLS ought to have a positive program and, if so, what that program ought to be are matters of significant debate both within and outside the CLS community.[89] But all sides could learn something from the reality of public/private interdependence. The public choice depiction of a privately driven political process appears to confirm CLS scholars' skepticism about the extent to which the state is captured. And yet, viewing the public realm as a set of negotiated relationships may suggest new pressure points for progressive ideas. Evidence of a more decentralized, dynamic public process with entry opportunities throughout might reengage critical scholars in the design of a positive agenda.

B. Public Choice Theory

Public choice can also be informed by CLS. Public choice theory fleshes out the diverse motivations that affect lawmakers and bureaucrats and usefully "identifies tendencies in political actions and outcomes that result from the interplay of interest groups, the public, and self-interested lawmakers."[90] This theory shares with traditional administrative law models a liberal belief in the public/private divide. Recall that the need to insulate agency officials from private pressure

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[88] Critical race theorists, for example, have taken CLS to task for abandoning rights as a vehicle of equality. See, e.g., Kimberlé Williams Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 Harv. L. Rev. 1331, 1384-87 (1988) (contending that rights are important tools in challenging dominant ideologies). Feminist scholars, while sensitive to the critique of the private, advocate reliance on the state in order to rectify inequality (for example, by creating new causes of action for sexual harassment or injury linked to pornography). See, e.g., Catharine A. MacKinnon, Sexual Harassment of Working Women (1979).

[89] For one influential group of CLS scholars, localized attempts to disrupt accepted meanings and images have constituted the preferred strategy. See Peter Gabel & Paul Harris, Building Power and Breaking Images: Critical Legal Theory and the Practice of Law, 11 N.Y.U. Rev. L. & Soc. Change 369, 374 (1982-83).

[90] Correspondence from Elizabeth Garrett, Professor of Law, University of Chicago, to author (June 5, 1999) (on file with the *New York University Law Review*).

and to prevent agencies from abdicating their responsibilities demands, in most administrative law conceptions, the constraint of private activity at crucial moments of public policy making. To the extent that it has a normative agenda, public choice theory recommends, by contrast, the opposite: that the public keep out of the private realm.[91] In this, the public choice prescription either oversimplifies or misleads. If one accepts the realist insight that there is no such thing as a purely private realm free of government intervention, depoliticizing economic activity is not an option. By attempting to return to the "natural" world of the market, scholars who embrace this normative project are really advocating one set of rules over another—the set that furthers their conservative agenda.[92]

The rejoinder to this (aside from the claim of many public choice theorists to have no normative agenda) might be that normative public choice theory seeks to create not a purely private realm, but, rather, a different balance between public and private. Thus, contracting out, deregulation, and devolution represent steps toward a net reduction in government involvement in the private sector. But shaking up the mix or jigging the balance may not necessarily imply less government intervention. Indeed, although contracting out might appear to diminish state control by replacing the state with a private provider, it may also enhance state control, as when the state uses its contractual power to enforce antidiscrimination laws or environmental standards.[93] The power of government may well increase in a con-

[91] See Mercuro & Medema, supra note 60, at 96-97; Merrill, supra note 35, at 1069 (claiming that public choice theory suggests that "wherever possible, collective ordering of social phenomena should be transferred from governmental institutions to the market").

[92] See Jim Rossi, Public Choice Theory and the Fragmented Web of the Contemporary Administrative State, 96 Mich. L. Rev. 1746, 1754 (1998) (book review) (claiming that message of public choice theory is to return to antifederalist principles and to "constrain government radically and place trust in the market, voluntary associations, and community-based government").

[93] See Joel A. Mintz, Enforcement at the EPA 69 (1995) (citing Environmental Protection Agency's (EPA) debarment of government contractors who were persistent violators of environmental standards in 1970s and 1980s). The notion that government might increase its control presupposes, however, that state agencies can and do use their bargaining power to pursue policy goals. The state's bargaining advantage may diminish over time, however, as agencies become dependent on particular private providers that establish virtual monopoly power over a service (as with military procurement and perhaps private prisons) or as a result of reduced administrative capacity to oversee private providers. Moreover, the theoretical imbalance of power between government as consumer and private providers does not appear to dissuade private actors from pursuing government contracts. Procurement contracts appear to be lucrative to private actors despite the laborious bidding process and despite termination for convenience clauses that limit private contractors to reliance damages. See Gillian Hadfield, Of Sovereignty and Contract: Damages for Breach of Contract by Government, 8 S. Cal. Interdisc. L.J. 467, 523-24 (1999) (reviewing advantages of contracting with government and arguing that limitation of reliance damages

tractual regime as the state extends its control over, and dependence upon, private sector institutions.[94]

Even if this criticism could be brushed aside, two other features help to explain why public choice provides only half the genetic material for the contractual conception of administration: a limited view of the private role, and a focus on "higher order" institutions in the policy-making process. Assuming arguendo that the rational actor model[95] at the heart of public choice is accurate—an assumption that grants a great deal to public choice—the public choice depiction of private activity seems incomplete.[96] That is, while rational actor theory is consistent with a broad range of private behavior, including collaboration and altruism, most of the applications of public choice theory seem to assume a view of private groups that emphasizes their selfishness, greed, and proclivity for adversarial engagement. A public choice scholar might object that she merely describes private behavior while disavowing normative judgments about "selfishness" and "greed." Nonetheless, the image of private groups that emerges from public choice seems particularly unappealing.[97] Private actors are not

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may not be as large in government contract setting as traditional analysis might suggest). But see Christopher F. Corr & Kristina Zissis, Convergence and Opportunity: The WTO Government Procurement Agreement and U.S. Procurement Reform, 18 N.Y.L. Sch. J. Int'l & Comp. L. 303 (1999) (noting that complexity of U.S. procurement regulation historically operated as nontariff barrier to foreign suppliers).

94 See Smith & Lipsky, supra note 17, at vii (explaining how government contracting with private nonprofits has "contributed to the expansion of the service state and facilitated greater fairness and higher standards in some service areas").

95 Rational choice theory assumes that individuals are rational decisionmakers who seek to maximize their utility and profits. See Thomas S. Ulen, Rational Choice and the Economic Analysis of Law, 19 L. & Soc. Inquiry 487 (1994) (book review) (discussing rational choice theory in context of law and economics).

96 Social psychologists have criticized rational actor theory for its failure to account for limited human rationality and the complications of cognitive processing. See, e.g., Amos Tversky & Daniel Kahneman, Judgment Under Uncertainty: Heuristics and Biases, in Rationality in Action: Contemporary Approaches 171 (Paul K. Moser ed., 1990) (noting that people rely on heuristic principles to "reduce the complex tasks of assessing probabilities and predicting values to simpler judgmental operations . . . but sometimes [the heuristics] lead to severe and systematic errors"); Amos Tversky et al., The Causes of Preference Reversal, 80 Am. Econ. Rev. 204 (1990) (reviewing evidence that assumption of rational choice model is flawed). My point is narrower, however: Rational actor theory may be inaccurate because it blinds us to the positive potential of private contributions. This, in turn, may lead to inaccurate predictions about behavior. See Milton Friedman, Essays in Positive Economics 40-41 (1953) (arguing that assumption of self-interest is problematic only if it yields inaccurate predictions). My objection is to the impression public choice leaves that its assumptions about private behavior deny the possibility of collaborative, public-oriented, accountable regulatory regimes.

97 See Farber, supra note 52, at 163 (describing vulgar pluralism informing public choice and claiming that it views political process as "an arena of pure greed, in which self-interested voters, self-aggrandizing politicians, and self-seeking interest groups meet to do business").

conceived as deployable resources—as "co-authors" of regulatory policy in a positive, "public-regarding" sense.[98] They operate upon the legislative and bureaucratic process but are not of it. They work for private gain, but disclaim responsibility for public purposes. Their interests are exogenous to the system, rather than produced in a dynamic with it. Indeed, to the extent that public choice theory has infiltrated administrative law—and most scholars agree its impact has been profound—this negative depiction of private activity is the residue it leaves.[99] The assumptions about rational, self-interested private behavior that characterize public choice theory both exemplify and reinforce the truncated view of private participation that already dominates the field.[100]

Public choice theory seems incomplete not only in its lopsided focus on selfish rationality, but also because of its methodological individualism, which treats institutions as aggregations of individual self-interest.[101] To the contrary, institutions have cultures that are not easily broken down—cultures characterized by informal norms of, for example, professionalism or public service. These norms may mediate the formation of individual self-interest.[102] Institutional culture may affect interactions among people within the institution, as well as interactions between insiders and those outside the institution. Unmediated by institutional culture, an individual may choose to be uncooperative; situated in an environment that prizes cooperation, however, that same person may behave differently.[103] Both behaviors

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98 That private actors are "authors" of public policy, controlling the political process and seeking private gain at public expense, is the heart of the public choice thesis.

99 See Merrill, supra note 35, at 1071 (arguing that public choice theory has had "by far the most extensive and transforming impact on mainstream administrative law scholarship overall").

100 See supra notes 60-76 and accompanying text.

101 For an analogous view that courts behave as an aggregation of individual interests, see Richard A. Posner, What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does), 3 Sup. Ct. Econ. Rev. 1 (1993).

102 Economists have begun to account for group norms when building models of individual behavior. See, e.g., William E. Encinosa III et al., The Sociology of Groups and the Economics of Incentives: Theory and Evidence on Compensation Systems (National Bureau of Econ. Research Working Paper No. 5953, 1997) (offering findings suggesting that norms are binding constraints on medical groups' choice of pay practices).

103 Conventional economic explanations for organizational behavior emphasizes individuals' selfish interests. Recent work suggests that the assumption of self-interest is limited and that individuals in organizations care about cooperation and respond to social norms. See, e.g., Rafael Rob & Peter B. Zemsky, Cooperation, Corporate Culture, and Incentive Intensity (INSEAD Working Paper 97/51/EPS/SM, 1997). Although much of the economic literature on organizational culture focuses on private firms, its basic insights are applicable to bureaucracies. For an economic theory of corporate culture, see David M. Kreps, Corporate Culture and Economic Theory, in Perspectives on Positive Political Economy 90 (James E. Alt & Kenneth A. Shepsle eds., 1990).

are rational, but by ignoring institutions qua institutions we miss a great deal.

The final reason why public choice takes us only part of the way toward a contractual conception of administration is its focus on higher-order policy-making activities: the legislative process, agency rulemaking, and statutory interpretation by courts.[104] Public choice theory reinforces the legislature/agency/court focus that pervades the more traditional approaches to administrative law. This marginalizes the relationships among public and private actors that characterize the relatively lower-order activities of implementation and enforcement.

C. *The Contractual Metaphor*

In contrast to those presenting hierarchical models of administrative law, I conceive of governance as a set of negotiated relationships. This alternative conception of policy making, implementation, and enforcement is dynamic, nonhierarchical, and decentralized, envisioning give and take among public and private actors. Information, expertise, and influence flow downward, from agency to private actors; upward, from private actor to agency; and horizontally, among public and private actors. In the negotiation conception, these exchanges are simultaneous and ongoing.

Because of its familiarity across fields and disciplines, the contract metaphor serves as useful shorthand. It conveys the notion of exchange, dialogue and flow. The contract metaphor is not intended to evoke either a one-time or a zero-sum bargain based on fixed preferences: It leaves open the possibility that the process of negotiation alters preferences. Nor is the contract metaphor limited to formal and legally enforceable contracts;[105] it should be construed broadly to describe both legally enforceable contracts and informal agreements or understandings.

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[104] One of public choice theory's most significant contributions to administrative law has been to shift the field's focus from judicial review of agency action to the relationship between Congress and agencies, demonstrating how administrative procedures serve as a monitoring device that ensures that legislative deals are enacted as regulations. Although refreshing, this shift has turned out to be a temporary detour. Administrative law scholars are reorienting their debate over what all of this means for judicial review. Compare Easterbrook, supra note 65, at 14-18, 42-60 (suggesting that courts should interpret statutes in accord with legislative intent), with Macey, supra note 61, at 235-40, 350-56 (arguing that textualist interpretation is more consistent with judicial role of checking legislative excess).

[105] See, e.g., Melvin A. Eisenberg, The Conception That the Corporation Is a Nexus of Contracts, and the Dual Nature of the Firm, 24 J. Corp. L. 819, 822-23 (1999) (explaining how term "contracts" rather than "reciprocal arrangements" came to be used in nexus-of-contracts conception of corporations).

In part, I can clarify the contract metaphor by articulating what it is not. It is not a claim that parties always actually negotiate; parties may proceed with their daily business informed by background understandings that assume a system in which everything depends on agreements. In other words, in this conception, there is no moment when negotiations formally begin or end. The point is simply that every aspect of policy making, implementation, and enforcement depends on the combined efforts of public and private actors. They must work out how to deliver a service, design a standard, and implement a rule. My contractual metaphor envisions that working out as negotiation.

Similarly, there is no moment of decision to which one can point and say, "Aha, there policy was made!" or "There policy was implemented." The process of design, implementation, and enforcement is fluid. Administrative law scholars tend to take "snapshots" of specific moments in the decision-making process (such as the moment of rule promulgation) and analyze them in isolation.[106] Rules develop meaning, however, only through the fluid processes of design, implementation, enforcement, and negotiation. This is not to deny the significance of rule promulgation as a separate process, or the rule itself as a product, but to situate both in a larger dynamic.

The negotiation conception is not a claim that there is no such thing as "public" and "private." Private activity is infused with public power, and, I argue, vice versa. The terms connote something important and are also a practical necessity. It proves nearly impossible to discuss policy making, implementation, and enforcement without resort to them. To think that public actors execute the business of governance *alone*, however, simplifies a complicated reality. The contractual metaphor helps us see the texture in what is traditionally called the public realm.

Finally, the contractual metaphor is not an argument that there is no such thing as an agency. There is clearly such a thing as the Environmental Protection Agency, the Securities and Exchange Commission, or the Internal Revenue Service. You can visit their headquarters in Washington. My only claim is that when you engage with an agency, you are not just engaging with "the agency" as an insulated entity; you are engaging a set of relationships, those internal

106 The focus on rulemaking to the exclusion of implementation is evident in administrative law casebooks. Not surprisingly, they present rulemaking via appellate cases that, taken together, suggest that rulemaking begins with the Notice of Proposed Rulemaking and ends with rule promulgation. The key questions arising from the cases are the sufficiency of the procedure followed by the agency and the appropriate role of judicial review, with little reflection on implementation. See generally, e.g., Cass et al., supra note 9, at 480-591; Peter L. Strauss et al., Gellhorn and Byse's Administrative Law (9th ed. 1995).

to the agency and those they develop with other entities.[107] Viewing governance in this more complicated light underlines the need for a less agency-centered and more dynamic administrative law agenda.[108]

The contractual metaphor offers, I believe, a descriptive advantage over competing approaches.[109] It captures the complexity and dynamic nature of what we call governance. It allows us to recognize the multiplicity of parties involved in the exercise of authority. It enables us to see the limitations of traditional administrative law constraints on which we rely to satisfy us that the "system" is accountable and points us toward a broader set of questions than a nearly exclusive focus on agencies allows.[110] At the same time, it reinforces what

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107 There is an elaborate contractarian literature on corporations that conceptualizes the firm as a "nexus" or "web" of contracts. See, e.g., Stephen M. Bainbridge, Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship, 82 Cornell L. Rev. 856, 858-73 (1997) (book review) (discussing "nexus of contracts" theory of firm); see also Frank H. Easterbrook & Daniel R. Fischel, The Economic Structure of Corporate Law 12 (1991) (describing corporation as set of implicit and explicit relationships).

108 Readers schooled in economics plausibly might think that both traditional and neoinstitutional economics might be brought to bear on an analysis of policy making, implementation, and enforcement in administrative law. For example, the delegation of legislative mandates to agencies or private actors, and the arrangements between agencies and private actors to implement regulations, create problems of agency cost and control similar to those that arise in firms. While economic analysis may be a fruitful enterprise, this Article is not an application of agency cost theory to administrative law. My conception of administration as a set of negotiated relationships is an attempt to describe the reality of policy making, implementation, and enforcement.

In administrative law scholarship, legislative and executive oversight and judicial review are mechanisms for controlling the temptation of agents to deviate from their mandates. There are other mechanisms for controlling agents (whether public agencies or private actors), including, as I point out in this Article, legally enforceable contracts, informal norms, market mechanisms, and third party oversight. The overlap between these issues in the context of government agencies and similar issues in the context of private firms seems an obvious area for further research. One might, for example, describe legislature/agency/private actor dealings as a set of contracts and analyze them from a neoclassical economic perspective (that treats contracts as fully defined, instantaneously consummated, and perfectly enforced by the courts), or, alternatively, approach those relationships from the perspective of transaction cost economics "in which '[p]lanning is necessarily incomplete (because of bounded rationality), promise predictably breaks down (because of opportunism), and the precise identity of the parties now matters (because of asset specificity).'" Mercuro & Medema, supra note 60, at 131, 147-48 (quoting Oliver E. Williamson, The Economic Institutions of Capitalism 32 (1985)).

109 Although descriptive accuracy is only one among a number of plausible goals (including prediction and control), it is important. See, e.g., Ronald H. Coase, The Nature of the Firm: Meaning, in The Nature of the Firm 52 (Oliver E. Williamson & Sidney G. Winter eds., 1991) (arguing for importance of realistic assumptions in economics); Gulati et al., supra note 11, at 3-5, 9-11 (discussing criteria for assessing utility of competing models).

110 In this endeavor, I take inspiration from Lester Salamon's comment that the function of theory is "not simply to provide 'explanations'; it is also to raise useful questions and, perhaps most important, to identify the most fruitful unit of analysis for coming to grips with the central problems in a field." Salamon, supra note 17, at 18.

many administrative law scholars have long suspected—that the project of creating constraints distracts us from the equally important project of facilitating "good governance." Whatever version of "good governance" one seeks to facilitate, however, to the extent that one has a normative agenda, it seems necessary to enlist not only agencies, but private actors as well.

III
APPLYING TRADITIONAL CONSTRAINTS

Given the consistent defensiveness in administrative law theory toward private influence on agency decision making, it is no surprise that greater reliance on private actors in policy making, implementation, and enforcement seems especially dangerous. It is one thing to tolerate properly structured private interaction with public bureaucrats and another directly to delegate authority to the private actors themselves. Private actors exacerbate all of the concerns that make the exercise of agency discretion so problematic. They are one step further removed from direct accountability to the electorate. Although vulnerable to private actions in tort or contract, subject to federal antitrust law, and disciplined to varying degrees by agency oversight, private entities escape most of the procedural controls and budgetary constraints that apply to agencies. As nonstate actors, they remain relatively insulated from the legislative, executive, and judicial oversight to which agencies must submit. Driven by profit, ideology, or group allegiance, most private organizations may not develop the institutional norms of professionalism and public service that characterize many public bureaucracies. Whether nonprofit or for-profit, private organizations may pursue different goals and respond to different incentives than do public agencies, interfering with their capacity to be as public-regarding as we expect agencies to be.[111]

Recently, widespread contracting out, devolution, and delegation has intensified unease over private power. By raising the specter that government will increasingly offload its obligations to private actors unfettered by the scrutiny that normally accompanies the exercise of public power, these trends have prompted some administrative law scholars to recommend the imposition of greater constraints on private power. The four most popular mechanisms are: treating private parties as "state actors" for purposes of imposing constitutional re-

111 See Michael Taggart, The Province of Administrative Law Determined?, in The Province of Administrative Law, supra note 1, at 1, 4-5 (noting distinction between self-regarding behavior as starting point for private law and public-regarding behavior as starting point for administrative law).

quirements; enforcing the nondelegation doctrine or applying the Due Process Clause to invalidate private delegations; extending procedural controls to private actors; and, finally, infusing private law with public law norms requiring fair and rational decision making. Some scholars go further, arguing that certain key functions should remain the exclusive responsibility of the state.[112]

To the extent that they remain wed to a sharp public/private distinction, the constraints described in this section perpetuate a flawed understanding of how administration works. The public/private divide obscures significant interdependence among public and private roles in governance and masks the extent to which accountability problems are the result of public and private power combined. Moreover, because administrative law theory has traditionally envisioned private authority as uniformly threatening, the administrative response to it focuses on constraint above all else. This formulation—private authority is dangerous and must be constrained—leaves no room for structuring and capitalizing upon desirable private contributions to governance. Finally, the instinctive appeal of these four devices suggests, erroneously, that they are the exclusive accountability mechanisms available in administrative law. A brief tour through each of the four mechanisms helps underscore their limitations, and points to the need to think more carefully and creatively about accountability.

A. State Action

In a handful of cases, and using slightly different doctrinal tests, both American and Commonwealth courts have imposed constitutional requirements on private actors,[113] or subjected their decisions

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[112] For example, some scholars think that the profit motive is simply incompatible with the noneconomic public policy goals associated with some functions, such as incarceration. See, e.g., John J. DiIulio, Jr., The Duty to Govern: A Critical Perspective on the Private Management of Prisons and Jails, in Private Prisons and the Public Interest, 155-157 (Douglas C. McDonald ed., 1990).

[113] See Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991) (finding state action where private party exercised peremptory challenges to exclude two black jurors in jury trial); Ex parte Datafin Plc., [1987] 1 Q.B. 815 (Eng. C.A.) (imposing judicial review upon takeover panel exercising important regulatory function within self-regulatory framework); see also Lebron v. National R.R. Passenger Corp., 513 U.S. 374 (1995) (requiring Amtrak to recognize free speech because of government control and performance of government function even though not government agency subject to APA); Murray Hunt, Constitutionalism and Contractualisation of Government in the United Kingdom, in The Province of Administrative Law, supra note 1, at 21, 28-29 (discussing *Datafin*).

In *Leesville*, the Court applied the test established in Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982). The Court asked whether the claimed action stemmed from a right or a privilege rooted in state authority and whether the private party charged with the constitutional violation "could be described in all fairness as a state actor." *Leesville*, 500 U.S. at 620 (citing *Lugar*, 457 U.S. at 941-42). To make this determination, the *Leesville* Court

to judicial review, by reasoning that they are in effect behaving as state actors.[114] Likewise, many scholars have argued that, in certain contexts, private actors ought to submit to oversight by agencies, courts, and the legislature, and to be constrained by the Constitution in the same manner as traditional public agencies are.[115] American courts appear reluctant, however, to expand the reach of state action beyond narrow bounds.

Despite its alleged lack of conceptual clarity, the Supreme Court's decisional direction on state action has been unmistakable. Since its expansive interpretation of state action in the context of racial discrimination,[116] the Court has consistently narrowed or distinguished its own precedents in order to limit strictly the extension of constitutional constraints to private actors engaged in arguably public activities.[117] The Court remains strongly committed to the public/private distinction on which the doctrine depends. The distinction has withstood blistering attacks from a range of disciplines: critical legal studies, feminist theory, and postmodernism.[118]

1. The Three Tests: Joint Participation, Nexus, and Public Function

Of the numerous state action tests, three are most relevant to determining when private participation in governance might be deemed state action for purposes of applying the Due Process Clause of the

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considered the following factors: the extent to which the actor relies on governmental assistance and benefits, whether the injury caused is aggravated in a unique way by the incidents of governmental authority, and whether the actor is performing a traditional government function. See id. at 621-22.

114 While every state function or service—housing, education, health care, policing, welfare, transportation, postal service, and dispute resolution—has a private counterpart, the law subjects only state actors to constitutional limits. The traditional justification for this differential treatment is that government power is uniquely coercive. See Ronald A. Cass, Privatization: Politics, Law, and Theory, 71 Marq. L. Rev. 449, 503-04 (1988).

115 See, e.g., Ira P. Robbins, The Impact of the Delegation Doctrine on Prison Privatization, 35 UCLA L. Rev. 911, 915 (1988) (concluding that delegation doctrine may require government to "oversee[ ], review[ ], and circumscribe[ ]" private prisons' authority); see also West v. Atkins, 487 U.S. 42, 54 (1988) (finding delivery of medical treatment to state prisoner by physician employed under contract by state to be state action).

116 See Shelley v. Kraemer, 334 U.S. 1, 20 (1948) (holding that state court's enforcement of racially restrictive covenant constituted state action and violated Equal Protection Clause of Fourteenth Amendment).

117 See id. While continuing to view *Shelley* as "not only correct but canonical," the Court has "steadfastly declined to extend the ruling." Sklansky, supra note 20, at 1250 n.474. One commentator assessed the Court's restrictive stance on state action as "congenial to Justices who want to preserve state power against the intrusion of the federal government, and who want to restrict the role of the judiciary in second-guessing the political process." Kenneth L. Karst, State Action—Beyond Race, in 4 The Encyclopedia of the American Constitution 1736, 1738 (Leonard W. Levy et al. eds., 1986).

118 See supra notes 81-83 and accompanying text.

Fourteenth Amendment. The first test, "joint participation," determines whether the state has "so far insinuated itself into a position of interdependence" with a private actor that it must be recognized as a "joint participant" in the challenged activity.[119] In more recent cases involving arguably greater state "insinuation" into private activity, however, the Court has declined to find sufficient interdependence to meet the joint participation test.[120]

In contrast, the "nexus" test focuses on the extent of government regulation of private activity, inquiring into whether the pervasiveness of the regulation creates a sufficient nexus between the state and private actor "so that the action of the latter may be fairly treated as that of the State itself."[121] This nexus must be close indeed. In the absence of direct governmental involvement in the challenged activity, even extensive and detailed government regulation of a utility cannot convert the utility into a state actor.[122] Although the government might fund, extensively regulate, and supervise private activity, or even approve particular decisions through silence,[123] even the most extensive involvement with government rarely will lead to a finding of state action.[124]

The third possibility for a claim of state action arises when a private actor performs a "public function." Even when a private entity performs a function widely viewed as both socially important and traditionally governmental, however, it will not likely be deemed a state

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119 Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357 (1974) (citing Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) (holding race-based discrimination by private restaurant to be state action)).

120 See, e.g., Blum v. Yaretsky, 457 U.S. 991, 1010-12 (1982) (holding that private nursing home's decision to transfer Medicaid patients to lower level of care was not state action, despite state funding, licensing, extensive regulation of facilities, and specific regulation requiring periodic reassessment of Medicaid patients' needs); Rendell-Baker v. Kohn, 457 U.S. 830, 840-43 (1982) (finding no state action on part of private high school to which almost all students had been referred from public schools, despite extensive state regulation and funding of private school).

121 *Jackson*, 419 U.S. at 351.

122 In *Jackson*, a private electric utility with a virtual monopoly terminated plaintiff's electricity for nonpayment without a hearing. See id. at 347.

123 In *Blum*, Medicaid patients argued unsuccessfully that state approval might be inferred from the state's reaction to the "private" decision to downgrade care, which was to reduce the benefits paid to the private nursing home. See *Blum*, 457 U.S. at 1010. That approval can be effectively granted through silence was also argued in *Jackson*, 419 U.S. at 354. Plaintiff argued that Metropolitan Edison had notified the state of its termination procedure in a rate application, and that, in approving the rates, the state had approved of the company's decision not to provide a hearing prior to terminating customers for nonpayment. See id.

124 Even government regulation of an industry does not suffice to create state action; the regulation must touch the specific private activity. See *Rendell-Baker*, 457 U.S. at 841.

actor.[125] In *Jackson*, the Supreme Court held that a finding of state action was available only when the function at issue was "traditionally and *exclusively*" reserved to the state.[126]

On the strictest reading of the public function theory,[127] moreover, private actors may be declared state actors only when they "substitute" for government in the performance of a function "traditionally associated with sovereignty."[128] The Court has never identified those functions it considers "associated with sovereignty."[129] Few functions can plausibly be described as essential to sovereignty, especially if the test for sovereignty demands historical support for the claim of exclusive performance by the state. Even assuming that the Court could differentiate sovereign from nonsovereign functions, and defend the choice on historical or normative grounds,[130] private actors performing these functions will rarely displace public alternatives sufficiently to "substitute" for the state.[131]

These three tests are alternatives; even in the absence of facts supporting a joint participation or government regulation argument, satisfaction of the public function test establishes state action. In

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125 Merely providing services to the public or performing a function that government also performs is not sufficient. See San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522 (1987) (holding U.S. Olympic Committee not to be state actor because promotion of amateur sports is not traditional government function). The provision of electricity and education are at least arguably "traditional" government functions even if they have never been exclusively performed by the state. See *Jackson*, 419 U.S. at 353; *Rendell-Baker*, 457 U.S. at 842.

126 *Jackson*, 419 U.S. at 353 (emphasis added); see also Flagg Bros. v. Brooks, 436 U.S. 149 (1978) (declining to find state action where warehouse proposed to sell private property in satisfaction of lien).

127 See generally Henry C. Strickland, The State Action Doctrine and the Rehnquist Court, 18 Hast. Const. L.Q. 587, 647 (1991) (discussing strict interpretation and application of public function theory by Rehnquist Court).

128 *Jackson*, 419 U.S. at 353 (referring to functions such as eminent domain).

129 In *Flagg Bros.*, the Court listed fire protection, taxation, and education as functions both more traditional and exclusive to government than dispute resolution, but declined to indicate circumstances under which their performance by private actors might lead to a finding of state action. See *Flagg Bros.*, 436 U.S. at 163-64.

130 Both of these grounds prove problematic. See Cass, supra note 114, at 455, 471.

131 See Marsh v. Alabama, 326 U.S. 501 (1946) (applying public function test for first time). In *Marsh*, the Court held the Gulf Shipbuilding Company to be a state actor subject to the First Amendment because, in a company town, it exercised monopoly power over all that town's streets. Although some of *Marsh*'s language focused on the public's interest rather than the public or private nature of the town, in later cases, the nature of the authority exercised has emerged as more determinative of state action analysis. See Kennedy, supra note 20, at 787-88. Focusing on the public's interest would potentially decimate the public/private distinction. Interestingly, residential community associations (RCAs) (perhaps the modern-day equivalent of company towns) can exercise monopoly power over streets within their jurisdiction, but are held only in certain circumstances to be state actors. See id. at 784 (noting that "state courts have reached wildly different conclusions" in deciding whether RCAs are state actors).

practice, however, each test proves difficult to satisfy. Short of a pecuniary interest in the enterprise,[132] or a direct state command to commit the challenged act, virtually any public contribution to a public/private regime will fall short of the Court's threshold for joint participation or nexus. The public function theory as applied by the Rehnquist Court seems equally difficult to satisfy. As argued earlier, not many functions historically have been reserved to the state.[133] In addition, it is difficult to discern the category of functions "associated with sovereignty," and rarely do private parties exercise monopoly power sufficient to "substitute" for the state.[134] Ironically, then, the historical pervasiveness of private activity may be largely responsible for the "remarkable uselessness"[135] of state action doctrine in constraining the private role in governance.

As the Court has made clear, even where the state extensively regulates a private entity exercising virtual monopoly power over a function traditionally associated with the state, the company is not a state actor.[136] Thus, scholars who seek to constrain the private exercise of authority through the extension of constitutional limits to nonstate actors face an uphill battle. The state action argument may succeed in extraordinary cases, but it cannot discipline the excesses—or facilitate the proper functioning—of the vast majority of arrangements in which private parties play a significant role.

2. *The Limits of State Action*

In an era of contracting out, arrangements characterized by significant entanglement of public and private actors are ubiquitous. And yet, by definition, state action doctrine demands that we demarcate the public from the private, a task that proves ever more difficult and unrealistic in the face of public/private interdependence.[137] As a mechanism for disciplining private actors, the doctrine proves inept, not only because of the current Court's restrictive stance on state action, but because reality undermines its core premise. There is no reliably discernible tipping point at which *responsibility*, to use the Chief

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132 See Burton v. Wilmington Parking Auth., 365 U.S. 715, 724 (1961).

133 See supra notes 20-23 and accompanying text.

134 See *Flagg Bros.*, 436 U.S. at 158.

135 Sklansky, supra note 20, at 1265.

136 See Jackson v. Metropolitan Edison Co., 419 U.S. 345, 358 (1974).

137 See Blum v. Yaretsky, 457 U.S. 991, 1027 (1982) (Brennan, J., dissenting):

> [T]he nature of the nursing home as an institution, sustained by state and federal funds, and pervasively regulated by the State so as to ensure that it is properly implementing the governmental undertaking to provide assistance to the elderly and disabled that is embodied in the Medicaid program, undercuts the Court's sterile approach to the state action inquiry . . . .

Justice's word, can be laid at the feet of government.[138] The coherence of this enterprise is precisely what a focus on interdependence calls into question.

The remedial response to the state action inquiry, moreover, is all or nothing: What falls on the public side suffers every constitutional constraint, while what falls on the private side operates unfettered. This result necessarily follows from the "essential dichotomy"[139] first articulated by the Supreme Court in the *Civil Rights Cases*,[140] but it is a crude instrument for protecting individuals from the threat of irrational, arbitrary, or unfair action, and it is irrelevant to achieving the goals of sound public policy and accountability. This approach cannot tailor procedural protections to the specific threats posed by a particular regulatory regime in which both public and private decisionmakers play a significant role.[141]

B. The Nondelegation Doctrine

In order to constrain the private exercise of public power, scholars instead might seek to resurrect the nondelegation doctrine, the principle that Congress may not delegate, to public or private actors, its constitutionally assigned lawmaking power.[142] When delegating decision-making authority, Congress must provide "an intelligible principle" to guide the delegate's discretion, cabining it within lawful bounds.[143] The nondelegation principle is consistent with the ideal of representative democracy: Elected officials accountable to the public assume responsibility for legislative decisions. In practice, however, the Supreme Court tolerates broad federal delegations to its coequal branches of government, and, less visibly, to private parties. Despite occasional rumbles to the contrary, the desuetude of the federal

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138 See id. at 1004. Numerous commentators have called into question the coherence and intellectual defensibility of the state action doctrine. See, e.g., Paul Brest, State Action and Liberal Theory: A Casenote on *Flagg Brothers v. Brooks*, 130 U. Pa. L. Rev. 1296 (1982); Duncan Kennedy, The Stages of the Decline of the Public/Private Distinction, 130 U. Pa. L. Rev. 1349 (1982).

139 *Jackson*, 419 U.S. at 349.

140 109 U.S. 3, 17 (1883) (holding that Fourteenth Amendment guarantees civil rights against state aggression, not wrongful acts of individuals).

