

Reinventing Government Accountability: Public Functions, Privatization, and the Meaning of “State Action”

Robert S. Gilmour, The University of Connecticut

Laura S. Jensen, The University of Massachusetts

Privatization is, for many, the contemporary answer to inefficient government administration. But when public functions are relegated to the nongovernmental sector, more is altered than mere organizational arrangements to promote governmental economy. While such transfers may offer efficiencies, they may simultaneously enable government and its officials to escape legal responsibility for actions that are permitted, encouraged, controlled, or paid for by the state. The rights of citizens at the hands of official authority are protected by the Constitution and an array of public laws; at the hands of private parties, very different and less protective rules apply. This article makes the case that contemporary judicial treatment of the transfer of government authority to “private” third parties, though inconsistent, is implicated in a wholesale loss of government accountability. The authors argue that the existence of an effective public accountability scheme requires a coherent understanding of “state action”—both before and after privatization decisions. Toward that end they outline a four-step inquiry for the recognition of state responsibility so that government accountability is assured and citizen rights are preserved.

Public sector privatization is typically viewed as a means of maximizing economic efficiency—reducing government costs while increasing the scope and quality of service delivery by transferring (or “returning”) government functions to the private sector (e.g., Butler, 1985; Savas, 1982; Donahue, 1989). Some proponents even contend that privatization is synonymous with reducing the size and effects of government (see Peters, 1996, 21-46; Wallin, 1997, 12). Although privatization changes the character of public service delivery and government-citizen relations, shifting or even significantly reducing taxpayer burdens, few government functions in America are simply abandoned altogether (so-called load shedding) and left to private markets. Government programs are commonly long-standing, public responses to past inadequacies or outright failures of the market. Citizens and their elected representatives are not eager to forgo such programs. Privatization in the United States is thus more likely to represent a change in form rather than function, i.e., the substitution of a “private” contractor or other nongovernmental designee to act as a proxy for government officials and employees in performing public tasks under the aegis of governmental authority and paid from the public purse (Seidman and Gilmour, 1986; Kettl, 1988; Salamon, 1989).

The dimension of governance most often altered significantly by privatization is that of public accountability. This is particularly the case when the locus of privatization shifts from the governmental provision of goods and services (such as housing, electricity, garbage removal, and transportation) for citizen-“customers” to the performance of government functions requiring that members of the public be treated more like citizen-“clients” with constitutional and statutory rights to complex professional services (medical care, welfare, legal representation, education, and the like) or citizen-“subjects” (in the British sense) with governmentally imposed duties (to pay taxes, obey laws and regulations, defend the state, and so on) (Mintzberg, 1996). When the relationship between government and citizen becomes more complex than that between a mere commodity or service provider and its customers, more than marketplace efficiency is required to hold the government and its proxies and surrogates accountable for their exercise of authority on behalf of the state.

Fundamentally, government officials may be held accountable for action taken on behalf of the state in two ways. First, they are held accountable *politically* with respect to their exercise of duly constituted authority, either by the voting public (if they are elected officials) or by elected legislative and executive officeholders (if they are appointed). Elected executives, legislatures, and their agents all play roles: regularly urging administrators to politically inspired interpretations of institutional missions and policy mandates; taking them to task for improper understanding of legislative intent; and/or changing the law outright to specify explicit requirements and priorities, reallocate funds, reorganize institutional structures, and otherwise narrow administrative discretion. Second, the state and its officers are held accountable *legally*, either by the constitutive force of a body of law suggesting or demanding appropriate modes of government behavior or by an independent judiciary weighing their actions against constitutional, statutory, and other legal mandates and limits.¹

Because public law is the foundation of government administration, this article focuses upon the legal, rather than the economic or the political aspects of privatization. First, we assess the accountability under American law of nonprivatized and privatized government programs and activities. Second, we review the vacillating judicial treatment of various actions and actors associated with government and its implications for public administration. Finally, we develop a method of identifying actors and activities of the government for the purpose of holding them to standards of accountability that may become obscured in contemporary administrative settings, where a variety of proxy arrangements are commonly regarded as undifferentiated forms of privatization (National Academy of Public Administration, 1989). Assuring the legitimate use of state power by private actors is a critical issue for contemporary American governance. As Smith and Lipsky (1993, 11) have observed, the government's "control and manipulation of vulnerable populations proceeds properly only when sanctioned by deliberate democratic processes and safeguards."

Privatization and Its Potential for Accountability Avoidance

Current judicial doctrines hold the government and its officials accountable legally for their behavior in order to protect the constitutional and statutory rights of citizens. The threshold step in this legal accountability scheme, though, is a judicial finding that there is "state action" to review for conformity with the rules that apply to government. These rules include the Bill of Rights and the Fourteenth Amendment; a host of general management laws; the requirements of executive orders, budget circulars, and—critically, at the state and municipal levels—Section 1983 of the Civil Rights Act of 1871.² Virtually any behavior that can be effectively labeled or understood as private (unattributable to the state) is not so constrained. Remedies for unlawful "private" behavior may be pursued only under a quite different set of rules at common law, for example in contract, tort, and property actions. The implications of this judicial stance are obvious in an environment of accelerating privatization initiatives, especially given a recent legislative preference that the government's work be performed by private vendors, nongovernmental entities, and other third parties instead

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of executive branch officials (National Academy of Public Administration, 1992, ch. 8). If private actors are not subject to the rules set for government action, delegating authority to private parties may allow the government to do through them what it cannot do itself.³

Some of the Supreme Court's most remarkable state action decisions actually encourage innovative ways for government to avoid limitations on its behavior by simply *calling* its own actions or actors "private." In *Blum v. Yaretsky* (1982), for example, the Supreme Court permitted the state of New York summarily to reduce or eliminate Medicaid benefits to nursing home patients because these actions were attributed not to the state-mandated forms that embodied New York's cost-control policy, but to the "private" physicians who filled them out. Similarly, the state of Iowa was absolved of responsibility for the actions of one of its public defenders because the job she performed was declared to be "essentially" that of a private attorney (*Polk County v. Dodson*, 1982). In the case of *DeShaney v. Winnebago County Department of Social Services* (1989), responsibility for a child's permanent brain damage was attributed not to the government social workers who had intervened under Wisconsin law and thereafter ignored the child's obvious plight, but to the state-anticipated "private" action of his father who repeatedly beat him. According to the Supreme Court, employees of "private" nonprofit agencies may be fired summarily with no opportunity for a hearing even if their agencies are funded exclusively by the government and subject to extensive government regulation, reporting requirements, and expenditure controls (*Rendell-Baker v. Kohn*, 1982), despite the range of constitutional protections afforded employees performing identical functions for government agencies (*Perry v. Sindermann*, 1972; *Cleveland Board of Education v. Loudermill*, 1985). It is only too easy to imagine other organizational arrangements whereby, with the blessing of the judiciary, government may elude both scrutiny and liability by labeling its own activities "private."

