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Abstract. Privatization has occupied the attention of theorists of different disciplines. Yet, despite the multiplicity of perspectives, the typical arguments concerning privatization are instrumental, relying heavily on comparing the performance of a public functionary with that of its private counterpart. This paper challenges this approach for leaving unaddressed other important consequences of shifting responsibilities to private entities. More specifically, privatization cuts off the link between processes of decision-making and the citizens and, therefore, erodes political engagement and its underlying notion of shared responsibility.

The effects of privatization are not restricted to the question of whether public prison is better or worse qua prison than its private counterpart or whether private forestry is better or worse qua forestry than its public counterpart. It extends to whether stripping the state of its responsibilities erodes public responsibility. For privatization is not only the transformation of detention centers, trains, tax inquiry offices, forestry operations, and so on, considered one service at a time. It is also the transformation of our political system and public culture from ones characterized by robust shared responsibility and political engagement to ones characterized by fragmentation and sectarianism.

Introduction

For the last several decades, privatization—roughly speaking, the shifting of responsibility from public to private entities—has affected modern societies in deep and profound way and this shift forces us to consider what privatization really means and what its underlying costs and benefits are. This Article identifies a fairly neglected kind of costs: The undermining of political engagement and public responsibility. To establish this claim we differentiate between two conceptions of

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2 For the dramatic changes resulting from privatization, see, eg, Paul R Verkuil, Outsourcing Sovereignty: Why Privatization of Government Functions Threatens Democracy and What Can Be Done About It (Cambridge: Cambridge University Press, 2007).
privatization: First, the reason conception under which privatization has to do with transforming the reasons that guide the decision-maker (whoever it is); and second, the agency conception under which privatization transforms the decision-maker itself, namely, it shifts responsibility from a public official to a private entity. In contrast to many discussions of privatization, we rely on the agency conception and establish that the mere shifting of responsibility from public officials to private entities has freestanding normative consequences, that is, ones that do not depend on the type of reasons that happen to guide the private entity.

The typical arguments concerning privatization proceed by comparing the performance of a public functionary with that of a private functionary. In that, they must presuppose some function that each functionary is expected to perform. By contrast, we argue that even given that a private entity is better at providing a certain good or service, there are other important consequences of shifting responsibilities and functions to private entities that are not reflected in the quality of the privatized good. More specifically privatization has detrimental effects concerning public responsibility and, as a result, also repercussions concerning political engagement. Furthermore, the costs of privatization are not merely contingent; they do not hinge upon empirical concerns only. Instead, they are a byproduct of the shared responsibility of citizens for the decisions and the actions of public officials. We reject therefore the misguided effort to make recommendations concerning privatization simply by examining empirically the virtues and vices of privatization and, in particular, by comparing the quality and the costs of the provision of privatized and non-privatized goods and services.

This Article defends the agency conception of privatization. It argues that for certain purposes the question of who the agent is becomes crucial for establishing public responsibility. Public officials are unique in that their acts and decisions are governed (in the right sense) by practices that are, in principle, subject to the power of the polity. We also argue that this fact implies that, under the appropriate circumstances, citizens assume responsibility for the decisions made by public officials. The decisions of public officials can properly be described as decisions performed in the name of citizens and, consequently, they give rise to political engagement among citizens. Privatization cuts off the link between the decisions and the citizens and, therefore, erodes political engagement and its underlying notion of shared responsibility.

Our view has important implications concerning contemporary debates about privatization. Many opponents of privatization justify their opposition on the grounds that privatization undermines the realization of public goods because private agents are not disposed to act in a way that promotes the public good; in particular it is often

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argued that private agents are not ‘accountable.’ The soundness of this view depends on factual contingencies; it depends on the conjecture that private agents are unlikely to promote public ends because on the whole they are more likely to act purely on the basis of selfish concerns or sectarian ideology.\(^4\) This claim is of course hotly debated precisely because of its empirical nature.\(^5\) In contrast, our position need not settle these debates as we argue that the concern with the identity of the agent is not merely empirical. Privatization distances the polity from major decisions that affects the well-being of its members and therefore it undermines its responsibility for these decisions.

Further our argument deviates in another respect from the traditional arguments concerning privatization—it develops an objection to privatization at the wholesale, rather than retail, level. Most arguments for and against privatization are based on a comparison between the quality of one-good-at-a-time before and after privatization; they proceed by judging the desirability of privatization at a retail level on the basis of such a comparison.\(^6\) By contrast, we argue that privatization as a general phenomenon—viz., privatization as such—may weaken and erode political engagement insofar as it distances and alienates citizens from judgments, decisions, and actions concerning their society. We suggest that the costs of privatization should be measured not only in terms of the quality of the provision of the privatized goods or services but in wholesale terms concerning the relations of citizens to other citizens and to the polity. This does not imply by any means that privatization of a particular

\(^4\) Minow (n 1) 1259-60; Jody Freeman, ‘Private Parties, Public Functions and the New Administrative Law’ (2000) 52 Administrative Law Review 813, 823; Gillian E. Metzger, ‘Privatization as Delegation’ (2003) 103 Columbia Law Review 1367, 1372. The concern that private contractors act in a way that is detrimental to the public interest is a real concern and various initiatives to privatize led to such opportunistic behavior on the part of contractors. For an investigation of the defense industry, see Martha Minow, ‘Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy’ (2005) 46 Boston College Law Review 989, 994-5. For the context of privatization of welfare, see Michele Estrin Gilman, ‘Legal Accountability in an Era of Privatized Welfare’ (2001) 89 California Law Review 569, 596-7. In the context of prisons, see Sharon Dolovich, ‘State Punishment and Private Prisons’ (2005) 55 Duke Law Journal 429, 503-4. Needless to say, each one of the claims made in these articles is controversial. Furthermore, public officials can also act in self-serving ways and often are not more accountable than private entities. As advocates of privatization are quick to observe, it is not sufficient to note that private entities are opportunistic. To make decisions concerning privatization one ought to compare the performance of the private entity with its public counterpart. See, e.g., Joseph Stiglitz, ‘The Private Uses of Public Interests’ (1998) 12 Journal of Economic Perspectives 3.


\(^6\) See note 3.
good or service is undesirable. It only implies that there are costs to privatization which may be disregarded by policy-makers as they are not easily monetizable.\(^7\)

The proposed approach accounts better for the intuitive resistance to privatization which, if examined by using the traditional method of comparing the quality of the publicly and privately provided goods is sometimes irrational.\(^8\) Arguments against privatization that focus on the quality of the privatized goods or services cannot account for a wholesale resistance to privatization.\(^9\) Indeed, it is one thing to identify compelling instrumental or non-instrumental reasons against the privatization of a particular good (or cluster of goods); quite another to articulate an argument against privatization itself. This Article is designed to make good on the latter ambition by explaining why privatization can undermine public responsibility and political engagement.

To forestall misunderstandings, let us register two important observations. First, it might be protested that the intuitive resistance to privatization at a wholesale is better explained by reference to the distributional-egalitarian opposition to the regressive implications to which privatization gives rise. The thought is that privatization is a surface manifestation of a broader libertarian agenda. We do not deny that some (and perhaps even most) decisions to privatize public services and goods nowadays are influenced by such agenda. However, although it purports to focus on the wholesale level, an objection to privatization based on distributive justice grounds cannot generate an argument against privatization as such. Private provision of goods need not (as a matter of conceptual truth) be categorically objectionable from an egalitarian point of view.\(^10\) Our approach seeks to capture the intuitive resistance to privatization even when it results in just distribution.

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\(^9\) More generally for the inclination of theorists to rationalize institutions and procedures in terms of their consequences when the underlying motivation is not consequentialist, see Alon Harel, Why Law Matters 1-9 (OUP, 2014).

