

# Privatization and the Market Frame

MATTHEW TITOLO†

## INTRODUCTION

David Westbrook argues that “the current financial crisis provides us with an opportunity for the critical analysis of established patterns of thought . . . .”<sup>1</sup> One of the established patterns of thought in desperate need of critical analysis is the durable myth of a self-regulating and efficient free market.<sup>2</sup> This myth is a defining feature of our governing neoliberal policy consensus.<sup>3</sup> The symbolic centerpiece of neoliberal, market-based governance is privatization,<sup>4</sup> which refers to “the use of the private sector in the provision of a good or service, the components of

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† J.D., Ph.D, Visiting Associate Professor, West Virginia University College of Law. This Article benefitted from insightful comments and advice in its early stages in the fall of 2010 by faculty at West Virginia University College of Law, University of Tulsa College of Law, Capital University Law School, University of Baltimore School of Law, and the University at Buffalo Law School. I would especially like to thank Greg Bowman, dre cummings, Atiba Ellis, Anne Lofaso, Jena Martin Amerson, Will Rhee, Dean Rowan, and John Taylor for their feedback, assistance, and guidance. Conversations with Steve Pfaff over the years have sharpened my thinking on political economy and furnished invaluable insights from the related disciplines of historical and comparative sociology. Brittany Vascik provided excellent research assistance. This Article was completed with the support of a West Virginia University Bloom Summer Research Grant.

1. DAVID A. WESTBROOK, *OUT OF CRISIS: RETHINKING OUR FINANCIAL MARKETS*, at viii (2010); *see also* James R. Hackney, Jr., *The Enlightenment and the Financial Crisis of 2008: An Intellectual History of Corporate Finance Theory*, 54 ST. LOUIS U. L.J. 1257, 1274 (2010) (“[T]he financial collapse of 2008 . . . opens up space for looking beyond the Enlightenment beliefs that serve as the foundation for modern finance theory.”).

2. *See* WESTBROOK, *supra* note 1, at 9-10; *see also* Ellen Byers, *Corporations, Contracts, and the Misguiding Contradictions of Conservatism*, 34 SETON HALL L. REV. 921, 956 (2004) (“Despite its appealing frontier connotations, the concept of a ‘free market’ separate from government is simply a myth.”).

3. *See* discussion *infra* Part I.A.

4. *See* discussion *infra* Part I.C.

which include financing, operations (supplying, production, delivery), and quality control.”<sup>5</sup> In the context of U.S. domestic policy, privatization refers to contracting out traditional government functions to the private sector, rather than to selling off government assets to commercial interests.<sup>6</sup> American privatization debates are typically organized around core premises, which I call “baseline assumptions.”<sup>7</sup> One baseline assumption is that markets are more efficient than government.<sup>8</sup> Another is that the privatization decision is essentially apolitical and technocratic.<sup>9</sup>

The financial crisis has thrown into sharp relief the inadequacy of many prevailing baseline assumptions.<sup>10</sup> In this Article, I critically examine some of those assumptions and suggest that we abandon our baseline view of privatization as efficient, neutral, and apolitical to adopt a default view of privatization as fraught with normative implications. This will especially involve subjecting default market efficiency assumptions to empirical and conceptual scrutiny. I advance these goals as follows. First, in Part I, I lay out what I call the dominant neoliberal frame, explaining the efficient market ideas at its core and arguing that it constitutes our horizon of understanding, making it very difficult to think ourselves out of its epistemic blind spots. Next, in Part II, I provide a brief overview of recent privatization history and some debates surrounding the phenomenon. I then explain, in Part III, that certain *a priori* assumptions make it difficult for us to see how privatization policies function in the world (rather than how

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5. KEVIN R. KOSAR, CONG. RESEARCH SERV., RL 33777, PRIVATIZATION AND THE FEDERAL GOVERNMENT: AN INTRODUCTION 3 (2006); *see also* GEN. ACCOUNTING OFFICE, GAO/GGD-97-121, TERMS RELATED TO PRIVATIZATION ACTIVITIES AND PROCESSES 9 (1997) (“The term privatization has generally been defined as any process aimed at shifting functions and responsibilities, in whole or in part, from the government to the private sector.”).

6. The sense of privatization as “selling off government assets” has become increasingly salient in recent years, as states and municipalities attempt to plug budget shortfalls with cash from various privatization deals. *See infra* note 153 (discussing state infrastructure contracts).

7. *See* discussion *infra* Part II.B.1.

8. *See* discussion *infra* Part II.B.2.

9. *See* discussion *infra* Part III.B.1.

10. *See* discussion *infra* Part I.A.

they might unfold in an idealized world). I conclude by suggesting new baselines for privatization discussions and for legal theory more broadly as it moves past the old neoclassical models and develops new ways of seeing.

### I. THE NEOLIBERAL FRAME

I begin with the premise that neoliberalism constitutes the dominant frame of reference for American policy debates.<sup>11</sup> In American academia, the word “neoliberalism” typically signifies a set of policies—i.e., the “Washington Consensus”<sup>12</sup>—imposed on emerging economies by institutions, such as the International Monetary Fund and the World Bank, mandating austerity regimes and privatization in exchange for loans and other resources from the developed economies.<sup>13</sup> I will use the term “neoliberal

11. See, e.g., David Harvey, *Neoliberalism as Creative Destruction*, 610 ANNALS AM. ACAD. POL. & SOC. SCI., Mar. 2007, at 22, 22 (“Neoliberalism has become a hegemonic discourse with pervasive effects on ways of thought and political-economic practices to the point where it is now part of the commonsense way we interpret, live in, and understand the world.”); see also DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 3-4 (2007).

12. The Washington Consensus has been defined as follows:

The Washington Consensus, articulated in 1990, was meant to synthesize the reforms that most economists in the World Bank, the International Monetary Fund (IMF), the U.S. Treasury, and some of Washington's think tanks believed were necessary for sustained economic growth. It emphasized the importance of privatization, fiscal discipline, trade and financial liberalization, and price stability, and it is associated with “market fundamentalism”—the view that markets solve economic problems by themselves and that government intervention is destructive.

Yoram Margalioth, Comment, *Intellectual History as Legal Analysis*, 96 CORNELL L. REV. 1025, 1027 (2011) (footnote omitted).

13. Ha-Joon Chang notes that:

[T]he neo-liberal agenda has been pushed by an alliance of rich country governments led by the US and mediated by the “Unholy Trinity” of international economic organizations that they largely control—the International Monetary Fund (IMF), the World Bank and the World Trade Organisation (WTO). The rich governments use their aid budgets and access to their home markets as carrots to induce the developing countries to adopt neo-liberal policies.

HA-JOON CHANG, *BAD SAMARITANS: THE MYTH OF FREE TRADE AND THE SECRET HISTORY OF CAPITALISM* 13 (2008). Similarly, María Padua writes that:

frame” to focus our attention on two interrelated facts: neoliberalism is both an intellectual framework and a set of institutionalized political and social practices. In the first sense of “intellectual framework,” the term “neoliberalism” serves as shorthand for a constellation of familiar concepts: neoclassical/rational-actor economics,<sup>14</sup> market self-regulation,<sup>15</sup> the efficient market hypothesis,<sup>16</sup> a fundamental belief in the power of “free markets”<sup>17</sup> to

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Washington is the capital of the world, the capital of globalization and the capital of international economic power. Along with the International Monetary Fund (IMF), the World Bank (WB) and the Inter-American Development Bank (IDB), Washington extols the global application of neoliberal policy and compels Mexico and Latin America to join their example.

María Eugenia Padua, *Mexico's Part in the Neoliberal Project*, 8 U.C. DAVIS J. INT'L L. & POL'Y 1, 2 (2002).

14. See, e.g., STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 1 (2004) (“[T]he view taken will generally be that actors are ‘rational.’ That is, they are forward looking and behave so as to maximize their expected utility.”); see also DIANE COYLE, THE SOULFUL SCIENCE: WHAT ECONOMISTS REALLY DO AND WHY IT MATTERS 5 (2007) (arguing that modern economics has built on the neoclassical framework); NICHOLAS MERCURO & STEVEN G. MEDEMA, ECONOMICS AND THE LAW: FROM POSNER TO POST-MODERNISM AND BEYOND 306 (2d ed. 2006) (“[M]ost approaches to Law and Economics have relied almost exclusively on the rational choice model of human behavior . . . .”); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 3 (4th ed. 1992) (“[M]an is a rational maximizer of his ends in life . . . .” (footnote omitted)).

15. See WESTBROOK, *supra* note 1, at 7 (“As a policy matter, for some decades it was argued that no more substantial regulation of financial market actors . . . was required, because such entities regulated themselves.”).

16. See *id.* at 4. Westbrook argues that:

The importance, for contemporary financial policy and the academy, of the concept of “efficiency” caricatured here cannot be overstated. In the United States, the concept of efficiency oriented the single most important legal perspective in generations, law and economics. In politics, as an ideal, efficiency legitimated, and to a large degree genuinely informed, the deregulation of financial industries . . . . Much U.S. foreign policy . . . was organized by efficiency and functionally equivalent terms such as “growth” and “competitiveness.”

*Id.*; see also Hackney, *supra* note 1, at 1257 (noting that the rational individual is at the heart of neoclassical economics).

17. On the social power of the “free market” concept, James Galbraith writes:

Because the word lacks any observable, regular, consistent meaning, marvelous powers can be assigned. The market establishes

produce optimal social welfare, and at least a minimal commitment to a libertarian ethos of individual freedom and consumer choice.<sup>18</sup> We often associate this cluster of concepts with the most influential legal movement of the last thirty years: “law and economics,”<sup>19</sup> which applies neoclassical economics to legal problems.<sup>20</sup> But far from supplying a neutral analytical approach, law and economics is accompanied by a strong set of ex ante commitments to

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Value. It resolves conflict. It ensures Efficiency in the assignment of each factor of production to its most Valued use, and of each consumable good or service to the customer who wants it most, provided, always, he or she can pay. . . . Markets achieve effortlessly exactly what governments fail to achieve by directed effort. No fuss, no muss, no budget, no time wasted in discussions, no voting, and no appeal. No wonder that conservatives and all who fall under their spell prefer markets to governments.

JAMES K. GALBRAITH, *THE PREDATOR STATE: HOW CONSERVATIVES ABANDONED THE FREE MARKET AND WHY LIBERALS SHOULD TOO* 20 (2008).

18. *Id.* at 16-18 (discussing the centrality of consumer freedom to the neoliberal project).

19. We should proceed with caution before allowing “law and economics” to be our default conceptual shorthand. The legal economic approach is just one very influential embodiment of a more generalized intellectual-policy framework rooted in the neoliberal ethos. Nevertheless, “there is no contesting the fact that law and economics is currently the undisputed champion of the putative legal-theoretic competition.” Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 144 (2003).

20. As Robert Ashford implies, it would be far more accurate to describe “law and economics” as “law and *neoclassical* economics” because, until fairly recently, the neoclassical model dominated discussions in the legal academy, sometimes at the expense of other possible approaches. Robert Ashford, *Using Socio-Economics and Binary Economics to Serve the Interests of Poor and Working People: What Critical Scholars Can Do to Help*, 8 SEATTLE J. SOC. JUST. 173, 179 (2009) (“[F]rom its inception and continuing to this day, this fuller range of economic theory and practice was and continues to be intentionally, and perhaps strategically, omitted from the dominant law and economics approach in favor of a concentration largely limited to neoclassical economics.”); see also Anita Bernstein, *Whatever Happened to Law and Economics?*, 64 MD. L. REV. 303, 305 (2005) (arguing that Chicago-style welfare economics largely characterized the law and economics movement, despite claims that the movement entailed a diversity of economic viewpoints); Hanson & Yosifon, *supra* note 19, at 134 n.12 (“By ‘legal economists,’ we mean scholars in economics departments and, more commonly, in law schools who apply neoclassical economics to law and law-related issues.”).

laissez-faire governance.<sup>21</sup> Because on this view government regulation will typically be inefficient, it follows that we ought to “reduce the size of the public sector . . . through accelerated privatization projects, reducing the size of bureaucracy primarily by contracting out public functions to private parties.”<sup>22</sup> The goal is to get government out of the way so that the market can do what it presumptively does best: efficiently allocate resources to their best social uses.<sup>23</sup>

Second, neoliberalism is not merely a set of abstract ideas, but also a set of concrete political practices deeply embedded in our legal system, media, corporations, and universities;<sup>24</sup> so much so that neoliberalism now arguably constitutes our horizon of understanding,<sup>25</sup> our ready-to-

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21. As Judge Posner succinctly phrases it: “[L]egislative regulation of the economy frequently, perhaps typically, brings about less efficient results than the market-common law system of resource allocation.” RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 329 (1st ed. 1972); see also Byers, *supra* note 2, at 956-57 (defining “ex ante” and “ex post” regulation).

22. Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 366 (2004).

23. Edward Rubin, *Can the Obama Administration Renew American Regulatory Policy?*, 65 U. MIAMI L. REV. 357, 366-67 (2011). As Rubin argues:

The essential claim is that a market where goods and services are voluntarily exchanged is inherently efficient, more so than any alternative mode of governing economic activities. From this claim, it follows that the task of government is to facilitate the market, not to control it or alter its results. Thus, the government should establish and protect property rights and enforce contractual agreements, but it should not undertake any further regulatory action. If such regulatory action is already in place, it should be rescinded. The exception, of course, is in a case of market failure due to monopoly, externality, information asymmetry or public goods. In that case, regulation has the potential to improve the efficiency of the market.

*Id.* (footnotes omitted).

24. HARVEY, *supra* note 11, at 3 (“[T]he advocates of the neoliberal way now occupy positions of considerable importance in education . . . in the media, in corporate boardrooms and financial institutions . . . and also in those international institutions . . . that regulate global finance and trade.”); see *infra* Part II.B.2.

25. I borrow the term “horizon of understanding” from interpretive theory and more particularly hermeneutics. See HANS-GEORG GADAMER, *TRUTH AND METHOD* 301 (2d ed. 2004) (defining “the horizon” as “the range of vision that includes everything that can be seen from a particular vantage point”). By using this phrase, I mean to signal that the problem we face in constructing a new

hand tool to craft an array of regulatory policies with wide application<sup>26</sup>: from monetary and trade regulation, to financial deregulation and government procurement policy.<sup>27</sup> American public institutions have been redesigned to better fit the neoliberal frame that has dominated policy since the 1970s. The free market frame yielded deregulation,<sup>28</sup> a project that began with the trucking and airline industries.<sup>29</sup> Government procurement policy has embraced an accelerated privatization agenda.<sup>30</sup> Free market theories are bolstered by an array of quantitative models and epistemic habits that characterize the American economics profession.<sup>31</sup> Within financial economics, we have portfolio and risk management theory and the growth of new forms of financial engineering (collateralized debt obligations, credit-default swaps, and the like).<sup>32</sup>

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frame is a serious interpretive challenge; that is, it is not just an issue of the right ideas or tinkering around the edges with policy recommendations, but rather of situating ourselves reflexively inside the frame we are trying to fix.

26. On the dominance of the neoliberal model, see HARVEY, *supra* note 11, at 22. For further discussion of the Manichean deregulatory philosophy, see WESTBROOK, *supra* note 1, at 60-63 (“Government is identified with the forces of order; markets are identified with the forces of productivity, creativity, indeed happiness. . . . The dead hand of regulation, the imposition of rules, stifles innovation, and conversely, in the absence of rules, progress is expected to flower.”); see also YVES SMITH, *ECONOMY: HOW UNENLIGHTENED SELF INTEREST UNDERMINED DEMOCRACY AND CORRUPTED CAPITALISM* 6 (2010) (“[D]eregulation led to structural changes in the financial services industry that not only made it less stable but also predatory . . .”).

27. See Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 AM. U. L. REV. 627, 636 (2001).

28. See MONICA PRASAD, *THE POLITICS OF FREE MARKETS: THE RISE OF NEOLIBERAL ECONOMIC POLICIES IN BRITAIN, FRANCE, GERMANY, AND THE UNITED STATES* 55-60 (2006) (arguing that the reduction of the role of the state in the market began under Ronald Reagan through tax cuts, decreases in social spending, deregulation, and privatization).

29. See DANIEL YERGIN & JOSEPH STANISLAW, *THE COMMANDING HEIGHTS: THE BATTLE BETWEEN GOVERNMENT AND THE MARKETPLACE THAT IS REMAKING THE MODERN WORLD* 343-46 (1998) (describing the deregulation of the airline and trucking industries in the 1970s).

30. See generally Schooner, *supra* note 27 (discussing reform of the federal procurement process during the 1990s).

31. See SMITH, *supra* note 26, at 180.

32. See WESTBROOK, *supra* note 1, at 47-49.

But these are technical matters outside the common experience of laypersons. What allows neoliberal efficiency arguments their politically persuasive force? Just this: that they are enmeshed in other networks or clusters of values that appeal to us in some, usually intuitive, fashion.<sup>33</sup> Absent sheer repression, no set of ideas as abstract and counterintuitive as the “free market” or “efficiency” can command anything like a consensus without a strong grounding in a network of recognizable moral values. Figures such as Milton Friedman, Friedrich Hayek, and Ayn Rand helped to provide that network by breathing new life into a moribund libertarianism.<sup>34</sup> At the heart of libertarianism is a powerful narrative of “negative freedom”<sup>35</sup> from government interference in what are imagined to be the pre-political liberties of property and contract.<sup>36</sup> Outside the narrow cases of force and fraud,<sup>37</sup>

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33. See HARVEY, *supra* note 11, at 5 (“The founding figures of neoliberal thought took political ideals of human dignity and individual freedom as fundamental, as ‘the central values of civilization.’”).

34. See BARBARA H. FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ-FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* 29-31 (1998) (discussing private coercion, property rights, and “the empty idea of liberty”); see also MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 8-10 (1962) (arguing that political freedom is grounded on commercial, market-based freedoms); F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 227-28 (1960) (providing a defense of nineteenth-century style free market capitalism and advancing the theory that prices function as a form of natural social ordering).

35. ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118, 121-31 (1990) (discussing negative and positive freedom).

36. Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 *CORNELL L. REV.* 1549, 1568 (2003) (“Property is a ‘natural’—inherent, prepolitical, and prelegal—right because its pursuit secures a wide range of natural goods.”); Eric T. Freyfogle, *Property and Liberty*, 34 *HARV. ENVTL. L. REV.* 75, 100 (2010) (“For libertarians, freedom is defined *negatively* . . . in terms of freedom from *government* action, rather than freedom from *private* interference.”); Joseph William Singer, *Essay, Democratic Estates: Property Law in a Free and Democratic Society*, 94 *CORNELL L. REV.* 1009, 1012 (2009) (describing the libertarian view that “regulations constitute an assault on individual autonomy because they interfere with freedom of contract”).