141 Moreover, even if the impugned decision in *Jackson* or *Blum* was held to constitute state action, the question would remain whether the plaintiffs could claim an entitlement sufficient to establish a property right. See Board of Regents v. Roth, 408 U.S. 564, 578 (1972) (distinguishing entitlements that create property rights from other forms of state action). Then the question would follow as to how much process would be due. See Mathews v. Eldridge, 424 U.S. 319, 340-49 (1976) (laying out three-part due process balancing test).

142 See Hampton & Co. v. United States, 276 U.S. 384, 411 (1928) (upholding delegation to President of responsibility to revise tariff duties).

143 See id.

nondelegation doctrine in the modern era is well settled.[144] Virtually any delegation to an agency, no matter how vague, will survive constitutional scrutiny.[145] Such tolerance by the federal judiciary is not reserved exclusively for delegations to the co-equal branches. The number of delegations to private entities that pass constitutional muster prompted one commentator to declare that "the private exercise of governmental power delegated by state or local governments [is no longer] a federal constitutional issue."[146]

The federal government thus retains considerable flexibility to make substantial delegations of its responsibilities, and even of functions closely associated with core sovereign powers, to private parties. In *Flagg Brothers, Inc. v. Brooks*,[147] for example, the Court considered that government might seek to avoid its constitutional obligations through private delegation, but declined to provide standards for how much delegation it would allow.[148] The issue arose concretely in

144 Although individual members of the Supreme Court occasionally threaten to invoke the nondelegation doctrine, the doctrine has not been applied meaningfully since 1935. Nonetheless, it remains a background threat that may serve to discipline agency officials' interpretation of their statutes. The D.C. Circuit, for example, recently invoked the nondelegation doctrine in striking down EPA's revised ambient air quality standards for ozone and particulate matter established pursuant to the Clean Air Act. See American Trucking Ass'ns v. EPA, 175 F.3d 1027 (D.C. Cir. 1999), modified on reh'g, 195 F.3d 4 (D.C. Cir 1999), cert. granted sub nom. Browner v. American Trucking Ass'ns, 68 U.S.L.W. 3496 (U.S. May 22, 2000) (No. 99-1257). For a discussion of the potential import of this decision, see Cass R. Sunstein, Is the Clean Air Act Unconstitutional?, 98 Mich. L. Rev. 303 (1999). But see Craig N. Oren, Run Over by *American Trucking* Part I: Can EPA Revive Its Air Quality Standards?, 29 Envtl. L. Rep. 10,653, 10,654 (1999) (arguing that "[t]he invocation of the 'nondelegation' doctrine of the court's decision may represent rhetorical flourish as much as an attempt at doctrinal exhumation").

For references to the nondelegation doctrine in recent Supreme Court opinions, see Clinton v. City of New York, 524 U.S. 417 (1998) (invalidating line item veto); Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 685-88 (1980) (Rehnquist, J., concurring, on nondelegation grounds). Scholars have staked out opposing positions on the wisdom of reviving the doctrine. See, e.g., Schoenbrod, supra note 44, at 14 (arguing that delegation weakens democracy); David Schoenbrod, The Delegation Doctrine: Could the Court Give It Substance?, 83 Mich. L. Rev. 1223 (1985) (developing and advocating test to control improper delegation). But see Mashaw, supra note 49 (arguing that broad delegations increase administrative system's responsiveness).

145 See United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968) (upholding delegation in Federal Communications Act allowing regulation "as public convenience, interest or necessity requires" (internal citations omitted)). But see South Dakota v. Department of Interior, 69 F.3d 878 (8th Cir. 1995), vacated and remanded on other grounds, 519 U.S. 919 (1996) (invalidating delegation to Secretary of Interior to acquire trust land due to absence of legislative standards).

146 David M. Lawrence, The Private Exercise of Governmental Power, 61 Ind. L.J. 647, 649-50 (1986).

147 436 U.S. 149 (1978).

148 "We express no view as to the extent, if any, to which a city or State might be free to delegate to private parties the performance of such functions and thereby avoid the strictures of the Fourteenth Amendment." Id. at 163-64.

West v. Atkins,[149] in which the Court unanimously held that a private doctor under contract in a public prison had acted "under color of state law" and violated a state prisoner's constitutional rights.[150] Here, the state action finding appeared to mitigate the impact of the private delegation. Writing for the Court, Justice Blackmun explained:

> Contracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody .... The State bore an affirmative obligation to provide adequate medical care to West; the State delegated that function to respondent Atkins; and respondent voluntarily assumed that obligation by contract.[151]

Were the physician considered a private actor, the state could effectively contract *out* of its constitutional obligation to provide medical care.[152] But this the state could not do.

Remarkably, the *West* court appeared unperturbed by the delegation itself. Indeed, the Court never engaged the possibility that some duties might be nondelegable. Presumably, then, constitutional obligations may be delegated freely, provided that the contractual private actor is bound by the same constitutional obligations as is the state.[153]

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149 487 U.S. 42 (1988).

150 *West* concerned a physician under contract with the state of North Carolina to provide medical services to inmates. A prisoner sued this physician under the civil rights statute, 42 U.S.C. § 1983 (1994), for deliberate indifference to his serious medical needs in violation of the Eighth Amendment. The Court had previously announced that the state action inquiry is related to the "color of state law" standard of § 1983, and that any conduct that constitutes state action also meets the "color of state law" test. See Lugar v. Edmondson Oil Co., 457 U.S. 922, 935 (1982).

151 *West*, 487 U.S. at 56.

152 See id. at 52 n.10.

153 In another recent case involving a 42 U.S.C. § 1983 challenge, a court held that a private contractor in a state prison is open to liability based on the state's obligation to provide prisoners with food. The court found that the private food provider could be subject to liability as a state actor under § 1983 for assaulting a prisoner who remarked in front of touring judges that the food provided was insufficient, see McCullum v. City of Phila., No. Civ. A. 98-5858, 1999 WL 493696 (E.D. Pa. July 13, 1999), though the provider was ultimately granted summary judgment in the matter, see McCullum v. City of Phila., No. Civ. A. 98-5858, 2000 WL 329203 (E.D. Pa. Mar. 23, 2000) (finding that single incident without evidence of provider practice or policy insufficient to support § 1983 claim). For cases in which private actors were found to be acting under color of state law for § 1983 purposes, see Street v. Corrections Corp. of Am., 102 F.3d 810, 814 (6th Cir. 1996) (finding warden and corrections officer of prison facility run by publicly held corporation to be state actors); Kesler v. King, 29 F. Supp. 2d 356, 370-71 (S.D. Tex. 1998) (deeming warden of private prison facility leased from county to be state actor); Blumel v. Mylander, 919 F. Supp. 423, 426-27 (M.D. Fla. 1996) (holding liable private corporation that contracted with county to run jail); Plain v. Flicker, 645 F. Supp. 898, 908 (D.N.J. 1986) (finding private physician's certification of civil commitment to be performance of public function).

Further, it appears that the state may contract out statutory functions to private actors *not* bound by constitutional constraints. In *Rendell-Baker v. Kohn*,[154] the Court rejected the argument that the state had delegated to a private school its statutory duty to educate children with special needs.[155] Likening the school to a private business that depends on government procurement contracts, the Court refused to find state action, declaring that "[a]cts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts."[156]

In these cases, state action doctrine plays a crucial role delineating the conditions under which courts will tolerate particular kinds of delegations. When the state seeks to delegate certain core functions, the delegates will be considered state actors and bound by constitutional constraints.[157] Constitutional due process may apply to private actors where they "assume responsibility" for the state's constitutionally mandated duties. Other, less critical functions may be performed by private actors under contract, without such limitations. In neither case does the Court explicitly discuss the possibility that there are any "inherent" or "core" state functions which may not be delegated to private actors under any circumstances.

Even so, delegations to actors traditionally considered private are more likely to trouble federal courts than the broadest delegations to public agencies.[158] Indeed, in two of its most notorious cases restrict-

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154 457 U.S. 830 (1982).

155 Cass, supra note 114, at 507-08 (citing *Rendell-Baker*, 457 U.S. at 840-41).

156 *Rendell-Baker*, 457 U.S. at 841. But see J.K. v. Dillenberg, 836 F. Supp. 694 (D. Ariz. 1993) (finding state action on part of private regional health facility). The *Dillenberg* court distinguished the case from Blum v. Yaretsky, 457 U.S. 991 (1982), reasoning that the private provider was created exclusively to deliver mental health services to children entitled to care pursuant to a federal statute: The provider was not merely "doing business" with the state, but executing an entirely delegated responsibility for state health care duties. See *Dillenberg*, 836 F. Supp. at 698. Echoing *West*, the court held that it would be "patently unreasonable to presume that Congress would permit a state to disclaim federal responsibilities by contracting away its obligations to a private entity." Id. at 699.

157 Constitutional due process may apply to private actors when they assume the state's mandated duties and are exclusive service providers. See, e.g., Catanzano v. Dowling, 60 F.3d 113, 120 (2d Cir. 1995) (holding state certified home health agency determinations regarding medical necessity of home health care to be state action since only those agencies could provide care to Medicaid beneficiaries); Perry v. Chen, 985 F. Supp. 1197, 1202, 1204 (D. Ariz. 1996) (holding Medicaid health care providers to be state actors where they "assumed the obligations" of state to provide Medicaid benefits); *Dillenberg*, 836 F. Supp. at 698-99 (holding private regional behavioral health authorities to be state actors where sole providers of state's Medicaid behavioral health services for children).

158 See Krent, supra note 8, at 69 n.17 (noting that courts appear relatively tolerant of delegations to private parties that "function[] subordinately to the public oversight agency" even when no executive branch oversight exists (internal quotation marks omitted)).

ing Congressional delegations, the Supreme Court forbade delegation to private groups.[159] Although judicial decisions reflect little on the comparative threat posed by public versus private agents, legal commentators seem to view private discretion as more dangerous than agency discretion, no matter how unconstrained.[160] While the federal judiciary may decline to resurrect the nondelegation doctrine to invalidate delegations to administrative agencies, then, it might still invalidate private delegations in future cases, especially if the delegated authority implicates "core" public powers. A delegation could prove so sweeping that it deprives the executive of its Article II powers, thereby raising a separation of powers concern.[161]

Resurrecting the nondelegation doctrine to invalidate private delegations on the theory that some "public" functions are nondelegable would, however, require heavy conceptual lifting. How would the court classify delegable from nondelegable functions, if not on the grounds of traditional performance by the state? As noted earlier, however, there are few public functions that were not either once private or conceivably executable by private actors.[162] To enforce the nondelegation doctrine using the traditional rationale would require the Court first to find that core governmental functions do exist and then to distinguish them from peripheral functions in a principled way,

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159 See Carter v. Carter Coal Co., 298 U.S. 238 (1936) (invalidating Bituminous Coal Conservation Act as unconstitutional delegation of legislative power to large coal producers); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (invalidating National Industrial Recovery Act provision allowing trade association and industry groups to establish codes of fair competition as violation of due process).

160 See Lawrence, supra note 146, at 649-50 (arguing that courts fail to distinguish differences between dangers of public and private delegations). Some commentators have noted that private delegation might enhance Congress's power at the expense of the executive. Congress aggrandizes its own power by appointing private delegates and insulating them from executive control. See Krent, supra note 8, at 72-73; see also Abramson, supra note 8, at 180-83, 210 (discussing ability of private delegates to elude executive oversight).

161 See *Carter Coal*, 298 U.S. at 311 (implying that some functions are inherently governmental: "The difference between producing coal and regulating its production is, of course, fundamental. The former is a private activity; the latter is necessarily a government function . . . ."). Even Harold Krent, who argues that most private delegations can be accommodated by the Constitution without interfering with the Article II interest in a unitary executive, agrees that some private delegations are intolerable:

> [I]f the delegation outside the federal government is too expansive or touches too closely to areas at the core of executive power, the interest in a unitary executive could still prevail. Consider, for example, *Carter Coal*. The problem in that case was not merely that private individuals exercised "public" power, but that the power exercised was so sweeping as to diminish the Executive's control over and accountability for creation and implementation of the industry codes.

Krent, supra note 8, at 108-09 n.171.

162 See supra notes 20-23 and accompanying text.

which would be a rather formalistic undertaking.[163] Although, as Ronald Cass points out,[164] the Supreme Court has classified government functions formalistically in some separation of powers cases in the past—*Bowsher v. Synar*[165] and *INS v. Chadha*[166] come to mind—in more recent separation of powers cases, the Court has adopted a functionalist approach.[167] Most scholars agree, moreover, that the Court's formalistic decisions in separation of powers cases evince an overriding concern with aggrandizement—that is, the potential for one branch of government to enhance its own power at the expense of another. In fact, the aggrandizement consideration could cut the other way: Private delegations could *prevent* concentrations of power by fracturing and decentralizing authority.

State court decisions confirm the idea that private delegations raise judicial concern more than public ones, largely because of unease about anticompetitive behavior and self-dealing among private actors.[168] A majority of state constitutions contain nondelegation doctrines, some very strict.[169] State courts emphasize the dimension of *Carter v. Carter Coal* that proscribes self-interested economic behavior, often focusing on Due Process implications for competitors ad-

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163 See Cass, supra note 114, at 500 (arguing that "[t]he complex intermingling of functions among public and private parties" makes it difficult to identify essential government functions).

164 See Ronald A. Cass, Looking with One Eye Closed: The Twilight of Administrative Law, 1986 Duke L.J. 238, 251-52.

165 478 U.S. 714 (1986). The Court's reasoning in *Bowsher* turned on the characterization of the Comptroller General's function under the Gramm-Rudman-Hollings Act as "executive." See id. at 733.

166 462 U.S. 919 (1983) (holding unconstitutional use of one-house legislative veto to reverse Justice Department's suspended deportation of alien who overstayed his visa). Once the Court declared the agency action "legislative," it found the one-house veto unconstitutional; all "legislative" action was required to comply with constitutional requirements of bicameralism and presentment to the President. See id.

167 See Morrison v. Olsen, 487 U.S. 654 (1988) (using functionalist approach to uphold constitutionality of independent counsel provisions of Ethics in Government Act); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 847-48 (1986) ("This inquiry, in turn, is guided by the principle that 'practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III.'"(quoting Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 587 (1985))).

168 See State Bd. of Dry Cleaners v. Thrift-D-Lux Cleaners, Inc., 254 P.2d 29, 36 (Cal. 1953) (holding unconstitutional price fixing provisions of California Dry Cleaner's Act); Kenyon Oil Co. v. Chief of Fire Dep't, 448 N.E. 2d 1134, 1135 (Mass. App. Ct. 1983) (holding that fire marshal may not delegate authority to fire chief to license gas stations); Texas Boll Weevil Eradication Found. v. Lewellen, 952 S.W.2d 454, 457 (Tex. 1997) (invalidating delegation to private board).

169 See, e.g., Fla. Const. art. II, § 3 (requiring specific legislative authority for all delegations). As of 1997, 35 states had similar provisions in their constitutions. See Jim Rossi, Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States, 52 Vand. L. Rev. 1167, 1190-91 (1999).

versely affected by private delegations rather than the nondelegation principle itself.[170] State courts appear particularly attuned to delegations that empower self-interested parties to engage in self-dealing.[171] Still, even in light of a greater willingness among state courts to adopt a skeptical view of private delegation, careful state legislatures can insulate their delegations from invalidation fairly easily. A state legislature wary of the nondelegation doctrine need only reserve to an agency the power to accept, reject, or modify any proposed rules, and provide for judicial review of private adjudicative decisions.[172] The strictures of the nondelegation doctrine may force states to provide at least formal accountability over private delegates, but that demands careful legislative craftsmanship and little else. The nondelegation doctrine cannot guarantee that a public/private regime will be genuinely accountable or that it will operate effectively. To make matters more complicated, a great deal of private activity is generated by informal, rather than formal, delegations.[173]

Most importantly, viewing private participation in governance through the lens of the nondelegation doctrine seems increasingly out of step with modern governance. Many emergent arrangements deputize nongovernmental actors in the pursuit of public ends because they offer expertise, information, and monitoring capacity that the state lacks. Just as courts and scholars once struggled mightily against broad delegations from Congress to the executive only to find that the challenges of modern industrial society required them, so the time has come to accept private delegations as a fact of life. This is not to deny that some delegations will be problematic—only that, as a general matter, we should focus on how to structure these arrangements effectively and milk their positive potential.

C. Administrative Procedures

In addition to invoking the nondelegation doctrine, administrative law scholars concerned about private power suggest another response: extending to private actors the traditional procedural and oversight requirements demanded of agencies. Numerous laws designed to ensure transparency, rationality, and accountability in de-

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[170] See Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936) ("[O]ne person may not be entrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property.").

[171] Such schemes impose "[t]oo great a strain . . . upon human frailty." Becker v. State, 185 A. 92, 100 (Del. Super. Ct. 1936) (striking down statute regulating dry cleaning).

[172] See Robbins, supra note 115, at 935.

[173] See infra notes 216-22 and accompanying text.

cision making, including the Administrative Procedure Act (APA)[174] and the Freedom of Information Act,[175] apply to agencies, and not to private actors.[176] The APA authorizes judicial review of agency, not private, action.[177] Government sunshine laws apply, not surprisingly, only to government.[178]

Of course, Congress could extend the procedural requirements of the APA—or any other good-government statute—to private actors. Both Congress and state legislatures could demand that private actors comply with some aspects of procedural due process when they adjudicate claims and set standards. Indeed, proceduralizing private relationships could be an increasingly popular option in an era of widespread contracting out. As demand for private procedure builds, policymakers and scholars will confront a potential tradeoff between a net gain in greater accountability and a net loss in the benefits of private participation. That is, although bureaucratizing private relationships may have benefits, it imposes costs as well. Complying with the bureaucratic requirements typically imposed on agencies—following detailed procedures, providing hearings, defending decisions to review boards and courts—could frustrate the benefits of private participation in governance by imposing significant burdens.[179]

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174 Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706 (1994).

175 Freedom of Information Act (FOIA), 5 U.S.C. § 552. FOIA requires federal agencies to make available to applicants any written information in their possession unless the material falls into one of nine statutory exceptions. See id. § 552(b)(1)-(9).

176 See id. § 551. The APA defines "agency" as "each authority of the Government of the United States." Id. § 551(1). The Act defines "person" to include "an individual, partnership, corporation, association, or public or private organization other than an agency," clarifying that private organizations are distinct from government. Id. § 551(2).

177 See id. § 702.

178 See id. § 552. However, the Federal Advisory Committee Act (FACA), 5 U.S.C. app. §§ 1-15 (1994), requires certain private groups upon which agencies rely for advice to be chartered and subject to oversight. FACA structures governmental consultation with groups "established or utilized by one or more agencies . . . in the interest of obtaining advice or recommendations for the President or an agency or officer of government." See id. app. § 3(2)(C). The statute requires that the General Services Administration and Office of Management and Budget approve such charters and that advisory committees comply with regulations designed to ensure transparency, recordkeeping, and balanced representation. See generally Steven P. Croley & William F. Funk, The Federal Advisory Committee Act and Good Government, 14 Yale J. on Reg. 451 (1997). However, many private groups that render service to government escape FACA's reach. The Act does not apply to private associations that provide services pursuant to contract or that voluntarily supply government with regulatory proposals. See Timothy Stoltzfus Jost, The Joint Commission on Accreditation of Hospitals: Private Regulation of Health Care and the Public Interest, 24 B.C. L. Rev. 835, 889 (1983) (citing Consumers Union v. HEW, 409 F. Supp. 473 (D.D.C. 1976), aff'd, 551 F.2d 466 (D.C. Cir. 1977) and Lumbardo v. Handler, 397 F. Supp. 792 (D.D.C. 1975), aff'd, 546 F.2d 1043 (D.C. Cir. 1976)).

179 In his now classic article, Louis L. Jaffe articulated the potential benefits of private participation in governance:

To treat nongovernmental actors as we do agencies thus would require a significant shift in attitude. Their insulation from procedural rules stems from the same tenet of American legal culture that underlies state action doctrine: Public power poses greater danger to individual liberty than does private power.[180] Even in an era marked by the rise of multinational corporations and other nongovernmental organizations, the claim that public power is more menacing than private power remains unmovable as a pivot point in American public law.[181] Until that perception changes, private due process may grow at the behest of angry citizens, but only incrementally. Private decisionmakers, as compared to public actors, will remain relatively unfettered.

D. Private Law

For those concerned about the excesses of private power, the common law may offer a helpful last resort. Although some scholars believe that privatization will marginalize the role of courts relative to the position of Congress and the executive, others argue that a proliferation of private activity instead will intensify judicial review.[182]

> Those performing the operation or constituting a part of the relation to be regulated are likely to have a more urgent sense of the problem and the possibilities of effective solution: experience and experiment lie immediately at hand. . . . Participation in management satisfies the craving for self-expression, for power. It is valuable because it may stimulate initiative and quicken the sense of responsibility . . . . Group self-government democratically organized offers some hope for the development of these qualities in the broad masses of the people; it at least suggests that public administrations, superimposed, relatively divorced from the field of operation, and—at least under capitalism—not primarily responsible for results, should not be the exclusive method of regulation.

Jaffe, supra note 8, at 212; see also Lawrence, supra note 146, at 651-57 (canvassing justifications for delegations to private groups, including pluralism, interest representation, flexibility, and expertise).

180 See Richard S. Kay, The State Action Doctrine, the Public-Private Distinction, and the Independence of Constitutional Law, 10 Const. Commentary 329, 349-58 (discussing state action doctrine's focus on public action rather than private action because of greater need for limits on public power).

181 See Strange, supra note 1, at 183-89.

182 See, e.g., David Mullan, Administrative Law at the Margins, in The Province of Administrative Law, supra note 1, at 134, 155-58 (arguing that judicial review might intensify to respond to privatization). The common law has already imported public law notions to govern private behavior where the activities in question implicate the public interest, raise legitimate expectations of procedural fairness, or threaten rights of contract and property. If the private sector continues to exercise more and more public functions, public law values will be applied to those actors and their activities by courts through the common law. Thus, deregulation in the form of government retreat does not mean that the functions performed by different actors will go unregulated. See id. Contrast this conception with Alfred Aman's view that, although courts *may* play a creative role through common law

If so, judges may play a crucial role augmenting common law norms of due process, good faith, and nonarbitrariness.[183]

The common law offers ample precedent for imposing procedural requirements on private parties under certain circumstances. Historically, private parties performing "public functions" could not derogate from the public interest.[184] The relevant doctrines for regulating private firms fell into disuse by the late nineteenth century, but there are signs of imminent revival. Indeed, developments in employment law, including a recent decision by the California Supreme Court reading due process requirements into an employment contract,[185] suggest that courts may be eager to import public law due process norms into private law, and thus to proceduralize at least some private relationships.[186] Courts have applied due process and fairness requirements in two areas of contract law: cases involving private associations' interference with members' economic interests, and employment cases involving wrongful termination.[187]

The law of associations that requires fair procedures is well-developed and over a century old.[188] Courts have held that private associations owe a common law duty to members to use fair procedures where the association occupies a quasi-public or monopolistic position

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developments, the new administrative law will more likely be determined by the executive and legislature. See Alfred C. Aman, Jr., Administrative Law for a New Century, in The Province of Administrative Law, supra note 1, at 90, 117. Aman notes that the Supreme Court has implied that it will play a more minimal role by adopting a restrictive stance on Fourteenth Amendment and Article III standing issues. See id. at 110.

183 See F. Eric Fryar, Note, Common-Law Due Process Rights in the Law of Contracts, 66 Tex. L. Rev. 1021 (1988) (arguing for public law analysis of contract law and providing examples of common law due process rights).

184 See Taggart, supra note 111, at 6-7 (discussing "common callings" cases of medieval period, nineteenth century principle that businesses "affected with a public interest" could be regulated to ensure fair pricing and equal access, and "prime necessity" doctrine in Commonwealth law). These doctrines suggest a common law antidiscrimination principle applicable to "private" actors. They have all been abandoned in the modern era. See id. at 8.

185 See Cotran v. Rollings Hudig Hall Int'l, Inc., 948 P.2d 412, 422 (Cal. 1998) (holding that jury issue in sexual harassment case was whether employer reasonably believed, after appropriate investigation, that employee was guilty of harassment). In *Cotran*, good cause in an implied employment contract required an adequate and fair investigation, which included notice and an opportunity for the employee to respond. See id.

186 See generally Michael Asimow, News from the States, The Private Due Process Train Is Leaving the Station, Admin. & Reg. L. News (Summer 1998) at 8, available in Westlaw, ADMRLN Database.

187 See id.

188 See, e.g., Pinsker v. Pacific Coast Soc'y of Orthodontists, 526 P.2d 253, 260 n.8 (Cal. 1974) (citing nineteenth century case addressing expulsions from associations). For a more detailed summary of the law of associations, see Jack M. Beermann, The Reach of Administrative Law in the United States, in The Province of Administrative Law, supra note 1, at 171, 186-90.

with respect to members' economic interests, as would a professional organization.[189] In some cases, courts emphasize contract law as the source of the association's fiduciary obligation to make membership decisions in a reasonable and lawful manner.[190] In others, the source of the due process obligation derives from basic principles of fairness that apply to associations because they control an important economic interest.[191]

Courts have extended these common law due process requirements in a number of contexts.[192] Thus, even private contractual relationships may be subject to rudimentary procedural due process requirements, including notice and a hearing before an impartial tribunal. In addition, membership decisions must be substantively rational and not arbitrary and capricious—requirements that administrative law typically demands of public agencies.[193] Courts also impose a nonarbitrariness requirement on association bylaws and imply fair procedures in the absence of bylaws calling for them.[194]

Some scholars caution against relying on the importation of due process requirements to constrain the excesses of private power. While the application of due process in these contexts may superficially resemble judicial review of agency action, "the resemblance does not actually run very deep, and the review is much closer in kind and effect to corporate law than to administrative law."[195] It makes

189 See, e.g., *Pinsker*, 562 P.2d at 267-68 (holding that professional orthodontist society must use fair procedures before rejecting application for membership); Falcone v. Middlesex County Med. Soc'y, 170 A.2d 791 (N.J. 1961) (holding that membership decisions by professional association exercising monopoly power over practice of profession are subject to judicial review and may not be arbitrary, unreasonable, or contrary to public policy).

190 See Falcone, 170 A.2d at 799-800.

191 For an analysis of the contract- and noncontract-based decisions applying due process to private associations, see Beermann, supra note 188, at 187-88.

192 See Ambrosino v. Metropolitan Life Ins. Co., 899 F. Supp. 438 (N.D. Cal. 1995) (termination of membership based solely on physician's previous drug addiction was arbitrary and capricious, and violated plaintiff's common law right to fair procedures); St. Agnes Hosp. v. Riddick, 748 F. Supp. 319 (D. Md. 1990) (accreditation determinations by private firms); Delta Dental Plan v. Banasky, 33 Cal. Rptr. 2d 381 (Ct. App. 1994) (decisions by health insurers to modify fees paid to participating health providers); Ascherman v. San Francisco Med. Soc'y, 114 Cal. Rptr. 681 (Ct. App. 1974) (staff decisions by private hospitals); Curl v. Pacific Home, 239 P.2d 481 (Ct. App. 1952) (nursing home termination of residence, analogizing residence to membership in private organization).

193 See *Pinsker*, 562 P.2d at 259-60, 262.

194 See id. Courts have justified reviewing membership decisions in terms of property interest, breach of contract, and tort. In his seminal article on the law of associations, Zechariah Chafee argues that the real cause of action in the association cases lies in tort, as a claim to the destruction of a member's relation to the association. See Zechariah Chafee, Jr., The Internal Affairs of Associations Not for Profit, 43 Harv. L. Rev. 993, 999-1010 (1930). More recently, scholars have begun to characterize common law due process as derived from contract. See, e.g., Fryar, supra note 183.

195 See Beermann, supra note 188, at 194.

little difference, however, whether the real root of the judicial demand for process derives from corporate rather than administrative law. Either way, courts may play a significant role in constraining private discretion.

At the same time, relying solely on private law to cabin private discretion seems overly optimistic. The protections courts afford those affected by private decisions, and the scope of judicial review they provide, remain minimal. These standards may become more demanding, of course, but their chances of achieving a public law revolution in private law seem slim. Even if the association line of decisions, together with the emerging employment caselaw, provided a basis for extending public law norms into contract law, parties could presumably minimize or avoid their new obligations by explicitly contracting out of them.

E. Beyond the Traditional Constraints

Commentators concerned about private power typically seek to invoke some or all of the four types of measures discussed above, and for understandable reasons. If relatively unaccountable actors exercise authority in ways that affect both individual rights and the larger public interest, and if privatization will augment their power, why not extend to them the constitutional limits and formal procedural controls traditionally reserved for government? And yet, while these constraining mechanisms might be indispensable implements in a larger accountability toolbox, they also suffer from significant limitations. As a practical matter, there appears to be little judicial appetite for eroding the fundamental public/private distinction at the heart of the American constitutional order, which limits the potential for state action doctrine to be a meaningful limit on private power. Likewise, the nondelegation doctrine shows no credible signs of coming back to life. Positive law seems more promising, but while legislators might prove more willing to impose rudimentary due process requirements on powerful private actors in a few contexts, Congress and the states will likely balk at excessively proceduralizing private institutions. In short, private actors will escape most traditional constraints most of the time.

Even if the doctrinal picture changed, however, the impulse to constrain private actors, and to use these familiar and relatively formal devices, reflects an impoverished conceptual approach to the private role in governance. As traditionally understood and deployed, these mechanisms tend to reinforce the conceptual divide between public and private, impeding efforts to focus on the connective tissue

between them. In fact, whether and to what extent we ought to restrain private power—and with what instruments—depends on the risks and benefits of the particular decision-making regime of which they are a part. Exclusively targeting the private side of the public/private divide, even in light of the perceived growth of private power, may prove over or underinclusive or miss the target entirely. We might overconstrain private actors only to discover that it is the public agency's contribution that presents the greater accountability problem. Capture, self-interest, waste, or ineffectiveness may be due, moreover, to an interaction among actors, which a single minded focus on public or private could easily obscure.

IV
PUBLIC/PRIVATE INTERDEPENDENCE

Empirical support for a new conception of administration in which public and private actors share responsibility for governance has blossomed in recent years. Indeed, piecing together research on the private role in social service provision as well as private contributions to standard setting[196] and to implementation and enforcement[197]

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196 See Robert W. Hamilton, The Prospects for the Nongovernmental Development of Regulatory Standards, 32 Am. U. L. Rev. 455 (1982) (describing voluntary, private processes for establishing national health and safety consensus standards and proposing that federal government make more use of them).

197 On public/private cooperation in implementation and enforcement, see Ian Ayres & John Braithwaite, Responsive Regulation: Transcending the Deregulation Debate (1992) (advocating need to transcend divide between those who favor strong regulation and those who favor deregulation); Eugene Bardach & Robert A. Kagan, Going by the Book: The Problem of Regulatory Unreasonableness (1982) (advocating that current system be made more reasonable and responsive); John Braithwaite, To Punish or Persuade: Enforcement of Coal Mine Safety (1985) (arguing that cooperative policy measures better serve interests of coal workers); Sidney A. Shapiro & Randy S. Rabinowitz, Punishment Versus Cooperation in Regulatory Enforcement: A Case Study of OSHA, 49 Admin. L. Rev. 713 (1997) ("remedying" oversight concerning efficiency of cooperation as opposed to punishment as regulatory enforcement measures). On mandatory self-regulation in occupational health and safety, see Joseph V. Rees, Reforming the Workplace: A Study of Self-Regulation in Occupational Safety (1988). There are also numerous articles on other areas of mandatory self-regulation. See, e.g., Michael, supra note 15, at 218-27 (discussing oversight in health care accreditation context); Sam Scott Miller, Self-Regulation of the Securities Markets: A Critical Examination, 42 Wash. & Lee L. Rev. 853 (1985) (discussing self-regulation in securities market); Marianne K. Smythe, Government Supervised Self-Regulation in the Securities Industry and the Antitrust Laws: Suggestions for Accommodation, 62 N.C. L. Rev. 475 (1984) (same). On the role of voluntary self-regulation by private actors, see Neil Gunningham & Peter Grabosky, Smart Regulation: Designing Environmental Policy 137 (1998) (analyzing shortcomings of self-regulation, including lack of transparency and independent auditing, concern that performance is not being evaluated, and absence of real penalties for recalcitrants); Rees, supra note 22 (discussing self-regulation by nuclear power industry). On public/private cooperation in rulemaking, see, e.g., Negotiated Rulemaking Act, 5 U.S.C. §§ 561-570 (1994). For an example of public/private coopera-

produces a picture of governance strikingly at odds with the hierarchical, agency centered model of decision making that now dominates administrative law. The details of the relationships vary considerably across contexts and tasks, but the presence of a mix of public and private actors is a consistent feature.[198] The historical inattention to this complex reality might stem in part from a tendency among administrative law scholars to eschew empiricism, or from their continuing conviction that agencies are the most important actors in the administrative arena. Whatever the reason, this Part makes the case that the private role in governance is too important to ignore.[199]

In the examples below, I draw from arenas in which we expect private actors to play a role (the delivery of a social service such as health care) and those where we typically do not (performing functions such as incarceration). The examples include activities that we think of as more or less benevolent (delivery of services or benefits) and those that are clearly coercive (standard setting and enforcement). By encompassing different "modes" of decision making—service provision as well as standard setting, policy making as well as implementation and enforcement—the illustrations cover the gamut of activities that we associate with "governmental power." They all depend heavily, as it turns out, on private participation.

The examples also underscore the limitations of traditional accountability mechanisms and suggest alternative incentives, checks, controls, and monitoring tools that might supplement or supplant them. Viewing governance in terms of public/private interdependence—in terms, that is, of the contractual metaphor—complicates the traditional accountability project in administrative law in at least two ways. First, by focusing on the risks associated with public and private power combined, rather than the risks of private power in iso-

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tion in negotiating permits, see EPA, Regulatory Reinvention (XL) Pilot Projects, 60 Fed. Reg. 27,282 (1995).

198 The nonlegal policy literature on privatization reinforces the idea that the private role in all aspects of administration is pervasive and highly variable. Only a handful of legal scholars have begun to consider the administrative law implications of these trends. See, e.g., The Province of Administrative Law, supra note 1; Daphne Barak-Erez, A State Action Doctrine for an Age of Privatization, 45 Syracuse L. Rev. 1169 (1995).

