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PUBLIC AND PRIVATE PARTNERSHIPS: ACCOUNTING FOR THE NEW RELIGION

*Martha Minow**

What do American schools, prisons, welfare agencies, and social service programs have in common? These institutions have been largely or exclusively public in terms of their funding, operations, and identities over the past forty years.[1] Yet they now face major experiments in privatization. Public dollars increasingly can be spent purchasing private schooling, and private companies have entered the business of managing public schools. Public dollars flow through contracts with private corporations, nonprofit organizations, and religious groups to run public schools and prisons and to deliver welfare-to-work and other social services. What happens to the scope and content of public values when public commitments proceed through private agents?

This question demands historical context. The particular trends in privatization are new, and yet they highlight the longstanding and complex interactions between public and private social provision in this country.[2] A variety of for-profit and nonprofit organizations pro-

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* Professor, Harvard Law School. Some of the ideas here grow from MARTHA MINOW, PARTNERS, NOT RIVALS: PRIVATIZATION AND THE PUBLIC GOOD (2002). This Article was presented as the 2003 Kenan Distinguished Lecture, Duke University. Thanks to George Hicks, Anne Robinson, Stephen Shackelford, and Alix Smith for research assistance, and to Joe Singer, Orly Lobel, Vicky Spelman, and editors of the *Harvard Law Review* for valuable advice.

[1] Defining what is "public" and what is "private" turns out to be complicated in part due to the history of interconnections between governmental and private initiatives. *See* Part I *infra*. In the United States, "public" has potentially three meanings: (1) pertaining to the government, (2) pertaining to spaces and processes open to the general population or "the people," or (3) pertaining to any sphere outside the most intimate, which usually means outside of the home and family. Even the first meaning lends itself to contest and ambiguity. *See* Frank H. Easterbrook, *The State of Madison's Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1328 (1994) (questioning the relationship between legislatures, courts, and the public interest). The second and third meanings of public introduce further complexities, given that the government itself supplies critical definitions affecting the spaces and processes open to the population, and even defines what counts as a family and what counts as a religion, at least for important purposes such as tax treatment. For further discussion, see MINOW, *supra* note *, at 29–35; Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1426 (1982); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983). For a nuanced treatment of the public-private distinction and its shifts in terms of physical space and gender roles, see SARAH DEUTSCH, WOMEN AND THE CITY: GENDER, SPACE, AND POWER IN BOSTON, 1870–1940, at 6–24, 133–134 (2000).

[2] Social provision here refers to the variety of individual and collective efforts to respond to basic human needs, such as schooling; income supports and subsidies for housing, food, and prescription drugs; social services addressing child abuse and neglect; detoxification programs; health care; dispute resolution; and corrections. Historically, a mix of public and private, secular and

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vide education, health care, day care, elderly care, and other services through public subsidies.[3] This Article seeks to avoid the partisan and polarized debates over privatization by examining its potential for both good and disturbing effects against the backdrop of historical practices, evolving public norms, and vital public accountability.

The new versions of privatization potentially jeopardize public purposes by pressing for market-style competition, by sidestepping norms that apply to public programs, and by eradicating the public identity of social efforts to meet human needs. Inviting new providers into a market-based system to provide schooling and social services will produce at least some failures, with harms to vulnerable children and adults, and will rely on informed choosers when that may be precisely what we do not have. Privatization may also undermine public commitments both to ensure fair and equal treatment and to prevent discrimination on the basis of race, gender, religion, or sexual orientation. If competition can be harnessed through public accountability requirements, however, innovations and plural forms of social provision will strengthen the nation's total response to people in need. This Article explores the risks but looks also to the promise of privatization, if coupled with requirements for accountability in public terms.

Although the term "privatization" covers a variety of different activities, a useful definition encompasses the range of efforts by governments to move public functions into private hands and to use market-style competition.[4] Current privatization efforts involve both for-profit and nonprofit organizations — including religious entities — in performing public responsibilities or addressing public needs. These privatization developments cut across many fields, but schooling generates the most attention, perhaps because it potentially affects the most people or involves the critical functions of educating and socializing children. States and localities, pressed by a variety of private groups, have launched experiments in school choice, including vouchers for private schooling and charters for start-up schools. The Su-

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religious, for-profit and nonprofit providers has emerged in the United States in each of these areas.

[3] Henry Hansmann, *The Changing Roles of Public, Private, and Nonprofit Enterprise in Education, Health Care, and Other Human Services*, *in* INDIVIDUAL AND SOCIAL RESPONSIBILITY: CHILD CARE, EDUCATION, MEDICAL CARE, AND LONG-TERM CARE IN AMERICA 245 (Victor R. Fuchs ed., 1996).

[4] *See* Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1287 (2003). Privatization can include using publicly funded vouchers to permit eligible recipients to purchase goods or services in the private market, government contracts with private providers, and using private entities to set public standards. *See* Matthew Diller, *Going Private — The Future of Social Welfare Policy?*, 35 CLEARINGHOUSE REV. 491, 491 (2002). Rather than diminishing government, privatization may preserve or enlarge public spending. *See id.* at 497.

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preme Court's recent decision in *Zelman v. Simmons-Harris*[5] signaled a green light for vouchers and set the agenda for public deliberations about school reform for the next decade. A Florida court's rejection of that state's voucher program under the state constitution[6] and a Maine court's rejection of a challenge to a school tuition plan that excluded religious schools[7] are further indications that the legal and political debates will continue for some time.[8]

Less obviously, but no less importantly, these debates expose other activities that cross the boundaries not only between public and private, but also between secular and religious and between nonprofit and for-profit institutions dealing with social welfare. School voucher programs use public dollars to purchase private education, most often at religious schools.[9] Yet even within public school systems, local gov-

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[5] 122 S. Ct. 2460 (2002).

[6] *See* Holmes v. Bush, No. CV 99-3370, 2002 WL 1809079, at *1 (Fla. Cir. Ct. Aug. 5, 2002) (striking down a voucher scholarship program as a violation of the Florida Constitution, which states that "[n]o revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution").

[7] Bagley v. Raymond Sch. Dep't, 728 A.2d 127, 147 (Me. 1999) ("[T]he current exclusion of religious schools from Maine's tuition program does not violate the Free Exercise or Establishment Clauses of the First Amendment or the Equal Protection mandates of the Fourteenth Amendment.").

[8] *See* Lynn Porter, *Voucher Opponents Rally in Largo*, TAMPA TRIB., Oct. 1, 2002, at 7, *available at* 2002 WL 26174905 (describing a circuit court ruling that school vouchers violate the Florida constitution and rallies organized in opposition); *see also* Laurie Goodstein, *In States, Hurdles Loom*, N.Y. TIMES, June 30, 2002, § 4, at 3 (forecasting challenges to Washington State's constitutional ban on public payments to religious schools); Tan Vinh, *Limits on Student Teachers Targeted; Suit Filed Against Ban on Parochial-School Work*, SEATTLE TIMES, Sept. 26, 2002, at B1, *available at* 2002 WL 3915268; Monte Whaley, *Old Law May Be Voucher Stopper: Amendment Passed in 1800s*, DENVER POST, July 22, 2002, at B1 (noting that the Colorado Constitution "may be used to thwart the school voucher movement in the state"). At issue in many of the state cases (though not in Maine) are the Blaine amendments, adopted to forbid state subsidy of religious instruction as part of the anti-Catholic movement in the 1880s. *See* Frank A. Shepherd & Harold E. Johnson, *Florida Antivoucher Court Ruling Gives Lesson in "Three R's"*, TAMPA TRIB., Aug. 18, 2002, at 1. For a dispute about the history of the amendments, compare Nathan J. Diament, *Don't Battle Vouchers with a Bigots' Law*, NEWSDAY, Aug. 23, 2002, *available at* 2002 WL 2759229, and Thomas Roeser, *Catholic Schools Need No Shackles; Government Vouchers Come with Strings*, CHI. SUN-TIMES, Aug. 21, 2002, at 12, *available at* 2002 WL 6469727, with K. Hollyn Hollman, *Dredging Up Ugliness in the Name of Vouchers*, WASH. POST, Aug. 31, 2002, at A23. *See also* Kotterman v. Killian, 972 P.2d 606 (Ariz. 1999) (rejecting a challenge to a state statute allowing a tax credit for donations to school tuition organizations, despite a Blaine Amendment in the Arizona Constitution).

[9] Current school reforms include voucher programs in Cleveland, Ohio, and Milwaukee, Wisconsin; such programs allow a limited number of low-income families to obtain public resources to pay for education at private schools, which in practice are largely religious schools. *See Zelman*, 122 S. Ct. 2460 (2002); Jackson v. Benson, 578 N.W.2d 602 (Wis. 1998); *see also* GEN. ACCOUNTING OFFICE, SCHOOL VOUCHERS: PUBLICLY FUNDED PROGRAMS IN CLEVELAND AND MILWAUKEE 25 (2001); PEOPLE FOR AM. WAY FOUND., A PAINFUL PRICE: HOW THE MILWAUKEE VOUCHER SURCHARGE UNDERCUTS WISCONSIN'S EDUCATION PRIORITIES (2002), *available at* http://www.pfaw.org/pfaw/dfiles/file_27.pdf.

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ernments already contract with private management companies, including those organized to make profits.[10] Public education dollars also support entrepreneurial charter schools and mimic markets by offering parents choices among public schools and programs. Similarly, spurred by federal law, state and local governments outsource welfare program management to for-profit companies such as Lockheed Martin and social-service delivery to churches and religious nonprofit organizations. States and localities spend federal dollars with religious groups that run Head Start programs, participate in community-service block grants, and operate children's health programs. Publicly traded companies and religious groups manage prisons; for-profit companies and religious groups run welfare-to-work programs with government funds.[11]

The relationship between public funding and religious providers raises special problems. Allowing public resources to purchase services provided by religious institutions or to finance religious instruction raises constitutional, political, and practical concerns.[12] Public funding of religious schools and religious social services departs from a conception of the Constitution's First Amendment as a mandate to separate religion and state. Public subsidies, even when channeled through vouchers redeemable by individuals, risk creating perceptions of government endorsement of religion. Given a scarcity of other good options, publicly funded vouchers may also pressure people into religious activities that they would otherwise not choose. Fear of religious coercion or religiously motivated intolerance animates those who most steadfastly argue for separating religion and government, and thus religion and schooling.[13] The prospect of converting schooling that is nearly universally public into state-funded private and religious

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[10] *See* Michael A. Fletcher, *Private Enterprise, Public Woes in Phila. Schools*, WASH. POST, Sept. 17, 2002, at A1.

[11] *See* Ahmed A. White, *Rule of Law and the Limits of Sovereignty: The Private Prison in Jurisprudential Perspective*, 38 AM. CRIM. L. REV. 111 (2001); *Developments in the Law—The Law of Prisons*, 115 HARV. L. REV. 1838, 1868 (2002) [hereinafter *Developments*]; Terry Collins, *Inmates Find a Blessing Behind Bars*, STAR TRIB. (Minneapolis), Sept. 28, 2002, at 1B; Curtis Krueger, *Private Sector, Public Needs*, ST. PETERSBURG TIMES, Mar. 12, 2001, at 1B; Michele McNeil Solida, *Welfare Issue Intertwines Church, State*, INDIANAPOLIS NEWS/INDIANAPOLIS STAR, Aug. 1, 2002, at A1. With assistance from the federal government, religious groups have also moved into the banking and credit business — and critics charge that this development reflects governmental failures to address exorbitant inner-city lending practices. *See* Stephen Manning, *Faith-Based Banking Gets Boost from U.S. Agency*, CHI. TRIB., Sept. 9, 2001, § 5, at 8.

[12] *See* Maureen Magee, *School Vouchers Upheld: Public Money Can Be Used at Private, Religious Institutions*, SAN DIEGO UNION-TRIB., June 28, 2002, at A1 (reporting the view of the president of the Californian Teachers Association); Scott Stephens, *Couple Hope for 1 More Voucher: Cleveland Parents of 12 Are Among Those Petitioning Supreme Court*, PLAIN DEALER (Cleveland), Sept. 28, 2001, at B1 (reporting the view of the president of the Ohio Federation of Teachers).

[13] *See, e.g.*, AMY GUTMANN, DEMOCRATIC EDUCATION (1999).

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schooling troubles people who worry about social and religious divisions. This worry has been exacerbated by the September 11 attacks, which some have attributed in part to political indoctrination by religious schools.[14]

The provision of social services by houses of worship and other religious institutions, a high priority for President George W. Bush, triggers sharp criticisms, not only from those who worry about maintaining a separation between church and state but also from those concerned that government aid may intrude on the autonomy and freedom of religious groups.[15] Nonetheless, federal agencies use public resources to promote the involvement of religious organizations in public welfare.[16] State governments fund social-service programs that incorporate religious practices or are run under religious auspices.[17]

The involvement of religious and secular private providers of schooling, social services, and housing raises questions beyond the proper relationship between government and religion. Teachers' unions warn that school vouchers for private schools will drain needed resources and engaged families from the public school system. School vouchers may undermine state and national initiatives intended to raise expectations and student achievement if school systems use vouchers to send failing students to private schools exempted from those requirements.[18] For-profit prisons worry people who wonder if profits are made by skimping on legal protections or reducing the quality of conditions.[19] Others object that a function like punishment

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[14] One political cartoonist controversially suggested a connection between school vouchers and religious schools and thus religious terrorists. *See* Paul Thoreson, *Cartoon on Vouchers Was Unfair and in Poor Taste*, SAN DIEGO UNION-TRIB., Oct. 5, 2001, at B9 (Letters) (criticizing a cartoon by Signe Wilkinson).

[15] *See* Editorial, *Keeping the Faith: Allaying Discrimination Concerns Could Avoid Showdown*, DALLAS MORNING NEWS, July 21, 2001, at 26A.