Because private actors are not subject to the same constitutional, statutory, and oversight restrictions as governmental actors, delegation of public functions outside the bounds of government profoundly challenges traditional notions of accountability, making it all the more difficult, as James Madison put it, to "oblige" government "to control itself" (Rossiter, 1961, 322). Since the mid-1930s, when the Supreme Court declared the congressional delegation of government authority to private actors to be "unknown to our law...and utterly inconsistent with the constitutional prerogatives and duties of Congress" (*Schechter Poultry Corp. v. U.S.*, 1935, 537), "obnoxious," and "intolerable" (*Carter v. Carter Coal Co.*, 1936, 311), federal courts have routinely sanctioned delegations of federal and state power to private actors. Examples of such delegations include the private control of occupational licensing and regulation, accreditation of professional schools, and industrial rule-making and price-fixing as well as the private administration of

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government poverty programs, immunity for private police forces, the private arbitration of wage disputes (Liebmann, 1975, 668-719; Cass, 1988, 497-523; Krent, 1990, 80-93), and unreviewable adjudication of claims for Medicare payments by private insurance carriers (*Schweiker v. McClure*, 1982, 188-200). Examining such transfers of state authority to actors outside the government, Ronald Cass (1988, 502) has concluded that “it is likely that some government powers will be found to be nondelegable, that constitutionally only a specific governmental actor can perform certain given functions...[but] these restrictions...will be rare.... Even privatization proposals involving activities that intuitively appear to be essentially governmental are unlikely to pose constitutional problems.”

Some members of the federal judiciary have noted that inconsistent standards of accountability likely would apply to the performance of government programs. The Washington, DC Circuit Court of Appeals has stated, for example, that “the harm done...to principles of political accountability...is doubled in degree in the context of a transfer of authority from Congress to an agency and then from agency to private individuals” (*National Association of Regulatory Utility Commissioners v. FCC*, 1984, 1143, n. 41). Nevertheless participation by private actors in a wide range of activities (e.g., licensing, standard-setting, price-fixing, rule-making, administration, enforcement, arbitration, adjudication, seizure of private property, and incarceration) is only rarely challenged by reviewing courts, and then only for reasons of gross conflict of interest. Yet, activities of this sort hold far more potential for arbitrary and rights-infringing government action than provision of such public goods and services as domestic water, garbage collection, and sewage disposal.

Legal scholars have argued repeatedly that legislative delegation to private parties is inconsistent with the separation of powers principles designed to guard against potential abuses of government authority (see, e.g., Krent, 1990, 65; cf. Abramson, 1989, 188), but this argument has not prevailed with judicial decision makers. This is probably not surprising, given contemporary judicial enfeeblement of the “nondelegation” doctrine with respect to delegations of authority to administrative agencies and other entities discernably *within* government. Indeed, it has been more than 60 years since any major Supreme Court decision has turned on the impermissible delegation of quasi-legislative or quasi-judicial power to the executive branch.⁴ Further executive branch subdelegation of public functions to private entities, ordinarily by contracting out (Ascher, 1987), attenuates political accountability by insinuating a layer of bureaucratic authority between elected officials and nongovernmental, third-party service providers. Moreover, legal accountability for *private* acts may be maintained only as matters of criminal prosecution, contract or regulatory enforcement, or in actions at common law. Accountability for private action is otherwise left to the marketplace, where pecuniary incen-

tives and corporate fiduciary responsibilities to shareholders take precedence over concerns about equity or the constitutional and statutory rights of citizens. When public functions are delegated to private actors and are allowed to be transformed into “private” actions, public accountability is inevitably lost. Indeed, delegations of this sort may even shield such private actors from the mechanisms of private accountability as well, since they may be able to assert governmental immunities as instrumentalities of the state.⁵ Consequently, recognizing and preserving the legal responsibility of those acting on behalf of the state are all the more important.

Indifference to the identity of those exercising state power effectively lends credibility to a laissez-faire attitude toward performance of even the most basic governmental functions, rendering the protections afforded by the Constitution meaningless while promoting privatization as if the only considerations involved were economy or efficiency (see Craig and Gilmour, 1992). It is obvious that concepts such as authority, equity, and accountability are not easily incorporated into a calculus so cogent as cost-benefit analysis.⁶ Nonetheless, the privatization debate must transcend its persistent narrow focus on goods and services if we are to address fundamental questions regarding the proper roles and responsibilities of government and the private sector in a modern democracy.

Distinguishing between Reviewable “State Action” and Private Acts

As currently concluded by federal courts, the nondelegation principle imposes few constitutional limits upon the delegation of government authority to private actors. Nevertheless, limits should surely still exist upon the *use* of that authority. A fundamental purpose of the Constitution is, after all, to control the deployment of governmental power in order to protect citizens from arbitrary government action and to make it possible to call those who exercise such power to account. Federal courts have interpreted various constitutional amendments to allow citizens to sue federal and state government actors if they have infringed on citizens’ rights in the course of performing their official duties. Similarly, Section 1983 of the Civil Rights Act of 1871 has been interpreted as a basis for action against rights-depriving behavior of state and local government officials acting “under color of” government authority.