37. See David N. Mayer, *The Myth of “Laissez-Faire Constitutionalism”: Liberty of Contract During the Lochner Era*, 36 *HASTINGS CONST. L.Q.* 217 (2009), for the argument that:

Liberty, under [libertarianism], means freedom from physical compulsion. As libertarians see it, only through the initiation of force—or fraud, which is an indirect form of force—can individuals be

private coercion as a systemic worry is a nonstarter, because in a free society, individuals have recourse to courts of law to settle private grievances and to seek remedies for private harms. So, our consciences can rest easy. To be sure, many individuals will fail to reap market rewards. However, this is not a drawback but rather the genius of the neoliberal setup: structural forces and dynamics can be reframed in terms of personal morality.<sup>38</sup> In other words, the fact that a large number of individuals do not reap the benefits of the free market can be understood as the system working the way it is supposed to. After all, the “free” in “free market” means that individuals are at liberty to make good or bad choices without the government rescuing them from their shortsightedness or imprudence. Free from the smothering embrace of the nanny state, social policy will largely be written by the market itself, where countless individual transactions aggregate to set the social price of the public good in question.<sup>39</sup>

It should be clear from the above that neoliberalism is much more than just a technocratic toolkit; it is instead an

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deprived of their liberty. Thus, libertarians see as the basic social rule the “no-harm principle”: that no one ought to harm another, by using force or fraud, to the detriment of another’s life, liberty, or property.

*Id.* at 240.

38. For example, Brent White has argued that many homeowners do not strategically default even though it would be economically rational to do so because of personal shame and guilt, noting that:

[T]hese emotional constraints are actively cultivated by the government, the financial industry, and other social control agents in order to induce individual homeowners to act in ways that are *against* their own self-interest . . . . Unlike lenders who seek to maximize profits irrespective of concerns about morality or social responsibility, individual homeowners are encouraged to behave in accordance with social and moral norms that require individuals keep promises and honor financial obligations. . . . This norm asymmetry has led to distributional inequalities in which individual homeowners shoulder a disproportionate financial burden from the housing collapse.

Brent T. White, *Underwater and Not Walking Away: Shame, Fear, and the Social Management of the Housing Crisis*, 45 WAKE FOREST L. REV. 971, 972-73 (2010).

39. See Terry M. Moe, *Beyond the Free Market: The Structure of School Choice*, BYU L. REV. 557, 559 (“[Milton] Friedman and other libertarians believe that when markets are allowed to work freely with a minimum of government interference, society will be maximally productive and efficient.”).

articulation of first principles, a potent social allegory of human freedom.<sup>40</sup> In the last quarter of the twentieth century “free markets” were refigured as a subset of “human freedom” more generally.<sup>41</sup> When “freedom” and “liberty” are intuitively linked to “low taxes” and “deregulation,” we should not be surprised if it is a daunting, long-term task to develop new metaphors and narratives.<sup>42</sup>

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40. For the interrelationship between economics, religion, and moral values, see ROBERT H. NELSON, *ECONOMICS AS RELIGION: FROM SAMUELSON TO CHICAGO AND BEYOND* 7-8 (2002).

41. GALBRAITH, *supra* note 17, at 21-24.

42. The general point I am making here is not that our policy discourse is fully determined by the linguistic link between, for example, “freedom” and “free markets.” I am, however, arguing that the linkages are strong pre-determinants of how policy discussions are likely to play out in practice. This point has general warrant in studies of politics of language, a fertile field of inquiry to which I cannot do full justice in a single Article. I can only indicate some sources of inspiration. George Orwell, of course, crystallized important views about political language in *Politics and the English Language*. See GEORGE ORWELL, *Politics and the English Language*, in *A COLLECTION OF ESSAYS* 162 (Doubleday Anchor Books 1954). Orwell’s argument is that political propaganda works through euphemism and misdirection, generally by deliberately failing to call things by their proper names. *Id.* at 173. More recently, scholars of language such as Geoffrey Nunberg and George Lakoff have mapped the ways that political power is cemented through control of the terms of debate and, more generally, how language and experience shapes thought. In attempting to explain why Democrats had suffered a series of political defeats in the Bush years, for example, George Lakoff argues that conservatives have been successful because they were able to present their arguments with a powerful, value-laden terminology. GEORGE LAKOFF, *DON’T THINK OF AN ELEPHANT!: KNOW YOUR VALUES AND FRAME THE DEBATE; THE ESSENTIAL GUIDE FOR PROGRESSIVES* 33-34 (2004). In *Talking Right*, Nunberg argues that conservatives have been successful politically in the last thirty years not only because they have been good at using clever and evocative terminology (as Lakoff seems to be arguing), but because they have been able to connect that terminology with widely-accepted social narratives. GEOFFREY NUNBERG, *TALKING RIGHT: HOW CONSERVATIVES TURNED LIBERALISM INTO A TAX-RAISING, LATTE-DRINKING, SUSHI-EATING, VOLVO-DRIVING, NEW YORK TIMES-READING, BODY-PIERCING, HOLLYWOOD-LOVING, LEFT-WING FREAK SHOW* 7-18 (2006). Nunberg has the better of the argument: changing viewpoints is more than just a matter of shifting surface phraseology; it involves the much more difficult task of shifting the deep structures of political thought. See *id.* at 18 (noting the entrenchment of the right’s control of political discourse). To switch metaphors, the task involves rewriting the entire political script, not just punching up a scene or two.

A. *The Financial Crisis Has Made the Free Market Story Impossible to Maintain*

Whatever the appeal of this story, the global financial crisis has made it impossible to take at face value.<sup>43</sup> Elements of the story, taken individually, may prove salvageable. But as a project that once had ambition to be the exclusive idiom for policy analysis—its “Key to all Mythologies”<sup>44</sup>—neoliberalism’s claim to intellectual consensus is vanishing. A narrow vision of economic rationality is partly to blame.<sup>45</sup> Efficient market theory became institutionalized as pre-critical common sense, the baseline for understanding how the world works.<sup>46</sup> The

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43. See, e.g., Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61, 63 (2009). Nourse and Shaffer note:

In the past year, the world has shown us the folly of some of legal scholarship’s most powerful intellectual assumptions. The sudden collapse of our world economy has led to economists’ open confessions that markets are not self-regulating and that they can be skewed by systematic irrational behavior, [undermining] frequent assumptions of neoclassical law and economics.

*Id.*; see also RICHARD A. POSNER, *A FAILURE OF CAPITALISM: THE CRISIS OF ‘08 AND THE DESCENT INTO DEPRESSION* 235 (2009) (“As far as one can judge on the basis of what is known today . . . the depression is the result of normal business activity in a laissez-faire economic regime—more precisely, it is an event consistent with the normal operation of economic markets.”); JOHN QUIGGIN, *ZOMBIE ECONOMICS: HOW DEAD IDEAS STILL WALK AMONG US* 1 (2010) (“Before the Global Financial Crisis ideas like the Efficient Markets Hypothesis and the Great Moderation were very much alive. Their advocates dominated mainstream economics. . . . Today the Efficient Markets Hypothesis and the Great Moderation look like defunct ideas.”); Hackney, *supra* note 1, at 1265 (“This belief in the free market—particularly in the finance industry—contributed to a host of deregulatory moves in the last few decades of the twentieth century that arguably set the stage for the 2008 financial crisis.”).

44. GEORGE ELIOT, *MIDDLEMARCH* 279 (Rosemary Ashton ed., Penguin Books 1994) (1871).

45. See SMITH, *supra* note 26, at 93-94; see also Anatole Kaletsky, *Goodbye, Homo Economicus*, PROSPECT MAGAZINE, Apr. 2009, at 46, 46 (“The economics profession must bear a lot of the blame for the current crisis. If it is to become useful again it must undergo an intellectual revolution—becoming both broader and more modest.”).

46. See Timothy K. Kuhner, *Citizens United as Neoliberal Jusriprudence: The Resurgence of Economic Theory*, 18 VA. J. SOC. POL’Y & L. 395, 460 (2011)

economic models and the exotic financial products they sanctioned were wreathed in an aura of “science” and blessed by a deregulated state.<sup>47</sup> Investors could rely on these models with false confidence that led to placing far riskier and more speculative bets.<sup>48</sup> At the higher levels of finance capital, it was not uncommon to believe, with some justification, in the “Greenspan put,” the notion that “under Alan Greenspan . . . if financial markets began to flag, he would lower interest rates to avoid a serious recession. The Greenspan put probably helped fuel the asset bubbles first in Internet stock and then in housing. The latter led directly to the recent financial crisis.”<sup>49</sup> You could call this arrangement many things, but “free” is not the first thing that comes to mind—or at least it ought not to be. It is clear that the old narratives and analytical strategies have failed us.<sup>50</sup>

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(arguing that pro-market views operate uncritically as “folkways” that structure common sense views of the world.)

47. See SMITH, *supra* note 26, at 42-45; see also RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 16 (7th ed. 2007) (“Economists have created new methods of pricing financial and other products, new financial trading strategies, new methods of employee and executive compensation . . . . *These interventions have worked*, suggesting that economic theory is more than just pretty math.” (emphasis added)); WESTBROOK, *supra* note 1, at 58-65 (discussing the appeal of deregulation, even after the financial crisis, while arguing that the refusal to regulate is irresponsible).

48. See SMITH, *supra* note 26, at 89 (“Because financial theories treat markets as safer than they are (by understating their native risks and overestimating the protection that can be achieved), they unwittingly embolden investors to take on more risk. One way to do that is to choose more speculative or volatile holdings . . .”).

49. Brett H. McDonnell, *Of Mises and Min(sky): Libertarian and Liberal Responses to Financial Crises Past and Present*, 34 SEATTLE U. L. REV. 1279, 1304 (2011) (footnote omitted).

50. See, e.g., John W. Cioffi, *Fiduciaries, Federalization, and Finance Capitalism: Berle’s Ambiguous Legacy and the Collapse of Countervailing Power*, 34 SEATTLE U. L. REV. 1081, 1085 (2011) (“These policies and the catastrophic crises they unleashed reflected the growing hegemony of neoliberal ideology empowered by financial and other business elites pursuing ‘free market’ policy agendas.”); see also GALBRAITH, *supra* note 17, at 11; QUIGGIN, *supra* note 43, at 1; SMITH, *supra* note 26, at 29-30; WESTBROOK, *supra* note 1, at xi-xix; Nourse & Shaffer, *supra* note 43, at 61; Paul Krugman, *When Zombies Win*, N.Y. TIMES, Dec. 20, 2010, at A29.

The neoclassical/neoliberal frame has had many critics over the years, but those critics have often been a vocal minority.<sup>51</sup> It is thus noteworthy when iconic free market boosters, such as Ayn Rand acolyte Alan Greenspan,<sup>52</sup> and major figures in legal economics, such as Richard Posner, concede that it is possible to have “free markets” and still have social disaster.<sup>53</sup> At minimum, it ought to be a sign that some of the more reflective elites have seen the financial crisis as a profound epistemic failure. To put it bluntly: a way of knowing the world has been put to the test and found wanting. A spate of recent books by economists, legal academics, and financial insiders testify to the crumbling consensus and sharply question whether the American brand of neoliberalism should be the exclusive policy frame. In *Out of Crisis*, David Westbrook analyzes the deep fissures within modern finance theory and concludes that the general deregulatory framework and overreliance on neoclassical modeling created the preconditions for financial disaster.<sup>54</sup> Yves Smith excoriates the blinkered free market dogma that has hobbled our policy discourse over the last thirty years.<sup>55</sup> A growing chorus of mainstream academic economists, most prominently perhaps Paul Krugman and James K. Galbraith, have called to account the free market

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51. See Hanson & Yosifon, *supra* note 19, at 139-41 (citing many prominent scholars critical of law and economics who were “rarely, if ever, acknowledged”).

52. See ANNE C. HELLER, *AYN RAND AND THE WORLD SHE MADE* 275-76 (2009) (noting Alan Greenspan’s view that *Atlas Shrugged* was “radiantly exact” and discussing Greenspan’s membership in Rand’s circle); see also JENNIFER BURNS, *GODDESS OF THE MARKET: AYN RAND AND THE AMERICAN RIGHT* 149-50 (2009) (discussing Greenspan’s admiration for Rand).

53. POSNER, *supra* note 43, at 284 (“So there were failures of the free market, failures of economic science, failures of government—and some bad luck into the bargain.”). The *New York Times* reported that, when Greenspan was questioned about his ideology, he responded: “Yes, I’ve found a flaw. I don’t know how significant or permanent it is. But I’ve been very distressed by that fact.” Edmund L. Andrews, *Greenspan Concedes Flaws in Deregulatory Approach*, N.Y. TIMES, Oct. 24, 2008, at B1; see also *The Financial Crisis and the Role of Federal Regulators: Hearing Before the H. Comm. on Oversight and Reform*, 110th Cong. 12 (2008) (statement of Alan Greenspan) (“[T]hose of us who have looked to the self interest of lending institutions to protect shareholders equity, myself especially, are in a state of shocked disbelief.”).

54. WESTBROOK, *supra* note 1, at 58-65.

55. SMITH, *supra* note 26, at 162-68.

fundamentalism of the official policy frame.<sup>56</sup> As a result of these extended public critiques, it is far more difficult today than it was even a few years ago, as an intellectual matter, to dismiss as somehow beside the point Keynesian and other arguments critical of the neoliberal consensus. In a slightly different mode, a series of muckraking exposés of elite malfeasance and corruption in the financial and mortgage markets have emerged, making it very difficult to take for granted the official story that markets self-regulate and that government regulation is always the problem.<sup>57</sup>

The financial crash of 2008, then, ought to have been the straw that broke the camel's back. But old ideas die hard, if at all, and in the years since the crash, the old narrative has emerged from the crisis not only revived but now given full voice by a well-funded, pseudo-populist radical right wing movement in the Tea Party.<sup>58</sup> As a result, there is something farcical about the current state of American public discourse. In the summer of 2011, a tragicomedy played itself out on the public stage over the debt ceiling<sup>59</sup> and the Standard & Poor downgrade of the

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56. Krugman, *supra* note 50 ("Free-market fundamentalists have been wrong about everything—yet they now dominate the political scene more thoroughly than ever."); *see also* JOSEPH E. STIGLITZ, *FREEFALL: AMERICA, FREE MARKETS, AND THE SINKING OF THE WORLD ECONOMY* 238 (2010) (criticizing deregulation and free market economics as causes of the financial crisis). *See generally* GALBRAITH, *supra* note 17 (arguing that a narrow and doctrinaire free market ideology has damaged American policy discourse and created a state captured by elites).

57. *See, e.g.*, MATT TAIBBI, *GRIFTOPIA: BUBBLE MACHINES, VAMPIRE SQUIDS, AND THE LONG CON THAT IS BREAKING AMERICA* 210 (2010) (providing an account of the financial institutions and ideologies responsible for the recent crisis and arguing that a form of casino capitalism has taken hold in the United States); *see also* ROBERT SCHEER, *THE GREAT AMERICAN STICKUP: HOW REAGAN REPUBLICANS AND CLINTON DEMOCRATS ENRICHED WALL STREET WHILE MUGGING MAIN STREET 1-5* (2010) (linking deregulation of the last thirty years to multiple crises and to a massive transfer of wealth from Main Street to Wall Street). *See generally* NOMI PRINS, *IT TAKES A PILLAGE: AN EPIC TALE OF POWER, DECEIT, AND UNTOLD TRILLIONS* (2011) (providing a detailed insider's account of fraud and deception among the financial and political classes that led to the financial crisis).

58. For a discussion of the wealthy interests financing the Tea Party insurgency, *see* Frank Rich, *The Billionaires Bankrolling the Tea Party*, *N.Y. TIMES*, Aug. 29, 2010, at WK8.

59. *See* Carl Hulse & Helene Cooper, *Leaders Agree on Outlines of Deal to End Debt Crisis*, *N.Y. TIMES*, Aug. 1, 2011, at A1.

U.S. bond rating from AAA to AA.<sup>60</sup> With some notable exceptions,<sup>61</sup> the debates were infused with the same off-the-rack talking points, tropes, and rhetoric about taxes, economic growth, and deficits that have been fixtures in American political discourse for decades.<sup>62</sup> Talk about counter-cyclical spending cuts and deficits dominate the news, despite the fact that these ideas make very little economic sense.<sup>63</sup> The neoliberal frame has remained

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60. See Walter Brandimarte & Daniel Bases, *United States Loses Prized AAA Credit Rating from S&P*, REUTERS (Aug. 7, 2011, 2:25 AM), <http://www.reuters.com/article/2011/08/07/us-usa-debt-downgrade-idUSTRE7746VF20110807>.

61. Paul Krugman at the *New York Times* comes to mind. In general, though, powerful voices within new media have offered much more penetrating analyses of our current predicament than many more established media venues. See, e.g., Dean Baker, *The Nonsense Battle Over the Debt Ceiling*, REAL WORLD ECONOMICS REVIEW BLOG (July 29, 2011), <http://rwer.wordpress.com/2011/07/29/the-nonsense-battle-over-the-debt-ceiling/>; Brad DeLong, *Debt Ceiling Watch: Ezra Klein Makes a Mistake*, GRASPING REALITY WITH THE INVISIBLE HAND (July 24, 2011), <http://delong.typepad.com/sdj/2011/07/debt-ceiling-watch-ezra-klein-makes-a-mistake-nobooy-knows-department.html>; Edward Harrison, *Debt Ceiling Hypocrisy*, NAKED CAPITALISM (July 7, 2011, 6:24 AM), <http://www.nakedcapitalism.com/2011/07/debt-ceiling-hypocrisy.html>.

62. See, e.g., Jeanne Sahadi, *Tax Reform Could Be Too Big for Super Committee*, CNNMONEY (Sept. 8, 2011, 7:53 AM), <http://politicalticker.blogs.cnn.com/2011/09/08/tax-reform-could-be-too-big-for-super-committee/> (“Everyone agrees—fixing the tax code is imperative. Many believe a simpler, smarter tax code can help reduce the country’s debt burden by generating a more competitive economy and by raising more revenue through lower tax rates and a broader base of what’s taxed.”). Is it true that “everyone agrees” that fixing the tax code is the highest priority at a time when the official unemployment rate is over 9%? The Republican presidential debates have confirmed how bizarre and distorted the official policy frame has become. See Paul Krugman, *Rabbit Hole Economics*, N.Y. TIMES, Oct. 14, 2011, at A31.