[16] *See* Robyn Blumner, *Bush Does an End Run To Help Faith-Based Initiatives*, MILWAUKEE J. SENTINEL, Sept. 16, 2002, at 11A, *available at* 2002 WL 24010846 (describing the effort by the federal Departments of Housing and Urban Development (HUD), Health and Human Services, Justice, and Labor to encourage participation by faith-based organizations in federally funded programs); Waveney Ann Moore, *Societal Healers Line Up for Bush Buffet of Grants*, ST. PETERSBURG TIMES, Aug. 7, 2002, at 12, *available at* 2002 WL 24118630 (same); *see also* HUD's Center for Faith-Based and Community Initiatives, *at* http://www.hud.gov/offices/fbci/index.cfm (last visited Feb. 9, 2003) (providing public information about federal funding opportunities for faith-based groups). Some of these efforts date back to efforts launched by President Bill Clinton. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. § 604a (2000) (providing for charitable choice in the provision of welfare services).

[17] *See* Bill Broadway, *Faith-Based Groups Benefit from New Federal Grants*, WASH. POST, Aug. 3, 2002, at B9.

[18] *See* Dorothy Shields, *Cartoon Helped Show Us School Voucher Problems*, PANTAGRAPH (Bloomington, Ill.), Feb. 18, 2001, at A13 (commenting on an editorial cartoon published on February 11, 2001).

[19] *See* Shymeka L. Hunter, Note, *More Than Just a Private Affair: Is the Practice of Incarcerating Alaska Prisoners in Private Out-of-State Prisons Unconstitutional?*, 17 ALASKA L. REV.

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is fundamentally governmental and should not be contracted out to private providers.

What may make a particular function fundamentally public as opposed to private? The question points potentially to traditional practices, symbolic meanings, or political theories. Collecting taxes may seem fundamentally public because historically it has been conducted by agents employed by governments, whether monarchs or democratic officials. Criminal prosecution may carry special symbolism as a public rather than private action. Although some historical traditions permitted prosecutions initiated by private parties, contemporary U.S. practice consolidates prosecutorial power in the government, with the symbolic message that the government stands in for the community and private victims. Some may view the task of running prisons as importantly public because the political system currently assigns a monopoly over the legitimate use of force to the government, although historical practices included private prisons. Using private actors may jeopardize the legitimacy of government action because the public may suspect that private profit-making — rather than public purposes — is being served. Critics even suggest that prison privatization produces incentives to push for expanding the prison system and criminalization.[20] Others may wonder whether a profit-making company handling a state's welfare-to-work transition cares more about moving people out of welfare in the short term than about helping them find long-term jobs. Whether or not these doubts are warranted, the appearance of private motives in a public domain can undermine respect for government and even generate doubt whether the government is sincerely pursuing public purposes. The public identity of particular actions can carry traditional, symbolic, or political significance, and these dimensions may tacitly influence debates expressed in more utilitarian terms. Similar objections, along with constitutional concerns, arise when states permit religious groups to run units within public prisons.[21]

The provision of previously public services by religious and for-profit entities raises questions about public participation and the ef-

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319 (2000); Judith Greene, *Bailing Out Private Jails*, AM. PROSPECT, Sept. 10, 2001, at 23 (reporting on lawsuits raising challenges and state decisions to roll back or rescind contracts because of abuses in privatized prisons). *But see Developments*, *supra* note 11 (identifying strengths of for-profit prisons). For a historical perspective, see White, *supra* note 11.

[20] *See* Andrew Gumbel, *The US Economy May Be Ailing, but with Record Inmate Numbers To Contend With the Prison Industry Is Booming*, INDEP. (London), Oct. 19, 2002, at 16, *available at* 2002 WL 10168172o.

[21] Samantha M. Shapiro, *At Evangelical Jails, Jesus Saves and Texas Pays the Bills*, FORWARD, Sept. 6, 2002, at 1, http://www.forward.com/issues/2002/02.09.06/news5.html.

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fects of privatization on the character of the polity.[22] The shrinking of public space raises a related set of concerns. When courts uphold the rights of owners to restrict free speech in shopping malls, the avenues for public expression seem diminished.[23] Mirroring increasing private ownership of water supplies and distribution, the hit Broadway musical *Urinetown* satirizes a world with no free public restrooms, where people have to pay to relieve themselves (while also exposing dilemmas of both public and private resource management).[24] More abstractly, the settings for public debate and deliberation may be shrinking as key decisions about schooling, social services, prisons, and health care are made by private groups with public funds. Public control and review — whether through administrative or political processes — diminish as previously public activities fall under private management and control. Access to information about services and results also decreases if the information becomes private. Local, state, and federal governments make numerous but discrete decisions: to subcontract social services and prison and school management, to invite religious groups into government programs and public spaces, to cut back on public programs, to promote partnerships joining venture capital projects and government goals, to distribute public benefits in the form of vouchers redeemable at private settings, to solicit private underwriters for public initiatives, and to impose fees or other restrictions on programs. Ordinary people, if they are consulted at all, take the role of consumers rather than citizens who participate in governance decisions through elected representatives or other public channels. Many people, reflecting a range of constitutional, philosophical, and practical views, condemn the use of public dollars to finance religious instruction and to remake the relationship between schooling and the polity as well as al-

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[22] Secular nonprofits seem less likely to pose such risks when they chiefly act to deliver services specified by the government or, as is the case with private educational institutions, serve a small percentage of the population.

[23] *See* Hudgens v. NLRB, 424 U.S. 507, 520–21 (1976) (holding that the First Amendment does not apply against a privately owned shopping area); Waremart, Inc. v. Progressive Campaigns, Inc., 102 Cal. Rptr. 2d 392, 399 (Cal. Ct. App. 2000) (holding that commercial establishments can prohibit expressive activity unrelated to the business enterprise). The Supreme Court did rule that a state can create under its own constitution a right of access to shopping centers. *See* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 88 (1980). However, even the California law at issue in that case has been restricted by subsequent state interpretation. *See Waremart*, 102 Cal. Rptr. 2d at 392 (allowing a retailer to prevent a petition for signatures on a private sidewalk); *see also* Stranahan v. Fred Meyer, Inc., 11 P.3d 228, 244 (Or. 2000) (holding that a private shopping mall owner can prevent collection of signatures at the mall).

[24] *See* GREG KOTIS, URINETOWN, THE MUSICAL (2002); *Theater Guide*, N.Y. TIMES, June 7, 2002, at E5 (noting the performance of the Tony-award winning *Urinetown*); *see also* PETER H. GLEICK ET AL., THE NEW ECONOMY OF WATER: THE RISKS AND BENEFITS OF GLOBALIZATION AND PRIVATIZATION OF FRESH WATER (2002) (examining the risks from global trends toward transferring production, distribution, or management of water from public to private hands).

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ter the line between state and religion. Because these decisions are separated in time and space, the patterns of social provision are often difficult to discern. In addition, many of the decisions are made without public notice or opportunities to participate. With effects buried under a welter of specific decisions, no wonder there is little public debate over the kinds of services that warrant public subsidy or provision. In the meantime, emerging arrangements jeopardize public commitments to equality, due process, and democracy.

These shifts merit public discussion. Yet, if we stand back, we can recognize the changing relations between public and private actors as a new chapter in a long-running story of shifting relationships connecting public and private institutions, functions, and identities. New shifts should be subject to overarching public rules and goals governing their development. In this light, public and private institutions can and should be viewed as partners, serving larger and multiple public ends.

New uses of vouchers, government contracts, and public-private ventures afford a chance to draw upon the strengths of different societal sectors, to stimulate competition and innovation, and to embrace pluralism and tolerance as important public values. The persistent failures in existing forms of social provision — in schooling, meeting the needs of poor people, addressing substance abuse, resolving disputes, and ensuring health care — supply powerful reasons for government to work with the private forces of for-profit, secular nonprofit, and religious organizations. Still, public values, which themselves require public deliberation, should guide assessments of the specific benefits and limitations of competition and the quality of services delivered by for-profit or religious providers in partnership with government to meet basic human needs.

Whatever the normative limitations of the arguments favoring public-private partnerships, the trend is undeniable. State, local, and federal governments are widely exploring privatization. Skeptics should not simply decry this reality, but deal with it by demanding public accountability. Yet public accountability raises its own set of issues. Voters and leaders should demand public accountability that draws on the best, not the worst, of the accountability practices in the marketplace, in nonprofit organizations, in religious institutions, and in government. With scandals revealing defects in the accountability of corporations and religious institutions, governments must set and enforce meaningful public standards for public services, even if delivered privately.

Accordingly, this Article considers how current privatization efforts build upon and depart from historical practice. It then considers reasons to endorse and reasons to object to current privatization efforts. After arguing for a conception of partnership — joining public and private efforts to meet basic human needs — this Article identifies

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accountability as the central issue requiring inventive work and renewed public involvement and identity, and offers suggestions for promoting accountability.

I. A NEW CHAPTER IN THE PUBLIC-PRIVATE STORY: PROMISES AND RISKS

In some ways, our time mirrors the early nineteenth century, with its rising confidence in private initiative, voluntary action, and religiously inspired responses to the problems of neglected children, mentally ill people, and prisoners. Historian James Willard Hurst argues that "[b]elief in the release of private individual and group energies . . . furnished one of the working principles which give the coherence of character to our early nineteenth-century public policy."[25] During the nineteenth century, federal, state, and local governments used land grants, tax exemptions, and corporate and antitrust law to stimulate private efforts in the service of public aims.[26] Current initiatives, in contrast, supplement these government efforts with public funds to finance private initiatives and public-private ventures;[27] yet the chal-

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[25] JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES 32 (1967). For a discussion of current uses of market mechanisms in governance, see John D. Donahue, *Market-Based Governance and the Architecture of Accountability*, *in* MARKET-BASED GOVERNANCE: SUPPLY SIDE, DEMAND SIDE, UPSIDE, AND DOWNSIDE 1, 2–5 (John D. Donahue & Joseph S. Nye Jr. eds., 2002).

[26] In the nineteenth century, common law governance at the state and local levels promoted economic development and industrialization alongside restrictions, such as nuisance laws, that sought to guide private actors to respect the public good. *See* WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA 12, 22, 42 (1996).

[27] At the turn of the twenty-first century, private-sector actors are joining in partnerships with local and state governments, and with large federal government agencies and initiatives forged during Reconstruction, the New Deal, the Great Society, and subsequent periods. *See, e.g.*, Bill Berkowitz, *Prospecting Among the Poor: Welfare Privatization* (2001), *available at* http://www.arc.org/downloads/prospecting.pdf (describing how the federal Personal Responsibility and Work Opportunity Act of 1996 allows states to set up private delivery systems for public welfare funds and services); Ronald D. Utt, *How Public-Private Partnerships Can Facilitate Public School Construction* (Heritage Found. Backgrounder No. 1257, 1999), *available at* http://www.heritage.org/Research/Education/Schools/BG1257es.cfm (describing public-private partnerships and public school construction); Child Care P'ship Project, *at* http://www.nccic.org/ccpartnerships/home.htm (last visited Feb. 9, 2003) (describing public-private partnerships to improve child care); Nat'l Council for Pub.-Private P'ships, *Factsheet*, *at* http://ncppp.org/presskit/factsheet.html (last visited Feb. 9, 2003) (describing cutting-edge public-private partnerships in environmental protection, water treatment, transportation, and other fields); *see also* Nat'l Council for Pub.-Private P'ships, *For the Good of the People: Using Public-Private Partnerships To Meet America's Essential Needs* (2002), *available at* http://ncppp.org/presskit/ncpppwhitepaper.pdf. Historians also identify the emergence of governmental appropriation, as well as charters and tax exemptions to private institutions, in the nineteenth century. HURST, *supra* note 25, at 96–97; *see also id.* at 79–82, 88 (describing the shift toward governmental funding through land grants and utility financ-

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lenge today, just as it was in the past, is to balance confidence in private initiative with a vision of public values, respect for religion with a commitment to liberty, and an embrace of ethnic and religious pluralism with a commitment to nourish a union.

Thus, it is not novel to ask how extensively public resources should be privatized. One financially strapped municipality in 1849 literally sold the public square to private interests — but the state supreme court found this a violation of public purposes.[28] When New York City Mayor Michael Bloomberg proposed in 2002 to redress an enormous budget crisis by selling naming rights to city parks, he triggered jeers and parodies, but no lawsuits as yet.[29] Even as governmental activities increasingly addressed the needs of children, disabled people, and poor people in the nineteenth century, philanthropic and voluntary agencies — today's nonprofits — sprung up and expanded.[30] In the area of social services such as foster care and adoption, private agencies — many religious — formed the central elements of social response but gradually became part of publicly regulated and subsidized systems.[31] The creation of private dispute resolution agencies, some for-profit, some religious, in some way revives traditions of mercantile and religious communities in the eighteenth and nineteenth centuries.[32]

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ing); ALAN TRACHTENBERG, THE INCORPORATION OF AMERICA: CULTURE AND SOCIETY IN THE GILDED AGE 165 (1982).

[28] *See* Commonwealth v. Rush, 14 Pa. 285 (1850); NOVAK, *supra* note 26, at 146.

[29] *See* John Leland, *And Now, Unveiling RCA Battery Park*, N.Y. TIMES, Feb. 10, 2002, § 9 (Sunday Styles), at 10 (satirizing a New York world in which everything from cab drivers' verbal assaults to traffic jams presents an opportunity for corporate endorsement); *see also* Dave Saltonstall, *Park Ads Plan a Sign of Tough Times*, DAILY NEWS, Feb. 15, 2002, at 20 (distinguishing Mayor Bloomberg's proposal to sell ads in city parks from the proposal to sell naming rights, which would be reserved "for companies willing to build and maintain large new complexes for the park system, like a new track and field stadium").

[30] *See* OSCAR & MARY HANDLIN, THE DIMENSIONS OF LIBERTY 104 (1961).