199 Indeed, even when venturing beyond judicial review, administrative law scholars tend to explore relationships among the different branches of government. For example, public choice theory has shifted the focus in administrative law towards legislative controls over agency action. See McCubbins et al., supra note 63, at 247. Still, the field remains focused on judicial review of agency action. If administrative law theory is to maintain its utility, it ought to be informed to a greater extent by empirical reality. See Cass R. Sunstein, Health-Health Tradeoffs, 63 U. Chi. L. Rev. 1533, 1539 (1996) (advocating that administrative law focus "more on questions that are at once more concrete, more empirical, more manageable, and more directed toward real-world consequences").

lation, the new approach invites us to think of accountability as an aggregation of mechanisms emanating from complex regimes. In some cases, formal constraints such as judicial designation as a "state actor" or application of a strict nondelegation principle might be adequate to guarantee accountability. Usually, however, they will fall short of ensuring that a decision-making regime is appropriately checked. Second, the alternative conception forces us to acknowledge that the project of constraint cannot meaningfully be divided from that of facilitating good governance.

Although I focus on the federal and state level, public/private arrangements operate at every level of government.[200] Indeed, the blending of public and private actors is likely to be especially complex and difficult to disentangle at the local level.[201] However, the examples below make clear that, in a variety of settings, governance depends on both public and private actors, which should be adequate to suggest that administrative law must reorient itself.[202]

A. Social Welfare Delivery: Health Care

The administrative state is becoming the contracting state.[203] The double meaning here is intentional: The state appears to be shrinking while simultaneously relying on contract as the principal method of social service delivery.[204] In Britain, New Zealand, and Australia, governments on both the right and left have opted to "marketize" the public service by stimulating the development of markets for the pro-

200 For other efforts at providing a mix of public and private arrangements, see Donahue, supra note 9; see also Symposium, The New Private Law, 73 Denv. U. L. Rev. 993 (1996).

201 See Briffault, supra note 30.

202 See Aman, supra note 182, at 95 (arguing that administrative law is moving from legitimating new extensions of public power to legitimating new blends of public and private power and/or private power used for public interest ends).

203 See Hunt, supra note 113, at 21 (describing developments in United Kingdom: Many of the responsibilities of central government departments have been transferred to executive agencies, whose relationship with its parent department is regulated by a Framework Document. "Internal markets" have been introduced into the provision of the most fundamental of public services such as health and education, organised around a central separation between "purchasers" and "providers" of such services. Contract has replaced command and control as the paradigm of regulation.).

204 The examples in this section illustrate public/private interdependence in the provision of services or functions to be consumed directly by the public or in the execution of a government function authorized by statute, rather than goods or services meant for government consumption. That is, the focus here is on contracting out rather than on procurement. Although government procurement raises a host of procedural and substantive concerns—efficiency, corruption, and fairness, for example—from an administrative law perspective, contracting out better illustrates the complexity of public/private interdependence.

vision of most social services, including education, health care, welfare, residential care for the elderly, and refuse collection.[205] These states aggressively manage the shift, using a combination of oversight mechanisms designed to structure and monitor the new arrangements.[206] As one commentator explains, "What is emerging is a new form of organization that is neither market nor hierarchy, but which lies rather uncomfortably between the two."[207] One way to understand recent trends toward reliance on private actors, then, is in terms of a shift from hierarchy to contract.[208]

In the United States, many social services long have been funded by government but provided by nongovernmental entities. In other words, many "public functions" traditionally have been contracted out.[209] Local governments historically have contracted for basic municipal services such as road construction, building maintenance, refuse collection, and the like.[210] Now, in addition, governments are turning increasingly to private firms to perform functions—like incarceration—once thought to be within the exclusive province of the state.[211]

Governments also contract out the bulk of social service delivery, including health care, welfare, education, and training to the nonprofit sector.[212] The trend toward privatizing social services has only grown in recent years, and the percentage of for-profit organizations involved in service delivery is expanding. Until recently, contracts for health, welfare, and similar social services primarily went to nonprofits. This has begun to change, however, as economic conditions make social welfare delivery increasingly attractive to for-profit firms.[213]

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205 See Kieron Walsh, Public Services and Market Mechanisms 56 (1995). Walsh describes five major mechanisms that make up public sector reform: user charges for services, opening services to competitive tendering or contracting out work, introducing internal markets, devolving financial control, and establishing parts of organization on agency basis. See id. at 26.

206 See id. at 126-27.

207 Id. at xviii.

208 See id. (stating that "[a]uthority relations are being redefined as contracts" and "[t]he public service is becoming a more or less integrated network of organisations that relate through contract and price rather than authority").

209 See Salamon, supra note 17, at 42-43; see also General Accounting Office, Social Service Privatization (No. GAO/HEHS-98-6, Oct. 1997) (documenting expanded privatization of social services and analyzing implications for accountability); Donahue, supra note 9; Walsh, supra note 205, at 121 (referring to emergence of "contract culture").

210 See Donahue, supra note 9, at 132; Salamon, supra note 17, at 41.

211 See infra notes 296-327 and accompanying text.

212 See Salamon, supra note 17, at 42-43; Smith & Lipsky, supra note 17.

213 For example, the percentage of nursing homes operated for profit increased by 140% between 1960 and 1976. See Eleanor D. Kinney, Private Accreditation as a Substitute for Direct Government Regulation in Public Health Insurance Programs: When Is It Appro-

To provide services and benefits, state and local governments depend significantly on federal grants-in-aid, which are themselves contract-like mechanisms that enable the federal government to enlist state or local government in accomplishing federal goals.[214] In order to qualify for federal grants, recipients must meet eligibility criteria, conform to federal standards, and impose regulatory requirements on the private parties that ultimately deliver the service.[215]

For most social services, a state legislature or local government body, acting in accord with the conditions of federal grants, delegates responsibility to an agency, and the agency undertakes its delegated task through a combination of contract and regulation.[216] In a typical

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priate?, Law & Contemp. Probs., Autumn 1994, at 47, 51. By 1980, over 90% of nursing homes were privately owned. See Patricia A. Butler, Assuring the Quality of Care and Life in Nursing Homes: The Dilemma of Enforcement, 57 N.C. L. Rev. 1317, 1337 n.96 (1979).

214 Because federal grants offer conditional inducements, they allow the federal government to accomplish indirectly what it cannot mandate directly. See South Dakota v. Dole, 483 U.S. 203, 210-11 (1987) (holding it constitutional for Congress to attempt to induce states to raise drinking age).

215 See Paul G. Dembling & Malcolm S. Mason, The Essentials of Grant Law Practice § 12 (1991).

216 I focus here on the phenomenon known colloquially as "contracting out," rather than on procurement. In government contracting parlance, there is a distinction between the two. The government relies on "domestic assistance" contracts such as grant or cooperative agreements ("contracting out") when carrying out a "public purpose of support or stimulation authorized by a law of the United States." 31 U.S.C. §§ 6304(1), 6305(1) (1994). In contrast, see 31 U.S.C. § 6303(1)-(2) (1994), which distinguishes procurement contracts from grant or cooperative agreements. Government uses procurement contracts, by contrast, when purchasing a property or service for its own use. Unlike procurement contracts, domestic assistance contracts allow the government considerably more flexibility. Government procurement must conform to elaborate statutory and regulatory requirements, principally contained in the Competition in Contracting Act, Pub. L. No. 98-369, tit. VII, § 2711, 98 Stat. 1175 (1984) (codified as amended in scattered sections of 31 U.S.C. and 41 U.S.C.), and the Federal Acquisition Regulation (FAR), 48 C.F.R. pts. 1-53 (1999) (establishing highly detailed procedures governing every aspect of procurement process, including notice, competition, award, contract method, and contract management). In addition to the FAR, each agency of the federal government has promulgated supplementary regulations that apply to its own procurement process. Federal procurement has been highly regulated, requiring contractors to follow strict, government-unique product specifications and contract rules and regulations.

This regime has attracted substantial criticism for burdening companies doing business with the government, unnecessarily inflating prices, and wasting taxpayer money. See, e.g., Corr & Zissis, supra note 93, at 314; Steven Kelman, Buying Commercial: An Introduction and Framework, 27 Pub. Cont. L.J. 249, 250 (1998). In response to such criticisms, Congress passed the Federal Acquisition Streamlining Act, Pub. L. No. 103-355, 108 Stat. 3243 (1994) (codified as amended in scattered sections of 10 U.S.C., 40 U.S.C., and 41 U.S.C.) and the Federal Acquisition Reform Act (FARA), Pub. L. No. 104-106, 110 Stat. 186 (1996) (codified as amended in scattered sections of 40 U.S.C. and 41 U.S.C.) to simplify acquisition procedures and decrease procurement of government-specific products by increasing commercial purchases. FARA specifically called for the full and open competition requirements governing procurement to be balanced with efficiency. See Patrick E.

contractual regime, the agency and private provider may negotiate the terms of the contract, but the ultimate consumer of the service is a member of the public. As the client, the agency assesses compliance with the terms of the contract and judges the quality of performance and then, if necessary, penalizes the provider or terminates the contract in favor of another provider. Thus, the delivery of social welfare and services is accomplished through a series of contracts: those struck between governments and those subsequently negotiated between a government agency and a private provider. Government-provider contracts are meant to specify the terms under which private providers will implement the agency's policy decisions (which themselves are ostensibly designed to implement legislative will).[217]

Contractual regimes necessarily depend on formally structured public/private partnership, but, informally, public and private roles are not so easily separable. Indeed, private providers do more than merely implement policy. Although government maintains a significant oversight role and can renegotiate or terminate a contract for services (something rarely done in practice),[218] private actors perform the substance of service delivery. For services such as refuse collection or road repair, the heart of the service seems easy to specify, leaving little room for discretion. In other contexts, however, such as health or social services, private actors may perform key functions that are traditionally considered the responsibility of the state and that are not easily reduced to contractual obligations, such as setting standards, allocating benefits, and determining quality of care. Inevitably, the delivery of a service involves discretionary decisions that are difficult either to prevent through delineated delegation or to police with formal oversight mechanisms.

Whether formally or informally, such arrangements allow private actors to share significant discretionary authority with government, including considerable coercive authority.[219] Even when a public agency has the authority to impose conditions, and retains ultimate

Tolan, Jr., Government Contracting with Small Businesses in the Wake of the Federal Acquisition Streamlining Act, the Federal Acquisition Reform Act, and *Adarand*: Small Business as Usual?, 44 A.F. L. Rev. 75, 79-80 & 79 n.28 (1998).

217 Public sector reform and the literature devoted to it are both marked by an insistence on the division between politics and administration, which accounts for the attempt to divide policy making from implementation when devising contracts. See Walsh, supra note 205, at 195-96. Public sector reform consists largely of devolution, decentralization, and specialization, with an emphasis on professionalism and managerialism over politics. These distinctions are reminiscent of the expertise rationale for delegating authority to agencies in the U.S. context. See generally James Landis, The Administrative Process (1938).

218 See Handler, supra note 9, at 92.

219 Implementation always entails policy design. See Donahue, supra note 9, at 14.

formal responsibility for a decision, the implementation of that decision depends on a delicate balance of public and private actors. While plausible in theory, then, the distinction between policy making and implementation proves dubious in fact: Virtually every act of implementation necessarily involves policy choices, often important ones. Indeed, the dichotomy has been much criticized in nonlegal fields such as implementation studies,[220] and the difficulty of dividing one from the other in practice is an important lesson of administrative law. Formal government oversight can amount, moreover, to nothing greater than an appearance of accountability. As Lester Salamon argues, considerable reliance on nongovernmental parties places government officials in the "uncomfortable position of being held responsible for programs they do not really control."[221]

The examples below illustrate the conception of administration as a negotiated enterprise by demonstrating how contractual arrangements confer power on private actors. In regimes that feature a mix of regulation and contract, private actors either explicitly or effectively establish standards and make important policy choices. Thus, the examples ground the earlier theoretical claim—derived from combining public choice theory and CLS—that there is neither a purely public nor a purely private realm.

In addition, the inadequacy of traditional accountability mechanisms in the examples below brings to the fore the need for a complement of devices capable of satisfying our craving for fairness, rationality, responsiveness, and quality, among other things. As we shall see in the examples below, the private role in service delivery cannot easily be cabined. These decision-making regimes raise significant due process and accountability problems that traditional accountability mechanisms cannot easily resolve. As we shall discover, however, private parties can produce accountability as well as undermine it. Among the devices for enlisting private participation in accountability, enforceable legal contracts emerge as a potentially crucial tool.[222]

1. Medicaid-Funded Nursing Homes

a. Interdependence. Because health care delivery in the United States relies significantly on federal and state governments as well as private institutions, it nicely illustrates public/private interdependence

220 See John T. Scholz, Cooperative Regulatory Enforcement and the Politics of Administrative Effectiveness, 85 Am. Pol. Sci. Rev. 115, 131-33 (1991).

221 Salamon, supra note 17, at 21.

222 See supra notes 518-28 and accompanying text.

in social programs.[223] Health care regulation is, however, dauntingly complex. The federal Medicare and Medicaid programs are governed by highly detailed legislation and technical regulations promulgated by the Department of Health and Human Services. States implement these federal programs, overseeing care delivery by a variety of public and private institutions including hospitals, clinics, and nursing homes.[224]

Medicaid-funded nursing homes provide a particularly salient example of public/private interdependence. Although nursing homes funded by federal dollars from Medicaid and Medicare are heavily regulated, the private role in the nursing home environment remains significant—it is not limited to "mere" implementation of federal and state standards. Medicaid is a means-tested, federal-state entitlement program that provides health care to low-income families with dependent children, the elderly, and the blind or disabled.[225] The program provides federal financial assistance to states that reimburse medical costs incurred by the poor.[226] Medicaid funding of nursing homes combines regulatory and contractual mechanisms.[227] As a condition of receiving federal dollars, the federal government imposes obligations upon the states. Should they fail to comply with federal law and regulations, they can be disqualified from participation in the program. States in turn rely on a combination of licensing, regulation, and contract to impose obligations on private homes that provide care.[228]

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223 See DiIulio & Nathan, supra note 9, at 3 ("Medicaid—a joint federal-state program that provides health care insurance to over 35 million low-income, elderly, and disabled Americans—is the single most costly, complicated, and consequential of all intergovernmental programs.").

224 See 42 U.S.C. § 1395 (1994 and Supp. II 1996) (pertaining to Medicare); 42 U.S.C. § 1396 (1994 and Supp. II 1996) (pertaining to Medicaid).

225 See Kaiser Comm'n on Medicaid and the Uninsured, Medicaid: A Primer 1 (Aug. 1999) <http://www.kff.org/content/1999/2161/pub2161.pdf>. Within federal guidelines, states administer their own programs, resulting in wide variation in eligibility criteria, benefits, and provider reimbursement rates. The federal government pays anywhere from a minimum of 50% to over 83% of expenditures, depending upon the state's per capita income. See id.

226 To qualify for Medicaid assistance pursuant to the Social Security Act, an individual must meet financial eligibility requirements and seek medically necessary services. See 42 U.S.C. § 1396.

227 Nursing homes are populated by residents whose care is paid for differently: some through Medicaid, others through Medicare, and still others through private insurance. In this example, however, I discuss only Medicaid patients.

228 See Maureen Armour, A Nursing Home's Good Faith Duty "To" Care: Redefining a Fragile Relationship Using the Law of Contract, 39 St. Louis U. L.J. 217, 223 (1994) (referring to Texas process whereby state regulatory agency determines homes qualified to participate in Medicaid and enters into contract with them for provision of services);

Medicaid funding overwhelmingly supports the private nursing home industry, subsidizing capital and operating expenditures and reimbursing more than ninety percent of eligible patient care.[229] With funding, however, come conditions: Providers cannot collect reimbursement from states unless they comply with state-provider agreements governing care delivery.[230] The system thus appears to rely on a classic division between government design of a program (policy making) and private service delivery (implementation).

Private nursing homes are arguably the most heavily regulated health care delivery institutions.[231] By comparison with hospitals, for example, nursing homes are more closely and directly regulated by state agencies.[232] Despite increasingly stringent regulation in recent years, however, private nursing homes retain significant discretionary authority over patient care. The private administrator is the authoritative decisionmaker within the nursing home environment, interpreting statutory, regulatory, and contractual obligations and

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Butler, supra note 213, at 1322-27 (discussing Medicaid and Department of Health, Education and Welfare certification of nursing facilities).

229 See id. at 1318 (claiming that, at time of article, Medicaid paid more than half of total nursing home revenues).

230 See id.

231 When Congress passed the Omnibus Balanced Budget Reconciliation Act of 1987 (OBBRA), Pub. L. No. 100-203, tit. IV, 101 Stat. 1330, 1339 (codified as amended in scattered sections of 42 U.S.C.), it established detailed statutory standards governing the quality of care in nursing homes. Among other things, the OBBRA redefined the required quality of care to include an affective component reflecting patients' quality of life and adopted a "Patients' 'Bill of Rights.'" See 42 U.S.C. § 1395bbb (1994). The statutory standards are quite detailed and reflect a crackdown on substandard care in nursing homes since the inception of Medicaid and Medicare in the 1960s. States enforce the new federal standards, elaborated in Department of Health and Human Services (HHS) regulations, by regulating and licensing nursing facilities within their jurisdictions, predominantly relying on a state-administered survey and inspection process to ensure compliance.

232 Although some nursing facilities seek private accreditation, such accreditation does not entitle the institutions to be deemed in compliance with Medicaid program requirements, as does the Joint Commission on Accreditation of Healthcare Organizations (JCAHO) certification of hospitals. As a result, reliance on private accreditation in the nursing home industry is far less extensive than in other health care institutions, such as hospitals. With respect to nursing home care, the Health Care Financing Administration (HCFA) exerts relatively stringent oversight. For example, HCFA posts nursing home survey results on the web. Compare Health Care Fin. Admin., Nursing Home Database (visited Apr. 4, 2000) <http://www.medicare.gov/nursing/home.asp> (providing search system to compare state ratings of different nursing homes), with Office of Inspector Gen., Dep't of Health and Human Servs., The External Review of Hospital Quality: A Call for Greater Accountability 1-2 (1999) <http://www.dhhs.gov/progorg/oei/reports/a381.pdf>, and Office of Inspector Gen., Dep't of Health and Human Servs., The External Review of Hospital Quality: The Role of Accreditation 6-7 (July 1999) <http://www.dhhs.gov/progorg/oei/reports/a382.pdf> [hereinafter Office of Inspector Gen., Accreditation] (detailing lack of accountability and quality oversight in accredited hospitals).

operationalizing them into decisions about care.[233] Certainly a resident might have difficulty discerning where the state ends and the private provider begins, so entangled are their roles.

Blum v. Yaretsky[234] nicely illustrates this entanglement. At issue in *Blum* was a private nursing home's decision to reassign patients to a lower level of care.[235] For purposes of ensuring that residents received only appropriate care, federal regulations in place at the time required private providers to establish review committees of physicians, which were charged with periodically reassessing patient needs.[236] The reassessment process, while clearly a cost-containment measure intended to benefit government, relied on private medical judgment. In effect, the "private" reassignment decision triggered a reduction in "public" Medicaid benefits. The state effectively delegated to the private home the decision to reduce a public assistance recipient's benefits by assigning it responsibility for determining the recipient's need.[237] However, the *Blum* Court refused to find that the reassignment constituted state action. Although federal regulations mandated reassessment, the regulations did not dictate the actual decision to lower the patients' level of care.[238] Instead, private doctors made that decision according to private professional standards.[239]

While Congress has reformed significantly the Medicaid regime and the regulation of nursing home care in the years since *Blum*,[240]

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233 See Blum v. Yaretsky, 457 U.S. 991, 1028 (1982) (Brennan, J., dissenting) ("[T]he nursing home operator is the immediate authority, the provider of food, clothing, shelter, and health care . . . .").

234 457 U.S. 991 (1982).

235 Id. at 995. As a participant in the Medicaid program, New York reimbursed "reasonable costs of health care" provided by facilities designated as "health related facilities" or "skilled nursing facilities." The latter provided more intensive care than the former, and were therefore more costly. See id. at 994.

236 See id. at 994-95. Federal law requires that nursing homes conduct an assessment of a resident's "functional capacity" within 14 days of admission to the facility and at least once every 12 months thereafter. Resident assessments must be reviewed quarterly to "assure the continuing accuracy of the assessment." Resident assessments are conducted by or coordinated in conjunction with other health professionals by a registered professional nurse. If during the state survey and inspection process the state discovers "knowing and willful certification of false assessments," the state may require that resident assessments be conducted by independent assessors. 42 U.S.C. § 1396r(b)(3)(B)(iii) (1994); see also 42 C.F.R. § 483.20 (1999) (detailing requirements for assessment).

237 See *Blum*, 457 U.S. at 1018-19 (Brennan, J., dissenting).

238 See id. at 1005-07.

239 See id. at 1008.

240 The OBBRA comprehensively reformed nursing home care, introducing an expansive new definition of "care" that included an "affective dimension concerned with the overall quality of life as experienced by the resident in the nursing home." Armour, supra note 228, at 242. The Act also requires providers to comply with a patient's bill of rights. See Omnibus Balanced Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 4021, 101 Stat. 1330, 1367 (codified at 42 U.S.C. § 1395bbb (1994)). State standards formally

the state-nursing home relationship remains fundamentally unchanged. While the facts in *Blum* failed to support a finding of state action, they do illustrate how service delivery depends on a delicate balance of public and private actors. The *Blum* facts are also representative of contemporary public/private social welfare programs in which the government itself, despite pervasive regulation of the private activity, leaves significant discretionary power in the hands of nongovernmental entities.

And yet, private providers still make daily decisions regarding care. Inevitably, then, they retain considerable room to exercise discretion.[241] Perhaps most significantly, private homes, or in some cases, independent professional committees, effectively determine standards of care by engaging in assessment review.[242] Since this process ultimately governs whether nursing home residents are transferred or not and whether their care will be reimbursed by Medicaid, this is arguably the single most important decision affecting nursing home residents. Moreover, homes may nominally meet federal and state standards, and retain their licenses, while varying significantly in quality of care. Simply because it relies on private actors to assess and deliver care, the private nursing home environment represents a straightforward case of public/private interdependence.

b. Accountability. Beyond illustrating the private role in social service delivery, *Blum* suggests the limitations of the traditional administrative law response to private actors. State action doctrine cannot address questions of quality of care, or ensure accountability in a system in which authority is fragmented among different levels of government and numerous private actors. Conceiving of private decision making as the problem, and responding by constraining it through the application of constitutional requirements, obscures the complexity of the accountability concerns that are peculiar to the context of a nursing home. A focus on constraining private discretion also obscures the range of plausible responses. These regulatory regimes are com-

govern virtually every aspect of the nursing home environment. See, e.g., Cal. Code Regs. tit. 22, §§ 70,001-74,515 (1990) (detailing state regulations for licensing and certification requirements of health care facilities generally); Cal. Code Regs. tit. 22, §§ 72,001-72,713 (1990) (detailing state regulations for licensing and certification requirements of skilled nursing facilities). For example, California state regulations specify that call buttons with "[d]etachable extension cords shall be readily accessible to patients at all times." Cal. Code Regs. tit. 22, § 72,631(b) (1990).

241 Nursing home staff exercise discretion in determining what level of care to provide in numerous daily decisions. Telephone interview with Julie Bryce, Staff Physical Therapist, Scripps Torrey Pines Convalescent Hospital, San Diego, Cal. (Feb. 24, 2000).

242 See the regulations governing assessment review at 42 C.F.R. § 483.20 (1999).

plicated, involving strict regulatory requirements, multilayered agency oversight, and a government-provider contract. They offer a variety of opportunities for quality control and responsiveness to consumers that the mere finding of state action overlooks.

To illustrate, consider the options facing two hypothetical elderly Medicaid patients in a private nursing home. Assume that the contract between the state agency and the nursing home obligates homes to provide quality care and requires them to hold a hearing prior to evicting tenants. Suppose that one patient, Arnie, is seriously ill and receives substandard care in breach of the terms of the agency-provider contract and that another patient, Betty, suffers from Alzheimer's induced "aggressive outbursts" that lead to eviction without a hearing, again in breach of the terms of the contract. Privity of contract will likely prevent both Arnie and Betty from suing to enforce the terms of the state-provider agreement. First, private litigants enjoy "no rights or protectable expectations" regarding the care they receive from nursing homes, eliminating constitutional due process claims as a viable option.[243] As we have learned, despite extensive federal and state regulation, nursing homes are not considered "public" providers of health care.[244] Private denials of care and private eviction determinations do not constitute state action.[245] Second, courts only reluctantly find state-provider contracts to be a source of third party beneficiary claims against nursing homes for statutory violations.[246] Nursing home residents might argue that the federal Medicaid statute creates an implied private right of action, but, as a general matter, courts rarely recognize private rights of action to redress viola-

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243 See Armour, supra note 228, at 254 (noting that providers' lack of duty beyond regulatory structure limits patients' private right of action); see also Fuzie v. Manor Care, Inc., 461 F. Supp. 689 (N.D. Ohio 1977) (holding that private nursing home was not state actor and that plaintiff had no implied private right of action under Medicaid regulations); Anthony Jon Waters, The Property in the Promise: A Study of the Third Party Beneficiary Rule, 98 Harv. L. Rev. 1109, 1186-88 (1985) (describing *Fuzie* as example of courts using third-party beneficiary rule to create private right to enforce public programs regardless of legislative intent).

244 See *Fuzie*, 461 F. Supp. at 695.

245 Federal courts, have, on occasion, held private providers to be state actors when they are the only providers of care in a government-regulated arrangement and where they therefore assume responsibility for the state's mandated health care duties. See Catanzano v. Dowling, 60 F.3d 113, 120 (2d Cir. 1995) (holding that state-certified home health agency determinations regarding medical necessity of home health care to be state action since only certified home health agencies can provide care to Medicaid beneficiaries); J.K. v. Dillenberg, 836 F. Supp. 694, 698-99 (D. Ariz. 1993) (holding private regional behavioral health authorities are state actors as sole providers of state's Medicaid behavioral health services for children).

246 See Waters, supra note 243, at 1174-78 (describing four-prong doctrinal test for finding implied right of action and comparing it to inquiry into third-party beneficiary claims).

tions of federal law.[247] To the extent that courts have allowed third party beneficiary claims, or recognized implied rights of action, they have done so to enforce "specially iterated rights" stipulated in legislation, such as those covering wrongful transfer or eviction decisions by the home.[248] As a result, only Betty, who was wrongly evicted, and not Arnie, who received substandard care, would have any chance of success using either of these arguments. Still, residents may suffer from an information deficit; the terms of contracts between state Medicaid agencies and providers might not be well publicized, making it more difficult for members of the public to act as private attorneys general.

Both Arnie and Betty could thus find themselves limited to largely useless private causes of action. Most tort and contract strategies for enforcing the terms of agency-provider agreements, including claims for implied warranty and breach of duty of good faith, have failed to achieve judicial recognition.[249] Alternatively, Arnie and Betty might seek to enforce the terms of their own admission contracts with providers. However, absent express contractual representation to the contrary, courts tend to interpret these according to tort standards of quality of care, which may not be favorable to residents.[250]

Practical factors might further limit Arnie's and Betty's prospects for redress. Attorneys may be unwilling to take Arnie or Betty as clients, as Medicaid patients generally will lack resources to finance a lawsuit and will not likely recover large damage awards. Problems of proof complicate these lawsuits: The deterioration of Medicaid patients such as Arnie could be due to disease progression in addition to, or instead of, negligent care. For these and other reasons, nursing home residents are underrepresented in tort litigation.[251] Finally, even if individual plaintiffs occasionally recover, piecemeal lawsuits may fail to address patterns of substandard care.

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247 See Richard B. Stewart & Cass R. Sunstein, Public Programs and Private Rights, 95 Harv. L. Rev. 1193, 1196 (1982) (noting that Supreme Court has created "strong presumption against judicial recognition of private rights of action"). Although some states have passed legislation affording patients private rights of action, only Betty might benefit from such a law, as legislation often limits private rights of action to such specific rights as eviction rather than general standards of care.

248 See Armour, supra note 228, at 259.

249 See id. at 253 (noting failure of express and implied private causes of action, tort actions, and contract actions to secure legal paradigm of caregiving).

250 See id. at 266-68 (summarizing standard critiques of tort paradigm's application in nursing home context).

251 See id. at 267-68 (summarizing reasons that nursing home residents are underrepresented in litigation).

Weaknesses in the accountability of the Medicaid regime stem in part from government failure. Relying on state or federal enforcement of provider contract terms may be no more promising for Arnie and Betty. Contractual terms may be vague, and agency monitoring insufficient, due to a long tradition of relatively weak government oversight.[252] Absent vicarious liability, the contracting agency may lack sufficient motivation to supervise the provider's compliance with the agreement. In fact, governments have historically taken a more aggressive approach to negotiating and monitoring procurement contracts, compared to contracts governing the delivery of benefits.[253]

Even armed with a detailed contract and a variety of enforcement tools, however, an agency's interest in the operation of the contractual regime may not (and often will not) coincide with that of the ultimate consumer.[254] An agency may care more about cost savings and blame-shifting than quality of service,[255] or it may be more interested in maintaining smooth relationships with its contractual partners over the long term than in individual fairness or responsiveness to consumers in the short term. Even a well-meaning agency may be torn between competing goals. The price of closer scrutiny over private providers of care could prove to be the flexibility, cost savings, and innovative capacity associated with relying on private providers in the first place—a tradeoff that some agencies may not be willing to make.

The obstacles to patient vindication in the nursing home example above seem particularly objectionable from an administrative law

252 Historically, governments have purchased services like health care differently than they have procured goods such as airplanes. See Bruce C. Vladek, Unloving Care, the Nursing Home Tragedy 98-99 (1980).

253 For example, procurement contracts obligate suppliers to specific performance standards, whereas until recent years, state-provider agreements rarely contained either performance standards or penalties for nonfulfillment. See id. at 98 (arguing that, in 1970s, there was "no comparison between a typical government procurement contract and a typical 'provider agreement' between a state Medicaid agency and a nursing home"). While, in theory, the nursing home is required to meet all the requirements of the state's licensing and health codes, "the separation of the enforcement from the purchasing function seriously limits their enforceability." Id. On the weaknesses of reimbursement as a quality assurance tool when the Medicaid agency is not the licensing certification agency, see Butler, supra note 213, at 1329. Inattention to contracting details flowed from Medicaid's roots as a redistributive claims processing operation.

254 There is nothing about the divergence of agency and Medicaid beneficiary interests that is unique to managed care. As an outgrowth of welfare cash assistance programs, Medicaid has always had a "corporate culture" of saving money and preventing fraud. Historically, insurance programs like Medicaid have had no responsibility for the health of beneficiaries. I thank Elizabeth Wehr for helpful comments on this point.

255 See James W. Fossett, Managed Care and Devolution, in Medicaid and Devolution, supra note 9, at 106, 120 ("The major continued political appeal of managed care rests on its perceived ability to produce budget savings while shifting financial risk and political blame for spending reductions to private agencies.").

view, because the government appears to insulate itself from accountability by relying on private providers not subject to due process constraints.[256] Especially where the agency fails to police quality and enforce contractual terms, one might think that the state ought not to deprive purported beneficiaries of opportunities for participation in the system, or for redress when things go wrong.

A contractual system of administration relies on judicial enforcement of private contract law at the behest of the supervising agency rather than judicial enforcement of administrative law principles at the behest of private citizens. The difference is more than semantic. Constitutional constraints and elaborate procedural rules govern agency decision making, as we have learned, but do not govern private decision making undertaken pursuant to contract. These rules normally provide points of entry for members of the public affected by the regulation and grounds to challenge ensuing policy choices. Although courts might imply third-party beneficiary rights into contracts, the documents themselves almost never explicitly afford consumers the right to sue. Public/private contractual agreements thus raise a version of the principal/agent problem that characterizes the delegation of authority from legislatures to public bureaucracies, raising the coincident and familiar tension between providing the delegate adequate flexibility and ensuring oversight over an agent.[257] To make matters worse, private providers are even further insulated from direct accountability to the electorate.

Given this analysis, constraining private power with the tools described in Part III is tempting. However, traditional accountability mechanisms offer little assistance. Even if courts were willing to recognize private nursing homes as state actors, this finding would merely ensure minimal due process protection.[258] A pretermination hearing might go some distance toward providing some responsiveness to patients, but it would likely not address quality of care issues that domi-

256 Some commentators are more concerned about quality of care in for-profit nursing homes than in nonprofit homes. Patricia Butler has criticized this distinction, however, arguing that nonprofit homes operate "profitable" enterprises as a result of tax exemptions and other benefits. See Butler, supra note 213, at 1339. She attributes high quality care in nonprofits to the "dedication, commitment and beneficent motivations of their managers and employees" rather than to their nonprofit status, begging the question whether the two are correlated. Id.

257 See McCubbins et al., supra note 63, at 247 (describing need for congressional control over agencies in terms of principal-agent problem).

258 See, e.g., Catanzano v. Dowling, 60 F.3d 113, 120 (2d Cir. 1995) (holding that determinations by state-certified home health agencies regarding medical necessity of home heath care are state action extending notice and hearing rights to Medicaid beneficiaries).

nate the nursing home environment. Few complaints are likely to implicate patients' constitutional rights.

Federal statutes governing the Medicaid program could not be struck down on nondelegation grounds. They are specific, even rigorous—certainly more so than many federal statutes that have withstood nondelegation challenges. The impulse to invalidate the contractual arrangement as a private delegation has no traction here, since there is no formal private delegation to invalidate. The private role is considerable, but incidental to the federal-state agreement.

Of course, the federal government could choose to reimburse only public nursing homes, but would the elimination of the private role be the right solution?[259] Privately operated nursing homes may be no better than public ones on many scores, but surely an argument could be made that they are no worse. Even if one believes that the profit motive is incompatible with quality nursing home care, surely this militates only against for-profit homes, not all private ones. Moreover, public provision of nursing home care might not address quality issues at all, and could equally disadvantage plaintiffs seeking redress against arbitrary decision making. In fact, patients might face greater obstacles in government homes: Government providers might be insulated to a greater extent from private lawsuits due to sovereign immunity.[260]

Thus, although the current public/private arrangement seems bleak from the consumer perspective, laying blame at the feet of private actors simplifies a complex problem. Many of the criticisms leveled at a contractual regime that depends on private providers use an unrealistic baseline: They imagine meaningful public participation in a fictitious, purely public regime that is perfectly accountable.