63. See, e.g., Jack Cafferty, *How Should Obama’s \$300 Billion Jobs Plan Be Paid For?*, CNN (Sept. 7, 2011, 5:00 PM), <http://caffertyfile.blogs.cnn.com/2011/09/07/how-should-obamas-300-billion-jobs-plan-be-paid-for/> (“Here we go again: President Obama wants to spend another \$300 billion we don’t have.”); see also David Gamage, *Preventing State Budget Crises: Managing the Fiscal Volatility Problem*, 98 CAL. L. REV. 749, 760 (2010) (“In the absence of political considerations, economists generally agree that governments should run surpluses during booms and deficits during busts.”). One commentator argues:

America’s Tea Party has a simple fiscal message: the United States is broke. This is factually incorrect—US government securities remain one of the safest investments in the world—but the claim serves the purpose of dramatizing the federal budget and creating a great deal of hysteria around America’s current debt levels. This then produces the

remarkably resilient in media, political, and even academic circles. It's common to believe that a visit from the "confidence fairy" will sprinkle magic dust on another round of speculation, debt, and consumption.<sup>64</sup> The deficit/austerity story continues to be the dominant, bipartisan Beltway frame narrative.<sup>65</sup> This should come as no surprise: the default discourses that quickened and catalyzed this crisis are deeply embedded in both our intellectual and popular cultures.<sup>66</sup> The resiliency of the neoliberal idea lies in its rhetorical and social power—a story of liberty and prosperity embedded in an institutional framework—and not in its intellectual vitality per se. The assumption that markets and privatization always work better is likely to be the basis for U.S. political economy and discourse for the foreseeable future. After all, we have been

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fervent belief that government spending must be cut radically, and now.

Simon Johnson, *The Tea Party's Modest Proposal*, CNNWORLD (Aug. 13, 2011, 1:00 AM), <http://globalpublicsquare.blogs.cnn.com/2011/08/13/the-tea-partys-modest-proposal/>.

64. The term "confidence fairy" was popularized by Paul Krugman:

[T]he next time you hear serious-sounding people explaining the need for fiscal austerity, try to parse their argument. Almost surely, you'll discover that what sounds like hardheaded realism actually rests on a foundation of fantasy, on the belief that invisible vigilantes will punish us if we're bad and the confidence fairy will reward us if we're good. And real-world policy—policy that will blight the lives of millions of working families—is being built on that foundation.

Paul Krugman, Op-Ed., *Myths of Austerity*, N.Y. TIMES, July 2, 2010, at A25.

65. For a recent analysis of how austerity politics has conquered official American discourse on political economy, see Ari Berman, *The Austerity Class: How the Deficit Hawks Have Manufactured a Center-Right Consensus that Rules Washington*, THE NATION, Nov. 7, 2011, at 11, 11.

66. See GALBRAITH, *supra* note 17, at 11 ("[I]nvocations of the power of markets, the 'magic' of markets, and the virtues of a 'free enterprise system' . . . remain staples of political speech on both sides of the political aisle. However, they have been emptied of practical content, and the speakers know it."). It is heartening to see that the discourse may indeed be changing with the Occupy Wall Street movement. See Mark Egan & Ben Berkowitz, *Insight: Occupy Wall St, the Start of a New Protest Era?*, REUTERS (Oct. 7, 2011), <http://www.reuters.com/article/2011/10/07/us-wallstreet-protests-history-idUSTRE7964CY20111007>.

thinking this way for a long time.<sup>67</sup> Still, there is hope. But to have any chance of creating new frame narratives for our contemporary realities, we will need to think seriously about how we think.

B. *We Must Engage in a Sustained Critique of Our Reified Metaphors and Categories*

The events recounted above did not occur in a political or cultural vacuum. Political and financial elites would not have been able to enlist popular support for neoliberal policies without a powerful, unifying storyline. The story is that free markets work for the common good, markets self-regulate, and the private sector is inherently more efficient than government. As discussed below, privatization policy, like much American policy discourse, is grounded in a set of a priori assumptions about the ontological nature of free markets and government bureaucracy.<sup>68</sup> Free markets are by their very nature flexible, efficient, and self-correcting.<sup>69</sup> Government, by contrast, is a slow, lumbering beast that cannot do anything right (except policing and punishing).<sup>70</sup> Both the market and government are separate things, separate objects, presenting themselves to us as solid, ready-made categories that form the springboard of our policy prescriptions.<sup>71</sup>

Our language for comprehending modern political economy has not evolved to register the new realities of neoliberal finance capitalism. Even prior to the crisis, concepts were trailing behind the realities of contemporary governance, which had blurred public and private into new,

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67. See Kuhner, *supra* note 46, at 460 (arguing that it is difficult to escape the unconscious habit of thinking in terms of the free market).

68. See *infra* Part II.B.3.b.

69. See WESTBROOK, *supra* note 1, at 3-6 (recognizing, but not endorsing, this view).

70. See BERNARD E. HARCOURT, *THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER* 41 (2011) (arguing that the neoliberal model relies on a concept of natural order that limits the competency of government to policing and punishing, not regulating the economy, which is figured as a space of natural and spontaneous self-ordering).

71. See *infra* Part III.A (detailing the conceptual problems with dividing the world into public and private, state and market).

hybrid forms of governmentality.<sup>72</sup> The categories themselves need to be reworked or discarded altogether.<sup>73</sup> A common theme that emerges from the recent literature is that the present crisis was the result of a deeply flawed—and deeply held—worldview.<sup>74</sup> Sustained criticism of the neoliberal project is long overdue in U.S. policy circles, but especially in fields such as my own—law—where the neoclassical model has been so deeply imprinted on our teaching and scholarship for decades.<sup>75</sup> As David Westbrook suggests, critics of the neoclassical-neoliberal frame are unlikely to make much headway without first taking seriously the deep narrative and social power of the frameworks they hope to replace.<sup>76</sup> To do this work, we will need to suspend some key assumptions and bracket some of the grounding concepts of our neoliberal order. This Article contributes in one small area, privatization discourse, which is an embodiment of the neoliberal frame.

In *Beyond Camelot: Rethinking Politics and Law for the Modern State*, Edward Rubin provides guidance on how to undertake such a project.<sup>77</sup> The provocative thesis of *Beyond*

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72. See Chris Sagers, *The Myth of "Privatization,"* 59 ADMIN. L. REV. 37, 41 (2007) ("[T]he concept of 'privatization' and the public-private divide on which it is based are not meaningful and cannot guide academic inquiry."); see also EDWARD L. RUBIN, *BEYOND CAMELOT: RETHINKING POLITICS AND LAW FOR THE MODERN STATE* 1-3 (2005) (arguing that our anchoring political concepts serve to wreath the realities of the administrative state in a halo of nostalgia).

73. See, e.g., HARCOURT, *supra* note 70, at 44 ("The categories of 'free market' and 'regulated,' it turns out, hinder rather than help. They are, in effect, illusory and distort rather than advance our knowledge. Ultimately, the categories themselves—of 'free markets' and 'excessive regulation,' of 'natural order' and 'discipline'—need to be discarded."); see also RUBIN, *supra* note 72, at 1-3 ("[T]hese concepts are simply not the most useful or meaningful ones that we could find to describe contemporary government.").

74. See, e.g., WESTBROOK, *supra* note 1, at 14-17; see also SMITH, *supra* note 26, at 29-31.

75. See Hanson & Yosifon, *supra* note 19, at 272-75; see also SMITH, *supra* note 26, at 124-26; Robert Ashford, *Socioeconomics and Professional Responsibilities in Teaching Law-Related Economic Issues*, 41 SAN DIEGO L. REV. 133, 133-40 (2004); William K. Black, *The Imperium Strikes Back: The Need to Teach Socioeconomics to Law Students*, 41 SAN DIEGO L. REV. 231, 232-44 (2004); Lynne L. Dallas, *Teaching Law and Socioeconomics*, 41 SAN DIEGO L. REV. 11, 11-13 (2004).

76. WESTBROOK, *supra* note 1, at xvi.

77. RUBIN, *supra* note 72, at 8-14.

*Camelot* is that grounding concepts such as the “three branches of government,” “direct democracy,” and “sovereignty” embody social nostalgia for a lost world that never existed.<sup>78</sup> Our discourse on direct democracy, for example, sounds with strong historical echoes of an idealized ancient Greek city-state.<sup>79</sup> Rubin asks “whether the concept of democracy really serves as a good description of the government we actually possess, or whether this concept, with its Ionic columns and its sculptured architraves, is really a papier-mâché facade that conceals a different actuality.”<sup>80</sup> In other words, “direct democracy” conjures images of the ancient Greek *polis*, an image of localized political community that only obscures the structures of our modern administrative state.<sup>81</sup> Our modern forms of government derive from medieval corporatism with its attendant forms of mediated governance;<sup>82</sup> but the allure of direct, citizen democracy remains in our frame as a powerful, illusory afterimage.<sup>83</sup>

Rubin is right to focus our attention on historically sedimented grounding concepts transplanted to alien contexts. He argues that these “[r]eified, conceptually coagulated metaphors are engines of overinterpretation . . . [of] the data, and demand still further explanations to maintain their rigid, awkwardly shaped boundaries.”<sup>84</sup> “Coagulated metaphors” prevent us from seeing what is right in front of us or may lead us to “overinterpret” what we do see to fit pre-existing categories.<sup>85</sup> Our normative

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78. *Id.* at 2.

79. *See id.* at 111.

80. *Id.*

81. *Id.* at 112.

82. *See id.* at 112-13.

83. *See id.* at 117. As Rubin describes it:

The concept of deliberative democracy is closely allied to participatory democracy, and suffers from a similar affection for the Aristotelian image of direct democracy. . . . In a modern state, with its millions of people, thousands of interest groups, and hundreds of administrative agencies, any sort of unified, collective debate is inconceivable . . . .

*Id.*

84. *Id.* at 16.

85. *Id.*

commitments to grounding concepts such as democracy make it difficult for us to see the anti-democratic realities of the administrative state for what they are: permanent features of the modern world.<sup>86</sup> This doesn't mean that we can't seek to reshape the contours of that world; but we ought not to approach the task by holding up the administrative state to the impossible ideal of the ancient Greek *polis*.<sup>87</sup> Rubin proposes that we begin to break the hermeneutic deadlock by bracketing the problematic concepts and working to replace them with "equally familiar" concepts derived from another context.<sup>88</sup> But why not just jettison the concepts and start from scratch? This has the immediate appeal that we will no longer be trapped in the same problematic language that we're trying to escape. However, as Rubin points out, simply jettisoning the unworkable concepts raises other, more serious problems. Chief among them is this: given that we are analyzing grounding concepts, it is true by definition that we have organized our normative and intellectual commitments around these concepts.<sup>89</sup> That is why we call them "grounding" concepts in the first place. This means that by simply discarding the concepts we risk a failure to communicate our criticisms effectively because of deeply held emotional commitments that have formed around those

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86. *See id.*

87. *See id.* at 112. In this respect I agree with the basic approach of Bernard Harcourt when he writes:

There is, in the end, no "realistic alternative," nor any "utopian project" that can avoid the pervasive regulatory mechanisms that are necessary to organize a complex late-modern economy—and that's the point. The vast and distributive regulatory framework will neither disappear with deregulation, nor with the withering of a socialist state. What is required is constant vigilance of all the micro and macro rules that permeate our markets, our contracts, our tax codes, our banking regulations, our property laws—in sum, all the ordinary, often mundane, but frequently invisible forms of laws and regulations that are required to organize and maintain a colossal economy in the 21st-century and that constantly distribute wealth and resources.

Bernard E. Harcourt, *Occupy Wall Street's 'Political Disobedience,'* N.Y. TIMES (Oct. 13, 2011, 4:15 PM), <http://opinionator.blogs.nytimes.com/2011/10/13/occupy-wall-streets-political-disobedience/>.

88. RUBIN, *supra* note 72, at 17.

89. *See id.*

concepts.<sup>90</sup> Rubin argues, among other things, that we attempt to honor the emotional commitments that cohere around these grounding concepts even as we critique them.<sup>91</sup>

My argument here is that the neoliberal worldview is replete with the same sort of coagulated, metaphorical, and value-laden constructs that Rubin identifies. We will need to bracket ready-to-hand concepts such as “free market” if we are to have productive conversations about privatization—and indeed about political economy more generally. If we fail to reflect critically on our grounding language, even good-faith efforts to resolve our neoliberal policy woes may become entangled in the value-laden, coagulated metaphors that cause the market freedom story to have wide appeal. To develop alternatives will require that we “defamiliarize”<sup>92</sup> our object of study—in this case, privatization—as a necessary first step towards clearing away the ruins of a failed epistemic project so that we can begin to see the world anew. What would our privatization policy discourse sound like if we didn’t allow anchor terms such as free market to serve as the uncritical baseline? How might we approach privatization policy decisions if we bracketed the neoliberal frame? We won’t know the answers to these questions before we take some initial steps towards bracketing the old concepts. And that project in turn requires that we resist the temptation to be pragmatic. That is, we should not expect that such a project will generate immediate policy prescriptions. It is no small matter to change grand narratives, even when there are powerful reasons why they ought to be changed. Rather, our goal should be an incremental realignment in the way we think and talk about political economy. In short, we must become intellectual historians of our own institutional present.

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90. *Id.*

91. *Id.*

92. I borrow the term “defamiliarize” from literary criticism. See, e.g., Viktor Shklovsky, *Art as Technique*, in *LITERARY THEORY: AN ANTHOLOGY* 17, 18 (Julie Rivkin & Michael Ryan eds., 1998).

C. *American Privatization Discourse: A Case Study in Reified Metaphors*

In the last thirty years, Americans have undertaken a sustained social experiment in government privatization.<sup>93</sup> Although we associate privatization with conservative economics, it would be a mistake to view privatization solely—or even primarily—through a left-right prism. Since the early 1990s, it has been a bipartisan article of faith that privatization and markets yield better outcomes at a lower price.<sup>94</sup> The governing neoliberal framework believes that markets deliver better results than government at a lower cost.<sup>95</sup> This belief is not easily cabined by popular notions of a left-right political typology. Indeed, scholars have shown that deregulation and privatization were originally ideas with support across the political spectrum.<sup>96</sup> The

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93. The American government has used private contractors to fulfill public functions since the early days of the Republic. *See infra* Part II.A. However, it is also widely acknowledged that the pace of privatization has increased in recent decades. *See infra* note 93 and accompanying text.

94. YERGIN & STANISLAW, *supra* note 29, at 358-60 (“The purpose [of privatization] is to bring market forces and market tests to bear—to increase efficiency, to reduce both costs and the drain on public budgets, and to improve the quality and effectiveness of services.”). Galbraith has also noted:

There is a common ground on economic policy that now stretches, with differences only of degree, from the radical right to Bill Clinton. Across the spectrum, all declare that the main job of government is to help markets work well. On the supply side, government can help, up to a point, by providing education, training, infrastructure, and scientific research—all public goods that markets undervalue. But when it comes to macroeconomic policy, government should do nothing except pursue budget balance, and leave the Federal Reserve alone.

James K. Galbraith, *The Surrender of Economic Policy*, THE AMERICAN PROSPECT (Dec. 19, 2001), [http://prospect.org/cs/articles?article=the\\_surrender\\_of\\_economic\\_policy](http://prospect.org/cs/articles?article=the_surrender_of_economic_policy).

95. Martha T. McCluskey, *Subsidized Lives and the Ideology of Efficiency*, 8 AM. U. J. GENDER SOC. POL'Y & L. 115, 150 (2000) (“The rise of the neoliberal ideology of ‘efficiency’ appears to have elevated ‘economics’ over politics, ‘market’ over state.”).

96. As indicated by Jody Freeman:

Ronald Reagan’s presidency, which stressed deregulation, embodied this antigovernment ethos. Nor has it been limited to Republican administrations; former President Bill Clinton, a self-identified “New Democrat,” declared the era of big government over, ended “welfare as

deregulatory Right opposed “Big Government” and regulation on principle and the Left embraced deregulation as a way to break the deadlocks of cartelization and capture.<sup>97</sup> It was the Clinton administration, after all, that deregulated the banking industry,<sup>98</sup> made substantial cuts in the social safety net,<sup>99</sup> and ensured that the North American Free Trade Agreement (“NAFTA”) and free trade

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we know it,” and instructed former Vice President Al Gore to conduct a “performance review” of government agencies to create a government that “works better and costs less.” In so doing, the Clinton Administration adopted the rhetoric and conceptual approach of the “New Public Management,” which proposes to organize public bureaucracies more like private firms.

Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1293 (2003) (footnotes omitted); see also PRASAD, *supra* note 8, at 67 (“The economists who first developed [deregulation] came from the populist Left as well as the neoliberal Right.”).

97. See PRASAD, *supra* note 28, at 66-70 (discussing the shift in rationales for deregulation, from the Left’s focus on consumer protection to the Right’s focus on free markets).

98. See Timothy A. Canova, *Financial Market Failure as a Crisis in the Rule of Law: From Market Fundamentalism to a New Keynesian Regulatory Model*, 3 HARV. L. & POL’Y REV. 369, 377 (2009) (“The deregulatory agenda was politically and ideologically sustained during the Clinton and Bush II years, fueling a bubble economy based on easy credit, high debt, low or no margin requirements, and the deterioration of lending standards.”).

99. As Ronald Krotoszynski describes it:

Both before and after the Great Depression, and certainly in the modern era since the election of Ronald Reagan as president in 1980, the rhetoric of U.S. politics has reflected a shared assumption that government is the problem, not the solution. Recall that President Bill Clinton, the next most recent member of the Democratic Party to serve as president, famously declared that “the era of big government is over.” He then worked assiduously to unravel the social safety net through legislation like the 1996 Welfare Reform Act. In a similar vein, President Barack Obama ran on a platform of reforming the federal government, not celebrating its accomplishments or the benefits of massively expanding its reach, except as necessary to address the current financial and economic crises.

Ronald J. Krotoszynski, Jr., *The Shot (Not) Heard ‘Round the World: Reconsidering the Perplexing U.S. Preoccupation with the Separation of Legislative and Executive Powers*, 51 B.C. L. REV. 1, 28-29 (2010) (footnotes omitted).

were bipartisan consensus positions.<sup>100</sup> Since its inception in the 1970s, privatization has received criticism.<sup>101</sup> Nevertheless, until fairly recently, the broad policy consensus in the United States was that markets are better, more efficient, allocators of social resources than government.<sup>102</sup>

The last ten years have been difficult ones for privatization and free market advocates. The first domestic signs of serious trouble with market triumphalism began with the collapse of the internet stock bubble that closed the go-go Clinton era—with its expectations of permanent expansion<sup>103</sup>—not with a bang but with a fizzle.<sup>104</sup> Some analysts (including even Alan Greenspan) expressed doubts about a radically unregulated financial sector and easy-money environment.<sup>105</sup> Then came the 9/11 attacks and the

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100. Roger Lowenstein, *Tariff to Nowhere*, N.Y. TIMES, June 16, 2008 (Magazine), at 15 (“In the 1990s, when Bill Clinton pushed through NAFTA and normalized trade relations with China, it seemed to reflect a new, bipartisan consensus.”).