[31] *See* LINDA GORDON, HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE: BOSTON, 1880–1960, at 27–58 (1988).

[32] Extensive scholarship examines the tradition of merchant arbitration and dispute resolution. *See, e.g.*, LINDA R. SINGER, SETTLING DISPUTES: CONFLICT RESOLUTION IN BUSINESS, FAMILIES, AND THE LEGAL SYSTEM 5 (1990) (describing private arbitration procedures established by merchants' associations and noting that religious and immigrant groups, ranging from colonial Puritans to twentieth-century Jewish and Chinese immigrants, supported dispute resolution outside the formal court structure in the United States); Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449, 460–61 (1996) (explaining that, as early as the seventeenth century, merchants turned to fellow merchants with knowledge of industry customs, rather than to the courts, to resolve trade disputes); Bruce H. Mann, *The Formalization of Informal Law: Arbitration Before the American Revolution*, 59 N.Y.U. L. REV. 443, 469–73 (1984) (noting that trade associations established private dispute resolution mechanisms early on, culminating in the birth of commercial arbitration under the auspices of the New York Chamber of Commerce in 1768); *see also* JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? 44–45, 73–94 (1983).

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Nor is it new to see religious organizations in the business of schooling and social welfare. Religious goals animated education efforts in early America.[33] Religious groups initiated social services for the poor, the sick, and the disabled.[34] Even ostensibly secular reform efforts at the turn of the twentieth century had strong religious roots.[35] Due to social conventions and constitutional interpretations, religiously affiliated hospitals and child welfare and social service agencies have received public funding for decades through contracts and entitlement programs structured as insurance or vouchers. Usually, such organizations exist independently as nonprofit organizations, formally separate from places of worship or ritual. Often, observers do not even realize the religious affiliation of many nonprofit agencies.[36] But the staff and volunteers are often acting out of religious conviction and pursuing practices guided by religious teachings.[37]

When Franklin D. Roosevelt signed the G.I. Bill into law in 1944 as an educational entitlement for World War II veterans,[38] the government initiated a program that paid billions of public dollars to both public and private educational institutions, with no apparent objection to including religious schools. In fact, the Conference Committee report explained that it included the word "all" before "public or private" in defining "educational or training institutions" in order "to make it clear that church and other schools are included."[39] The popular law overcame objections that it was too expensive, would encourage sloth by veterans, and would lower standards at educational institutions. Veterans initially faced unscrupulous practices by proprietary schools that promised programs that they did not deliver or otherwise engaged

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[33] *See* LAWRENCE A. CREMIN, AMERICAN EDUCATION: THE NATIONAL EXPERIENCE, 1783–1876, at 17–100 (1980).

[34] *See* PAUL BOYER, URBAN MASSES AND MORAL ORDER IN AMERICA, 1820–1920, at 132–42 (1978); ROBERT M. CRUNDEN, MINISTERS OF REFORM: THE PROGRESSIVES' ACHIEVEMENT AND AMERICAN CIVILIZATION, 1889–1920, at 40–44 (1982); DAVID J. ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER IN THE NEW REPUBLIC 7–10 (1971).

[35] *See* CRUNDEN, *supra* note 34, at ix–x, 14–15 (arguing that progressive leaders in philanthropy and culture were influenced by their parents' Protestant moral values and incorporated their religious beliefs into their efforts to educate and reform society as journalists, lawyers, and professors).

[36] *See, e.g.*, Julie Wilson, Long-Term Care in Transition: Does Religious Affiliation Make a Difference? (2002) (unpublished manuscript, on file with the Harvard Law School Library) (discussing nursing homes with religious orientations unknown to outside observers).

[37] Thus, Catholic hospitals and health care providers resist performing or even discussing abortion and certain other reproductive services. *See* MINOW, *supra* note *, at 14. Child protection agencies have long tried to match children to adoptive parents of the same religion and in many parts of the country continue to do so today. *See* RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION (2002).

[38] *See* 38 U.S.C.A. § 3011 (West 2002).

[39] H.R. REP. NO. 1624, at 21 (1944).

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in fraudulent schemes. An unregulated market yielded unacceptable results. Changes in the law restricted redemption of the G.I. benefit to state-approved schools and provided for stricter oversight by the Veterans' Administration.[40] In retrospect, the G.I. Bill is widely viewed as a sound social investment that delayed the entry of returning veterans into a stressed labor market, equipped them with better skills, and strengthened higher education through the infusion of federal aid and mature, motivated students.[41] Many people, including large numbers of African-Americans, took advantage of the Bill and became the first in their families to attend college. Since its inception, the G.I. Bill has granted veterans their choice of educational institution, whether a trade school, public or private university or college, or religious institution, including seminaries devoted to training clergy.[42]

At the turn of the twenty-first century, the increasing use of private organizations to achieve public ends reflects a number of trends: disillusionment with government programs, faith in competition and consumer choice, politicians' desire to claim to have diminished government when in fact they have merely outsourced it, and strategic pressure for privatization by lobbying groups.[43] Religious providers continue educational or social-service activities they started years before but now benefit from the government's desire for private partners, subcontractors, or replacements.[44]

While continuing some patterns from the past, recent privatization efforts depart from the longstanding American practice of partnership between the public and private sectors in four ways. First, governments now use direct financing and joint public-private ventures rather than simply relying on public policies, like hospitable antitrust law, to facilitate private enterprises. Second, precisely because current efforts occur now — after the twentieth-century buildup of government institutions and social provision — new privatization in schools, social services, prisons, and dispute resolution reverses trends that many see as laudable extensions of the social safety net and the ambit of public responsibility. Third, the new injection of market-style language and concepts into sectors such as education, social services, and

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[40] Robert Lowe, *The GI Bill Doesn't Vouch for Vouchers*, RETHINKING SCHOOLS, Summer 1995, http://www.rethinkingschools.org/SpecPub/vouchers/vgibill.htm.

[41] *See id.*

[42] *See* Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 782 n.38 (1973) ("[O]ur decision today does not compel . . . the conclusion that the educational assistance provisions of the 'G. I. Bill' impermissibly advance religion in violation of the Establishment Clause." (citation omitted)).

[43] *See* MINOW, *supra* note *, at 23–25.

[44] *See* Barry D. Karl, *Lo, the Poor Volunteer: An Essay on the Relation Between History and Myth*, 58 SOC. SERV. REV. 493, 530–32 (1984) (discussing the religious roots of charitable organizations).

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prisons assumes that competition and choice are pertinent, effective, and better than governance by democratic and constitutional values.

A final distinctive feature of recent public-private initiatives is deliberate governmental efforts to engage houses of worship themselves, not only their separate social-service nonprofit agencies, in providing welfare, child care, and housing.[45] Defended in part as a way to include smaller, urban (chiefly minority) denominations that do not have separate tax-exempt social-service agencies, efforts to include houses of worship in public-private partnerships also emphasize that religious practices, belief, and community — not just secular social services — may help people in trouble. Yet under these circumstances, government funds pay directly for religious practice and instruction — a striking departure from historic constitutionally framed practice. With Establishment Clause jurisprudence in transition, there is no longer a Supreme Court majority committed to keeping public funds out of "pervasively sectarian" institutions.[46] American history scholars may point out that, in this shift, the Court has simply returned to the earlier era that launched public schools as a way to teach children to read the Bible.[47] Yet this change in current Supreme Court views remakes some forty years of doctrine.[48] The change will startle or even disturb many who thought that the fundamental constitutional commitment with respect to establishment of religion was to bar government subsidies of worship and proselytization.[49]

Thus, despite striking continuities, the new privatization marks important departures and generates strong objections. I will argue that these new developments present both opportunities and risks.

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[45] *See* MINOW, *supra* note *, at 68–73 (describing charitable choice and other faith-based proposals for the federal government); *see also* OFFICE OF POLICY DEV. & RESEARCH, U.S. DEP'T OF HOUS. & URBAN DEV., FAITH-BASED ORGANIZATIONS IN COMMUNITY DEVELOPMENT (2001), *available at* http://www.huduser.org/publications/pdf/faithbased.pdf (considering the feasibility and desirability of creating federal funding opportunities for faith-based organizations).

[46] *See* Zelman v. Simmons-Harris, 122 S. Ct. 2460 (2002) (upholding the Cleveland school voucher program); Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001) (holding that a New York school could not exclude a Christian organization from its limited public forum on the grounds that the organization intended to use the forum for religious purposes); Mitchell v. Helms, 530 U.S. 793 (2000) (denying an as-applied challenge to a federal law that, in providing school materials and equipment, mostly benefited religious schools).

[47] *See* PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 220 (2002).

[48] *See* Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673, 697 (2002) (describing Justice O'Connor's 1984 "endorsement test" as "complet[ing] a sea change" in the Supreme Court's Establishment Clause jurisprudence); Michael J. Frank, *The Evolving Establishment Clause Jurisprudence and School Vouchers*, 51 DEPAUL L. REV. 997, 1000–01 (2002).

[49] A widespread view that the Establishment Clause would not allow government aid to a religious school that advances worship is well expressed in Steven K. Green, *Charitable Choice and Neutrality Theory*, 57 N.Y.U. ANN. SURV. AM. L. 33 (2000).

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Accordingly, the new privatization deserves collective encouragement but also counsels caution.

II. REASONS TO ENDORSE CURRENT DEVELOPMENTS

Where public resources are involved, an overarching framework, irreducibly public, should require explicit oversight and accountability to public values in provision of schooling, social services, prisons, and welfare. Yet insisting on such public values does not require public monopoly over the actual delivery of services or even over their design. Indeed, there are four reasons for federal, state, and local governments to explore privatization and public-private partnerships to generate plural forms of social provision.

A. Quality and Effectiveness

First, schooling, social services, prisons, and welfare provided by public bodies are often ineffective. Particularly in urban districts, many public schools are plagued by overcrowded classrooms and underqualified (even uncertified) teachers. When governments offer substance abuse programs, foster care, and housing assistance, the results can range from modestly to severely troubling. Legal challenges claiming violations of individual rights in public foster care systems and public housing programs have yielded damage awards and injunctive relief, including court-ordered receiverships to reorganize recalcitrant if not corrupt public systems.[50] Courts themselves are often slow and cumbersome, giving rise to alternative dispute resolution mechanisms delivered by private providers as well as within the public system.[51] Perceptions of widespread failure in the welfare system led to its reform in 1996, which created room for states and localities to work more closely with religious and for-profit organizations.

Given disappointment with failures in public systems, allowing others to take a turn makes sense. In each instance, parallel experiences with private provision offer grounds for hope that private schools, private social services, private dispute resolution, and private

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[50] *See* Morgan v. McDonough, 540 F.2d 527 (1st Cir. 1976) (placing a public high school in temporary receivership because it failed to provide a peaceful, desegregated education); Dixon v. Barry, 967 F. Supp. 535 (D.D.C. 1997) (placing the District of Columbia's department of mental health services in temporary receivership); LaShawn v. Kelly, 887 F. Supp. 297 (D.D.C. 1995) (imposing receivership to ensure the provision of services and protection for children in foster care); Perez v. Boston Hous. Auth., 400 N.E.2d 1231 (Mass. 1980) (placing the public housing authority in temporary receivership in light of unsafe, indecent, and unsanitary conditions).

[51] *See* Milton Mollen & Paul Grosswald, *Trends in Alternative Dispute Resolution: Corporate America Turns to the Quicker, Cheaper Forms of Dispute Resolution*, METROPOLITAN COUNS., Aug. 2002, at 6; Frank E.A. Sander & Stephen B. Goldberg, *Making the Right Choice*, ABA J., Nov. 1993, at 66–68.

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housing can generate higher quality and better outcomes with greater efficiency. Private alternatives may achieve higher quality than public ones when they operate on smaller scales, pursue different philosophies, or generate cross-subsidies across customers with different abilities to pay. Market-style competition and incentives also could improve quality and accountability in operations that remain public in form.

B. Competition and Incentives for Improvement

A second, related reason to favor privatization stems from the potential power of competition, which creates incentives for innovation and increased efficiency. Competition gives power to critics (whether local governments or ultimate users) who can threaten to take their business (whether in the form of dollars or vouchers) elsewhere. Competition can also create pressure to generate information to permit comparisons of options.

Whether these benefits of competition work well outside purely private markets remains a subject of much academic and political debate.[52] There are particular grounds for concern where the predicates of competition are lacking in practice. If information that would allow for informed choice among options is not generated, or if people are not free or able to choose among options, the promised benefits of competition are not likely to emerge. The pressure for information also elevates measurable costs and benefits over "soft" attributes, a tendency that may pressure schools or social services to deviate from their ideal purposes. For example, schools may come to be judged in light of student scores on standardized tests, but such judgments ignore the schools' contributions to other kinds of learning,[53] to student aspirations, and to the creation of safe, welcoming communities in neighborhoods badly in need of such islands of hope and calm.

Yet generating demand for at least some measures of accountability can assist informed choices and also trigger the development of more sophisticated measures of the multiple features of schools. Introducing modest incentives and choice programs within an otherwise public operation can begin to address these concerns. Even regulated competition and market mechanisms incorporated in public systems can trigger

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[52] Here, an analogy to the G.I. Bill is less than powerful, for the infusion of federal dollars through that initiative reflected not an intention to improve higher education but a plan to give something back to veterans while easing their transition into a difficult labor market. *See* Lowe, *supra* note 40.

[53] *See* CAROL ASCHER ET AL., HARD LESSONS: PUBLIC SCHOOLS AND PRIVATIZATION 54 (1996) (describing a focus on test scores in the context of a Baltimore school privatization experiment as "eclipsing" all other measures of teaching).