\(^10\) In fact, it is quite plausible to suppose that the private provision of some goods is perfectly consistent with the demands of distributive justice. See Starr (n 1) 131. Starr believes, however, that even if privatization does not lead to injustice, it ‘signals a diminished commitment to include the poor in the national household.’ Ibid. 135. It seems here that Starr contrasts between the actual effects of privatization (which need not necessarily be detrimental to distributive justice concerns) and the symbolic or communicative effects of privatization.
Second, the fact that privatization erodes political engagement does not imply that it is always wrong or undesirable. Political engagement among members of the polity is only one value among many. Sometimes instrumental considerations favoring privatization may override it. More than drawing any conclusive inference as to the desirability of privatization of a particular function or service, we seek to identify a less familiar consideration that could help to explain the intuitive resistance to privatization as such.

1. Two Conceptions of Public Law: Reason and Agency

A. Introduction

To set the stage, we begin by examining two ways to understand what privatization could mean. On the one hand, privatization may trigger a loss of accountability, impartiality, and other publicly-acknowledged virtues and norms that purport to guide the conduct of public officials in the service of the general interest. On the other hand, privatization may give rise to what has been called the publicization of private service, namely, the creation of publicly-oriented private actors.

One may argue that if ‘privatization’ is accompanied by publicization, which is to say a change in the way private actors act such that they act in conformity with the reasons to which public officials are expected to conform, this should not count as genuine act of privatization. Instead it should be described as a rather technical or technocratic institutional change; changing the titles of the people in charge without changing the substance of their decisions. In other words what counts is what the

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11 See Minow (n 1) 1259-60; Metzger (n 4) 1372; Freeman (n 4) 823.


13 The view that privatization is merely a technical change is indeed a very common view among theorists, in particular among those who favor privatization. As Jon Michaels has noted: ‘[P]rivatization in the United States tends to be thought of as a technocratic process: contractors are hired to build a better mousetrap, not to change the rules of the hunt.’ See Jon D Michaels, ‘Privatization’s Pretensions’ (2010) 77 University of Chicago Law Review 717, 725. See also Mark H Moore, ‘Introduction, Symposium: Public Values in an Era of Privatization’ (2003) 116 Harvard Law Review 1212, 1218; Cass (n 1) 466.

The claim that privatization is merely a technocratic change has also been made by courts. In his dissenting opinion in a case concerning private prisons, Justice Scalia criticized the majority decision because in his view:

Today’s decision says that two sets of prison guards who are indistinguishable in the ultimate source of their authority over prisoners, indistinguishable in the powers that they possess over
reasons underlying the performance of the agent are rather than who performs the act. In contrast one may claim that privatization is nothing but transferring the responsibility from a public entity to a private entity independently of whether the new entity acts to promote public ends. In other words what counts is who performs the act rather than (merely) what the reasons underlying the performance are.

Although theorists of public law are not always explicit which conception they hold one can identify in the literature, especially literature concerning privatization, both a reason conception and an agent conception of privatization. Section B analyzes the reasons-based view of publicness. Section C explores the agent-based view.

B. The Reason-based Characterization of Publicness

What is it that makes an act or a decision a public one? This question is important for both political philosophers and for legal practitioners. Political philosophers may be concerned about the legitimacy of the decisions of private or public institutions; practitioners may be concerned given that ‘publicness’ may be relevant to the determination of the legal validity of a decision and it has many other legal implications.

One prevailing view is that a decision is ‘public’ (and consequently the individual making the decision can claim to be acting in the name of the state) if the decision is grounded in appropriate publicly-oriented reasoning. More specifically it is claimed that a decision is public if it meets certain conditions of equality and impartiality. Malcolm Thorburn expressed this view as follows:

prisoners, and indistinguishable in the duties that they owe toward prisoners, are to be treated quite differently in the matter of their financial liability.

See Richardson v McKnight, 521 US 399, 422 (1997).

14 In previous work we argued that sometimes the identity of the agent dictates the reasons that ought to be attributed to it. We argued that the difference between public and private agents follows directly from the type of reasons that such agents are capable of using (simply by virtue of their different status). Hence, in effect we argued that there are conceptual considerations that bear on the question of which agents can reason in publicly-oriented ways. Avihay Dorfman & Alon Harel, ‘The Case Against Privatization’ (2013) 41 Philosophy & Public Affairs 67.


16 See Cass (n 1) 497-522. Even those who are skeptical about the usefulness of the distinction between public and private believe that legal practitioners make extensive use of these terms to resolve legal questions. See Karl E Klare, ‘Public/Private Distinction in Labor Law’ (1982) 130 University of Pennsylvania Law Review 1358, 1359.
In order for an individual to successfully claim to be exercising a state power, he must meet the accountability standards set out in public law – roughly, reasonableness and fairness – in the exercise of his discretionary powers. … but the justification for the state’s power turns on its ability to act impartially in the name of all. If it fails to do so, then it undermines its own legitimacy.\(^{17}\)

This view seems to be an influential view both among opponents and proponents of privatization. The underlying rationale is clear: arguably the status of the agent is a technical matter. What really count is why the decision was made and what its effects are likely to be. The agent is merely a means for the implementation of publicly oriented decisions or actions. If it successfully does so, her decision is public. If she fails to do so her decision is private.\(^{18}\)

Yet despite its initial plausibility it is evident that in reality very often the concept of privatization includes important institutional aspects, namely components concerning the status of the agent (rather than the reasons underlying the decision). In his attempt to characterize privatization Bauman identified features such as:

1) the complete or partial sell-off (through asset or share sales) of major public enterprises; (2) the deregulation of a particular industry; (3) the commercialization of a government department; (4) the removal of subsidies to producers; and (5) the assumption by private operators of what were formerly exclusively public services, through, for example, contracting out.\(^{19}\)

In examining closely what Bauman identifies as paradigmatic instances of privatization one can differentiate the reasons and the agency-based understandings. Some forms of privatization identified by him (such as commercialization) are characterized on the basis of the reasons underlying the decision. Other forms of


\(^{18}\) This is the view that is labelled by Freeman a pragmatist view:

To the pragmatic privatizer, it matters little whether the service in consideration is waste collection, power generation, education or incarceration. Similarly irrelevant are the vulnerability of the population being served, its exit options or its political power. Any of these services may be ripe for privatization if they present opportunities to cut costs and improve service quality through innovation.

Freeman (n 12) 1298.

As Dolovich pointed out, the view that privatization is merely a technical change has often been used to legitimize privatization. See Sharon Dolovich, ‘How Privatization Thinks: The Case of Prisons’ in Jody Freeman & Martha Minow (eds.), Government By Contract: Outsourcing And American Democracy (Cambridge, Mass.: HUP, 2009) 128, 145.

\(^{19}\) Richard W Bauman, ‘Foreword’ (2000) 63 Law & Contemporary Problems 1, 2.
privatization (such as sell-off of public enterprises and deregulation) are forms of transferring power from the state to private entities. This form of privatization rests on the agency-based understanding of publicness, namely on the view that the status of the agent determines whether a decision is considered public or private. Given the importance attributed to the agency-view in political theory and in legal doctrine, it is evident that proponents of the reasons-based view must provide a rationale for the concern given to the status of the agent. If they fail to explain the prevalent concern with the status of the agent, their theory deviates too much from existing doctrine.  

The standard way of advocates of the reasons-based view to explain the concern with the status of the agent is to distinguish between the fundamental normative core of publicness (resting on the reasons used by the agent to reach the decision) and the contingent means to guarantee that the agent is guided by these reasons. The reasons guiding the agent are what ultimately determine whether the decision is public or private; it is public if it is impartial, fair, deliberative, and therefore promotes the public interest. To guarantee fairness and impartiality one needs at time to use public agents as those agents are typically, generally or frequently moved by the right type of reasons. Given the institutional environment and the type of incentives operating on them, public officials or public entities are more likely to be guided by public rather than private reasons.