101. See, e.g., ELLIOTT D. SCLAR, YOU DON’T ALWAYS GET WHAT YOU PAY FOR: THE ECONOMICS OF PRIVATIZATION 5 (2000) (“Contrary to near conventional folk wisdom that privatization almost invariably represents improvement, this is simply not true.”); Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalization, and Democracy*, 46 B.C. L. REV. 989, 999 (2005) (“[T]he lack of transparency and disclosure makes it difficult for the public . . . to know what is going on with the military’s use of private contractors.”). See generally DANIEL GUTTMAN & BARRY WILLNER, THE SHADOW GOVERNMENT: THE GOVERNMENT’S MULTI-BILLION-DOLLAR GIVEAWAY OF ITS DECISION-MAKING POWERS TO PRIVATE MANAGEMENT CONSULTANTS, “EXPERTS,” AND THINK TANKS (1976) (arguing that privatization does not provide good value to the public and does not serve the public interest); PAUL R. VERKUIL, OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT (2007) (arguing that reliance on the private military industry has left us less able to govern ourselves effectively).

102. See HARVEY, *supra* note 11, at 183-84.

103. To get a sense of the mass delusion of the pre-Crash world, see JAMES K. GLASSMAN & KEVIN A. HASSETT, DOW 36,000: THE NEW STRATEGY FOR PROFITING FROM THE COMING RISE IN THE STOCK MARKET (1999). The title says it all. In a good example of the market working as it should, the book can now be purchased used on Amazon.com for one cent.

104. John Cassidy, *Dot.con: The Greatest Story Ever Sold*, in PANIC: THE STORY OF MODERN FINANCIAL INSANITY 208, 211 (Michael Lewis ed., 2009).

105. Steven M. Davidoff, *How to Deflate a Gold Bubble (That Might Not Even Exist)*, N.Y. TIMES, Aug. 31, 2011, at B7 (“Alan Greenspan, the former Federal

subsequent invasion, occupation and reconstruction of Iraq and Afghanistan, conducted in large part by for-profit corporations.<sup>106</sup> The increasing privatization of national security functions has raised concerns over political and financial accountability.<sup>107</sup> These concerns have been recently highlighted by a *Washington Post* series chronicling the rise of a government-corporate intelligence network “so large, so unwieldy and so secretive that no one knows how much money it costs, how many people it employs, how many programs exist within it or exactly how many agencies do the same work.”<sup>108</sup> Privatization has recently received critical coverage in mainstream media outlets such as the *New York Times*<sup>109</sup> and National Public Radio<sup>110</sup> as

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Reserve chairman, speculated that the stock market might be ‘irrationally exuberant’ in 1996, well before the actual bubble took hold.”). On those who sounded alarms before the housing and financial bust, see Paul M. Barrett, *Prophet-Making*, N.Y. TIMES, June 27, 2010 (Book Review), at 13 (discussing the warnings provided by Nouriel Roubini about the housing bubble in 2006).

106. NAOMI KLEIN, *THE SHOCK DOCTRINE: THE RISE OF DISASTER CAPITALISM* 391-93 (2007) (arguing, among other things, that the invasion and occupation of Iraq were contracted to private companies, and that these companies lobbied for invasion, leading to the ongoing conflict).

107. Simon Chesterman, Opinion, *The Dogs of War Can Keep the Peace*, N.Y. TIMES (Aug. 13, 2007), <http://www.nytimes.com/2007/08/13/opinion/13iht-edchester.html?scp=5&sq=privatization%20of%20military%20forces%20accountability&st=cse> (“Today, contractors have become a regular part of the military landscape. In Iraq, private contractors make up the second largest contingent of personnel after the U.S. military. One company—Blackwater—has already offered its services for Darfur. Practice has been ahead of theory, however. Governments have been unwilling or unable to control how these private actors exercise traditionally public powers, particularly—and most troubling—the use of potentially lethal violence.”); see also *infra* Part II.B.3.b (discussing accountability).

108. Dana Priest & William M. Arkin, *A Hidden World, Growing Beyond Control*, WASHINGTON POST (July 19, 2010), <http://projects.washingtonpost.com/top-secret-america/articles/a-hidden-world-growing-beyond-control/>; see also Simon Chesterman, *We Can't Spy . . . If We Can't Buy!: The Privatization of Intelligence and the Limits of Outsourcing 'Inherently Governmental Functions,'* 19 EUR. J. INT'L L. 1055, 1056 (2008) (“Though it lags behind the privatization of military services, the privatization of intelligence has expanded dramatically with the growth in intelligence activities following the 11 September 2001 attacks on the United States.”).

109. See, e.g., Richard A. Oppel Jr., *Private Prisons Found to Offer Little in Savings*, N.Y. TIMES, May 19, 2011, at A1 (“The conviction that private prisons save money helped drive more than 30 states to turn to them for housing inmates. But Arizona shows that popular wisdom might be wrong: Data there

well as in a variety of new media outlets that now compete with the established press.<sup>111</sup>

Although I will draw on recent criticisms of privatization and “government by contract,”<sup>112</sup> my goal is not to add to that literature. Rather, I intend to use privatization discourse to show how reified metaphors such as “free market” can capture the way we think to such an extent that even our proposed solutions to the problem at hand end up entangled in the outworn concepts and exhausted dogma that caused the problem in the first place.<sup>113</sup> These narratives may survive long after the

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suggest that privately operated prisons can cost more to operate than state-run prisons—even though they often steer clear of the sickest, costliest inmates.”).

110. Laura Sullivan, *Prison Economics Help Drive Ariz. Immigration Law*, NAT'L PUB. RADIO (Oct. 28, 2010), <http://www.npr.org/templates/story/story.php?storyId=130833741> (discussing how private prison companies stand to make hundreds of millions from the passage of an Arizona Senate Bill these same companies are helping to draft).

111. See, e.g., Yves Smith, *Wisconsin's Walker Joins Government Asset Giveaway Club (and is Rahm Soon to Follow?)*, NAKED CAPITALISM (Feb. 22, 2011, 2:39 AM), <http://www.nakedcapitalism.com/2011/02/wisconsins-walker-joins-government-asset-giveaway-club-and-is-rahm-soon-to-follow.html> (arguing that privatization deals are “tantamount to selling the family china only to have to rent it back in order to eat dinner”); Matt Stoller, *Public Pays Price for Privatization*, POLITICO (June 8, 2011), <http://www.politico.com/news/stories/0611/56525.html> (“Privatization takes inherently governmental functions—everything from national defense to mass transit and roads—and turns them over to the control of private actors, whose goal is to extract maximum revenue while costing as little as possible.”).

112. *Government by Contract* is the title of a recent series of essays on privatization. GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY (Jody Freeman & Martha Minow eds., 2009).

113. I intend this Article to be a first step towards understanding the “cognitive regulatory capture” that I believe explains at least some of the failures of government policy that led to the current crisis. The term “cognitive regulatory capture” was coined by Willem H. Buiter, who was referring to the evidence that the Federal Reserve had been “co-opted by Wall Street.” Willem H. Buiter, *Lessons from the North Atlantic Financial Crisis* 37 (May 28, 2008) (unpublished paper presented at the conference “The Role of Money Markets,” jointly organized by Columbia Business School and the Federal Reserve Bank of New York), available at <http://www.newyorkfed.org/research/conference/2008/rmm/buiter.pdf>; see also Simon Johnson, *The Quiet Coup*, ATLANTIC, May 2009, at 47 (discussing the capture of the U.S. government by the finance industry). Buiter is referring to the ways in which the Fed essentially identified its role with Wall Street, but not because of traditional capture mechanisms such as

material conditions that originally made them plausible have been radically transformed. Privatization is a good candidate for a case study in reified concept-metaphors for several reasons. First, on both the practical and the conceptual levels, privatization of government services has been a centerpiece of neoliberal governance strategies in the United States.<sup>114</sup> While we can debate the extent to which successive administrations have been able to achieve fully their stated privatization goals,<sup>115</sup> it is well established that those goals have been the central organizing principles in major government initiatives for decades.<sup>116</sup> Second, because privatization has been institutionalized within American politics for at least thirty years, it affords a good opportunity for us to construct a critical, reflexive view of the present, an internal critique of the elite policy frame. If we can understand the problems with our discursive frame for privatization, we are on our way to understanding much of what afflicts American policy discourse.

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“special interests buying, blackmailing or bribing . . . but instead through those in charge of the relevant state entity internalising, as if by osmosis, the objectives, interests and perception of reality of the vested interest they are meant to regulate and supervise in the public interest instead.” Buitter, *supra*, at 37. I believe that “cognitive regulatory capture” explains much of what afflicts discourse on government regulation, but I can only suggest as much here. A fuller theoretical elaboration is outside the scope of this Article.

114. See Brenda Cossman, *Contesting Conservatism, Family Feuds and the Privatization of Dependency*, 13 AM. U. J. GENDER SOC. POL’Y & L. 415, 416-17 (2005) (“[I]n an era of privatization and the emergence of a neo-liberal state, characterized by a reduction in government social spending and a transfer of these responsibilities to the private sphere, [family law] might be expected to have newfound importance.”); Mark Schuller, *Gluing Globalization: NGOs as Intermediaries in Haiti*, 32 POL. & LEGAL ANTHROPOLOGY REV. 84, 87 (2009) (“NGOs provide and depoliticize services that were previously under governments’ purview.”).

115. See Rubin, *supra* note 23, at 366-67 (discussing Reagan’s commitment to privatization of government); Sagers, *supra* note 72, at 42 (noting George W. Bush’s proposal to rethink government through privatization); see also *infra* Part II.A (outlining the trajectory of neoliberalism from the Reagan to Obama administrations).

116. See Rubin, *supra* note 23, at 366.

## II. AMERICAN PRIVATIZATION: HISTORY AND CONCEPTS

In this Part, I provide a brief summary of American privatization trends since the 1970s and explain the dominant framing of privatization policy in the United States. That frame is a neoliberal one, which tells us that we need to make government work better by either outsourcing to the private sector, which is presumptively more efficient than government bureaucracy, or by reforming government to mimic the best aspects of the private sector.<sup>117</sup> I explain that the neoliberal frame is committed to a technocratic discourse that purports to be “ideologically agnostic” (that is, indifferent to whether nominally public or private actors perform the given task) and that has a strong—though not unshakeable—*ex ante* bias that the private sector is typically more efficient than government. In Part III, I go on to discuss the “reified, coagulated metaphors” that make it difficult to break the deadlocks in our privatization discourse.

A. *A Brief History of U.S. Privatization*

Although the American government has hired private contractors to do public work since the earliest days,<sup>118</sup> our

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117. See E.S. SAVAS, *PRIVATIZATION: THE KEY TO BETTER GOVERNMENT* 112 (1987) (“[T]he private sector [is] a more efficient producer of services . . .”).

118. Chris Sagers has noted that:

Instances of privatization in the United States are not only old, but have occurred in profusion for a long time. . . . Americans have long left much more to the private sector than other Western nations, and prior to the 1960s American governments regulated much less of society than is now commonly perceived.

Sagers, *supra* note 72, at 52-53 (footnotes omitted). In fact, there are some who question whether privatization is a new phenomenon at all. For example, Sagers argues that privatization is not properly viewed as a new phenomenon because it is a longstanding historical practice. *Id.* at 52-53. Beginning with the collapse of the Roman Empire, after all, Western societies were organized around models of proprietary, private governance typified by feudalism. See Dan Guttman, *Governance by Contract: Constitutional Visions; Time for Reflection and Choice*, 33 *PUB. CONT. L.J.* 321, 322 (2004) (“Long ago, today’s modern Western states relied on nongovernmental actors to perform core ‘governmental’ activities—tax collection, public finance, war-fighting, and building and maintaining empires under contractual arrangements.”). What are we to make of this observation? Well, on the one hand, it is true, as *Ecclesiastes* tells us, that there is nothing new under the sun. *Ecclesiastes* 1:9. On the other hand, despite the important

privatization story begins in the troubled decade of the 1970s, which established the preconditions for the emergence of neoliberalism as the key governing strategy.<sup>119</sup> Since neoliberalism was born out of a crisis in the “embedded” welfare state liberalism that preceded it,<sup>120</sup> a few words about the postwar period and embedded liberalism are in order. The political economy of the World War II period has been described as “embedded liberalism,”<sup>121</sup> a period characterized by a faith in the power of government as a force of social progress.<sup>122</sup> This system

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historical continuities, it would be a mistake to downplay the novelty of privatization. While it’s true that governments have often used nominally private actors to undertake what we would now call public administration, the relevant historical comparison is not the middle ages or even the nineteenth century, but public administration in the massive, complex democracies of today. Critics worry about privatization because they believe that unchecked private power has taken on new and potentially dangerous forms in our era of deregulated global capitalism. See, e.g., Alfred C. Aman, Jr., *Globalization, Democracy, and the Need for a New Administrative Law*, 49 UCLA L. REV. 1687, 1692 (2002) (“Given the role that the public/private distinction plays in U.S. administrative law, privatization, in this global context, tends to reduce the democratic public sphere in favor of other arrangements that are likely to be less transparent and accountable to the public, and less exposed to competing value regimes. I call this scenario the ‘democracy deficit.’”).

119. HARVEY, *supra* note 11, at 57.

120. *Id.* at 9-13.

121. “Embedded liberalism” has been defined as:

[T]he strain of economic liberalism that was dominant during the immediate post-World War II years. Embedded liberalism . . . represents a compromise between the competing policy objectives of free markets and state intervention in support of domestic social and political stability.

Suzanne A. Spears, *The Quest for Policy Space in a New Generation of International Investment Agreements*, 13 J. INT’L ECON. L. 1037, 1041-42 (2010) (footnote omitted). As David Harvey describes further:

To ensure domestic peace and tranquility, some sort of class compromise between capital and labour had to be constructed. The thinking at the time is perhaps best represented by an influential text by two eminent social scientists, Robert Dahl and Charles Lindblom, published in 1953. Both capitalism and communism in their raw forms had failed, they argued. The only way ahead was to construct the right blend of state, market, and democratic institutions to guarantee peace, inclusion, well-being, and stability.

HARVEY, *supra* note 11, at 10.

122. HARVEY, *supra* note 11, at 10-11.

suffered a series of shocks in the late 1960s and early 1970s: an inflationary spiral caused by military and social Keynesianism,<sup>123</sup> 1970s oil shocks,<sup>124</sup> the collapse of the Bretton Woods system of currency regulation,<sup>125</sup> a loss of faith in elites occasioned by a highly unpopular war,<sup>126</sup> and many other factors. These social upheavals were accompanied by a revival of principled, philosophical arguments against the welfare state, perhaps most famously represented by Robert Nozick's *Anarchy, State, and Utopia*.<sup>127</sup>

The 1980s and 1990s saw our present neoliberal order emerge from the ruins of postwar Keynesianism.<sup>128</sup> In the United States, neoliberalism underwrote a program of deregulation that culminated in the deregulation of the financial sector, a policy that precipitated the crises of recent years.<sup>129</sup> Politicians, policy entrepreneurs, and intellectuals have undertaken an evangelical campaign to privatize as many traditional government services as

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123. *Id.* at 12.

124. James J. Varellas, *The Constitutional Political Economy of Free Trade: Reexamining NAFTA-Style Congressional-Executive Agreements*, 49 SANTA CLARA L. REV. 717, 752-3 (2009).

125. *Id.*

126. *Id.* at 53.

127. ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA*, at ix (1974) (“[A] minimal state, limited to the narrow functions of protection against force, theft, fraud, enforcement of contracts, and so on, is justified; . . . any more extensive state will violate persons’ rights not to be forced to do certain things, and is unjustified . . . .”) For a recent critical reading of Nozick’s libertarianism, see Stephen Metcalf, *The Liberty Scam: Why Even Robert Nozick, the Philosophical Father of Libertarianism, Gave Up on the Movement He Inspired*, SLATE (June 20, 2011, 7:06 AM), [http://www.slate.com/articles/arts/the\\_dilettante/2011/06/the\\_liberty\\_scam.html](http://www.slate.com/articles/arts/the_dilettante/2011/06/the_liberty_scam.html).

128. Cioffi, *supra* note 50, at 1106-07 (“The 1980s are generally, and accurately, regarded as the tipping point when the deterioration of the New Deal and postwar order finally gave way to the succeeding era of neoliberalism.”).

129. See generally andré douglas pond cummings, “Ain’t No Glory in Pain”: *How the 1994 Republican Revolution and the Private Securities Litigation Reform Act Contributed to the Collapse of the United States Capital Markets*, 83 NEB. L. REV. 979 (2005) (arguing that deregulation in the 1990s led to collapsed capital markets and other serious social problems).

possible,<sup>130</sup> even if they have only met with partial success.<sup>131</sup> Just as Keynesianism provided the intellectual bulwark for embedded capitalism, Chicago School-neoclassical economics provided the intellectual foundation for the new order.<sup>132</sup> Policymakers looked to the private sector for solutions to public problems.<sup>133</sup> A “new governance” frame sought to replace the vertical, command-and-control model of the New Deal regulatory state with a horizontal and cooperative model that diffused sovereignty across a wide range of state and non-state actors.<sup>134</sup> The key to remaking the state was to make government more efficient and responsive, which are presumptive characteristics of the private sector.<sup>135</sup> The end of the Cold War and defeat of

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130. Edward Rubin, *The Possibilities and Limits of Privatization*, 123 HARV. L. REV. 890, 895-96 (2010) (reviewing GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY, *supra* note 112) (discussing the “current spate of privatization” in the past few decades). For an indication of the far-reaching ideological aspects of privatization, see Joseph M. Schwartz, *Democracy Against the Free Market: The Enron Crisis and the Politics of Global Deregulation*, 35 CONN. L. REV. 1097, 1098 (2003) (“Deregulation is not simply the absence of state regulation of corporate behavior; it is a comprehensive ideology advocating the down-sizing of the public sector, the privatization of social services and benefits, and the implementation of balance-budget austerity in the name of securing the health of financial and equity markets.”).

131. Rubin, *supra* note 130, at 896-97 (discussing critiques of privatization and citing the case of Abu Ghraib as an example of the failure of private contracting).

132. YERGIN & STANISLAW, *supra* note 29, at 329-30.

133. See Lester M. Salamon, *The New Governance and the Tools of Public Action: An Introduction*, 28 FORDHAM URB. L.J. 1611, 1611-12 (2001) (“Stimulated by popular frustrations with the cost and effectiveness of government programs and by a new-found faith in liberal economic theories, serious questions are being raised about the capabilities, and even the motivations, of public-sector institutions. . . . As a consequence, governments . . . are being challenged to reinvent, downsize, privatize, devolve, decentralize, deregulate, and de-layer themselves . . .”).