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options, innovation, information, and efficiencies — as demonstrated, for example, by recent experience with environmental regulation.[54]

C. *Pluralism*

Third, introducing private options supported by public resources can advance pluralism. Pluralism means valuing the variety of ethnic, religious, and cultural groups within society and the virtues of tolerance and mutual accommodation.[55] Pluralism calls upon the government and private actors alike to respect distinctive groups. In the United States, the Constitution has long been understood to ensure parents a variety of educational options so that parents may guide their children to take on "additional obligations"[56] alongside those chosen by the state. Pluralism in social services may foster meaningful connections within communities formed around neighborhood, religious, or ethnic identities. Drawing on the communal and cultural resources of religious groups and of the commercial sector to resolve disputes may also promote less costly and more productive resolutions. Religious communities and local groups have long offered settings for resolving disputes among their members.[57] Analogously, merchant courts and commercial arbitration represent historic and present-day contributions of business communities to dispute resolution. Respect for group affiliations does not, and in a constitutional democracy should not, confine individuals to any one group or prevent groups themselves from shifting and influencing one another over time. Some may want to elevate groups organized around religion above others; others may want to elevate groups organized around language, past oppression, or other characteristics. But a vibrant and nontoxic

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[54] Government regulation frames the public effort to protect environmental resources; nonetheless, competitive use of public incentives, predicated on market ideas such as offsetting and banking, permeates recent regulatory efforts. *See* Vivien Foster & Robert W. Hahn, *Designing More Efficient Markets: Lessons from Los Angeles Smog Control*, 38 J.L. & ECON. 19, 21–25, 42 (1995). For a general comparison of traditional "command-and-control" regulation with market-based approaches in environmental regulations, see Norman W. Spaulding III, *Commodification and Its Discontents: Environmentalism and the Promise of Market Incentives*, 16 STAN. ENVTL. L.J. 293 (1997).

[55] For thoughtful discussions of pluralism, see DAVID A. HOLLINGER, POSTETHNIC AMERICA 79 (1995); and CAROL WEISBROD, EMBLEMS OF PLURALISM: CULTURAL DIFFERENCES AND THE STATE 30, 99–100 (2002).

[56] Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925) ("The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."). For a fuller analysis of the meaning of pluralism in this decision, see Martha Minow, *Before and After* Pierce, 78 U. DET. MERCY L. REV. 407 (2001).

[57] *See* AUERBACH, *supra* note 32, at 42–46, 69, 93–94; THE POSSIBILITY OF POPULAR JUSTICE: A CASE STUDY OF COMMUNITY MEDIATION IN THE UNITED STATES (Sally Engle Merry & Neal Milner eds., 1993).

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pluralism rejects such claims of absolute priority, while treating the secular, or the monolingual, as one group no more privileged than others.

It makes sense for a nation as large as the United States to recognize and value the capacities of groups smaller than the nation or the state but bigger than the individual or the family. Group affiliations can encourage virtues of participation, self-governance, mutual aid, and care for others, while allowing freedom from the controlling force of a powerful government.[58] To be nontoxic, groups must permit individuals to exit and to participate in multiple groups or even none at all. Nontoxic pluralism also requires sufficiently established and pervasive civic virtues — such as freedom of speech, equal opportunity for individuals in public and private settings, and democratic participation — to temper the dangers of prejudice, demagoguery, and group-based rivalries or domination.

The state committed to pluralism can guard against discrimination by groups that receive government subsidies, even as it ensures space for groups to govern themselves. Public rules can not only make room for private efforts in educating children, addressing poverty, responding to substance abuse, and rehabilitating convicted criminals, but can also support those private efforts with tax exemptions, grants, contracts, and partnerships. Although a pluralist state can support some but not all possible groups, in our constitutional democracy the state must treat groups in a way that does not discriminate on the basis of religion, race, nationality, or other group traits — and does not promote private discrimination along those lines. For pluralism is best defended as the commitment to sustain and nurture the variety of normative and cultural resources generated within groups distinct from the polity.

D. New Knowledge and Infrastructure

Privatization stimulates new knowledge and infrastructure by drawing new people into businesses previously handled by government. In addition, experimentation and institutional innovation can promote learning and participation, in tune with the democratic values of participation and dialogue.

For all these reasons, it is understandable that local and state governments, federal agencies, and legislative committees explore further opportunities for outsourcing public work, generating private initiatives through public incentives, and promoting public-private partner-

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[58] *See* ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (2000); Robert M. Cover, *The Supreme Court, 1982 Term—Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 16 (1983).

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ships. Governments are also justified in deploying policy tools such as vouchers to link public ends with private means. Scholarly observers suggest that old conceptions of government policymaking now need to be reshaped in light of these initiatives.[59]

III. REASONS FOR CONCERN

In turning to private actors to supply education, social services, dispute resolution, and other programs to meet basic human needs, governments may duck public obligations and rules, become too closely enmeshed with religion, or divert public resources to private profits without gaining the discipline of a true economic market. Rather than achieving increased efficiencies and improved options, then, the privatization process risks reduced quality, unequal treatment, and outright corruption. Privatized programs may balkanize communities, produce less visibility or public access, and result in less protection for members of minority groups. These issues can be grouped under three headings: (a) dilution of public values, (b) potential mismatch between competition and social provision, and (c) dangers of divisiveness and loss of common institutions.

A. Dilution of Public Values

Privatization creates possibilities of weakening or avoiding public norms that attach, in the legal sense, to "state action" or conduct by government. Government agencies act not only as purchasers of goods and services but also as guarantors of freedom and equality.[60] They can contractually establish rules against discrimination in the provi-

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[59] *See* LOCAL GOVERNMENT INNOVATION: ISSUES AND TRENDS IN PRIVATIZATION AND MANAGED COMPETITION (Robin A. Johnson & Norman Walzer eds., 2000); Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121 (2000); Symposium, *Public Oversight of Public/Private Partnerships*, 28 FORDHAM URB. L.J. 1357 (2001). For further discussion of new approaches to governance in an era encouraging mixed public and private strategies, see Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998); and Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997).

[60] Due process, equal protection, freedom of information, and public participation are leading public values jeopardized by privatization of public services. *See* Diller, *supra* note 4, at 503–04; Cindy Huddleston & Valory Greenfield, *Privatization of TANF in Florida: A Cautionary Tale*, 35 CLEARINGHOUSE REV. 540, 541–45 (2002). Altering the relationship between government and religion raises further risks to the public values of assuring individuals free exercise of religion and guarding against government establishment of religion. *See* Alex J. Luchenitser, *Casting Aside the Constitution: The Trend Toward Government Funding of Religious Social Service Providers*, 35 CLEARINGHOUSE REV. 615 (2002). Privatization can also sharply reduce access to certain services — such as reproductive health services — if the leading private providers do not want to offer them. *See* Manjusha P. Kulkarni et al., *Public Health and Private Profit: A Witch's Brew*, 35 CLEARINGHOUSE REV. 629, 643–44 (2002).

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sion of services. Yet governments can also work with private providers indirectly by giving individuals vouchers that they can redeem with private providers. If these private providers are unregulated, this practice can bypass otherwise applicable public obligations and reporting requirements. The result may improve efficiency and reduce costs, but it may also vitiate public values. Privatization can undermine a value as basic as guarding against the misuse of public funds. This risk escalates when public dollars previously subject to public scrutiny move into private accounts closed to public review.[61]

This risk is especially salient where the private providers are religious institutions and therefore can claim constitutional protection against interference with free exercise. The law currently excuses houses of worship even from the financial disclosure required of other nonprofits to receive tax-exempt status.[62] If a church receives public funding to run a welfare-to-work program, it may claim a threat to religious liberty if forced to disclose its financial records — although one could make a good case against such a claim simply in terms of honest contractual dealing. Moreover, religious providers may demand the freedom to preserve religious elements of their programs even after receiving public aid. A religious provider of job counseling, for example, could demand enough latitude to include prayer or Bible study in its programs if the government is not directly contracting for the services — and perhaps even if it is. Yet then the government might be viewed as endorsing those religious practices, establishing them, or even coercing individuals in dire straits to engage in religious practice. Indeed, these kinds of risks contributed to the development of a jurisprudence deploying the metaphor of a "wall of separation" between religion and the state, even though scholars have cast doubt on the match between that metaphor and the intention of the Constitution's framers.[63]

A thoughtful handbook for religious organizations serving people in need shows the problems that arise when the boundaries between gov-

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[61] *See, e.g.*, ASCHER ET AL., *supra* note 53, at 54–55 (noting that accountability for public funds proved more difficult when the private firm employed by Baltimore's school system exercised its right to keep its financial books closed).

[62] *See* I.R.C. §§ 501(a), (c)(3), 7611(a), (b) (2000); *see also* Reka Potgieter Hoff, *The Financial Accountability of Churches for Federal Income Tax Purposes: Establishment or Free Exercise?*, 11 VA. TAX REV. 71, 75–76 (1991).

[63] *See* HAMBURGER, *supra* note 47, at 65–78, 89–107; Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 739–40 (1992) ("The view that religion 'undermines' the democratic spirit certainly played no part in this country's adoption of the First Amendment."); Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 936–41 (1986) ("Exponents of strict separation are embarrassed by the many breaches in the wall of separation countenanced by those who adopted the first amendment . . . ."). *See generally* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1410 (1990) (providing a historical argument).

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ernment and religion blur. When a religious organization augments a public school system's services by paying for guidance counselors, who in turn build relationships between churches and children, the counselors must be "careful not to proselytize."[64] When the government not only makes recordkeeping demands but also specifies acceptable services that reflect secular ideas, "[t]he possibility of cultural clashes is high."[65] Yet precisely such specification — in curricular guidelines, welfare-to-work programs, substance abuse treatment, or prison social services — may come from those who want to ensure that the programs conform to professional standards. Similar demands may come from others who oppose the use of religious practices in addressing poverty, substance abuse, or joblessness. Although *Zelman v. Simmons-Harris* has opened the door to vouchers redeemable at religious schools,[66] communities may be reluctant to authorize such vouchers when the schools engage in religious instruction and ritual — and religious schools may be just as reluctant to accept public funds for fear of constraints and oversight intrusive to their mission.

B. Potential Mismatch Between Competition and Social Provision

When governments work closely with companies organized to make profits, they open avenues for investment-based financing, such as venture capital, that demands an ownership interest. Such undertakings also risk serious conflicts between public and private interests. Voters may object if public dollars more visibly enhance the earnings of private investors than they palpably improve the quality of schools, prisons, or housing for the poor. Public and private interests also diverge when the lack of a genuinely competitive market allows for-profit companies to exact exorbitant prices for their services or turns public schools into settings for marketing commercial products to students.[67] Some functions simply seem to demand public identity. For

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[64] Harold Dean Trulear, *Faith-Based Initiatives with High-Risk Youth*, *in* SERVING THOSE IN NEED: A HANDBOOK FOR MANAGING FAITH-BASED HUMAN SERVICE ORGANIZATIONS 278 (Edward L. Queen II ed., 2000).

[65] Edward L. Queen II, *Religion and the Emerging Context of Service Delivery*, *in* SERVING THOSE IN NEED, *supra* note 64, at 18.

[66] 122 S. Ct. 2460, 2465–68 (2002) (holding constitutional a school voucher program whose beneficiaries chose overwhelmingly to attend religious schools).

[67] *See* PAUL T. HILL & ROBIN J. LAKE, CHARTER SCHOOLS AND ACCOUNTABILITY IN PUBLIC EDUCATION 77–79 (2002) (describing conflicts between the interests and missions of for-profit management companies and the public charter school boards that contract with them); ALEX MOLNAR, WHAT'S IN A NAME? THE CORPORATE BRANDING OF AMERICA'S SCHOOLS: THE FIFTH ANNUAL REPORT ON TRENDS IN SCHOOLHOUSE COMMERCIALISM, YEAR 2001–2002, *available at* http://www.asu.edu/educ/epsl/CERU/Annual%20reports/EPSL-0209-103-CERU.pdf (examining the tension between commercialization of schools and other educational purposes).

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example, privatized airport security, exposed as inadequate, generated swift demands for public presence and control.

Even more basically, privatization can be disastrous — and the disasters could demonstrate a profound mismatch between means and ends.[68] The desirability of moving some kinds of social provision into competitive forms of delivery depends on certain dubious assumptions. In the context of education, for example, many advocates for school choice through vouchers or charter schools assume that:

- competition will generate relevant and comparable information necessary to assess the quality of each school;
- parents and guardians will seek out the information necessary to make informed choices — or a sufficient number of them will do so, thus signaling better choices and better schools;
- competition will allow good schools to attract students away from bad schools — and then the failing schools will shut down or change;
- competition will generate more good schools as failing schools copy methods from good ones or good ones expand or replicate;
- competition will produce efficiencies through bypassing public bureaucracies and therefore will draw private investment and improve schooling.

Reality does not readily support these assumptions. A central difficulty is the absence of reliable, comparable information about schools that are available for selection.[69] Parents are likely to rely on scores on standardized tests and pass rates on tests mandated by state and federal law. Using these test results as a method for choosing among schools is problematic. Public and private schools usually do not use comparable tests.[70] Even different public school systems administer

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[68] *See* ELLIOTT D. SCLAR, YOU DON'T ALWAYS GET WHAT YOU PAY FOR: THE ECONOMICS OF PRIVATIZATION (2000) (describing disastrous privatization efforts). Fraud and embezzlement compound simple failures to deliver promised results when the use of private contractors proves to be a mistaken means to achieve public ends. *See* Jon R. Luoma, *Water for Profit*, MOTHER JONES, Nov.–Dec. 2002, at 34, 36–37 (describing how a for-profit company increased losses and decreased service under a contract to manage water filtration and delivery in Atlanta). The mismatch between means and ends may also reveal public disputes about what should constitute public ends. For example, private management of public schools becomes especially problematic in light of ongoing debates over what really amounts to a good education: high test scores or tolerance, preparation for jobs or capacity for engaged citizenship.

[69] Portions of this discussion draw from MINOW, *supra* note *, at 153–56.