But who, precisely, *are* the federal, state, and local “government officials” who should be held accountable in the context of privatization? The Constitution (except for narrowly interpreted Thirteenth Amendment anti-slavery prohibitions) and Section 1983 of the Civil Rights Act are concerned only with *government* and not private behavior. Therefore, the central problem in all government liability suits lies in ascertaining when the government has acted, or when governmental authority has been employed. Making that determination has often proven exceptionally difficult in state action cases involving delegation beyond the obvious bounds of government institutions *per se*. Here the primary question facing the courts is whether a challenged “private” action is governmental or not—i.e., whether that action may be justly attributed to the state.⁷

The judicial state action inquiry originated with the *Civil Rights Cases* of 1883, which are said to have “affirmed the essential dichotomy...between deprivation by the State...and private conduct, ‘however discriminatory or wrongful,’ against which the

Fourteenth Amendment offers no shield” (*Jackson v. Metropolitan Edison Co.*, 1978, 349, quoting *Shelley v. Kramer*, (1948, 13). Such judicial declarations notwithstanding, this “essential dichotomy” between public and private action has been difficult for the judiciary to articulate with any consistency. The Supreme Court’s frustration was perhaps best expressed in 1961, when it lamented that fashioning and applying a precise formula for identifying government versus private action “is an ‘impossible task’.... Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance” (*Burton v. Wilmington Parking Authority*, 722, citing *Kotch v. Board of River Pilot Commissioners*, 1947, 556). One observer remarked that the Court’s subsequent “sifting” and “weighing” in state action cases has “differ[ed] from Justice Stewart’s famous ‘I know it when I see it’ standard for judging obscenity mainly in the comparative precision of the latter” (Brest, 1982, 1325, citing *Jacobellis v. Ohio*, 1964, 197). Another observer termed the Court’s state action adjudication a “conceptual disaster area” (Black, Jr., 1967, 95). A third, federal judge Henry J. Friendly (1982, 1291), aptly declared that what we know about the location of the border between public and private action is “rather because the Court has pricked out more reference points than because it has elaborated any satisfying theory.”

In some cases, especially prior to the 1970s, Supreme Court doctrine established with relative ease or even assumed the presence of state action subject to constitutional and statutory restrictions. Recently, however, the identification of state action has become more idiosyncratic as the Court has sporadically imposed one or more of three “tests” to inquire whether particular circumstances have converted a private actor into an agent of the state who could be held accountable as a matter of public law.

Identifying Government Action: The “Public Function” Test

Many recent state action cases have employed the Court’s “public function” test, which asserts that in order for government activity to be recognized, private entities must exercise “powers traditionally exclusively reserved to the State” (*Jackson v. Metropolitan Edison Co.*, 1978, 352), or “exclusive prerogatives of the sovereign” (*Flagg Brothers, Inc. v. Brooks*, 1978, 160). Judicial application of this standard has rarely identified state action. In the *Flagg Brothers* case, for example, the Court held that seizure and sale of a householder’s personal property by a private storage company was not state action, despite the fact that such seizures were both established by state law and enforced in state courts. The Court’s finding was based on the argument that “the settlement of disputes between debtors and creditors is not traditionally an exclusive public function” (at 161). In another case, *Blum v. Yaretsky* (1982), the reduction or termination of Medicaid benefits resulting in the transfer or discharge of nursing home patients was not found to be state action, in part because the Court was “unable to conclude that nursing homes perform a function that has been ‘traditionally the exclusive prerogative of the State’” (at 1011, citing *Jackson*, 353). In *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee* (1987), the Court refused to consider whether the committee’s selective enforcement of its right to prohibit certain uses of

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the word *Olympic* (established by the Amateur Sports Act of 1978) was discrimination in violation of the due process clause of the Fifth Amendment, because “[n]either the conduct nor the coordination of amateur sports has been a traditional governmental function” (at 545).

The public function test, applied in this manner, is flawed at best because it offers no guidance on how to *define* those functions that are “traditionally” supposed to be the “exclusive” prerogatives of the sovereign. While “tradition” might furnish information on the roles played by government at various times, it cannot of itself distinguish between governmental and private activities. Indeed, there is “virtually no discrete function that one can identify as historically committed to government rather than private parties” (Cass, 1988, 499-500; see also Van Zandt, 1993). The notion that a function is governmental either because “the government has chosen to engage in it” or because it “bears a peculiar relationship to sovereignty” (Lewis, 1960, 1100) is suggestive, but fails to provide any specific criteria for distinguishing governmental activities from private activities. Without such defining criteria, a minimum standard of legal accountability for the actions of government proxies simply cannot be guaranteed.

Examples of “sovereign” functions have certainly been tendered. The Supreme Court has declared that eminent domain, elections, municipal functions when private property “has taken on *all* the attributes of a town,” zoning, and the exercise of peremptory challenges during jury selection are powers or functions traditionally or exclusively reserved to or “constitutionally compelled by” the state (*Jackson*, 1978, 352-353; *Flagg Brothers*, 1978, 158-159, emphasis in original; *Larkin v. Grendel’s Den, Inc.*, 1982; *Edmonson*, 1982, 614; *Georgia v. McCollum*, 1992, 42). In addition, the Court has asserted that there are some functions, such as “education, fire and police protection, and tax collection,” which have been administered by states and municipalities “with a greater degree of exclusivity” than have others (*Flagg Brothers*, 163).

Nonjudicial authorities have proposed alternative lists of sovereign functions. A panel of the National Academy of Public Administration (1989, 44) assembled to consider privatization, for example, has stated that “making laws, taking property without consent, depriving people of life and liberty, imposing taxes, conscripting individuals for military service, declaring war, enforcing contracts and extending the full faith and credit of the U.S. government” are all activities “centrally involving the sovereign powers of the state.” After an extensive effort to identify “inherently governmental functions,” the U.S. General Accounting Office (GAO) surmised that while such functions are “difficult to define,” government should maintain an in-house capacity to carry out “its responsibilities to serve the public [and] to exercise its sovereign powers.” To that end, the GAO concluded that criteria should be

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established to “identify those specific functions that should appropriately be administered only by government employees” (U.S. General Accounting Office, 1991, 2-7). Precise criteria of this sort have yet to be established.

The problem with all such catalogues of “traditional governmental” or sovereign functions is that they furnish no *theoretical* basis for proving that they are correct or all-inclusive even though they inspire instinctive recognition. That the public function standard offers no precise definition of “sovereign” should come as no surprise, since the term *sovereignty* has frustrated consensus among theorists for centuries. Nonetheless, an amorphous concept cannot accurately delineate functions of a “purely public and governmental character” (Moe, 1987, 458) that must be performed in accordance with legal standards of accountability.