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[259] From an efficiency perspective, we might wonder whether large corporations establish monopoly power in the nursing home industry or whether entry barriers are too high to encourage competition. But eliminating the private role may not be the answer. John Donahue argues that the presence of competition and the output- or input-based nature of the task is more important to determining relative efficiency than the organizational form of the delivering institution. See Donahue, supra note 9, at 82. Prior to recent reforms pursuant to OBBRA, for example, standards for nursing homes were criticized as input- rather than output-oriented: If the facilities, equipment, and staff qualifications were satisfactory, quality care would follow. In the words of one state official, "[T]here is nothing in our regulations that says a nursing home may not permit a patient to starve to death; they only require three meals a day meeting minimal nutritional standards." Vladek, supra note 252, at 156; see also Handler, supra note 9, at 85.

[260] The principle of sovereign immunity bars suits against the federal government unless federal legislation specifically authorizes the suit. Congress has waived sovereign immunity, for example, in the APA. The Eleventh Amendment to the Constitution has been interpreted by the Supreme Court to bar suits against states in federal court by the state's own citizens or citizens of other states, subject to a number of exceptions. See generally Erwin Chemerinsky, Federal Jurisdiction §§ 7.4, 9.2 (3d ed. 1999).

In a regime that depends so heavily on both public and private actors, however, accountability will stem from a variety of sources, and will be, inevitably, imperfect. The mix of contract and regulation in the Medicaid context suggests a number of accountability mechanisms, some of which are familiar, others of which are new. From this perspective, we might ask whether additional instruments or actors might play a role in oversight. For example, the contracts themselves might do more work as enforceable agreements. Courts normally treat them as such.[261] Provider contracts could equip agencies with more effective enforcement tools: Greater specificity of terms, graduated penalties, and oversight by a "contract manager" employed by the agency might help agencies to oversee quality of care. Indeed, trends point in this direction. Recent reforms in the nursing home context have put a greater variety of enforcement tools at the government's disposal.[262]

Contracts could also require private homes to observe minimal administrative procedures such as notice and hearing requirements, which might help to eradicate the most arbitrary decisions and slow the pace of others. Given legitimate fears about lax government enforcement, contracts could go farther still by conferring explicitly upon patients' third-party beneficiary rights that would allow consumers to sue when government monitoring failed.[263] In addition to these traditional measures, contracts could be instruments for diversifying sources of oversight. For example, a contract could establish an ombudsman to represent nursing home residents or demand that nursing homes submit to periodic review by a community oversight committee.[264]

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261 Courts adjudicate disputes over payment, withdrawal from a program, or any other matter arising within the agency/provider relationship on principles of contract law. See Elias S. Cohen, Legislative and Educational Alternatives to a Judicial Remedy for the Transfer Trauma Dilemma, 11 Am. J.L. & Med. 405, 418 (1986) (summarizing three federal cases involving voluntary withdrawal from Medicaid provider and noting that these types of cases turn on issue of contractual relationship between state agency and provider).

262 See Health Care Fin. Admin., supra note 232.

263 See Kinney, supra note 213, at 68 ("Some state statutes and judicial decisions have recognized a private right of action to enforce state licensure laws particularly with respect to nursing homes." (citing Sandra H. Johnson et al., Nursing Homes and the Law: State Regulation and Private Litigation §§ 1-21 to 1-28 (1985))); see also Smith v. Heckler, 747 F.2d 583 (10th Cir. 1984) (class action holding that HHS Secretary violated Medicaid Act by not informing herself as to whether facilities receiving federal money satisfied federal requirements).

264 Indeed, third-party oversight by either family members of residents or community groups already seems to be a crucial ingredient in the quality of nursing home care. Community interest and concern is the single most important reason why small and rural nursing homes have the best reputations for high quality of care. Community groups that

Accreditation of homes by independent nonprofit or professional organizations might be another useful accountability device. Private accreditation has played an important role in certifying hospitals for participation in Medicaid and Medicare, but policy advocates have resisted it for nursing homes because of the vulnerability of nursing home populations. As one tool among many, however, private accreditation could augment accountability. Widespread publication of accreditation results could help consumers choose among nursing homes. Recently, for example, the Health Care Financing Administration has begun to post results from state surveys of nursing homes on the Web.[265] Finally, reforms that would add professionalism to the nursing home environment might help to provide a check on quality of care. In the low-wage, high-turnover environment of the private nursing home, the professional values that dominate the nursing home environment are likely to be the bottom-line accounting concerns of the home's administrator.

This example illustrates how entwined public and private actors become in the delivery of benefits such as health care. It also points to significant accountability deficits in regimes that rely on a mix of public and private actors. Although the Medicaid/nursing home environment features strict regulatory requirements, multilayered agency oversight, and enforceable contracts between state agencies and providers, the arrangement offers less than full assurance of meaningful responsiveness to beneficiaries. At first glance, the accountability concerns raised in this context might seem due to the private role and to judicial reluctance to subject "private actors" to constitutional due process requirements.

Upon closer inspection, however, this simple diagnosis proves too limited. The Medicaid-funded nursing home example is rich with opportunities for exploiting alternative accountability mechanisms and enlisting nonstate actors in oversight. Devising the right mix of formal and informal measures requires a great deal of knowledge about the strengths and weaknesses of the particular public/private regime: Are the relationships between state agency officials and nursing home operators collusive? Could private accreditation play a more significant role in this context? Are there ways to increase contact between nursing home staff and family members? Would a small increase in pay prevent high-turnover of employees, and would that improve care?

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support nursing home residents have organized across the country. See Butler, supra note 213, at 1377.

[265] See Health Care Fin. Admin., supra note 232.

What informal relational regimes develop between public and private actors where contractual terms are vague?

Understanding the nature of the public/private relationship in the nursing home environment better enables us to design the right mix of measures and actors for controlling its excesses and capitalizing on its strengths. That is, just as public/private interdependence produces accountability deficits, so too does it simultaneously suggest possible solutions. Although private actors contribute to the weaknesses of the system, they might also be sources of help.

2. *Medicare "Conditions of Participation" and Private Accreditation*

a. Interdependence. This example concerns the extent to which the government depends on private accreditation in "deeming" hospitals to be in compliance with the conditions for participation in both Medicare and Medicaid. Since the inception of Medicare, the Joint Commission on Health Care and Accreditation of Health Organizations (JCAHO), a private organization of professional associations, has performed a crucial function certifying health care institutions for compliance with federal regulations and state licensure laws.[266] For our purposes, government reliance on private accreditation illustrates how private actors permeate and mediate government regulation in ways that complicate a strict public/private divide. In fact, the government plays a minimal role in regulating the quality of health care.[267]

Medicare is a federal social insurance program (similar to Social Security) that provides health insurance for the elderly and disabled.[268] Among other things, Medicare reimburses hospitals for providing care to eligible elderly and disabled patients.[269] The Health Care Financing Administration (HCFA) within the Department of Health and Human Services, makes payments through intermediaries such as Blue Cross/Blue Shield and supervises the program. When Congress enacted Medicare in 1965 it required hospitals to meet minimum health and safety requirements for participation in the program; partially because it lacked expertise to evaluate hospital quality, and partially to secure medical professionals' support for Medicare, Congress followed the lead of private insurers and looked to private accreditation as a quality assurance tool.[270] The Act provided that

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266 See Kinney, supra note 213, at 52.

267 See id. at 55 (noting that states continue to leave licensure standards to private bodies).

268 See 42 U.S.C. §§ 1395-1395ccc (1994); see generally 2 Barry R. Furrow et al., Health Law § 13-1 (1995) (offering background on and summary of Medicare).

269 See 42 U.S.C. §§ 1395-1395ccc (detailing "[a]greements with providers of services").

270 See Kinney, supra note 213, at 55.

hospitals accredited by JCAHO be deemed in compliance with the conditions of participation.[271] When state governments began to fund health care facility construction and regulate health care institutions, they too relied extensively on private accreditation to determine whether health care institutions met licensure standards.[272]

The JCAHO standard-setting process generates what the Department of Health and Human Services describes as high quality standards that are constantly updated and refined to respond to changes in health care delivery and evaluation methodology.[273] The JCAHO establishes standards via a committee that includes representatives of professional and industry groups, as well as government representatives from HCFA; a recent government study reviewing the role of accreditation in hospital quality praised the JCAHO's standard setting but was less enthusiastic about its ability to ensure compliance, concluding that JCAHO adopts a "collegial approach" to hospital accreditation which encourages education and quality improvement but deemphasizes enforcement and strict regulation.[274]

Nonetheless, HCFA has pressed recently to move toward JCAHO's collegial model of regulation. Numerous Congressional Health Care reform proposals have also suggested greater reliance on private accreditors; some have proposed according them an even more explicit role in policy making.[275] This reliance seems motivated by a need for expertise, but interest group theory helps explain it as well.[276] Certainly hospitals have always preferred standards set by like-minded professionals to those established by government bureaucrats.[277]

At the same time, the need for private cooperation in standard setting and quality assurance is real. Although the assumption that nongovernmental parties both possess and will apply their expertise

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271 See 42 U.S.C. § 1395bb.

272 See Kinney, supra note 213, at 54.

273 See Office of Inspector Gen., Accreditation, supra note 232, at 13.

274 See id. Surveyors were experienced health care professionals who approached accreditation as peer reviewers rather than regulators. See id. at 11.

275 See Eleanor D. Kinney, Protecting Consumers and Providers Under Health Reform: An Overview of the Major Administrative Law Issues, 5 Health Matrix 83, 113 (1995) (claiming that several proposals called for National Association of Insurance Commissioners or private accrediting organizations like JCAHO to suggest policy and standards for state responsibilities under health reform).

276 Here I use interest group theory synonymously with public choice theory, meaning simply that contending interest group behavior (and their ability to deliver benefits to rational decisionmakers) can explain the policy outcome. See Bruce A. Ackerman & William T. Hassler, Clean Coal/Dirty Air 57 (1981) (explaining Clean Air Act in similar interest group terms).

277 See Kinney, supra note 213, at 50-55 (providing history of accreditation).

may prove wanting in some contexts,[278] even critics of the JCAHO acknowledge that health care professionals are better able than agency staff to establish and update standards of care.[279]

b. Accountability. At the same time, private accreditation raises accountability concerns. In administrative law terms, private accreditation combines "legislative" and "adjudicative" functions. Accreditation both "defines standards by which to establish and measure quality and determines whether organizations have complied with these standards, thereby warranting accreditation."[280] As of 1994, almost two-thirds of states had incorporated JCAHO standards into licensing programs for health care institutions, effectively leaving determinations of licensure standards to private accrediting bodies.[281] Clearly, the private role in health care delivery goes beyond mere implementation and extends to the policy-making function of standard setting.

As a private body, the JCAHO only indirectly answers to the public and Congress. Historically, the relative independence of the JCAHO accentuated the need for greater accountability: Until recently, HCFA lacked independent standard setting authority.[282] Although Congress has amended the Medicare program to augment HCFA oversight of JCAHO accreditation, the agency continues to do little in practice to hold either the JCAHO or state agencies accountable for their performance.[283] HCFA's approach to the JCAHO, according to a recent report by the Inspector General, is more "deferential than directive."[284] Accreditors are also insulated from consumer and provider challenge. Neither Medicaid nor state licensure laws allow patients or health care providers to challenge the decisions of private accreditors.[285]

Private accreditation significantly, albeit indirectly, affects consumers of health care. The JCAHO currently accredits most American hospitals for participation in Medicare and Medicaid. Accreditation is meant to be a quality assurance technique, replacing

278 Cf. Miller, supra note 197, at 862 (criticizing assumption that self-regulating organizations in securities regulation have greater access to expertise than does government).

279 See Kinney, supra note 213, at 65.

280 Id. at 49.

281 See id. at 54-55.

282 See id. at 68.

283 See Office of Inspector Gen., Accreditation, supra note 232, at 3-4. HCFA retains the authority to accredit or remove hospital accreditation independently, to add different conditions for participation than those used by JCAHO, and to hear appeals from denials of accreditation by the JCAHO. See Michael, supra note 15, at 220.

284 Id. at 4.

285 See Kinney, supra note 213, at 68.

government certification. When that system fails, consumers have little redress against the JCAHO.[286]

Recall Arnie and Betty, reimagining them as Medicare eligible patients in a local hospital. Frustrated with their care, but lacking sufficient evidence to prevail in a malpractice lawsuit, they might wish to challenge the JCAHO's accreditation of a hospital or the state's decision to license the hospital pursuant to that accreditation. Private accreditors provide limited opportunities for outsider participation in the accreditation process, however, and grant no rights of appeal directly to patients.[287] Moreover, patients can claim no constitutionally protected liberty or property interest in the government's decision, based on accreditation, to license a private nursing home.[288] A nondelegation challenge to JCAHO's authority by either patient or private hospital will likely fail; the arrangement has survived constitutional scrutiny to date.[289]

Conventional administrative law responses to constraining private actors again offer little help. Courts will not find private accreditors to be state actors and appear loathe to invalidate their authority under the nondelegation doctrine, even in light of arguments that private accreditation produces anticompetitive effects.[290] Eliminating the private role in accreditation would not necessarily help improve accountability: As mentioned above, patients have no better luck challenging *government* decisions to license hospitals than they do challenging private accreditation.[291] Patients enjoy no due process rights when they lose government benefits because a state decertifies an institution for participation in a federal program.[292]

This nondistinction is important. The due process and accountability concerns raised by the public/private arrangement in certifying health care institutions for participation in Medicare and Medicaid are the product of a combination of government and private failures. Disciplining private actors cannot guarantee the substantive goal of quality assurance, nor ensure that health care delivery is produced in

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286 See id.

287 See id.

288 See id. at 69 (citing O'Bannon v. Town Court Nursing Ctr., 447 U.S. 773 (1980)).

289 See Michael, supra note 15, at 221 & n.339 (citing Cospito v. Heckler, 742 F.2d 72 (3rd Cir. 1984) (holding that government agency maintains primary authority over Medicare certification decisions)).

290 See Clark C. Havighurst, Foreword: The Place of Private Accrediting Among the Instruments of Government, Law & Contemp. Probs., Autumn 1994, at 1, 10-13 (discussing arguments for and against competing in accreditations).

291 See *O'Bannon*, 447 U.S. at 784 (holding that nursing home patients lacked due process interest in state's decertification of facility for participation in Medicaid).

292 See Kinney, supra note 213, at 69 (discussing private parties' due process challenges to accreditation decisions).

accord with public law norms of fairness, participation and rationality. Ameliorating the accountability problem demands attention to the weaknesses of both public and private actors. Statutory reforms augmenting existing procedures for both the agency and private accrediting body might go some, but not all, of the distance toward improving accountability. For example, Congress has already augmented HCFA's oversight powers over JCAHO and required HCFA to submit its own deeming decisions (themselves based on JCAHO accreditation) to notice and comment.[293] Disclosure is a step in the right direction. It enables the public to access information about hospitals developed in the course of JCAHO's compliance determination process, which could create market pressure for hospitals to improve quality of care. Additional legal mechanisms, including private rights of action enabling patients to challenge accreditation or state licensure laws, could further improve quality of care.

However, a more complete approach to accountability requires a closer look at the less obvious factors that contribute to the weaknesses of the regime. The quality and responsiveness of private accreditation may be in part a function of institutional factors, prestige, and professionalism. The effectiveness of private accreditation may vary with the nature of the institution (hospital versus nursing home), its organizational form (for-profit versus nonprofit), and the characteristics of the patient population (poor and elderly versus simply elderly).[294] The impetus for quality assurance will be stronger when a professional group with its own standards of excellence dominates the institution, as with doctors in hospitals;[295] private nursing homes, by contrast, lack a dominant professional group. A nonprofit tradition and a history of community prestige may also affect an institution's commitment to quality. Public visibility and the prospect of patient complaints may encourage greater responsiveness on the part of health care institutions.

We might, therefore, seek to intensify accountability measures in accord with these factors. Relying on private accreditation, for example, might be least problematic in a nonprofit teaching hospital with strong ties to the community and most problematic in a for-profit urban nursing home where family contact is minimal. At the same time, to understand the public agency's role in Medicare, we need to know

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[293] See id. at 62 (discussing HFCA "deeming" procedure and relevant statutory requirements).

[294] See id. at 64 (identifying characteristics important to determining when private accreditation is appropriate for public health insurance programs).

[295] See id. at 65 (suggesting presence of professional dominance as important consideration in determining appropriateness of private accreditation).

more about the relationship between HCFA, state licensing bodies, and the JCAHO. Are the relationships cooperative or collusive? Are the agencies badly underfunded and incapable of monitoring? And what role do HCFA representatives play on JCAHO committees? Procedural protections will not produce more accountability where an agency lacks sufficient independent expertise and monitoring capacity.

These institutional, organizational, professional, locational, demographic, and relational dimensions of the public/private regime may be more or less vulnerable to manipulation and repair, but, without acknowledging them, we are likely to oversimplify both the problem and the solution. Traditional administrative law anxiety about private participation in governance could point automatically toward constraining private actors through the extension of formal legal procedures, the invalidation of private delegations, or the application of constitutional due process. This reaction, however, erroneously singles out nongovernmental actors as the source of the accountability deficit and adopts a one-size-fits-all approach to solving it, exemplifying the old adage that when one's only tool is a hammer, every problem looks like a nail. Instead, as this example reveals, accountability depends on engaging numerous measures (formal and informal; command-and-control and incentive-based) and a variety of actors (both public and private) in a context-sensitive way.

3. *Medicaid and the Shift to Managed Care*

a. Interdependence. There is no hotter topic in health law than the general shift from fee-for-service to managed care, which, among other things, features significant reliance on private actors in health care delivery. In a managed care regime, a host of differently structured institutions called "managed care organizations" (MCOs) (which include, but are not limited to health maintenance organizations (HMOs)) exert control over the delivery of health care, using a variety of mechanisms to limit consumption and keep costs down.[296]

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296 Managed care is a system that combines health insurance with controls over the delivery of health care. Managed Care Organizations (MCOs) exert control by either choosing providers or controlling provider behavior through "financial incentives, rules and organizational controls." Marc A. Rodwin, Managed Care and Consumer Protection: What Are the Issues?, 26 Seton Hall L. Rev. 1007, 1009 n.1 (1996). Managed care is "used generically for all types of integrated delivery systems, such as [health maintenance organizations (HMOs)] or [preferred provider organizations], implying that they 'manage' the care received by consumers (in contrast to traditional fee-for-service care, which is 'unmanaged')." Jonathan P. Weiner & Gregory de Lissovoy, Razing a Tower of Babel: A Taxonomy for Managed Care and Health Insurance Plans, 18 J. Health Pol. Pol'y & L. 75, 97 (1993). Managed care "is often used to denote the entire range of utilization control tools that are applied to manage the practices of physicians and others, regardless of the setting in which they practice." Id. Most people are familiar with the term HMO, but

The federal Medicaid program represents just one context in which the shift to managed care is underway. Here again, private accreditation plays a significant role in health care. Private accreditors ensure that MCOs meet state and federal requirements for serving the Medicaid population.[297]

This example reinforces the earlier discussion of private accreditation, but managed care also introduces new wrinkles. For example, it demonstrates that increased reliance on nongovernmental actors can be an indirect effect of devolving authority to state and local governments. The federal government recently provided states greater flexibility to require the Medicaid population (for which the federal and state government cover costs) to receive their health care from MCOs rather than fee-for-service providers. Devolving this power to the states has intensified reliance on these nongovernmental actors, and reinforced the need for independent private accreditation as a quality control measure.[298]

The Medicaid managed care regime works as follows: To obtain health care for Medicaid recipients, state Medicaid agencies purchase care from a range of providers. In recent years, state agencies have shifted from employing a fee-for-service system to purchasing care for Medicaid beneficiaries from MCOs.[299] As a result, Medicaid beneficiaries now choose among the MCOs offered by the state, much like employees in firms might choose from a menu of managed care prov-

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HMOs are just one example of a managed care institution. HMOs have been called "private sector health care regulators." See Donald F. Phillips, A Quarter Century of Health Maintenance, 280 J. Am. Med. Ass'n 2059, 2060 (1998).

297 For example, a number of states, including Florida, Kansas, Massachusetts, Oklahoma, Pennsylvania, and Vermont, require health plans to be accredited by a recognized external review body to maintain their operating licenses or to enroll Medicaid beneficiaries. See John K. Iglehart, The National Committee for Quality Assurance, 335 New Eng. J. Med. 995, 997 (1996). Some states (e.g., Ohio and New York), as well as many private and public employers, require or request that health plans receive National Committee for Quality Assurance (NCQA) accreditation in order to bid on contracts for medical care for their employees. See id. at 996.

298 Federal Medicaid law has always permitted states to purchase managed care services for Medicaid beneficiaries who enroll on a voluntary basis. Most of the mandatory Medicaid managed care programs currently operate under one of two types of waivers authorized by Section 1115 of the Social Security Act. See 42 U.S.C. § 1315(a) (1994).

299 See John T. Boese, When Angry Patients Become Angry Prosecutors: Medical Necessity Determinations, Quality of Care and the Qui Tam Law, 43 St. Louis U. L.J. 53, 56 (1999) (reporting that nearly 17% of Medicare patients are enrolled in managed care programs). In a fee-for-service system, consumers of health services rely on their physicians to determine the care they need and insurance companies compensate providers based on the volume and type of services provided. In theory, managed care responds to the tendency to overconsume health care by requiring primary care physicians with no financial stake in overtreatment to perform a "gatekeeping" function in determining the care required. See id. at 58-60.

iders offered by their employers. The Balanced Budget Act of 1997 explicitly authorized this practice by eliminating the prior requirement of a federal waiver for mandatory enrollment of Medicaid beneficiaries in managed care.[300] Thus, states can now require Medicaid beneficiaries to enroll in managed care plans from which they may disenroll only "for cause" or at prescribed times.

Although devolution in the Medicaid context primarily represents an intergovernmental transfer of power, it also has implications for public/private interdependence.[301] Intergovernmental transfers of power can lead to significant dependence on private actors to deliver services for which states and localities find themselves newly responsible, or these transfers can intensify a relationship that already exists. Analogously, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRA) abolished the entitlement to federal financial assistance for the poor, replacing it with a system of block grants for states.[302] The grants permit states, with few conditions, to design benefit programs and eligibility requirements for welfare recipients.[303] The devolution of authority from federal to state governments in the PRA builds on, and will likely accelerate, an existing trend toward greater reliance on nongovernmental actors.[304] The Act

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300 See Balanced Budget Act of 1997, Pub. L. No. 105-33, §§ 4001-4002, 111 Stat. 251, 275-327 (codified as amended at 42 U.S.C. § 1395w (Supp III. 1998)) (enacting "Medicare+Choice" program and eliminating prior requirement of federal waiver for mandatory enrollment of Medicaid beneficiaries in managed care).

301 See David J. Kennedy, Due Process in a Privatized Welfare System, 64 Brook. L. Rev. 231, 231 (1998) (describing Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRA) as permitting states to use private corporations to operate benefit programs). For a detailed description of the Temporary Assistance to Needy Families Block Grant (which replaced Aid to Families with Dependant Children (AFDC)) and the Child Care and Development Block Grant, see Mark Greenberg, Welfare Restructuring and Working-Poor Family Policy: The New Context, in Hard Labor: Women, Work in the Post-Welfare Era 29, 33-34 (Joel F. Handler & Lucie White eds., 1999). Under the prior AFDC regime, states were obligated to provide benefits to individuals eligible under federal law. See id. at 25.

302 See Pub. L. No. 104-193, 110 Stat. 2105 (codified at 42 U.S.C. § 601 (Supp. III 1998)).

303 Pursuant to the PRA, states now determine for themselves which populations to serve and exercise very broad discretion in spending block grants, providing that they do so in a manner designed to accomplish the permissible purposes specified in the Act, such as providing assistance to needy families. See Greenberg, supra note 301, at 31.

304 The new balance of power between state and federal governments under the PRA has attracted considerable attention, but the reallocation of authority from states to private corporations as a result of welfare reform may be more significant than the new balance of authority between the federal and state governments. See Kennedy, supra note 301, at 232 (suggesting that federal/state balance might return to federal dominance but that authority ceded to the private sector will be harder to regain). Under the law, the state has no obligation to provide assistance for low income families. A state wishing to do so has considerable flexibility. It provides assistance through cash or noncash means or funds social services rather than any form of assistance. A state could also "turn over some or

specifically allows states to operate welfare programs "through contracts with charitable, religious, or private organizations."[305] Nongovernmental organizations increasingly will deliver benefits, exercising the considerable discretion that "administration" and "delivery" imply.[306]

Welfare reform represents a wholesale devolution of authority that dwarfs the more modest devolution exemplified by the Medicaid regime, but both examples illustrate that devolution can indirectly empower nongovernment decisionmakers to make important policy determinations that go far beyond the mere implementation of government directives. Devolution may also exacerbate monitoring problems associated with contractual relationships by adding the need for greater intergovernmental monitoring in addition to government/provider monitoring.

Further, the shift to managed care in the Medicaid context increases dependence on private accreditation bodies such as the National Committee on Quality Assurance (NCQA) to certify that health care providers meet adequate standards of care.[307] Until re-

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virtually all funding to nonprofit organizations, religious groups, or for-profit organizations for an array of different approaches." Greenberg, supra note 301, at 37. Prior to passage of the PRA, many states were already experimenting with time limits, work requirements, and, most importantly for our purposes, "privatizing" aspects of their welfare systems; the federal government had routinely granted states waivers under the AFDC program in order to allow them flexibility in administering benefits. See id. at 25-28 (describing state initiatives as mixture of expansion and contraction of program eligibility). For a critical view, see Lucy A. Williams, The Abuse of Section 1115 Waivers: Welfare Reform in Search of a Standard, 12 Yale L. & Pol'y Rev. 8 (1994) (arguing that unrestricted state discretion is inappropriate strategy for addressing welfare policy concerns).

305 42 U.S.C. § 604(1)(a). Major corporations anticipating a significant role in welfare administration not only lobbied in support of the legislation but also rushed to capitalize on it. See Kennedy, supra note 301, at 258-59.

306 Critics worry that private firms will maximize profits by "churning" and "creaming" recipients, effectively making policy decisions about who will receive benefits. "Churning" refers to the variety of burdensome administrative procedures used to dissuade potential beneficiaries from applying for benefits, including requiring applicants to comply with extremely complicated verification and documentation requirements, subjecting them to interminable waits, and locating facilities in inconvenient locations. See id. at 241-47. "Creaming" refers to finding the best qualified beneficiaries jobs while allowing the bulk of beneficiaries to languish and eventually be dropped from the rolls. See id. at 263.

307 The NCQA is a private, nonprofit organization that assesses and accredits health plans. It is governed by a board of directors consisting of employers, consumer and labor representatives, health plans, quality experts, policymakers, and representatives from organized medicine. See National Comm. for Quality Assurance, NCQA: An Overview (visited Apr. 4, 2000) <http://www.ncqa.org/pages/main/overview3.htm>; see also 1 Sara Rosenbaum et al., Executive Summary, Negotiating the New Health System: A Nationwide Study of Medicaid Managed Care Contracts (2d ed. 1998) <http://www.chcs.org/oview.htm> (noting that state Medicaid agencies rely on MCOs to conduct their own quality assessment and also rely on industry accreditation). As MCOs proliferate, the accreditation process for health plans becomes more competitive. Competitors of NCQA are

cently, NCQA certification was primarily voluntary, offering MCOs an advantage when competing for lucrative health care delivery contracts. When states became managed care purchasers, they adopted the benchmark of quality for managed care endorsed by commercial purchasers, which was, at the time, private accreditation.[303]

b. Accountability. The Medicaid managed care example further highlights the significant, expanding private role played in health care delivery. It also reinforces the idea that traditional accountability mechanisms offer an unsatisfactory response to accountability deficits found in complicated public/private regimes. From an administrative law perspective, managed care contracts between state agencies and MCOs raise questions about fairness and access for beneficiaries. Through contract, the parties incorporate existing federal and state standards and agree to terms under which states will consider them satisfied. Unlike traditional rulemaking, however, contract negotiation does not accord either the general public or Medicaid beneficiaries a role in decision making.

Negotiating contracts against the backdrop of elaborate federal regulations introduces risk for the state agency and accountability concerns for the public. As a recent report describes, "standard setting through contracts holds unprecedented enforceability implications, because of the legal consequences of drafting error or omission on the agency's part."[309] Should states carelessly draft state-provider contracts, they could find themselves directly responsible for services and benefits they intend to pass on to private MCOs.[310] For their

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JCAHO, the Accreditation Association for Ambulatory Health Care, the Foundation for Accountability, the Medical Quality Commission, and the Utilization Review Accreditation Commission. See Iglehart, supra note 297, at 999. Further:

> Although the MCO accreditation program is voluntary and rigorous, it has been well received by the managed care industry, and almost half the HMOs in the nation, covering three quarters of all HMO enrollees, are currently involved in the NCQA Accreditation process. For an organization to become accredited by NCQA, it must undergo a survey and meet certain standards designed to evaluate the health plan's clinical and administrative systems. In particular, NCQA's Accreditation surveys look at a health plan's efforts to continuously improve the quality of care and service it delivers. One measure of the value of accreditation is the growing list of employers who require or request NCQA Accreditation of the plans they do business with.

National Comm. for Quality Assurance, supra.

[308] See Rosenbaum et al., supra note 307; Iglehart, supra note 297, at 995.

[309] Rosenbaum et al., supra note 307.

[310] Pursuant to state plans filed with the federal government, states are obligated to provide care to Medicaid patients in a manner consistent with statutory and regulatory standards. See id. at 8. As the report notes, residual liability as a result of poor contract drafting is "unique to Medicaid." Id. Health benefit plans offered by private employers

part, agencies may find contractual instruments procedurally easier to manage than direct regulation of health care delivery through the traditional rulemaking process alone. Alternatively, if public participation in contract development is minimal, a contractual approach creates substantial costs. By minimizing public participation, the agency may forego an opportunity to collect relevant data and a variety of policy views; it may also overlook an opportunity to legitimize the resulting agreements.

In addition, these public/private contracts might compromise the deference agencies normally receive when they act in their regulatory capacity. Although administrative law principles suggest that courts should defer to an agency's subsequent interpretation of its publicly promulgated rules, courts are likely to interpret contracts according to private contract principles.[311] Unlike administrative law, moreover, contract law prohibits unilateral amendment at the behest of the agency, or unilateral interpretation in the form of guidance documents. Thus, an agency may find itself, even if only temporarily, bound to a bad bargain and unable to alter it through a simple interpretive decision or rulemaking process. States may choose to avoid these complications by codifying contractual terms in state law, or promulgating them as regulations. This would create accountability of a sort, but perhaps at the expense of flexibility. Codification and promulgation necessarily render the contracting process more cumbersome, time consuming, and rigid.[312]

Medicaid contracts vary widely across states; some are highly specific, leaving little discretion to managed care plans, while others delegate substantial discretion to contractors in making coverage, operational, and administrative decisions.[313] Under most contracts, private companies rather than states select and design their provider networks and oversee provider performance.[314] The need to monitor their contracts with MCOs poses significant challenges for state bureaucracies, which frequently lack a comprehensive approach to data

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are exempt from most state laws by the Employment Retirement Income Security Act, which imposes "almost no federal content or structural requirements." Id.

311 See id.

312 The report notes that a few states have codified the service and performance specifications in Medicaid managed care contracts in state regulations. This "merger of regulation and contract" gives the state the flexibility to unilaterally interpret contractual provisions and receive deference from courts. It also enables the agency to make unilateral post-contract modifications obviating the need for negotiating amendments. Thus, contracts from these states may provide only a framework for incorporating the relevant regulations. See id.

313 See id.

314 See id.

collection and processing.[315] State monitoring of MCOs may be even more attenuated than their monitoring of other health care delivery institutions, such as nursing homes, because of the intermediary role played by private quality assurance bodies like the NCQA. A managed care regime may rely more heavily on independent accreditation and private assessments of quality of care even though they are more difficult to make in the managed care environment than in the hospital setting.[316] Finally, some observers argue that states will wield limited influence with MCOs, which serve a broad array of nongovernmental clients, such as private employers.[317]

As in the nursing home environment, consumers enjoy few opportunities for redress in the Medicaid managed care regime. Patients often lack the information and resources necessary to challenge benefit denials or protest substandard care in managed care organizations.[318] Even though the Balanced Budget Act requires MCOs to establish internal grievance procedures, many of the same obstacles to consumer enforcement of agency-provider contracts identified in the nursing home example—judicial reluctance to declare MCOs state actors, absence of private rights of action, and tenuous third-party beneficiary claims—apply in this context.[319] Only rarely will private health care providers be declared state actors, a fact that two leading reports

315 Reporting requirements can be idiosyncratic. States have differential capacities both to identify the information that would be most useful and to analyze it critically. See id. (noting need for Medicaid agencies to supplement internal analytic capabilities through agreements with other state agencies and institutions specializing in data analysis).

316 Given the relatively short periods of time for which most Medicaid beneficiaries are eligible for the program (and hence managed care coverage) on a continuous basis, and the special needs of this population, commercial standards of quality are relatively uninformative. Thus, special methodologies beyond those used in traditional private accreditation might be necessary to evaluate whether MCOs provide the Medicaid population adequate care. See id. For the claim that private health care providers may not be as familiar with Medicaid beneficiaries as public providers, see Jane Perkins & Kristi Olson, An Advocate's Primer on Medicaid Managed Care Contracting, Clearinghouse Rev., May-June 1997, at 19, 21.