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20 One indication for the significance of the agency view can be found in the US legislation which reserves some functions exclusively to public officials. The US legislation defines the concept of ‘inherently governmental function’ which the Federal Activities Inventory Reform (FAIR) Act of 1998 describes as ‘a function that is so intimately related to the public interest as to require performance by Federal Government employees.’ Federal Activities Inventory Reform Act of 1998, 31 U.S.C. § 501 note (2006). The FAIR Act contains, in addition to the definition of an inherently governmental function, a list of functions that fall under this category:

(i) to bind the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;

(ii) to determine, protect, and advance United States economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;

(iii) to significantly affect the life, liberty, or property of private persons;

(iv) to commission, appoint, direct, or control officers or employees of the United States; or

(v) to exert ultimate control over the acquisition, use, or disposition of the property, real or personal, tangible or intangible, of the United States, including the collection, control, or disbursement of appropriated and other Federal funds.

The reasons-based view is shared by both prominent advocates of privatization and by prominent opponents. Yet there are often differences in the type of reasons being used by advocates and opponents. Advocates of privatization often emphasize efficiency-based reasons. They argue that private entities can provide high quality goods and services at a lower cost given that they are subjected to the discipline of the market. Such pragmatic arguments are taken largely from the discourse of economics. Opponents in contrast emphasize other concerns which in their view should characterize public decisions: impartiality, fairness, responsiveness etc. At times they also rely on procedural values that ought to guide the decision such as due process. Private agents, so it is argued, are not sufficiently accountable to the public; they are partial and consequently do not act in accordance with the public interest. The ‘public law perspective’ as Freeman labels it ‘prioritizes legally required procedures designed to guarantee public participation and due process… Compliance with these procedures has an inherent value in the public law view; it is part of the minimum obligation a state owes to its citizens.’ But while the reasons that are provided by advocates and opponents of privatization may be different: efficiency on the one hand and fairness and impartiality on the other hand in both cases what characterizes publicness is the type of reasons guiding the decision. The agent that ought to make the decision has to be the one that is the most likely to be guided by these reasons.

The question of whether private agents can (or are likely to) act for ‘public’ reasons is ultimately an empirical question. Martha Minow—an influential opponent of privatization—defended her view along these lines and argued that: ‘Privatization may also undermine public commitments both to ensure fair and equal treatment and to prevent discrimination on the basis of race, gender, religion, or sexual orientation.’

In contrast, Jody Freeman suggested that privatization is not a ‘means of shrinking government’. In that, Freeman joins those who see private law institutions and doctrinal platforms as plausible means to instill public law norms of fairness and accountability. On Freeman’s view, privatization can serve as a mechanism for ‘publicization’, namely a means by which private actors commit themselves to traditionally public goals. Freeman argues:

22 Trebilcock & Iacobucci (n 5) 1435; Cass (n 1); Freeman (n 12) 1296. For an opposition to the dominance of economic considerations, see Dolovich (n 18) 134.


24 Freeman (n 12) 1302.

25 Minow (n 1) 1230.

‘Instead of seeing privatization as a means of shrinking government, I imagine it as a mechanism for expanding government’s reach into realms traditionally thought private. In other words, privatization can be a means of ‘publicization’, through which private actors increasingly commit themselves to traditionally public goals… So rather than compromising democratic norms of accountability, due process, equality and rationality – as some critics of privatization fear it will – privatization might extend these norms to private actors through vehicles such as budgeting, regulation, and contract.’

Both Minow and Freeman (among others) rely implicitly on the reasons conception of publicness. Advocates of the reasons-based view of public law maintain that the reason the status of the agent matters is that public agents are more likely as an empirical matter to be guided by public reasons. Other theorists dispute this view and believe that the status of the agent matters not merely for empirical reasons. We shall explore this view in section C.

C. The Agency-Based View of Public Law
Assume now that a theorist agrees with Freeman that private institutions can (as an empirical matter) operate impartially and can be guided by concerns which are typically understood to be ‘public’ and which are associated with public officials. Assume for instance that the state operates public prisons and also pays for the operation of private prisons and, also assume, that both public and private prisons provide identical conditions to prisoners. In both private and public prisons directors are moved by public concerns such as the concern to promote prisoners’ welfare, protect their rights and provide opportunities for rehabilitation. Should not we conclude (as the reason-based view of publicness requires us) that in an important respect both prisons are ‘public’ as in both of them public values have been used to dictate the decisions?

There is a prevalent intuition that there is a difference between the two cases and that this difference is important independently of the empirical considerations described earlier. Arguably the legitimacy of the decision hinges on the ‘public’ status of the agent not simply because the agent is more or less likely to be guided by public reasons. Instead some agents are the appropriate agents to make public

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27 Freeman (n 12) 1285.

28 This intuition seems to inform Lord Scott’s attempt to drive a wedge between public and private provision of the same good. See YL v Birmingham City Council [2007] UKHL 27, §§ 26-32, especially § 31. More generally, it resonates with a preference for institutional over functional understanding of what counts as public activity, especially (but not exclusively) on the part of EC jurisprudence. As Peter Cane observes, “institutional understandings are still dominant or at least very important”. Peter Cane, ‘Accountability and the Public/Private Distinction’ in Nicholas Bamforth & Peter Leyland (eds.), Public Law in a Multi-Layered Constitution (Oxford & Portland, Or.: Hart Publishing, 2003) 247, 256.

29 In her comprehensive historical survey, Sarah Percy illustrates that there is a persistent opposition to mercenaries in European history. Yet, the reasons provided for this opposition shift and change in
decisions simply because of their status. Take the three following discussions all of which are taken from the context of punishment:

Locke, who is otherwise famously considered as a prominent supporter of what we have called the reason-based view, argues that:

To justify bringing such evil [i.e., punishment] on any man two things are requisite. First, that he who does it has commission and power to do so. Secondly, that it be directly useful for the procuring of some other good… Usefulness, when present (being but one of those conditions), cannot give the other, which is a commission to punish.”

Malcolm Thorburn argues:

Those who are acting in the name of the polity as a whole are entitled to do things… that private citizens may not, and they have the power to decide questions… that private citizens do not; but in all this, they are answerable to others for their conduct and their decisions in a way that private citizens are not… All of these rules are concerned not merely with the quality of an individual’s acts but, first and foremost, with her legal standing to undertake it in the first place.

Last David Lyons says:

‘it is not generally accepted that I have the right simply to hurt another who has done something wrong, just because he has done it, where there is no special relation between us.”

Each one of these paragraphs asserts that the mere fact that an agent is likely to punish rightly or correctly is not sufficient for the agent to justify the infliction of the punishment. Locke believes that in addition to the fact that the punishment is ‘directly useful for the procuring of some other good’ the agent must also have ‘commission and power’ to inflict it; Thorburn believes that the ‘quality of the individual acts’ of the agent is not sufficient to justify the infliction of punishment. In addition the agent

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31 Thorburn (n 17) 442.
must have legal standing. Finally Lyons sharply distinguishes between two questions: (a) whether an agent ‘deserves’ to be punished or ought to be punished for other reasons, and (b) whether a particular agent is the ‘appropriate agent’ (namely ‘has a commission’ or ‘legal standing’) to inflict the sanction. To justify the infliction of punishment X by an agent Y on a wrongdoer Z, it is not sufficient to show that X should be inflicted on Z and that Y is the most likely or the most capable agent to inflict it. Something else needs to be shown. 33

A useful distinction which captures this intuition has been made by Thomas Hill. In discussing criminal punishment Thomas Hill distinguishes between practical or action-guiding desert theories and merely faith-guiding or wish-expression desert theories. The former argue that perpetrating crimes provides one a reason to inflict sufferings on the guilty while the latter argue merely that perpetrating crimes provides one a reason to wish that the guilty suffer. 34 Thus in Hill’s view the mere conviction that a person ought to suffer does not imply that I (or anybody else) has a reason to bring this suffering about.