Judicial references to the sovereign may be viewed as oblique attempts to convey the understanding that some activities, however performed, are more dependent upon the presence of governmental power than others. After all, the judicial objective in state action cases is to ensure the appropriate and accountable *use of government* authority. Unfortunately, this fundamental purpose tends to be lost in a search for discrete “functions.” In *Polk County v. Dodson* (1982, 318-19), for example, the Supreme Court specifically raised the question of whether the activities of a court-appointed “offender advocate” involved the use of governmental authority. However, the Court reverted to the public function test to conclude that an Iowa public defender, notwithstanding the source of her income and her official position, performed “essentially a private function, traditionally filled by retained counsel, for which state office and authority are not needed.” Incredibly, in some circumstances, actual government employees are not considered to be state actors, and their actions are not considered to be state action. Such applications of the public function test have been said to render the state action question almost meaningless (Abramson, 1989, 205). On at least one occasion the Court itself has declared the function test to be “unsound” and “unworkable” (as well as inconsistent with established principles of federalism) (*Garcia v. San Antonio Metropolitan Transit Authority*, 1985, 531, 539).⁸ Nonetheless, the test lives on in the area of state action adjudication, where courts have recently employed it so restrictively that state action subject to legal standards of accountability has not often been detected.

Identifying Government Personnel: The “State Actor” Test

In some instances actual government employees have not been regarded as state actors because of the *functions* they perform. Conversely, private actors sometimes *have been* so regarded, either because they have “acted together with or ha[ve] obtained significant aid from state officials, or because [their] conduct is otherwise chargeable to the State” (*Lugar v. Edmondson Oil Co.*, 1982, 937). In *Lugar*, a slim five-to-four majority held that a private

party’s joint participation with state officials in the seizure of disputed property was state action under Section 1983 of the Civil Rights Act. The reason for the finding was that the scheme used in executing the associated writ of attachment was the product of a state statute that was procedurally defective under the due process clause of the Fourteenth Amendment. *Lugar* capped a series of legal challenges to the debt-collection procedures of private creditors during the late 1960s and 1970s, where the judicial recognition of state action apparently hinged upon the physical presence of “virtual” state officials.⁹ These cases stand in stark contrast to the 1978 *Flagg Brothers* holding, where, despite vehement dissent, a majority of the Supreme Court used the “absence of overt official involvement” (in the bodily form of government personnel) in conjunction with the public function test to deny that state action had occurred. According to the *Flagg Brothers* majority, the Court had “never held that a State’s mere acquiescence in a private action converts that action into that of the State” (at 164, citing *Jackson v. Metropolitan Edison Co.*, 1978, and *Moose Lodge No. 107 v. Irvis*, 1972). The point in *Lugar* was, rather, that “private use of the challenged state procedures *with the help of state officials* constitutes state action” (at 933, emphasis added).¹⁰

Judicial confusion about the identity of state actors continued into the 1990s. Citing *Lugar*, a divided Court found in both *Edmonson v. Leesville Concrete Co.* (1991) and *Georgia v. McCollum* (1992) that the race-based exclusion of potential jurors by private litigants constituted state action violating the equal protection clause of the Fourteenth Amendment. The Leesville Concrete Co. was accorded state actor status in *Edmonson* because it invoked a right “having its source in authority” of the state, involving court personnel in exercising its peremptory challenges, “a unique governmental function” (at 618-628). This reasoning was held to apply “with even greater force” in the criminal context of *McCollum*, because “the selection of a jury in a criminal case fulfills a unique and constitutionally compelled governmental function” (at 52). Both of these cases inspired vigorous dissent, which argued against ascribing “private” discrimination to the state.¹¹ Yet just a few years earlier, an essentially unanimous Court held that a private physician under contract to provide medical services to state prison inmates was a state actor (*West v. Atkins*, 1988).¹² Because inmates could not seek medical treatment other than what the state was constitutionally obligated to provide them, a physician’s behavior in treating inmates was held to be “conduct fairly attributable to the State” (at 54). The *West* decision distinguished between the provision of medical services (“a function traditionally performed by private individuals”) in and out of the context of a correctional setting, where service delivery is controlled by the government (at 56-57, n. 15). This decision may, as David Rosenbloom (1992, 120) observed, portend reduced opportunities for privatization in program areas such as prisons, mental health and other hospitals, and human services, where government contractors’ risk of liability for constitutional torts is increased. Thus far, however, state action adjudication has not been such a “model of consistency” that either government or potential contractors can predict with certainty which state actors will be found responsible for privatized behavior (*Edmonson*, 1991, 633, Justice O’Connor dissenting).

Identifying Government Involvement: The “State Action” Test

In some instances the Supreme Court has been less concerned with discerning government functions or actors than with distinguishing action generally marked by the government’s imprimatur, especially when confronting racial discrimination. In the leading case of this sort, *Burton v. Wilmington Parking Authority* (1961), the refusal of a privately owned coffee shop to serve a black man was held to be discriminatory state action merely because the coffee shop operated in leased space in a city-owned garage. Since the Eagle Coffee Shop’s actions had taken place in a building “dedicated to ‘public uses’ in performance of the Parking Authority’s ‘essential governmental functions,’” the Court determined that the state had placed its “power, property, and prestige behind the admitted discrimination” (at 723). This reasoning, that an injury was “aggravated in a unique way by the incidence of government authority,” operated in *Edmonson*, which disallowed state court participation in the racially motivated dismissal of potential jury members. *Edmonson* echoed the Court’s holding in the landmark case *Shelley v. Kraemer* (1948) that even though private racially restrictive covenants were not unconstitutional *per se*, their judicial enforcement amounted to state action denying equal protection of the laws. As Justice Felix Frankfurter observed, state action does not necessarily imply the presence of some “impressive machinery or deliberative conduct,” but merely state responsibility for the behavior of those clothed with its power (*Terry v. Adams*, 1953, 473). A nearly unanimous Court has lately applied this principle in dealing with persistent if somewhat more subtle “government” behavior in addressing racial discrimination at Mississippi’s state universities, holding that “even after a State dismantles its segregative admissions policy, there may still be state action that is traceable to the State’s prior *de jure* segregation and that continues to foster segregation” (*U.S. v. Fordice*, 1992, 729, emphasis in the original, Justice Scalia dissenting in part).