317 Interview with Sharon Connors, Consultant, Mediamatrix, Boston, Mass. (Aug. 17, 1999).

318 See Boese, supra note 299, at 59-62. Patients with grievances about managed care plans have little recourse because the Employee Retirement Income Security Act (ERISA) preempts most of their legal claims and limits them to an ERISA appeals process under which they may recover only wrongfully denied benefits and attorney's fees. See id. at 59-60. Boese's article examines the growth of qui tam actions brought pursuant to the Federal False Claims Act, as a mechanism for disgruntled patients to sue managed care organizations for substandard care, underutilization of health care services, and violations of federal regulations. See id. at 60-62. Courts have grown more receptive to patient attempts to sue MCOs in negligence and wrongful death actions. See Robert Pear, Series of Rulings Eases Constraints on Suing HMO's, N.Y. Times, Aug. 15, 1999, at A1.

319 For an overview of consumers' procedural rights under both Medicare and Medicaid, see Kinney, supra note 213, at 67-73.

on the Balanced Budget Act and Medicaid managed care obscure.[320] Indeed, the Supreme Court recently vacated a Ninth Circuit decision holding HMO denials of Medicare services to be state action subject to the Due Process Clause.[321] Finally, private delegations to bodies such as the NCQA are likely to pass constitutional muster.[322] Even if they did not, eliminating the NCQA's role hardly seems the appropriate response. In sum, the traditional administrative law responses to control private power again disappoint.

However, the public outcry over managed care has prompted both federal and state legislatures to afford patients additional rights by requiring MCOs to adopt bureaucratic procedures such as hearings prior to denying claims or benefits.[323] Although minimal, such hearing rights may help to prevent precipitous decision making and avoid the worst abuses in the managed care system. Private law developments may provide additional, if piecemeal, assistance to consumers:

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320 See 1 Sara Rosenbaum et al., Negotiating the New Health Care System: A Nationwide Study of Medicaid Managed Care Contracts n.39 (3d ed. 1999) <http://www.gwu.edu/~chsrp/manga>; Andy Schneider, Overview of Medicaid Managed Care Provisions in the Balanced Budget Act of 1997, at 27 (1997) <http://www.kff.org/content/archive/2102/>. Both reports cite Daniels v. Wadley, 926 F. Supp. 1305 (M.D. Tenn. 1996), for the proposition that beneficiaries enjoy constitutional due process rights against MCOs. In fact, the district court's state action finding in *Daniels* (itself based on a dubious reading of the Supreme Court's state action jurisprudence) was vacated in part on appeal, see Daniels v. Menke, 145 F.3d 1330 (6th Cir. 1998). The Kaiser report also refers to the possibility that Medicaid enrollees will enforce MCO/state agency contracts in third party beneficiary claims, but relevant law is mixed at best. See Perkins & Olson, supra note 316, at 33 (citing "multitude of tests being used to determine third-party beneficiary status").

321 See Grijalva v. Shalala, 152 F.3d 1115, 1120 (9th Cir. 1998), vacated and remanded, 119 S. Ct. 1573 (1999), remanded to district court, 185 F.3d 1075 (9th Cir. 1999). The Court remanded the case for consideration in light of American Mfrs. Mut. Ins. Co. v. Sullivan, 119 S. Ct. 977, 982 (1999) (holding that private insurer's decision pursuant to worker's compensation statute to suspend payment of health benefit pending utilization review was not state action). However, the Court also instructed the Ninth Circuit to consider the Balanced Budget Act of 1997 along with HHS's implementing regulations, which confer procedural rights upon patients. See Balanced Budget Act of 1997, Pub. L. No. 105-33, §§ 4001-4002, 111 Stat. 251, 275-327. The Ninth Circuit in *Grijalva* had distinguished Blum v. Yaretsky, 457 U.S. 991 (1982), and reasoned that HMOs and the federal government were joint participants in the Medicare provision. See *Grijalva*, 152 F.3d at 1120.

322 See Michael, supra note 15, at 195-98 (discussing constitutional constraints on private-accrediting bodies).

323 See Pear, supra note 318, at A1. Public outcry over managed care has prompted Congress and state legislatures to begin treating such private entities as if they were public by forcing them to comply with bureaucratic procedures, such as hearings. New California legislation grants patients the right to sue HMOs for punitive damages and gives them the right to solicit outside appeals for denials of coverage, among other measures. See Cal. Civ. Code § 3428 (West Supp. 2000) (establishing duty of care to managed care plan subscribers and providing damages); Cal. Health & Safety Code § 1374.30 (West Supp. 2000) (establishing Independent Medical Review System, effective in January 2000); James Sterngold, Trailblazing California Broadens the Rights of Its H.M.O. Patients, N.Y. Times, Sept. 28, 1999, at A1.

Courts have grown receptive to patient attempts to sue managed care organizations in negligence and wrongful death actions.[324]

Alternative accountability mechanisms, such as market mechanisms and organizational reform within agencies, might supplement these conventional responses. For example, the earlier point about the states' bargaining power with MCOs has a flipside: As one purchaser of care among many, states can free ride on monitoring conducted by private buyers.[325] Moreover, as major and growing purchasers of care, states will soon be in a position to drive demand for NCQA accreditation of MCOs.[326] States could require by contract that MCOs diversify the providers they include in their provider networks. By demanding as a condition of the contract that MCOs include "public" health agencies as providers, they introduce a quality benchmark for private providers, who may be less familiar with the vulnerable Medicaid population and may need to develop new methodologies and criteria for evaluating the sufficiency of their care.[327] And, although the transition to managed care may initially overwhelm state agencies, many states appear to be adapting to the new regime by developing model contracts.[328]

Today, the length and detail of provider contracts varies across states, but there is a notable trend toward both detailed standards and

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324 Judges have allowed these suits in the context of ERISA, the federal statute that limits employee remedies against health care organizations selected by employees as part of a benefit plan. See 29 U.S.C. § 1144(a) (1994).

325 On this view, all patients may not require the right to sue, providing there is an adequate collection of accountability mechanisms, including clients with incentives to police quality. When the state is a monopsony (i.e., the sole buyer in a market), however, it might be necessary to provide patients such rights. In a model where some patients rely on others to police quality, however, it would be necessary to ensure that MCOs could not distinguish among patients and treat Medicaid patients differently. Because of the special characteristics of the Medicaid population, however, private monitoring tools may not adequately reflect whether the Medicaid population is properly served.

326 "[S]tate and local governments spend about 45 percent of the total health care purchasing dollars. Public purchasers, with their enormous purchasing power and their regulatory authority over those from whom they purchase health care, have the potential to drive the market in health care." Caren A. Ginsberg, In Pursuit of Value: Innovative State/Medicaid Purchasing Strategies 3 (State Initiatives in Health Care Reform Monograph/Memoranda No. 41, 1997). According to another report, federal funds constitute 57% of all funds flowing to MCOs. See Schneider, supra note 320, at 17. In addition to relying on commercial standards of quality, some states "piggyback" on state insurance regulators to certify financial solvency of MCOs and on private accreditors to certify the quality of the institutions' clinical standards of care. Interview with Sharon Connors, supra note 317.

327 See Perkins & Olson, supra note 316, at 22.

328 See 1 Rosenbaum et al., supra note 320, at 5 (reviewing variety of state contracts and noting trend toward larger and more complex contracts).

diversification of penalties.[329] Even relatively short provider contracts, those that simply regurgitate federal and state Medicaid law,[330] extend federal and state regulations to private providers. As a result, they could enable government agencies to monitor quality as well as control fraudulent claims. Some states now employ contract managers to monitor state contracts with MCOs; California recently created a state department of managed care.[331] The contracts themselves could constitute crucial accountability mechanisms, enabling state agencies to demand that MCOs submit to independent third-party oversight, private accreditation, and insurance requirements, among other things. Contracts might serve as a means of enlisting additional nongovernmental entities such as community groups and patient advocates to provide accountability.[332]

For example, Wisconsin has embarked on a Medicaid managed care program which one commentator described as "built on contracts" between the state Medicaid administrator, MCOs, communi-

329 Although some contracts appear to be relatively short, others contain extremely detailed provisions. See 1 Rosenbaum et al., supra note 307.

330 Correspondence from Gary Abrahams, Dir. of Reimbursement, Mass. Extended Care Fed'n, to author (Aug. 18, 1999) (on file with the *New York University Law Review*).

331 Legislation establishing California's Department of Managed Care (DMC) came into effect on January 1, 2000, and the DMC is scheduled to become operative by July 1, 2000. The DMC will regulate all MCOs, and not just those relevant to Medicaid managed care. See California Dep't of Managed Care (visited Apr. 10, 2000) <http://www.dmc.ca.gov/pub/dmctp.htm>. Other states have adopted different institutional reforms. For example, in Ohio, the Bureau of Managed Health Care (BMHC) within the Ohio Department of Human Services is responsible for the administration of the Ohio Medicaid managed care program. The BMHC is divided into four sections: Contract Administration, Performance Monitoring, Program Development and Analysis, and Enrollment Administration; its responsibilities include monitoring quality of, access to, and performance of, managed health care plans. See Bureau of Managed Health Care (visited Apr. 10, 2000) <http://www.state.oh.us/odhs/medicaid/bmhc/index.stm>; Medicaid Managed Care Program (visited Apr. 10, 2000) <http://www.state.oh.us/odhs/medicaid/managed.stm>.

332 Again, the devolution of welfare reform offers a useful analogue. Although welfare "privatization" could cut costs and improve service delivery, we might also be concerned that states will avoid responsibility for cutting welfare rolls by shifting blame to private actors. Resorting to traditional constraints, one could argue that private parties ought to be considered "state actors" when they administer benefits, or, instead, seek to invalidate delegations of power to them. See Kennedy, supra note 301, at 283-85 (applying balancing test in Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976), and arguing that government interest is minimized where the cost of adding procedure falls to private contractors). Given current state action doctrine, these efforts will likely prove fruitless or achieve only minimal due process protections. Again, however, the contractual mechanisms themselves could present opportunities for structuring the public/private arrangement. Contracts could require private companies to retain professional social workers, for example. Contracts, speculatively, could enable alliances to develop among private companies, professional groups, and poverty advocates.

ties, public health organizations, and consumer groups.[333] Exercising its power as purchaser, the agency "encourages MCOs to utilize community groups, public health units, and schools" to provide care, and these commitments are reflected in formal agreements.[334] For example, the agreements provide for HMO advocates to represent patients and coordinate activity with community coalitions.[335] Similarly, the state Medicaid agency in Massachusetts has developed a "customer advisory committee" to represent the populations served by each of their benefit plans.[336]

Thus, Medicaid managed care both illustrates public/private interdependence and points to the need to think in terms of aggregate accountability. Here, in an ostensibly "government" program, we see the private management of health care by MCOs, which is actually delivered by a variety of public and private providers (hospitals, clinics, and public health agencies). The regime relies on private quality assurance (by accrediting bodies) and additional private oversight (by community groups, patient advocates, and private litigants). The agency exerts considerable influence by controlling the purse strings, as well as by negotiating and monitoring contracts.

The administrative law preoccupation with controlling agency discretion obscures the dynamic interaction among public and private actors in social service delivery regimes like this one in two ways. First, an exclusive agency focus blocks private contributions from view. Second, the impulse to constrain private influence when it does surface, ignores opportunities for fostering accountability through a combination of contractual, organizational, and market mechanisms—mechanisms which themselves rely on private actors.

B. Government Functions: Incarceration

1. Interdependence

If the nature and extent of private participation in health care surprises us, the fact that private parties play some role in health care delivery itself does not. Indeed, for most social services or functions, we expect, or at least tolerate, some dependence on private actors. Recently, however, government agencies have begun contracting with private actors to perform more controversial functions, such as incar-

333 See Louise G. Trubek, The Health Care Puzzle, in Hard Labor, supra note 301, at 143, 144-45.

334 Id. at 145.

335 Advocates are often licensed health care professionals. See id.

336 See Ginsberg, supra note 326, at 9.

ceration, spurring vigorous debate about the wisdom of "privatizing" public functions.[337]

For our purposes, the emergence of private prisons serves as an example of the already significant, and still growing, private role in even the most seemingly traditional public functions.[338] As it turns out, even publicly run prisons have never been completely public. Since the inception of the American penitentiary system in the late eighteenth century, prisons have provided labor to private enterprise; indeed, most early prisons were state operated vehicles for contracting out labor.[339] Prison labor and convict-leasing programs in the postbellum South, for example, were notoriously corrupt and brutal.[340] Proponents of prison labor defended the programs as meeting legitimate prison objectives on the theory that penitentiaries had an obligation to be self-supporting, but, in practice, they enabled jailers to exploit and abuse prisoners for personal gain.[341] That prisons were originally profit-making ventures managed by government complicates the common view of incarceration as a traditionally public enterprise.[342]

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337 Economists and policymakers usually justify privatization in the form of selling state assets on the theory that private control will provide efficiency gains. For public management scholars, the most important questions raised by government contracting in these and similar circumstances concern the conditions under which private provision offers greater efficiency than direct government provision. See Andrei Shleifer, State Versus Private Ownership, J. Econ. Persp., Fall 1998, 133, 141-44 (1998) (analyzing politics of government ownership and privatization and noting that political considerations not only strengthen case for privatization, but in fact drive decision to privatize); see also Donahue, supra note 9, at 11-12 (arguing that values of efficiency and accountability of public and private arrangements in "organizational architecture" should be reorganized in way that will best deliver public goods and services). Privatization does not guarantee accountability, however; in some cases, private ownership has reduced access to information that was more easily available under public ownership. See Cosmo Graham & Tony Prosser, Waiving the Rules: The Constitution Under Thatcherism (1988), reprinted in part in "Rolling Back the Frontiers"? The Privatisation of State Enterprises, in A Reader on Administrative Law 63, 80-86 (D.J. Galligan ed., 1996).

338 See Laura Suzanne Farris, Private Jails in Oklahoma: An Unconstitutional Delegation of Legislative Authority, 33 Tulsa L.J. 959, 959 (1998) (noting trend toward "privatization" and stating that 120 private jail and prison operations are operating in 27 states).

339 See Alexis M. Durham III, Managing the Costs of Modern Corrections: Implications of Nineteenth-Century Privatized Prison-Labor Programs, 17 J. Crim. Just. 441, 446 (1989) (describing successful profit-making intention of early New York prisons).

340 Public jailers, and the private parties to whom convicts were leased, routinely worked prisoners for personal gain, deprived them of basic sustenance to increase production, and beat them for minor infractions, sometimes to death. See id. at 449. For a general history of prison reform cases, see Malcolm M. Feeley & Edward L. Rubin, Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons 152 (1998) (summarizing view prevalent among those who leased convicts after Civil War as "One dies, get another").

341 See id. at 153-58.

342 See David Leonhardt, As Prison Labor Grows, So Does the Debate, N.Y. Times, Mar. 19, 2000, at A1 (documenting that, across the country, 80,000 inmates hold jobs, 36

In recent years, private reliance on prison labor has experienced a revival. Since 1990, at least thirty states have legalized the contracting out of prison labor to private companies, notwithstanding federal laws restricting interstate commerce in prison-made products.[343] Today, private companies employ prisoners at low rates of pay (made lower still by deductions for maintenance and restitution) to perform tasks such as making airline reservations for TWA and assembling computer cables.[344] Law school graduates are likely unaware that their graduation gowns may have been sewn by prison labor.[345] In 1994, American prisoners produced goods and services valued at $1.4 billion in such industries as computer data entry, light manufacturing, and printing.[346]

Just as the private sector has long hired prisoners as a source of cheap labor, the civil service relies extensively on private contractors to provide public prisons with services. Thus, even in publicly owned

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states now employ inmates, and program has doubled in size since 1995). Although the federal government began to restrict prison labor in the twentieth century, it encouraged prison labor for limited purposes. In 1934, for example, the Federal Bureau of Prisons established UNICOR, the trade name for Federal Prison Industries (FPI), a wholly-owned government corporation created by Congress to employ federal prisoners to produce goods for government agencies. See Diane C. Dwyer & Roger B. McNally, Public Policy, Prison Industries, and Business: An Equitable Balance for the 1990's, Fed. Probation, June 1993, at 30, 31. FPI is a $600 million per year corporation, one of the government's 50 largest suppliers. See Stephen M. Ryan, Federal Prison Industries Has Unfair Advantage, Gov. Computer News, Sept. 9, 1996, at 34, available in Westlaw, 1996 WL 16569695. Historians and social scientists have analyzed prison labor's link to slavery and union busting, arguing that this form of social control has operated to institutionalize racism and working class oppression. See Julie Brown, The Labor of Doing Time, in Criminal Injustice: Confronting the Prison Crisis 61, 61 (Elihu Rosenblatt ed., 1996) (describing convict leasing system).

[343] Best Western International hires inmates inside the Arizona Correctional Institute for Women to make reservations for guests, and Zephyr Products, Inc. hires inmates from the Lansing, Kansas correctional facility for its prison-adjacent manufacturing business. See Dwyer & McNally, supra note 342, at 33; Christian Parenti, Making Prison Pay, Nation, Jan. 29, 1996, at 11, 11-12.

[344] Since 1986, TWA has employed hundreds of inmates at the California Youth Authority's Training School for youthful offenders. Inmates at the Evans Correctional Facility in South Carolina assemble millions of dollars of cables for Escod Industries, a division of a Fortune 500 company, which sells the cables to IBM and Northern Telecom. See National Inst. of Justice, Work in American Prisons: Joint Ventures with the Private Sector (visited Apr. 10, 2000) <http://www.ncjrs.org/pdffiles/workampr.pdf>.

[345] Josten, the largest manufacturer of graduation gowns in the United States, pays inmates in the Leath women's prison in South Carolina to sew, inspect, sort, and package graduation gowns. See id.

[346] See National Center for Policy Analysis, Time to Put More Prisoners to Work (visited Apr. 4, 2000) <http://www.ncpa.org/pi/crime/pdcrm/pdcrm10.html>. In Ohio, inmates perform data entry. In Hawaii, they pack Spalding golf balls. In Texas, inmates in a private prison fix circuit boards for a company that supplies them to Dell, IBM, and Texas Instruments. Even Toys 'R' Us has used prison labor. See Parenti, supra note 343, at 11-12.

and operated prisons, private firms provide basic goods such as food, bedding, and clothing, along with medical, rehabilitative, vocational, and transportation services. Government also contracts with the private sector to build and maintain prison infrastructure, and supply everything from bullet-proof vests to security systems.

Private involvement in correctional facilities goes beyond contracts for goods and services, however. Sociologists have described corrections as a "subgovernment," a network of organizations comprised of federal agencies, for-profit corporations, and professional associations.[347] Nongovernmental professional groups such as the American Bar Association (ABA) and the American Correctional Association (ACA) exert considerable influence over correctional policy. The ABA has had a significant impact on criminal justice reform. The corrections policy literature refers to the ABA as a "working criminal justice elite,"[348] presumably because of the deference its recommendations and guidelines attract from law and policymakers.

The ACA, an organization of correctional professionals dating to 1870, performs a variety of functions that shape corrections policy, including training personnel and accrediting agencies and programs.[349] Throughout its history, the ACA has fostered professionalism in prison administration through the development of standards and promoted progressive reforms such as rehabilitation.[350] Indeed, ACA standards govern most aspects of prison operation.[351] Compliance with ACA standards can be a condition of government contracts with private firms to build and operate prisons.[352] Even when not required by contract, compliance with ACA standards yields a number of other important benefits. For example, the federal Commission on Accredi-

347 See J. Robert Lilly & Paul Knepper, The Corrections-Commercial Complex, 39 Crime & Delinq. 150, 151 (1993). The authors argue that participants in subgovernments share a close working relationship marked by cooperation and compromise and that subgovernments feature overlap between societal interest and the government bureaucracy in question. "The line between the public good and private interest becomes blurred as governmental and nongovernmental institutions become harder to distinguish." Id. at 153.

348 Albert P. Melone, Criminal Code Reform and the Interest Group Politics of the American Bar Association, in The Politics of Crime and Criminal Justice 37, 37 (Erika S. Fairchild & Vincent J. Webb eds., 1983).

349 See id. at 156-57.

350 See Feeley & Rubin, supra note 340, at 163.

351 The American Correctional Association (ACA) provides standards for "security and control, food service, sanitation and hygiene, medical and health care, inmate rights, work programs, educational programs, recreational activities, library services, records and personnel issues." Id.

352 See id.; see also Texas Dep't of Crim. Just., Solicitation, Offer and Award, Continued Award 6 (visited Apr. 4, 2000) <http://www.tdcj.state.tx.us/finance/purch&lease/billy%20moore-rfp.pdf> [hereinafter Texas Model Contract] (discussing general duties and obligations of contractor).

tation for Corrections requires ACA compliance for accreditation; this, in turn, helps private firms attract investors.[353] In the prison reform cases of the 1960s and '70s, the ACA manual became a "leading resource" for federal courts.[354] Thus the ACA, rather than government agencies, may effectively establish correctional standards.[355]

In addition, the American Medical Association, the National Sheriffs' Association, the American Public Health Association, and the National Fire Protection Association have all published either guidelines or standards governing such things as medical care, sanitation, and safety in prisons.[356] Thus, although "at the beginning of the 1970s, one could only guess what an effective jail or prison might look like; by the mid-1980s there were standards everywhere defining acceptable policies, procedures, and practices for virtually every facet of institutional life."[357] Such standards not only define measurable, objective management norms for corrections officials to meet, but they attempt to give concrete meaning to the constitutionally required minimum conditions in prisons.[358]

For example, the constitutional prohibition against "cruel and unusual punishment" has been interpreted judicially to forbid "deliberate indifference" to the medical needs of prisoners.[359] The translation of that obligation into more specific operational terms occurs through a process mediated by private actors:

> [S]tate statutes or regulations generally require correctional agencies to provide 'adequate' health care; the American Correctional Association outlines service and structural requirements in about

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353 Although not dispositive, compliance with ACA standards may also help private firms defend against civil rights litigation arising under 42 U.S.C. § 1983 (1994). Federal courts have held private actors liable for violations of prisoners' constitutional rights pursuant to § 1983. See, e.g., West v. Atkins, 487 U.S. 42, 54 (1988) (holding that physician employed on contract basis by prison can be held liable). Federal courts have relied on compliance with ACA standards as an indication of the acceptability of prison conditions. See Lilly & Knepper, supra note 347, at 161; cf. Women Prisoners v. District of Columbia, 93 F.3d 910, 929 (D.C. Cir. 1996) (noting district court reliance on private standards in determining constitutional violations, but overturning district court's conclusion on this point). However, the Supreme Court has made clear that ACA standards do not establish a constitutional minimum. See Bell v. Wolfish, 441 U.S. 520, 544 n.27 (1979).

354 Feeley & Rubin, supra note 340, at 163.

355 See Lilly & Knepper, supra note 347, at 161.

356 See Michael Keating, Jr., Public over Private: Monitoring the Performance of Privately Operated Prisons and Jails, in Private Prisons and the Public Interest, supra note 112, at 130, 139.

357 Id.

358 Efforts by the ACA actually to establish the constitutional minimum have, however, failed. See *Bell*, 441 U.S. at 544 n.27 ("[W]hile the recommendations of these various groups [such as the ACA] may be instructive in certain cases, they simply do not establish the constitutional minima.").

359 See *West*, 487 U.S. at 46.

> four pages of standards and commentary; and the American Public Health Association provides a whole volume of standards covering every conceivable aspect of correctional health care.[360]

Thus, contracting out the management of prisons represents a step on the continuum of public/private interdependence, rather than a wholesale shift from public to private control. Consistent with arguments supporting privatization in other contexts, advocates of private prison management claim that taking the additional step will increase both efficiency and quality: Motivated by profit and unburdened by civil service employment constraints, private companies promise to build prisons more quickly and at lower cost than public agencies can.[361] In an era of significant prison expansion and skyrocketing prices, privatization offers the taxpayer very attractive cost savings. One can also imagine indirect benefits to prisoners: Private prisons might, for example, alleviate overcrowding, and competition for lucrative government contracts might result in higher quality prison programs and services.

Privatization could, moreover, capitalize on private ingenuity.[362] Empirical and historical evidence suggests that reliance on private actors does have at least the potential to produce innovation.[363] Private entrepreneurs in the prison environment have expanded the functions of probation by developing treatment programs for inmates, proposing supervised release for parolees, and introducing sophisticated technologies for surveillance of probationers.[364] Increasing the private role may facilitate new approaches to old problems—it can spur care providers to find "different" ways to do their jobs, especially when government, in its capacity as purchaser, specifies that it is looking for new approaches and not just cost savings.[365]

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360 Keating, supra note 356, at 140. The standards are meant to apply to institutions of all varieties. "Specific application in a particular facility requires that the standards be refined and tailored to local needs." Id.

361 Up to two-thirds of a prison's operating costs are personnel related. See Kevin Acker, Off with Their Overhead: More Prison Bars for the Buck, Pol'y Rev., Fall 1999, at 73, 73.

362 Malcolm Feeley's example of the technological and treatment innovations developed by private contractors in prisons illustrates this potential. See Malcolm M. Feeley, The Privatization of Punishment in Historical Perspective, in Privatization and Its Alternatives 199, 216-17 (William T. Gormley, Jr. ed., 1991).

363 See id.

364 See id. Not all of these programs may be salutary in effect. Feeley argues that private intervention has expanded intermediate levels of punishment and increased the state's capacity to apply the criminal sanction. See id. at 220.

365 See Michael O'Hare et al., The Privatization of Imprisonment: A Managerial Perspective, in Private Prisons and the Public Interest, supra note 112, at 107, 109. O'Hare cites a case study of youth services in Massachusetts for the proposition that privatization can force different patterns of information flow by opening up providers to sources of

2. Accountability

However, as with health care delivery, the private role in incarceration poses serious accountability concerns. First, and most fundamentally, some commentators argue that contracting out the incarceration function enables the state to abdicate its responsibility to punish.[366] That is, regardless of the efficiencies to be gained, a "liberal ethical society" simply ought not delegate incarceration to private companies.[367] For the most part, however, the debate over private prisons has assumed the legitimacy of contracting out and focused instead on the conditions under which privatization will realize the promised cost savings.[368] For many scholars, then, technocratic problems of system design matter most. Less prominent, if they arise at all, are questions about how contracting out affects due process, rationality, public participation, openness, and accountability—issues that might be relevant to administrative law scholars.

Setting to one side ethical or symbolic objections, private prisons still raise significant accountability problems. The ultimate beneficiaries of the incarceration function, whether taxpayers, prisoners, or both, face considerable obstacles to meaningful oversight. The typical taxpayer encounters few opportunities or incentives to monitor conditions in prisons. Although prisoners may file suits alleging violations of their constitutional rights, and while families and advocates of prisoners may help to monitor conditions in prisons, the relative invisibility and low moral status of the prison population makes prisoners

information and expertise outside the hierarchy of tight government control. In this case, youth service providers began to consult a broader network of psychologists, educators, and social workers instead of channeling problems up the chain of command to the agency and the legislature. See id. at 119-20.

366 See DiIulio, supra note 112, at 174-76.

367 Sharon Dolovich, The Ethics of Private Prisons 75 (Nov. 1999) (unpublished draft on file with the *New York University Law Review*) (framing objection to privatization in "expressivist" terms and arguing that choice to privatize prisons advances "objectionable normative vision of the state"). Many people have a viscerally negative reaction to the idea that some government functions—those they view as symbolically important or inherently governmental—might be contracted out to private parties. Some draw the line at what they consider "core" governmental functions, including foreign affairs, tax collection, national defense, and policing. See Oliver E. Williamson, Public and Private Bureaucracies: A Transaction Cost Economics Perspective, 15 J.L. Econ. & Org. 306 (1990) (explaining why foreign affairs ought not to be privatized).

368 Scholars tend to adopt a "consequentialist" approach to prison privatization, meaning that their objections to privatization are motivated by a concern about the consequences of contracting out. That is, if it were possible to ensure favorable consequences, such as cost savings without a concomitant decline in quality, they might favor privatization. Those who support privatization on such instrumental, rather than ideological, grounds are advocates of what one scholar calls "pragmatic privatization." See Harvey Feigenbaum & Jeffrey R. Haig, The Political Underpinnings of Privatization: A Typology, 4 World Pol. 185, 193-94 (1994).

especially vulnerable and heightens the need for accountability.[369] Finally, although it represents the enforcement end of criminal regulation, incarceration is unlike other enforcement processes in which private actors play a role. Running a prison involves something more than enforcement: It confers on private actors a powerful combination of policy making, implementation, and enforcement authority in a setting rife with the potential for abuse.

As with nursing homes providing health care, the private provider in this example is one step further removed than a public agency from direct accountability to the electorate.[370] The incarceration function, like quality health care, proves difficult to specify.[371] Finally, as with many instances of for-profit service provision, the prison example suggests potential conflicts of interest between traditionally private and public goals. The private interest in maximizing profits may conflict with the public interest in sound correctional policies: Private managers could choose to lower costs by minimizing staff, hiring underqualified guards, or providing minimally adequate but nonetheless substandard medical care. They confront numerous incentives and opportunities to cut corners and quality in ways that are difficult to monitor and harder still to press in a civil rights action.

In light of such concerns, legal commentary on private prisons has focused on two traditional mechanisms for limiting private discretion: the nondelegation doctrine (claiming that it is unconstitutional to delegate prison management to private, for-profit firms) and the state action doctrine (claiming that private prison managers are public actors bound by constitutional constraints).[372] Although both go some distance toward constraining private actors, they prove unsatisfying as the exclusive accountability mechanisms in the prison context.

For example, the constitutionality of a private delegation turns on how the government structures its relationship with the delegate. If the state assigns only management of the prison to a private company

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369 For a description and historical analysis of the procedural mechanisms available to prisoners, including writs of habeas corpus, constitutional claims, and suits pursuant to the Civil Rights Act, see Feeley & Rubin, supra note 340, at 31.

370 This raises a concern about democratic accountability analogous to that voiced by Justice O'Connor in New York v. United States, 505 U.S. 144, 168-69 (1992) (expressing concern about citizen confusion where citizen could not identify level of government responsible for policy).

371 See O'Hare et al., supra note 365, at 112 ("Indeed, information flow, product specification, and control are the critical factors in the managerial analysis of privatization . . . .").

372 See Robbins, supra note 115, at 913-14 (stating that prison privatization raises important legal issues, including state action and delegation problems); see also Joseph E. Field, Making Prisons Private: An Improper Delegation of a Governmental Power, 15 Hofstra L. Rev. 649, 655-56 (1987) (same).

but retains ultimate rulemaking and adjudicative authority for itself, the delegation will likely survive constitutional scrutiny.[373]

This nondelegation analysis assumes that policy making and implementation are easily divisible and that the two functions might be allocated to different authorities. In practice, the distinction is less clear. Private prison officials and private guards exercise discretion over every aspect of a prisoner's daily experience: meals, health care, recreation, cell conditions, transportation, work assignments, visitation, and parole. Private prison officials determine when infractions occur, impose punishments, and, perhaps most significantly, make recommendations to parole boards.[374] Their discretion affects prisoners' most fundamental liberty and security interests. Under these circumstances, the distinction between day-to-day management and ultimate rulemaking and adjudicative power blurs the line between the policy-making and implementing functions.[375] Although an agency may retain the authority to review, accept, or reject rules proposed by the private provider, the provider interprets and put into operation those rules, giving them their practical meaning.

Thus, despite the theoretical potential for an agency to reject a provider's rule, or the availability of judicial review, authority over day-to-day operation confers upon the private manager a "governmental" power to both legislate and adjudicate. Formal oversight might assure us of the regime's constitutionality, but it offers little comfort that the public/private arrangement in the prison context is adequately accountable. Moreover, it says little about the soundness of the correctional policies at work.

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373 Robbins's study exhaustively examined prison privatization and reached this conclusion. See Robbins, supra note 115, at 922-25 (using three prong test found in Todd & Co. v. SEC, 557 F.2d 1008 (3d Cir. 1977) (holding that federal Maloney Act did not unconstitutionally delegate governmental power to private securities associations)). Robbins examines state delegations of rulemaking as well, emphasizing that such delegations are constitutional as long as the agency retains authority to "accept, reject, or modify" private rules. Id. at 941-42. In terms of adjudication, where regulations delegate adjudicative power to private parties, state courts generally invalidate them where there is no provision for judicial review. See id. at 942-43.

374 See Field, supra note 372, at 661.

375 From a management perspective, focusing on the public/private divide itself creates obstacles to creative institutional reform:

> The problem, then, is not to get the public-private line between the parts of the business of corrections "in the right place once and for all." Rather, the challenge is to define a specific set of benefits that correctional institutions are supposed to produce and continuously to seek new opportunities to relocate the boundary between public and private organizations in a manner that will provide the benefits being sought.

O'Hare et al., supra note 365, at 110.

However, while nondelegation challenges to prison privatization are likely to fail, other measures have been somewhat successful at constraining private discretion. For example, private officials have been held liable for constitutional deprivations pursuant to section 1983 of the Civil Rights Act, and have been held ineligible for qualified immunity.[376] Nonetheless, formal oversight and legal constraints can go only part of the way toward ameliorating the risk of abuse and inadequate care.

In addition to governmental actors, private parties and nontraditional mechanisms may play useful oversight roles in the prison context. The already powerful presence of private standard setting could be further exploited, for example, through contract. States could require compliance with both procedural and substantive standards that might otherwise be inapplicable or unenforceable against private providers.[377] The model contract for private prison management drafted by the Texas Department of Criminal Justice (TDCJ) demands, for example, that contractors comply with constitutional, federal, state, and private standards, including those established by the ACA and the National Commission of Correctional Health Care Standards.[378] Contractors must certify that training provided to personnel is equal to that for state employees,[379] and they must meet numerous performance standards concerning security, meals, and education.[380]

The model contract states, among other things, that the contractor shall "continually conduct self-monitoring, utilizing a comprehensive self-monitoring plan approved by TDCJ."[381] This is equivalent to requiring a company to adopt a significant management reform. The contract also requires that private contractors establish performance measures for rehabilitative programs and develop a system to assess achievement and outcomes. Absent enforcement, these detailed provisions are meaningless. Admittedly, many of them leave considerable room for interpretation, as with the description of limited situations in which personnel may use force to subdue prisoners.

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376 See Richardson v. McKnight, 521 U.S. 399, 412 (1997) (holding that private prison guards are not entitled to qualified immunity from suit by prisoners charging violations of Civil Rights Act, 42 U.S.C. § 1983 (1994)).