Legal doctrine also provides ample support for the view that the identity of the agent matters. Some courts have explicitly acknowledged that the identity of the agent matters independently of the prospects that the resulting decisions of the agent are right or wrong. As illustrations let us use two cases:

In Sundar and Others v. Chattisgarh, The Indian Supreme Court decided that appointing special police officers for short periods is unconstitutional. Although the Court emphasized also instrumental concerns such as the poor education of the special police forces it also resorted to principled arguments against privatizing security. The Court said:

Consequently, such actions of the State may be an abdication of constitutional responsibilities to provide appropriate security to citizens, by having an appropriately trained professional police force of sufficient numbers and properly equipped on a permanent basis. These are essential state functions, and cannot be divested or discharged through the creation of temporary cadres with varying degrees of state control. They necessarily have to be

33 The analogy to parents can clarify the concern with the status of the agent. Disciplining children is typically done by parents. Traditional common law has even recognized the privileges of parents with respect to performing ‘moderate and reasonable chastisement and correction.’ While parents may be perceived to be instrumentally better in inflicting such punishment the reasons underlying this privilege have to do with their status as parents. For the common law position on this point, see William Blackstone, Commentaries on the Law of England (Chicago: University of Chicago Press, 1979) vol 1, ch 16.

delivered by forces that are and personnel *who are completely under the control of the State*… (emphasis ours, A.D. & A.H.)35

The Israeli Court has been even more explicit in its rejection of instrumental considerations and his principled resistance to the privatization of prisons. A recent (highly controversial) Israeli case barred the privatization of a prison on the grounds that such privatization violates the human dignity of prisoners.36 The Court emphasized that it rests its decision on principled grounds, namely that the transfer of the prison to private entity is *in itself* a violation of the right to dignity of prisoners. The Court argued that:

‘The special constitutional status of the right to personal liberty and the fact that it constitutes a condition for exercising many other human rights mean that the legitimacy of denying that liberty depends to a large extent on the identity of the party that is competent to deny that liberty and on the manner in which that liberty is denied.’ (emphasis ours, A.D. & A.H.)

This intuition supports the agency view of publicness; such view seems prevalent and it could be extended more generally to public law. There is something in the status of the agent which is crucial for characterizing some acts as public and more importantly crucial for the legitimacy of these acts. This also implies that the desirability of privatization does not hinge merely on empirical or contingent factors.

But can this intuition be defended? Why should the *status* of the agent (rather than the reasons guiding her or the reasons likely to guide her) be important or relevant? What makes it the case that agents cannot be chosen simply on the basis of their ability to ‘get it right’ namely to reason correctly, weigh all the relevant considerations and reach the right conclusions?

While advocates of the agency view can find ample support in legal doctrine and in political practices, the normative foundations of this view remains mysterious. And although the thought that agency matters strikes an intuitive chord, it is not clear why so. It is not surprising, therefore, that so many of the opponents of privatization try to rationalize their opposition in terms of the reason-based framework. The reason-based framework provides theorists with an intelligible and seemingly rational framework to articulate their opposition. But an apparently intelligible framework to justify an institution may often turn out to be a mere rationalization or a smoke-screen for what

35 Nandini Sundar v Chattisgarh, (2011) 7 SCC 547 (India).
is really at stake; the inclination for theoretical clarity and preciseness may often lead theorists astray. It may induce theorists to resort to instrumentalist explanations at the risk of distorting what really matters.\footnote{Harel (n 9) ch 1. In this chapter it is shown that many of the arguments provided by political theorists to justify institutions and procedures are ‘insincere’, i.e., they do not capture underlying sentiments that sustain these institutions and guarantee public support for them.}

Part 2 defends the agency-based view of publicness. To do so we examine the concept of public officials and later defend the view that a proper understanding of the concept of ‘public officials’ can provide an explanation for the appeal of the agency view of public law.

2. Defending the Agency View of Publicness: The Difference that Public Officials Make

A. Introduction

This Part develops a defense of the agency view. More specifically we argue that a ‘public’ reason is one that can reasonably be attributed to us as members of a polity. It is one with which we (as members of a polity) are responsible for. What determines whether citizens are responsible for an act is not (only) the reasons that the agent used (or is likely to use) but its status and, in particular, whether the agent is a public official rather than a private entity. Privatization, understood in terms of the agency paradigm, erodes shared responsibility and political engagement.

Being a public official is a condition in virtue of which an act can be attributed to the state and become the responsibility of its citizens. For certain acts to succeed in being acts of the state, they must satisfy certain conditions; such acts must count as deferential to the polity, and, as we show below, to be deferential to the polity, only individuals with certain characteristics – public officials – can perform them. Being a public official is therefore not merely contingently conducive to the execution of a task that, in principle, can be performed by anybody; it is conceptually required for the very ability to perform certain tasks that need to be done ‘in the name of the state.’

Section B develops the concept of public officials. It argues that public officials are those decision-makers whose decisions are properly performed in the name of the polity. In this section we define public officials in a way which emphasizes their link to the polity. Section C develops the concept of political engagement and establishes why privatization (understood in terms of the agency view as transferring functions from public officials to private individuals) may undermine or at least erode political engagement.
B. Public Officials as Agents of the State

This section provides a characterization of public officials. This characterization is designed to capture some features that are legally relevant and, also to provide the foundations for a normative analysis. Under the proposed view, public officials are characterized by their deference to the polity represented by politicians. It is their deference which makes them public officials and which explains why their decisions are attributable to the polity.

Note that our deference-based characterization need not track the legal definitions of the term 'public official' used by lawyers or political scientists for various purposes. Public officials are often identified on the basis of various benefits they are entitled to including, for instance, fixed-salary-based structure of official compensation, procedural due process and the legal protection against termination of civil service except for cause. Those characteristics are important for various purposes but to establish our argument we develop a different characterization – one which rests on deference.

In analyzing the concept of deference of public officials one confronts a serious problem. On the one hand it is evident that public officials often act without direct orders from the state. In fact exercising such discretion is almost inevitable for successfully promoting the public interest. On the other hand, there is a strong sense that the decisions made by public officials are decisions of the polity. How can these two observations be reconciled? If public officials exercise discretion why should their decisions count as decisions made by the polity? Should we not then turn to the reason conception of publicness to solve the mystery of what it takes to act in the name of the state?

We reject this conjecture. The requirement of deference can be reconstructed so as to render it perfectly available to modern state agents insofar as they assume—as they inevitably do—an active role in determining what acts are done in the name of the state. On this view, deference requires the existence of a practice that satisfies

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38 This concern is similar to the concerns of legal philosophers with respect to the discretion exercised by judges. Judges are bound by law. It is precisely their deference to the law which justifies attributing their decisions to the state. But it is often claimed by positivists that judges have legal discretion. When they exercise such discretion they cannot defer to the law and therefore they make decisions that are not dictated by law. This concern was partially the motivation for Dworkin’s attempt to establish that judges do not exercise discretion as judicial discretion in his view undermines the legitimacy of judicial decisions. Similarly it can be argued that to the extent that officials have discretion, their decisions cannot properly be attributed to the polity and are therefore illegitimate.

39 For a more elaborate development of this argument, see Dorfman & Harel (n 14) 80-1.

certain conditions in order to count as deference to the state. The deferring agent defers to a community of practice to which he or she belongs—a community that collectively determines what the public interest dictates—and takes this determination as a baseline against which to measure what fidelity of deference requires in each particular case. Perhaps ironically, therefore, deference to the state involves collective determination by the deferring agents themselves (qua participants in the requisite practice) concerning what choices deference on their part dictates.

Two conditions must be satisfied for persons to act successfully in the name of the state: the existence of a practice and its institutional form. More specifically, speaking and acting in the name of the state require a practice that takes a distinctive form, namely, one that integrates the political and the bureaucratic in the execution of the relevant functions. An integrative practice is characterized by its principled openness to ongoing political guidance and intervention. We take each of the two conditions (the existence of a practice and the institutional form of the practice) in turn.