[70] *See* Victoria Thorp & Jesse James, *Private vs. Public Schools: What's the Difference?*, *at* http://www.greatschools.net/cgi-bin/showarticle/CA/197/improve (last visited Feb. 9, 2003) ("Private schools can create their own curriculum and assessment systems, although many also choose to use standardized tests.").

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different tests.[71] In addition, standardized tests are at best crude indicators of the quality of education at particular schools.[72] Greater reliance on these tests encourages teachers to teach to the test or screen students at the admissions stage rather than to deepen student knowledge, build citizenship and empathy, and develop inquiring, problem-solving minds — that is, to educate for the long term.[73] Developing and administering more meaningful measures of instructional quality would be costly,[74] especially since these measures must undergo several years of evaluation before they can produce reliable assessments.[75]

Moreover, even if adequate information could be gathered, not all parents and guardians would get it, understand it, or act on it. The ability and time necessary to become an informed chooser of schools are not evenly distributed. While motivated and competent parents will seek out information (to the extent that it exists) about the quality

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[71] *See* U.S. DEP'T OF EDUC., STRATEGIC PLAN 2002–2007, *available at* http://www.ed.gov/pubs/stratplan2002-07/stratplan2002-07.pdf (describing the No Child Left Behind Act, which leaves discretion to states in adopting standardized assessments); Michael A. Fletcher, *Conferees Agree on Education Package: Final Vote Is Near on Plan for Tests, Accountability*, WASH. POST, Dec. 12, 2001, at A1 (describing the variety of state testing practices before the adoption of the No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425). For an overview of the Act, see http://www.nochildleftbehind.gov/next/overview/index.html. For a February 2002 report on states' readiness to implement the requirements, see http://www.ecs.org/html/Special/ESEA/NSLB_main.htm.

[72] *See* Georgann Eubanks, *Does Testing Make the Grade?*, DUKE MAG., July–Aug. 2001, http://www.dukemagazine.duke.edu/dukemag/issues/070801/testing.html ("Factors such as parents' educational background, type of community, and poverty level account for more than 50 percent of the difference in test scores." (quoting Prof. Steven Pfeiffer) (internal quotation marks omitted)); Barbara Kantrowitz & Daniel McGinn, *When Teachers Are Cheaters*, NEWSWEEK, June 19, 2000, at 48, 48 ("Even the best tests are designed with much more modest goals. They're supposed to be diagnostic tools — to help pinpoint gaps in learning. They don't provide a full picture of a child's — or a school's — accomplishments any more than a single blood test can supply all the data a doctor needs to treat a patient.").

[73] *See* Laura Pappano, *Making the Grade*, BOSTON GLOBE, April 21, 2002, Magazine, at 11 ("Because doing well on the tests is critical, boosting [standardized state test] scores — not necessarily improving teaching — has become a goal in some school districts."); Ben Wildavsky, *The Question Is: Are Tests Failing the Kids?*, U.S. NEWS & WORLD REP., May 21, 2002, at 23, 23 ("[A]s more states adopt the tests, some people are beginning to wonder whether they're truly improving instruction — or, as critics claim, whether they are hurting kids by forcing teachers to merely teach to the tests.").

[74] For example, many educators support the use of portfolio assessment in evaluation, which uses collections of student work rather than standardized tests. Yet such assessments do not permit quantitative or standardized ranking of performance. *See* Meg Sewell et al., *The Uses of Portfolio Assessment in Evaluation*, *at* http://ag.arizona.edu/fcr/fs/cyfar/Portfo~3.htm (last visited Feb. 9, 2003). Other methods, such as outside examination of school performance and multifaceted measures of success, would improve accountability, *see* TONY WAGNER, MAKING THE GRADE: REINVENTING AMERICA'S SCHOOLS 73–81 (2002), but also raise costs. Meanwhile, pressure to perform under single statewide standards may force schools to abandon rich, rigorous curricula. *See id.* at 80.

[75] *See* NAT'L COMM'N ON TESTING & PUB. POL'Y, FROM GATEKEEPER TO GATEWAY: TRANSFORMING AMERICA (1990).

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of programs, others will not. Alternatively, parents will be more influenced by matters of convenience (such as the availability of transportation or after-school programs) or familiarity. Even in purely commercial markets, not all consumers need to be informed choosers. Theorists emphasize that enough informed consumers will, by making good decisions, signal to others who can free-ride on their investment of time and research and behave as if they had full information themselves.[76] Yet such signaling requires networks of communication — and these are precisely what is jeopardized when informed and motivated parents leave public schools for private or charter schools. Even surveys can be misleading, as parents may report satisfaction with their children's schools without correspondingly high quality.[77] Molly McUsic concludes that "[t]he irony of the school choice model is that it requires two components that are not in adequate supply: committed and interested parents, and empty desks in high-quality public or private schools."[78]

If the competitive model worked, we should observe failing schools close and good schools attract more students and increase in number. Yet not all inadequate schools close — and good schools do not easily expand or replicate. Inadequate schools often persist because of inertia and resistance to change by teachers, unions, and parents. Inadequate schools also persist because there are not enough talented teachers and administrators willing to work for the salaries allotted. Even when failing schools do close, the closure can be abrupt and disruptive, forcing children to move to other inadequate schools.

Long waiting lists for attractive schools may eventually lead to expansion, but they may instead lead to long lists of disappointed students. Of course, many attractive schools — in suburban districts — remain out of reach for families unable to afford the real estate or excluded by zoning or tradition. It is precisely those students who lack good choices under the current regime who also may be stuck with the

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[76] *See* Michael Spence, *Competitive and Optimal Responses to Signals: An Analysis of Efficiency and Distribution*, 7 J. ECON. THEORY 296 (1974).

[77] *See* CARNEGIE CORPORATION OF N.Y., YEARS OF PROMISE: A COMPREHENSIVE LEARNING STRATEGY FOR AMERICA'S CHILDREN 14–22 (1996); Lewis D. Solomon, *The Role of For-Profit Corporations in Revitalizing Public Education: A Legal and Policy Analysis*, 24 U. TOL. L. REV. 883, 886–88 (1993) ("Numerous reports and analyses conducted during the past decade point to one sorry conclusion: our schools are not doing their job."); *see also* John F. White, *Who Benefits from the Milwaukee Choice Program*, *in* WHO CHOOSES? WHO LOSES?: CULTURE, INSTITUTIONS, AND THE UNEQUAL EFFECTS OF SCHOOL CHOICE 118, 135 (Bruce Fuller & Richard F. Elmore eds., 1996) (noting the parental satisfaction with a Milwaukee private school choice program despite the lack of significant improvement in student performance).

[78] Molly S. McUsic, *The Law's Role in the Distribution of Education: The Promises and Pitfalls of School Finance Litigation*, *in* LAW AND SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY 88, 122 (Jay P. Heubert ed., 1999).

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least desirable schools even if offered choice and competition in urban settings.

One potential solution, increasing the capacity of good schools, is especially difficult because small scale and small class size are predictors of good schooling.[79] Indeed, scaling up successful education from one school to an entire district is widely cited as the missing step in school reform in a world in which individual good schools can emerge even in failing systems.[80] In addition, if start-up charter schools become successful — so far the results are mixed[81] — they will divert funds from existing public schools and risk pushing them even further behind.[82] Meanwhile, the initial flood of enthusiasm for starting for-profit companies to run failing public schools, or to start charter or private schools, has quickly abated in light of the financial, political,

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[79] *See* Scott Stephens, *Teachers Union Sees Smaller Classes as Way To Help Raise State Test Scores*, PLAIN DEALER (Cleveland), Apr. 14, 1999, at 1B, *available at* 1999 WL 2358108 (reporting that one study "concluded that students in smaller classes . . . showed immediate academic gains that continued with them through their school careers"). *But see Cuts in Class Size Fail To Bolster Learning*, USA TODAY, Aug. 2, 2002, at 8A, *available at* 2002 WL 4730952 (arguing that "teacher quality, not class size, has the greatest impact on learning"). Apart from reducing class size, many successful experiments have divided large schools into smaller schools. *See, e.g.*, *Financing Our Future Education Improvements for the 21st Century: Panel One: Private Contributions to Public Schools*, 1998 ANN. SURV. AM. L. 181, 190, *available at* WL 1998 ANNSAL 181 (comments of Vincent McGee) (describing one such effort). This approach was the innovation of Deborah Meier, who first implemented it at Central Park East in Harlem. *See generally* DEBORAH MEIER, THE POWER OF THEIR IDEAS: LESSONS FOR AMERICA FROM A SMALL SCHOOL IN HARLEM 15–38 (1995).

[80] Although there are many examples of successful schools in large urban school systems, there are no examples of entirely successful large urban school systems. *See* F. HENRY HEALEY & JOSEPH DESTEFANO, EDUCATION REFORM SUPPORT: A FRAMEWORK FOR SCALING UP SCHOOL REFORM: HOW TO TACKLE THE PROBLEM OF SCALE IN EDUCATION REFORM 1–4, 12–16 (1997) (describing the phenomenon of uneven school quality within systems and explaining obstacles to scaling up school reform), *available at* http://www.seisummit.org/Downloads/aspd/EducReformSupport.PDF.

A more profound difficulty with scaling up effective schools through school choice systems is that school choice can increase racial and socioeconomic stratification within schools. Helen F. Ladd, *School Vouchers: A Critical View*, J. ECON. PERSP., Fall 2002, at 3, 13. Ladd notes that "[i]f peer effects were positive and linear, the gains in achievement for the students who move out of the public schools in search of higher-quality peers would be exactly offset by the losses to other students, either those in the schools left behind or those in the destination schools," but argues that "asymmetry in peer effects is quite plausible." *Id.*

[81] *See* Scott S. Greenberger, *For-Profit School Firm Falls Short on Reforms*, BOSTON GLOBE, May 13, 2001, at A1 (noting that test results have varied widely across schools run by one for-profit company); Ladd, *supra* note 80, at 17.

[82] *See, e.g.*, RPP INT'L, CHALLENGE AND OPPORTUNITY: THE IMPACT OF CHARTER SCHOOLS ON SCHOOL DISTRICTS 10–11 (2001), *at* http://www.ed.gov/pubs/chartimpact/district_impact.pdf (reporting that 45% of surveyed districts reported that charter schools negatively affected their budget, 47% reported no impact, and 8% reported a positive impact); Scott S. Greenberger, *Charter Schools' Influence Surveyed*, BOSTON GLOBE, July 8, 2001, at B9 (discussing the RPP International study).

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and educational failures of these companies.[83] If markets work, this decline in enthusiasm would suggest that for-profit schooling companies do not.

C. Dangers of Divisiveness and Loss of Common Institutions

Absent some degree of public supervision, increasing choice and competition in social provision risks diminishing experiences of commonality and fomenting tension and distrust across groups already experiencing religious or ethnic tension. These risks are most obvious in the context of schooling. Although the vision of the common school was never realized fully in practice, in many parts of the United States and in many decades, public schools have offered a common experience and opportunities for young people to learn alongside individuals from many different backgrounds. Without regulation, more choice — including private religious options, for-profit options, and alternatives serving specialized interests — could produce self-segregation along the fault lines of race, class, gender, religion, disability, and national origin. As a result, schools could exacerbate misunderstandings among groups and impede the goal of building sufficient shared points of reference and aspirations for a diverse society to forge common bonds. Admittedly, some forms of school choice have long existed with some of those effects; those with sufficient resources move to the suburbs or opt for private schools even without a formal public policy embracing school choice. Yet an explicit shift could erode even the aspiration of common school experiences and undermine efforts to promote integration across lines of group difference. If schooling becomes a set of disparate activities in diverse settings without common purpose, how can young people be expected to develop any sense of collective identity or shared goals?

These dangers may not seem as serious in the contexts of social services, welfare-to-work assistance, dispute resolution, and prisons. Yet if new privatized options divide along religious lines, with particular programs emphasizing religious practice and identity as part of their content, the delicate balance of pluralism and unity could indeed

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[83] *See Edison Schools Dropped*, BOSTON GLOBE, Aug. 24, 2002, at D1 (reporting the Dallas school board's cancellation of its contract with Edison Schools in light of "disappointing academic performance and high costs"); Greenberger, *supra* note 81 (reporting that the academic and financial failures of Advantage Schools have led school systems to declare contractual breaches); Diana B. Henriques, *A Learning Curve for Whittle Venture*, N.Y. TIMES, May 25, 2002, at C1 (discussing financial problems at Edison Schools); *see also* F. Howard Nelson & Nancy Van Meter, *What Does Private Management Offer Public Education?*, 11 STAN. L. & POL'Y REV. 271 (2000) (describing the limited possibilities of improving efficiency through private management of public education, what benefits it can bring, and its track record); *id.* at 283 (concluding that "no independent evaluation of student achievement in schools managed by companies has shown superior performance, and some independent evaluations found failure").

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be disturbed. If courts become places only for those too poor to afford access to private dispute resolution options that the participants themselves shape and control, then the perception and practice of public justice for all will face profound challenge.

Indeed, privatizing social provision jeopardizes individuals' abilities to imagine and participate in a public realm. As basic human needs are met increasingly through relationships of sale and consumption, even with vouchers funded collectively, individuals lose chances to take part in communities; to act like citizens concerned with the welfare of others; and to identify with, care about, or even know about collective efforts funded by taxes, vouchers, and government contracts. Some observers may rejoice at the prospect of diminishing collective will and shrinking popular support for government that these lost experiences of community participation can produce. But this prospect of an increasingly atomized society, with minimal sense of communal good, would not result from a democratic decision to embrace libertarianism as a guiding philosophy. Many Americans may instead wonder how privatization, which promised more efficient, cost-effective, and innovative uses of public resources to meet basic needs, instead came to divide communities into groups marked by religious or other traits that take on greater salience than the national identity. They may start to wonder how their society became composed of private consumers rather than engaged citizens.[84] With the accretion of numerous discrete privatization decisions and the prospect of diminished collective will or interest in the public good, will there even be a public forum to ask or discuss whatever happened to public commitments to meet basic human needs, redress inequalities, and strengthen democracy?