377 See Keating, supra note 356, at 138-41.

378 See Texas Model Contract, supra note 352, at 5.

379 See id. at 12 (stating that employees must be trained pursuant to TDCJ training requirements).

380 See id. at 12, 15, 18 (setting standards for security, meals, and education, respectively). The contract contains specifications for education, see id. at 32 (requiring, among other things, 65% pass rate for GED), vocational training, see id. ex. J.6. at 86 (mandating that 20% of offender population shall be enrolled in and attend vocational training), and even the percentage of different types of books in the library, see id. at 25-26.

381 Id. at 45.

Nonetheless, the contract presents an opportunity for TDCJ to regulate contractors extensively and to demand compliance with standards that even government facilities may not meet.[382] In addition, lending institutions motivated to protect their investment, and insurers wishing to minimize risk, may act as third-party regulators over private prison operators. As a condition of the loan or policy, for example, these third-party regulators might require that guards and officials submit to training or that prisons officials develop detailed management plans.[383]

As in other contexts, mandatory disclosure could serve as one among other accountability mechanisms.[384] State governments could require firms to publish statistics on inmate graduation rates from training or rehabilitation programs, or demand publication of statistics on illness or recidivism. The supervising agency could facilitate third-party participation in oversight by requiring independent monitoring or auditing of prisons by certified professionals. A statute, regulation, or contract might stipulate that prison officials hire only guards certi-

382 Moreover, the terms appear favorable to the agency and do not seem to undermine its concurrent regulatory authority over the contractor. The contract also provides for inspection authority, access to records, and entry to the facility at any time. See id. at 52. TDCJ may terminate contracts for a variety of reasons, including material failure to comply with any covenant, condition, or agreement or TDCJ policy. See id. at 65 (listing terms that constitute default by contractor). TDCJ's remedies for the contractor's breach are extensive, see id. at 67 (providing for liquidated damages in event of default), but the contractor's sole remedy for TDCJ's breach is payment for services furnished, see id. at 68. Finally, although all contract changes must be mutually agreed upon, the contract authorizes TDCJ to amend its terms unilaterally when "judicial decisions, settlement agreements, statutes, regulations, rules and decisions of federal and state courts and governing agencies require changes or amendments" to the contract. Id.

383 The Supreme Court recently acknowledged the potential role of market forces in the private prison context when it held that private prison guards are not entitled to qualified immunity from suit by prisoners charging a violation of 42 U.S.C. § 1983 (1994). See Richardson v. McKnight, 521 U.S. 399, 412 (1997). The Court might have been too optimistic in reasoning that competitive marketplace pressures will ensure appropriate force—"a firm whose guards are too aggressive will face damages that raise costs, thereby threatening its replacement" and "a firm whose guards are too timid will face threats of replacement by other firms with records that demonstrate their ability to do both a safer and a more effective job." Id. at 409. However, a variety of market mechanisms, together with other measures, might prove helpful.

384 See Paul R. Kleindorfer & Eric W. Orts, Informational Regulation of Environmental Risks, 18 Risk Analysis 155, 156-57 (1998) (discussing disclosure in informational regulatory schemes); Richard C. Rich et al., "Indirect Regulation" of Environmental Hazards Through the Provision of Information to the Public: The Case of SARA, Title III, 21 Pol'y Stud. J. 16, 31 (1993) (suggesting proactive risk communication strategy for environmental hazards). Federal statutes such as the Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. §§ 11001-11050 (1994), and state initiatives such as California's Proposition 65, passed at the November 4, 1986 general election and implemented as the Safe Drinking Water and Toxic Enforcement Act of 1986, Cal. Health & Safety §§ 25249.5-25249.13 (West 1999), require the industry to disclose the use of toxic chemicals.

fied by independent training programs. Professionals within the prison (for example, medical personnel) might have sufficient institutional power and independence to perform a critical role in maintaining health standards. To insulate them from the wrath of the private employer, such personnel might be hired directly by the state agency. States might also enlist the help of independent prisoners' rights groups by granting them standing to sue for violations of any requirements stipulated in the statute or contract.[385]

From this example we learn two things: Not only is there a long history of private involvement in ostensibly "public" prisons, but further privatization will not necessarily lead to a net loss of accountability. An exclusive preoccupation with traditional constraints blinds us to the possibility of an alternative mix of measures. Policymakers may choose, in the end, not to privatize prisons, but to the extent that there is something promising about private prison management, an exclusive focus on the dangers of private participation makes exploring that promise impossible. The application of constitutional limits to private managers may help to control abuses but a range of alternative accountability mechanisms might better serve to both control risks and facilitate sound correctional policies.

C. Regulation

Even if the reader is satisfied that service provision reflects public/private interdependence, she might remain skeptical about the more coercive government functions associated with traditional regulation. After all, if government does not set and enforce regulatory standards, who does? However, close investigation of the regulatory process reveals that private actors play crucial roles in policy making, implementation, and enforcement. By this I mean not merely that interest groups pressure legislators and agency officials or that regulated industries seek to capture their regulators, but, rather, that a variety of actors play unexpected and facilitative roles in the regulatory process as well. As we shall see, the extent and variety of private participation is surprising. The examples below continue to drive home the crucial lesson of combining CLS and public choice theory—that there is neither a purely private nor a purely public realm.

Nonetheless, important differences between the service provision and regulatory contexts remain. Although enforceable contracts have appeared recently in some areas of regulation, formal contracting is

[385] Such contracts may already be a source of third-party beneficiary rights. See Owens v. Haas, 601 F.2d 1242, 1250 (2d Cir. 1979) (holding that federal prisoner benefiting from contract between federal government and Nassau County may sue under contract).

rare in the regulatory setting.[386] Instead, although substantial, private participation in regulation appears subordinate to agency authority. For example, private actors self-regulate subject to agency supervision, voluntarily set standards that agencies adopt, and supplement agency enforcement efforts with their own. Sometimes Congress authorizes, or agencies undertake within their enforcement discretion, "contract-like" approaches to regulation, whereby agencies formally negotiate agreements with stakeholders. Still, these experiments are infrequent. Moreover, the private role in these processes almost never displaces the agency's formal role as authoritative decisionmaker.

At the same time, private actors do exercise decision-making power in regulatory contexts, whether informally or through more formally structured stakeholder processes, and their participation causes commentators acute concern.[387] Indeed, although scholars might welcome private actors as partners in service delivery, and tolerate the additional accountability problems private participation poses in those contexts, they might nonetheless look askance at the private role in regulation. From a traditional administrative law perspective, excessive reliance on private actors, not to mention the prospect that the agency might tie its hands through enforceable agreements, virtually invites the agencies to abdicate their statutorily assigned responsibility to regulate, which strikes administrative law scholars as fundamentally undemocratic. This anxiety clearly manifests itself in administrative law theory. Recall that public choice theory, for example, expects self-interested groups to use the administrative process to implement legislative deals:[388] From a public interest or civic republican perspective, that possibility justifies insulating the agency from private influence; even a pluralist might argue for rules to regulate and equalize private access. Typically, however, the retention of formal authority in the agency satisfies the administrative law demand for accountability.

As we shall see, this traditional administrative law response makes at once too little and too much of the private role in the regulatory process. First, by assuming that private parties are dangerous,

386 See J.B. Ruhl, How to Kill Endangered Species, Legally: The Nuts and Bolts of Endangered Species Act "HCP" Permits for Real Estate Development, 5 Envtl. Law. 346, 373-75 (1999).

387 See, e.g., Mark Seidenfeld, Empowering Stakeholders: Limits on Collaboration as the Basis for Flexible Regulation, 41 Wm. & Mary L. Rev. 411, 500 (2000) ("[M]any potential problems with empowerment of stakeholders as a means of creating collaborative government . . . are likely to limit its usefulness to select regulatory contexts . . . .").

388 See supra Part II.B.

administrative law overreacts with the impulse to constrain, thus failing to appreciate the diversity of private contributions to the regulatory enterprise. Even if, consistent with rational actor theory, private actors are motivated only by self-interest, they might nonetheless have something to offer the regulatory process; conceivably, they could contribute to an effective and accountable regulatory regime.

Ironically, administrative law also makes too little of the private role by settling for formal agency oversight as an accountability guarantee. Formal, traditional checks alone might be inadequate to control the risks associated with public/private interdependence in regulation. This points us toward alternative accountability mechanisms emanating in part from private actors themselves. To some extent, informal agreements, norms, market mechanisms, third party oversight, and even formal contract, could conceivably augment accountability. While these complementary measures may not satisfy everyone, surely they are worth exploring—and without an appreciation of public/private interdependence they remain invisible.

1. Regulatory Standard Setting

a. Traditional Standard Setting. The mere fact of private participation in standard setting[389] should not be surprising, since notice-and-comment rulemaking under the Administrative Procedure Act specifically grants private parties significant opportunities to exert their influence on agency decision making.[390] Although that influence can be substantial, it operates at arm's length.[391] Ultimate responsibility for notice-and-comment rulemaking lies with the agency.[392] The APA, as interpreted over time by the federal judiciary, demands that the agency defend the rationality of its chosen rule and build a record

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389 In this section, I refer to health, safety, and environmental standards, not economic regulation in the form of ratemaking. See Hamilton, supra note 196, at 455 (defining "regulatory standards" similarly).

390 See Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706 (1994). In addition to the opportunity to file comments, agencies must provide adequate support for rules in the form of a written record. The agency's handling of the arguments and data it rejects must be sufficient to survive sometimes rigorous "arbitrary and capricious" review mandated by the APA. Id. § 706(2)(a); see, e.g., Competitive Enter. Inst. v. National Highway Traffic Safety Admin., 956 F.2d 321, 327 (D.C. Cir. 1992) (finding that failure to consider safety implications of decision not to lower fuel efficiency standards arbitrary and capricious). In other cases, the agency must meet a "substantial evidence" test. See, e.g., Corrosion Proof Fittings v. EPA, 947 F.2d 1201, 1213-14 (5th Cir. 1991) (holding that EPA's decision to exclude evidence did not merely come under "arbitrary and capricious" standard of review, but also had to meet "substantial evidence" standard mandated by 15 U.S.C. § 2618(c)(1)(B)(i)).

391 See Stewart, supra note 57, at 1723.

392 Public choice theory advances the alternative view that judicial review gives effect to the legislative bargain struck by interest groups.

indicating that it considered alternatives, responded to important arguments, and weighed conflicting data.[393] Judicial review ensures that agency decisions are not purely the product of capture.[394] Although political judgments may provide the basis for a given rule, the safeguard of judicial review discourages agencies from relying on naked political judgments unsupported by evidence and reason.[395]

This account of rulemaking, while often accurate, oversimplifies. In truth, agencies routinely promulgate rules developed, not internally, but by private parties. Private standard-setting groups are so well integrated into the standard-setting process that their role appears to give neither administrators nor legal scholars pause. However, by adopting privately generated standards after a cursory notice and comment process, agencies may effectively (if not formally) share their standard-setting authority.[396] In this sense, even traditional regulation illustrates public/private interdependence.

Numerous nongovernmental organizations, including professional societies such as the Society for Automotive Engineers and the American Society of Mechanical Engineers, and nonprofits, such as the American Society for Testing and Materials, publish health, safety, and product standards; private standard setting plays a prominent role in numerous industries, including data and voice communications, software, and consumer electronics.[397] Although nearly invisible to

393 See, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 49-57 (1983) (discussing National Highway Traffic Safety Administration's analysis of National Traffic and Motor Vehicle Safety Act of 1996 and noting that agency is required to explain available evidence, weigh costs and benefits, and defend rationality of chosen rule).

394 See Macey, supra note 61, at 224 (arguing that judicial review inevitably also checks legislative excess by encouraging passage of public regarding legislation); see also Cass R. Sunstein, Legal Interference with Private Preferences, 53 U. Chi. L. Rev. 1129, 1134 (1986) (claiming that much of administrative law can be understood as effort to ensure that government action reflects some kind of deliberation, rather than mere aggregation of preferences).

395 The threat of judicial review has an enormous impact on the way agencies construct their records. See Richard J. Pierce, Jr., Rulemaking and the Administrative Procedure Act, 32 Tulsa L.J. 185, 192-93 (1996) (noting effects of judicially imposed obligations on rulemaking records).

396 See Hamilton, supra note 196, at 456. There is a long tradition of agency incorporation of privately established health, safety, and product standards. Influential private standard setting groups include the American Society for Testing and Materials, the National Fire Protection Association, and the American Society of Mechanical Engineers. Some standard setting groups are diverse membership organizations, such as the National Fire Protection Association, which is comprised of manufacturers, professionals, and government officials. Others, such as the American Petroleum Institute, are trade associations. See generally Franco Furger, Accountability and Systems of Self-Governance: The Case of the Maritime Industry, 19 Law & Pol'y 445 (1997) (citing numerous standard setting organizations).

397 See Lemley & McGowan, supra note 39, at 753-54 (describing high technology standard setting and process by which privately generated products are transformed into inter-

the public, private organizations generate thousands of industrial codes and product standards.[398] Agencies incorporate these national consensus standards by reference,[399] and state and governments routinely adopt them.[400] These standards have the potential for enormous economic and social influence, affecting the safety of the products we buy, the risks we face in the workplace, the nature of materials we surgically insert in our bodies, and the quality of our natural environment. In some cases, legislation directs agency officials to adopt such standards, as with OSHA in its early years.[401] Congress not only recognizes but endorses this practice. The National Technology Transfer and Advancement Act of 1995, for example, requires federal agencies to use voluntary consensus standards in certain activities as a means of carrying out policy objectives unless the use of those standards would be inconsistent with applicable law or otherwise impractical.[402]

Thus, the reality of much regulatory standard setting belies the model of an insulated expert agency independently making judgments

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national standards by organizations such as International Electrotechnical Commission and Institute for Standards Organization (ISO)).

398 See James W. Singer, Who Will Set the Standards for Groups That Set Industry Product Standards?, 12 Nat'l J. 721, 721 (1980).

399 See Hamilton, supra note 196.

400 See Singer, supra note 398. States and cities also incorporate voluntary standards into building codes. For example, the National Fire Protection Association (NFPA) promulgates the National Electric Code (NEC) through a consensus process at the NFPA's annual meeting. The NEC is routinely adopted by state and local governments with little or no change. The NEC is also relied upon by many private organizations in setting standards of acceptability. Products not in conformity with the NEC might not get listed by private certification laboratories, such as Underwriters Laboratories, and might not be used by electrical contractors or distributors. See Kurt J. Lindower, Noerr-Pennington Antitrust Immunity and Private Standard-Setting: *Allied Turd & Conduit Corp. v. Indian Head, Inc.*, 58 U. Cin. L. Rev. 341, 341 (1989).

401 Among the agencies that incorporate private standards by reference are the Food and Drug Administration, the Nuclear Regulatory Commission, the Federal Aviation Administration, and the Occupational Safety and Health Administration (OSHA). This was the primary method for establishing OSHA standards in the years after the agency was first created. See Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (codified as amended at 29 U.S.C. §§ 651-678 (1994)). The Act directed the Secretary of Labor to promulgate any national consensus standard unless he determined that it would not result in improved safety or health. See Sidney A. Shapiro & Thomas O. McGarity, Reorienting OSHA: Regulatory Alternatives and Legislative Reform, 6 Yale J. on Reg. 1, 25 (1982) (citing then-current version of 29 U.S.C. § 651).

402 National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113, 110 Stat. 775 (codified in scattered sections of 15 U.S.C.). The Act also requires agencies to participate in the development of voluntary standards when such participation is compatible with an agency's mission and authority, priority, and budget resources. See Office of Management & Budget, Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities (Circular No. A-119, Rev., 1998), available in Westlaw, OMB-CIRCULAR Database.

in the public interest. Even seemingly independent internal agency processes rely significantly on outside experts, advisory panels, and scientific advisors.[403] Agencies lack important information about industrial practices. Government officials can only speculate about how regulations might impact individual businesses or entire industries, let alone consumers. Agency officials may fail to grasp the root of a particular regulatory problem, or strain to imagine the range of solutions to it, making it necessary to consult experts in a variety of fields. A back-and-forth between interested parties (on all sides of a particular issue) and agency officials can be crucial to the development of sound, and implementable, regulation. Indeed, informal negotiation has been the dominant model for federal policy making for many years.[404]

When agencies first adopted consensus standards, however, there were few procedural checks on the standard-setting organizations' internal processes. In the sixties and early seventies, standard-setting

[403] Several agencies, including OSHA, EPA, and the FDA, rely significantly on advisory panels of scientists and other experts. Such panels may exert enormous informal influence on agency decision making. Their activity is not limited to resolving technical disputes and achieving consensus on the state of science; instead, they often become embroiled in policy debates. See Nicholas A. Ashford, The Role of Advisory Committees in Resolving Regulatory Issues Involving Science and Technology: Experience from OSHA and the EPA, in Law and Science in Collaboration 165, 172 (J.D. Nyhart & Milton M. Carrow eds., 1983). Advisory committees may be permanent, quasipermanent, or ad hoc. They may be broadly representative of diverse interests (OSHA's permanent advisory committee known as the National Advisory Committee on Occupational Safety and Health, for example), or limited to particular kinds of experts (such as the Environmental Protection Agency's Science Advisory Board). See id. at 171-72. Although formally chartered advisory panels to federal agencies are subject to the open meeting and balanced representation requirements of the Federal Advisory Committee Act, 5 U.S.C. app. §§ 1-15 (1994), and to conflict of interest rules, expert advisory committee members may experience conflicts of interest and be vulnerable to pressure from outsiders. Even financial disclosure requirements cannot prevent interested parties from lobbying panel members or supplying them with flawed or self-interested technical information. For these reasons, some commentators are troubled by regulatory reform bills that would require regulations to be vetted by a peer review group of scientists. See, e.g., The Science Integrity Act, H.R. 3234, 105th Cong. (1998) (requiring "peer review of scientific data used in support of federal regulations, and for other purposes"); The Sound Sciences Practices Act, H.R. 2661, 105th Cong. (1997) (seeking to establish "peer review of standards promulgated under the Occupational Health and Safety Act of 1970"); see also Kenneth John Shaffer, Improving California's Safe Drinking Water and Toxic Enforcement Act Scientific Advisory Panel Through Regulatory Reform, 77 Cal. L. Rev. 1211, 1213 (1989) (noting that many critics see supposedly disinterested expert panel as "highly politicized and sometimes ineffective decision-making body whose decisions seriously threaten both public health and the state's economic welfare").

[404] See Philip J. Harter, Fear of Commitment: An Affliction of Adolescents, 46 Duke L.J. 1389, 1389 (1997) (referring to consultation and negotiation between agencies and affected interests as "an essential ingredient of the administrative process if not of democracy itself," and citing support for proposition that informal processes have long dominated both adjudication and rulemaking).

organizations failed to guarantee balanced representation on their technical committees or provide "due process" to interested parties.[405] Larger firms tended to exert a disproportionate influence over standards that often ensured favorable treatment for their products.[406] To outsiders, the process appeared secretive, industry-dominated, and rife with the potential for anticompetitive behavior.[407]

Although unease about private standard setting has not entirely abated, many standard-setting organizations have taken steps to ensure compliance with due process, and have opened their meetings to public view.[408] For example, the American Society for Testing and Materials (ASTM) has become a pseudoagency, with "balanced" committees and subcommittees comprised of representatives with different interests whose responsibility is to draft standards, a central staff to monitor their work, and an appeals process to ensure compliance with procedures.[409] Undeniably, technical committees still frequently fail to include sufficient consumer, small business, and labor interests,[410] and committees may continue to be driven primarily by economic concerns, but they have moved in the direction of openness and balanced representation.

This evolution has been influenced by extensive interaction with agency officials.[411] At OSHA's inception, for example, the American National Standards Institute (ANSI) entered a working agreement with the agency to provide technical support for the development, issuance and application of standards.[412] ANSI functions as clearinghouse and oversight body for standard setting organizations; it

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405 See Andrew F. Popper, The Antitrust System: An Impediment to the Development of Negotiation Models, 32 Am. U. L. Rev. 283, 284 (1983) (citing Hydrolevel Corp. v. American Soc'y of Mechanical Eng'rs, 635 F.2d 118 (2d Cir. 1980), aff'd, 456 U.S. 556 (1982), as example of anticompetitive behavior by American Society of Mechanical Engineers in consensual private standard setting process).

406 See Singer, supra note 398, at 723 (claiming that only 14.6% of American Society for Testing and Materials (ASTM) membership is individual members, including consumers, ecologists, and consultants, but that ASTM has financed consumer participation in some of its committees).

407 See generally Popper, supra note 405; Singer, supra note 398.

408 See Hamilton, supra note 196, at 463-64.

409 See id. at 462.

410 See id. (citing efforts by private group to diversify committee membership, even if participation required funding participants or providing them with technical expertise).

411 See Abramson, supra note 8, at 173 (pointing out that Consumer Product Safety Commission and Office of Management and Budget have tried to influence the procedures used for developing privately generated standards).

412 The American National Standards Institute (ANSI) does not write standards itself; rather, it develops them by soliciting submissions from knowledgeable corporations or individuals or by forming committees from a pool of member groups, including technical and professional societies and trade associations. See Mark A. Rothstein, Occupational Safety and Health Law § 56 (4th ed. 1998).

certifies that standards comply with procedural requirements.[413] As part of the working agreement, OSHA representatives in turn participated on ANSI committees and provided ANSI with information and research reports.[414] Similarly, the Consumer Product Safety Commission cooperates extensively with private standard-setting groups, "expending a significant amount of its resources participating in and monitoring the development of voluntary standards."[415] Thus agencies have not been supplanted by private standard setting bodies; they enjoy a much more reciprocal relationship.

While in one view the public/private relationship in this context might be cause for alarm, the interaction—while demanding close scrutiny—produces important benefits. However, given the extent of private participation in standard setting, it seems naive to point to the mere fact of agency incorporation as sufficient evidence of accountability. At the same time, eliminating altogether the private role in standard setting would sacrifice the many benefits of private expertise. Surely the right response lies somewhere in between, or beyond, these options.

Perhaps standard-setting groups should adhere to at least some internal procedural rules designed to promote information disclosure, reasoned decision making, and fairness. But these might best be encouraged through interaction with agency officials, and allowed to develop idiosyncratically, depending on the nature of the standard-setting group, rather than imposed uniformly by Congress. Perhaps, the tradition of professionalism in technical standard setting might deter some of the temptation for self-serving behavior, but perhaps not. The point is simply that we know little about how such informal checks might work; as an informal accountability mechanism, professionalism is invisible from a traditional administrative law perspective.[416] Acknowledging that regulatory standards, even those officially promulgated by agencies, depend significantly on private actors might make us skeptical about the rulemaking process, or alternatively, more confident about the technical basis of rules. At a minimum, it invites a rethinking of how public/private interaction might help to produce accountability in the regulatory process.

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413 See id.

414 See id.

415 Kathleen M. Sanzo, Voluntary Standards for Consumer Products, in Consumer Product Safety Commission: Current Developments in Law and Practice B-1, B-1 (ABA Ctr. for Continuing Legal Educ. Nat'l Inst. May 22, 1997), available in Westlaw, N97CPSB ABA-LGLED.

416 See id.

b. Voluntary Self-Regulation. Voluntary private standard setting often operates on a parallel track to government regulation, playing a powerful role in establishing the de facto standards that govern a particular industry or activity. Whether self-regulation supplants government regulation or supplements it, however, depends on the government's posture. An agency may encourage self-regulation by exercising its enforcement discretion favorably whenever a self-regulating firm technically violates statutory or regulatory standards.[417] The widespread use of such discretion could turn private regulation into de facto government regulation, with little public access to the process.

An effective self-regulatory system depends on a network of relationships within the relevant industry, sometimes between a trade association and member firms as well as between firms and their suppliers. A typical self-regulatory initiative in the environmental field, for example, combines an environmental management system with regular audits (sometimes performed by the firm itself, sometimes by independent professional auditors) and publication of environmental reports (sometimes to regulators only, sometimes both to regulators and to the general public). Most voluntary environmental self-regulation makes no pretense of establishing hard performance

417 There is a heated dispute in both the academic literature and in the real world of enforcement, over whether firms that engage in self-monitoring and self-auditing should be entitled to special treatment by regulators. Both the EPA and the Department of Justice have adopted policies that allow the mitigation of penalties or exercise of enforcement discretion when firms implement self-monitoring and self-auditing programs. See EPA, Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. 66,706 (1995); see also Department of Justice, Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator (July 1, 1991), quoted in EPA, Restatement of Policies Related to Environmental Auditing, 59 Fed. Reg. 38,455, 38,458 (1994) (announcing that "self-auditing, self-policing, and voluntary disclosure of environmental violations" will be treated as mitigating factors in criminal enforcement).

A separate issue is whether information revealed in the audits should be privileged and unavailable to either agencies or private actors who wish to use it in enforcement litigation. While numerous states have passed audit privilege legislation, the EPA has steadfastly refused to treat audits as privileged and has pressured states to amend their legislation. See Eric W. Orts & Paula C. Murray, Environmental Disclosure and Evidentiary Privilege, 1997 U. Ill. L. Rev. 1, 1 (stating that EPA opposes privilege for voluntary environmental audits because they believe polluters will be able to withhold evidence of environmental violations); see also Brooks M. Beard, The New Environmental Federalism: Can the EPA's Voluntary Audit Policy Survive?, 17 Va. Envtl. L.J. 1, 2 (1997) (noting that state-level efforts to afford legal protection to companies that conduct voluntary audits "strike at the heart of the enforcement policy of the [EPA]"); Lisa Koven, The Environmental Self-Audit Evidentiary Privilege, 45 UCLA L. Rev. 1167, 1186 (1998) ("In contrast to state legislatures' inclination to recognize a qualified environmental self-audit evidentiary privilege, federal agencies have consistently denied the existence of such a privilege.").

standards. Rather, it is designed to inculcate management reforms aimed at continuous improvement toward program goals that are either set by the firm or, more commonly, established by government regulation.

The chemical industry's Responsible Care program offers the best example of a voluntary system. Responsible Care consists of industry codes governing how chemical companies manufacture and distribute their products and interact with their suppliers, distributors, and consumers. Because the codes do not impose quantitative performance standards, compliance with them commits firms only to management practices and internal accountability mechanisms (such as auditing and reporting) which are designed to integrate environmental considerations into every aspect of firm decision making, from product design through distribution and sale.[418] The Chemical Manufacturers Association (CMA), the industry's trade association, enforces Responsible Care and has the power to expel noncompliant member firms.

Similar self-regulatory mechanisms exist in the international arena. For example, the Institute for Standards Organization (ISO) in Geneva has published its 14000 series, a set of environmental management standards based largely on the ISO's total quality management standards adopted in its earlier 9000 series.[419] ISO 14000 certification requires firms to assess their environmental effects and establish a management system for achieving continuous improvement.[420] Firms that adopt these standards become "ISO-certified," a characterization that can generate a number of important economic benefits to the certified firm, including lower insurance or loan rates, access to markets that demand ISO certification, potential advantages with environmentally aware consumers, and favorable treatment by domestic regulatory agencies. Indeed, domestic companies are likely to feel increasing pressure to adopt ISO standards in order to compete in the global marketplace.[421]

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418 See Jennifer Nash & John Ehrenfeld, Codes of Environmental Management Practice: Assessing Their Potential as a Tool for Change, 22 Ann. Rev. Energy & Env't 487, 499-501 (1997) (outlining requirements of Responsible Care program).

419 See Paula C. Murray, The International Environmental Management Standard, ISO 14000: Tariff Barrier or a Step to an Emerging Global Environmental Policy?, 18 U. Pa. J. Int'l Econ. L. 577, 578-79, 581-82 (1997).

420 Firms seeking certification must "inventory all of the environmental 'aspects' associated with its activities and products. It identifies those it considers 'significant' and develops a management system that sets targets, allocates resources, provides training of employees, and establishes a system for auditing." Nash & Ehrenfeld, supra note 418, at 507.

421 See Murray, supra note 419, at 579-80 ("Although the standards are voluntary, there is apprehension that certification to the standards will become de facto mandatory as orga-

Similar experiments in voluntary regulation seem to be proliferating, some at the impetus of trade associations representing particular industries (as with Responsible Care),[422] and some initiated by more heterogeneous business networks.[423] Standard-setting organizations take different forms, from broadly representative stakeholder groups[424] to industry dominated associations, but they are all, notably, nongovernmental.[425] Although the coercive element of government regulation might be missing from these regimes, "they appear to be competing with each other and possibly governments in environmen-

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nizations or countries require ISO certification for entrance into their markets."). As with Responsible Care, adopting an EMS to satisfy ISO 14000 is not a commitment to achieving specific performance standards. Certification guarantees only that a system is in place to meet a firm's goals, but it does not require firms to achieve a particular level of environmental performance. ISO certification is often proposed as an alternative to domestic regulatory standards, which impose on firms substantive, technology-based limits, as well as process and design standards. See Tom Tibor & Ira Feldman, ISO 14000: A Guide to the New Environmental Management Standards 48-75 (1996) (detailing requirements imposed on firms for ISO compliance).

422 Examples of trade associations that have embarked on self-regulatory initiatives include the American Forest and Paper Association, the National Association of Chemical Recyclers, the American Meat Institute, the Wisconsin Paper Council, the American Textile Manufacturer's Institute, and the American Petroleum Institute (API). I thank Franco Furger for sharing with me his compiled list of trade associations and initiatives. For a description of the API's Strategies for Today's Environmental Partnership (STEP) program, see Nash & Ehrenfeld, supra note 418, at 510-11. For a description of the American Forest and Paper Association's Sustainable Forestry Initiative, see id. at 511; see also Eric W. Orts, Reflexive Environmental Law, 89 Nw. U. L. Rev. 1227 (1995).

423 Examples of initiatives launched by such loosely cohesive networks include the Global Environmental Management Initiative (GEMI), the Coalition for Environmentally Responsible Economies (CERES), Business for Social Responsibility, the International Chamber of Commerce (ICC), and the Social Venture Network. Some of these initiatives were launched by citizen groups in collaboration with companies, others by financial institutions, and still others by business leaders alone. Again, I thank Franco Furger for sharing his compiled list of these initiatives. For a description of the ICC Charter on environmental management and GEMI's role in encouraging firms to adopt it, see Nash & Ehrenfeld, supra note 418, at 503-05. For a description of the CERES principles (encouraging disclosure of environmental performance), see id. at 512-16.

424 The Forest Stewardship Council (FSC), comprised of over 200 member organizations with a stake in forest management, establishes international Principles of Forest Management. The organization certifies independent certification bodies that, in turn, certify forests and forest products for compliance with the principles. As with the ISO, the FSC emphasizes management plans and certification systems rather than specific performance standards. The FSC controls its membership, allocating representation to social, economic, and environmental groups that it designates itself. See Errol E. Meidinger, "Private" Environmental Regulation, Human Rights, and Community 2-21 (Prepublication Draft 2.1 1999) <http://www.ublaw.buffalo.edu/fas/meidinger/hrec.pdf>.

425 For an overview of voluntary approaches to environmental regulation and a review of existing empirical studies, see generally Thomas P. Lyon & John W. Maxwell, Voluntary Approaches to Environmental Protection, in Economic Institutions and Environmental Policy (Maurizio Franzini & Antonio Nicita eds., forthcoming).

tal standard setting."[426] Indeed, these private standards may have a significant public impact. Although technically voluntary, standards may become de facto mandatory as countries require ISO certification for entrance into their markets.[427] That domestic regulatory agencies still possess formal authority to ignore these standards bears little on their practical import.

Not surprisingly, self-regulation raises accountability concerns. Most self-regulatory programs lack the transparency and public involvement that characterize legislative rulemaking. For example, although the CMA "enforces" Responsible Care, its enforcement process is opaque to outsiders. Notably, the trade association has never expelled a member firm for noncompliance.[428] For their part, national and international private standard-setting organizations design their own decision-making processes and committee structures with a view to balance and expertise, but in practice, balance proves elusive. Scientists and engineers dominate the ISO's subcommittees as well as its working groups, which are the bodies that actually develop ISO standards. Proposed standards move through the committee hierarchy to be proposed to the ISO membership for consensus-based adoption. The membership consists of a single representative per stakeholder country, who is often a representative of a domestic private trade association. Thus, voluntary regulation and governmental regulation work in tandem. The background threat of government-imposed standards spurs self-regulation, but self-regulation in turn can exert so powerful an influence that it effectively may supplant the government's role. Further, even when voluntary organizations try to guarantee broad representation, few public interest, environmental, or consumer groups possess either the technical capacity or the resources to participate.[429]

Even when firms expect to receive nothing more than the favorable exercise of enforcement discretion in return for voluntary compliance with a self-regulatory program, this is a significant benefit with implications for accountability.[430] The enforcement end of the

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426 Id.

427 The European Union requires ISO certification. See Murray, supra note 419, at 579.

428 See Nash & Ehrenfeld, supra note 418, at 500-01 (stating that, in United States, no Chemical Manufacturers Association member has had membership revoked, and companies are not required to release audit results).

429 See Naomi Roht-Arriaza, Shifting the Point of Regulation: The International Organization for Standardization and Global Lawmaking on Trade and the Environment, 22 Ecology L.Q. 479 (1995).

430 Although the EPA has thus far refused to accept ISO certification in lieu of compliance with domestic standards, it has signaled a willingness to exercise enforcement discretion favorably for companies that are ISO-certified. EPA's audit policy requires either an

regulatory process is subject to far less public participation than, say, notice-and-comment rulemaking: Especially at a time when courts are reluctant to review the exercise of enforcement discretion, its more frequent use to respond approvingly to voluntary regulation may undermine important public law values.[431] At the same time, self-regulation can shift the burden of monitoring to private firms and their competitors. It can, moreover, generate effective regulatory tools.[432]

The relationship between an agency and a private standard-setting venture may prove crucial to the latter's success. Agencies can lend their authority to the self-regulatory enterprise by simply allowing a private regulator to threaten that the agency will act if they do not. Simply by doing nothing, the agency may help bolster a private trade association's authority to regulate member firms.[433] Whether a self-regulatory regime is accountable depends not just on the presence of formal agency supervision, but on a number of other factors, including the internal structure of the industry itself and the institutional background against which the self-regulation arises. For example, Responsible Care is a product of the unique features of the chemical industry, including its relative maturity and stability, its vulnerability to poor publicity, and the unusually strong influence of its peak level trade association.[434]

Thus, the internal culture of an industry may be an important determinant of accountable, effective self-regulation. Certainly, in designing a public/private regime, we ought to take that culture into account. For example, the CMA's formal power to enforce Responsible Care may be less important to the program's success than informal

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Environmental Management Systems (EMS) such as ISO or a systematic audit in order to obtain some level of relief. See EPA, Position Statement on Environmental Management Systems and ISO 14001, 63 Fed. Reg. 12,094 (1998).