134. *Id.* at 1628-29, 1674.

135. See SAVAS, *supra* note 117, at 93-117 (comparing institutional arrangements for providing services to the public and presuming the private sector to be more efficient than government); see also MICHAEL BARZELAY, *BREAKING THROUGH BUREAUCRACY: A NEW VISION FOR MANAGING IN GOVERNMENT* 6 (1992) (“[G]overnment organizations should be customer driven and service oriented.”).

Communism—which was the End of History, after all<sup>136</sup>—only seemed to ratify market governance.<sup>137</sup>

The privatization—or “contracting out”—of government services is at the center of the neoliberal, new governance strategies.<sup>138</sup> Privatization received a bipartisan imprimatur with President Clinton’s “Reinventing Government” initiative, which was designed to make government more responsive by incorporating the purported efficiencies of the private sector.<sup>139</sup> The 1998 Federal Activities Inventory Reform Act (“FAIR”) requires agencies to submit to the Office of Management and Budget (“OMB”) an annual list of all activities deemed “inherently governmental” and therefore inappropriate for potential outsourcing to the

136. See FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN*, at xi (1992) (“[L]iberal democracy may constitute the ‘end point of mankind’s ideological evolution’ and the ‘final form of human government,’ and as such constitute[s] the ‘end of history.’” (citations omitted)).

137. YERGIN & STANISLAW, *supra* note 29, at 125-26.

138. Frank Munger, *Dependency by Law: Poverty, Identity, and Welfare Privatization*, 13 *IND. J. GLOBAL LEGAL STUD.* 391, 392 (2006) (“Privatization is the symbolic core of the so-called ‘new governance.’”).

139. Raymond Brescia describes the initiative by noting that:

Over the last twenty years, there has been a growing movement to “reinvent” government, to make government activities more efficient, accessible, transparent, and result-oriented. This theme was first adopted on a national level at the beginning of the Clinton Administration, through the creation of the National Performance Review, chaired by Vice President Gore, but the approach has been utilized in states and localities across the country. Emphasizing measurable outcomes, privatization, and local control, reinventing government strives to provide better services in a more efficient and less costly way.

Raymond H. Brescia, *Sheltering Counsel: Towards a Right to a Lawyer in Eviction Proceedings*, 25 *TOURO L. REV.* 187, 242-43 (2009) (footnotes omitted). Rubin argues that Clinton continued the deregulatory policies of the Reagan revolution and states that:

[The Reinventing Government Initiative] acknowledges the inherent inefficiency of government agencies and attempts to counteract it by relying on the private market, in this case as a model rather than directly. Most notably, perhaps, Clinton continued the OMB cost-benefit analysis that Reagan had initiated. He substituted a new Executive Order that made some secondary changes, but left the basic structure of Reagan’s approach intact.

Rubin, *supra* note 23, at 369.

private sector.<sup>140</sup> In the 1990s, it seemed a settled matter that as much public business as possible should be conducted by the private sector.<sup>141</sup>

President Bush continued the trend towards government by contract with his “competitive sourcing” initiative, which would require federal employees to compete with private contractors for government projects.<sup>142</sup> 9/11 changed the privatization policy debate. Recent years have seen the growth of a cottage industry dedicated to understanding privatization, in part as a response to high-profile scandals involving military contractors and a growing concern about the emergence of an unaccountable and opaque shadow government that exists outside of the normal channels of democratic governance. This debate has been particularly robust in administrative law, where scholars such as Alfred Aman and Martha Minow have contended that our overreliance on private contractors may create a shadow government unconstrained by bedrock constitutional norms or, for that matter, even the rule of law.<sup>143</sup> Others have raised concerns that outsourcing has

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140. Federal Activities Inventory Reform Act of 1998, S. 314, 105th Cong. § 2 (1998) (enacted).

141. See Rubin, *supra* note 130, at 895-96 (“There can be no doubt that the last few decades of our nation’s history have seen the privatization of many activities that were previously regarded as the preserve of public authority.”); see also Schooner, *supra* note 27, at 636 (“The mid-1990s witnessed a tsunami of procurement reforms heralded as the most successful aspect of Gore’s reinventing government initiative, which were intended to make the procurement system less bureaucratic and more businesslike.”).

142. As Rubin describes President Bush’s initiative:

[Bush] abandoned the Reinventing Government initiative, which was ineradicably linked to his electoral opponent, but pushed privatization hard, issuing a new Circular-76 that required agencies to open everything they did to competition from private firms. The revised Circular provided that unless a specially designated agency officer could justify to the OMB that the activity in question was “inherently governmental,” the agency had to contract out the function or demonstrate to the Government Accountability Office (GAO) that the agency could perform the function more cheaply than the private bidders.

Rubin, *supra* note 23, at 369.

143. See ALFRED C. AMAN, JR., *THE DEMOCRACY DEFICIT: TAMING GLOBALIZATION THROUGH LAW REFORM* 129-30 (2004) (arguing that “private actors inevitably make policy” when they are carrying out tasks that are usually

diminished the government's internal capacity to perform basic functions.<sup>144</sup> In recent years, congressional hearings have uncovered massive waste, fraud, and abuse in military contracting.<sup>145</sup> Conflicts of interest where regulated parties write the rules by which they will be governed abound.<sup>146</sup>

There are countertrends worth noting. Recent studies have cast doubt on the official narrative that the private sector and markets are more efficient than government.<sup>147</sup>

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accomplished by government actors); *see also* Minow, *supra* note 101, at 1012-13 (discussing the growing public awareness of private military companies and worries about control, accountability, and effectiveness).

144. Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397, 399 (2006) ("Pressures are building to outsource more and more government functions. At the same time, the federal civilian bureaucracy is shrinking in alarming proportion to its oversight responsibilities. The number of private contractors doing the work of the government has accelerated, while the number of federal employees needed to supervise them has eroded.").

145. *See, e.g.*, Phil Stewart, *U.S. Wastes \$34 Billion in Afghan and Iraq Contracting*, REUTERS (July 23, 2011, 12:04 PM), <http://www.reuters.com/article/2011/07/23/us-usa-afghanistan-waste-idUSTRE76M27Y20110723> ("The United States has wasted some \$34 billion on service contracts with the private sector in the wars in Iraq and Afghanistan, according to a study being finalized for Congress.").

146. *See, e.g.*, Robert O'Harrow, Jr., *Potential for Conflict Grows With Government's Use of Contractors*, WASH. POST (Aug. 18, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/08/17/AR2008081702013.html> ("The [Science Applications International Corp.] case offers a rare glimpse at one of the consequences of the government's unprecedented reliance on contractors to help federal agencies: Consultants sometimes gain insider knowledge and help draft rules that could benefit their own bottom lines . . ."); *see also* Jeffrey Branstetter, *Darleen Druyun: An Evolving Case Study in Corruption, Power, and Procurement*, 34 PUB. CONT. L.J. 443, 444-47 (2005) (cataloguing instances of procurement fraud and discussing a conflict of interest in which a senior procurement officer negotiated a contract with Boeing on behalf of the Air Force, in her official capacity, while negotiating a job for herself with the company at the same time); Leslie Wayne, *Air Force at Unease in the Capital*, N. Y. TIMES, Dec. 16, 2004, at C1 (reporting on the procurement scandal within the Air Force involving Boeing).

147. *See, e.g.*, Bernard D. Rostker, *A Call to Revitalize the Engines of Government* 6 (RAND Corporation Nat'l Security Research Division, Occasional Paper W74V8H-06-C-0002, 2008), *available at* [www.rand.org/pubs/occasional\\_papers/2008/RAND\\_OP240.pdf](http://www.rand.org/pubs/occasional_papers/2008/RAND_OP240.pdf) (citing government studies that show that contracting out government services to the private sector can cost more money than if the government had performed those services directly); *see also* Transcript of Conference Call with Dr. Ronald Sanders, Assoc. Dir. of Nat'l

Even where there may be cost savings, overreliance on contractors can hollow out the government's basic capacity to oversee its operations.<sup>148</sup> There have been some signs that federal legislators have taken notice. For example, the Omnibus Appropriations Act for 2009 provides "Guidelines on Insourcing New and Contracted Out Functions" that may begin to reverse the trend towards privatization.<sup>149</sup> President Obama has ordered a government-wide review of contracting practices and procedures in order to reduce waste and improper payments.<sup>150</sup> There have been initiatives to reduce the government's reliance on private contractors, especially in defense contracting.<sup>151</sup> It is unclear

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Intelligence for Hum. Capital, Results of the Fiscal Year 2007 U.S. Intelligence Community Inventory of Core Contractor Personnel 8 (Aug. 27, 2008), *available at* <http://www.fas.org/irp/news/2008/08/odni082708.html> (reporting that total cost for government worker is \$125,000 compared with \$207,000 per private contractor); U.S. GENERAL ACCOUNTING OFFICE, GAO/RCED-91-186, ENERGY MANAGEMENT: USING DOE EMPLOYEES CAN REDUCE COSTS FOR SOME SUPPORT SERVICES 2 (1991) (noting that contractors are on average twenty-five percent more costly than government workers in most activities for which cost comparisons were conducted).

148. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-572T, DEFENSE MANAGEMENT: DOD NEEDS TO REEXAMINE ITS EXTENSIVE RELIANCE ON CONTRACTORS AND CONTINUE TO IMPROVE MANAGEMENT AND OVERSIGHT 8 (2008) ("[A]n increasing reliance on contractors to perform services for core government activities challenges the capacity of federal officials to supervise and evaluate the performance of these activities.").

149. H.R. 1105, 111th Cong. § 736 (b)(1)(A) (2009) (enacted) ("The heads of executive agencies subject to the Federal Activities Inventory Reform Act of 1998 . . . shall devise and implement guidelines and procedures to ensure that consideration is given to using, on a regular basis, Federal employees to perform new functions and functions that are performed by contractors and could be performed by Federal employees."); *see also* Correction of Long-Standing Errors in Agencies' Unsustainable Procurements (CLEAN-UP) Act of 2009, S. 924, 111th Cong. § 3 (finding that inherently governmental functions "have been wrongly outsourced"); S. Con. Res. 13-42, 111th Cong. § 502(5) (as passed by Senate, Apr. 29, 2009) ("[T]he Department of Defense should review the role that contractors play in its operations, including the degree to which contractors are performing inherently governmental functions . . .").

150. *See* Scott Wilson & Robert O'Harrow, Jr., *President Orders Review of Federal Contracting System*, WASH. POST (Mar. 5, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/04/AR2009030401690.html>.

151. *See* Karen DeYoung, *U.S. Moves to Replace Contractors in Iraq*, WASH. POST, Mar. 17, 2009, at A7 (describing the State Department's plan to hire short term "Protective Security Specialists," who are government employees, in lieu of

how this will all play out in the coming years on the federal level. As of the writing of this Article, however, privatization continues apace. Ironically, the financial crisis, caused in no small part by excessive deregulation and blind faith in the powers of the market,<sup>152</sup> has led to an acceleration of privatization efforts at the state and local level. One recent example is the long-term lease of Chicago's parking meters to a consortium of buyers represented by Morgan Stanley, which critics argue may be a bad deal for the city in the long term.<sup>153</sup>

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private security contractors); see also Dana Hedgpeth, *Contracting Boom Could Fizzle Out: Jobs Would Return to the Pentagon*, WASH. POST, Apr. 7, 2009, at A1 ("The government said it would hire as many as 13,000 civil servants to replace contractors in the coming year and up to 39,000 over the next five years.").

152. See *supra* notes 129-37 and accompanying text.

153. See, e.g., Max Fisher, *Why Does Abu Dhabi Own All of Chicago's Parking Meters?*, THE ATLANTIC WIRE (Oct. 19, 2010), <http://www.theatlanticwire.com/business/2010/10/why-does-abu-dhabi-own-all-of-chicago-s-parking-meters/> 18627/ (noting that the deal would require the city to yield some of its basic control of the streets to the private contract owners); see also Darrell Preston, *Morgan Stanley Group's \$11 Billion Makes Chicago Taxpayers Cry*, BLOOMBERG (Aug. 9, 2010, 12:01 AM), <http://www.bloomberg.com/news/2010-08-09/morgan-stanley-group-s-11-billion-from-chicago-meters-makes-taxpayers-cry.html> ("Chicago drivers will pay a Morgan Stanley-led partnership at least \$11.6 billion to park at city meters over the next 75 years, 10 times what Mayor Richard Daley got when he leased the system to investors in 2008."). For a recent critical discussion of infrastructure privatization deals, see Ellen Dannin, *Crumbling Infrastructure, Crumbling Democracy: Infrastructure Privatization Contracts and Their Effects on State and Local Governance*, 6 NW. J.L. & SOC. POL'Y 47, 54 (2011). Dannin states that state infrastructure contracts include terms that:

[M]ake government parties to infrastructure privatization contracts the insurer of the private contractor's financial success. The three most commonly found provisions that can require governments to reimburse private contractors for lost anticipated revenue are (1) compensation events; (2) noncompetition provisions; and (3) "adverse action" or "stabilization" clauses. Failing to have a national conversation about these terms and their effects has left the public ignorant as to how these contract terms shift power over government policy and actions to private contractors.

*Id.*

### B. *How We Talk About Privatization Today*

Privatization is a discourse rooted in the epistemic habits of neoliberalism.<sup>154</sup> This is often true even for the critical discourse that has arisen around privatization, which generally takes place on neoliberal terrain. I will focus on two interrelated themes in privatization debates that mirror themes in our broader policy discourse. The first is the “technocratic frame,” which encourages us to think about privatization issues as normatively neutral questions of administration. The second is the operative presumption that markets are more efficient than government. In Part II.B.1, I suggest why these ideas may be attractive for policy professionals. In Part II.B.2, I discuss the presumption of market efficiency that forms the baseline for many discussions of privatization. Part II.B.3 reviews some promising insights that have identified the problematic trends within the neoliberal privatization frame and then suggests ways to build on these new insights to move towards a more comprehensive critique.

1. *The Technocratic Frame.* At the center of the scholarly debate over privatization is the presumption that the choice of government or private actors to perform any given task is “ideologically agnostic.”<sup>155</sup> I borrow the term from Jon Michaels, who writes: “Economic privatization is, ostensibly speaking, ideologically agnostic. Its advocates may have particular agendas, but efficiency-driven privatization per se mainly creates an alternative *process* for carrying out government contracts that strive to replicate government provision—only at a fraction of the cost (and perhaps with less government red-tape).”<sup>156</sup> Privatization, in other words,

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154. See Alfred C. Aman, Jr., *An Administrative Law Perspective on Government Social Service Contracts: Outsourcing Prison Health Care in New York City*, 14 *IND. J. GLOBAL LEGAL STUD.* 301, 301-02 (2007) (“[T]he prevailing form and key terms of globalization in the United States derive from neoliberalism, particularly in the binary division of public/private and their conflation with legal regulation and market responsiveness, respectively.”); see also *supra* Part II.A.

155. Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 *WASH. U. L.Q.* 1001, 1039 (2004).

156. *Id.* To be fair, as I note *infra* Part III.B.2, Michaels and others are beginning to provide a more thoroughgoing critique of the technocratic rationale

is simply a way to make the delivery of pre-existing goals more efficient.<sup>157</sup> I will refer to this way of looking at privatization as “technocratic,” by which I simply mean that we frame the choice between market and state actors as a neutral question of managerial efficiency. Thus, normative policy questions (what should we do?) are treated as categorically distinct from technical questions of efficient administration (how should we do it?). As Jody Freeman explains:

The legislature’s constitutionally assigned role is to tax and spend—to occupy itself with policymaking and budgeting. The executive must use appropriated funds to implement those policy decisions effectively. Both of these branches face incentives to focus on productive efficiency, that is, accomplishing social policy goals at the lowest possible cost. The executive branch in particular must determine the best way to provide the social services that Congress funds. And because of electoral discipline, both the legislative and especially the executive branch (which makes the front-line decisions regarding implementation) face incentives to cut costs.<sup>158</sup>

In this view, the legislature acts as the customer and the executive branch the vendor supplying the goods at the lowest price possible. One consequence of this commercial view of government is that we risk taking at face value policy objectives as articulated by the state. To take the Iraq war example, scholarly and media discussions often note the cost-cutting rationale for military privatization.<sup>159</sup> From

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for privatization. As I argue in this Part, Michaels’ theory of tactical privatization should form part of the baseline of our new framework for understanding privatization. For an earlier, more traditional view, see Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 91 (1994) (“[A]lthough agencies may set regulatory policy, they do not make controversial, value-laden choices, but rather use their expertise to solve technical problems left to them by Congress.”).

157. Matthew Diller, *Form and Substance in the Privatization of Poverty Programs*, 49 UCLA L. REV. 1739, 1743 (2002) (“Under this view, privatization appears to be a shift in thinking about the means of effectively and efficiently achieving governmental ends, rather than a change in the ends themselves. This account perceives privatization as an essentially neutral device that can be used to advance either expansive or narrow social policies.”).

158. Freeman, *supra* note 96, at 1335.

159. As reported in the *New York Times*:

this perspective, the central question becomes: “How can the government better manage and prosecute its wars?”<sup>160</sup> Focusing on costs and what the state “needs,” however, may lead us to neglect the crucial normative questions involved in waging war. Likewise, the private prison debate typically

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Why rely on the private sector for our national defense, even if it is largely a supporting role? Part of the reason is practical: since the end of the cold war, the United States military has been shrinking, from 2.1 million in 1989 to 1.4 million today. Supporters of privatization argue that there simply aren't enough soldiers to provide a robust presence around the world, and that by drafting private contractors to fix helicopters, train recruits and cook dinner, the government frees up bona fide soldiers to fight the enemy. (Of course, in the field, the line between combatant and noncombatant roles grow fuzzier, particularly because many of the private soldiers are armed.) Private contractors are supposed to be cheaper, too, but their cost effectiveness has not been proved.

Barry Yeoman, Op-Ed., *Need an Army? Just Pick Up the Phone*, N.Y. TIMES, Apr. 2, 2004, at A19; see also Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, 47 WM. & MARY L. REV. 135, 149 (2005) (“Military privatization can perhaps be explained primarily by the premise of cutting costs. The government need not offer pensions or benefits to employees of private companies working under contract, and it can hire contractors on a short-term basis, thereby decreasing the size of the uniformed military.” (footnote omitted)).