Each of these concerns arises as governments blur the borders between public and private, secular and religious, and nonprofit and for-profit enterprises. Yet these borders were never sharp. Moreover, collaborations continue to offer potential benefits, and it remains possible to conceive of partnerships that respect the distinctive missions and

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[84] The authors of a recent study of charter schools describe the risk that private choice approaches can turn a public good, like schooling, into a commodity valued in terms of client satisfaction rather than in terms of service to public purposes. By offering charters, states invite private groups to initiate new schools that receive public funding; the states thereby hope to create competition and innovation within the public system through public-private partnerships. Paul Hill and Robin Lake write that intense debate over charter schools reflects a disagreement over whether those running these schools "are responsible only to adhere to professional standards and maintain a clientele of satisfied parents" or instead are responsible "to show government and the general public that their children are learning what they need to become responsible, productive citizens." PAUL T. HILL & ROBIN J. LAKE, CHARTER SCHOOLS AND ACCOUNTABILITY IN PUBLIC EDUCATION 1 (2002).

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methods of government and private actors, whether religious or secular, nonprofit or for-profit.

IV. THE ARGUMENT FOR PARTNERSHIP

These risks and possibilities are real. Yet more enduring than the recent debate over new forms of privatization is the long tradition of intertwining public and private action to meet basic social needs. Religious and voluntary organizations existed before any current national government, but today they operate within a framework of laws that both facilitate their involvement and constrain their actions. In the United States, ostensibly private groups, including secular and religious nonprofits, religious congregations, and for-profit companies, all operate under public rules enabling and shaping their existence.

Tax exemptions for charitable nonprofits are one of the most obvious forms of public facilitation of private action.[85] Commentators justify charitable exemptions from income, property, and sales taxes on the grounds that the exempt organizations serve valuable public functions and thus deserve to be exempted from taxation designed for private profit-making activities.[86] The same point can be made, however, by framing the tax exemption as a subsidy designed to create incentives for private actors to fulfill those functions. The relationship between the government and tax-exempt organizations can be understood as a partnership, a mutually beneficial arrangement to advance shared purposes.

Tax exemptions sit on a continuum of relationships between government and private groups.[87] On one end of the continuum sit government prohibitions such as criminal laws. Moving toward the center is government permission for a group to proceed. Next to that is government encouragement through charter or incorporation, offering individual participants protections against liability for the conduct of the

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[85] *See* Evelyn Brody, *The Legal Framework for Nonprofit Organizations*, *in* THE NONPROFIT SECTOR: A RESEARCH HANDBOOK 13 (Walter W. Powell ed., 2d ed. forthcoming 2003).

[86] *See* John D. Colombo, *Why Is Harvard Tax-Exempt? (And Other Mysteries of Tax Exemption for Private Educational Institutions)*, 35 ARIZ. L. REV. 841 (1993); John M. Strefeler & Leslie T. Miller, *Exempt Organizations: A Study of Their Nature and the Applicability of the Unrelated Business Income Tax*, 12 AKRON TAX J. 223, 229–30 (1996).

[87] The metaphor of a continuum inevitably flattens to one dimension the potential points of comparison and here collapses the different meanings of public and private into one line. A fuller but more complicated analysis would pursue many dimensions, such as sources of funding, structure of operations, and perceived or proclaimed identity. A richer analysis also would distinguish religious and secular as well as for-profit and nonprofit characteristics of the institutions or actions under view.

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group.[88] Further along the continuum lies indirect government subsidy through exemptions, deductions, or credits, either to the organizations themselves[89] or to their contributors.[90] These policies give a public boost to the organization even while letting private individuals decide whether to contribute. Next comes more direct government support, in which the government approves the organization as a recipient of vouchers redeemable for particular services. Even though individuals choose whether to redeem the vouchers at a particular organization, the government has preapproved the particular redeeming organization for that purpose. For example, the government must approve which schools are eligible for school vouchers. Further on the continuum lie government contracts with private entities for service provision. Even closer governmental control comes next, in the form of partnerships that give both government and a private actor governance, performance, or ownership roles. Next come publicly chartered entities, like the Red Cross and the Boy Scouts. Nearly at the end of the continuum, beyond the bounds of constitutionality in the United States, sits government establishment of private religious institutions, political parties, and labor unions.

The continuum represents the relationship of the government to private groups. The government may forbid, permit, encourage, subsidize, or establish private entities. Another conceptual map reflects the perspective of private groups and locates government as either a close presence or a distant authority to be tolerated and avoided. From the vantage point of, for example, a religious group that retains the power to relocate to another nation should governmental intrusions prove too onerous, any particular secular government is simply to be assessed as friend or foe in light of a more eternal project.[91]

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[88] *See, e.g.*, DEL. CODE ANN. tit. 6, § 18-303 (1999) (providing that members or managers of a limited liability company (LLC) shall not be responsible for the company's obligations to third parties).

[89] *See* I.R.C. § 501(c) (West 2002) (listing the requirements to qualify as a tax-exempt organization under the federal income tax code).

[90] *See, e.g.*, I.R.C. § 170 (West 2002) (providing a deduction for contributions to charitable organizations).

[91] *See* Wisconsin v. Yoder, 406 U.S. 205, 218 & n.9 (1972) (noting that, absent First Amendment protection, the Amish would be left with a choice between abandoning belief and forced migration); Brief for Respondents at 26–27, *Yoder* (No. 70-110), *reprinted in* 71 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 591, 620–21 (Philip B. Kurland & Gerhard Casper eds., 1975) (discussing how Amish families have responded to failures of legal accommodation for their religious practices by leaving the state or country). Libertarians might prefer still another map, in which government's role is limited to enforcing contracts, providing police, and ensuring national defense — but the historical practices in this country depart too dramatically from this conception to make it of much practical use for current analytic purposes.

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Governments can also act as the ultimate provider; in so doing, they can use market methods and tools. They can back bond issues to finance construction of housing and schools pursued by private owners or nonprofit entities. Private for-profit and nonprofit hospitals depend on public as well as private insurance payments and research funding. Government and private entities collaborate, commingle, and coexist in extensive, complex ways. By mixing public and private finance and deploying government policies to encourage and shape private supply, public and private partnerships can use market mechanisms while pursuing publicly defined aims.

Private for-profit and nonprofit enterprises supply goods and services that address needs identified and subsidized by the government. When government providers exist alongside private ones, they compete for government dollars or for enrollment or election by private individuals. Yet public and private schools, social services, prison programs, and subsidized housing efforts should also be understood as partners. From the perspective of people with needs — children to educate, housing crises, joblessness, alcoholism or drug abuse — religious and secular nonprofit organizations exist alongside for-profit companies and governments as potential resources. Both kinds of entities do, or should, abide by the same basic rules and do, or should, pursue overlapping, if not identical, purposes.[92] Yet determining and enforcing those basic rules remains centrally a public task, to be pursued according to democratic means and purposes even while seeking efficiencies.

At best, maintaining avenues for innovation and effort through each of these channels ensures competition and pluralistic approaches for educating young people, addressing the needs of impoverished or substance-abusing people, or meeting other social needs. At worst, however, the mix of public and private efforts produces gaps and failures that leave many without effective education or services, and without an obvious avenue to redress the failures of each system. Evidence of such gaps and failures is plentiful. The disparity between the quality of good schools, whether public or private, for suburban children and comparable opportunities for urban children is well documented.[93] Waiting lists for subsidized housing are only one meas-

[92] People running a faith-based initiative can agree to abide by the same commitments as secular providers of social services — including steering clear of pressure to engage in religious practices and making sure that secular alternatives are available for participants. A study of the national faith-based initiative for high-risk youth reports that participating agencies understood and abided by these commitments. *See* ALVIA Y. BRANCH, FAITH AND ACTION: IMPLEMENTATION OF THE NATIONAL FAITH-BASED INITIATIVE FOR HIGH-RISK YOUTH 45–66 (2002), *available at* http://www.ppv.org/pdffiles/faithandaction.pdf.

[93] *See generally* JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS (1991).

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ure of the unmet need for shelter; another is the rising rate of homelessness.[94] Waiting lists for alcohol and drug treatment programs, overburdened social workers helping people move from welfare to work, and children in foster care placements waiting for help for their families or for new, permanent families offer further evidence of the scope of unmet social needs. These failures should inspire deep humility and a strong reluctance to reject, without specific analysis, any new initiative that could improve social services, schooling, and housing for poor and working-class people. New and better answers might come from venture capitalists, entrepreneurial nonprofit organizers, religious leaders, or religious congregations, and the problems are big enough to call for solutions not only by government but also by the sectors these people represent.

The argument for conceiving of the public and private sectors as partners resists any suggestion of merging public and private. Preservation of a private realm is crucial to the objectives of pluralism and competition that justify such partnerships. Yet assessing the combined effects of public and private initiatives warrants a system that permits and sustains both. By standing back to analyze the combined effects of public and private initiatives, evaluators — both public and private — can strengthen the overarching rules and incentives governing not only each sector but also the relationships between them. In this sense, often rivalrous, competitive, or parallel efforts may follow their own courses while abiding by overarching rules against fraud or deception, anticompetitive behavior, illicit discrimination, and violation of the religious freedoms of individual participants.[95]

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[94] Public housing waiting lists can require applicants to wait as long as two years. *See* Otto J. Hetzel, *Asserted Federal Devolution of Public Housing Policy and Administration: Myth or Reality*, 3 WASH. U. J.L. & POL'Y 415, 423 (2000) ("Families wait an average[] of 13 months on [public housing agency] waiting lists for units."). On homelessness rates, see H.R. REP. NO. 101-395, at 25 (1990); NAT'L COALITION FOR HOMELESS, HOW MANY PEOPLE EXPERIENCE HOMELESSNESS? (Fact Sheet No. 2, 1999), *at* http://nch.ari.net/numbers.html.

[95] The complex relationships between public and private should not be understated. The public defines the line between them; the private generates values, models, and competition altering the public, and the broader notion of public — the people — shape and are shaped by the resulting interaction. The enterprise that still carries the name of "public broadcasting" illustrates some of this complexity. Under old conditions of scarcity, public broadcasting emerged to provide radio and television programming without commercial advertising and with the intention of serving the public interest. *See* NEWTON N. MINOW & CRAIG L. LAMAY, ABANDONED IN THE WASTELAND: CHILDREN, TELEVISION, AND THE FIRST AMENDMENT (1995). The "public interest," though notoriously ambiguous, meant something sufficiently different from commercial broadcasting to inspire public broadcasters to include educational and cultural programming, including noncommercial children's programming, absent elsewhere in the mass media, and to create opportunities for citizen commentaries. Chronically underfunded, public broadcasting in the United States differs from its counterparts in Britain, Japan, and Canada, and often imports programs developed in these countries. Public broadcasts also permit commercial interests to act as sponsors and to receive on-air identifications that increasingly resemble commercials.

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That private providers view themselves as marketplace competitors with one another or with government providers should not obscure this broader understanding of shared purposes. Just as adversaries in dispute resolution, teams in competitive sport, or even separate branches of government often work in immediate rivalry and tension but over the long term maintain collaborative enterprises, so too do private and public schools, for-profit prisons and government prisons, religious social services and secular social services. The law should promote effective results, efficient use of resources, and the benefits of competition and pluralism. But the official rules of the game must also ensure compliance with public values of fairness, equality, and neutrality. Of course, these are complex demands, and striking the perfect balance between competition and regulation may be elusive. Yet to seek the good as well as the best, balance there must be. That balance can be achieved only by demanding and instituting measures of public accountability when governments privatize social provision.

V. THE CHALLENGE OF PUBLIC ACCOUNTABILITY

The urgent question posed by a shifting mix of public and private providers of education, welfare, and prison services is how to ensure genuine and ongoing accountability to the public.[96] Privatization of public services soared precisely when major corporations engaged in unfettered private self-dealing and one major religious group reeled

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One of the most successful public television producers in terms of both quality and financial stability is the Children's Television Workshop. It supports itself with profits from sales of videos, toys, and other products related to its popular shows, such as *Sesame Street*. *See* Don Aucoin, *On a Wing and a Prayer: Are Big Bird's Colleagues at PBS in Danger of Becoming Roadkill on the Information Superhighway?*, BOSTON GLOBE, Feb. 27, 2000, at E1, *available at* 2000 WL 3315822. The success of the Children's Television Workshop has convinced commercial broadcasters to pursue similar shows and even to contract with it. Yet many families cannot afford cable service and thus are shut out of the improved quality of commercial telecommunications generated by public investments. Meanwhile, changing technologies, including cable, raise questions about the initial scarcity justifications for public broadcasting. Yet public rules govern cable franchises and new auctions of the spectrum. The interconnections between public and private have grown increasingly elaborate, but neither element has disappeared.

[96] One thorough discussion identifies three traditional meanings of accountability: "accountability for finances, accountability for fairness, or accountability for performance." ROBERT D. BEHN, RETHINKING DEMOCRATIC ACCOUNTABILITY 6 (2001). Yet new public management also requires democratic political accountability, meaning satisfying citizens' concerns about fairness, equality, and other matters. *Id.* at 33–35. Perhaps paradoxically, Behn argues that increased accountability in all these senses can require giving greater discretion to public officials. *Id.* at 100–01. Accountability could take the form of agreements with mutual obligations, such as performance contracts that outline specific expected results but ensure flexibility in methods. *Id.* at 122–25. The discussion of accountability pursued here follows the spirit of these suggestions while giving greater emphasis to the role of the public in defining the criteria for success.

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from scandals, cover-ups, and mounting distrust among the faithful.[97] This coincidence in timing should be all the reminder anyone needs of the vital role of public oversight and checks and balances.