The Court has also demonstrated a broad vision of governmental authority in a number of cases involving deprivations of freedom of speech and the free exercise of religion. In an early decision of this type, the Court overturned the state trespass conviction of a Jehovah’s Witness who distributed religious literature in a privately owned company town. The Court maintained that a private corporation’s property rights did not entitle it either to “govern a community of citizens so as to restrict their fundamental liberties” or to have the state enforce such an arrangement in the face of the First and Fourteenth Amendments (*Marsh v. Alabama*, 1946, 509). Similarly, in a 1968 case, the Court held that a privately owned shopping center could not exclude picketers because it was the functional equivalent of a municipal business district and thus bound by the First and Fourteenth Amendments (*Amalgamated Food Employees Union v. Logan Valley Plaza*). More recently, a sharply divided Court held that the decision of a public school principal to invite a member of the clergy to offer a nonsectarian prayer at a high school graduation was “a choice attributable to the State” in violation of the establishment clause, despite vehement dissent that the majority had found state-induced religious coercion only by extravagantly distorting the record and ignoring American tradition (*Lee v. Weisman*, 1992, 481). Two notable Supreme Court decisions in 1996 held that government contrac-

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tors should have the same rights to freedom of speech as government employees *per se* (*Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr*; *O’Hare Truck Service, Inc. v. City of Northlake*; see Koenig, 1997).

While the Supreme Court has attempted to fashion several standards by which to identify state action—public functions, actors, and actions—and in some instances has applied them quite aggressively (particularly with regard to racial discrimination), the Court has not created a doctrine of such precision and consistency that accountability is ensured. Nonetheless, the difficulties the Court has encountered in its efforts to hold a variety of actors accountable for their behavior alert us to important issues that should be raised by all parties concerned when delegations of public authority are contemplated that go beyond the easily articulated boundaries of the state. These parties include not only the courts and judicial system but also all those in and attentive to the national and state legislatures and executives.

Toward a Coherent Understanding of State Action

A comprehensive view of state action, originally proposed by legal scholar Harold Horowitz, considers that state action has occurred “when a state, *in any way*, defines and enforces legal relations between private persons” (1957, 221, emphasis added). Such a perspective suggests that the Court’s fundamental purpose in all state action cases is to examine the manifestation of governmental policy in the law itself. Thus, in essence, state action cases are “an inquiry into the reasonableness of the manner in which the state has classified competing private interests, some of which it has preferred and established as ‘rights,’ and others of which it has subordinated” (Van Alstyne, 1965, 232).

This expansive mindset has been largely absent in the Supreme Court’s recent state action decisions. In retreating to the limited and superficial standards of the various “tests” described above, particularly the “public function” test, the Supreme Court has frequently denied the connection between the government and private actors exercising state authority. Only a Court that had severed that link could have decided as it did in *Flagg Brothers v. Brooks*, for example, that it was immaterial that a state statute created a process whereby one private party was allowed to deprive another of her property without due process of law (1978, 165).¹³ According to the majority opinion in that case, it “would intolerably broaden...the notion of state action...to hold that the mere existence of a body of property law in a State, whether decisional or statutory, itself amounted to ‘state action’ even though no state process or state officials were ever involved in enforcing that body of law” (at 160, n. 10, emphasis added). The majority vaguely suggested that there might be some limits upon the behavior of private actors involved in the performance of certain governmental

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functions, but it explicitly “express[ed] no view as to the extent, if any, to which a city or State might be free to delegate to private parties...and thereby avoid the strictures of the Fourteenth Amendment” (at 163-164).

Ira Nerken (1977, 361) has pointed out that defining standards for the delegation of governmental authority to private actors would not cause the Fourteenth Amendment to go “out of control,” constitutionalizing everything. Nerken notes, for example, that in its departure from a doctrine of Fourteenth Amendment substantive due process based on constitutional protection of private contracts the Court “did not reject the idea that the state allows liberty of contract, but only insisted that this was a ‘liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people’” (at 361, citing *West Coast Hotel v. Parrish*, 1937, 391). Analogously, when private or quasi-private actors are manifestly vested with the authority to act on behalf of the state, the rights—including property rights—of other private citizens and organizations at the hands of such proxies surely deserve the same concern and protection that they would possess if dealt with directly by the state.¹⁴ Widespread acceptance of a comprehensive view of state action would not compromise the government’s ability to operate or to privatize many of its functions. Rather, it would encourage consideration of the *total* context of situations involving the use of government authority—prior to privatization as well as thereafter—so that appropriate controls and accountability measures could be applied.

Recognizing State Action: A Four-Step Inquiry

The development of a coherent and comprehensive understanding of state action begins with a multi-issue inquiry (ideally by all branches at all levels of government) into the nature of every transfer of government authority. Such an inquiry would highlight private sector involvement in government decision making and clarify complex public-private relationships not only at the point of judicial review (Abramson, 1989, 217), but also at the time that delegations are made, and afterward during administrative oversight proceedings and policy audits. If appropriate and meaningful controls are established at the time that quasi- and nongovernmental entities become implicated in governmental activity, accountability problems might well be prevented.

Step One: Identify the Actor

What is the nature of the actor receiving governmental authority, instructions, or funds to act? Is it governmental, quasi-govern-

mental/quasi-private, or private? If it is private, is it for profit or not for profit? Who are the “physical, three-dimensional manifestations of government authority” (Tribe, 1985, 248)? Questions of this sort have sometimes been finessed altogether by legislators and executives in an effort to retain authority while avoiding responsibility for potentially expensive or unpopular decisions. Ronald Moe (1990, 135) has shown, for example, that the extraordinarily complex and convoluted lines of public and private authority devised to deal with the federal bailout of savings and loan associations “were left purposefully ambiguous because many agencies, including the Department of the Treasury, wanted to avoid direct responsibility...while retaining the right to intervene selectively in the process.” The savings and loan debacle, with literally hundreds of billions in taxpayer dollars at stake, was, of course, precisely the kind of situation where clear mechanisms for asserting authority and assessing responsibility were needed most and where the urge to avoid political blame was greatest.