160. JENNIFER K. ELSEA ET AL., CONG. RESEARCH SERV., RL 32419, PRIVATE SECURITY CONTRACTORS IN IRAQ: BACKGROUND, LEGAL STATUS, AND OTHER ISSUES 35-36 (2008) (“To meet various surge requirements, the Department of State argues that PSCs allow Diplomatic Security (DS) to rapidly expand its capability to meet security needs without a delay in recruiting and training direct-hire DS personnel. . . . When the surge need is gone, just as the State Department could rapidly expand its force, it can also reduce its security force when requirements change. . . . Many defense analysts view private contractors as an indispensable force multiplier, especially needed over the past decade to ease the strain on a downsized military.” (footnote omitted)); see also Scott M. Sullivan, *Private Force/Public Goods*, 42 CONN. L. REV. 853, 856 (2010) (arguing that an assessment of the danger of private actors must operate against alternatives available to pursue existing national security policy). Although this all sounds quite reasonable, we must take care that our focus on evaluating the alternatives that are available to the government does not lead us to lose sight of the normative and political questions that matter most to us. After all, we may not want the executive branch to have flexibility in pursuing what we think of as illegitimate wars. And if we think they are legitimate, we should be prepared to justify such a view on normative and not merely technocratic grounds.

takes relevant criminal law objectives as a given.<sup>161</sup> The central question becomes: “Given that the state must incarcerate criminals, what is the most efficient way to do this?” The technocratic frame is grounded in the common sense notion that, by definition, private contractors merely replicate what the government would have done by other means anyway. Once our democratically-elected legislatures decide what the policy should be, the question of which particular parties carry out these policies is not a matter of great normative concern. It follows that if our choice between nominally public and private actors is a technocratic one, with the tough value decisions taking place, as it were, offstage, then our primary concern should be over the nuts and bolts of performance criteria. And indeed, this is how discussions of privatization typically proceed.<sup>162</sup>

Although I will criticize these ideas below, we should understand the conceptual and institutional power of the technocratic frame. First, a technical means-end frame promises to disentangle us from difficult—seemingly intractable—normative debates that characterize our world of fundamental value pluralism. It is a lot easier to discuss the logistics of prison privatization than it is to have a messy public debate over drug legalization. Second, it tracks with our Civics 101, common-sense picture of how government works: the executive branch executes orders given to it by the legislature. So, it may embody our normative commitments to a well-functioning liberal

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161. See Sharon Dolovich, *How Privatization Thinks: The Case of Prisons*, in GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY, *supra* note 112, at 128, 128; see also *infra* Part III.B.1.

162. See *infra* Part III.B.1 (arguing that privatization debates are characterized by questions of “comparative efficiency”); see also Verkuil, *supra* note 144, at 417-21 (describing the appeal of performance concerns driving privatization, but questioning the consequences of this preoccupation). Of course, as I have emphasized, scholars are also talking about the normative issues of accountability. See *supra* notes 107-11 and accompanying text. But even where the practice is being criticized, the language of service delivery is often part of the background. See, e.g., Sheila S. Kennedy, *When Is Private Public? State Action in the Era of Privatization and Public-Private Partnerships*, 11 GEO. MASON U. C.R. L.J. 203, 204 (2001) (“As contracting out becomes a more common method of delivering government services, the nature of ‘the state’ and hence of ‘state action’, in a constitutional framework, becomes an evolving concern.”).

democracy. Third, the technocratic frame has practical, institutional advantages: it allows policy professionals to exchange an analytically tractable and modular methodology for irreducibly complex and messy value debates. Talking about privatization this way allows scholars to avoid the appearance of a pre-commitment to specific policy outcomes. All these factors suggest that the technocratic frame reflects deeply held commitments to a certain image of democratic governance and the rule of law—commitments that are appealing in their own terms and that, even as we supplement them, we should be wary of discarding in the name of “realism” or of finding better metaphors and frames.

2. *The Presumption of Market Superiority.* I won't belabor this point, but one obstacle to constructing the proper frame of analysis is the presumption of market efficiency. While it is true in theory that we can be neutral about the choice between public and private, in practice the presumption that the market is more efficient than government is deeply embedded in our discourse.<sup>163</sup> This is a central premise of neoliberalism, and it is evident everywhere in the broader policy and political debates. Judge Posner's assessment that “legislative regulation of the economy frequently, perhaps typically, brings about less efficient results than the market-common law system of resource allocation”<sup>164</sup> is the baseline from which our policy discussions typically proceed. The titles of some of the privatization tracts tell the story here. For example, Al Gore entitled his report on Reinventing Government *From Red Tape to Results: Creating a Government That Works Better and Costs Less*; where “red tape” is a characteristic of government and “results” a presumed advantage of the private sector.<sup>165</sup> Similarly, David Osborne and Ted Gaebler title their critique of government bureaucracy *Reinventing Government: How the Entrepreneurial Spirit Is*

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163. See *infra* notes 164-67 and accompanying text.

164. POSNER, *supra* note 14, at 329.

165. AL GORE, NAT'L PERFORMANCE REVIEW, EXECUTIVE SUMMARY: FROM RED TAPE TO RESULTS; CREATING A GOVERNMENT THAT WORKS BETTER AND COSTS LESS 2-3 (1993).

*Transforming the Public Sector.*<sup>166</sup> The most prominent rationales for privatization reflect common, pre-critical beliefs that governments don't work as well as markets do.<sup>167</sup> As I explain in more detail below, this strong presumption of market efficiency makes it difficult to look at the world as it actually exists: a world characterized by irrational actors, bubbles, manias, and instability in markets.<sup>168</sup>

3. *A Critique and a Modification of the Neoliberal Frame.* My concern here is with an internal critique of our dominant neoliberal policy frame. However, this project would be incomplete without acknowledging dissenting views and some important prior efforts to provide new frames of analysis. In Part II.B.3.a, I summarize one very important view that dissents from neoliberal cost-benefit analytics. I characterize that view as a normative critique because it rejects exclusive reliance on cost-benefit analysis on the grounds that it distracts us from other, more important value debates. Philosophical critique is a necessary first step, because it asks the right questions about our core policy assumptions. However, inasmuch as it does not adequately acknowledge the scope of the task to be undertaken, it is incomplete. In Part II.B.3.b, I discuss the New Public Governance and explain that it should be understood as an institutionalization of neoliberal analytics itself, although in its best incarnations it has ambitions to

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166. DAVID OSBORNE & TED GAEBLER, *REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR* (1992).

167. As Martha Minow has noted:

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. . . .

. . . [T]he new injection of market-style language and concepts into sectors such as education, social services, and prisons assumes that competition and choice are pertinent, effective, and better than governance by democratic and constitutional values.

Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV 1229, 1240-41 (2003) (footnote omitted).

168. See *infra* Part III.A.

solve some of the problems that have emerged in the private governance model, such as ensuring democratic accountability.

a. The Normative Critique of Cost-Benefit Analysis. The neoliberal project is unthinkable without cost-benefit analysis at its core.<sup>169</sup> But a longstanding and robust philosophical debate suggests that cost-benefit economics is a radically incomplete grounding ethic. Philosophers such as Martha Nussbaum and others have criticized the cost-benefit analytics of neoliberalism from a normative perspective.<sup>170</sup> The basic objection is as follows: “Economic discourses are seldom broad enough to encompass fully issues involving human values such as the aesthetics of the environment, the moral justifications for welfare, and a host of other social justice and human rights issues. It is not that you cannot *do* the economics of welfare or prisoners’ rights, but, like translating a poem from one language to another, it is the poetry itself that is lost in translation.”<sup>171</sup> Whatever its considerable, even indispensable, heuristic value, a cost-benefit frame may misdirect our attention from important values that don’t fit easily into an efficiency framework; that is, it may not be capacious enough to answer normative

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169. See McCluskey, *supra* note 95, at 119-20 (“Neoliberalism incorporates and promotes the neoclassical version of economics as a matter of scientific fact divorced from politics or ideology. Neoclassical economics teaches that scarce resources mean we cannot have it all, but that impartial cost-benefit calculations tell us how to make the most of what we have.” (footnote omitted)).

170. See Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553, 1556, 1578-80 (2002) (“[C]ost-benefit analysis is so inherently flawed that if one scratches the apparently benign surface of any of its products, one finds the same kind of absurdity.”); Martha C. Nussbaum, *Flawed Foundations: The Philosophical Critique of (a Particular Type of) Economics*, 64 U. CHI. L. REV. 1197, 1197 (1997) (“The success of Law and Economics obscures, to some extent, a striking fact: the movement has virtually ignored criticisms of its foundations that are increasingly influential in mainstream economics, and by now commonplace (at least as points to grapple with) in utilitarian philosophy.”). See generally AMITAI ETZIONI, *THE MORAL DIMENSION: TOWARD A NEW ECONOMICS* (1990) (arguing that in place of rational choice, people are impacted by normative and affective factors); MARTHA C. NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP* (2009) (critiquing utilitarianism and social contract theory).

171. Alfred C. Aman Jr., *Privatization and the Democracy Problem in Globalization: Making Markets More Accountable Through Administrative Law*, 28 FORDHAM URB. L.J. 1477, 1486 (2001).

concerns regarding human dignity that are nevertheless central to our moral frameworks.<sup>172</sup> The thought is that we should not decide in advance that securing a certain level of basic rights or entitlements will be too costly.<sup>173</sup> Some costs, no matter how well calibrated, are simply too high to be compatible with human dignity.<sup>174</sup> Or, to put it another way, some costs are distinctly bad in a special way such that no member of the moral community ought to be required to bear them.<sup>175</sup> In Nussbaum's formulation: cost-benefit economics does not allow us to ask the relevant questions in the right way.<sup>176</sup> I will borrow from this well-established critique to advance my objective of constructing new frames of analysis and new stories to situate our policy debates.

b. New Governance: Democracy, Accountability and "Efficiency Plus." Building from neoliberal premises, public policy discourse has embraced a "New Governance" model.<sup>177</sup> New Governance is intended to challenge the expert-centered, command-and-control regulatory regime of the New Deal.<sup>178</sup> Inefficient, vertical command-and-control

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172. See Martha C. Nussbaum, *The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis*, 29 J. LEGAL STUD. 1005, 1028-36 (2000) (expressing this objection in terms of a "tragedy tax" that illustrates the subjective nature of valuing social justice and human rights issues).

173. See *id.*

174. *Id.* at 1033.

175. *Id.*

176. *Id.* at 1032 ("Cost-benefit analysis does not pose the tragic question; if anything, it suggests that there is no such question, the only pertinent question being what is better than what.").

177. Michael Waterstone states that:

The goal of new governance theory is to get a broad range of stakeholders involved, including regulated entities, private interest groups, government enforcement agencies, and the class of people that the law is intended to benefit. Ideally, these various groups converge on a set of legal norms, and then utilize their collective energy in achieving effective and context-specific solutions.

Michael Waterstone, *A New Vision of Public Enforcement*, 92 MINN. L. REV. 434, 482 (2007).

178. As Orly Lobel has argued:

The new governance model challenges these conventional [New Deal] assumptions. It broadens the decision-making playing field by involving more actors in the various stages of the legal process. It also

structures are to be replaced by a more cooperative, stakeholder model for which the most appropriate metaphor is the contract.<sup>179</sup> New Governance argues that we can use privatized, market-based models of governance to promote the social good.<sup>180</sup> Like neoliberalism more generally, efficiency is at the heart of the New Governance vision.<sup>181</sup> Because of the New Governance model's frame of efficiency plus accountability, I refer to this approach as "efficiency plus." Departing from the philosophical critique outlined above, the "efficiency plus" view accepts the expanded role of privatization in governance, and the cost-benefit analysis at its core, but hopes to embed constitutional and democratic norms into what it sees as the new cooperative relationship between public and private.<sup>182</sup> Proposals range from reviving common law doctrines such as "state action" and "non delegation"<sup>183</sup> to "deputizing" private contractors to

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diversifies the types of expertise and experience that these new actors bring to the table. Renew Deal governance is a regime based on engaging multiple actors and shifting citizens from passive to active roles. The exercise of normative authority is pluralized.

Lobel, *supra* note 22, at 373.

179. See Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 7 (1995) ("The modern regulatory state delivers insufficient benefits at unnecessarily high costs."); see also Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 4-6 (1997) (proposing a normative model of collaborative governance to replace a model driven by interest groups and adversarialism); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 571 (2000) ("In contrast to those presenting hierarchical models of administrative law, I conceive of governance as a set of negotiated relationships. This alternative conception of policy making, implementation, and enforcement is dynamic, nonhierarchical, and decentralized, envisioning give and take among public and private actors.").

180. See *supra* note 177.

181. See, e.g., Lobel, *supra* note 22, at 466 ("The governance model promotes more efficient organization of public life, efficient use of public dollars, and effective delivery of governmental services."); see also Amy J. Cohen, *Negotiation, Meet New Governance: Interests, Skills, and Selves*, 33 LAW & SOC. INQUIRY 503, 540 (2008) ("New governance and negotiation scholars broadly share methodological and normative commitments . . . to the conviction that collaboration and economic efficiency can be mutually reinforcing values.").

182. See Lobel, *supra* note 22, at 466.

183. See Freeman, *supra* note 96, at 1334.

do the work of the public good.<sup>184</sup> At its best, the New Governance model is sensitive to the accountability issues within privatized governance and proffers concrete fixes for those accountability problems.<sup>185</sup> In light of the recent scandals involving military contractors,<sup>186</sup> debates are quite properly focused on accountability to public law and constitutional norms.

There is no question in my mind that the “efficiency plus” focus on democratic control, accountability, and protecting the constitutional order is an advance over simply ignoring those concerns or assuming that any problems will be solved by the marketplace operating without any regulatory constraints. This is so despite the possibility that phrases such as “democratic control” and “constitutional order” may be the sort of nostalgic, pre-critical grounding concepts criticized by Rubin.<sup>187</sup> Nevertheless, it may be that we are asking the right questions in the wrong way. There are two problems with the efficiency plus approach that can hinder our attempts to construct new frames of reference to understand new realities. The first is that it generally takes for granted the desirability of an efficiency ethic<sup>188</sup> and sometimes tacitly imports the neoliberal premise that the private sector is generally more efficient than government.<sup>189</sup> The second problematic assumption is a categorical distinction between

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184. See, e.g., MARTHA MINOW, PARTNERS, NOT RIVALS: PRIVATIZATION AND THE PUBLIC GOOD 142 (2003) (arguing that “public values [must] follow public dollars” and advocating for more robust public debate on privatization issues); see also Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1369-76 (2003) (proposing private delegation constitutional analysis to ensure accountability for government contractors).

185. See Lobel, *supra* note 22, at 378.

186. See, e.g., Justin Rood & Emma Schwartz, *Defense Contractor Gets 30 Months in Bribe Scandal*, ABC NEWS (Dec. 15, 2008), <http://abcnews.go.com/Blotter/ConductUnbecoming/story?id=6465466&page=1>; Timothy J. Burger, *Another Goss Aide Is Linked to Military Contracting Scandals*, TIME (May 10, 2006), <http://www.time.com/time/nation/article/0,8599,1192766,00.html>.

187. See RUBIN, *supra* note 72, at 2-3.

188. See Ellen Dannin, *Red Tape or Accountability: Privatization, Public-ization, and Public Values*, 15 CORNELL J.L. & PUB. POL'Y 111, 113 (2005) (“The popular view is that the debate on privatization is about cost and efficiency.”); see also Dolovich, *supra* note 161, at 128.

189. Dolovich, *supra* note 161, at 134.

means and ends (what I call the technocratic neutrality thesis). It is my contention that the New Governance model risks taking at face value an idealized picture of democratic governance, one in which policies are formulated in the legislature and carried out by a cost-conscious executive branch,<sup>190</sup> where public and private actors can be made to cooperate in the name of the public good,<sup>191</sup> and one in which there is an almost ontological distinction between public and private even as New Governance claims to provide an alternative to outmoded binary categories. That is, in the name of a more realistic approach, New Governance risks reifying a fairly naïve frame for understanding political economy. We should focus our attention on the very real risks that efficiency plus, or pragmatic, New Governance frames may distract us from the deeper structural and institutional dynamics at play in privatization as it actually exists. Thus, while we can all agree that more accountability is better, and acknowledge problems with a command-and-control approach to regulation, I argue below for a deeper and more sustained critique of the core assumptions of privatization discourse than has generally been provided by more pragmatic New Governance approaches.

### III. PROBLEMS WITH PRIVATIZATION DISCOURSE

In Part III, I identify two broad problems with our privatization discourse. First, it implicitly or explicitly relies on a comparative efficiency model. In this regard, I would like to suggest the following: a characteristic problem with neoliberal privatization discourse is that the very real benefits that can be discerned under competitive market conditions *in certain cases* are universalized, are made out to be ontological properties of *market* and *state* in general. Ideas, such as the efficient market hypothesis, that begin their lives as academic thought experiments, become programmatic dogma, first philosophies, which are then asked to do far more work than they should be asked to

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190. See, e.g., *supra* note 177 and accompanying text (discussing the principles of New Governance); see also Lobel, *supra* note 22, at 435.

191. See, e.g., *supra* note 177 and accompanying text; see also Lobel, *supra* note 22, at 344.

do.<sup>192</sup> Second, privatization discourse adopts a foundational and conceptually unstable dichotomy between the means of governance and the ends of governance. The technocratic frame divides the political world into means and ends and sometimes misses the ways that means and ends are symbiotically linked. Thus our privatization discourse may mask the way that seemingly neutral decisions embody hidden normative preferences.

A. *Markets Are Not Categorically More Efficient than Government*

Even if we take the efficiency imperative as given and self-evident, and we all agree on a definition of efficient, we can have little confidence in the notion that markets are categorically or even *typically* more efficient than government. This is simply an ideological bias inherited from the intellectual tradition of neoclassical-neoliberal economics.<sup>193</sup> My argument is not with the possibility of rational action or efficient market competition, but rather with the uncritical adoption of those concepts as default presumptions. Let's look at a few of the problems with the governing assumption that markets are typically better than government, especially in the context of government privatization. First, actually-existing government contracting markets in key areas—such as national defense—are not competitive and are not good candidates

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192. See SMITH, *supra* note 26, at 71 (describing the appeal of applying the efficient market hypothesis).

193. Ha-Joon Chang argues:

We have been told that, if left alone, markets will produce the most efficient and just outcome. Efficient, because individuals know best how to utilize the resources they command, and just, because the competitive market process ensures that individuals are rewarded according to their productivity. . . . We were told that government intervention in the markets would only reduce their efficiency. Government intervention is often designed to limit the very scope of wealth creation for misguided egalitarian reasons. Even when it is not, governments cannot improve on market outcomes, as they have neither the necessary information nor the incentives to make good business decisions. In sum, we were told to put all our trust in the market and get out of its way.