The first condition involves the existence of an institutional structure in which the general interest as seen from the public point of view is articulated. On the proposed view, approaching the task of execution from the perspective of the state depends on there being an ongoing framework or coordinative effort in which participants immerse themselves together in formulating, articulating, and shaping a shared perspective from which they can approach, systematically, the implementation and execution of government decisions, thus tackling questions such as how one should proceed in general and in the particular instance. The process takes a coordinative form in the sense that participants are responsive to the intentions and actions of one another as they go along with the execution of government policy and decisions. To this extent, a practice of the requisite kind can potentially place a freestanding constraint on the practical deliberations of its participants. For instance, what an official does in a particular case depends on the ways his or her co-officials have approached the matter in similar cases. This form of responsiveness is founded on a joint commitment to support the practice of executing laws by taking the intentions and activities of other officials as a guide to their own conduct.

Arguably private entities can also establish a practice. This could be a personal practice, in the case of an individual who undertakes to execute government laws, or a group practice featuring a plurality of individuals jointly committed to deferring not to each one’s unilateral conception of the general interest but to the conception they come to share in the course of deliberating toward action from one case to another in a way that is consistent and intelligible. Moreover, the formed practice could then be subject to close supervision by state officials. Can an action dictated by a practice developed by private agents and duly supervised by state officials count as an action done in the name of the state? A positive answer would undermine our primary claim;
it would imply that privatization is compatible with acting from the public point of view.

We believe it cannot; even given that a community of practice can arise among private individuals, its mere existence is not sufficient for the purpose of speaking and acting in the name of the state. The practice must be able to integrate the political offices into this community. It must be open to the possibility that politicians change the practice, guide its mode of operation, and reevaluate the norms governing it.

We shall argue that a private community of practice falls outside the requisite range; and this is true even in cases where state officials supervise the private practice. This is so because the interaction of participants in a private practice with state officials is mediated through a contractual agreement whose effect is the replacement of deference to the polity with reason that is unconstrained by the polity.

A practice of public officials that takes the integrative form does not merely operate among bureaucrats (with politicians taking the backseat), but rather includes among its engaging participants both politicians and bureaucrats. Thus, the integration of the political offices into the community of practice does not limit the role of politicians to that of setting the practice among bureaucrats in motion by determining the basic rules of conduct and the boundaries of the framework within which bureaucrats deliberate toward action. Nor does it limit their role to that of monitoring and supervising the participants (either directly or indirectly through other state officials). Rather, integration enables political officials to guide, within the limit of their legal powers, the ongoing deliberations and everyday actions performed by bureaucrats. In that, political officials can exert their influence on the other participants directly (which is the mirror view of the deference bureaucrats owe them).41

The exerted influence is direct in the sense that it is not mediated through, and thus not contingent upon, the particular terms of the agreement between the state and the private organization hired for the task in question.42 An integrative practice featuring

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41 It is important to note that different systems of government give rise to different schemes of interaction between political and other public officials. As a result, the lived experience of public provision of goods and services (or its counterpart, privatization) may be different across different forms of government. For instance, the traditional British-style parliamentarism and the U.S.-style separation of powers are two systems of government that reflect different styles of integration. According to the former, the integration of political and civil service occurs at the highest levels on both sides of the equation. According to the latter, and unlike the former, integration penetrates the lower levels of civil service as manifested by the mass appointments, including appointments of the president’s loyalists, made by the president after his or her election. Despite these differences, parliamentarism and separation of powers are arguably of a piece insofar as they engender a sufficiently integrative community of practice between civil servants and politicians.

42 Of course, public officials, with the exception of those performing mandatory army service, are also employed on a contractual basis. However, their contractual obligation requires them to concede authority to other public officials who occupy higher places on the governmental hierarchy.
this notion of direct influence is qualitatively different from a private community of practice, including even a private practice duly supervised by state officials.

To see that, consider a typical privatization agreement under which the government is in charge of setting, usually in general and underspecified terms, the desired ends and of imposing basic constraints on the means that the private executor can deploy in pursuit of these ends. It then makes some room—*an arena of permissibility*, as it were—for the private entity so that the latter can meet the designated ends with whatever means, provided that they are consistent with the basic constraints set out by the contract in accordance with the government’s guidelines.

Now, the decisions and rules generated by a community of private practice striving to act within the arena of permissibility necessarily fall short of what deference to the general interest (as judged from the point of view of the relevant political officials) requires. A formally defined arena of permissibility is just an authorization for private contractors to act according to their own views as to what the public interest requires—that is, to pursue the general interest as filtered through their own viewpoints of what impartial concern for this interest requires. Further, what we label ‘arena of permissibility’ is not an accidental feature of privatization—a feature which may be dispensed. It is a prerequisite for realizing the goals that privatization is designed to realize, in particular, efficiency. As one commentator has noted: ‘The emphasis on outcomes gives private service providers latitude to develop their own strategies for achieving the desired results. If all tasks were specified in the governing contracts, there would be little room for the beneficial effects of competition to operate.’

Indeed, insofar as they participate in a practice that takes a separatist form, the participants in a private community of practice do not incur an obligation to engage the relevant political offices deferentially in an effort to determine what the general interest requires. Unlike public officials participating in an integrative practice, no

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43 As with statutory provisions, the vague and underspecified content of the contract is not coincidental. It reflects different considerations (such as uncertainty and the bounded rationality of the parties) that render it natural to leave the language of the contract sufficiently airy to accommodate foreseeable and unforeseeable future events.

44 This typical scenario can accommodate a case where state officials are authorized by the state to renegotiate the terms of the agreement with the other party insofar as circumstances change and modifications become necessary. These modifications (if accepted by the private entity) merely change the *scope* of the arena of permissibility, but it does not eliminate it. The only way to eliminate it (or even to come close to its elimination) is to require the private entity to defer to state officials in all matters. However, this will be tantamount to converting the participants in the practice to public officials properly conceived.

45 See Matthew Diller, ‘Form and Substance in the Privatization of Poverty Programs’ (2002) 49 UCLA Law Review 1739, 1745. The arena of permissibility is typically broader than is conceived by the government at the time of contracting. See Freeman (n 4) 823-4.
such deference to political officials is required from them (in typical cases) simply by virtue of being in charge of performing government functions. Were they required to display the requisite deference, participants would in essence become public officials, regardless of their formal title (e.g., private contractors).

Accordingly, the private community of practice is not integrative in the sense that it does not provide politicians adequate opportunity to shape constantly its contours by commanding the unmediated deference of those who are in charge of the execution of the relevant tasks. Privatization, insofar as it cuts political officials off from the community of practice, immunes the participants—for example, the employees of a private firm—from being obligated to defer to the relevant political officials. It is thus implausible to describe their efforts in executing laws or judicial decisions as the doings of the state.

The inclusion of politicians in the practice of execution, then, is necessary to forge a connection between the rules generated by it and the general interest (as seen from the public point of view). The rules generated by the integrative practice—the rules that govern moves within the practice and set the baseline against which to determine what deferential fidelity requires in every particular case—are the product of practical deliberation that can span the entire range of governmental hierarchy, which is to say, all the way up to the highest political office and all the way down to the lowest-level civil servant who happens to push the proverbial button.

Note that the argument does not focus on how much, and to what extent, politicians make actual use of their power to influence the practice. In some cases and

46. The relevant political offices, as a leading administrative law scholar has observed, may also include top-level bureaucrats who work under conditions that render them highly responsive to the elected officials. See Jerry L. Mashaw, ‘Accountability and Institutional Design: Some Thoughts on the Grammar of Governance’ in Michael W Dowdle (ed.), Public Accountability: Designs, Dilemmas and Experiences (Cambridge: Cambridge UP, 2006) 115, 121.

