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Introduction: The Aims of Privatization

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Privatization refers to the shift from government provision of functions and services to provision by the private sector. At base, privatization is a set of strategies for making government more effective. Put in these terms, privatization should—and I predict will—come to command widespread popular and political support; which of our politicians has the nerve to advocate less effective government? For similar reasons, privatization has become the central policy instrument of political interests as diverse as the Thatcher government in Great Britain and the (formerly) socialist Labour Party in New Zealand.

At the simplest level, privatization refers to the introduction of incentives into the government production of services in order to increase productive effectiveness. Most commonly, this means the introduction of increased competition, not as an end in itself, but to better focus the attention of individuals providing the government service toward the ends that the service was meant to achieve.

In many cases, government ends can be achieved more effectively by the substitution of a profit motive for the amorphous motives of a government bureaucracy. Students of government have always had difficulty identifying the motivational ethic of government bureaucracy. But if direct costs can be reduced or service enhanced, it makes sense to substitute private for public management. Privatization in this sense is hardly novel; the only issue is how far the policy can be extended. For example, just as the U.S. Postal Service currently contracts rural delivery routes to private entrepreneurs in order to increase efficiency, it may make sense to shift management of military commissaries from civil service employees to large grocery and appliance chains.

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The achievement of more effective government through privatization, however, need not derive from the profit motive. The introduction of competition itself into government provision of services is likely to enhance government effectiveness. For example, the requirement under the A-76 contracting-out program¹ that government departments submit bids for the provision of the service in competition with private sector bids is likely to encourage these departments to consider ways to provide the services more effectively, even if the government departments ultimately prevail over private contractors in retaining the jobs. Similarly, the introduction of educational vouchers increasing parental choice is likely to enhance school responsiveness even if voucher use is confined to the public schools.

These examples illustrate that privatization through the introduction of competition or through greater reliance on the motivational success of the private sector provides no inherent challenge to government objectives themselves. Thus, a very large range of privatization initiatives offers *no* grounds for political controversy.

In many other contexts, however, privatization will become controversial because the provision of more effective government services challenges entrenched interests or government subsidies that are no longer politically justified. At a minimum, the introduction of competition through the prospect of privatization will serve to identify the extent of government subsidization. Privatization can be expected to be challenged on these grounds alone because for many subsidies identification is equivalent to normative critique, where either past political support or current rationale has vanished.

In other instances, however, privatization, by identifying a subsidy, will open debate over the subsidy's existence, its magnitude, or the form in which it is provided. Here, again, the view that privatization threatens the subsidy's beneficiaries may easily be mistaken. For example, military employees have challenged the privatization of military commissaries on the grounds that the current subsidy provided through the below-cost and untaxed sale of groceries, sundries, and appliances could not survive if commissary services were provided by the private sector. This position, however, mistakes the form of the subsidy for its substance. If commissary services could be provided at lower real cost to the government, the opportunity to subsidize military employee purchases with no increase in the mili-

1. Discussed *infra* Tingle, Privatization and the Reagan Administration: Ideology and Application, 6 Yale Law & Pol'y Rev. 229 (1988).

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tary budget would be enhanced.² More realistically, commissary privatization raises the important issue of the continued justification of supplementing the military pay package indirectly through below-cost product sales—differentially attractive to heavy consumers—rather than directly through salary and pension benefits.

Of course, in many circumstances privatization is a direct challenge to the existence of a subsidy. The many proposals to privatize Amtrak, for example, may be, in essence, little more than direct attacks on the continued subsidy of intercity passenger rail service. Some commentators have claimed that *none* of the Amtrak lines is or can ever be profitable. If so, the shift of the provision of passenger rail service to the private sector will dictate the abandonment of service.

It must be acknowledged that in the complex world of government finance, some privatization proposals themselves can serve as a form of subsidy. Many privatization initiatives, for example, involve proposals to sell government assets, whether public lands, petroleum reserves, or loan assets. The government does not currently maintain financial records that account for asset values or for the current stream of income or services from them. The legitimate privatization question with respect to asset sales is whether, in terms of national income (or equivalent services, for example, in the case of National Parks), the asset can be more productively managed by the public or private sector. Many asset sale proposals, however, envision using the proceeds of the asset sale to offset the current annual budget deficit.³ If implemented over the long term, such proposals would be the equivalent of selling one's house to meet the fire insurance premium. More precisely, asset diversion of this nature represents a not-so-hidden subsidy to current spending and the current tax level.