HA-JOON CHANG, 23 THINGS THEY DON'T TELL YOU ABOUT CAPITALISM, at xiii-xiv (2010).

for a presumption in favor of efficiency.<sup>194</sup> Second, the categories of market and government are not given or self-evident.<sup>195</sup> The endemic problem inherent in conceptually and practically delinking “markets” from “government”—long ago identified by the legal realists<sup>196</sup>—makes any confidence we might have in such a formulation shaky at best. Since social forces set baseline market endowments, it’s simply not helpful to begin our analysis of privatization policy by making a categorical distinction between market and government, as if these categories existed as natural and discrete objects in the empirical world. And a third related point: the categories of “public” and “private” upon which the privatization discourse has generally relied are no more stable than “markets” and “government.”

1. *Many Government Contract Markets Are Not Competitive.* Privatization discourse accepts the standard economic model of a competitive marketplace as a starting point.<sup>197</sup> That model assumes a picture of government contracting where barriers to entry are low and in which producers can readily enter the market for public contracts.<sup>198</sup> Competition is supposed to keep market actors disciplined and accountable.<sup>199</sup> But the empirical realities of

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194. See *infra* Part III.A.1.

195. See *infra* Part III.A.2.

196. “This critical approach, highlighting the role of courts’ ‘baseline’ assumptions, was pioneered by the Legal Realists and revived by such critical legal scholars as Duncan Kennedy.” William E. Forbath, Essay, *Why Is This Rights Talk Different from All Other Rights Talk? Demoting the Court and Reimagining the Constitution*, 46 STAN. L. REV. 1771, 1775 n.7 (1994); see also Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387, 389-91 (1981) (arguing that efficiency arguments for assignment of legal entitlements are incoherent because the choice of an appropriate baseline is arbitrary). For an historical discussion of the baseline problem, see Jack M. Beermann & Joseph William Singer, *Baseline Questions in Legal Reasoning: The Example of Property in Jobs*, 23 GA. L. REV. 911, 914-15 (1989).

197. SCLAR, *supra* note 101, at 11 (“The case for privatization . . . always rests on an appeal to a theory of competitive contractual behavior derived from the standard market model. The notion rests on an assumption that contracting takes place in a competitive market environment.”).

198. *Id.* at 11-12.

199. *Id.* at 9.

government contracting do not resemble this picture. Eliot Sclar expresses this divergence with the following image:

Unlike the standard market model, the real economy is not a flat playing field on which a host of atomistic . . . agents perpetually compete . . . . The economic playing field is more realistically conceived as mountainous terrain that includes several high peaks from which well-endowed corporate and individual warriors swoop down and seize targets of opportunity. Among these high peaks are some flat areas where market battles akin to the competitive ones described by the standard market model do occur.<sup>200</sup>

So this is the first problem with the presumption of efficiency when applied to the privatization debate: federal government contracting “markets” are often monopolies or oligopolies and thus not good candidates for a presumption in favor of competitiveness.<sup>201</sup> At the state and local levels, competitive bidding is often not the norm.<sup>202</sup> Even if public contracting markets are born in the image of the classic competitive market, they may mature quickly to take on anti-competitive features. For example, actually existing federal contracting markets are plagued by no-bid contracts. To illustrate, in 2006, the Waxman House Committee on

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200. *Id.*

201. *Id.* at 69 (“Most public contracting takes place in markets that range from no competition (monopoly) to minimal competition among very few firms (oligopoly).” (footnote omitted)); *see also* SMITH, *supra* note 26, at 102 (“[W]hile neoclassical theory acknowledges the existence of monopolies and oligopolies, they are treated as curiosities and put aside.”).

202. *See* Richardson v. McKnight, 521 U.S. 399 (1997). In his dissenting opinion, Justice Scalia noted:

[I]t is fanciful to speak of the consequences of “market” pressures in a regime where public officials are the only purchaser, and other people’s money the medium of payment. Ultimately, one prison-management firm will be selected to replace another prison-management firm only if a decision is made by some *political* official not to renew the contract. This is a government decision, not a market choice.

*Id.* at 418-19 (Scalia, J., dissenting) (citation omitted); *see also* Dominique Custos & John Reitz, *Public-Private Partnerships*, 58 AM. J. COMP. L. 555, 572 (2010) (“[A]t least at the local level, competitive bidding is not the norm.” (quoting Dannin, *supra* note 188, at 114)); Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 495-500 (2005) (arguing that there are serious questions as to whether private prisons operate in a competitive marketplace).

Oversight found that “50.2% of federal procurement spending—\$206.9 out of \$412.1 billion—was awarded without full and open competition.”<sup>203</sup> Likewise, in 2007, 69% of Department of Defense (“DOD”) contracts and 73% of Department of Homeland Security (“DHS”) contracts were awarded without full and open competition.<sup>204</sup>

Ellen Dannin’s work explores a related aspect of real-world privatization deals: they are often one-sided and do not reflect competitive terms that would embody an idealized arm’s-length transaction. In a recent piece on infrastructure privatization, Dannin examines three provisions that are common to infrastructure contracts: (1) compensation events, (2) noncompetition provisions, and (3) the contractor’s right to object to and be compensated for government decisions.<sup>205</sup> From a business standpoint, one of the problems of multi-decade infrastructure deals is that its revenue streams are unreliable.<sup>206</sup> For example, there are many unforeseeable factors that may reduce revenue from toll roads and thus make the infrastructure deal less profitable.<sup>207</sup> To solve this dilemma, infrastructure contracts include “compensation event” clauses that require the government to pay private contractors when it takes actions that reduce infrastructure revenue: “Much of infrastructure privatization contracts concerns contractor revenue guarantees. From the point of view of the government partner, they operate as a form of penalty for government’s taking actions in the public interest.”<sup>208</sup> Contracts include

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203. STAFF OF H. COMM. ON OVERSIGHT AND GOV. REFORM, 110TH CONG., MORE DOLLARS, LESS SENSE: WORSENING CONTRACTING TRENDS UNDER THE BUSH ADMINISTRATION 6-7 (Comm. Print 2007) (Over the last year alone, spending on no-bid and limited-competition contracts increased 43%, from \$145.1 billion in 2005 to \$206.9 billion in 2006. . . . The rapid growth in no-bid and limited-competition contracts has made full and open competition the exception, not the rule.”); *see also* ALLISON STANGER, ONE NATION UNDER CONTRACT: THE OUTSOURCING OF AMERICAN POWER AND THE FUTURE 33 (2009) (citing the Committee Report).

204. STANGER, *supra* note 203, at 33.

205. Dannin, *supra* note 153, at 54.

206. *See id.* at 54-55.

207. *See id.*

208. *Id.* at 56; *see also* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-44, HIGHWAY PUBLIC-PRIVATE PARTNERSHIPS: MORE RIGOROUS UP-FRONT ANALYSIS COULD BETTER SECURE POTENTIAL BENEFITS AND PROTECT THE PUBLIC INTEREST

non-compete clauses which may, for example, require governments to forego developing competing forms of transportation that would decrease contractor revenues.<sup>209</sup> It is certainly true that despite everything stated above, individual privatization initiatives may wind up being advantageous for society.<sup>210</sup> But there is enough strong counter-evidence<sup>211</sup> that we ought to abandon our default presumption in favor of market competitiveness and construct a default, functional account of privatization based on a picture of how it actually works.

There is a related and more general point to make about markets: it has long been clear that actual markets do not operate in the manner posited in the neoclassical models, upon which privatization discourse explicitly or tacitly relies.<sup>212</sup> The answer given to this criticism is that it doesn't really matter if the model isn't a good approximation of reality because it's intended to be a heuristic tool with predictive, not descriptive, power.<sup>213</sup> But this is not a

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7, 31 (2008) (citing potential advantages to privatization of public highways). However, this report also emphasizes that:

There are also potential costs and trade-offs—there is no “free” money in public-private partnerships and it is likely that tolls on a privately operated highway will increase to a greater extent than they would on a publicly operated toll road. There is also the risk of tolls being set that exceed the costs of the facility, including a reasonable rate of return, should a private concessionaire gain market power because of the lack of viable travel alternatives. Highway public-private partnerships are also potentially more costly to the public than traditional procurement methods and the public sector gives up a measure of control, such as the ability to influence toll rates. Finally, as with any highway project, there are multiple stakeholders and trade-offs in protecting the public interest.

*Id.* (executive summary).

209. See Dannin, *supra* note 153, at 60-69.

210. See KOSAR, *supra* note 5, at 26-30 (discussing “marketization” as an alternative method for increasing the performance of government agencies that may yield benefits without full scale privatization).

211. See *supra* notes 201-04 and accompanying text.

212. SCLAR, *supra* note 101, at 6-9 (describing the standard market competition model); see WESTBROOK, *supra* note 1, at 3-5 (noting the unpredictability and inefficiency of market behavior).

213. As Judge Posner has argued:

satisfactory answer, and certainly not enough to carry water for the entire program of market deregulation that the model inspired. Economic history is replete with bubbles, manias, and market failures that provide powerful counter-evidence to the rational market story.<sup>214</sup> The “predictive power” answer is not looking very good these days, since the vaunted models did not predict one of the largest financial crises in history. But to see this evidence requires looking past deductive modeling for other ways to understand and frame our discussions of political economy. As I discuss below, there is a body of empirical and sociological work that has modified the neoclassical market behavior picture so dramatically that it can no longer credibly form the baseline for privatization policy discussions.<sup>215</sup>

2. *Market and Government Are Not Natural Categories.* The foregoing assumes that we can readily draw boundaries between market and government, public and private, in the first place.<sup>216</sup> These foundational categories are so embedded in our commonsense and policy frameworks as to be almost

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[One] test of a scientific theory is its predictive power. Here, too, economics has had its share of successes, most dramatically in recent decades. The effects of deregulation, for example of the airline industry in the United States, and, more dramatically, of the communist economies of Central and Eastern Europe and of China, have had the effects predicted by economists.

POSNER, *supra* note 43, at 16; see also MILTON FRIEDMAN, *The Methodology of Positive Economics*, in *ESSAYS IN POSITIVE ECONOMICS* 3, 9 (1953) (“[T]he ‘predictions’ by which the validity of a hypothesis is tested need not be about phenomena that have not yet occurred, that is, need not be forecasts of future events; they may be about phenomena that have occurred but observations on which have not yet been made . . .”).

214. As Ann Graham has noted:

The recorded history of economic bubbles extends from Tulip Mania in the 1630s, to the South Sea Bubble in 1720, the Mississippi Bubble, the Railway Mania of 1845, the Stock Market Crash of 1929, the Bank and S&L Crisis in the 1980s, the Japanese Bubble of the 1980s, the Dot-com Bubble in the late 1990s, and now, to the present fallout of a residential real estate bubble.

Ann Graham, *Bringing to Heel the Elephants in the Economy: The Case for Ending “Too Big to Fail,”* 8 *PIERCE L. REV.* 117, 139 (2010) (footnote omitted).

215. See *infra* Part III.A.2.

216. Sagers, *supra* note 72, at 38 (noting the implied distinction between public and private and arguing that the distinction does not exist).

invisible.<sup>217</sup> However, it is “notoriously complex” to draw clear lines between “public” and “private.”<sup>218</sup> Scholars have recently raised this issue in the privatization debate. For example Chris Sagers argues, correctly in my view, that the entire debate over privatization has been trapped in formalistic categories of market and government.<sup>219</sup> Given our hybrid patterns of administrative governance, relying on sharp categorical distinctions between public and private is not a promising baseline for privatization discourse.<sup>220</sup> While I agree with the general point that privatization discourse is committed to public-private categories that don’t reflect contemporary governance, I would follow Rubin’s suggestion that we remain alert to the broad normative and emotional commitments of the categories we are critiquing.<sup>221</sup> Thus, rather than jettisoning the categories altogether as unsuitable for our age of mixed governance, I would suggest a more incremental approach that retains the force of our normative commitments, (for example, our commitment to concepts such as “public good”), while also patiently clearing the ground of the conceptual detritus that has collected around these historically sedimented concepts.

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217. Verkuil, *supra* note 144, at 402 (“The words ‘public’ and ‘private’ are so commonplace in American law and society that they almost defy definition.”).

218. MINOW, *supra* note 184, at 29; *see also* Verkuil, *supra* note 144, at 402 (“For anyone who has studied the administrative state here and abroad, the most complicated question is understanding where the line between public and private is drawn.”).

219. *See* Sagers, *supra* note 72, at 40.

220. *Id.* at 40 n.7; *see also* Kennedy, *supra* note 162, at 209 (“The distinction between public and private acts loses clarity in a number of contexts . . . .”); Margaret Jane Radin & R. Polk Wagner, *The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace*, 73 CHI.-KENT L. REV. 1295, 1295-96 (1998) (“Contrary to laissez-faire ideology, the ‘private’ legal regimes of property and contract presuppose a ‘public’ regime of enforcement of policing, a baseline of background rights.”).

221. *See* RUBIN, *supra* note 72, at 7-9.

B. *The “How” Shapes the “What”: The Symbiosis of Policy and Implementation*

The second point I want to make is that the technocratic vision at the heart of both neoliberalism and New Governance, while reflecting commonsense ideas about how best to make government work in the public interest, will need to be modified if it is to serve as a baseline for academic policy discussions. A core technocratic justification for privatization is that it is essentially apolitical.<sup>222</sup> But we should take more seriously the possibility that the choice between nominally public or private providers may not in fact be “ideologically agnostic” at all. I base this claim on two observations. The first is historical: since Eisenhower warned of the military-industrial complex, we have known that the private sector has powerful, direct influence on public policy.<sup>223</sup> This means that business interests commonly shape the substance of the laws that they are then hired to administer.<sup>224</sup> The second issue is more conceptual: it is a core rationale of privatization that markets work to reduce the cost of service provision.<sup>225</sup> It hardly seems a leap from this to the conclusion that if it works out this way in practice—that is, if private providers are indeed cheaper and more efficient than government—we might expect there to be increased demand for the product that privatized providers are delivering more cheaply and efficiently. While this may be unremarkable in policies that are not normatively sensitive, it is disturbing to consider that war and prison policies, for example, are decided on a for-profit basis. Another conceptual point is that our current pragmatic frame risks reifying the perspective of government administrators. By this I mean that in the

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222. See *supra* Part II.B.1 (referring to privatization as “ideologically agnostic”).

223. Christopher A. Preble, *The Founders, Executive Power, and Military Intervention*, 30 PACE L. REV. 688, 698 (2010) (“Eisenhower correctly recognized that, whereas America’s economic interests had once broadly favored peace . . . crucial segments of industry and entire regions of the country had become heavily dependent on the sales of arms and equipment to the United States military.”).

224. Jon D. Michaels, *Privatization’s Pretensions*, 77 U. CHI. L. REV. 717, 719 (2010).

225. See *supra* Part II.B.2.

name of realism, “statecraft” rationales are sometimes taken as a point of departure for our privatization discourse.

1. *The Decision Whether to Privatize May Not Be Normatively Neutral*. Even if it were true that markets were typically more efficient than government—or rather, especially if it is true—there would be several more serious problems to contend with. The core idea of privatization is that we ought to choose the provider, whether public or private, who can do the same thing at a cheaper price.<sup>226</sup> This choice is supposed to be a neutral one.<sup>227</sup> But if the *means* that we choose actually alter the *policy ends* that we choose to pursue then it becomes more difficult to say that the choice of means is a neutral one. One problem is that our businesslike focus on comparative efficiency generally takes for granted the underlying policy as a starting point for analysis.<sup>228</sup> Efficiency, however, is not a freestanding criterion to judge the desirability of a given policy—it is dependent on prior normative attitudes (even if these are pre-critical) about the underlying policy in question. In other words, we should prefer more efficient government where we want to encourage and support the underlying policy in question. This dynamic may be invisible where the underlying policy is itself uncontroversial. For example, if we are deciding how best to deliver prenatal care, it would be uncontroversial that it should be delivered more efficiently, all other things being equal. When war making and prisons are at issue, the picture is less clear. In other words, is it self-evident as a general proposition that we want governments to wage war or imprison people more efficiently? Given the insights of public choice theory, it is

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226. See Dolovich, *supra* note 161, at 130.

227. *Id.* at 128.

228. *Id.* at 130. Although there is no space to explore it here in detail, a similar dynamic is in play with financial discourse. We have been told that regulation of the financial sector may be a bad thing because it could discourage creativity and flexibility in the development of new forms of financial instruments. See, e.g., Joel P. Trachtman, *The International Law of Financial Crisis: Spillovers, Subsidiarity, Fragmentation and Cooperation*, 13 J. INT'L ECON. L. 719, 729-30 (arguing that the current financial crisis has “given financial innovation a bad name” but attempting to rehabilitate the idea because financial innovation has improved the quality of life for many). But given how all this “innovation” has played out, is it really uncontroversial to advocate that innovation be the lodestar of financial deregulation? Perhaps reliability, predictability, and stability might be better candidates for grounding norms.

hard to see how we could take the public-regarding nature of such government action for granted.<sup>229</sup> The key point here is that a bare “comparative efficiency” discourse obscures larger normative concerns that we would be better off debating on the appropriate normative grounds. We thus have to consider the possibility that neoliberal efficiency frames are distorting the policies that we imagine them to be carrying out in a technically neutral manner.<sup>230</sup>

There is also the basic issue of pricing and incentives to contend with. It is schoolbook economics that demand is sensitive to prices.<sup>231</sup> So, if we reduce the cost of something, it makes sense to think that that thing will be in greater demand, all other things being equal. So why discard this insight when it comes to privatization of normatively sensitive areas? Take the Iraq example: if we think the Iraq war was a good idea, we may cogently believe that we should do it as cheaply as possible. And believing that private actors are more efficient, we could advocate for a greater private sector role in military occupation and

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229. Neomi Rao describes public choice theory:

[One type of public choice theory] focuses on interest-group theory and describes the political process as a competition between self-interested individuals and groups, including politicians and special interests. In this view, legislation and regulation generally result from powerful interest groups using politicians and the political process to improve their welfare, rather than the general welfare of the public. “In short, legislation is ‘sold’ by the legislature and ‘bought’ by the beneficiaries of the legislation.”

Neomi Rao, *Public Choice and International Law Compliance: The Executive Branch Is a “They,” Not an “It,”* 96 MINN. L. REV. 194, 225 n.115 (2012) (citations omitted).

230. For a discussion of this general point in the prison privatization context, see Dolovich, *supra* note 161; see also Jerry L. Mashaw, *Reinventing Government and Regulatory Reform: Studies in the Neglect and Abuse of Administrative Law*, 57 U. PITT. L. REV. 405, 410 (1996) (criticizing what he calls the “managerialist” view of governance on the grounds that decisions about governance in the agencies are inherently normative and are concerned with more than just cost-cutting and efficiency).