47. To be sure, the fact that the act is not the doing of the state, properly conceived, does not imply that the state cannot be held responsible for it. Certainly, the state could be held responsible for acts that are not attributed to it. Moreover, there are a number of reasons for doing so. For instance, the very act of delegating its power in certain matters (such as that of waging a war) may give rise to such reason. Another example concerns the immoral or illegitimate nature of the delegated act (such as the act of punishment when inflicted by a private entity) as the state ought to prevent it anyway. The state could also be held responsible as it aids, reinforces, or fails to prevent immoral acts performed by private individuals. A recent case illustrates that the state can be held responsible in torts even when the accident is the immediate upshot of a private individual’s wrongdoing. There, a child was injured during a swimming lesson which was part of the curriculum of his school and supervised by private swimming instructors. While Lord Sumption did not affirm the existence of a non-delegable duty in this case, he acknowledged that there might be such a duty on the part of the state. The privatization of the swimming instruction did not preclude the responsibility of the local authority. See Woodland v Essex City Council [2013] UKSC 66.
with respect to some spheres of state action, politicians seldom use their powers. That said, it is the combination of the potential for intervention in and guidance of the practice, on the one hand, and the readiness of politicians to intervene whenever they are unsatisfied with the ways in which the practice operates, on the other, that counts. Accordingly, the realization of this potential, namely the de facto intervention on the part of politicians is not in and of itself crucial to determine whether the political offices are sufficiently integrated into the community of practice. Instead, what is crucial is the participants’ Hohfeldian liability to the power of political officials to place them under a duty to act in certain ways and the willingness to exercise this power whenever they are unsatisfied with the ways in which the practice operates.

To forestall misunderstanding, it is important to note that nothing in this argument turns on a formal definition of public official or private employee; as a result, the specter of tautology in this respect is groundless. Consistent with our insistence on the constitutive place of an integrative community of practice in the overall non-instrumental argument against privatization, executors are public officials by virtue of the integrative practice. They are not officials prior to it. Their participation in a coordinated effort, like imprisoning convicted criminals, renders the practice possible, but it is the integrative practice that makes them officials. Accordingly, it is in principle (and in practice) possible that the private employees of a private firm would be considered, for our purposes, public officials, functionally, rather than formally, speaking. This may be so in the case in which they satisfy the two conditions we have articulated: that of participation in a practice that takes an integrative form.\footnote{Whether or not cases of formally private agents that count as functionally public agents exist is a question we do not address here.}

Note that the mere fact that there are counter-examples, namely cases in which agents who are traditionally characterized as ‘public officials’ engage in practices which are not integrative or cases in which agents that are characterized as private engage in practices which are integrative does not undermine our analysis for several reasons. First, as elaborated above the term ‘public official’ can be defined in different ways for different purposes. We acknowledge that our definition may sometimes be revisionary. Second, we introduce in the next section an important qualification by establishing the existence of pockets of autonomy within the public service. More specifically, we show that the term ‘public officials’ can be plausibly extended to agents who engage in non-integrative practices as long as the arena of permissibility granted to what we call apolitical public practices is qualitatively different from the one created by the act of privatization.

This section identified two conditions that must be fulfilled for a person to be a public official, that is, to be capable of reasoning deferentially and therefore to be capable of acting successfully in the name of the state: the existence of a practice and the intimate proximity of the community of practice with political authority, that is, the existence of an integrative practice.
C. Public Officials and Apolitical Public Practices

Our argument has so far sought to drive a principled wedge between two practices, an integrative practice and a private one. In the course of fleshing out the character of the former, we have observed that its scope can run the gamut from hyper-politicized to some professional public practices. There exist, however, practices or institutions that are aptly perceived as public even though they defy an integrative character; these are practices that insulate, to an important extent, the participants from the direct control of political agents. Consider the case of an independent election committee in both post-authoritarian and democratic states authorized to enforce campaign finance laws, redraw election districts, and insure the integrity of the election process, more generally.\(^49\) Save for the state’s role of authorizing the particular commission, the committee enjoys formal and substantive independence from political influence. It is beyond the scope of this paper to discuss the case of apolitical public institutions in detail. However, it is important to seek to explain negatively, why such apolitical institutions are rightly conceived as non-private entities and, affirmatively, what render them ‘public’ and their members ‘public officials.’

The insulation of a public institution reflects the polity’s choice to release the institution’s agents from the requirement to defer to political officials. The judgment that underlies this choice is that the public interest is sometimes best served not by way of politicians dictating the decisions and actions that participants in the particular practice ought to make, but rather by creating a sufficiently wide arena of permissibility within which the participants could decide, by themselves, what decisions and actions would be best for the polity to have. Depending on the relevant context, there may be any number of reasons for enlisting the discretionary powers of bureaucrats and experts at the expense of political judgment—for instance, the subject matter of the activity requires special expertise, long-term reasoning, confidentiality, and so on. Furthermore, sometimes the exercise of political judgment may severely undermine the effective pursuit of the public interest up to the point where it would be appropriate to disintegrate the political/bureaucratic nexus. The New Public Management trend in Britain and Europe, more generally, may be explained as an attempt to address this concern.\(^50\)

Granting greater autonomy to bureaucrats may be deemed necessary in cases in which there exist excesses of office politics (in the pejorative sense of the phrase) or

\(^49\) See, eg, India’s Election Commission and the special status (or a par with a supreme court judge) granted to the Chief Election Commissioner in the Constitution of India §324. See also Susanne Hoeber Rudolph & Lloyd I Rudolph, ‘New Dimensions of Indian Democracy’ (2002) 13 Journal of Democracy 52, 62-3.

\(^50\) Relatedly, the Next Steps executive agency reform in the UK may also be explained by reference to this consideration.
populist tendencies (again, in the pejorative sense), making it too difficult for public officials adequately to manage their tasks and to serve the public efficiently. What is important to note, however, is that the resort to their discretion is sometimes the best, and perhaps the only, proxy for a bureaucrat or an expert to display fidelity of deference to the public interest.

It may be protested that this sort of outsourcing is, at bottom, a form of privatization. We think not. This is because the arena of permissibility granted to apolitical public practices is qualitatively different from the one created by the act of privatization. In contrast to public officials, private actors possess a valid claim-right against state interference insofar as they act within the designated arena of permissibility. In other words, instead of being liable to the power of the state to direct their conduct, private agents enjoy a form of immunity on the basis of which they can invoke their right not to follow the demands of the public interest (as viewed from the polity’s point of view). Agents of apolitical public institutions, by contrast, enjoy no such immunity. Accordingly, they have no valid claim of their own against state intervention whenever the polity determines that the judgments of these agents disserve the public interest.

The fundamental difference is that the arena of permissibility in the case of private entities reflects a concession granted to the private entities and it is designed to allow them to pursue their interests, concerns, and ambitions. Private entities, therefore, have a right that the arena of permissibility be respected. In contrast, the arena of permissibility given to public officials in apolitical institutions is exclusively designed to promote the public interest. It confers no rights on the public officials even though it does form a genuine obstacle to political intervention. In other words, it should be perceived as an exercise of self-constraint on the part of politicians grounded in their judgment that the public interest is better served by apolitical practices.

One implication of this analysis is that sometimes politicians should defer to the decisions made by the private entity insofar as they fall within the arena of permissibility even when these decisions run afoul of the public interest. This is because, and insofar as, the private entity has acquired a right to so acting. In contrast, public officials enjoy no such right: in principle, when the arena of permissibility granted to officials is invoked in ways that are judged, by the polity, as being detrimental to the public interest, it should be revoked. Of course, making a judgment of this sort raises important concerns—for instance, there must be an appropriate political procedure for making such judgments and for intervening in the decision-making processes of the apolitical institution. We shall not belabor these concerns. What is important for the present argument is to observe that the arena of permissibility characteristic of apolitical institutions is qualitatively different from the one granted to private entities and that the difference lies in the absence of a valid claim by the former to act contrary to the public interest, properly conceived. Put
affirmatively, whereas a public official of an apolitical institution holds a mandate from the polity, a private agent holds a right against the polity.

We can now return to the dichotomy between the reason-based and the agency-based conception. The analysis of public officials just provided illustrates that this dichotomy fails to capture the complexity of public law. In effect, our analysis implies that public officials are the only agents that can operate for certain reasons — reasons that are internal to the integrative practice. To act in the name of the public, the agent needs to participate in a practice that satisfies conditions which grant the polity power over it i.e., an integrative practice. Agency therefore matters because only certain type of agents, namely public officials, can reason in certain ways; only they can defer to the polity by virtue of participating in the integrative practice. Part 3 will explore what normative implications this conceptual analysis may carry.