Accountability for government action can be ensured only when the agents of the government, in all of their manifestations, can be recognized. In the extreme case it is no doubt too much to expect governmental actors to accept unprotected responsibility willingly. Yet there is no reason why the federal judiciary should be willing to implicate itself in the blame-avoidance stratagems of legislators and executives. Indeed, although the Supreme Court has recently demonstrated an unfortunate tendency to concentrate on the inherent or traditional “public function” performed while glossing over the threshold question of the identity of the performer, recent decisions of lower federal courts have begun to scrutinize the sponsorship of “private” actors as well as the payment for and legal control of their activities (e.g., *J.K. v. Dillenberg*, 1993; *Catanzano v. Dowling*, 1995; *Grijalva et al. v. Shalala*, 1996). In *Catanzano*, which involved nongovernmental home health care agencies providing Medicaid services, the Second Circuit Court of Appeals held it “patently unreasonable to presume that Congress would permit a state to disclaim federal responsibilities by contracting away its obligations to a private entity” (at 118, citing *Dillenberg*, 699). Similarly, a federal district court found in *Grijalva* (1996) that the “privatization” of Medicare services via contracts with nongovernmental health maintenance organizations did not disengage the government from providing health care to the elderly, even though that is precisely what the Department of Health and Human Services argued in attempting to deny citizens deprived of “privatized” benefits their due process rights to a hearing. Such inquiries probing the identity of those exercising public authority should (and as noted below, may be likely to) continue.

Step Two: Identify the Function

If a nongovernmental actor is involved, does it carry out functions of the sovereign? That is, does that actor exercise core governmental authority, or engage in activity with significant potential for the infringement of constitutionally or statutorily guaranteed rights or other egregious misbehavior that is in essence governmentally sanctioned? Without doubt, the judiciary and its coordinate branches will continue to have difficulty arriving at definitive answers. Nonetheless, the very articulation of these questions, whatever the institutional setting, will suggest certain functional categories, such

as the making of binding law, authoritative adjudication of disputes, control over elections for governmental office, the unconsented taking of private property, and the exercise of coercive force over others. Responses will vary with the specific nature of every situation, but unless such questions are posed directly—avoiding the trap of deciding whether particular activities are “traditional” public functions—answers are unlikely to be forthcoming.

The inquiry into functional performance is too important to be relegated to litigation and the judicial process alone. Instead, it should be initiated at the point of delegation, subdelegation, or contract in the legislative and executive branches. The General Accounting Office has recommended that lists of core governmental functions prohibited from subdelegation to private contractors should be drawn up by the president’s Office of Management and Budget (OMB) for elaboration and implementation by executive line agencies (U.S. General Accounting Office, 1991). In fact, OMB contract policy has long (if ineffectively) reflected this view, declaring that certain functions are inherently governmental in nature, including “those activities which require either the exercise of discretion in applying Government authority or the use of value judgment in making decisions for the Government” (U.S. Office of Management and Budget, Circular No. A-76). Official budget guidelines also forbid the use of private consulting services where “work of a policy, decision-making or managerial nature...is the direct responsibility of agency officials” (see Moe and Gilmour, 1995, 7).

The finding that a private actor exercises governmental power does not, in itself, constitute a constitutional violation (Abramson, 1989, 211). Nor, with few exceptions, does it appear that the present judiciary is likely to reassert the nondelegation doctrine (see, e.g., *Schweiker v. McClure*, 1982; *Larkin v. Grendel’s Den, Inc.*, 1982; *Thomas v. Union Carbide Agricultural Products*, 1985). Such a finding would, however, place the inquiry into the context of private regulatory activity (Abramson, 1989, 211), which could be probed in decision-making councils that might involve all three branches of government at both federal and state levels, not exclusively for constitutional toleration but also for the determination of appropriate measures to assure accountability for the exercise of public authority by private hands.

Step Three: Identify the Action

Does the particular action of a nongovernmental actor under consideration constitute an action of the state? Inevitably, such a query will be addressed in an immense variety of situations, ranging from judicial enforcement of private rights at common law, to indirect support or regulation of quasi-public associations, to overt grants of public power to private, profit-seeking corporations. If recent Supreme Court decisions offer any indication, it seems unlikely that the Court’s analysis of such activities will be any more consistent in the future than it has been in the past. Nonetheless, the proposed or actual privatization of governmental functions by statute, regulation, or contract should (and increasingly does) command close scrutiny, not only by the courts, but also initially by the political branches. OMB’s legislative clearance jurisdiction is well established, if recently neglected (U.S. Senate, 1986, 169-184), and it could be asserted with greater determination. Similarly, the administrative oversight jurisdictions of the Senate Commit-

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tee on Governmental Affairs and the House Committee on Government Reform and Oversight, among others, are well understood to embrace the review of delegated public functions to private or quasi-private proxies (see, e.g., U.S. Senate, 1990). In addition, as representatives of government employees, public service professionals, government program clientele, and other beneficiaries of public services come to realize that government responsibility declines when service functions are transferred to the private sector, there seems little doubt that they will respond with increased sensitivity and active political involvement to prevent forfeitures of government-established rights.

Political and legal access to privatization decisions at multiple points make the effective assertion of state action claims increasingly likely. An instructive example is provided by developments in contemporary federal Medicare policy. In anticipation of rapid growth in Medicare service delivery by health maintenance organizations (HMOs), Congress has provided in amendments to the Social Security Act for “a hearing before the Secretary [of Health and Human Services (HHS) for any member of] an eligible organization [HMO]...who is dissatisfied by reason of his failure to receive any health service to which he believes he is entitled [and] to judicial review of the Secretary’s final decision” (42 U.S.C.A. Section 1395 mm). Subsequently, the secretary of Health and Human Services decided that these hearing procedures do not apply, because HMOs are “private,” and the due process protection of the Fourteenth Amendment attaches only to state action. In response to the secretary’s claim, the Center for Medicare Advocacy, Inc. initiated a class action suit on behalf of Medicare claimants in the U.S. District Court for Arizona. On review, senior district judge Marquez essentially made his own four-step inquiry into the state action question and identified state action on the part of the HMOs by applying criteria specific to the facts of the case as follows:

- (1) the government pays for the covered services; (2) the government regulates HMOs’ activities as they apply to Medicare beneficiaries, especially benefit coverage determinations; (3) the Secretary issues regulations and directives which cannot be ignored; the Secretary creates the legal framework which governs the activities complained of by Plaintiffs; and (4) Medicare beneficiaries appeal HMO service denials directly to the Secretary, who has the power to overturn the HMO decision (*Grijalva v. Shalala*, 1996, 752).