231. Joshua Fairfield, *The Cost of Consent: Optimal Standardization in the Law of Contract*, 58 EMORY L.J. 1401, 1430 (2009) (“The slope of the demand curve is negative because as price increases, the quantity demanded decreases. Correspondingly, as price decreases, the quantity demanded increases. The intersection of the supply and demand curves . . . represents the price that will encourage the optimal production of goods in society.”).

reconstruction. Likewise, if our perspective is aligned with the goals of the executive branch, we might take it for granted that the executive ought to have the widest range of possible choices available to it when it comes to war-making. However, if we think the Iraq war was a bad idea, or if we are worried about executive aggrandizement, then we might reasonably prefer the exercise of discretionary Presidential war powers to be very expensive, both financially and politically. If war is very expensive, and government actors respond to incentives as much as any other actor is presumed to (as Public Choice teaches us), then governments might decline to choose military intervention and might instead choose less costly forms of statecraft, such as diplomacy.<sup>232</sup>

There are, of course, the basic issues of lobbying and capture.<sup>233</sup> These issues are crucial to understanding privatization on the ground and are an extension of the point expressed above: the means that we choose can shape the ends that we pursue and how we pursue them.<sup>234</sup> Two examples of the lobby/capture dynamic are readily apparent in prison and welfare privatization. Matthew Diller argues that social welfare policy has been a key area of government privatization in recent years.<sup>235</sup> As discussed above, a key

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232. See *supra* note 229.

233. For a recent discussion of the agency capture problem, see Nicholas Bagley, Response, *Agency Hygiene*, 89 TEX. L. REV. *SEE ALSO* 1, 1-3 (2010). Bagley writes:

Agencies are denominated “captured” . . . when they depend too much on the industries they regulate for information, political support, or guidance; when the “revolving door” between agency and industry allows industry groups to influence agency appointments and tempt regulators with benefits; when industry effectively leverages its influence with those elected officials responsible for overseeing the agency . . . .

*Id.* at 4-5 (footnotes omitted).

234. See *supra* notes 228-30 and accompanying text.

235. Matthew Diller writes:

The broad trend to privatize government programs is already having a substantial impact on programs that serve the poor and has the potential to transform the social welfare system. Indeed, the social welfare system has emerged as a major focus of the privatization movement, and many of the movement’s most controversial aspects

rationale for privatization is technocratic.<sup>236</sup> This is also true for welfare privatization: although other rationales are offered for privatizing social welfare provision, technocratic reasons predominate.<sup>237</sup> Although seemingly neutral, technical reasons are offered for privatization, closer analysis reveals that offloading welfare policy onto the private sector can advance certain substantive normative ends.<sup>238</sup> Welfare provision is charged with normative tensions. On one hand, the state undertakes an obligation to provide support for the indigent; on the other, too much support is thought to undermine incentives to work and create dependency.<sup>239</sup> But retrenchment policies can be unpopular.<sup>240</sup> So channeling welfare provision through private providers can have the effect of foregrounding cost and efficiency concerns, which in turn may lead to de facto retrenchment of social welfare provision under the guise of private sector cost savings.<sup>241</sup> Sarah Armstrong similarly argues, in the context of prison privatization, that “an enthusiasm for economic techniques to manage public services and values ignores the way that the techniques of management can re-shape values and . . . compromise them.”<sup>242</sup> Dolovich argues that comparative efficiency does

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have arisen in the context of privatizing components of social welfare programs.

Diller, *supra* note 157, at 1740.

236. *See supra* Part II.B.1.

237. *See* Diller, *supra* note 157, at 1743-51.

238. *Id.* at 1753.

239. *Id.*

240. *See id.* at 1754.

241. *Id.* at 1754-55.

242. Sarah Armstrong, *Bureaucracy, Private Prisons, and the Future of Penal Reform*, 7 BUFF. CRIM. L. REV. 275, 302 (2003); *see also* Diller, *supra* note 157, at 1746 (“Government actors are bound by legal requirements such as due process and administrative procedure laws that give the public and affected individuals input into decisionmaking. This input may promote fairness and democracy, but it exacts a price in terms of speed and flexibility. Seen in this light, privatization achieves cost savings at the expense of important democratic principles.” (footnote omitted)); Schooner, *supra* note 27, at 630-31 (“[D]espite the success of procurement reform and its well-intentioned goals, the current paradigm elevates its facially attractive norms—efficiency and discretion—at the expense of other established, yet apparently undervalued, norms necessary to guide the procurement system, e.g., transparency, integrity, and competition.”).

“not ensure adequate consideration of normative concerns”<sup>243</sup> such as “legitimacy, humanity, dignity, respect, justice and fairness.”<sup>244</sup> But this criticism also has to encompass the ordinary dynamics of lobbying and legislative capture, especially the multiple ways that private interests shape the substance of legislation. To take one recent example, we know that Arizona SB 1070—the controversial immigration detention law<sup>245</sup>—was drafted by the Corrections Corporation of America and other industry groups who planned on entering the immigration detention business.<sup>246</sup> Similarly, if the decision to invade and occupy Iraq followed the “tactical privatization” logic identified by scholars, it is reasonable to conclude that the decision to invade and occupy Iraq was bottomed on the availability of private military contractors who were able to handle, and profit from, the logistics of a large scale reconstruction effort.<sup>247</sup>

2. *We Must Avoid Reifying the Perspective of Administrators.* Related to the point raised above, we need to remain alert to normatively charged features of the privatization debate that may be lurking in technical details of administration. We have to be skeptical of the rationales proffered by governments, for example, that privatization is necessary so that the government retain the flexibility to deal with some new threat, such as terrorism. We would be better served by attending to the dynamics of “privatization workarounds.”<sup>248</sup> A key advantage of private actors performing government functions is to give the executive

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243. Dolovich, *supra* note 161, at 135.

244. *Id.* at 134.

245. SB 1070, 2010 Ariz. Sess. Laws 450 (enacted).

246. Sullivan, *supra* note 110; *see also* Stephanie Chen, *Larger Inmate Population is Boon to Private Prisons*, WALL ST. J., Nov. 19, 2008, at A4.

247. *See* KLEIN, *supra* note 106, at 439-42; *see also* Michaels, *supra* note 224, at 753-757 (noting the large numbers of private contractors stationed in Iraq during the war); JEREMY SCAHILL, *BLACKWATER: THE RISE OF THE WORLD'S MOST POWERFUL MERCENARY ARMY*, at xix (2007) (“Blackwater has more than \$500 million in government contracts—and that does not include its secret ‘black’ budget operations for U.S. intelligence agencies or private corporations/individuals and foreign governments.”).

248. Michaels, *supra* note 224, at 724; *see also* Michaels, *supra* note 155, at 1004 (describing the military privatization agenda).

branch more options than it would otherwise enjoy in pursuing its objectives:

In the military context, non-economic status differentials can emerge as all-important in (rather than incident to) decisions to privatize. Private actors *qua* private actors may be sought—not because they are situated in a more efficient market or even because they command lower market wages, but because legally, politically, and symbolically they are *not* soldiers. Military privatization can allow the government to achieve national security and even humanitarian ends that would be more difficult, if not impossible, to accomplish using American soldiers.<sup>249</sup>

In other words, one of the rationales for contracting out is precisely that it enables governments to avoid mechanisms of public accountability for controversial policies.<sup>250</sup> To take the Iraq example again: private contractors operate in a grey area that allows them to circumvent legal constraints that would otherwise limit the options available to the executive branch.<sup>251</sup> At a general level, the power to pursue executive objectives unfettered by political and legal constraints is a core reason for contracting out government operations.<sup>252</sup> If this view is correct, and there is very good

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249. Michaels, *supra* note 155, at 1038.

250. As Michael Rosenfeld has argued:

[T]hrough privatization, legal actors can escape from the fetters of law emanating from the nation-state, and formerly public functions subject to criteria of accountability and transparency can become entrusted to non-governmental actors who can avail themselves of most of the benefits of those who operate within the private sphere. Two distinct phenomena are at play in connection with privatization in the present context: availing oneself of non-state legal regimes, and delegation of public functions to private actors.

Michel Rosenfeld, *Constitutional Versus Administrative Ordering in an Era of Globalization and Privatization: Reflections on Sources of Legitimation in the Post-Westphalian Polity*, 32 CARDOZO L. REV. 2339, 2340 (2011).

251. See, e.g., Editorial, *Privatized War, and Its Price*, N.Y. TIMES, Jan. 11, 2010, at A16 (noting dismissal of charges against Blackwater agents who killed seventeen Iraqis and concluding that “[t]here are many reasons to oppose the privatization of war. Reliance on contractors allows the government to work under the radar of public scrutiny”).

252. As Jon Michaels writes:

Workarounds provide outsourcing agencies with the means of accomplishing distinct policy goals that—but for the pretext of technocratic privatization— would either be legally unattainable or

reason to think it is, then our accountability worries may be even worse than we have feared. From the perspective of the hybrid public-private governance system, with its emphasis on flexibility and cutting through red tape, a lack of accountability is not a problem, it is a solution to a problem.<sup>253</sup> Jon Michaels makes a powerful case that “privatization workarounds” are often the sine qua non of large-scale privatization projects.<sup>254</sup> I would add that tactical privatization is not a pathology that we can cure by urging more accountability. Tactical privatization may instead be a natural incident to our technocratic habit of foregrounding pragmatic flexibility. It is easy to see why an official of the executive branch might view “rule-of-law constraints” and “public opinion” as “costs” that privatization helps it avoid. As scholars, we are not compelled to adopt that perspective, and are thus free to ask whether privatization discourse hides controversial policy decisions behind a veil of technical neutrality. If this is the case, it follows that we may need to shift our baseline from a concept of privatization as neutral and technocratic towards one that sees privatization as part of an ongoing project of executive aggrandizement.<sup>255</sup> In other words, at the very least, we need to attend more rigorously to the way that “costs” are

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much more difficult to realize. In short, they are executive aggrandizing. They enable Presidents, governors, and mayors to exercise greater unilateral policy discretion—at the expense of legislators, courts, successor administrations, and the people.

Michaels, *supra* note 224, at 717.

253. For example, as Laura Dickinson has argued:

Indeed . . . reduced accountability may well be a principal reason that governmental actors seek to privatize in the first place. For example, President Clinton was able to intervene in Kosovo to halt ethnic cleansing in part because he used so many private contractors in supporting roles and therefore risked fewer troop deaths.

Dickinson, *supra* note 159, at 191-92; see also Barbara L. Bezdek, *Contractual Welfare: Non-Accountability and Diminished Democracy in Local Government Contracts for Welfare-to-Work Services*, 28 *FORDHAM URB. L.J.* 1559, 1568-72 (2001) (discussing how private contractors operate free of the constraints on government that are designed to hold it accountable to the public).

254. Michaels, *supra* note 224, at 719-22.

255. *Id.* at 746-47.

tabulated in practice.<sup>256</sup> As this discussion has shown, it does us no good to evade the normative dimensions of our policies under the guise of technical neutrality.

CONCLUSION:  
FIRST STEPS TOWARDS CREATING A NEW  
PRIVATIZATION FRAME

This Article has taken as its point of departure that we need to think seriously about how we frame major policies in light of the acknowledged failures of the entrenched neoliberal framework. In advancing this project, I have pointed out the shortcomings of our current privatization discourse by showing some of the ways that our rhetoric and concepts are failing to provide adequate frameworks for comprehending the present. Those problems include an idealized picture of markets and insufficient attention to the normative dimensions of privatization. Our current privatization discourse is overly indebted to the neoliberal frame that forged modern privatization policy. The following are some concluding observations and suggestions for future areas of inquiry.

The privatization story of well-intentioned technocrats making an ideologically neutral choice between public and private providers is facially attractive. It has the advantage of honoring our normative aspirations of how political economy should work. However, we have too much evidence now that privatization isn't an ideologically agnostic policy choice, but is irreducibly fraught with normative implications. This doesn't mean that any individual privatization initiative should or should not be embraced. It does

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256. There are a number of other reasons to suspect that privatization may not be quite agnostic. For example, Michaels has argued:

[Contractors can] generate . . . cost-savings benefits [because] contractors are not subject to the costly and time-consuming notice-and-comment requirements of the Administrative Procedure Act or to the disclosure mandates of the Freedom of Information Act. Nor are they necessarily deemed "state actors" for purposes of *Bivens* or 42 U.S.C. § 1983 liability. Finally, employees of contracting firms are less likely to have union protection, and thus they can be made more responsive to market incentives (and more easily fired) than can civil servants.

Michaels, *supra* note 155, at 1037-38 (footnotes omitted).

mean, though, that we need to shift our baseline assumptions about the purposes and functions of privatization in the modern world. The work of Jon Michaels and Ellen Dannin should provide us with a new baseline for scholarly privatization discussions. Tactical privatization should be our new presumptive baseline, rather than being viewed as a pathology that policy recommendations can help to fix. Skepticism—not cynicism—should be our default attitude. We need more empirical studies of actual privatization arrangements, such as Ellen Dannin’s exemplary work in state infrastructure contracts, to determine how much they cost and what we are giving up in return for all the purported efficiency that nominally private actors bring to the table.<sup>257</sup> More broadly, we should develop microanalysis of the web of interconnections between purportedly public and private institutions,<sup>258</sup> including the elite corporate and professional networks that link what we have traditionally called the public and private sectors. In the meantime, as we develop our new frameworks and study the realities of hybrid public-private governance, we should be wary of allowing pragmatic concern for technocratic efficiency to obscure the crucial normative issues at play in privatization policy. Instead, we should remain alert to the critical normative issues that scholars have identified regarding accountability, while keeping in mind that those normative concerns may harbor the sort of reified idealizations that Rubin warns us of.

Finally, as we construct an intellectual and institutional history of our own present, we should heed the words of Roscoe Pound, who decried “the rigorous logical deduction from predetermined conceptions in disregard of and often in the teeth of the actual facts.”<sup>259</sup> Although Pound was referring to nineteenth-century legal formalism with this remark, it is a good description of the rigid modeling and historical blindness that helped wreck the global economy in 2008. The criticisms of the neoclassical model are

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257. See *supra* notes 178, 193-97 and accompanying text.

258. Edward L. Rubin, Commentary, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1425-29 (1996) (introducing microanalysis and defining it as a methodology that focuses on the specific, rather than the general, and addresses the “particularized and detailed strategies of governance”).

259. Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 462 (1909).

longstanding, legion, and remain largely unanswered.<sup>260</sup> New trends have emerged, challenging the austere rationality assumptions at the heart of the neoliberal enterprise.<sup>261</sup> Whether we speak of “behavioral economics,”<sup>262</sup>

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260. See WESTBROOK, *supra* note 1, at 3-7 (discussing the limitations of the neoclassical model for grounding financial regulation); Hanson & Yosifon, *supra* note 19, at 179 (“[T]he starting points of dominant legal theories are unrealistic and are based on fundamentally inaccurate visions of humanity.”); see also Ashford, *supra* note 20, at 179 (discussing how the neoclassical model has dominated discussions in the legal academy at the expense of other theories); Bernstein, *supra* note 20, at 305 (arguing that Chicago-style welfare economics largely characterized the law and economics movement, despite claims that the movement entailed a diversity of economic viewpoints); Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23, 23 (1989) (“[T]he law and economics theory has been losing its upward trajectory within law schools . . . .”); Kennedy, *supra* note 196, at 388 (“[T]he program of generating a complete system of private law rules by application of the criterion of efficiency is incoherent.”); Nussbaum, *supra* note 170, at 1198 (“[A]t one time [many ideas were] unchallenged in mainstream neoclassical economics—[however,] all are currently contested, in part as the result of pressure from philosophy and its history.”). Some have argued that we should recapture cost-benefit analysis from neoclassical economics and business interests. See, e.g., RICHARD L. REVESZ & MICHAEL A. LIVERMORE, *RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH* 9-19 (2008).

261. For example, critics have noted that:

While economics as a discipline, as well as the laws it sustains, assumes and explains that humans are rational, calculating machines, there is abundant social science data calling into doubt consumers’ ability to form meaningful demand curves in terms of their own considered self-interest, let alone to make decisions that have positive community effects.

M. Neil Browne et al., *Concealment of Information in Consumer Transactions in the United States, Sweden and China: A Window to the Relationship Between Individualism and Regulation*, 20 LOY. CONSUMER L. REV. 270, 274 (2008); see also Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEGAL STUD. 537, 551 (1998) (“The founders of classical law and economics were oblivious to important phenomena, especially the centrality of informal systems of social control. The mounting appreciation of those systems has destabilized the classical paradigm. . . . [H]owever, law and economics is in for a time of turbulent normal science, not extinction.”); Christine Jolls, Cass R. Sunstein, & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1541 (1998) (proposing to replace the rational actor model of neoclassical economics with a behavioral model); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1074-75 (2000) (arguing that a “law-and-behavioral science” model replace the rational actor model at the core of law and

“power economics,”<sup>263</sup> “critical realism,”<sup>264</sup> the “new legal realism,”<sup>265</sup> or “microanalysis,”<sup>266</sup> there is an emerging sense that legal scholarship must be open to empirical and institutional modes of inquiry that challenge our categories and preconceptions. We should work towards building more “three-dimensional” models that integrate history, social science, and normative concerns into a rich, interpretive enterprise. Replacing the old stories will be a difficult, long-term task since the neoliberal model has dictated the outer edge of our interpretive horizon for a long time. Nevertheless, as we dissolve coagulated metaphors such as *free market*, legal scholarship will be taking the necessary first steps towards a productive intellectual engagement with the complexities of the modern world. As we bury neoclassical dogma and seek to develop new modes of inquiry, though, we should be mindful of our own limits and remember that we have institutional and professional incentives to create new dogmas to replace the old ones we have torn down.

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economics); Jeanne L. Schroeder, *Rationality in Law and Economics Scholarship*, 79 OR. L. REV. 147, 150 (2000) (“The practitioners of the ‘science’ of law and economics rarely engage in empirical research. Typically, non-falsified theories are applied to untested assumptions in order to produce non-verifiable conclusions. In other words, at the turn of the millennium, law and economics has all of the characteristics of a cult.” (footnote omitted)).

262. See Jolls, Sunstein & Thaler, *supra* note 261, at 1473.

263. Hanson & Yosifon, *supra* note 19, at 193-200 (proposing that we substitute “power economics” for the frictionless world of neoclassical economics in order to enrich our analyses of social and economic life).

264. *Id.* at 179-93 (discussing a new analytical approach that combines legal realism with insights from critical theory).

265. See Nourse & Shaffer, *supra* note 43, at 136 (urging a “dynamic realism” to replace a moribund neoclassical model). Nourse and Shaffer conclude:

Dynamic realism, like the broader category of new realism of which it is part, takes its lead from the world, not ethereal, dogmatic, and academic theorizing. It rejects the privileging of markets by neoclassical law and economics and rejects left-leaning postmodernism, which sees power corrupting all institutions, from markets to courts to bureaucracies to new-governance alternatives.

*Id.* at 136-37.

266. Rubin, *supra* note 258, at 1425.