3. Why Privatization As Such is Prima Facie Objectionable: Public Officials and Political Engagement

The analysis in Part 2 identifies what it means to be a public official. It leaves open however the question of what goods if any must or should be publicly provided. In an earlier paper we argued that there are some goods—intrinsically public goods as we called them—whose goodness hinges upon their public provision whereas public provision meant provision by public officials.51

In contrast, in this Article we do not provide a list of what goods must be publicly provided. Instead we seek to identify the values that are promoted by public provision of goods and services as such. More particularly, we explore the implications that privatization as such has for our practices of responsibility-taking especially in connection with the relations among citizens and the relations between citizens and the state.52

It is ultimately the link between citizens and the decisions made by public officials that establish the claim that privatization as such erodes shared responsibility and political engagement. The link between the polity and public officials has been established in Part 2. There, the argument was that public officials are decision-makers who participate in a practice which is ultimately governed by politicians. It is

51 For instance, we argued that communicating condemnation (understood broadly to capture the process of carrying out a sentence) is ineffective unless done by an agent who holds a privileged status in relation to the one subjected to the condemnation, namely, one whose judgments concerning the appropriateness of behavior are worthy of attention or respect. Otherwise, the infliction of ‘a sanction’ amounts to a mere act of violence that cannot express or communicate censure for the culpable and wrongful acts done. Dorfman & Harel (n 14) 92-6.

52 Throughout, we use responsibility to denote citizens’ moral or civic, rather than legal, responsibility.
time now to establish the remaining link, namely the connection between citizens and the politicians. The conjunction of both links is necessary because ultimately the argument from shared responsibility depends upon whether citizens are sufficiently involved in the decisions of public officials to justify the attribution of responsibility to citizens. Shared responsibility, we argue, requires political engagement and, so, large-scale privatization erodes political engagement.

The requirement that citizens have ‘meaningful role’ in making political decisions is a standard requirement in liberal theory. A meaningful role presupposes some degree of influence of citizens over the decisions of politicians.

A meaningful role integrates control and institutional convention. To begin with, in order for the decisions made by public officials to count not merely as the decisions made in the name of the polity, but also in the name of individual persons in their collective capacity as citizens, there must exist some, non-trivial measure of control exercised by citizens over the polity.

Arguably, there could be any number of institutional settings capable of generating some measure of control. Although certain forms of direct control are conceptually possible to imagine, it seems more likely these days to expect indirect forms of control arranged through institutional settings that make those who occupy the political offices the representatives of the citizenry. Note also that, it is an open question, one that is not being addressed here, whether democracy, or a certain form of democratic rule, necessarily provides the only or the best institutional framework in which political representation allows for sufficient popular control.

The control that citizens possess (in some measure) over the doings of the polity carries immediate normative implications, but only when public officials, rather than private entities, are in charge of providing the relevant goods. Private contractors enjoy the discretion to make decisions within the scope of what we have termed ‘arena of responsibility’. As a result, the polity has no control over them, and therefore no, responsibility for these decisions and the actions that follow thereof. Privatization, therefore, signifies detachment of the polity from at least some of the decisions made by the private body. By granting (Hohfeldian) immunity to the decisions made by the private entity the polity distances itself from the privatized

53 According to Rawls, a society that is a benevolent absolutism fails to count as a well-order society precisely because it denies its members ‘a meaningful role in making political decisions.’ See John Rawls, The Law of Peoples (Cambridge, Mass.: HUP, 1999) 63.

54 In the American context this is particularly evident in the Thayerite tradition. See Kenneth Ward, ‘Originalism and Democratic Government’ (2000) 41 South Texas Law Review 1247, 1271.

activity or, at least from those decisions made by the private entity which fall within the scope of the arena of permissibility.

By contrast citizens are responsible for decisions of their polity. Even if they may not be in direct control over these decisions, the rightness or justness of these decisions is, nonetheless, directly their business, for such decisions are done in their name. This is the byproduct of the fact that (1) citizens in a ‘well-ordered society’ have ‘a meaningful role in making political decisions’ and that (2) politicians are active participants in the ‘integrative practice’ of public officials. Hence citizens also participate though indirectly in the integrative practices.

The view that privatization has important consequences concerning control was articulated by Paul Starr as follows:

Privatization does not transform constraint into choice; it transfers decisions from one realm of choice-and constraint- to another. These two realms differ in their basic rules for disclosure of information: the public realm requires greater access; private firms have fewer obligations to conduct open proceedings or to make known the reasons for their decisions. The two realms differ in their recognition of individual desires; the public realm mandates equal voting rights while the market responds to purchasing power. They differ in the processes of preference formation: democratic politics is a process for articulating, criticizing and adapting preferences in a context where individuals need to make a case for interests larger than their own.\(^{56}\)

While we disagree with some of Starr’s observations, it is evident that Starr identified the significance of control to issues concerning privatization. This observation has important implications. Citizens always have good reason to struggle against injustice simply by virtue of being persons; however, there arises an additional reason to do so when the injustice in question is the doing of public officials. This is because the latter instance of injustice is done in their name—that is, by public officials who act in the name of the polity to which they belong. Hence the strong link identified in the last Part between public officials and politicians has repercussions concerning the responsibility of citizens, that is, persons acting in their collective political capacity. The citizen’s protest against the injustice committed by a public agency differs from mere protest against injustice committed by an individual, private entity, or another state. It is a protest against injustice (or some other grievance) that can be attributed to the citizen who is, thereby, responsible for its occurrence.

It might be protested that, at bottom, the polity is the one that decides voluntarily to alienate its powers to a private entity. For that reason, the polity should also be

\(^{56}\) Starr (n 1) 32.
held responsible for the decisions made within the arena of permissibility by virtue of having made the initial decision to alienate its powers. It follows that the private entity operates also ‘in the name of the polity’ as ultimately its powers are ones that were granted (in the appropriate sense) by the polity. Under this view the polity is as responsible for the decisions of the private entity as it is for the decisions of the private entity.

It is of course true that the polity and its constituents bear responsibility for making the initial decision to privatize a given activity, selecting the appropriate contractor, and monitoring its conduct. That said, none of these could compensate for the lost control over the manner in which the private entity acts (at least insofar as it acts within the arena of permissibility). Even given that the polity had a specific vision when it privatized the activity, it is barred from reconsidering or changing its course and purpose. Citizens who protest against decisions made by private bodies cannot maintain that such decisions are made in their name and consequently they do not share responsibility for these decisions. It is this feature which underlies the fundamental difference between public officials and private entities; the former act in our name while the latter, at best, act for us. Indeed, to repeat, what characterizes public officials is the fact that they are constantly subject to the Hohfeldian power of the polity. The guidance of politicians can therefore become real at any time.

Now, shared responsibility is not in and of itself desirable or undesirable. To complete the argument against privatization as such, it will be necessary to show that the civic detachment from responsibility for major decisions is at least sometimes undesirable. This requires two steps. We first explain why it is that shared responsibility can be of value and, then, identify when it might be so.

Privatization might undermine an important dimension of our moral practices of responsibility-taking. In particular, privatization reduces the political dimension of responsibility by partially obviating the distinctive role of collective undertaking in discharging the responsibility persons have in virtue of being citizens. The argument is not one of political solidarity, which is to say it does not turn on the psychology of joint activity and its beneficial effects. Rather, the argument is that political engagement forms a special instance of our moral practices of taking responsibility. The reason for that lies in the collective form that this instance of assuming and discharging responsibility takes.

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57 This difference is of course not a necessary truth applying in each and every society. Public institutions could have developed differently and they may even, as suggested below, be transformed as a result of privatization.