431 See, e.g., Heckler v. Chaney, 470 U.S. 821, 837-38 (1985) (holding unreviewable exercise of enforcement discretion by Food and Drug Administration).

432 Most self-regulatory systems designed to address environmental problems emphasize technological innovation, life cycle assessment, benchmarking, continuous improvement, and pollution prevention. Indeed, self-regulation proponents argue that these strategies, which theoretically integrate environmental concerns into every stage of product development (design, distribution, and sale), as well as every business relationship (between firms, suppliers, distributors, and customers), have flourished precisely because they were developed by private industry. See Gunningham & Grabowsky, supra note 197, at 15-16 (arguing that involvement of private sector leverages governmental influence on environmental issues).

433 See Rees, supra note 22, at 94 (showing how nuclear industry's self-regulation worked effectively because of threat of enforcement by Nuclear Regulatory Commission).

434 See Gunningham & Grabowsky, supra note 197, at 143 (highlighting relative maturity of chemical industry, trade association power, and common interests shared by companies vulnerable to negative publicity).

disciplinary mechanisms such as peer pressure and institutional norms of compliance. Empirical studies reveal that executives from leading firms pressure noncompliant counterparts at industry meetings to adopt and adhere to the industry codes.[435] Publication of the codes has also given leverage to professionals and managers within the industry who wish to take a leadership role in environmental performance.[436] The same considerations apply to ISO standards. Large visible industries with incentives to self-police can effectively pressure other industry sectors.[437]

In assessing voluntary self-regulation, administrative law scholars might be tempted to either over or underreact. Because they fail formally to displace the agency's authority to promulgate binding rules, voluntary measures might strike administrative law scholars as unproblematic. As long as an agency refuses to accept compliance with private standards as evidence of compliance with governmental standards, all will be well. But given the fact that self-regulation can establish standards that become the de facto rule, the practice merits serious consideration. At the same time, this form of private activity is not uniformly dangerous; counterintuitively, even the most seemingly private form of regulation depends on the participation of public actors. We might rely on self-regulation to a greater or lesser extent depending on contextual factors such as those analyzed by Neil Gunningham and Peter Grabosky in their study of Responsible Care.[438] Indeed, by focusing attention on industry culture, internal private rulemaking, market mechanisms, and third party auditing, voluntary self-regulation introduces alternative and supplementary sources of accountability into the regulatory process.

c. Audited Self-Regulation. In addition to the informal and voluntary roles private actors play in setting regulatory standards, Congress sometimes officially "deputizes" them as regulators, by formally delegating to them the authority to set and implement standards, subject to agency oversight.[439] These delegations have been

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435 See Nash & Ehrenfeld, supra note 418, at 501 (describing "peer pressure" as important mechanism of informal control under Responsible Care).

436 See Gunningham & Grabowsky, supra note 197, at 171 ("Responsible Care . . . provides more leverage to community relations and plant managers seeking support for outreach and environmental activities.").

437 See Roht-Arriaza, supra note 429, at 532 (stating that voluntary systems depend on incentive of large producers subject to public scrutiny to ensure that other industry sectors incur same compliance expenditures).

438 See Gunningham & Grabowsky, supra note 197, at 135-266.

439 There are numerous examples of private delegations to producer groups. Dairy farmers and handlers, as well as wheat and tobacco growers, set prices that bind dissenting industry members. Producers of other agricultural commodities not only set prices but

called "audited self-regulation" and they encompass a wide variety of private activity. For example, "audited self-regulation" is another way to describe the role that the JCAHO and NCQA play in certifying that hospitals and MCOs comply with legislative standards or regulations, as discussed earlier.[440] It also describes delegations to industries and professions that enable them to regulate themselves.[441] For example, securities exchanges and broker dealers self-regulate under the authority granted them by the Securities and Exchange Act.[442]

The Securities and Exchange Commission relies heavily on the exchanges themselves and on the National Association of Securities Dealers (NASD) to promulgate and enforce rules of conduct, as well as the securities laws.[443] Such regimes raise significant concerns about the anticompetitive effects of allowing private actors to police themselves.[444] Formal accountability mechanisms go some distance toward guaranteeing accountability, but here again, they prove limited.[445] Courts sometimes find that the exchanges or the NASD are state actors, and demand compliance with constitutional due process.[446] Still,

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establish quotas and determine unfair labor practices. Producer groups are organized as cooperatives and are exempt from antitrust law under the Capper Volstead Act, 7 U.S.C. §§ 291-292 (1994), for the same reasons unions are likewise exempt. See Krent, supra note 8, at 85-89.

440 See Michael, supra note 15, at 218-22.

441 On self-regulation by the legal profession, for example, see Abel, supra note 23, at 142-57.

442 Self-regulation by stock exchanges existed long before the Securities and Exchange Act of 1934, Pub. L. No. 291, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a-78mm (1994)), incorporated self-regulation and required the Securities and Exchange Commission (SEC) to supervise it. See Miller, supra note 197, at 869. Later, the SEC authorized broker dealers to self-regulate.

443 See Miller, supra note 197, at 869.

444 Disciplinary proceedings have been criticized for an absence of fairness and disinterested adjudication. See generally Lewis D. Lowenfels, A Lack of Fair Procedures in the Administrative Process: Disciplinary Proceedings at the Stock Exchanges and the NASD, 64 Cornell L. Rev. 375 (1979).

445 See, e.g., id.; Gabriel S. Marizadeh, Self-Regulation of Investment Companies and Advisers: A Proven Solution to a Contemporary Problem, 16 Ann. Rev. Banking L. 451 (1997); Miller, supra note 197; Smythe, supra note 197.

446 Reconciling antitrust laws with the self-regulatory scheme effectively has forced the National Association of Securities Dealers (NASD) and the exchanges to adopt administrative procedures. See Smythe, supra note 197, at 487-509 (describing accommodation of self-regulatory goals with antitrust goals); see also Miller, supra note 197, at 877 (citing Silver v. NYSE, 373 U.S. 341 (1963)). Due process challenges have been somewhat successful against the exchanges, but less so against the NASD. See, e.g., Intercontinental Indus. v. American Stock Exch., 452 F.2d 935 (5th Cir. 1971) (holding exchange to be state actor and finding due process required delisting program); Villani v. NYSE, 348 F. Supp. 1185, 1188 (S.D.N.Y. 1972), aff'd sub nom. Sloan v. NYSE, 489 F.2d 1 (2d Cir. 1973) (holding stock exchange disciplinary proceedings to be governmental functions requiring due process); see also Miller, supra note 197, at 873-78 (discussing effects of self-regulatory organizations on its members in disciplinary actions and competition). But see United

"judges [requiring] due process enforce only minimum requirements."[447] Nondelegation challenges to self-regulatory organization authority have also failed.[448] Consistent with the earlier discussion of the non-delegation doctrine, audited self-regulatory regimes have survived challenges largely because they are usually formally subject to agency oversight.[449]

There are smaller scale and less visible instances of audited self-regulation however, that add texture to our discussion of public/private interdependence, and of which legal scholars have taken little notice. Consider the California Cooperative Compliance Program (CCCP), an experiment in audited self-regulation undertaken by California's Occupational Health and Safety Administration (CAL-OSHA). The CCCP authorized unions and employers to develop and implement workplace safety requirements through collective bargaining.[450] It effectively delegated the agency's traditional inspection and enforcement role to a joint labor/management safety committee (consisting of two members each from management and labor). The agency pledged not to intervene as long as the program effectively reduced accident rates, which it did.[451]

In his nuanced study of the CCCP, Joe Rees traces the incentives, background conditions, shared norms, and other factors that help explain the program's success. Both management and labor faced strong incentives to cooperate on the safety program. Management had found CAL-OSHA's traditional inspection system inconvenient and had already begun to pay more attention to safety issues as workers' compensation costs rose.[452] At the same time, unions were motivated to cooperate with employers because they felt increasingly threatened by competition from open shops.[453] More significant than this fear,

States v. Bloom, 450 F. Supp. 323 (E.D. Pa. 1978) (holding that NASD is not governmental actor).

447 See Lowenfels, supra note 444, at 376.

448 See, e.g., Sorrell v. SEC, 679 F.2d 1323 (9th Cir. 1982).

449 For a comprehensive study of audited self-regulation, see generally Michael, supra note 15.

450 The California Cooperative Compliance Program (CCCP) predated the federal OSHA's own experiment with self-regulation in the form of the Voluntary Protection Program (VPP). The VPP allowed companies with exemplary safety records to take over the role of OSHA inspectors themselves and be exempt from regular inspections. See Rees, supra note 197, at 1. California's OSHA (CAL-OSHA) instituted the CCCP in an effort to reform the agency's adversarial, enforcement-based approach to workplace safety regulation. See id. at 1, 194-96.

451 See id. at 2 ("[A]ccident rates at [CCCP] projects were significantly lower than accident rates for comparable projects in California, and also lower than those for comparable company projects.").

452 See id. at 67, 72-74, 76.

453 See id. at 28-29, 44.

however, was the presence of an "ideology of cooperation" in construction unionism, which Rees traces to a number of socioeconomic factors that have historically bound construction unions symbiotically to their employers.[454] This alignment of interests is not surprising. For audited self-regulation to work, the affected interests must be motivated to participate.

From a traditional administrative law perspective, the retention of supervisory authority in the agency (i.e., the background threat of direct CAL-OSHA inspection) ensures accountability. And yet, Rees's sociological view further helps explain the more subtle factors, emanating from the parties themselves, and their relationships with each other, that contributed to accountability. For example, both labor and management shared important norms, practices, and experiences, which facilitated cooperation in an environment with great adversarial potential. They largely agreed, for example, on what constituted a "safety problem."[455] In addition, Rees's study demonstrates that merely enlisting private actors in self-regulation can enhance trust among them, which in turn contributes to the program's chances of success.[456]

Moreover, formal agency oversight alone did not guarantee accountability: CAL-OSHA did more than maintain its background threat of direct regulation. The agency helped instead to facilitate cooperation through the appointment of a designated compliance officer (DCO) for each job site.[457] The DCOs were carefully chosen for both their knowledge and relational skills: DCOs behaved flexibly, acting as problem solving consultants to the process rather than as mere enforcement agents. Other players contributed as well. Rees attributes the CCCP's achievements in significant part to the power and independence of professional safety engineers within the firms.[458]

Thus, the success of audited self-regulation as a regime of shared public/private authority can depend on a fragile conjunction of ingredients. The CCCP story suggests that in the absence of a strong

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454 Id. at 27-28.

455 See id. at 155.

456 The standards adopted by the labor/management teams in the CCCP not only caused accident rates to go down, but the process also cultivated greater trust among the parties. See id. at 154. Management, in particular, took steps to develop trust, encouraging worker confidence in the joint inspection committee by appointing knowledgeable and respected employees to the committee. The committee then proved credible to employees by taking visible and immediate action in response to complaints. See id. at 136-46.

457 See id. at 175-76.

458 Their influence had grown in the years prior to the institution of the CCCP, due, in part, to the initial passage of the OSHA. The statute and its safety mandate bolstered the engineers' organizational status, positioning them at a later date to play a key role in the CCCP. See id. at 103, 105.

union, management might have dominated the standard setting process, which in turn might have undermined the program's safety goals. Similarly, without direct representation on the safety committees, employees might have been skeptical of the program and might have failed to report accidents. Private firms were not motivated to control safety related costs until professional engineers were able to translate worker compensation expenses into a concept of preventable accidents. The firms might have been less likely to implement reforms without the help of an internal body of independent professional actors capable of mobilizing support for the goal of safety prevention. Had agency oversight been more remote (conforming to the typical OSHA model of occasional inspection), private firms might have escaped scrutiny. Absent a flexible compliance officer skilled in facilitating cooperation, the program might have failed entirely.

The example underscores the need to search for both informal and formal accountability mechanisms in public/private regimes. Some of these features are easier to reproduce than others. A strong union, for example, might be a pre-condition without which a similar effort would fail. The mere presence of formal agency oversight cannot guarantee that this regime is accountable, nor does the significant participation of private actors render it, ipso facto, unaccountable. This is just one illustration, however, of how accountability in standard-setting and implementation depends on a particular complement of factors, the production of which requires the engagement of both public and private actors.

d. Negotiated Rulemaking. Negotiated rulemaking serves as another example of private participation in regulation.[459] Also known as regulatory negotiation (reg-neg), it is a consensus-based approach to developing rules which grew out of the collective bargaining tradition in labor law and was introduced as a promising alternative to "ossified," adversarial notice-and-comment rulemaking.[460] After a number of agencies experimented with reg-negs and produced favorable results, Congress formally endorsed the practice, and stipulated how agencies were to use it by adopting the Negotiated Rulemaking Act in 1990.[461]

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459 See generally Negotiated Rulemaking Act of 1990, 5 U.S.C. §§ 561-570 (1994).

460 See Thomas O. McGarity, Some Thoughts on "Deossifying" the Rulemaking Process, 41 Duke L.J. 1385, 1438-40 (1992) (examining regulatory negotiation as possible technique to avoid ossification in future).

461 Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, 104 Stat. 4969 (codified as amended at 5 U.S.C. §§ 561-570 (1994)); McGarity, supra note 460, at 1438 ("Congress... enacted the Negotiated Rulemaking Act of 1990 to encourage agencies to engage in negotiated rulemaking.").

A reg-neg works as follows: The agency convenes a group of representative stakeholders with the aim of achieving consensus on the contents of a rule.[462] When convening parties, the agency typically includes a balance of interests with technical capacity and a demonstrated history of involvement in the underlying issue.[463] Those with the greatest expertise are important not only because of what they might contribute to the process, but also because they often possess either the knowledge or resources to block the rule through legal challenge. The agency, together with a facilitator, defines the parameters of the discussion to some extent, but the parties negotiate a number of important procedural matters themselves, including the rules, committee structure, and definition of consensus that will govern the group.[464]

Negotiations over substance typically occur over a period of months or even years. The Federal Advisory Committee Act requires that the committee be formally chartered, that meetings be open to the public, and that minutes of meetings be kept.[465] Parties agree not to challenge any consensus-based rule, although they may withdraw from negotiations at any time. At no time, even when it signs the consensus agreement, is the agency obligated to promulgate the consensus reached.[466]

Despite its relatively infrequent use, regulatory negotiation has generated an extensive literature, with commentators sharply divided over its effectiveness and legitimacy.[467] Proponents argue that it can be more inclusive than traditional notice-and-comment rulemaking, more "problem-oriented," and, at least according to some data, either less costly and time-consuming than conventional regulation, or no

462 See 5 U.S.C. § 565 (detailing establishment of committee); § 566(a) (specifying duties of committee).

463 See 5 U.S.C. § 563(a)(3)(A) (requiring that committee be able to represent all relevant interests).

464 See 5 U.S.C. § 556(a) (describing agency's role to define parameters); § 556(d)(2) (providing assistance of facilitator); § 556(e) (detailing adoption of committee procedures).

465 See Federal Advisory Committee Act, 5 U.S.C. app. §§ 1-15 (1994).

466 USA Group Loan Servs., Inc. v. Riley, 82 F.3d 708, 709 (7th Cir. 1996).

467 Compare Jody Freeman, Collaborative Governance in the Administrative State, 45 UCLA L. Rev. 1, 56 (1997) (stating that negotiated rulemaking, while controversial, could potentially foster problem solving), and Harter, supra note 26, at 113 (advocating use of regulatory negotiation), with William Funk, Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest, 46 Duke L.J. 1351, 1356 (1997) (arguing that "the principles, theory, and practice of negotiated rulemaking subtly subvert the basic underlying concepts of American administrative law"), and Susan Rose-Ackerman, American Administrative Law Under Siege: Is Germany a Model?, 107 Harv. L. Rev. 1279, 1287-96 (1994) (examining German administrative procedure, which fails to satisfy American notions of political accountability, to support conclusion that regulatory negotiation can produce legitimate decisions only in narrow range of issues).

more so.[468] Indeed, some accounts portray regulatory negotiation as a deliberative process that facilitates creative solutions.[469] A recent empirical study concludes that parties to reg-negs believe they produce "superior" rules and that they are more satisfied with negotiated rules than traditional ones.[470] By giving all parties a stake in the rule, regulatory negotiation is thought to foster commitment to the resulting agreement, which, presumably, might facilitate implementation. And, in any event, proponents point out, negotiated rules must still go through informal notice and comment pursuant to section 553 of the APA.

Detractors claim, by contrast, that reg-neg is more labor- and resource-intensive and more likely to generate litigation than traditional rulemaking.[471] Critics also reject the process on principle, because it appears to surrender rulemaking to explicit interest group bargain-

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468 See Cornelius M. Kerwin & Laura I. Langbein, An Evaluation of Negotiated Rulemaking at the Environmental Protection Agency: Phase II (1999) (unpublished report prepared for Administrative Conference of the United States, on file with the *New York University Law Review*) [hereinafter Kerwin & Langbein, Phase II] (concluding that regulatory negotiation has numerous advantages over conventional rule making); Cornelius M. Kerwin & Laura I. Langbein, An Evaluation of Negotiated Rulemaking at the Environmental Protection Agency: Phase I (1995) (unpublished report prepared for Administrative Conference of the United States, on file with the *New York University Law Review*) (same). For a contrary view, see Cary Coglianese, Assessing Consensus: The Promise and Performance of Negotiated Rulemaking, 46 Duke L.J. 1255, 1261 (1997) (arguing that regulatory negotiations neither save time nor reduce litigation). But see Jody Freeman & Laura I. Langbein, Evaluating Negotiation as a Regulatory Tool, 9 N.Y.U. Envtl. L.J. (forthcoming 2000) (arguing that litigation rates can be deceiving because negotiated rules may have been more likely candidates for challenge in any event); Philip J. Harter, The Actual Performance of Negotiated Rulemaking: A Response to Professor Coglianese, 9 N.Y.U. Envtl. L.J. (forthcoming 2000) (claiming that reg-neg cuts rulemaking time by one-third).

469 Advocates claim that reg-neg offers parties an opportunity to engage more productively with each other in grappling with difficult technical questions. In one reg-neg, the parties reached consensus by adopting an incentive program that no one had envisioned at the start. See Freeman, supra note 467, at 41-45 (referring reg-neg to "equipment leaks"). In another, industry agreed to an information disclosure requirement "outside the parameters of the rule" that would enable monitoring of pollutants in the future. See Charles C. Caldart & Nicholas A. Ashford, Negotiation as a Means of Developing and Implementing Environmental and Occupational Health and Safety Policy, 23 Harv. Envtl. L. Rev. 141, 162 (1999) (referring reg-neg to wood furniture coatings). Although the rule drafted by the committee in this reg-neg was less stringent than it likely could have been, it placed a substantial emphasis on pollution prevention, an important priority for the agency. The presence of industry representatives helped to "deepen and legitimize the committee's efforts to build pollution prevention into the rule." Id. at 161-62.

470 See Kerwin & Langbein, Phase II, supra note 468.

471 See Coglianese, supra note 468, at 1257 (criticizing view that negotiated rulemaking encourages negotiation and reduces time and litigation).

ing.[472] Viewed in this negative light, reg-neg is simply undemocratic. At worst, it facilitates illegal outcomes.[473]

The debate above reveals administrative law's anxiety about affording private actors a direct role in regulation, and it reinforces the idea that we tend to imagine accountability in formal, traditional terms. The criticisms of regulatory negotiation might be fatal, were it not for the accountability-conferring requirement of the conventional notice-and-comment process.

Surely, however, before determining whether reg-neg is sufficiently accountable, we need to know more. Perhaps the public/private interaction in this context enhances accountability rather than undermines it, by making private actors directly responsible for the rule to which they will ultimately be bound. What should interest us here is the nature of the relationship between public and private actors. Does accountability turn in part on which representative groups, or how many of them, participate? Does the potential for "repeat players" to participate in numerous rulemakings undermine or enhance accountability? Do the parties interact differently when negotiations are formal rather than informal? Might that interaction have consequences for implementation and enforcement? What difference, in other words, does direct participation make to both the process and outcome of rulemaking?

Perhaps this form of public/private interdependence might increase the willingness of regulated entities to submit to the regulation, even when the outcome does not favor them. Social psychology teaches us that parties are more likely to view outcomes as legitimate when they play a meaningful role in the process.[474] Parties may derive satisfaction not solely from getting what they want in a bargaining process, but from being included in the enterprise, taken seriously, and offered explanations for decisions.[475] Evidence from the most recent study of regulatory negotiation supports such claims.[476] Although speculative, it is reasonable to believe that a direct role in

[472] See Cary Coglianese, Is Consensus an Appropriate Basis for Regulatory Policy?, in Environmental Contracts: Comparative Approaches to Regulatory Innovation in the United States and Europe (Eric Orts & Kurt Deketelaere eds., forthcoming 2000).

[473] See Funk, supra note 467, at 1371-74; Rose-Ackerman, supra note 467, at 1281.

[474] See, e.g., Farina, supra note 45, at 1028-29 & 1028 n.159 (citing Tom R. Tyler, Why People Obey the Law (1990), and discussing important role that perceptions of fairness play in determination of administrative legitimacy).

[475] See Kerwin & Langbein, Phase II, supra note 468. Empirical evidence suggests that the more involved people are in making rules, the stronger their sense of obligation to abide by them. See Robert Kidder & Craig McEwen, Taxpaying Behavior in Social Context: A Tentative Typology of Tax Compliance and Noncompliance, in 2 Taxpayer Compliance 47, 53 (Jeffrey A. Roth & John T. Scholz eds., 1989).

[476] See Kerwin and Langbein, Phase II, supra note 468.

rulemaking will facilitate policy implementation or improve relationships among repeat players, producing payoffs down the line.

Without more information about the nature of the public/private interaction, however, it proves difficult to assess its implications for accountability. Neither economists nor political scientists have sufficiently explored the deliberative dimension of public/private interaction, and how it might alter parties' preferences, for example.[477] Traditionally, economists have modeled behavior assuming fixed preferences,[478] but preferences form through the confluence of culture, environment, and experience. Conceivably, they shift as a function of both time and context.[479] Recent research in cognitive psychology suggests, in fact, that preferences are not as fixed as traditional economics assumes.[480] Perhaps deliberative processes present opportunities not only to readjust one's own preferences, but also to influence those of others.

Regulatory negotiation is a particular form of public/private interdependence, and an especially provocative one. It invites close scrutiny, even in the face of formal agency oversight and the safeguard of notice and comment. In this sense, reg-neg's proponents worry too little about accountability. But, detractors worry too much, or at least about the wrong things. Reg-neg does not cause private influence in the regulatory process, and taken alone, it would provide insufficient evidence of interdependence. However, it represents an experiment in structuring the private role in a particular way. So structured, the public/private relationships here may help to produce accountability rather than just undermine it, a possibility that seems worthy of further inquiry.

2. *Implementation and Enforcement*

Explaining the role of private actors in implementation should be relatively easy because it seems so obvious. Even within a conception of regulation as a hierarchical "top-down" enterprise, implementation must surely be somewhat cooperative. Translating health and safety standards or financial regulations into operational changes in a firm, for example, necessarily relies significantly on the private participa-

477 See Jane Mansbridge, A Deliberative Perspective on Neocorporatism, 20 Pol. & Soc'y 493, 500 (1992) (arguing that scholarship has not explored possibility that preferences change during deliberative engagement).

478 For the classic work on this point, see generally George J. Stigler & Gary S. Becker, De Gustibus Non Est Disputandum, 67 Am. Econ. Rev. 76 (1977).

479 Behavioral economics may be moving in this direction. For the proposition that preferences are social constructs and that the legal system does and should shape preferences, see Sunstein, supra note 394, at 1133.

480 See, e.g., Tversky & Kahneman, supra note 96.

tion of the regulated entities themselves. For example, the traditional environmental permitting process requires firms to provide detailed qualitative and quantitative assessments of their emissions, and to devise strategies that will bring them into compliance with applicable regulations. Regulation can depend heavily upon firms identifying themselves to agencies for purposes of being included in a regulatory program,[481] and for purposes of licensing or permit design.[482] Given resource constraints and informational deficits, agencies across a variety of regulatory contexts need regulated entities and independent expert organizations to assist them with implementation.

Agencies may also rely in the implementation process on independent third parties capable of mediating their relationships with regulated entities or filling expertise gaps by helping to provide information, monitoring, and management.[483] For example, informal multistakeholder groups of private actors have emerged in recent years to negotiate environmental and resource management conflicts.[484] Nonprofits and professional consultants play important roles in a number of formal planning processes designed to resolve disputes over resource protection and economic development. These processes require data collection, research, and monitoring expertise in a number of areas (such as resource management, conservation biology, ecology, and economics) that government may not be able to furnish on its own.[485] The private role in implementation is thus largely, although not exclusively, informal. In recent years, however, the federal government has experimented with initiatives that formally structure private participation in implementation.

One highly visible example of such an initiative is habitat conservation planning, a multistakeholder resource management process au-

481 See L. D. Duke & K. A. Shaver, Widespread Failure to Comply with U.S. Storm Water Regulations for Industry—Part 2: Facility-Level Evaluations to Estimate Number of Regulated Facilities, 16 Envtl. Engineering Sci. 249, 250 (1999) (indicating that industry failure to self-identify, under Clean Water Act regulations, impedes effort to regulate storm water runoff).

482 When firms apply for permits, they provide detailed information about their emissions or effluent. See Caroline Wehling, RCRA Permitting, Nat. Resources & Env't, Winter 1987, at 27, 27.

483 See Lee P. Breckenridge, Nonprofit Environmental Organizations and the Restructuring of Institutions for Ecosystem Management, 25 Ecology L.Q. 692 (1999) (describing role of nonprofits as ecological consultants, land managers, and gap fillers in environmental policy implementation).

484 Such groups include, for example, the Quincy Library Group and the Applegate Partnership. See Stephen M. Nickelsburg, Note, Mere Volunteers? The Promise and Limits of Community-Based Environmental Protection, 84 Va. L. Rev. 1371, 1396-1403 (1998).

485 See Breckenridge, supra note 483, at 699 ("[T]he ability of government agencies to identify and understand ecological problems has far exceeded governmental capacity to formulate and impose solutions through the exercise of coercive authority.").

thorized by the Endangered Species Act (ESA).[486] Under section 10(a) of the ESA, the Secretary of Interior may issue a permit to allow an otherwise impermissible "incidental take" of a threatened or endangered species, providing the applicant submits a satisfactory "conservation plan." Among other things, the plan must ensure that the "take" will not "appreciably reduce the likelihood of the survival and recovery of the species in the wild."[487] Thus, HCPs amount to mitigation measures designed to minimize the impact of a proposed action (usually a development project) on a threatened or endangered species.[488] As with regulatory negotiation, the federal agency (here the Fish and Wildlife Service) participates in the negotiations, but is also statutorily obligated independently to determine the adequacy of the plan, submit the plan to public comment, and then decide whether to issue the permit.[489] The permit makes the negotiated commitments legally enforceable but the process is "quasi-contractual."[490] Responsibility for supervision and coordination of the disparate interests involved in a habitat conservation planning process may fall to an intermediary such as a nonprofit land conservation organization.[491]

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[486] See Endangered Species Act, 16 U.S.C. §§ 1531-1544 (1994 & Supp. III 1998). Although the only truly indispensable parties in the permit application process are those whose actions may otherwise violate the statute, many HCP negotiations include a diversity of stakeholders including community groups, environmental organizations, scientists, and land conservation groups.

[487] 16 U.S.C. § 1539(a)(2) (1994). The requirements of section 10(a) largely mirror the contents of the San Bruno HCP which had been developed independently in response to a conflict between proposed development and the habitat of a threatened butterfly species. The Plan was developed by the parties without specific ESA authorization. The parties subsequently urged Congress to amend the ESA to allow a permitting exemption based on the plan. The San Bruno HCP was formally accepted by the Interior Department and a permit was issued following passage of the 1982 amendments. See Robert D. Thornton, Searching for Consensus and Predictability: Habitat Conservation Planning Under the Endangered Species Act of 1973, 21 Envtl. L. 605, 624-25 (1991).

[488] See 16 U.S.C. § 1539(a)(2)(A).

[489] See Michael J. Bean et al., World Wildlife Fund, Reconciling Conflicts Under the Endangered Species Act: The Habitat Conservation Planning Experience 15 (1991).

[490] See Ruhl, supra note 386, at 397 (1999). Habitat Conservation Plans agreements are "quasi-contractual" even though agreements are incorporated into permits. "HCP permitting is very much a structured negotiation in which permit applicant and permitting agency work to design a development scenario that is compatible with the conservation goals of the ESA as well as the economic goals of development in general." Id. at 400. Reinforcing the "contractual" image of the HCP process, the Fish and Wildlife Service recently adopted a "no surprise" policy by regulation. The policy assures HCP permittees that the agency will impose no additional burdens on permittees in the event of changed circumstances. See Habitat Conservation Plan Assurances ("No Surprises") Rule, 63 Fed. Reg. 8859, 8871-73 (1998).

[491] See Breckenridge, supra note 483, at 697-98 (describing extensive interaction between federal, state, and local governments and Nature Conservancy in collaborative efforts to protect habitat while allowing some development in certain areas).

EPA's Excellence in Leadership Project (Project XL) represents another example of a stakeholder approach to implementation in which private parties play a formal role.[492] In fact, XL is implementation's analogue to regulatory negotiation. A typical XL agreement for an individual facility might allow a firm to negotiate an agreement in which it makes detailed commitments of "superior" environmental achievement in exchange for a more unified, performance-based permit from the agency. The agency negotiates Project XL agreements by convening a stakeholder process, which usually includes federal and state agencies, environmental groups and community representatives. The goal of this process is to conclude a Final Project Agreement (FPA) that will contain the detailed commitments of both the agency and the firm and form the basis of the permit.[493]

Beyond implementation, even enforcement depends heavily on the actions of private parties. In most regulatory contexts, agencies lack the resources necessary to research, inspect, and pursue all regulated entities that violate regulations. In general, administrative enforcement cases rely significantly on self-monitoring, recordkeeping, and reporting by regulated entities.[494]

In addition, the enforcement process is characterized by "virtually constant negotiations with a host of recalcitrants."[495] From a practical perspective, private participation at this point in the regula-

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[492] XL stands for eXcellence and Leadership. The EPA announced that it would consider facilities XL projects, sector-based XL projects, and federal facilities XL projects. See EPA, Regulatory Reinvention (XL) Pilot Projects, 60 Fed. Reg. 27,282 (1995).

[493] Among other things, the Final Project Agreement (FPA) might authorize a firm to engage in multimedia or cross pollutant trades (shifting pollutants from one medium to another or trading increases in one pollutant for decreases in another) that would be impermissible under traditional regulations. The FPA might also authorize firms to combine multiple permits with different expiration dates into a single, longer term permit. For a more complete description of Project XL and an analysis of two projects, see Freeman, supra note 467, at 55-61. For a critical view of XL, see Rena I. Steinzor, Reinventing Environmental Regulation: The Dangerous Journey from Command to Self-Control, 22 Harv. Envtl. L. Rev. 103, 122-50 (1998). For suggestions on improving XL, see Lawrence E. Susskind & Joshua Secunda, The Risks and Advantages of Agency Discretion: Evidence from EPA's Project XL, 17 UCLA J. Envtl. L. & Pol'y 67 (1999).

The debate over XL mirrors that over regulatory negotiation. Proponents claim that it offers all the benefits associated with direct participation in decision making, both in terms of process and substance. Moreover, they argue, the agency never surrenders its formal supervisory role; it can always withdraw from the agreement and revert to traditional enforcement. Critics fault XL for the same reasons they fault regulatory negotiation: Stakeholder bargaining will undercut environmental standards established by law and regulation. See Bradford Mank, The Environmental Protection Agency's Project XL and Other Regulatory Reform Initiatives: The Need for Legislative Authorization, 25 Ecology L.Q. 1, 4 (1998).

[494] See Mintz, supra note 93, at 114-15; see also Rees, supra note 197, at 10.

[495] Id. at 12 (quoting Peter C. Yeager, The Limits of Law: The Public Regulation of Private Pollution 251 (1990)).

tory process may be most significant. Only at the enforcement stage do policy choices made by Congress and interpreted by agencies through regulations translate into substantive requirements.[496] Parties often settle, enter consent decrees, or otherwise come to agreement over the measures that will be considered to constitute "compliance" with statutory and regulatory requirements. There is give in the system, in other words, and this allows room for negotiation.

In addition to participation by the regulated entities themselves, a host of independent third parties act as "private attorneys general" in numerous regulatory contexts. State and federal governments often encourage private enforcement through direct and indirect subsidy.[497] Government agencies might also formally seek to enlist third parties in enforcement, for example, to verify a firm's implementation of regulatory requirements.[498]

Third party oversight has long been a feature of securities regulation, antitrust, and even government procurement.[499] Many federal environmental statutes provide a private right of action for individuals and groups to sue both the agency (for failure to exercise a nondiscretionary duty) and private individuals or firms (for statutory violations).[500] The private role in enforcement has a long history in the United States. Indeed, qui tam actions predated federal enforcement actions in colonial and postcolonial times.[501] When state governments

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496 See id. at 10 ("The inevitably ambiguous language of the rules is defined only as decisions are made about what constitutes a violation in specific cases." (quoting Marc K. Landy et al., The Environmental Protection Agency: Asking the Wrong Questions 204 (1990))).

497 See Thompson, supra note 16.

498 For example, the EPA's Environmental Leadership Program (ELP) relies on third party verification to monitor compliance with existing environmental regulations. The independent third parties are themselves certified by the agency. As part of the ELP, EPA Region One has created a program called StarTrack, under which the EPA grants certified companies penalty reductions and regulatory flexibility in the form of expedited regulatory decisions and reduced reporting and recordkeeping requirements. To obtain certification, companies must be evaluated by independent third parties, and must implement an environmental management system, benchmarking to ISO 14000 and the completion of compliance audits. See George S. Hawkins, Compliance and Enforcement Changes in Congress and the EPA, 11 Nat. Resources & Env't. 42 (1997).