The most basic issue raised by the privatization movement is the identification of the irreducible core of governmental activity. Considered carefully, the irreducible core of government is quite small: the administration of justice, including the control of discrimination and externalities; and the provision of pure public goods, including defense. The government, of course, is also the most effective insti-

2. Obviously, the government could continue below-cost product sales in the context of private sector commissary management only if it were to specify a product price package and then franchise commissary operation to the lowest private bidder.

3. See Tingle, *supra* note 1, at 247-256.

tution for redistributing income to the poor and the disabled.⁴ These government objectives privatization does not question. Privatization, rather, challenges all other governmental activities to determine how the basic core of governmental objectives can more effectively be achieved.

The articles in this issue of the *Yale Law & Policy Review* explore several issues raised by privatization, ranging from its theoretical bases to its applications in policy decisions, in our system of justice, and as a labor strategy. Paul Starr's Article, "The Meaning of Privatization," provides a very helpful survey of the ideology of privatization. In Starr's view, privatization as a political movement represents a fundamental, and perhaps ill-advised reordering of priorities. To my mind, Starr's survey views privatization from the excessively narrow prospect of current U.S. conservative support, thus placing insufficient emphasis on the broader sources of commitment to more effective government that the privatization movement commands internationally. Geoffrey C. Hazard's and Paul D. Scott's "The Public Nature of Private Adjudication" addresses one aspect of what I have referred to as the irreducible core of governmental activity: the limits on the extent to which the provision of justice can be shifted from public to private fora. Hazard and Scott conclude that the validity of any tribunal of justice depends, ultimately, on the approval and acceptance of the community. "Private" justice is justice, then, only to the extent that it furthers public values. Peter J. Ferrara's "Medicare and the Private Sector" is an excellent illustration of privatization in practice, in this case demonstrating how Medicare benefits can be redefined and reorganized through privatization to extend basic medical care coverage with minimum additional fiscal support. Ferrara demonstrates brilliantly how privatization, far from challenging the basic values implicated in a government program, can seek to achieve those values more effectively.

Finally, Craig Becker's "With Whose Hands: Privatization and Public Employment" provides an example of how groups affected by privatization—here government employees—confuse the protection of their personal pecuniary and employment interests with the larger privatization goal of more effective government. In Becker's view, privatization is at odds with the democratic nature of our civil

4. For a discussion of the critical role that government subsidies and tax incentives play in fostering low-income housing, see *infra* Stearns, The Low-Income Housing Tax Credit: A Poor Solution to the Housing Crisis, 6 *Yale Law & Pol'y Rev.* 203 (1988).

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service system: It threatens to erode employment gains made by women and minorities in government service, and to eliminate a public workforce that, unlike the private workforce, is free to criticize employer policies without fear of retaliation. Becker's principal complaint derives from his observation that the shift of government functions from the public to the private sector often results in reduced wages, benefits, and job security without improving the quality of the service provided. Here, privatization conflicts not with societal ideals, but with the personal interests of affected parties. Employees who wish to view the current wage level as vested, oppose reduction in wages for the same services. In contrast, taxpayers who ultimately must pay these wages or citizens committed to the most effective extension of governmental activities, support the reduction in wages from privatization as a substantial positive achievement.

Becker's simple comparison of the proportion of women and minorities in the public and private sectors misses the point. The more accurate empirical comparison is between the proportion of women and minorities in specific governmental services, before and after the services were privatized. There is no necessary link between privatization and the employment of women and minorities nor between privatization and the suppression of free speech. Moreover, free speech as well as women and minority employment can—and should—be protected in any privatization initiative by supplementary regulation.

By itself, privatization need not deflect the goals to which our society aspires. Indeed, in many contexts, privatization can serve to extend those goals by seeking to achieve them more effectively. Not all of government activity, however, can be defended by norms commanding widespread acceptance. Privatization helps to identify those who gain and those who lose from the current provision of governmental services. Privatization becomes controversial when those who gain from the current structure of government are no longer the legitimate beneficiaries of the public fisc.