Accountability in this sense means being answerable to authority that can mandate desirable conduct and sanction conduct that breaches identified obligations. In a democracy, the ultimate authority should be the general population, organized as voters and served by elected representatives, attorneys general, school boards, and tax enforcement agencies. To satisfy the basic requirement of public oversight, government bodies that use private means to fulfill their obligations should evaluate those private means and report on and take responsibility for the results. Thus, a government that contracts with a corporation to run a prison or that permits redemption of welfare vouchers through a religious charity should be held responsible for the consequences resulting from such contracts.

Seeking accountability through such measures does not mean simply resisting privatization by retaining existing methods of public control. The potentially enormous variety of current methods for combining public and private energies to meet basic human needs offers great possibilities for more resources, better employed. Yet without processes for defining goals and assessing experiments against those goals, the larger society has little chance of learning what works and what does not. More profoundly, without public involvement and public reporting on the results of various public-private ventures, democracy is itself in jeopardy. Self-government will not retain meaning if major decisions about public resources and the shape of collective experiences occur without the knowledge or participation of the nation's citizens.

In the domains of education, health, dispute resolution, prisons, and social services, the measures of accountability must involve more than keeping honest books and delivering what is promised, although

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[97] An initial corporate scandal emerged as faulty accounting practices and off-the-books partnerships destroyed the seemingly successful Enron Corporation. *See* David Barboza, *From Enron Fast Track to Total Derailment*, N.Y. TIMES, Oct. 3, 2002, at C1; Kurt Eichenwald, *Ex-Enron Official Admits Payments to Finance Chief*, N.Y. TIMES, Aug. 22, 2002, at A1. Another corporate scandal pushed WorldCom into bankruptcy and generated criminal prosecutions of its former officials for fraud. *See* Kurt Eichenwald, *2 Ex-Officials at WorldCom Are Charged in Huge Fraud*, N.Y. TIMES, Aug. 2, 2002, at A1; Simon Romero & Riva D. Atlas, *WorldCom Files for Bankruptcy; Largest U.S. Case*, N.Y. TIMES, July 22, 2002, at A2; Simon Romero & Alex Berenson, *WorldCom Says It Hid Expenses, Inflating Cash Flow $3.8 Billion*, N.Y. TIMES, June 26, 2002, at A1. These developments offered a brief reprieve from the media's attention to the Catholic Church, which faced charges of covering up sexual abuse of children by priests. *See* Pam Belluck, *Boston Archdiocese Protected Priest Long Linked to Abuse*, N.Y. TIMES, Apr. 9, 2002, at A22; Fox Butterfield with Jenny Hontz, *A Priest's 2 Faces: Protector, Predator*, N.Y. TIMES, May 19, 2002, at A1; Laura Goodstein & Alessandra Stanley, *As Scandal Keeps Growing, Church and Its Faithful Reel*, N.Y. TIMES, Mar. 17, 2002, at A1.

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that is already a tall order. Publicly subsidized schooling, health care, welfare, and social services must also advance public values, which in turn must be the product of collective deliberation and mutual persuasion over time. The historical evolution of American democracy has yielded vital principles that should provide guidance in the future: assurance of individual freedom of belief and expression, governmental neutrality toward religion, the primacy of the rule of law through opportunities for fair hearings by impartial decisionmakers, and freedom from exclusion or inferior treatment on the basis of race, national origin, ethnicity, language, gender, disability, religion, and, increasingly, sexual orientation.

Under existing law, a school voucher plan, for example, must not involve any school that excludes students on the basis of race, religion, national origin, or ethnicity.[98] Additionally, if concerns based on resources, expertise, or philosophy lead some schools to exclude students on the basis of gender, disability, or language, public values demand that the governing school voucher plan offer comparable opportunities for such excluded students at other schools. Similarly, a state can work with religious providers of welfare and social services only if the providers, like the state itself, refrain from violating state and local antidiscrimination employment law and strive to ensure participants' freedom of religion and expression. Thus, two different approaches may make sense. One would ensure enough choice among providers so that potentially conflicting public values — opposing discrimination and ensuring free exercise of religion — can both persist. The other would extend public norms to each provider that receives direct public support.[99] A for-profit or religious provider can work to provide corrections facilities but not to bypass due process. Contract and voucher plans must have these public strings attached and enforced through adequate oversight and monitoring. At the same time, the public value mandating the protection of freedom to exercise religion should also guard against the degree of intrusiveness into religious practices within institutions that would jeopardize avenues for religious expression. This principle would allow a religious group to discriminate on the basis of religion, and even receive a tax exemption — but not perform a public contract to deliver social services.

This nation, as reflected in its constitution and laws, embraces complex and multiple social values: freedom and community, abstract equality and religious diversity, and individual and communal responsibility. These values compete, but they also hinge on one another.

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[98] Martha Minow, *Parents, Partners, and Choice: Constitutional Dimensions of School Options*, *in* SCHOOL CHOICE: THE MORAL DEBATE (Alan Wolfe ed., forthcoming 2003).

[99] For further discussion, see MINOW, *supra* note *, at 50–120.

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Individual freedom relies on collective rules and institutions. Religious pluralism depends on overarching laws that mandate tolerance and also limit the government's involvement and support. To promote such complex values, we need democratic debate over how to protect both the independence and interdependence of individuals.

We need to improve schools, welfare, health care, dispute resolution, and corrections. Competition and plural approaches can help, but not without the larger public framework devoted to ensuring individual freedoms and mutual respect. Making the new experiments accountable to a diverse public should be the central and unrelenting demand of citizens and political leaders.

With social services, including welfare-to-work transition assistance, substance-abuse treatment, and foster care for children, accountability becomes especially important but also recalcitrant, because those most directly affected by the services or failures to provide services are politically and economically ineffectual. Treatment of vulnerable populations simply does not work well in markets that depend upon consumer rationality or upon political processes that demand active citizen monitoring.[100] Nor does paternalistic provision of services by nonprofits guarantee good practices, as abuses in institutional settings demonstrate.[101] A mixed system of public and private provision with incentives for competition, disclosure of processes and results, and public standards open to revision in light of improving practices could increase accountability, but might also degenerate into the worst features of the separate for-profit, nonprofit, and governmental programs. Rigid standards could force private providers to behave like government and lose their potential for innovation, efficiency, and flexibility. Yet ineffective public standards could leave the terrain open for profiteering or for skimming the eligible populations to serve only the least needy. Rather than trumpeting privatization or marching against it, scholars and activists should demand closer study of the strengths and weaknesses of existing accountability mechanisms that govern private markets, governmental bodies, and nonprofits, as well

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100 *See* Susan Rose-Ackerman, *Social Services and the Market*, 83 COLUM. L. REV. 1405, 1406 (1983).

101 *See* ALEXIA PARKS, AN AMERICAN GULAG: SECRET P.O.W. CAMPS FOR TEENS (2000) (documenting abusive practices in private lock-up facilities for juveniles); *60 Minutes II: Three-Year Nightmare* (CBS television broadcast, Jan. 2, 2001), *available at* http://www.cbsnews.com/stories/2001/01/02/60II/main260849.shtml. For a more general treatment of the risks of unregulated benevolence, see WILLARD GAYLIN ET AL., DOING GOOD: THE LIMITS OF BENEVOLENCE (1978). *See also* ROBERT WHITAKER, MAD IN AMERICA: BAD SCIENCE, BAD MEDICINE, AND THE ENDURING MISTREATMENT OF THE MENTALLY ILL 261–65 (2002) (attributing at least some of the unsatisfactory outcomes in clinical treatment of persons with mental illness to profit-seeking institutional activities).

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as of the new opportunities and dangers posed by collaborations across these sectors.

VI. ESTABLISHED EXPECTATIONS AND CURRENT BREACHES

Differences in both language and practice characterize the treatments of accountability in the spheres of government, markets, and nonprofits, including religious groups. Democratic governments promise accountability through transparency, a trendy term for public disclosure of key decisions and the information necessary to assess those decisions. Through public debate, enabled by legislatures, city councils, public hearings, and mass media, an open democracy ensures freedom of expression and latitude for reporting. Through the electoral sanction, which enables voters to express their approval or disapproval of the behavior of elected officials, a democracy creates timely cycles for public accountability. In addition, the division of governmental powers among legislative, executive, and judicial branches and among federal, state, and local governments creates opportunities for one sector of the government to check another.[102]

Private economic markets generate accountability through the operation of supply and demand, which tests the viability of ideas, products, and processes by their ability to attract and maintain a sufficient number of purchasers to meet costs and generate desirable profits. Many firms are held accountable through the operation of capital markets, and will only receive enough funding from investors if they meet investors' disclosure and performance expectations. Publicly traded companies face additional accountability requirements, such as satisfying their boards, including independent directors in certain board functions, and meeting the disclosure requirements mandated by government agencies.[103] In a regulated economy, for-profit companies also face enforcement of public laws guarding against monopolistic behavior, mistreatment of consumers, and excessive externalities affecting the physical environment or other domains.

Nonprofits must report to boards of directors and may have some public disclosure obligations as well. Though they lack the demands of a profitable bottom line, nonprofits sustain themselves by satisfying funders, whether individual or institutional donors, contributors of volunteer time, or contracting partners. Religious institutions may have boards or entirely different governance structures: some have a

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[102] *See* ROBERT COVER, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, *in* NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER 51 (Martha Minow et al. eds., 1992).

[103] *See, e.g.*, Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745; DEL. CODE ANN. tit. 8, § 141 (1991 & Supp. 2002).

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hierarchical form; some have endowments, large holdings of property, and subsidies from national or international organizations; others maintain tiny storefront operations, struggling to pay rent.[104] These institutions can and should be accountable not only to divine authority but also to people. A minimal level of regulation derives from the turnout and donations of the faithful, but more overtly public tools to promote accountability also exist. Though restrained by the Constitution's Free Exercise and Establishment Clauses, state attorneys general and taxing authorities retain limited tools for overseeing nonprofit organizations. Accordingly, even religious groups remain subject to public scrutiny that guards against fraud, criminal conduct, and abuse of donor intentions.

Colossal failures in existing accountability practices across all sectors are ready at hand. The voting count mess in the 2000 presidential election,[105] the off-the-books transactions of the Enron Corporation,[106] the conflicts of interest within the Arthur Andersen accounting and consulting businesses,[107] the fraud perpetrated by Tyco executives,[108] the failures of the Roman Catholic Church to deal openly and swiftly with allegations of sexual abuse by priests and to cooperate with law enforcement officials,[109] the misleading behavior of the Red Cross in soliciting funds following September 11,[110] and the diversion of funds

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104 *See* LESTER M. SALAMON, AMERICA'S NONPROFIT SECTOR: A PRIMER 31–35 (2d ed. 1999); Hamil R. Harris, *Route 1's Storefront Sanctuaries: Business Revitalization Could Threaten Small Churches*, WASH. POST, June 13, 2002 (Prince George Extra), at 9; Zerline Hughes Jennings, *Giving Them That Ol' Storefront Religion: A Fight for Souls — and Paying the Rent*, BOSTON GLOBE, June 30, 2002 (City Weekly), at 4.

105 *See* Michael Cooper, *Florida Official Has Dual Roles in a Maelstrom*, N.Y. TIMES, Nov. 14, 2000, at A1; Katharine Q. Seelye, *Little Change Forecast for Election Process*, N.Y. TIMES, Apr. 26, 2001, at A14.

106 *See* Kurt Eichenwald, *Ex-Enron Official Admits Payments to Finance Chief: A Step for Prosecutors*, N.Y. TIMES, Aug. 22, 2002, at A1; James Traub, *The Attorney General Goes to War*, N.Y. TIMES, June 16, 2002, § 6 (Magazine), at 38.

107 *See* Jonathan D. Glater, *4 Audit Firms Are Set To Alter Some Practices: They Fear That Enron May Bring New Rules*, N.Y. TIMES, Feb. 1, 2002, at A1; Floyd Norris, *Andersen Told To Split Audits and Consulting*, N.Y. TIMES, Mar. 12, 2002, at C1, *available at* LEXIS, *The New York Times* File.

108 *See* Andrew Ross Sorkin, *2 Top Tyco Executives Charged with $600 Million Fraud Scheme*, N.Y. TIMES, Sept. 13, 2002, at A1.

109 *See* Dean E. Murphy, *In Crisis, U.S. Catholics See Turning Point for Church*, N.Y. TIMES, Apr. 28, 2002, at A1; Daniel J. Wakin, *Priests Seek To Assert Rights and Fight Church Abuse Policy*, N.Y. TIMES, Oct. 4, 2002, at B1; Greg Winter, *Diocese Pays $1.2 Million in Sex Lawsuit: In New York, a Priest Faces a Rape Charge*, N.Y. TIMES, Apr. 2, 2002, at A14.

110 *See* David Barstow, *Red Cross Agrees to Database*, N.Y. TIMES, Oct. 25, 2001, at B10; Diana B. Henriques & David Barstow, *Red Cross Pledges Entire Terror Fund to Sept. 11 Victims*, N.Y. TIMES, Nov. 15, 2001, at A1; Katharine Q. Seelye & Diana B. Henriques, *Red Cross President Quits, Saying That the Board Left Her No Other Choice*, N.Y. TIMES, Oct. 27, 2001, at B9; Stephanie Strom, *Red Cross Is Pressed To Open Its Books*, N.Y. TIMES, June 3, 2002, at B7.

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by executives at some branches of the United Way[111] are only a few recent, high-profile examples.

Many observers attribute such abuses to systematic problems. Failures in governmental accountability are widespread, argue public-choice theorists, due to the self-interest of incumbents and the dynamics of multiparty agenda manipulation.[112] Campaign finance practices ensure that money, rather than popular votes, determines election results, and low voter turnouts both reflect and perpetuate this problem. In addition, periodic general elections are too infrequent and removed from day-to-day decisions to serve as an adequate check.