58 A brief discussion of this point appears in Iris Marion Young, Responsibility for Justice (OUP, 2011) 169.
Begin with the basic observation that, all else is being equal, individual persons are morally responsible for their own actions. And in some circumstances they can also be held morally responsible for the decisions and actions done in their names by other agents (as it is often the case in the employer/employee context). The notion of shared responsibility we discussed above reflects a special instantiation of the latter case. It is special in character and scope, taken together. Concerning character, shared responsibility extends individual responsibility to activities through which each person exercises and assumes his or her responsibility by engaging his or her compatriots. That is, precisely because of its political dimension, responsibility manifests itself in the form of coordinated action in which individuals—acting as citizens— influence one another in order to determine, collectively, the course of the particular activities pursued by public officials. Concerning its scope, participation in a collective enterprise transcends the parochialism of both the commercial enterprise and the sectarian one. It gives rise to the principled inclusion of all members of the polity, regardless of their other private or sectarian commitments.

As observed above, the fact that privatization defuses the political dimension of responsibility-taking is not necessarily problematic. The thought is that the provision of some goods may not give rise to political engagement on the part of the polity in the first place. Two such classes of cases suggest themselves. First, goods whose provision requires special expertise at every level of decision-making leave ordinary citizens unable to influence the course of the provision. And second, goods whose provision does not give rise to major normative questions or trade-offs such as the ones between equality and efficiency, domestic and cosmopolitan justice, and so on cannot contribute to civic engagement. In the absence of some such trade-offs, insisting on the collective undertaking of responsibility through political engagement can only be justified instrumentally, namely it can only be justified if these goods can be provided better by public officials.

Note that the question of whether a particular good raises normative concerns depends to an important extent on context. There are at times simple and clear-cut cases—for instance, consider the criminal justice system, on the one hand, and the U.S. Government Publishing Office, on the other. However, the harder cases lie between these two poles. The worry is not that of determining whether or not a particular good—say, railroad services—falls within either class of cases mentioned above, but rather under what circumstances it does. That is, the provision of the same good can sometimes generate important considerations of justice and political legitimation, whereas at other times it may give rise to considerations that are mainly technocratic.\(^\text{59}\) We shall leave this sort of inquiry to another occasion.

\(^{59}\) Indeed, railroad services in many countries, during different historical periods and in response to different geographical, demographical, and economic conditions, aptly exemplify the circumstances-based approach in question. The same (arguably) holds, say, with respect to electricity, postal services, and so on.
Note that our emphasis on the importance of public provision of goods and service does not imply that privatization should be ruled out categorically. Indeed, the argument developed in these pages does not deny that sometimes, and perhaps often, privatization is desirable for any number of reasons, including the traditional instrumental reasons. It only points out that considerations of political engagement and responsibility-taking should be balanced against conflicting considerations. Privatization on a large scale has significant costs as it distances citizens from direct and immediate control over the provision of goods and services. Once again, such costs need not preclude privatization of any particular industry or service when doing so is particularly desirable. But the gradual transition to a privatized society has grave costs in terms of political engagement and its underlying idea of shared responsibility. And though these costs are non monetizable, they should be considered and taken into account when making decisions concerning privatization.

Our argument differs radically from previous discussions concerning privatization. Both advocates and opponents of privatization judge the instrumental or non-instrumental desirability of privatization in a discrete manner rather than a cumulative one. In other words, they perceive the desirability (or undesirability) not of privatization as such but of the privatization of the provision of a particular good or a particular service. To do so they compare the quality of the provision performed by a public entity with the one performed by a private entity.

Even from a purely economic perspective this view is incomplete. Privatizing the provision of one set of goods may have external effects on the provision of other goods and services. For instance, privatizing the provision of some goods and services may decrease the appeal of public service as a whole and the willingness of individuals to serve as public officials. It may also affect the reputation of public officials and worsens the quality of the provision of other public goods and services that have not been privatized. This Article identifies one such externality which is not easily translated into economic terms: a robust system of public service in charge of providing goods and services is needed to sustain political engagement among responsible agents.

The effects of privatization are not restricted to the question of whether public prison is better or worse qua prison than its private counterpart or whether private forestry is better or worse qua forestry than its public counterpart.\(^6\) They extend to the question of whether stripping the state of its powers erodes public responsibility. For privatization is not only the transformation of detention centers, trains, tax inquiry offices, forestry operations, and so on, considered one service at a time. It is also the

transformation of our political system and public culture from ones characterized by robust shared responsibility and political engagement to ones characterized by fragmentation and sectarianism.\textsuperscript{61}

One may wonder whether the distinctively political dimension of responsibility-taking could not be satisfactorily replaced by a different institutional structure under which individuals would share responsibility for the actions of private entities. After all, the meaning attributed to institutional entities is not natural; it is partially constructed by our traditions and, no matter how entrenched they happen to be, they could be transformed.

As a matter of fact, there are reasons to suspect that such transformation is currently under way, though it is beyond the scope of the present argument to assess its effects and desirability. Arguably, the weakening of the public sphere is somewhat compensated for by the rising activism of private individuals and NGOs aiming to influence the decisions of private entities, and the so-called social responsibility, of private entities (including, in particular, multinational corporations). Admittedly, market activism of this sort is currently mainly focused on transnational markets and the various forms of wrongdoing associated with them. That said, the very phenomenon of market activism could extend beyond its current instantiation. In particular, it creates the opening for exercising market activism at the level of one’s own polity and, in particular, in connection with privatization. One may speculate that the more privatization undermines shared responsibility and political engagement the more control over privatized bodies is sought by market actors. The proliferation of consumers’ boycotts and the growing trend toward corporate social responsibility may indicate that market activism could provide an imperfect compensatory device for the lost shared responsibility that the same activists could have assumed in their capacity as citizens. Political engagement, if you like, is being partially replaced by market activism; accordingly, the ties among members of a political community are being partially replaced by an evolving transnational community of market participants. It remains to be seen whether such transformation proves effective and, more importantly, what moral implications it has for the possibility of persons to relate as free and equal beings.\textsuperscript{62}

\textsuperscript{61} To this extent, the problem with privatization identified in these pages is not limited to the private provision of the most basic goods and services. Rather, privatization (at least on a large scale) can be objectionable even when the goods and services do not count as the most basic ones.

\textsuperscript{62} This is but one instance of the relations between values and institutional forms. More specifically some institutions and procedures gain normative meaning, in part, from the ways they are traditionally understood, from the significance attributed to them and the values associated with them. The fact that people regard the decisions of the polity as decisions done in their name is part of the way citizenship developed in the modern world. The link between the institutions and the values is, in part, a by-product of our understandings and perceptions and, consequently without identifying these public perceptions we may fail to detect an important normative dimension embodied in these institutions and procedures. Such a link between institutional and procedural practices on the one hand and values on
Conclusion

This Article sought to develop an understanding of the ‘public’ in connection with public law and to reconsider the desirability of privatization. The ambition has not been to establish a novel understanding thereof, but rather to reconstruct one which is rooted in our lived experience. We started by exploring the contrast between reason-based and agency-based conceptions of publicness. Ultimately the debate between them is normative through and through. We observed that there is some incongruity between the fact that legal doctrine and decisions often rely on the agency paradigm while the conventional attempts of theorists of privatization has been to rationalize their accounts by reference to the reason-based conception of the public.

We then turned to establish the normative significance of the agency-based conception. Public reasoning is not merely reasoning designed to promote the interest of the public. In addition to being guided by the public interest, it also requires reasoning that can be imputed to the public, namely reasoning for which the public can be held collectively responsible. Such responsibility is built into the notion of publicness; it is part of what publicness means in our society. This is but an instance of a broader phenomenon namely of the fact that some institutions and procedures gain normative meaning from the ways they are understood, from the significance attributed to them and the values associated with them. And to this extent we argued that the standing to assume shared responsibility characteristic of citizens can be of value, as it sustains collective practices of taking responsibility. This is ultimately what justifies the otherwise seemingly irrational resistance to privatization as such.