Virtually identical criteria have been applied recently in *J. K. v. Dillenberg*, 1993, and *Catanzano v. Dowling*, 1995.

Step Four: Identify the Safeguards

If the state has acted, does the use of state authority comply

with constitutional and statutory requirements? If not, why not? Once it has been established that nongovernmental entities or agents are acting on behalf of the state, all three branches of government at both the federal and state levels are well equipped to articulate and to demand compliance with standards of protection appropriate to relatively well-defined categories of situations placing individual rights at risk, whether in entitlement programs, regulatory enforcement, or quasi-adjudicatory settings. The congressional model for protecting individuals in their dealings with administrative agencies, assuring participation in agency decision making, and mandating access to agency records and proceedings has long been established by the federal Administrative Procedure Act of 1946 (APA). State administrative procedure acts provide similar safeguards. Federal court elaboration of this model has not only articulated the APA's principles of fairness, participation, and access in particular bureaucratic settings but extends them to informal, quasi-adjudicatory situations such as disciplinary actions affecting public school students and government employees (see, e.g., *Goss v. Lopez*, 1975; *Cleveland Board of Education v. Loudermill*, 1985). The federal judiciary has well-established balancing tests to weigh the importance of individual rights against the operating needs of the government. Such considerations include the private interest at stake, the risk of erroneous deprivation, the probable value of additional procedural safeguards, and the fiscal and administrative burdens that additional procedural requirements would entail (*Matthews v. Eldridge*, 1976). As appropriate, such principles, procedures, and tests can easily be applied to the nongovernmental performance of public functions in analogous circumstances. The Supreme Court has already made it clear, for example, that federal due process protections can and should apply in private adjudicatory settings (*Schweiker v. McClure*, 1982), and that, in at least some circumstances, government contractors will be held to the same standards as public employees (*West v. Atkins*, 1988). In other settings, appropriate safeguards to the legal rights of citizens and government employees may simply be added to already developing lists of criteria now employed during the course of making the "privatization decision" (Donahue, 1989). Bruce Wallin (1997, 12-17) recently reported that in the early 1990s, the criteria guiding privatization initiatives in the Commonwealth of Massachusetts were expanded progressively to include numerous concerns that transcend cost and other market considerations: the privatization of "core functions," conflicts of interest, vendor compliance with affirmative action and equal opportunity laws, oversight to assure government control and accountability, and adverse impacts on government employees, among others. Over the opposition of Governor Weld, the state legislature passed a privatization control act embracing these and numerous other protective regulations of privatized state functions on December 16, 1993.

Conclusion

Far from attempting to resurrect some "Maginot Line" between the public and private sectors (see Bozeman, 1988, 673), our objective in this article is to begin to develop a protocol for recognizing government transfers of authority to the non-governmental sector so that appropriate and effective restraints and accountability measures can be established at the outset. So long as market

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dynamics are the preferred means of assuring accountability according to criteria of cost, cost-benefit efficiency, and/or customer satisfaction, few incentives exist for any branch of government to apply the analysis recommended here. Yet, while market considerations currently enjoy popular acclaim, they are by no means the only concerns being voiced about government performance (Starr, 1989; Smith and Lipsky, 1993, 11-12). Contractor nonperformance, misfeasance, and outright fraud have been hardy perennials since the earliest days of the Republic. So too has the misuse of government power and authority.

Traditionally, the delegation of legislative power to administrative agencies was justified, as Richard Stewart (1975, 1675) observed, by an understanding that government agencies served "as a mere transmission belt for implementing legislative directives in particular cases." Subsequent "intrusions into private liberties by agency officials" were legitimated by judicial review to ensure that agencies were kept "within the directives Congress had issued." The sweeping reforms of the New Deal era challenged the traditional accountability structure of the early administrative state by creating a host of new federal agencies operating under unprecedented delegations of authority from Congress. The subsequent response from regulated interests protesting the autocratic exertions of newly empowered bureaucrats provides much of the substance of contemporary administrative law—the Administrative Procedure Act as variously amended and literally thousands of federal judicial decisions reviewing agency actions for conformity with statutory and constitutional provisions governing citizen interactions with their government. Their purpose is to prevent arbitrary and capricious behavior and to assure decision making based on substantial evidence in the administrative record.

To this body of federal legal doctrines and their counterparts in the states has been added a bewildering array of additional constraints on administrative discretion. Often these constraints make government action more time consuming and expensive. At the extreme, the unhappy results of such controls are an affront to common sense (see Howard, 1994), making arguments for privatization both attractive and obvious. In fact, contract privatization makes available one of the most effective and realistic ways to "sweep away red tape," as urged by the advocates of the reinventing government movement (Executive Office of the President, 1993). The method presented here encourages the multiple actors involved in privatization decisions proactively to establish appropriate control systems, both to protect the commonweal from poor performance and fraud and to protect individuals from lawless, arbitrary, and capricious actions by the state's surrogate administrators. Without a reinvention of accountability to accompany the reinvention of government, the current wave of delegation by government at all levels to agents outside the state will almost certainly engender a reformist response from affected citizens and their representatives not unlike that which followed wholesale grants of

congressional power to agency administrators within government during the last era of reform.



Robert S. Gilmour is a professor of political science and director of the Master of Public Affairs Program at the University of Connecticut. He is also a member of the bar of the District of Columbia, and has written extensively about the relationship of government administration to public law.

Laura S. Jensen is an assistant professor of political science at the University of Massachusetts-Amherst. Her research interests include welfare state formation, the constitutive power of law, and American governance, public and private. Her doctoral dissertation on early American entitlements has won recognition from both the National Endowment for the Humanities and the American Political Science Association. She has published articles in the *Review of Politics* and *Studies in American Political Development*.