Corporate boards may fail to watch over management because they are often composed of friends of the chief executive officer or people too busy to be actively involved in corporate governance.[113] Additionally, companies sometimes fail because of external events or badly timed expansions, while others sometimes succeed, at least temporarily, because of hype or faulty financial statements. Preoccupation with short-term returns steers many corporations toward practices that do not build long-term value.[114] Structural rules and the failure of shareholders to exercise their voting powers can make it difficult to remove directors or create healthy turnover on boards because the structures are tilted toward some purposes — such as deterring takeovers or deferring to lawyers — other than protecting shareholders.[115]

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[111] *See* David Cay Johnston, *United Way Official Knew About Abuses, Memo Says*, N.Y. TIMES, Sept. 3, 2002, at A12; Stephanie Strom, *Director of the United Way in Washington Steps Down*, N.Y. TIMES, Sept. 6, 2002, at A16; Peter Whoriskey, *Charity's Pension Probed by U.S.; Documents Sought from United Way*, WASH. POST, Aug. 22, 2002, at B1.

[112] *See generally* THE THEORY OF PUBLIC CHOICE — II (James M. Buchanan & Robert D. Tollison eds., 1984). *See also* PAUL STARR, THE LIMITS OF PRIVATIZATION 5 (1987); GORDON TULLOCK ET AL., GOVERNMENT FAILURES: A PRIMER IN PUBLIC CHOICE 61 (2002); Paul Starr, *The Meaning of Privatization*, 6 YALE L. & POL'Y REV. 6 (1988), *quoted in* Leon Felkins, *Introduction to Public Choice Theory*, *at* http://www.magnolia.net/~leonf/sd/pub-choice.html (last revised Nov. 8, 2001).

[113] *See* Meredith Jordan, *Directors in the Hot Seat*, ATLANTA BUS. CHRON., Feb. 22, 2002, *available at* http://atlanta.bizjournals.com/atlanta/stories/2002/02/25/story2.html; *Board & Director Interlocks*, *at* http://www.thecorporatelibrary.com/products/directorinterlocks.html (last visited Nov. 14, 2002); *see also* ROBERT A.G. MONKS & NELL MINOW, CORPORATE GOVERNANCE (2001); ROBERT A.G. MONKS & NELL MINOW, WATCHING THE WATCHERS: CORPORATE GOVERNANCE FOR THE 21ST CENTURY (1996).

[114] Robert Reich has given the label "paper entrepreneurship" to this short-term style of corporate governance. *See* Frank C. Genovese, *Government, Management Fostered Drop in Worker Output*, CHRISTIAN SCI. MONITOR, Sept. 3, 1980, at 11.

[115] *See* John C. Coates IV, *Explaining Variation in Takeover Defenses: Blame the Lawyers*, 89 CAL. L. REV. 1301 (2001) (tracing features in takeover defenses to terms negotiated by repeat-player lawyers whose own interests can diverge from those of their clients); John H. Matheson & Brent A. Olson, *Corporate Law and the Longterm Shareholder Model of Corporate Governance*, 76 MINN. L. REV. 1313 (1992) (examining how rules about board structure and process impede monitoring by institutional investors who are long-term shareholders).

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Nonprofits often lack criteria to evaluate their own performances; they may also have inattentive boards. Some critics charge that too many nonprofits and too many religious institutions lack democratic procedures. Other commentators defend elite or hierarchical control. Still others question elite control due to participatory values or the potentially serious difficulties in recruiting and retaining high-quality leaders who have better-paying and more prestigious opportunities.

Collaboration between government and private entities could introduce accountability tools from the private sector and thereby improve performance. Yet such collaboration could also divert the public trust into forms of conduct that already have faulty accountability procedures or use accountability mechanisms inadequate to the public tasks. How can the new privatization experiments draw on the best and not descend to the worst forms of accountability? At a minimum, the accountability framework itself must be public in the source of its norms and in its overarching authority and enforcement power.[116]

VII. TOWARD A PUBLIC FRAMEWORK OF ACCOUNTABILITY

What would constitute a public framework of accountability when governments privatize functions or activities that have been public? Such a framework should preserve and revitalize the conception of "public" that puts people at the center, for it is the people whom the government is supposed to serve. Albert Hirschman's classic statement of exit, voice, and loyalty — the three options through which people can hold organizations accountable[117] — provides a useful starting point. The polity must ensure that governments, as representatives of the public, retain the option to exit relationships with private entities, the means to express disagreements with the ways in which the private entities proceed, and the capacity to remain with the private entity as a vote of confidence. Similarly, when a government creates a school voucher scheme, it should enhance the avenues for individual families to exit schools — public or private — that they find unacceptable, but also strengthen the procedures permitting families to express their desires for, and criticisms of, the schools, or to embrace an existing school as long as it satisfies public requirements monitored by the government.

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[116] In other countries, a more radical approach than the one proposed here extends public norms throughout private activities. *See, e.g.*, COMPARATIVE CONSTITUTIONAL LAW (Vicki C. Jackson & Mark Tushnet eds., 1999); POLITICAL CULTURE AND CONSTITUTIONALISM: A COMPARATIVE APPROACH (Daniel P. Franklin & Michael J. Baun eds., 1995). For a thoughtful effort to develop criteria for extending public norms into private activities, see Freeman, *supra* note 4.

[117] *See* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

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For governments hoping to achieve both the desired ends and perceived legitimacy of constitutional democracy, there are four relevant legal traditions of accountability. The first tradition, which often surprises nonlawyers, is the model of contract law. Centrally concerned with ensuring freedom to exchange promises, contract law is no less dependent upon public enforcement. Public enforcement of private promises involves courts and arbitration (or the mere threat of their use), rules about what kinds of promises will be enforceable, and norms about what kinds of sanctions can be imposed. Governments often use contracts when working with private entities to deliver social services or to manage schools or prisons. A public framework for accountability for these activities would disclose the facts surrounding the contracting process to the public and permit concerned citizens to contribute to the terms of those contracts. It would ensure that the government does not enter into any contracts that undermine constitutional or legislative commitments, absent public decisions to change those overarching rules. And it would create and maintain a viable process for enforcing the contracts, including substantive terms, procedures for resolving disputes, and mechanisms for terminating contracts.[118] None of these elements would infringe upon a private realm. Indeed, these elements would protect and strengthen the quality of public expenditures and the avenues for ordinary people to know about and evaluate these government practices. Recent decisions by school systems to terminate relationships with the Edison for-profit school corporation indicate not only disappointment with results but also the importance of ongoing public accountability.[119]

A second legal model for governmental accountability imposes constitutional obligations on the government. If the government chooses to fulfill its obligations by working with private entities, it should not be able to bypass those constitutionally defined obligations. Where the explicit terms of a constitution attach only to a government actor — as

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[118] Although many existing contracts lack performance measures and bases for oversight, strong and workable contracts with private vendors can be designed to ensure that disadvantaged recipients receive intended services, with protections for their civil rights. *See* Eileen P. Sweeney et al., *Language Matters: Designing State and County Contracts for Services Under Temporary Assistance for Needy Families*, 35 CLEARINGHOUSE REV. 508, 513, 516–25, 529 (2002).

[119] *See* Michael A. Fletcher, *Private Enterprise, Public Woes in Phila. Schools*, WASH. POST, Sept. 17, 2002, at A1; Scott S. Greenberger, *2d School Severs Ties with For-Profit*, BOSTON GLOBE, May 26, 2001, at B1; Ed Hayward, *Charters Leave Their Roots; Schools Part Ways with For-Profits*, BOSTON HERALD, June 16, 2002, at 8; Kim L. Hooper, *Charter Jettisons Pact with SABIS*, INDIANAPOLIS STAR, Aug. 30, 2002, at B4; Erika Niedowski, *Woes Growing, Educator's Fate in the Balance*, BALT. SUN, Sept. 28, 2002, at 1A; Eric Siegel & Jean Thompson, *EAI Facing Cancellation of Contracts*, BALT. SUN, Nov. 18, 1995, at 1A; Anand Vaishnav, *Another Charter School Cuts Its Ties*, BOSTON GLOBE, Aug. 2, 2002, at B2.

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is true of the Equal Protection and Due Process Clauses[120] and, by extension, of § 1983's private right of action against government actors who violate individuals' constitutional rights[121] — a government should not try to perform an end-run around those obligations by delegating tasks to an entity not covered by these provisions. To guard against such a risk, governments should explicitly require that contractual partners or organizations eligible for vouchers provide equal treatment or due process protections. Preserving a forum where people can raise complaints about noncompliance is another important part of the constitutional model of accountability. In addition, constitutional values are meant to guard against self-dealing or other conflicts of interest that arise when private parties are entrusted with public duties.[122]

Administration, the third model of accountability, is too often dismissed as bureaucracy. Admittedly, administrative action can become bureaucratic, complex, slow to change, driven by thirst for power rather than results, and characterized by inflexibility. Many privatization efforts grow from precisely such critiques of public bureaucracies. Yet administration need not descend into bureaucracy — and if it does, it can do so to ensure systematic collection of information needed to assess results and practices and deter abuse. Some paperwork, in short, is what permits accountability, especially when it comes to cost accounting and evaluation of performance. We count what we care about. Requirements to collect information about applicants for vouchers, attrition from schools, decreases in staff, or complaints by recipients may add paperwork to the leaner operations of private entities, but the resulting data are essential to monitoring the quality of schools, social services, and prison programs. The challenge is to require the reporting of information that is essential to assess compliance while ensuring that entities are not subject to mindless reporting requirements.

The fourth legal model for accountability is democracy. Democracy involves both the processes and values committed to governance by the people. This model usually translates into popular voting, but it need not take the form of referenda or up-or-down votes on an entire

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120 ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 385–94 (1997). Although the courts have recognized an exception to the state action requirement for a private actor performing a public function, the exception is narrow and has not been extended to schools. *Id.* at 395–403.

121 To prevail under § 1983, the plaintiff must show that the defendant acted "under color of" state law, even if the state did not authorize the action. *See, e.g.*, CHARLES ALAN WRIGHT, THE LAW OF FEDERAL COURTS 120 (4th ed. 1983); Michael Wells, *Constitutional Remedies, Section 1983 and the Common Law*, 68 MISS. L.J. 157 (1998).

122 *See* Dru Stevenson, *Privatized Welfare and the Nondelegation Doctrine*, 35 CLEARINGHOUSE REV. 546, 549–52 (2002).

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program. Democratic values can also inform the design of administrative review processes and contracting mechanisms. Disclosure of relevant information, accompanied by periodic occasions for the expression of public views on particular privatization decisions and the standards set and used to assess them, would advance democratic values and the public identity they reflect and create.

How can accountability mechanisms themselves be held accountable? This is not merely a cute exercise in reflexivity. Instead, it serves as a reminder to attend to what otherwise might be missed by familiar methods for assessing particular procedures or decisions. What might be missed? How about the unintended or collateral consequences of particular privatization decisions? If the introduction of vouchers lets more people select private schooling, and the percentage of children enrolled in private schools shifts from its current level of 10%[123] to 25% or 50%, what will be the effects on social cohesion and trust in public institutions?

The accretion of multiple decisions by governments to contract out public services or to use vouchers for private programs can transform the character of society, the prospects for equality and mutual respect, and the sense of community across lines of difference. Therefore, the cumulative impact of privatization decisions calls for evaluation in light of public values. This evaluation requires gathering information on actual government spending to determine whether the new policies alter spending levels or instead simply shift the agents assigned to implement the policies. Who is capable of performing that kind of assessment of changing policies and their effects over time? Perhaps a public commission, ideally composed of representatives from both the public and private sectors, could periodically review the cumulative effects of privatization decisions. Alternatively, a legislative or administrative body could hold hearings on the effects of privatization and consider adopting guidelines for government contracting or other privatization measures. The mere existence of a government initiative would provide a focal point for reporting by private, nongovernmental groups as well as an occasion for media attention, public education and debate, and citizen action. Difficulties in mobilizing these vital vehicles for democratic accountability regarding the general topic of privatization would be considerably reduced if a government commission or public hearings served as the focus of media and public attention. Without such efforts, privatization poses serious risks to public values, democratic control, and people's understanding of the choices being made in their names.

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[123] Stephen P. Broughman & Lenore A. Colaciello, *Private School Universe Survey: 1999–2000*, *at* http://nces.ed.gov/pubs2002/quarterly/fall/q3-4.asp (last visited Feb. 9, 2003).

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If the language of competition and consumption overtakes social provision in education and welfare, what will be the effect on civic commitment? Will people learn to be consumers rather than citizens, with a reduced sense of collective commitment? How will privatization affect people's willingness to vote or to make sacrifices for national defense? If the accountability measures do not capture these kinds of effects, then they are not themselves accountable to the public values of democracy, equality, and even public safety. Hence, a vigorous framework for public accountability will require inventive and searching inquiry into our collective commitments, our disagreements, and our chances both to change and to adhere to prior values. This is also the kind of task that is irreducibly public. Testing accountability requirements in light of public values is not a task to be contracted out to a private enterprise. For it is through the process of participatory inquiry into the values that it uses to govern that the polity constitutes itself.[124]

No small part of this effort must include creative ways to generate demand for information about the processes of privatization, the measures of accountability, and the space for public participation. Unless communities work to ensure that more people have the capacity to make these demands, governments will not be accountable when they use private methods to meet public needs. Here, as in so many settings, the preconditions for constitutional democracy are also its stated values; a population with the freedom and equality to pursue self-governance is both the end and the means of our political system. Vouchers, contracts, joint ventures, and partnerships among governments, religious groups, nonprofits, and for-profit companies could either undermine this alignment of ends and means or strengthen it and the values of pluralism and freedom it pursues. The direction is up to us.

[124] Some may view other activities, such as running prisons, as importantly public in light of symbolic or political effects. The demarcation of public and private identities ultimately must be made and monitored by public processes of democracy and law.

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