499 See Marshall et al., supra note 16, at 4.

500 See Clean Air Act (CAA), 42 U.S.C. § 7604 (1994); Clean Water Act (CWA), 33 U.S.C. § 1365(a)(1) (1994); Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. § 6972 (1994). But see Alden v. Maine, 119 S. Ct. 2240, 2243 (1999) (barring citizen suits for money damages in state court for violations of federal law); Seminole Tribe v. Florida, 517 U.S. 44, 44 (1996) (holding that suits by tribe against States under Indian Commerce Clause are barred by Eleventh Amendment).

501 See Steven L. Winter, The Metaphor of Standing and the Problem of Self-Governance, 40 Stan. L. Rev. 1371, 1407-08 (1988) (referring to first few Congress's passage of legislation creating and facilitating "informers' suits" for private enforcement of public rights).

first sought to rein in the power of private corporations, they relied partially on independent private counsel to manage state prosecutions.[502] Although the government's prosecutorial capacity has grown considerably since the nineteenth century, the gap between rule prescription and enforcement remains large enough to allow for a significant nongovernment role.[503]

By relying on third-party enforcement, an agency spreads the cost of ensuring compliance, but it also risks surrendering control over its enforcement agenda. Critics claim that citizen suits can disrupt an agency's priorities and undermine cooperative compliance efforts between the agency and regulated entities.[504] Private rights of action create the possibility for private plaintiffs and defendants to negotiate settlements that may deviate from or undermine stated regulatory goals.[505] In this sense, critics fear that private parties may "oust" public norms and replace them with private ones.[506]

From a traditional administrative law perspective, excessive reliance on regulated entities in implementation and enforcement (even, or especially, under the guise of "cooperation"), risks compromising the agency's independence. Explicit negotiation with regulated entities is undemocratic at best, and illegal at worst. Allowing independent third parties to participate too extensively in monitoring and enforcement usurps the agency's enforcement authority. In this view, private parties, whether the regulated entities themselves or indepen-

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502 See Charles W. McCurdy, The Knight Sugar Decision of 1895 and the Modernization of American Corporation Law, 1869-1903, 53 Bus. Hist. Rev. 304, 318 (1979) (referring to Pennsylvania legislature's authorization of counsel for oil magnates to manage state's initial prosecution of Standard Oil in 1879).

503 One scholar recently proposed a privatization scheme for administrative adjudication of penalties as an alternative to qui tam litigation. See Michael Abramowicz, Market-Based Administrative Enforcement, 15 Yale J. on Reg. 197, 209 (1998). The scheme relies on a capital market structure to supplant traditional adjudication of fines. The government would auction off securities representing legal claims. The system differs from qui tam actions because it does not encourage profiteering. See id.

504 See Rossi, supra note 169, at 1170-71; see also Landy et al., supra note 496, at 204-05 (acknowledging difficulty of knowing whether coercive enforcement measures are "defensible or wise" in context of ongoing relationships).

505 See Eric Bregman & Arthur Jacobson, Environmental Performance Review: Self-Regulation in Environmental Law, 16 Cardozo L. Rev. 465, 482 (1994); see also Caldart & Ashford, supra note 469, at 188 (citing EPA report claiming that 90% of firms cited with noncriminal violations of federal environmental laws reach resolution through negotiated settlements).

506 See Bregman & Jacobson, supra note 505, at 485; see also Daniel A. Farber, Triangulating the Future of Reinvention: Three Emerging Models of Environmental Protection, 2000 U. Ill. L. Rev. (forthcoming) (referring to consent decree filed pursuant to litigation over toxic regulation under Clean Water Act, which ostensibly replaced more stringent risk-based statutory standard with technology-based standard).

dent nongovernmental actors, once again pose a threat to accountability, which points to the need to constrain them.

And yet, cooperation with regulated firms may be a superior approach to implementation, maximizing the prospects both for problem solving and for the agency's ability to tailor responses to noncompliance.[507] Stakeholder processes may provide opportunities to enhance accountability, at least as often as they detract from it. Conceivably, formalizing public/private interdependence may structure it in accountability-enhancing ways. Consider, for example, the potential for the Final Project Agreement (FPA) in an XL project to work as a contract-like mechanism for accountability. The FPA reflects the parties' mutual commitments; it could provide for innovative accountability measures, such as ongoing oversight over firm performance by a community panel, or by a team of community representatives, firm employees, and members of national environmental groups. When publicly disclosed, the commitments in the FPA might serve, moreover, as the benchmark against which wholly independent third-party monitors could hold both the agency and the firm to account. Such an approach fosters and harnesses private contributions to implementation.

A similar argument applies to enforcement. Although private attorneys general might compromise an agency's enforcement agenda (either by emphasizing regulatory problems that the agency would prefer to ignore or reaching settlements that the agency would not assent to) they can also be enormously helpful to understaffed and overburdened regulators.[508] Beyond helping to shoulder the agency's enforcement burden, they can deliver important information to an insulated agency, sometimes redirecting a misguided enforcement agenda to more serious harms.[509] Citizen suits also introduce competition into the enforcement process,[510] stimulating innovation in enforcement. Local organizations can tailor their strategies to local conditions, or even to particular violators.[511] They may offer "new approaches to developing proof, new theories of liability, [and] new

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507 See Ayres & Braithwaite, supra note 197, at 19-53 (concluding regulatory agencies will achieve greatest success by being cooperative and deferential while possessing threat of harsh enforcement); see also Hawkins, supra note 498, at 44-45 (providing overview of experimental EPA efforts in New England).

508 See John S. Applegate, Beyond the Usual Suspects: The Use of Citizens Advisory Boards in Environmental Decisionmaking, 73 Ind. L.J. 903, 906 (1998) (advocating citizen groups as "partners" in regulatory decision making).

509 See Thompson, supra note 16, at 31.

510 See id. at 26-27.

511 See id. at 42.

lawsuit efficiencies."[512] For example, citizen groups pioneered the use of supplemental enforcement plans (SEPs), which consist of environmentally favorable remedial measures to be adopted by violators in lieu of paying fines.[513]

Whether one thinks these possibilities for accountability remote, or even fanciful, they never come to light without an appreciation of the private role in implementation and enforcement, which, as we have seen, proves varied and substantial. Even if we were to abandon experiments like HCPs or Project XL, private actors would continue to serve informally as mediators, information providers, and enforcers. A traditional approach to accountability, which demands that the agency formally remain in control of the implementation process, is relatively easy to satisfy, but it tells us virtually nothing about the ways in which particular public/private relationships might enhance or undermine accountability.

V

IMPLICATIONS OF PUBLIC/PRIVATE INTERDEPENDENCE

A. Aggregate Accountability

This Article has eschewed an explicit discussion of legitimacy in favor of a focus on the more manageable category of accountability, defined here as checks on decision making. As we have seen, however, administrative law deploys a rather thin understanding of ac-

512 Id. at 26. Although the Department of Justice was opposed to supplemental enforcement plans (SEPs) when they first surfaced, it has since done an about face. See id. at 28. Now, the EPA's SEP Project Program allows violators who settle with the agency to secure a reduction in penalties in exchange for agreements to engage in other environmentally beneficial activities, including pollution prevention, environmental restoration, and environmental assessments and audits. See EPA, Supplemental Environmental Projects Policy, 29 Env. Rep. (BNA) 78 (1998). It is difficult to compare the value of such settlements (in terms of environmental protection and public health) with the value of higher penalties, which are designed to have a deterrent effect. Typically, penalties go directly to the U.S. Treasury and are neither available to the EPA nor earmarked for environmental protection. See Caldart & Ashford, supra note 469, at 189 (describing SEP).

513 See Thompson, supra note 16. Whether instigated by citizen suits or agency enforcement actions, negotiated settlements allow violators to experiment with creative regulatory strategies rather than settling solely for monetary penalties. See Caldart & Ashford, supra note 469, at 191 (citing EPA report claiming that company representatives credited SEP process with this benefit). After analyzing the kinds of technological changes prompted by the settlements, Caldart and Ashford claim that there remain unexploited opportunities for using the enforcement process to stimulate technological change. See id. at 191. SEP negotiations enable an exchange between the company, the agency, and third-party organizations over what might be done to achieve environmental goals. Proponents argue that the process can be more problem-oriented than conventional penalty assessment. According to both the agency and company executives, SEPs offer both short- and long-term benefits, enabling firms to identify opportunities for technological change that might have additional beneficial environmental effects beyond the immediate lawsuit. See id. at 191.

countability. Almost every example of public/private interdependence in Part IV would survive both a nondelegation challenge and due process scrutiny. Virtually every arrangement analyzed here features formal agency oversight or government licensing, or some other mechanism of supervision. And yet, satisfying the traditional, formal demands of accountability may not provide the public with much assurance of fairness, public access, meaningful responsiveness, or sound policy.

Public/private regimes may engender doubts insufficiently addressed by the mere existence of agency oversight or the application of familiar procedural controls to private conduct. To be sure, requiring private actors to observe procedures usually demanded only of agencies may in some cases provide minimal accountability. The frustrations associated with trying to discipline private power, nonetheless, drive some scholars to advocate against yielding any power to private actors. As we have seen, however, *no* public function is public in a pure sense. The private role in governance is diverse, pervasive, and not uniformly dangerous. If the model of interdependence proposed here is accurate, responding to the private role in governance requires more than delineating a threshold test for determining when a private actor is performing a sufficiently public function to justify the imposition of public law constraints. The appropriate response to shared governance instead requires highly contextual, specific analyses of both the benefits and the dangers of different administrative arrangements, together with a willingness to look for informal, nontraditional, and nongovernmental mechanisms for ensuring accountability.

Even in the absence of tight government control, a public/private regime characterized by multiple and overlapping checks might produce enough aggregate accountability to assure us of its legitimacy. Private actors might be somewhat constrained, for example, by measures that emanate not from formal government supervision but from other sources: a private decisionmaker's internal procedural rules, its responsiveness to market pressures, its agreements or bargains with other actors, informal norms of compliance, and third-party oversight, for example. Sometimes the legitimacy of a regulatory initiative depends in part on trust or shared norms. Although these forms of accountability may not fully satisfy the traditional administrative law demand for accountability to the three branches of government, they nonetheless could play an important role in legitimizing, or rendering publicly acceptable, a particular decision-making regime.

As we have seen, a variety of accountability mechanisms are embedded within, or suggested by, the examples in Part IV. Legally en-

forceable contracts may become crucial mechanisms for increasing accountability in service delivery. Public/private arrangements can be more accountable because of the presence of powerful independent professionals within private organizations. The background threat of regulation by an agency can provide the necessary motivation for effective and credible self-regulation. The two principal partners in a regulatory enterprise (the agency and the regulated firm, or the agency and the private contractor) might rely on independent third parties to set standards, monitor compliance, and supplement enforcement.[514] Professional norms and internalized rules can militate against the pursuit of pure self-interest or the temptation to be corrupt.[515] Informal sanctions may be largely effective where the conditions most conducive to effective self-governance exist.[516] Thus, the absence of a direct government role does not mean that a regime is free of regulation or oversight. In sum, traditional, formal legal procedures and agency oversight may provide the appearance of adequate accountability, but a variety of other mechanisms and an array of private parties play an important and undervalued role in legitimizing public/private arrangements. As I argued at the outset, legitimacy has been a relatively empty vessel in administrative law scholarship and it continues to elude definition. At bottom, legitimacy is a synonym for public acceptability, regardless of how it might be measured. Surely public acceptance might derive from a variety of sources.[517]

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[514] See supra Part V.E.

[515] See Robert C. Ellickson, Order Without Law: How Neighbors Settle Disputes 184-264 (1991) (discussing categories of informal norms—substantive, remedial, procedural, and constitutive—necessary for self-governing communities to achieve efficient self-regulation); Richard A. Posner, Social Norms and the Law: An Economic Approach, 87 Am. Econ Rev. 365, 366-67 (1997) (discussing benefits and costs of internalized norms and habits). On the importance of internalized rules and social norms in the ISO system, see Roht-Arriaza, supra note 429, at 531-32. On the conditions conducive to communities establishing self-governance, see generally Elinor Ostrom, Crafting Institutions For Self-Governing Irrigation Systems (1992).

[516] See David Charny, Nonlegal Sanctions in Commercial Relationships, 104 Harv. L. Rev. 373, 425 (1990) (concluding that business relationships are better governed by nonlegal sanctions when social mechanisms to enforce sanctions already exist).

[517] Cynthia Farina has suggested something along these lines in rejecting "strong Presidentialism" as the single device for reconciling administrative authority with American constitutional democracy. Legitimacy, she argues, is a product of a plurality of institutions and actors. See Farina, supra note 45, at 989. Peter Schuck has invoked a similarly open-ended definition, claiming that legitimacy derives from "effective governance, desirable policy outcomes, and other political values." Schuck, supra note 4, at 779. I have suggested elsewhere that legitimacy flows in part from the presence of accountability mechanisms that ensure responsiveness to the electorate and fidelity to both procedural and substantive law, but that other things do matter. A decision might be acceptable to the public because it appeals to them as simply "right," because it is the product of a particu-

B. *Enforceable Contract*

Because of its potential importance for enhancing accountability, legally enforceable contract merits separate attention. In an era of contracting out, enforceable contracts form the connective tissue between public and private actors; as such, they promise to be important vehicles of policy making. At the same time, although enforceable contracts are not nearly as common in the regulatory process, here, too, they could perform a similar accountability-enhancing function. At least conceivably, the trend toward quasi-contract instruments in the regulatory process (such as reg-neg and Project XL), and the few experiments with enforceable contracts (such as HCPs), portend a greater future role for contract in regulation. In fact, the prospects are hardly remote; a handful of legal scholars have begun to explore just this potential.[518] Although the service provision and regulatory contexts differ in important ways, the use of contract in either setting raises significant technical, conceptual, and doctrinal problems. The health care and prison examples, as well as the accounts of Project XL and habitat conservation plans, illustrate the challenges governments face whenever they use contract, namely, the difficulty of drafting and monitoring the agreements. Tension inevitably develops between the desire to provide sufficient contractual specificity to enable meaningful monitoring and the temptation to leave terms flexible enough to allow adaptations in light of changing conditions.[519]

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larly respected decisionmaker or because it is a technically optimal solution to a regulatory problem. See Freeman, supra note 12, at 335 n.14.

[518] See David A. Dana, The New "Contractarian" Paradigm in Environmental Regulation, 2000 U. Ill. L. Rev. (forthcoming). The inquiry into regulatory contracts currently includes analysis of enforceable as well as unenforceable agreements. Some scholars focus on any government initiative in which negotiation plays a part. See, e.g., Caldart & Ashford, supra note 469 (describing variety of practices used by OSHA and EPA informally to negotiate implementation and compliance with regulated entities); see also Farber, supra note 506 (proposing "bilateral bargaining" model); Freeman, supra note 467 (proposing collaborative model of regulation in which negotiation and problem solving play prominent roles). Others, however, seem focused specifically on formal environmental "contracts" understood as enforceable legal agreements. See, e.g., Geoffrey C. Hazard, Jr. & Eric W. Orts, Environmental Contracts in the United States (1999) (unpublished manuscript, on file with the *New York University Law Review*).

[519] The Balanced Budget Act's grant of greater flexibility to the states in contracting with MCOs, as with devolution of authority under welfare reform and privatization of prison management, will place great pressure on contractual design and contractual remedies. Contracts may end up conforming to the model of procurement contracts, which are painstakingly detailed. Grants and cooperative agreements can be structured more loosely, and might offer an alternative contract model. Grants and cooperative agreements are the domestic assistance vehicles through which the federal government provides funding to a state or local government or other agency. Grants involve little federal agency interaction with the grant recipient for purposes of implementing the funded project, whereas cooperative agreements involve substantial federal agency involvement with the

The administrative law demand for accountability presses for greater contractual specificity; however, no contract can be sufficiently specific to anticipate any and all situations that parties might encounter. Instead, the written document may become the basis for future negotiations as the parties' relationship develops and conditions change; it may also become the "end-game" default rules against which the parties will determine the extra-legal norms that will actually govern their working relationship.[520] This possibility makes it difficult, at least on the face of the contract, to assess the accountability-enhancing potential of enforceable agreements.

Familiar problems of contract design and monitoring take on new importance, moreover, when contract becomes the principal instrument of service provision, and perhaps, an important mode of regulation. How will members of the public monitor public/private agreements? Perhaps interested individuals, or representative groups should be entitled to participate in contract negotiation. If so, how should they be chosen? Perhaps beneficiaries should be entitled to sue as third parties, or afforded a private right of action to seek enforcement of a statutory scheme of which the contract is a crucial part.

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grant recipient. See Dembling & Mason, supra note 215, at § 2.05(a). Grants and cooperative agreements are not contracts, but they do stipulate conditions upon which recipients receive funds, and they do require recipients to engage in self-monitoring. As a model they offer considerable discretion to grant recipients and provide for a mix of monitoring devices.

Much of the literature and case law regarding federal grants originated in the late 1970's and early 1980's. This may be explained by the increasing proliferation of federal grants that occurred during the 1960s/1970s and also by the passage of the Federal Grant and Cooperative Agreement Act in 1978 which clarified the differences between procurement contracts and grants and cooperative agreements. See Federal Grant and Cooperative Agreement Act of 1977, Pub. L. No. 95-224, 92 Stat. 3 (1978) (codified as amended at 31 U.S.C. §§ 6301-6308 (1994)). However, what was said then, for the most part, remains valid.

520 See Robert E. Scott, Conflict and Cooperation in Long-Term Contracts, 75 Cal. L. Rev. 2005, 2024-25 (1987) (arguing that parties to long-term contracts negotiate adjustments to formal terms in order to adjust to changing conditions over life of contract); see also William E. Kovacic, Law, Economics and the Reinvention of Public Administration: Using Relational Agreements to Reduce the Cost of Procurement Regulation and Other Forms of Government Intervention in the Economy, 50 Admin. L. Rev. 141, 148 (1998) (noting that informal adjustments to ongoing contracts have minimal transaction costs). For additional scholarship on the development of informal norms within formal contractual regimes, see Lisa Bernstein, Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms, 144 U. Pa. L. Rev. 1765 (1996) (arguing that Uniform Commercial Code undermines necessary flexibility of adjustment in long-term contracting relationships). This more recent work on social norms builds on a much older scholarship in the law and society tradition devoted to describing the relational dimensions of contractual regimes. See Stewart MacCauley, Non-Contractual Relations in Business: A Preliminary Study, 28 Am. Soc. Rev. 55, 61 (1963) (concluding from empirical survey of lawyers and businesspersons that "[d]isputes are frequently settled without reference to the contract or potential or actual legal sanctions").

If so, what guarantee is there that private enforcement will not frustrate the government's objectives? In addition, public/private contracts inevitably raise such thorny questions about the application of private law contract principles to government as a contracting party. The matter of when to treat government as a sovereign, and when as a private party, has generated a substantial literature already,[521] and the Supreme Court's recent decision in *United States v. Winstar*,[522] holding the federal government liable for legislatively reneging on an agency contract with private savings and loan thrifts, has reinvigorated the debate over the extent to which the government can and should be held liable for breach.[523]

Although courts appear reluctant to bind agencies to regulatory agreements with private stakeholders, the proliferation of contract and contract-like mechanisms could translate into a demand for guarantees that agencies not renege on their agreements.[524] This is part of a larger concern that any move toward formal contract in regulation will amount to private deals that "oust" the public interest.[525] The

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521 See, e.g., Michael W. Graf, The Determination of Property Rights in Public Contracts After *Winstar v. United States*: Where Has the Supreme Court Left Us?, 38 Nat. Resources J. 197 (1998); Hadfield, supra note 93; Jonathan R. Macey, *Winstar*, Bureaucracy and Public Choice, 6 S. Ct. Econ. Rev. 173 (1998); Michael P. Malloy, When You Wish upon *Winstar*: Contract Analysis and the Future of Regulatory Action, 42 St. Louis U. L.J. 409 (1998); Joshua I. Schwartz, Assembling *Winstar*: Triumph of the Ideal of Congruence in Government Contracts Law?, 26 Pub. Cont. L.J. 481 (1997); Richard H. Seamon, Separation of Powers and the Separate Treatment of Contract Claims Against the Federal Government for Specific Performance, 43 Vill. L. Rev. 155 (1998); J. Gregory Spidak & Daniel F. Spulber, Deregulatory Takings and Breach of the Regulatory Contract, 71 N.Y.U. L. Rev. 851 (1996); Thomas J. Gilliam, Jr., Note, Contracting with the United States in Its Role as Regulator: Striking a Bargain with an Equitable Sovereign or a Capricious Siren?, 18 Miss. C. L. Rev. 247 (1997).

522 518 U.S. 839, 843 (1996).

523 See Hadfield, supra note 93, at 488 (arguing that in suits against government agencies for breach of contract, plaintiffs should be limited to reliance rather than expectation damages). Hadfield's article indirectly anticipates the hornet's nest of legal and theoretical questions stirred up by the shift to contract as the dominant method of effecting service provision. She notes, for example, the tendency for courts to interpret "termination for convenience" clauses in federal procurement contracts as instances of agency discretion. See id. at 527.

524 See USA Group Loan Servs., Inc. v. Riley, 82 F.3d 708, 715 (7th Cir. 1996) (finding that Negotiated Rulemaking Act procedure was not intended to produce binding contract).

525 This criticism echoes the objections frequently made about alternative dispute resolution: that the "privatization" of justice deprives a democratic society of the "norm-articulating" function of judicial decisions. See, e.g., Owen Fiss, Against Settlement, 93 Yale L.J. 1073, 1085 (1984) (arguing that settlement deprives court of role in articulating public values at issue in dispute); David Luban, Settlements and the Erosion of the Public Realm, 83 Geo. L.J. 2619, 2620 (1990) (modifying Fiss's argument to suggest that some, though not all, settlements advance public values); G. Richard Shell, ERISA and Other Federal Employment Statutes: When Is Commercial Arbitration an "Adequate Substitute" for the Courts?, 68 Tex. L. Rev. 509, 568 (1990) (describing mandatory alternative dispute resolu-

salience of these issues will only intensify should contract become the principal mode of administration and regulation.

From a traditional administrative law perspective, contractual relationships between public and private actors might undermine agency authority and alter prevailing conceptions of judicial deference to agency action. Courts may not accord agencies deference in contract interpretation, nor permit agencies unilaterally to amend terms as they might regulations. On the other hand, agencies could presumably avoid these difficulties by promulgating contracts as regulations in order to recapture the deference they might otherwise lose, or negotiate only short term contracts, obviating the need to incorporate them as regulations. But these procedures would encumber and rigidify a more flexible contracting process, perhaps undermining valuable benefits.

Finally, in both the service provision and regulatory settings, the use of contract prompts questions about the agency's role. How might an agency reconcile its potentially competing obligations to be a decisive and independent authority while also holding up its obligations as a negotiating partner?[526] The agency may play multiple roles in a regime infused with negotiation and contract, making it an amalgam of all the agency archetypes: the expert-insulated agency of public interest theory, the deliberative public-regarding bureaucrats of republican theory, and the self-interested bargainers of public choice theory.[527]

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tion in employment law and loss of Title VII claims in terms of loss of "public value" articulation by courts). The ouster critique casts new light on experiments such as regulatory negotiation or HCP. To the extent that these initiatives prioritize consensus and aim to reduce litigation, perhaps they do deprive courts of an important norm-articulating opportunity. As a condition of participation in a reg-neg, for example, the parties commit not to challenge the consensus rule. If a significant percentage of rules were produced in this way, courts might lose their critical role of protecting and advancing the public policy articulated in regulations through review of agency decision making. This deprives the public of a check on the agency's interpretation of its delegated authority, and gives fewer opportunities for courts to weigh in on the meaning of statutes. Scholars have made a similar argument about the rise of judicial decision making without publishing reasons. See Mitu Gulati & C.M.A. McAuliff, On Not Making Law, Law & Contemp. Probs., Summer 1998, at 157, 175 ("The failure to write and publish an opinion deprives the system of the many positive externalities created when a case is decided by a published opinion that gives reasons.").

526 The data thus far on regulatory negotiation, Project XL, and multistakeholder resource management initiatives suggests that this conflict is real. On the one hand, strong, engaged agencies are crucial to the negotiation process: They must set default rules, foster cooperation, muster credible threats, and monitor performance. See Freeman, supra note 467, at 32. On the other hand, the agency's negotiating partners might expect it to be bound to the bargain as an equal.

527 Not surprisingly, agencies seem confused over how to mediate these very different roles. Consider regulatory negotiation: The agency's participation places it in the awkward position of being asked essentially to preapprove tentative agreements when it is

But can these roles coexist? Do they make for an incoherent theory of administrative law?

The conditions under which contracts might enhance accountability will depend on the context in which they are struck, the historical relationship of the parties, the incentives they confront, the openness of the process to independent third parties, the potential for adapting the contracts in light of changed conditions, and a host of other considerations. Sometimes public/private contracts will amount to sweetheart deals. Sometimes they will compromise rather than advance public law norms of openness, fairness, and rationality. Given the prominent role of contract in contemporary administration and regulation, its effect on accountability merits serious attention; a fuller discussion of the potential for contract to contribute to accountability, or undermine it, must, however, await another article.

C. *The Role of the State*

Counterintuitively, the extensive private role in governance described in the examples above need not imply a state which is weakened or in retreat. Instead, the analysis of public/private interdependence demonstrates how government is differently engaged with a range of private actors in a variety of settings without disappearing from view. Thus, although agencies cannot claim to be the sole, or even the central, source of governance, they continue to exert enormous power. Because of their legal authority, historical legitimacy, and monopoly on state-sanctioned force, public actors remain vital.

The private role in governance need not sap that vitality. Indeed, public/private engagement may enhance state power while simultaneously augmenting private power. Through contract with private actors, for example, agencies may extend their influence to matters and actors that they could not otherwise lawfully reach.[528] Interdepen-

required to provide public comment periods and internal review prior to approval. Thus, the agency finds itself forced to indicate which outcomes would be acceptable without compromising its ultimate authority to alter its position should political winds change or should the formal comment period turn up anticipated problems with the proposed rule. See Freeman, supra note 467, at 87-89.

[528] See Breckenridge, supra note 483, at 698 (noting that multistakeholder resource management disputes not only increase the influence of the participating private organizations, but also enable government to demand concession and reach matters they could not otherwise regulate). The power of these contractual tools as instruments of policy is particularly striking now, as the Supreme Court's federalism jurisprudence makes direct federal regulation of the states increasingly more difficult and restricts the federal government's Commerce Clause power. See Printz v. United States, 521 U.S. 898 (1997); United States v. Lopez, 514 U.S. 549 (1995); New York v. United States, 505 U.S. 144 (1992). Conditional inducements in the form of grants-in-aid fall within Congress' Article I spending

dence among public and private actors does not require equality of power.[529] Even the prospect of greater reliance on private actors through contracting out and devolution does not necessarily portend an impotent state.[530]

None of the prevailing models of administrative law (public interest, civic republicanism, pluralism, and public choice) captures the interdependence described here, or suggests that the dynamic between public and private actors might simultaneously enhance public and private power. In part, this is because they portray government agencies as separate from, and hierarchically situated in relation to, private actors. From this perspective, the agency is inside and private actors are outside, and, they are locked in a zero-sum struggle. In fact, as I have sought to show, private actors are integrated into decision-making structures. Although they might at times be dangerous, they are something more, and may, under the right conditions, produce accountability.

The conundrum is this: We cannot think creatively about the role of the state without first breaking free of the hierarchical image of government power to which most of administrative law theory now adheres. At the same time, once we dislodge ourselves from the conceptual grip of the hierarchical model, there is no handy alternative to traditional accountability (normally understood as formal and procedural accountability to an institution of government) against which to evaluate a given decision-making regime. Always, we seem to fall back on the idea that accountability derives from the imprimatur of government, which assumes that government is—unilaterally, hierarchically, authoritatively—in charge. Perhaps it ought to be so, and perhaps some might wish it were, but the reality of the extensive private role in every dimension of administration and regulation shatters that notion and replaces it with something else. This Article has been an effort to describe that something else as a set of negotiated relationships, to offer a theoretical account of CLS and public choice the-

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Power. See U.S. Const. art. 1, § 8. While Congress can regulate state policy through inducements of federal money, the Spending Power is not unlimited. See United States v. Butler, 297 U.S. 1 (1936) (invalidating statute authorizing payments to farmers who agreed to curtail acreage or production as beyond Congress's power). But see Albert J. Rosenthal, Conditional Federal Spending and the Constitution, 39 Stan. L. Rev. 1103, 1126-31 (1987) (arguing that subsequent caselaw has backed away from *Butler* holding).

529 See Strange, supra note 1, at xiii (explaining that word "interdependence" may function as euphemism for asymmetric dependence); see also id. at 45-46 (arguing that growth of nongovernmental actors does not mean that state disappears).

530 Legal scholars have made an analogous point in the international arena, arguing that the pervasive participation of nongovernmental institutions in international policy making "illustrates the expansion, not the retreat, of the state." Kal Raustiala, States, NGOs, and International Environmental Institutions, 41 Int'l Stud. Q. 719, 721 (1997).

ory in support of illustrative descriptions, and to suggest their implications for administrative law.

CONCLUSION: TOWARD A NEW ADMINISTRATIVE LAW AGENDA

By exploring the world of administration and regulation that lies beyond the court/agency/legislature relationship, we see how governance depends heavily on private participation. The examples in Part IV paint a dynamic and perhaps depressingly messy picture of administration. Their vice is at once their virtue, however, because lurking in that image is a new and more accurate description of governance as a negotiated enterprise. To explore its implications, administrative law scholarship needs to broaden its view and lower its gaze.

Other scholars have made appeals to focus less on judicial review of agency action or to acknowledge the extent of private delegation, but to little avail. A small number of law review articles, including Louis Jaffe's classic analysis of private participation in lawmaking,[531] Bob Hamilton's important work on private standard setting,[532] and Hal Krent's comprehensive treatment of private delegation,[533] taken together, could provide the groundwork for a more systematic effort to envision a new administrative law agenda. They seem not to have been sufficiently linked in the imagination of administrative law scholars, however, to spawn the rethinking of governance that, to my mind, they clearly invite.[534]

My own rethinking relies on thick description to make a case that would otherwise remain purely theoretical: Both CLS and public choice theory are right at the same time—there is neither a purely private nor a purely public realm. There is, moreover, no center of decision making in administrative law as we tend to suppose. Instead, we find a variety of actors making collections of decisions in a web of relationships.

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531 See Jaffe, supra note 8.

532 See Hamilton, supra note 39; Hamilton, supra note 196.

533 See Krent, supra note 8.

534 Indeed, to find suggestions that administrative law scholars study private actors, one has to be looking for them. In critiquing Christopher Edley's exclusive focus on government in *Administrative Law*, Susan Rose-Ackerman acknowledges that agencies "typically contract out for many of their scientific tasks and use private organizations to administer programs and provide services" and that the private sector performs the functions of factfinder, policymaker, and administrator, but fails to elaborate on those functions. Susan Rose-Ackerman, Triangulating the Administrative State, 78 Cal. L. Rev. 1415, 1418 (1990). Without more, she argues that this recognition could "break down the traditional categories of administrative law." Id. at 1419.

Although largely descriptive, this endeavor is also normative. It proposes institutional analysis and design as central to the administrative law mission. Ed Rubin recently beckoned legal scholars to embark on a microanalysis of institutions aimed at the practical problems of governance and the institutions that might solve them.[535] As I understand it, microinstitutional analysis investigates the formation of institutions and their capacity for rational and public-oriented problem solving, in light of the multifarious political, ideological, and social influences that act upon them. With its contextual focus on how institutions work, and its acknowledgement of the forces that influence them, such an approach invites a marriage of the public choice and CLS perspectives.

However, the normative project of matching institutions to social problems need not limit itself to the three institutions at the heart of legal process theory: the judiciary, the legislature, and the executive. Surely an inquiry into the means by which institutions cultivate the capacity for rational, public-oriented decision making should encompass nonprofits, public interest organizations, trade associations, lenders, professional associations, and the host of private actors that already perform, or could perform, significant roles in governance.[536] The inquiry into public/private interdependence undertaken here—the description of different governance arrangements, the analysis of their strengths and weaknesses, and the identification of mechanisms for rendering them accountable—is an effort to rethink governance by engaging in a form of microinstitutional analysis.

Rethinking governance proves difficult, of course, without a clear sense of the mismatch between empirical reality and the dominant theoretical conceptions in administrative law. The leading administrative law theories, as we have seen, portray private activity as an intrusion into the agency-dominated policy-making and implementation

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[535] See Edward L. Rubin, The New Legal Process, The Synthesis of Discourse, and the Microanalysis of Institutions, 109 Harv. L. Rev. 1393, 1411 (1996). The "micro" in microinstitutional analysis connotes a focus on the particular and a distrust of generalization. The term "institutional" suggests an inquiry into the way that "political forces act upon or are translated into, social institutions, the law that governs them, and the law they establish and administer." Id. at 1426. Rubin makes the case for the viability of this project by arguing that it is compatible with the two dominant theoretical trends in legal academia, outsider scholarship, and law and economics, and that it promises to pursue their separate but overlapping ambitions.

[536] Rubin himself suggests that private firms be added to the list of potentially useful institutions for achieving social purposes. Indeed, one imagines that Rubin would not object to this more inclusive approach. His focus on policy implementation and exhortation that we "wean legal scholarship from its somewhat obsessive preoccupation with the judiciary" seem wholly compatible with a perspective that values the contributions of nongovernment actors. Id. at 1429.

process. Mostly, administrative law treats private actors as a threat to the legitimacy of the administrative state. These theoretical constructs obscure our ability to recognize the diverse and pervasive roles private actors play in executing the business of governance. And they prevent us from imagining the means by which private actors might contribute to accountability.

At the same time, one strains to identify empirical reality without a plausible alternative to the hierarchical, agency-centered conception of administration, into which observations of events on the ground might fit. Thus, the contractual metaphor of governance as negotiated by public and private actors: a horizontal conception to contrast with the vertical one that now dominates the field. Empiricism (or even grounded analysis) is hardly a staple of administrative law scholarship, and public/private interaction is a decidedly untidy affair. In that clutter lies the real story of governance, however, which administrative law ignores at its peril.