Notes

1. Barbara Romzek and Melvin Dubnick correctly point out that bureaucratic controls and professional standards also have an important place in the accountability structure of public organizations (1987, 227-238). These aspects of accountability are important in private organizations as well, though they operate somewhat differently. At a macro level in public organizations, however, the tenets of bureaucratic and professional accountability are reducible to political and legal accountability for purposes of binding enforcement.
2. In the federal government, significant examples of general management laws include the Budget and Accounting Act, 1921; Administrative Procedure Act, 1946; Federal Tort Claims Act, 1946; Freedom of Information Act, 1967; Federal Procurement Policy Act, 1974; Injunctive Relief Act, 1976; Sunshine in Government Act, 1976; Intentional Tort Amendment Act, 1976; Inspector General Act, 1978; Ethics in Government Act, 1978; Prompt Payment Act, 1983; Federal Managers Financial Integrity Act, 1984; Competition in Contracting Act, 1984; Privacy Act, 1984; Chief Financial Officers Act, 1990; Government Performance and Results Act, 1993; Government Management Reform Act, 1994; Information Technology Management Reform Act, 1996; among many other, less important Federal statutes. (The Administrative Procedure Act has been codified in Title 5 of the U.S. Code, along with the Freedom of Information, Privacy, Government in the Sunshine, and Injunctive Relief Acts.)
3. As Paul Starr (1989, 16, 19) has thoughtfully observed, using the terms "public" and "private" is risky because they are "fundamental to the language of our law, politics, and social life," yet "the source of continual frustration" regarding their exact meaning. We employ these terms in this article not to suggest the existence of a fixed or sharp public/private distinction, but rather as part of the "deeply resonant vocabulary for the making of claims against the state" that has historically been central in liberal democratic thought. As Starr has written:
the concept of a public government implies an elaborate structure of rules limiting the exercise of state power. Those who wield power are to be held publicly accountable—that is, answerable to the citizens—for their performance. Government decisions and deliberations must be public in the sense of being publicly reported and open to general participation. In short, the citizens of a liberal state are understood to have a right to expect their government to be public not only in its ends but also in its processes.
4. So long as Congress has not delegated or reserved executive power to itself or to its members, appointees, or agents (*Buckley v. Valeo*, 1976; *Immigration and Naturalization Service v. Chadha*, 1983; *Bowsher v. Synar*, 1986; and *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise*, 1991), the Supreme Court has permitted shared exercise of governmental authority as a matter of expediency. If Congress legislates "as far as [i]s reasonably practicable" (*Buttfield v. Stranahan*, 1904, 496), providing "intelligible principle[s]" (*J. W. Hampton, Jr. & Co. v. U.S.*, 1928, 409) or "standards" (*Skinner v. Mid-American Pipeline Co.*, 1989, 218) for official behavior, its delegations of authority are sustainable.
5. For example, courts have justified a "government contractor defense," barring all product liability claims against federal contractors, on the basis of the government's sovereign immunity and public policy interests (see Gusman, 1990). As to liability for constitutional torts, however, the U.S. Supreme Court recently concluded that private contract employees operating a public prison will not be shielded by the "qualified immunity" legal defense that would be available to government-employed prison guards. In a closely argued, five-to-four decision, the majority found that performance of a governmental function did not support the immunity of a private person, especially where such a job was performed without government supervision or direction (*Richardson v. McKnight*, 1997).
6. Phillip Cooper (1995, 187-91) has identified several kinds of market-based accountability focused on (1) cost alone, (2) cost-benefit efficiency, (3) input-output efficiency, and (4) client satisfaction. Much needs to be learned for effective application in public sector service delivery programs. Market accountability, as Cooper points out, "is different from either the legal or the political variety and in fact may conflict with them."
7. State action theory focuses, technically, on constitutional law, but the federal courts have mingled constitutional and Section 1983 liability and immunity precedents in suits against federal and state officials (see, e.g., *Lugar v. Edmondson Oil Co.*, 1982, 935; *Anderson v. Creighton*, 1987, 654). David Rosenbloom (1992, 119) has noted that actions taken "under color of" law are thus "interpreted synonymously with the traditional constitutional concept of state action." We agree with his observation, although we doubt the existence of one "traditional" concept of state action, as this article demonstrates.
8. The five-member *Garcia* majority overturned *National League of Cities v. Usery* (1976), in which the traditional public function standard had been held to bar subnational application of the Fair Labor Standards Act.
9. Situations involving such "virtual state officials" included the following: summary garnishment of employee wages upon a creditor's (or attorney's) petition to the clerk of the court (*Sniadach v. Family Finance Corp.*, 1969); summary process of *ex parte* applications for repossession of household goods purchased in conditional sales contracts (*Fuentes v. Shevin*, 1972; *Mitchell v. W. T. Grant Co.*, 1974); summary attachment and garnishment of assets upon *ex parte* petition containing only conclusory allegations to the clerk of the court (*North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 1975).
10. Dissenting in *Flagg Brothers*, Justices Stevens, White, and Marshall found the majority's holding to be fundamentally inconsistent with the Court's imposition of due process restrictions in earlier creditor-debtor cases; its posthumous imposition of the overt official involvement criterion, ostensibly from those cases, was, in their words, "baffling" (169, 173).
11. *Edmonson*, stated Justice O'Connor (joined by Justice Scalia and Chief Justice Rehnquist) was wrongly decided, because "[n]o one is compelled by government action to use a peremptory challenge, let alone use it in a racially discriminatory way" (at 636). Justice Scalia subsequently declared that the majority opinion in *McCullum*, which relied upon *Edmonson*, was a "bad decision [reduced] to the terminally absurd: A criminal defendant, in the process of defending himself against the state...held to be acting on behalf of the state" (at 70-71, Justice Scalia, dissenting).
12. Justice Scalia concurred in part and in the judgment.
13. Obviously, according to this logic, the same must be said of the governor of New York and the state assembly, which passed the "Enforcement of Warehouseman's Lien" provision of the New York Uniform Commercial Code Section 7-210.
14. Correspondingly, Harold Sullivan warns that "if private flexibility and discretion are among the advantages promised by privatization, they may come at the expense of citizens' rights" (1987, 466).

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